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Current Trends in Long-Arm Jurisdiction

By Paul L. Feinstein

Particularly in these times when many people have had to travel out of state just to become or remain employed, an important but overlooked aspect of matrimonial law practice remains personal jurisdiction.

It is well established that personal jurisdiction is not required to dissolve the marriage or issue custody orders, (courts generally consider custody *quasi in rem*, *see In re Marriage of Schuham*, 458 N.E.2d 559 (Ill. App. Ct. 1983)). However, personal jurisdiction is required to fully adjudicate property and support rights. In addition to constitutional limits, states employ long-arm statutes to determine whether causes of action fall within their jurisdiction. With respect to matrimonial cases, these statutes usually require maintenance in the state of a matrimonial domicile at the time the cause of action arose, or the commission in the state of any act giving rise to the cause of action. This can be difficult to determine, particularly with no-fault grounds now being the primary means of divorce. With respect to parentage actions, generally conception or acts in the state which could cause conception, as well as failure to support a child within the state (or directing the child to reside in the state), can provide long-arm jurisdiction in those cases. Also as explained below, amendments

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The Rights to Pre-Embryos Upon Divorce

By Stephanie F. Lehman

In *Batista v. Batista*, N.Y.L.J. 2/24/09 (Nassau Cty. 2009), a Supreme Court, Nassau County, NY, matrimonial case that gained national attention, Court Attorney-Referee A. Jeffrey Grob ("Referee Grob") denied the defendant's, Dr. Richard Batista's, application for a stay of the trial pending the issuance and exchange of expert reports regarding the value of a kidney donated by the defendant to save his wife's, Mrs. Dawnell Batista's, life. Dr. Batista took the position that his donated kidney should be deemed a marital asset subject to equitable distribution and that he should either receive monetary compensation equal to the value of his kidney or his kidney should be returned to him. In reaching his decision, Court Attorney-Referee Grob relied on New York's Public Health Law § 4307, which prohibits the exchange of monetary consideration for human organs intended for transplantation.

Referee Grob correctly recognized that Mr. Batista's kidney was not marital property subject to equitable distribution, denied Mr. Batista's application in its entirety and held that "[w]hile the term 'marital property' is elastic and expansive, consisting of a 'wide range of intangible interest,' its reach — does not stretch into the ethers and embrace, in contravention of this state's public policy, human tissues or organs."

Pre-embryos

While courts have failed to recognize a property interest in a person's body parts or tissue, as demonstrated by *Batista*, courts, through recent litigation, have attempted to answer the question whether to classify pre-embryos — a particular configuration of human cells, which are created during a marriage — as marital property subject to equitable distribution, a person or some special category of its own. Specifically, pre–embryos, or pre-zygotes, are "a fertilized ovum up to 14 days old, before it becomes implanted in the uterus." *See* http://www.ivf.com/ivffaq.html. While courts have classified pre-embryos as a "quasi property," no case law exists that specifically classifies pre-embryos as marital property, having a monetary value subject to equitable distribution. Charles M. Joran Jr.

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& Casey J. Price, "First Moore, Then Hecht: Isn't It Time We Recognize a Property Interest in Tissues, Cells, and Gametes?" 37 *Real Prop., Prob. & Tr. J.* 151 (Spring 2002). *See also, Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). The following hypothetical illustrates exactly why the property status of pre-embryos has been questioned by the court.

A Hypothetical Case

Joan and John are married. Sadly, despite years of trying, the parties cannot conceive a child naturally, and jointly decide to consult with a reproductive endocrinologist, who recommends conception through in vitro fertilization ("IVF"). While each round will cost approximately $25,000, a majority of which is not covered by insurance, Joan and John decide to give the process a try. The couple do not enter an agreement prior to undergoing the procedure that details the fate of any frozen pre-embryos upon divorce or death.

After the couple completes a round of IVF, the hospital is able to freeze five pre-embryos for future use. Unfortunately, Joan did not become pregnant from the pre-embryo transfer and shortly thereafter John filed for divorce. The parties were able to resolve all of the financial issues relating to their marriage except the fate of the five frozen pre-embryos. John did not want to be forced to become a father and wanted all of the pre-embryos destroyed. However, Joan desperately wanted to be a mother and wanted the right to use the frozen pre-embryos to achieve pregnancy post-divorce.

The Issues

Because pre-embryos are the product of genetic tissue provided by the husband through his sperm and the wife through her ova, such issues have arisen: 1) Do the husband and the wife have a property interest in the pre-embryos? 2) What happens if, upon divorce, one party wants to use the pre-embryo to create life, thereby not only forcing the other party to become a parent against his or her will, but perhaps, requiring him or her to provide financial support for the child? and 3) Do the states have an interest in the pre-embryos? Brilliantly, over the last several decades, scientific advances have made it possible for infertile couples to conceive children consisting of all or part of their genetic make-up. However, as will be demonstrated herein, unlike science that "races ahead," "[t]he law, whether statutory or decisional, has been evolving more slowly and cautiously." *Kass v. Kass*, 91 N.Y.2d 554, 562 (1998).

Understanding IVF

IVF is one of many methods that can help infertile couples conceive. American Society of Reproductive Medicine Web site, Frequently Asked Questions, http://www.asrm.org/Patients/faqs.html. Since the process was first used in 1981, over 45,000 babies have been born in the United States as a result of this procedure. *See* "Robertson, Pre-embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction." 50 *S. Cal. L. Rev.* 939, 942 (1986). IVF involves the surgical removal of a female's eggs during a normal menstrual cycle or after extensive hormonal stimulation using fertility drugs. *See* http://www.asrm.org/Patients/faqs.html. The fertility drugs help a woman produce multiple eggs, which increase the availability of multiple pre-embryos for transfer, thereby increasing the probability of conception. Each

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retrieved egg is combined with the male's sperm in a culture dish and incubated until a pre-embryo of between two and eight cells develops, which can either be implanted in the female's uterus or cryogenically preserved for future use. The procedure does not guarantee pregnancy, and if pregnancy is not achieved, the female must wait two to three menstrual cycles before trying IVF again. With the help of IVF, the patient has about a 20% chance in a given month of becoming pregnant.

Even if pregnancy is achieved, however, a live birth is not guaranteed. The process of cryopreservation, *i.e.*, a freezing method, may be used on any unused pre-embryos during a given IVF cycle. Cryopreservation of the unused pre-embryos reduces, and may eliminate, the need for further ovarian stimulation and egg retrieval, thereby reducing the medical risks and costs associated with both the hormone regimen and the surgical removal of eggs from the woman's body. The eggs must be fertilized before undergoing cryopreservation because unfertilized eggs are difficult to preserve and, once preserved, are difficult to fertilize. See http://www.asrm.org/Patients/faqs.html.

Statutory Law

Despite the fact that IVF is extremely popular — approximately 10%-15% of the reproductive population is infertile and woman are postponing pregnancy until later in life — the law concerning unused frozen pre-embryos produced during a marriage is scarce. Only three states — Florida, Louisiana and New Hampshire — have statutes providing for the disposition of frozen pre-embryos. Pursuant to Fla. Stat. Annot. § 742.17, couples must execute a written agreement providing for the disposition of their pre-embryos in the event of divorce, death or other unforeseen circumstances. Under La. Rev. Stat. Annot. §§ 9:121-9:133, all frozen pre-embryos are treated as unborn children, and, therefore, all issues concerning the disposition of such pre-embryos are resolved using a best interests of the child standard. N.H. Rev. Stat. Annot. §§ 168-B;13-168-B:15 provides that pre-embryos cannot be frozen for more than 14 days after fertilization. New York does not have a similar statute. In November 1997, a bill was drafted that attempted to require couples to enter an agreement outlining what should be done with the pre-embryos in the event of death, divorce and separation. The bill was never codified. *See* 1997-1998 N.Y. Senate Bill S 5815 [Nov. 24, 1997]. Nevertheless, both the American Medical Association and the American Fertility Association encourage gamete providers to enter this type of agreement. *See* Council on Ethical and Judicial Affairs, Opinion 2, 141, Frozen Pre-embryos in Code of Medical Ethics American Medical Association 1999-2000.

Decisional Legal Precedent

There are also only a few reported cases dealing with the disposition of frozen pre-embryos upon divorce. The holdings of each of these cases have either been based upon: 1) public policy concerns about a person's right to decide whether to become a parent; or 2) a contractual right created between the husband and wife through agreements entered prior to commencing an IVF cycle debating their positions as to the disposition of any frozen pre-embryos in the event of divorce or death. (These agreements shall be referred to in this article as "Disposition Agreements.")

Davis v. Davis

The Tennessee Supreme Court in *Davis v. Davis*, *supra*, the first reported case dealing with the disposition of frozen pre-embryos in connection with a divorce, premised its decision upon a party's right to procreate. During their marriage, Mr. and Mrs. Davis created pre-embryos, but after failed IVF attempts, decided to cryopreserve their extra pre-embryos. The hospital at which the Davises received treatment did not require them to execute a Disposition Agreement prior to the creation of the pre-embryos. After the pre-embryos were created and frozen, the Davises decided to divorce; however, they were unable to reach an agreement as to the disposition of the pre-embryos. Specifically, Mrs. Davis wanted custody of the pre-embryos for future use and Mr. Davis wanted the pre-embryos destroyed so he would not be forced to become a parent outside of marriage. The trial court awarded Mrs. Davis custody of the pre-embryos, holding that the pre-embryos were "human beings" from the moment of fertilization. The court of appeals (the intermediate Tennessee court) reversed and granted the Davises joint custody of the pre-embryos, finding that the state has no interest in requiring a person to become a parent against his or her will. After the matter was remanded to the trial court for a decision as to the disposition of the embryos, Mrs. Davis no longer wished to utilize the pre-embryos, but wanted them donated to a childless couple. Mr. Davis opposed the donation.

The court affirmed the intermediate court's decision. The court decided that the pre-embryos were neither property nor human life, but that they occupied an interim category of potential life deserving of special respect. After assigning this "quasi-property" label to the pre-embryos, the court held that the couple, as progenitors, had an interest in the ownership of the pre-embryos to the extent that they had decision-making authority concerning their disposition. However, the court never discussed treating the pre-embryos as marital property subject to equitable distribution. In *dictum*, the *Davis* court stated that the intent of the couple should govern the disposition of these gametes. However, because, in this instance, there had been no Disposition Agreement from which to discern the intent of the couple, the court was forced to weigh the procreative rights of each party — Mrs. Davis's right to become a parent or Mr. Davis's right not to become a parent.

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In order to resolve these conflicting interests, the *Davis* court considered "the positions of the parties, the significance of their interests, and the relative burdens that [would] be imposed by differing resolution." *Davis*, 842 S.W.2d at 588. Mr. Davis wanted to avoid parenthood outside of marriage because of childhood experiences that included having divorced parents and being separated from his siblings. He was vehemently opposed to fathering a child that would not live with both parents, or donating the pre-embryos to a family that would later divorce. Mrs. Davis was in favor of pre-embryo donation because she wanted to know the IVF process she endured had a purpose and wanted to know that her genetic material would create life. Ultimately, the court decided that Mr. Davis's right not to procreate should override Mrs. Davis's desire to donate the pre-embryos to a childless couple.

Kass v. Kass

Six years later, in the matter *Kass v. Kass, supra*, the New York Court of Appeals had the opportunity to opine on the disposition of pre-embryos created during a marriage where the couple had executed a Disposition Agreement. The New York Court of Appeals, like the *Davis* court, did not base its decision on whether the frozen pre-embryos were property subject to equitable distribution. Rather, as will be demonstrated below, the court examined the enforceability of the Disposition Agreement and determined that the agreement should be presumed valid and binding. Prior to starting an IVF cycle, the hospital at which Mrs. Kass was treated required the Kasses to execute a Disposition Agreement. Pursuant to this agreement, the parties agreed, *inter alia*: 1) to store the frozen pre-embryos for a maximum of five years; 2) to permit the release of the pre-embryos only upon joint written authorization; and 3) that in the event of divorce, the legal ownership of any stored pre-zygotes would be determined by a property settlement and could only be released as directed by Court Order. The parties further signed a second consent form dealing with the actual disposition of the frozen pre-embryos. The parties agreed that if they were no longer able to initiate pregnancy, they wanted the frozen pre-embryos either to be disposed of by the hospital or used for research. On June 4, 1993, the Kasses learned that pregnancy was not achieved and decided to divorce. On June 7, 1993, the parties signed an agreement authorizing the hospital to dispose of the pre-embryos in the manner outlined in the consent form. Shortly thereafter, Mrs. Kass changed her mind. She wanted the right to have the pre-embryos transferred to her, objected in writing to the destruction of the pre-embryos and as part of the divorce proceeding, and requested sole custody of the frozen pre-embryos. Mr. Kass counterclaimed for specific performance of the June 7 agreement.

The Supreme Court, Nassau County granted the wife custody of the frozen pre-embryos, holding that the "female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through the process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus … " *Kass*, 91 N.Y.2d at 561. The Appellate Division, Second Department reversed and unanimously concluded that "a woman's right to privacy and bodily integrity are not implicated before implantation occurs" and "when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control." *Id*. The Court of Appeals affirmed the Appellate Division decision, adopted its reasoning and held that the Kasses were bound by their prior joint unequivocal intent to donate the pre-embryos to the IVF program for research in the event of unforeseen circumstances, as manifested by the consent agreements they had both signed with the IVF facility. Relying on the *Davis* decision, the court held that the parties' intent regarding the disposition of the pre-embryos to be the controlling factor, and that because there had been a manifestation of such intent in this case, it was, therefore, unnecessary to weigh either Mr. Kass's or Mrs. Kass's procreative rights.

A.Z. v. B.Z.

In *A.Z. v. B.Z.*, 725 N.E.2d 1051 (Mass. 2000), the Supreme Judicial Court of Massachusetts had an opportunity to decide a case where the fact pattern involved both procreative rights and contractual rights. In this case, the husband and the wife underwent IVF and stored their extra pre-embryos in the clinic. Before starting the process, the parties signed a consent form agreeing that the extra pre-embryos would be given to the wife for future implantation. During a period when the couple was having marital difficulty, the wife, without prior consultation with the husband, had one of the pre-embryos implanted. The parties subsequently divorced. Ultimately, the court held that no agreement, even if clear in its meaning and intent, should be enforced when intervening events have changed the circumstances. The court "would not enforce an agreement that would compel one donor to become a parent against his or her will. Forced procreation is not an area amendable to judicial enforcement. An agreement to enter into a familiar relationship cannot be enforced because they violate public policy, hence enhancing the 'freedom of personal choice in matters of marriage and family life.' This policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship."

Matter of the Marriage of Dahl And Angle

Most recently, in *Matter of the Marriage of Dahl and Angle*, 194 P.3d 834 (Or. Ct. App. 2008), the Court of Appeals of Oregon addressed whether pre-embryos are marital property. Specifically, the

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to these long-arm statutes have changed the way courts analyze and decide jurisdictional issues.

Pleading Considerations

Pleading requirements are often ignored by practitioners. In some states, the Petition For Dissolution of Marriage or initial pleading, must allege the factual basis for personal jurisdiction when a nonresident is being sued.

Numerous cases hold that "[w]here a plaintiff seeks to hold a nonresident defendant liable, the complaint must allege the facts upon which jurisdiction under the Long-Arm Statute is based (citations omitted). Thus, we must first examine plaintiff's complaint and determine whether a *prima facie* showing of jurisdiction appears therein." *Bobka v. Cook County Hospital*, 453 N.E.2d 828, 829-30 (Ill. App. Ct. 1983). In *Bobka*, it was held that the allegations in the complaint "do not show the defendants invoked the benefit and protection of Illinois law or reasonably anticipated being called to defend themselves here because of their acts within this State. Plaintiff asked this court and the court below to infer from the allegations in the complaint that minimum contacts existed … We cannot infer jurisdictional acts without violating due process." *Bobka*, 453 N.E.2d at 830-31.

It was held in *McMahan v. McMahan*, 826 So. 2d 1024 (Florida 3d D.C.A. 2001) that the failure to allege jurisdictional facts (long-arm provisions or Florida residency) voids any attempted service.

In *Cabaniss v. Cabaniss*, 620 S.E.2d 559 (Va.Ct. App. 2005), personal jurisdiction was found. While it was noted that the initial pleading had to allege a factual basis for long-arm jurisdiction, it was held that by inference the allegation was that the parties had resided together in Virginia when the husband informed the wife that the marriage was over and that he wanted a divorce. It was held that the husband could not mistake the true nature of the claim, although the pleading might not have been well drafted. To be certain, however, practitioners should make sure the allegations suffice and should not assume they will be granted leave to amend the pleadings.

Jurisdictional Standards

In Illinois, even if a defendant's acts fall within the specifics of the Long-Arm Statute, the exercise of jurisdiction over him/her still may not be proper. The exercise of jurisdiction must be consistent with due process, and the quality and nature of his/her acts must be such that it is reasonable and fair to require him/her to conduct the defense in Illinois. *In re Marriage of Brown*, 506 N.E.2d 727, 729 (Ill. App. Ct. 1987) (court did not have *in personam* jurisdiction over non-resident defendant and could not resolve issues of property division, maintenance, or support though it could dissolve the marriage).

The purpose of the phrase "as to any cause of action arising from the doing of any of such acts" in the Long-Arm Statute is to ensure that there is a close relationship between a cause of action against a non-resident defendant and his jurisdictional activities. *In re Marriage of Brown*, 506 N.E.2d 727, 730-731 (Ill. App.Ct. 1987) (defendant's sending of letters into Illinois do not affect property division or support issues and do not bestow personal jurisdiction upon court although it could dissolve the marriage).

Illinois courts are trending toward a focus on constitutional standards, rather than the specifics of the Long-Arm Statute.

Literally interpreted, subsection (c) (the catch-all provision) makes the basis for exercising jurisdiction solely a constitutional analysis. Subsection (c) should obviate the need for the defendant to have committed one of the enumerated acts in subsection (a) and allow the inquiry to go directly to state and federal due process considerations.

"The Long Reach of Illinois' Long-Arm Statute: The Catch-All Provision," Eric D. Anderson, *Illinois Bar Journal*, October 1996, 84 Ill. B.J. 504.

In *Gordon v. Gordon*, 887 N.E.2d 35 (Ill. App. Ct. 2008) the former wife moved to Illinois after the parties had been divorced in Florida. She filed a tort lawsuit for intentional and negligent infliction of emotional distress. The allegations dealt with the former husband's alleged noncompliance with the Florida divorce decree. It was noted that most of the allegations never reached into Illinois, except for two acts alleged: an e-mail sent into Illinois, and a call to the Illinois Department of Children and Family Services, which initiated an investigation. It was held that those events did result in some contact, but were insufficient to require the defendant to litigate in Illinois. In that state, the Long-Arm Statute was supplemented with a "catch-all" provision, stating that a court may exercise jurisdiction on any other basis (in addition to specific acts set forth in the Long-Arm Statute) permitted by either the United States or the Illinois Constitutions. Many states now have catch-all provisions (and a trend may be emerging to make the catch-all provision the exclusive provision, such as in California, Cal. Civ. Proc. Code 410.10). These are considered to be co-extensive with the due process requirements generally said to be the *International Shoe* minimum contacts test. *International Shoe Company v. Washington*, 326 U.S., 310, 316 (1945).

Therefore, a trial court must determine whether: 1) the nonresident defendant has sufficient minimum contacts with the forum state; 2) the

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cause of action arises from these contacts; and 3) it is reasonable to require the defendant to litigate in the forum state. *Gordon*, 887 N.E.2d at 39.

As to the third requirement, in determining whether it is reasonable to require the defendant to litigate in the forum state, a trial court must consider: 1) the burden on the defendant; 2) the forum state's interest in adjudicating the dispute; 3) the plaintiff's interest in obtaining convenient and effective relief; 4) the interstate judicial system's interest in obtaining the most efficient resolution of the action; and 5) the shared interests of the several states in advancing fundamental social policies. *Id*. In this case it was felt that Florida had a much greater interest in resolving the dispute.

In re Marriage of Peck, 920 P.2d 236 (Ct. App. Wash. 1996) held that the mere opening of an account with the Washington Office of Support Enforcement and paying support was not sufficient to create personal jurisdiction. The parties never lived together in Washington. It was also argued that the husband's cessation of paying child support was a tortious act that conferred jurisdiction. However, citing *Kulko v. Superior Court of California*, 436 U.S. 84 (1978) the court held that these facts did not establish purposefully making a transaction in Washington. Also, if there was a tortious act, the lawsuit came before it, rather than arising from it.

In *Babu v. Babu*, 645 N.Y.S.2d 899 (N.Y.App. Div. 1996) the parties had originally divorced in New York, but resumed their status as a married couple under the common law of Georgia. The husband never went back to New York, but the wife, upon the husband's request, brought his mother to New York. Citing the *International Shoe* case, the court noted that besides establishing jurisdiction under the Long-Arm Statute, the plaintiff must also show that the nonresident defendant has certain minimum contacts with the forum state. Here, his contacts were held to be too attenuated to subject him to jurisdiction.

In *Fraiberg v. Cuyahoga County Cour*t, 667 N.E.2d 1189 (Ohio 1996), the parties had lived in Ohio throughout their marriage. Then they moved to Florida. They returned to Ohio for a visit and the wife remained there and filed an action for legal separation. An Ohio civil rule permitted service over a nonresident arising from the nonresident's living in a marital relationship within the state. Even though Ohio's long-arm statute did not contain a comparable provision, the civil rule controlled and the parties had spent more time in Ohio than in Florida. Also the majority of the marital assets were in Ohio and the acts allegedly giving rise to the wife's action occurred in Ohio. Therefore, Ohio was ruled to have jurisdiction.

In *C.L. v. W.S.*, 968 A.2d 211 (N.J. App. 2009), jurisdiction over the nonresident father was affirmed in a parentage case. It was alleged that the child was conceived in New Jersey and this was considered sufficient. It was noted that both the New Jersey long-arm statute and the New Jersey version of the Uniform Interstate Family Support Act (UIFSA) had a similar provision. Therefore, the court's decision was based on whether the exercise of long-arm jurisdiction was consistent with the Due Process clause. The court noted that case law distinguishes between cases in which the cause of action directly relates to the defendant's contacts with a state (specific jurisdiction) and those in which a cause of action is unrelated to those contacts (general jurisdiction) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)). With specific jurisdiction, one isolated act might be enough to subject the defendant to the jurisdiction of the forum. That was the case before the court; the defendant was engaged to the plaintiff and he spent substantial time in New Jersey. It was held that these contacts in New Jersey established that he purposely availed himself of the privilege of engaging in sexual activity within New Jersey and that he should reasonably anticipate being brought into court in New Jersey if these actions resulted in the conception of a child. It was held that New Jersey also has an interest in providing a forum for a New Jersey resident to obtain support. *See also Davis-Johnson v. Parmelee*, 18 S.W.3d 347, 352 (Ky. Ct. App. 2000) (jurisdiction found where both parties cohabited in the forum state; parentage could be decided, although support claim was untimely under this particular statute).

Although jurisdiction was found in the *C.L. v. W.S.* case, the court held that because the pleading did not contain a claim for retroactive child support, the judgment for $127,000 retroactive child support could not stand; the case was remanded for a trial on that issue. It appears that adding the claim for retroactive child support might have saved that judgment on appeal.

The Other Extreme

On the other extreme is *Katz v. Katz*, 707 A.2d 1353 (N.J.App. Div. 1998). The issue in *Katz* concerned college education expenses. In that case, the parties were married in New Jersey, but moved to Pennsylvania, where they divorced. Thereafter, the plaintiff moved back to New Jersey. The court held that any jurisdiction New Jersey may have had over the defendant many years ago had evaporated over the years and that currently there was insufficient contact. The court came to this conclusion despite the fact that there were certain contacts between the defendant and New Jersey, including that he was licensed to practice law there (but he did not practice there), that he was a limited partner in an entity that owned two buildings in New Jersey (but he only owned a very small percentage), and that his employer's corporate headquarters were located in the forum state. *Katz* was a general jurisdiction case (and the court in *C.L. v.*

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LITIGATION

No Separate Property Credit for Down Payment On Marital Residence

There can be no separate property credit for down payment on marital residence in the absence of proof that the source of the funds was separate. *Wasserman v. Wasserman*, 2009 NY Slip Op 07623, Appellate Division, Second Department, Oct. 20, 2009.

The Appellate Division determined that even though the lower court had properly distributed 50% of the value of the plaintiff's business interests to the defendant, it modified the payment terms, to avoid the plaintiff's having to liquidate assets in order to satisfy the order. It also affirmed the amount and number of years of maintenance due to the defendant wife and denied the plaintiff's request for a credit for his separate property contribution of the down payment on the marital residence because he failed to establish properly the source of the separate funds.

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W.S. distinguished *Katz* on that basis). The court also stated that under both the UIFSA and the Restatement of Conflicts of Laws, Pennsylvania would continue to have jurisdiction over the child support issue.

Long-Arm Jurisdiction and UIFSA

Personal jurisdiction over employers dealing with support orders for withholding has been the subject of controversy. It is not an issue when you have a national or multinational corporation that does business in just about every state. But sometimes there are smaller employers who only do business in one or a handful of states. Such a case recently occurred. Recently, the Supreme Court of Illinois decided *In re Marriage of Gulla and Kanaval*, _____ N.E.2d _____, 2009 WL 1578521 (June, 2009). In that case a Mississippi employer was ordered to pay the former wife a penalty for failing to withhold child support from the employee's wages. The Illinois statute contains a staggering $100 a day penalty for willful violation of this statute. In this case the former husband owed over $123,000 in past-due support. A Uniform Order For Support was served on his Mississippi employer. Ultimately the trial court entered a $369,000 judgment against the employer and the Appellate Court affirmed. Upon further appeal the Supreme Court first dealt with the issue of personal jurisdiction. It was noted that the current financial connection between the former wife and her former husband's employer was mandated by federal law. In Title IV-D of the Social Security Act, Congress mandates that states enact withholding procedures, as a condition for receiving significant federal aid. Congress also mandated that the states adopt the UIFSA, which provides that an income withholding notice may be sent directly to the out-of-state employer. Unless the employee objects, the employer must begin to withhold. Section 502 of the model UIFSA requires the employer to treat an income withholding order issued in another state which appears regular on its face, as if it had been issued by a court of the employer's state. The court ruled there was "personal jurisdiction over (employer) because, as mandated by Congress, Mississippi essentially has directed [the employer] to treat the income withholding notice as though it were issued by a Mississippi court. Based on the controlling statutes, we hold that these facts were sufficient to establish a *prima facie* case of personal jurisdiction over [the employer]." However, the former wife's victory was pyrrhic because since the jurisdictional basis required the employer to regard the notice as though it came from a Mississippi court, the Mississippi penalty applied. Whereas Illinois' penalty was $100 a day, (resulting in the $369,000 judgment) the Mississippi statute carried a total maximum penalty of only $500. There is no doubt that the Mississippi employer did not purposely establish minimum contacts with Illinois. *See International Shoe Company.*

The specially concurring opinion in *Gulla* pointed out the jurisdictional dilemma, noting that the *International Shoe* requirements were nowhere mentioned in the majority opinion. The judge also stated that mere receipt in Mississippi of the withholding order from Illinois does not constitute purposeful availment of the privilege of conducting activities in Illinois. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Chief Justice Fitzgerald did concur with the decision because he felt that the employer failed to provide a sufficient record on appeal to overturn the initial decision. He opined that sending the Illinois order to the employer in Mississippi did not equal valid service of process. It was also noted that Section 201 of UIFSA requires jurisdiction to be exercised within constitutional limits. It was suggested that UIFSA does provide for registration of income withholding orders in the employer's state, or administrative enforcement of these orders. The specially concurring opinion somewhat sarcastically concluded, "While these options may not be as expedient as the procedure the majority recognizes — simply haling the nonresident employer into Illinois — these options do have the advantage of preserving the nonresident employer's due process rights."

Conclusion

Although not that much tends to change in this area of the law for long periods of time, you must keep current because failure to do so can be disastrous to your client, and to you.

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MOVERS & SHAKERS

Jeralyn L. Lawrence, a Member of the Bridgewater, NJ-based law firm of **Norris McLaughlin & Marcus, P.A.**, participated in the Matrimonial Trial Lawyers Section's Evidence Jeopardy Game in November at the Meadowlands Seminar 2009 of the New Jersey Association for Justice (NJAJ), formerly the Association of Trial Lawyers of America – New Jersey (ATLA-NJ). The seminar was held Thursday and Friday, Nov. 12 and 13, 2009 at the Sheraton Meadowlands in East Rutherford.

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Pre-Embryos

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court posed the question: " … Does a contractual right to dispose of pre-embryos that have been created during a marriage and cryopreserved for potential later use constitute personal property … that is subject to the court's authority to distribute in a subsequent dissolution proceeding?" *Id*. The court looked at a dictionary definition of property for guidance. Pursuant to Webster's Third New Int'l Dictionary 1818, property "means something that is or may be owned or possessed, or the exclusive right to possess, use, enjoy, or dispose of a thing." *Id*, citing Webster's Third New Int'l Dictionary 1818 (un-abridged ed. 1993). Ms. Dahl's and Mr. Angle's pre-embryos were stored pursuant to a Disposition Agreement which provided that in the event of a disagreement, Ms. Dahl would be the final arbiter with respect to the disposition of the pre-embryos. Because the Disposition Agreement gave Ms. Dahl and Mr. Angle "exclusive right to use, enjoy or dispose of" the pre-embryos, the court concluded that the pre-embryos were personal property. However, notwithstanding its characterizing the pre-embryos as personal property, the court recognized that the pre-embryos were not akin to other property to which a value could be attached. Rather, the court, like the *Davis* and *Kass* courts, elected to enforce the Disposition Agreement and dispose of the pre-embryos in the manner elected by the parties at the time they underwent the IVF process. Because the parties elected Ms. Dahl to be the final decision-maker regarding the disposition of the pre-embryos, the court affirmed the trial court's decision to destroy them.

OTHER RULINGS

Other courts have followed the holdings in *Davis*, *Kass*, *A.Z. v. B.Z.* and *Dahl*. *See, e.g.*, *Cahill v. Cahill*, 757 So. 2d 465, 468 (Ala. Civ. App. 2000) (enforcing agreement stating the parties relinquished control of the pre-embryos to the IVF clinic upon divorce); *Roman v. Roman*, 183 S.W.3d 40, 50 (Tex. App. 2006), *rev. den*. (2007), *cert. den*., --U.S. ---, 128 S.Ct. 1662, 170 L. Ed.2d 1025 (2003) (enforcing agreement stating the parties relinquished control of the pre-embryos to the IVF clinic upon divorce); *Litowitz v. Litowitz*, 146 Wash.2d 514, 533, 48 P.3d 261, 271 (2002) *cert. den*., 537 U.S. 1191, 123 S. Ct. 1271, 154 L.Ed.2d 1025 (2003) (enforcing agreement stating the parties relinquished control of the pre-embryos to the IVF clinic upon divorce); *In Re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003) (enjoining any transfer of frozen pre-embryos until the parties reached consensus where agreement required joint consent).

CONCLUSION

To date, the courts that have addressed the issue of the right to dispose of gametes have uniformly and correctly held that this genetic material is "quasi-property," subject to the owner's decisional authority. This decisional authority is founded in a couple's right to procreate, which has constitutional guarantees of liberty and protection. A court should not force a person to become a parent because once the child is born, the biological and emotional ties cannot be terminated. In some states, including New York, once a child is born, there is an unwaivable duty to support offspring. While the parent wishing to use the frozen pre-embryos could agree not to seek support from the other parent, unforeseen circumstances can always arise, and the state cannot accept responsibility for the support of the child under such circumstances.

Just as the concept of equitable distribution cannot be applied to Mrs. Batista's kidney, that concept, or any other property disposition theory, cannot be applied to pre-embryos. Even though at the time the IVF procedure is performed the couple is considered a partnership, both parties are contributing to the creation of the pre-embryo, and thus the pre-embryo is property that was acquired during the marriage. The rights regarding the pre-embryo's disposition cannot mirror the legal rights to the disposition of other marital property. There is no feasible way to perform a financial valuation of a pre-embryo. What would the court rely on: receipts, bank statements and records from the hospital as evidence of the amount of money the couple invested in the IVF process? Traditionally, a fair market method is applied to valuations performed for purposes of equitable distribution. Because there is no legal market for pre-embryos, there is a serious impediment to valuing a pre-embryo. More importantly, while a property interest may exist, a value cannot be put on the potential for human life, and a party can neither be forced to reproduce nor can a court compel a person to become a parent. The emotional aspect associated with pre-embryos cannot be easily removed.

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