**Fact Pattern : Frozen Embryo** : Questions suggested by the facts include:

Are the frozen embryos marital property?

Is there an Ohio statutory protection afforded to the frozen embryos?

Is the agreement between Joe and Joyce regarding ownership of the frozen embryos in the event of divorce enforceable?

If the agreement would be enforceable but cannot be produced, what recourse does Joyce

have to prove its terms?

If Joyce is successful in retaining the frozen embryos, and subsequently successful in

delivering a baby as a result of in-vitro fertilization with one of them, will she be able to get child support from Joe?

Here are some ways to explore the landscape before you craft a strategy to help Joyce:

1. Searching **Ohio secondary sources** using natural language: *Are frozen embryos marital property?*

Try **Ohio Jurisprudence :**  In **Westlaw**, the first few search results are not relevant, - but scan the Results Plus, and note the brief filed in the U.S. Supreme Court case *Roman v. Roman.* Note the Questions Presented and the Table of Authorities: this is all useful to help you frame the relevant issues for Ohio, even though the Supreme Court denied cert. in this Texas case.

Try Anderson’s **Ohio Family Law** in **Lexis.** Because this is a natural language search, you get 100 hits: Use focus to limit the search to those seven hits that use the word “embryo.” Scan the results – no answer to the marital property question.

2. You are starting to think that Ohio courts haven’t ruled on the issue. Check **Ohio cases** using the **terms and connectors** search in **Lexis**: *embryo /s asset*. You get one case, and discover that the court did not address the Assignment of Error which asked for a monetary value on the embryo asset. Note the “Related Content” feature, including the citations to ALRs, Matthew Bender treatises, and law review articles, especially, *KING SOLOMON'S SOLUTION TO THE DISPOSITION OF EMBRYOS: RECOGNIZING A PROPERTY INTEREST AND USING EQUITABLE DIVISION* ([30 U. La Verne L. Rev. 66](http://www.lexis.com/research/search/lexsee?_m=ef14162dc6d82570263c4b23fc1c5fcc&wchp=dGLbVlb-zSkAW&_form=byCitation&_search=%3ccite%20cc%3d%22USA%22%3e%3c%21%5BCDATA%5B30%20U.%20La%20Verne%20L.%20Rev.%2066%5D%5D%3e%3c%2fcite%3e&svc=lxe&prevCite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5BCDATA%5B2007%20Ohio%207108%5D%5D%3e%3c%2fcite%3e&_LHPtrk=ct%3ALawRev%3Bt%3ASDR%3Bhcsi%3A9250%3Bsctcsi%3A270077&_md5=CD5C632974C278CC6FCA10601F4D2841)). Expand the proximity to within the same paragraph – have you missed anything? Repeat the search in **Westlaw** (remember to leave out the “or”, as it is understood by a space). You get only the Ewing case – Scan the Results Plus and see the reference to **Modern Law of Contracts - § 24:20. Surrogate parenthood—Embryo custody.**

**Again, this is not Ohio law being discussed, but the term “custody” is perhaps one we need to think about. Expand the Results Plus here, and see the ALR Annotation: Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre–embryo, or Pre–zygote in Event of Divorce, Death, or Other Circumstances. (Note: this ALR annotation did not appear in the Lexis Related Content using the same search terms, nor did the law review article found in the Lexis search appear in Westlaw’s Results Plus. While very useful, these “related” and “plus” features should never be substituted for a thorough search in secondary sources!) Scan the article outline, table of cases, laws, and rules (no Ohio!) and the summary:**

Only three states have enacted legislation concerning the disposition of frozen embryos: Florida, New Hampshire, and Louisiana… There is no federal law providing uniformity with respect to disputes over embryo ownership…. Thus, there remains a huge void in this area of the law concerning the disposition of these embryos when disputes occur…

Scan the rest of the annotation, and note the suggested query:

# Westlaw® Search Query: sy,di((embryo pre–embryo preembryo pre–zygote prezygote) & (custody procreate parent)) That search in Ohio cases nets you a case from the 5th District Court of Appeals: Karmasu v. Karmasu,2009 -Ohio- 5252, which held that custody of parties' frozen embryos following their divorce was controlled by contract between them and fertility clinic.

3. The ALR annotation gives us cause to believe we can convince the court to enforce the contract. But how do we prove it? (leave aside for the moment that the Fertility Clinic would probably require the Jones’ to sign an agreement regarding disposition of the embryos.) Let’s look for Ohio case law on how to prove the existence of the terms of the destroyed contract:

**Westlaw**: sy,di(agreement contract /s destroy! mutilate! destruct! /s prove! proof evidence)

**Lexis** : LN-HEADNOTES(contract /3 destruct! or destroy! /10 proof or prove or evidence) or CORE-TERMS(contract and destruct! or destroy! and proof or prove or evidence)

Those seem like reasonable searches, but the results aren’t giving us the kind of black letter law we’d like. Even the Natural Language search   “***what evidence is required to prove the terms of a written contract regarding disposition of property which has been intentionally destroyed by one of the parties***?” is inconclusive. Why not try another secondary source, such as: Weissenberger’s Ohio Evidence Treatise in Lexis to get you to a clear discussion of the Best Evidence Rule?

4. Let’s see if there is any Ohio law which would entitle Joyce to **child support** from Joe should she successfully deliver a child from one of the embryos post divorce.

**Westlaw** – Oh-CS: "IN-VITRO FERTILIZATION" EMBRYO /P "CHILD SUPPORT" - gives you two cases involving surrogates (not the issue here) “but not surroga! added to the search would have reduced hits to zero. Is it possible that this issue has not been decided in Ohio? Try the search in the Allstates database to find: *Ferguson v. McKiernan*, 596 Pa. 78, 940 A.2d 1236  
Pa.,2007. *In re O.G.M***.** 988 S.W.2d 473 Tex.App.-Houston [1 Dist.],1999.

**Lexis** Ohio State Cases Combined: "in-vitro fertilization" or embryo /p child support raises the same two cases. Running the search in the State Court Cases, Combined file retrieves a couple more cases than the Westlaw search did.

Look at the **Ohio Revised Code Annotated**: If we haven’t found an Ohio case directly on point, we should be able to figure out how paternity is established in Ohio. In **Westlaw,** search the file Oh-St-Ann for: preembryo embryo and paternity. – This will get you into the Uniform Parentage Act provisions in the ORC 3111.01 et seq. See especially the law review and journal commentary annotations which get you to discussions of the issues implicit in the statutes, but not expressed in the language of the statute . (Search the unannotated statutes and you will come up empty.)

The same terms and connectors search in **Lexis**’ **Page’s Ohio Revised Code** brings no matching documents. Why? Try it as a Natural Language Search and you will retrieve hits.

5. **Summary**: So far you’ve determined that Ohio courts, while not specifically ruling that embryos are marital property, might honor agreements between the parties and a fertility clinic regarding the custody of frozen embryos, that Ohio does not have a statute regarding their disposition, that the terms of a lost or destroyed contract can be proven under the Best Evidence Rule, and that Ohio does have a statutory scheme governing actions to determine paternity. You have other questions – if the contract provisions are upheld, and Joyce gets custody of her embryos, did the contract provisions address Joe’s obligations to those embryos? If the contract provisions absolved him of a support obligation, are those void as against public policy?