NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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March 7, 2025

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Re: Honeyhline Heidemann v. Jason Heidemann
Case No: CL-2023-8845

Dear Counsel:

This matter comes before the Court on Plaintiff Ms. Heidemann's partition suit filed on June 14, 2023. Plaintiff asks the Court to partition human embryos. While Virginia courts have addressed embryo disposition in equitable distribution proceedings, the application of partition statutes to human embryos presents a novel legal question of first impression. The Court concludes that human embryos are not subject to partition under Virginia Code § 8.01-83 and § 8.01-93, as they do not constitute goods or chattels capable of being valued and sold. The partition suit is dismissed with prejudice, and the Court reserved on the issue of awarding attorney's fees.

BACKGROUND

Mr. Heidemann and Ms. Heidemann were married on August 25, 2012, in Los Angeles, California. In January 2015, the parties began *in vitro* fertilization (IVF) at the Genetics & IVF Institute (GIVF) in Falls Church, Virginia. On January 22, 2015, the parties entered into an agreement titled Legal Statement-Embryo Ownership (GIVF Form) which described ownership and control of the embryos. In the GIVF Form, the parties opted to donate or dispose of any embryos not yet utilized for initiating a pregnancy if GIVF could not act in accordance with their directions.

The parties underwent three cycles of IVF, with the final cycle resulting in the creation of four embryos. Two of the embryos were implanted to achieve a pregnancy, which resulted in the parties having one child together, born on [redacted]. The two remaining fertilized embryos of the parties have remained cryopreserved at GIVF since October 2015 and are at issue in this suit. Prior to cryopreservation, the embryos were graded, with one being graded 6.4AY and the other 6.4BY.

The parties separated on September 22, 2017. On January 4, 2018, the parties entered into a Voluntary Separation and Property Settlement Agreement (PSA), which was incorporated into their Final Decree of Divorce entered by this Court on November 8, 2018. Paragraph 4.F of the PSA addresses the two remaining embryos and states:

> The parties acknowledge that there are certain human embryos in cryogenic storage with Genetics & IVF Institute (GIVF) in Falls Church, Virginia belonging to the parties. Pending a court order or further written agreement of the parties as to the disposition of the aforesaid embryos, the parties agree that neither of them will remove such embryos from storage at GIVF. The parties shall be equally responsible for the cost of storage of said embryos at GIVF pending their future disposition. Husband shall forward a copy of this agreement to GIVF within five days of the date of execution.

During the pendency of their divorce proceedings, neither party raised the issue of disposition of the embryos with the Court. After their divorce on April 19, 2019, Ms. Heidemann requested Mr. Heidemann's consent to use the two embryos to have more children. Mr. Heidemann did not give his consent, stating in a letter on May 6, 2019, that Ms. Heidemann's request would violate his privacy and personal liberty. On July 8, 2019, Ms. Heidemann reopened the divorce proceeding and filed a Motion to Determine Disposition of Cryopreserved Human Embryos, in which she sought sole possession of the embryos. On April 30, 2020, Mr. Heidemann filed a Motion to Dismiss for Lack of Jurisdiction under Virginia Code § 20-107.3, requesting that the Court enter an order denying Ms. Heidemann's motion for lack of jurisdiction. The Motion to Dismiss was heard on May 14, 2020. The Court entered an order entered on May 20, 2020, dismissing Ms. Heidemann's motion with prejudice.

On June 12, 2020, Ms. Heidemann filed a partition suit against Mr. Heidemann (Case Number CL-2020-8035) asking the court to award her sole ownership of the embryos or to divide in kind the embryos as jointly owned personal property under Virginia Code § 8.01-93. In her Complaint, Ms. Heidemann sought a declaratory judgment or partition as to ownership of the embryos because the parties could not agree on disposition. On July 15, 2020, Mr. Heidemann filed a plea in bar and demurrer. On September 4, 2020, Ms. Heidemann non-suited her case for declaratory relief. On November 10, 2020, Mr. Heidemann filed an Answer to Ms. Heidemann's

Complaint and asked the Court to dismiss Ms. Heidemann's Partition Suit with prejudice. On October 17, 2021, Ms. Heidemann voluntarily non-suited her case.

On November 8, 2021, Ms. Heidemann filed her second Complaint for Partition (Case Number CL-2021-15372). In her Complaint for Partition, Ms. Heidemann, again, sought an award of ownership of the embryos, or partition in kind of the embryos pursuant to Va. Code § 8.01-93 without seeking declaratory judgment. On August 12, 2022, Mr. Heidemann filed a demurrer. On December 2, 2022, the second complaint was dismissed with prejudice after the Court sustained Mr. Heidemann's demurrer.

Ms. Heidemann filed a Motion to Reconsider. The Court vacated the dismissal order on February 8, 2023. Accompanying the dismissal order was an Opinion Letter ("February 2023 Opinion Letter) detailing the judge's reasoning for vacating the dismissal order[1]. Following the Opinion Letter and a subsequent denial of a continuance request, the parties consented to a second nonsuit.

Ms. Heidemann now has filed her third Partition suit against Mr. Heidemann. On August 18, 2023, the parties incorporated the pleadings and orders from the second Partition suit (CL-2021-15372) and incorporated discovery that had been completed in the first Partition suit (CL-2020-8035). Ms. Heidemann seeks the Court award her both embryos. In the alternative, if she were to receive only one, she requests the embryo graded at 6.4AY.

ANALYSIS

Ms. Heidemann seeks disposition of the embryos under Virginia Code §8.01-93, which provides:

> When an equal division of goods or chattels cannot be made in kind among those entitled, a court of equity may direct the sale of the same, and the distribution of the proceeds according to the rights of the parties.

Virginia Code § 8.01-93. Virginia's partition statute requires that the Court determine whether an equal division of the goods or chattels can be made in kind among those entitled. Prior to that determination, it is necessary to ascertain whether the controversy involves "goods or chattels" subject to partition or allotment.

Ms. Heidemann asserts that the cryopreserved human embryos are property subject to allotment or partition based on (1) the agreements of the parties, (2) Virginia case law, (3) the February 2023 Opinion Letter and (4) the evidence at trial. Rejecting those arguments, the Court finds that human embryos cannot be partitioned in kind, allotted, or considered "goods or chattels" subject to partition under Virginia's partition statutes.

I. The February 2023 Opinion Letter is not the law of the case.

Ms. Heidemann argues that the February 2023 Opinion Letter, finding that human embryos may be considered "goods or chattels" within the meaning of Virginia Code § 8.01-93, is binding law upon the issue before the Court now. This is incorrect. As referenced in the Conclusion section

[1] In the Fairfax Circuit Court, it is common for different judges to hear pretrial rulings in the same case. The Opinion Letter dated February 8, 2023, was authored by another jurist.

of the February 2023 Opinion Letter, this was not an Order of the Court. Rather, it is a written statement of a judge's reasoning for granting a motion to reconsider a dismissal order.

> Even if it was an order, the case never went to trial, nor was it considered on appeal.
>
> Under the law of the case doctrine established by Virginia courts,
>
> [when] there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law.

See Steinman v. Clinchfield Coal Corp., 121 Va. 611, 620, 93 S.E. 684, 687 (1917); *see Uninsured Employer's Fund v. Thrush,* 255 Va. 14, 18, 496 S.E.2d 57, 59 (1998); *Chappell v. White*, 184 Va. 810, 816, 36 S.E.2d 524, 526-27 (1946); *Kemp v. Miller,* 160 Va. 280, 284, 168 S.E. 430, 431 (1933).

The Virginia Supreme Court has recognized that decisions applying the law of the case doctrine can extend to future stages of the same litigation when two cases involve the same parties and issues, and one case has been resolved on appeal. *See Miller-Jenkins v. Miller-Jenkins,* 276 Va. 19 (2008) citing *Kemp v. Miller,* 160 Va. 280 (1933). When the first appeal resolves the issues between the same parties, the law of the case doctrine prevents the court from re-examining the merits of the first appeal on a second appeal or after resolution on an appeal a party attempts to file a separate identical action litigating the same issues. *See Kemp v. Miller,* 160 Va. 280 (1933). Here, the Opinion Letter is not the law of the case.

Insofar as the February 2023 Opinion Letter constitutes non-binding authority, the Court is not persuaded the "goods or chattels" include human embryos. The February 2023 Opinion Letter relies upon an earlier version of Virginia Code § 8.01-93 that authorized the partition of slaves to analogize that human embryos can be valued and sold to the extent that the statute is not limited to the partition of land. The Court takes issue with reliance upon a version of the statute that pre-dates passage of the 13th Amendment to the United States Constitution in 1865. For analysis purposes, while partition may be available for personal property not annexed to the land being partitioned, after full review of this matter, the analysis of the Opinion Letter is rejected as it relates to human embryos.

When interpreting a statute, the "primary objective is to ascertain and give effect to the legislative intent, which 'is initially found in the words of the statute itself.'" *Chaffins v. Atl. Coast Pipeline, LLC,* 293 Va. 564, 568 (2017) (quoting *Crown Cent. Petroleum Corp. v. Hill,* 254 Va. 88, 91 (1997)). The proper course is "to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *Smith v. Commonwealth*, 66 Va. App. 382, 389 (2016) (quoting *Marshall v. Commonwealth*, 58 Va. App. 210, 215 (2011)). Additionally, the "plain, obvious, and rational meaning of a statute is always preferred to any curious, narrow, or strained construction." *Id.* At 388 (quoting *Williams v. Commonwealth*, 57 Va. App. 341, 351 (2010)).

When the reference to slaves was removed from the statute, the General Assembly did not take any steps to amend the other portions of Article 9 that outline how the subject property is to

be appraised by a disinterested real estate appraiser (Virginia Code § 8.01-81.1(D)) and sold by a disinterested real estate broker (Virginia Code § 8.01-83.1(B)). In 2007, the Virginia General Assembly approved a formal statement of "profound regret" for "the involuntary servitude of Africans." H.J. Res. 728 (Va. 2007). The removal of reference to slaves was solely to excise a lawless blight from the Virginia Code, the institution of slavery applicable to fellow citizens, which removal supports the principle that human beings, and by extension the embryos they have created, should not as a matter of legislative policy be subject to partition. The application of Virginia Code § 8.01-93 to cryopreserved human embryos is a strained construction never envisioned by the modern General Assembly and would not be in harmony with the context of the statute.

II. The Agreements of the Parties Do Not Determine Whether the Human Embryos are Property Subject to Partition or Their Disposition.

Ms. Heidemann argues that the stored human embryos are personal property subject to partition or allotment based on the parties' own agreements. She asserts that the parties previously agreed that their embryos should be considered property in the GIVF Form and the parties' January 4, 2018 Voluntary PSA.

On January 22, 2015, the parties signed a series of documents, including a GIVF Form and Consent Form, (collectively the "GIVF documents"). In the GIVF documents, the parties agreed that the embryos would be owned "[j]ointly by the female patient and her husband or partner." The GIVF Form also asked the parties to select an option "if, for any reason (including death), it is not practicable for GIVF to act in accordance with your foregoing directions." Mr. Heidemann and Ms. Heidemann selected the following option:

> Donate the embryos, if appropriate, to another female patient (and her husband or partner, if any), seeking to have a child, the selections of the donee to be made solely by GIVF and in accordance with GIVF policies. If the embryos are not suitable for donation as determined by GIVF, the embryos will be disposed.

Mr. Heidemann argues that GIVF documents signed by the parties at the outset of their IVF treatments are controlled when it comes to the disposition of the embryos. Virginia courts have long recognized the enforceability of contracts in which parties enter an agreement that waives a significant right. *See Gordonsville Energy, L.P. v. Virginia Elec. & Power Co.*, 257 Va. 344 (1999). The Court, however, does not find the GIVF documents controlling in this matter. The GIVF documents only released GIVF from liability and instructed them how to dispose of the embryos if the directions of Mr. and Ms. Heidemann could not be followed. They did not address which party would own or be entitled to possession of the embryos in the event of the parties' separation or divorce. *See Kass v. Kass*, 91 N.Y.2d 554 (1998) (holding the parties' agreement providing for donation to the IVF program controls).

Ms. Heidemann argues that the parties' PSA intended to treat the embryos as personal property. In Virginia, marital settlement agreements are viewed as enforceable contractual agreements between divorcing parties. *Douglas v. Hammett*, 28 Va. App. 517, 523 (1998). Hence, the same rules of contract interpretation apply. *Tiffany v. Tiffany*, 1 Va. App. 11, 15, 332 S.E.2d 796, 799 (1985). Virginia Courts generally favor marital property settlement agreements to resolve disputes between divorcing parties. Virginia Code § 20-109.1; *see also Jessee v. Jessee*, 74 Va. App. 40 (2021) (holding that if a contract exists, it should be the controlling mechanism to resolve disputes). Here, however, while the parties list the embryos in Paragraph 4.F under "Division of

Personal Property," the PSA captions do not make them fall within the meaning of goods or chattels under the partition statute.

> "A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not from detached portions. All of the different parts of an agreement must be viewed together, as a whole and each part interpreted in the light of all of the other parts."

Sweely Holdings, LLC v. R SunTrust Bank, 296 Va. 367, 377-78 (2018). Paragraph 21.F of the parties' PSA clearly states:

> The captions are inserted for convenience and reference only, and such captions in no way define, limit or describe the scope, intent and/or construction of this Agreement or of any particular paragraph or section thereof.

The captions to the PSA clearly do not evidence an intention by the parties to agree that the embryos are goods or chattels. The PSA only represents that the parties agreed to maintain the status quo until further agreement or court order. Moreover, the GIVF documents and the parties' PSA do not reference the partition statute in any manner. As such, the plain language of the parties' agreements does not suggest any contemplation or classification of the human embryos as goods or chattels subject to partition.

III. Human Embryo Distribution in Virginia and the Characterization of Human Embryos as Property in Foreign Courts.

Virginia's equitable distribution statute Virginia Code § 20-107.3 allows the court upon dissolution of marriage or divorce to determine legal title between the parties and establish ownership and value of tangible or intangible property. However, the statute does not establish a framework for the distribution of genetic material, such as cryopreserved human embryos. *See Jessee* at 50. Under Virginia's equitable distribution statute, however, courts have created an approach to determine the disposition of embryos.

According to the Court of Appeals of Virginia decision in *Jessee*, there are three approaches to determine the disposition of embryos that are recognized by Virginia courts and other states. *Id.* at 52. There is the contemporaneous mutual consent approach, the contractual approach, and the balancing approach. The contemporaneous mutual consent approach is disfavored and proposes that if the parties cannot agree to disposition, the embryos are to remain in storage indefinitely until the parties can agree. *See Id.*; *see also Bilbao v. Goodwin*, 333 Conn. 599, 217 A.3d 977, 985 (Conn. 2019). The contractual approach provides that if the parties have a pre-existing agreement the disposition provided for in the agreement is valid and enforceable. *See Id.* at 985. However, if the parties cannot agree on disposition and there is no pre-existing agreement, the court should use the balancing approach to weigh the parties' individual interests. *See Jessee*, 74 Va. App. at 52. The balancing approach recognizes both that preserved pre-embryos can be considered a special type of marital property regarding equitable distribution and recognizes autonomy over reproductive decision-making and constitutional rights. *See Id.* The *Jessee* decision outlines numerous factors that the court should consider when using the balancing approach, including, but not limited to: "circumstances related to the parties' intended use for the pre-embryos, their "original reasons for undergoing IVF," "the reasonable ability" of the party seeking the pre-embryos to have biological "children through other means," "the potential burden on the party

seeking to avoid becoming a genetic parent," and the possibility of a party's "bad faith and attempt to use the frozen pre-embryo[s] as leverage in the divorce proceeding." *See Id.* at 58.

The case at bar is distinguishable from *Jessee*. In *Jessee*, at the trial court level, both the parties and the court agreed to treat the embryo as a type of property subject to equitable distribution. On appeal, the Court of Appeals of Virginia expressly left unaddressed the question of whether human embryos constitute property under Virginia law. Here, the embryos were not addressed by the parties during equitable distribution and the Defendant, Mr. Heidemann, does not agree that the embryos are property subject to partition.

Jessee has not been applied to Virginia's partition statutes and the Court declines to do so here. The Court is not persuaded that human embryos can be characterized as goods or chattels under Virginia Code § 8.01-93 or property under the partition statutes. Recognizing that embryos give rise to ownership interests, the Court is not persuaded that the three tests discussed in *Jessee*, including the balancing approach, can be applied, because unlike *Jessee*, this case arises under Virginia's partition statutes that provide a specific framework of how property is to be partitioned, allotted, or sold.

Some jurisdictions have characterized cryopreserved embryos as property or a special type of property but have not determined whether embryos could be valued, bought, or sold. In *York v. Jones*, for example, the District Court held that an agreement between the Yorks and the Jones Institute, where the embryos were stored, created property rights since the agreement between the parties characterized the embryos as property. *See York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (holding that since the American Fertility Society found that gametes and concepti are the property of the donors, donors therefore have a right to decide at their sole discretion the disposition of these items, provided such disposition is within the medical and ethical guidelines). However, in *York*, the issue did not involve the sale of the embryos, but whether the Yorks had a property interest in the embryos that permitted them to sue the Jones Institute for breach of contract and detinue since it refused to transfer the embryos to the Institute for Reproductive Research at the Hospital of the Good Samaritan. This matter does not involve a breach of contract or detinue action against GIVF.

Other jurisdictions have suggested that embryos are not property, but instead biological human beings that cannot be bought or sold and give rise to parental rights. *See* La. R.S. 9:126. Under Louisiana's ownership statute, for example, "an in vitro fertilized human ovum is a biological human being, which is not the property of the physician which acts as an agent of fertilization or the facility which employs him or the donors of the sperm and ovum." *See La. R.S. 9:126; see also Harper v. Harper, 2024 La. App.* LEXIS 1145 (La. App 2 Cir. Jul. 17, 2024).

Other courts have suggested that embryos are not property but may give rise to ownership interests that put embryos in an interim category that entitles them to special respect due to their potential for human life. *See Davis v. Davis* (holding that embryos could not be considered "persons" or "property" under Tennessee law and that any interest progenitors have in the embryos is not a true property interest but instead an interest in ownership with respect to disposition); *see Freed v. Freed*, 227 N.E.3d 954 (Ind. Ct. App. 2024) (holding that Indiana's division of marital property statute did not categorize embryos as persons or property, and therefore Mother and Father did not have a property interest, but instead an interest in ownership); *See Jocelyn P. v. Joshua P.*, 259 Md. App. 129 (Md. App. Ct. 2023) (holding that embryos were neither persons nor property under Maryland law).

IV. Regardless of Status as Personal Property, the Human Embryos May Not Be Partitioned Under Virginia Code § 8.01-83 or § 8.01-93.

Virginia Code § 8.01-83 provides in part "that in any case in which partition cannot be conveniently made, if the interest of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court may order such sale, or an allotment." The court, however, cannot sell the property without first determining that a partition in kind cannot be conveniently made. *See also Sensabaugh v. Sensabaugh,* 232 Va. 250 (1986). A partition in kind occurs when there is a division between two or more persons of lands that are jointly owned as joint tenants or tenants in common. *See Martin v. Martin,* 112 Va. 731. Virginia Code § 8.01-83 relates to partitions of real property. Thus, when drafting Virginia Code § 8.01-83 the General Assembly did not contemplate the disposition of human embryos, as the primary purpose of the statute is the disposition of jointly owned land. The Court finds that the unique nature of each human embryo means that an equal division cannot conveniently be made.

Further, the relief provided in the partition statute serves as evidence that human embryos are not "goods or chattels" subject to partition. The only relief Virginia Code § 8.01-93 provides is related to sale and distribution. It provides that when an equal division of goods or chattels cannot be made, the court is permitted to direct the sale of the goods according to the rights of the parties. Though the parties had an agreement to treat the embryos as personal property, to be subject to the partition statute the embryos must be able to be sold in accordance with the relief provided by the statute. The sale of "goods or chattels" requires mechanisms for the valuation and a framework for sale. The court does not find that Virginia courts characterize embryos as personal property subject to partition as there is no case law that suggests that embryos are permitted to be valued, bought, or sold.

First addressing value, Virginia Code § 8.01-81.1 provides that except when (1) the parties agree to value or another method of valuation or (2) the court finds that the evidentiary value of an appraisal is outweighed by the cost of appraisal, the court in every partition action shall order an appraisal by a "disinterested real estate appraiser licensed in the Commonwealth."

The parties here do not agree on value, nor do they agree to another method of valuation. The Court does not have any evidence of the cost of an appraisal or that the cost would outweigh its evidentiary value. As such, this case is one where the court should order an appraisal. The logical inference is that a real estate appraiser licensed in the Commonwealth does not appraise human embryos. Thus, the Court would not be able to comply with this requirement of the Code.

Mr. Heidemann testified that both embryos were "individually priceless." Transcript Day 3, Pg. 20, line 14. Ms. Heidemann argues that the Court must value the embryos based on their cost of creation and storage costs. The Court rejects this method of valuation. The evidence before the Court failed to establish that this method is generally accepted in the field of IVF and assisted reproduction. The term "cost of creation" refers to the cost of a single round of IVF treatment. The round of treatment that produced the two embryos at issue here resulted in four total fertilized human embryos suitable for implantation.

Under Ms. Heidemann's proposed method of valuation, the two human embryos that were implanted to achieve a successful pregnancy would have no impact or value in the "cost of creation." Ms. Heidemann cites *Piland v Piland,* 2 Va. Cir. 136 (1983) and *Mato v. Birney,* 31 Va.

Cir. 498 (1992) to support her position on valuation. Both of those cases are distinguishable from the case at bar, as it does not appear that either dealt with the valuation of human embryos. Both rulings involved the partition of the parties' real estate and other household property items, such as a guitar, grandfather clock, china cabinet, nightstands, desk, sleeper sofa, bookcase and washer. *Piland* does indicate that some of the items at issue were "not so normal items," but provides no indication human embryos were involved or that 'cost of creation plus storage' was a method of valuation accepted by the court.

Additionally, the proposed method of valuation ignores that these two human embryos are not identical. One of the embryos is graded at 6.4AY and the other at 6.4BY. While Dr. Wheeler agreed that both embryos "would have very close potential to make it to viability and then to term if they took," Ms. Heidemann testified to her desire to be allotted the embryo graded 6.4AY over the 6.4BY embryo. The reasonable inference based on the expert testimony before the Court is that she deems this embryo better suited for viability than the other. What impact, if any, does the expected viability of a human embryo have on any ascertainable value? It is obvious that these two human embryos, if implanted and carried to term, would not result in the same two people. In fact, the embryos are as unique as any two people that may be selected from the population, including siblings with the same biological parents.

Valuation methods must reflect objective market conditions. In the partition context, valuation is generally based on an established economic framework. The "cost of creation" approach does not reflect market value, as it fails to account for viability, uniqueness, or ethical restrictions on sale. Additionally, valuation must be uniform across similar cases. No court in Virginia has accepted "cost of creation" as a legally recognized valuation method for human embryos, and doing so here would create an arbitrary and inconsistent precedent.

Assuming, but not deciding, that the Court had sufficient evidence of value or a method of valuation, the sale of human embryos is unethical in the field of reproductive endocrinology. Dr. Wheeler testified that while a minority opinion exists, "the dominant opinion, the consensus opinion, is that embryos are simply too close to being intact human beings and to buy and sell them is exactly unethical." Transcript Day 3, Pg. 97, lines 7-10. Citing the American Society of Reproductive Medicine, he further testified that "the selling of embryos per se is ethically unacceptable." Transcript Day 3, Pg. 98, lines 17-18.

Ms. Heidmann argues that because the sale of human embryos is unethical and not illegal, the Court can and should proceed with the disposition options available under the partition statute. She fails, however, to present any evidence to suggest that there is a current scheme that exists to facilitate their sale. The Court's research on this issue has involved an extensive review of a plethora of cases, statutes, and secondary materials from jurisdictions across the nation, and none of that has produced an instance where a court ordered the human embryos at issue to be sold. Absent evidence of a viable market or method for such sale, the Court will not order such a sale in the face of it being unethical in the field.

When applied to human embryos, Virginia Code § 8.01-93, partition in kind is inherently impractical. Unlike divisible assets, such as land or financial instruments, human embryos are *unique* biological entities. Any division would require either allocating one embryo to each party, which does not ensure equal division, or ordering a sale, which is neither legally sanctioned nor ethically acceptable in Virginia. Virginia's partition framework presumes a market-based

valuation and sale mechanism, which is inapplicable to human embryos. This Court cannot enforce a remedy that is fundamentally unworkable.

The unavailability of a statutorily specified method of disposition further confirms that human embryos were not contemplated or intended for inclusion when the Virginia General Assembly used the terms "goods or chattels" in Virginia Code § 8.01-93. There appears to be a gap in Virginia law for the disposition of human embryos between parties that are not at issue in the context of an equitable distribution proceeding and consenting to the court's jurisdiction like the parties in *Jessee*. As stated from the bench during these proceedings, this Court is not setting policy precedent and can only address the controversy at hand between Ms. and Mr. Heidemann. "It is one of the fundamental principles of our government, State and Federal, that the legislative power should be separate from the judicial. To enact laws, or to declare what the law *shall be*, is legislative power. To interpret law – to declare what law *is* or *has* been – is judicial power." *Wolfe v. McCaull*, 76 Va. 876, 880 (1882). This dispute brought to this Court cannot find resolution in the current statutory scheme and is rather left by this Court more appropriately for policymakers, the General Assembly, to address if they are so inclined.

CONCLUSION

For the foregoing reasons, the Court finds that the human embryos at issue in this matter are not goods or chattels subject to partition under the Virginia partition statutes. The partition suit shall be dismissed with prejudice by separate order, and until such time, this cause is not final. This matter is hereby set for entry of the order and argument on attorney's fees on April 3, 2025, at 2:00 p.m.

Sincerely,

[redacted]

Dontaé L Bugg
Judge