NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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February 8, 2023

Jesse Beringer
1152 15th Street, N.W.
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Lily Becker
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Adam Kronfeld
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Re: *Honeyhline Heidemann v. Jason Heidemann,* CL-2021-0015372

Dear Ms. Beringer, Ms. Becker, and Mr. Kronfeld:

This matter is before the court on Plaintiff's Motion to Reconsider the court's December 2, 2022 order sustaining Defendant's demurrer with prejudice.

Plaintiff filed a Complaint seeking partition of the parties' frozen embryos, to which Defendant demurred. A hearing was held on October 28, 2022 on Defendant's demurrer. The matter was taken under advisement and the parties were asked to file supplemental memoranda regarding the applicability, or lack thereof, of the common law partition of goods or chattels. After review of the memoranda, the court sustained Defendant's demurrer with prejudice. For the reasons that follow, this court's December 2, 2022 order sustaining Defendant's demurrer is VACATED and Defendant's Demurrer is OVERRULED.

OPINION LETTER

BACKGROUND

Ms. Heidemann and Mr. Heidemann, formerly married, were divorced by an order of this court on November 8, 2018. Prior to their divorce, Ms. Heidemann and Mr. Heidemann engaged in *in vitro* fertilization ("IVF") due to difficulty with conceiving children. The IVF process would produce embryos that could be cryopreserved for later use.

Before beginning the IVF process in 2015, the parties completed a form given to them by the IVF clinic titled "Legal Statement - Embry (*sic*) Ownership." In the form, the parties elected to own any stored embryos jointly. The form did not address what would happen with the embryos upon one of the party's death or in the event of divorce.

The parties completed the IVF process, conceiving one daughter from the embryos created. Presently, two embryos remain cryopreserved from the parties' IVF treatment.

Mr. and Ms. Heidemann separated in 2017. Prior to their November 2018 divorce, they executed a *Voluntary Separation and Property Settlement Agreement* ("the Agreement"). In the Agreement, under the subheading "Division of Personal Property," the parties addressed the cryopreserved embryos with the following language:

> 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 (5) days of the date of execution.

Voluntary Separation and Property Settlement Agreement, 4F (January 4, 2018).

In April 2019, after their divorce, Ms. Heidemann requested Mr. Heidemann's consent to utilize the embryos to conceive more biological children as she is infertile due to chemotherapy treatments after a cancer diagnosis. Mr. Heidemann rejected the request. The parties were unable to reach an agreement amongst themselves as to the disposition of the stored embryos.

In July 2019, Ms. Heidemann re-opened the parties' divorce case

and filed a *Motion to Determine Disposition of Cryopreserved Human Embryos*. The motion was dismissed in May 2020 as the court no longer had jurisdiction to distribute the parties' marital property.

In November 2021, Ms. Heidemann opened a new case and filed a *Complaint for Partition of Personal Property* requesting that the court award Ms. Heidemann sole ownership of the embryos or, in the alternative, partition the two embryos in kind. Mr. Heidemann demurred.

The court entered an order on December 2, 2022 sustaining the demurrer with prejudice, reasoning that the partition of goods or chattels statute, Code § 8.01-93, refers only to partition of goods or chattels found on real property being partitioned, as the statute must be read in the context of the other statutes in Title 9 ("Partition") which refer to real property. The court further reasoned -- based upon Mr. Heidemann's representation that the cryopreserved embryos could not be sold pursuant to 42 U.S.C. § 289g-2(a) -- that, because the cryopreserved embryos do not have a market value and because Code § 8.01-93 relies on goods or chattels having monetary value, the cryopreserved embryos were not goods or chattels within the meaning of Code § 8.01-93. Accordingly, the court concluded that Ms. Heidemann's *Complaint* did not state a cause of action upon which relief could be granted and Mr. Heidemann's demurrer was sustained with prejudice. Ms. Heidemann's Motion to Reconsider followed.

The Parties' Positions

This is a case of first impression in Virginia. Although there are two cases involving disposition of cryopreserved embryos, those cases arose in the context of equitable distribution of marital property. *See Jessee v. Jessee*, 74 Va. App. 40 (2021) and *Patel* v. *Patel*, 2017 WL 11453591 (Va.Cir.Ct. 2017). Here, Ms. Heidemann is asking the court to partition the embryos as goods or chattels, as her request to address the embryos as marital property was denied in May 2020 for lack of jurisdiction. Mr. Heidemann opposes Ms. Heidemann's position on three grounds: 1) Ms. Heidemann cannot bring an action for a disposition of the embryos different from what is in the Agreement; 2) awarding Ms. Heidemann ownership of the embryos to conceive children without Mr. Heidemann's consent would violate Mr. Heidemann's rights under the 14th Amendment to the United States Constitution; and 3) the embryos cannot be partitioned because they are not "goods or chattels" within the meaning of Code § 8.01-93.[1]

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[1] Mr. Heidemann also demurred as to Ms. Heidemann's request for a declaratory judgment, but Ms. Heidemann later withdrew her claim for a declaratory judgment.

Mr. Heidemann's Argument Based on the Agreement

In his demurrer, Mr. Heidemann argues that Ms. Heidemann is precluded from bringing suit seeking to change the disposition of the embryos because the Agreement determines and settles all questions of property rights between the parties. Mr. Heidemann also points to various waivers of rights provisions in the Agreement, which he claims operate as an "absolute bar" to Ms. Heidemann's right to bring an action regarding the embryos. Mr. Heidemann also points to Code § 20-109 for the notion that the Court may only enter an order enforcing the Agreement, not changing it. According to Mr. Heidemann, therefore, because the parties addressed the embryos in the Agreement, the court must enforce the Agreement and may not order anything inconsistent with the Agreement.

The court finds Mr. Heidemann's arguments to be without merit as the Agreement did not provide for the disposition of the embryos. Instead, the parties agreed that the embryos would remain in storage "pending a court order or further written agreement of the parties as to the disposition [of the embryos]" and that they would remain in storage "pending their future disposition." *Voluntary Separation and Property Settlement Agreement*, 4F (January 4, 2018). It is clear from these statements that the disposition of the embryos was not settled, and in fact contemplated further negotiation or litigation. If the parties intended and agreed for the embryos to be kept in storage indefinitely, as Mr. Heidemann suggests in his demurrer, that would have been explicitly stated. Instead, the parties, in the Agreement, left the matter of the disposition of the embryos open "pending a court order or further written agreement of the parties."

Similar language was found in the agreement between a former husband and wife who underwent IVF treatment in *Jessee v. Jessee*, 74 Va. App. 40 (2021). There, the Court of Appeals of Virginia found that the parties' agreement that they signed prior to their IVF treatment did not determine the disposition of the preserved embryos when it stated that, in the event of divorce, "the ownership and/or other rights to the embryos will be as directed by a court decree and/or settlement agreement." 74 Va. App. at 55.

Because the disposition of the embryos was not settled in the Agreement, the Agreement cannot be enforced as to the embryos and an order as to their disposition would be consistent with the Agreement.

Mr. Heidemann's Constitutional Argument

Mr. Heidemann argues in his demurrer that allowing partition of the embryos for Ms. Heidemann to conceive children would violate his

constitutional right to procreational autonomy under the Fourteenth Amendment to the United States Constitution. Mr. Heidemann goes on to state what framework the court should use when deciding how to partition the embryos.

The court finds Mr. Heidemann's constitutional arguments to be premature; thus, his arguments regarding the framework to be used in deciding the disposition of the embryos do not need to be addressed at this time.

Mr. Heidemann's Argument Regarding The
Inapplicability of the Partition Statute

Lastly, Mr. Heidemann argues that Code § 8.01-93 does not apply because embryos are not "goods or chattels" that can be partitioned, nor can they be sold.[2] Mr. Heidemann argues that embryos are not "goods or chattels" that can be partitioned because each embryo is distinct, unique, and not fungible, therefore, they cannot be partitioned, unlike parcels of land. Mr. Heidemann also argues that the partition statutes contemplate appraisals of property subject to partition. Mr. Heidemann further misleadingly argues that embryos cannot be sold pursuant to 42 U.S. Code § 289g-2.a, so there is no market value for embryos and thus they cannot be partitioned based on their value, nor can they be sold.

ANALYSIS OF CODE § 8.01-93

The court first finds that the two remaining embryos owned jointly by the Heidemanns were intended by the parties to be "goods or chattels" for purposes of Code § 8.01-93. The embryos are listed under the "Division of Personal Property" section of the Agreement. Thus, by the parties' own admission, the embryos are considered goods or chattels.

Turning to the interpretation of Code § 8.01-93, in its order of December 2, 2022, the court focused only on Code § 8.01-93 ("Partition of goods, etc., by sale, if necessary"), which reads as follows:

> 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.

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[2] Although Ms. Heidemann's *Complaint* does not cite a specific statute, she asks the court to award her sole ownership of the embryos or partition them in kind. This court has found no statute that allows for partition of goods or chattels other than Code § 8.01-93.

While the court initially viewed this language as applying only to "goods or chattels" on land being partitioned, upon extensive review of the origins and evolution of Code § 8.01-93, the court now concludes that partition of "goods or chattels" pursuant to Code § 8.01-93 is not restricted to "goods or chattels" on land being partitioned.

Although the language of Code § 8.01-93 has been recodified over the years, the language has remained identical since 1887. And, since 1950, the language has been codified under the "Partition" provision of the "Civil Remedies and Procedure" portion of the Code.

The Code preceding the Code of 1950 was the Code of 1919. In the 1919 Code, the language of what is now Code § 8.01-93 was identical, as was the title of the statute: "Partition of goods, etc., by sale, if necessary." The language was codified in Title 47, Chapter 214, of the Code of 1919, which was titled "Partitions and Coterminous Owners." The language of what is now Code § 8.01-93 was found in Sec. 8286.

Prior to 1919, the most current Code was the Code of 1887. Again, the language found in today's Code § 8.01-93 was identical in 1887, as was the title of the statute. It was codified as Sec. 2569 in Title 31, Chapter 114 ("Partitions and Coterminous Owners") of the Code of 1887. The margin notes for Sec. 2569 reference two cases and § 6 of the Code of 1849, p. 526, c.124.

In the Code of 1849 -- which is the Code directly preceding the 1887 Code -- language almost identical to Code § 8.01-93 can be found in § 6 ("Partition of slaves and other chattels") of Title 34, Chapter 124 ("Partitions"). The language of § 6 reads:

> When an equal division of *slaves,* 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. (emphasis added).[3]

The two main differences between Code § 8.01-93 and § 6 of Title 34, Chapter 124 of the Code of 1849 are the following. First, the title of § 6 is "Partition of slaves or other chattels." Second, the language includes "slaves" as partitionable in kind or subject to sale. As shown, *infra*, by 1849 slaves were partitionable in kind or subject to sale as they were considered personal property not annexed to the land. Thus, "goods or chattels" also would have been partitionable in

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[3] The removal of the reference to slaves between the 1849 and 1887 Codes was undoubtedly the result of the passage of the 13th Amendment to the United States Constitution in 1865.

kind as personal property not annexed to the land.

The margin notes for § 6 of Title 34, Chapter 124 of the Code of 1849 references "1 R.C. p. 432, § 50," which refers to § 50 of the Revised Code (page 432) -- the Code of 1819 -- the first codification of Virginia statutory law. The Code of 1819 directly preceded the Code of 1849.

Prior to 1819, the question of whether slaves were considered to be part of real estate or considered to be personal property was unsettled as reflected in *Blackwell v. Wilkinson*, Jeff. 73, 1768 WL 4, at *5 (Va. Gen. Ct. Oct. 1768) ("slaves could never be entailed unless annexed to lands").[4] The question was ultimately settled, however, when the Virginia legislature declared that "all Negro and mulatto slaves . . . shall be held, taken, and adjudged to be personal estate." Code of 1819, Vol. 1, Chapter 111, § 47.[5]

Section 50 of the Code of 1819 (page 432) reads as follows:

> Where one or more slaves shall descend from a person dying intestate, and an equal division thereof cannot be made in kind, on account of the nature of the property, it shall be lawful for the high court of chancery, or the court of the county or corporation, by which the administration to the estate of the intestate was granted, to direct the sale of such slave or slaves, and the distribution of the money arising therefrom, according to the rights of each claimant: Provided, always, That each claimant shall be first duly summoned to shew (*sic*) cause, if any he can, for such sale.

Section 50 thus contemplated a physical division of slaves among those entitled or, in the alternative, the sale of the slaves and the proceeds divided among those entitled because, at the time that the Code of 1819 was published, slaves were considered to be personal property not attached to the land. From that, it follows that the versions of the Code discussed, *supra* -- resulting in today's Code § 8.01-93 -- equally contemplated that "goods or chattels" are personal property not attached to the land. Accordingly, Code § 8.01-93 too

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[4] "Entailed" means limited to specified heirs.

[5] The issue of whether slaves were personal property may have been settled as early as 1792. *See Poindexter* v. *Davis*, 47 Va. 481, 501 (1850) ("by the act of 1792, 1 St. Large N. S. 128, (which declared slaves personal estate,)"). A reference to the act of 1792 appeared again in the Code of 1819 (page 431), codifying the declaration that slaves were to be considered personal property.

must be interpreted as including personal property not attached to the land as "goods or chattels."

The court originally found in its December 2, 2022 order that Code § 8.01-93 did not allow for the partition of embryos because the court believed, given the context of the preceding code sections in the *Partition* article, that the "goods or chattels" mentioned in Code § 8.01-93 referred to "goods or chattels" found on real property being partitioned. The court is now of the opinion, however, based on the origins and evolution of Code § 8.01-93, that Code § 8.01-93 permits the partition or, in the alternative, the sale, of "goods or chattels" regardless of whether they are found on real property being partitioned.

Mr. Heidemann's Argument Regarding 42 U.S.C. 289g-2.a

Mr. Heidemann argues that Code § 8.01-93 cannot apply because the preceding code sections under the *Partition* article contemplate an appraisal prior to partition, and embryos cannot be appraised because they do not have a market value. Mr. Heidemann states that embryos do not have a market value because:

> it is illegal in the United States to pay for an embryo. *E.g.*, 42 U.S. Code § 289g-2.a ("it shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue [*e.g.*, a human embryo] for valuable consideration if the transfer affects interstate commerce.").

Def. at 8.

Mr. Heidemann cites, and purports to quote, 42 U.S.C. § 289g-2.a, adding brackets to insert what is in fact *his interpretation* of "human fetal tissue" to include, "*e.g.*, a human embryo." It is unclear whether Mr. Heidemann attempted to mislead the court intentionally, or whether Mr. Heidemann failed to research the issue fully, but Mr. Heidemann's interpretation of the term "human fetal tissue" is contrary to the statutory definition of the phrase.

42 U.S.C. § 289g-2.e states: "for purposes of this section: (1) the term 'human fetal tissue' has the meaning given such term in section 289g-1(g) of this title." 42 U.S.C. § 289g-1(g) is titled "'Human fetal tissue' defined" and states that "the term 'human fetal tissue' means tissue or cells obtained from *dead human embryo* or fetus *after a spontaneous or induced abortion, or after a stillbirth.*" (emphasis added). Thus, contrary to what Mr. Heidemann suggested to the court, the statutory definition of "human fetal tissue" does not include cryopreserved human embryos. Consequently, Mr. Heidemann's

argument that embryos cannot be sold pursuant to 42 U.S.C. § 289g-2.a fails. Upon independent research, this court was unable to find any Virginia law prohibiting the purchase or sale of human embryo, nor has either party cited a federal law prohibiting the activity.

As there is no prohibition on the sale of human embryos, they may valued and sold, and thus may be considered "goods or chattels" within the meaning of Code § 8.01-93.

CONCLUSION

The Court's December 2, 2022 order sustaining Defendant's demurrer is VACATED, and the demurrer is OVERRULED.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge