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Christopher J. Falcon
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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

HONEYHLINE K. HEIDEMANN )
Plaintiff, )
v. ) CL No. 2023-8845
JASON E. HEIDEMANN, et al. )
Defendant. )

# MR. HEIDEMANN'S PRE-TRIAL MEMORANDUM[1]

## I. Introduction:

This is a case of first impression in Virginia. Plaintiff ("Ms. Heidemann"), the former spouse of Defendant ("Mr. Heidemann), is asking the Court to partition two cryopreserved human embryos that she and Mr. Heidemann created during their marriage. While there is controlling Virginia precedent related to the disposition of human embryos in the context of divorce and equitable distribution proceedings, see Jessee v. Jessee, 74 Va. App. 40 (2021), the applicability of this recent precedent to the partition statutes is unknown. A pre-trial memorandum is appropriate in navigating the complex and novel legal issues in this case.

## II. Factual and Procedural Background:

Ms. Heidemann and Mr. Heidemann were lawfully married on August 25, 2012, in Los Angeles, California. In January 2015, the parties endeavored to pursue in vitro fertilization ("IVF") through the Genetics & IVF Institute ("GIVF") in Falls Church, Virginia. On January 22, 2015, prior to initiating their first IVF cycle with GIVF, the parties executed a Legal Statement-Embryo

1 Mr. Heidemann's former counsel, Russell W. Ray, Esq., largely contributed to the drafting of this memorandum and it is based off his pretrial memorandum that was filed as part of Case No. 2020-8035. Mr. Ray has graciously provided his consent to the undersigned's use of his work product.

Ownership ("Legal Statement"). The stated purpose of the Legal Statement was for the parties to describe their "intentions regarding the use and disposition of any frozen embryos which are not yet utilized for the purpose of initiating a pregnancy." The Legal Statement provided that "[t]o the extent that the ownership and control of the embryos may be legally designated…," the parties agreed that the embryos would be owned "[j]ointly by the female patient and her husband or partner." The Legal Statement further asked the parties to select an option, limiting GIVF's liability, "if, for any reason (including death), it is not practicable for GIVF to act in accordance with your foregoing directions." The parties selected the following option:

> Donates 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.

After the parties underwent three IVF cycles, the parties created four embryos and implanted two to achieve one pregnancy and, as a result, have one child together, Emma Heidemann ("Emma"), born June 13, 2016. Two remaining fertilized embryos, the product of the fertilization of Ms. Heidemann's egg by Mr. Heidemann's sperm, have remained in cryogenic storage at GIVF since October 2015.

The parties' marriage deteriorated, and they separated on September 22, 2017. On January 4, 2018, the parties entered into a Voluntary Separation and Property Settlement Agreement ("Agreement") resolving their equitable distribution and custody issues. Paragraph 4.F. of the Agreement directly addresses the issue of the two remaining frozen embryos.

> 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.

The Agreement was incorporated into the Final Decree of Divorce entered by this court on November 8, 2018 ("Final Decree") in the matter styled as Honeyhline K. Heidemann v. Jason E. Heidemann, CL No. 2017-16297. Neither party made a request prior to entry of the Final Decree for the court to determine the disposition of the embryos. Neither party made a motion pursuant to § 20-107.3A, either at the time of entry of the Final Decree or within the 21-day period following entry of the Final Decree, asking this court to reserve jurisdiction to later adjudicate the embryo issue.

On April 19, 2019, notwithstanding that the parties were now divorced, Ms. Heidemann, through her counsel, requested Mr. Heidemann's consent for her to use the embryos for the purpose of having more children with Mr. Heidemann. By letter, dated May 6, 2019, Mr. Heidemann's counsel rejected Ms. Heidemann's proposal, noting that he could think of "nothing more violative of Mr. Heidemann's (or any other person's) privacy and personal liberty than to be forced to father a child without his consent."

A. Ms. Heidemann reopens the divorce case

On July 8, 2019, Ms. Heidemann reopened the parties' divorce proceeding and filed a Motion to Determine Disposition of Cryopreserved Human Embryos seeking to obtain possession

of the two cryogenically preserved embryos and bring them to term over Mr. Heidemann's objection.

On April 30, 2020, Mr. Heidemann filed Defendant's Motion to Dismiss for Lack of Jurisdiction Under Section 20-107.3 of the Code of Virginia (1950) ("Motion to Dismiss"), asking this Court for entry of an order denying Plaintiff's Motion to Determine Disposition of Cryopreserved Human Embryos on the grounds that this Court lacked jurisdiction under Section 20-107.3 of the Code of Virginia (1950), as amended, to grant Ms. Heidemann the relief she sought. The Motion to Dismiss was argued by counsel for the parties before the Honorable Dontae L. Bugg on May 14, 2020. By Order, dated May 20, 2020, this court dismissed Plaintiff's Motion "with prejudice."

B. Ms. Heidemann files a suit for partition in Case No. 2020-8035 ("Partition I")

On June 12, 2020, Ms. Heidemann elected to sue Mr. Heidemann for partition in the matter styled as Honeyhline K. Heidemann v. Jason E. Heidemann, CL No. 2020-8035, by filing her first Complaint for Partition of Personal Property ("Partition I"). In Partition I, Ms. Heidemann asked the court "pursuant to Code § 8.01-93 to award her sole ownership or to divide in kind certain personal property owned jointly by the parties . . ." That Complaint alleges that "[t]he differences between the parties . . . necessitate that the Court make a declaratory judgment or partition as to the ownership of [the] cryopreserved embryos." (Partition I Compl. ¶24). Ms. Heidemann further alleged that because she is infertile (Partition I Compl. ¶25) and because "Virginia Code §20158(3)(C) [sic] provides that [Mr. Heidemann] would not be the legal father of any child resulting from the stored embryos" (Partition I Compl. ¶26), an "equitable balancing test weighs in favor" of the Court awarding "her sole ownership of the embryos." (Partition I

Compl. ¶27). Mr. Heidemann filed a plea in bar and demurrer on July 15, 2020. By Order, dated September 4, 2020, Ms. Heidemann non-suited her cause of action for declaratory relief. Mr. Heidemann then filed his Answer to Complaint for Partition of Personal Property on November 10, 2020 asking that Plaintiff's partition cause of action be dismissed with prejudice and asserting various affirmative defenses, including res judicata, waiver, breach of contract, collateral estoppel and that granting Plaintiff the relief she seeks would deprive Mr. Heidemann of his due process right not to be forced to have a child against his will in violation of the 14th Amendment of the United States Constitution and Article 1, Section 11 of the Constitution of Virginia. On December 9, 2020, the case was set for a bench trial set to begin October 18, 2021. Ms. Heidemann elected to take a voluntary nonsuit on the morning of trial.

C. Ms. Heidemann re-files her partition suit against Mr. Heidemann ("Partition II")

On November 8, 2021, in the matter styled as Honeyhline K. Heidemann v. Jason E. Heidemann, CL No. 2021-15372, Ms. Heidemann filed her second Complaint for Partition of Personal Property ("Partition II"). In her Complaint for Partition II, Ms. Heidemann dropped her claim for declaratory judgment and removed reference to Virginia Code §8.01-93, but maintained her request for an award of ownership of the embryos, or a partition in kind of the embryos.

On August 12, 2022, Mr. Heidemann, through prior counsel, filed a Demurrer to Ms. Heidemann's Partition II. Between September 22, 2022 and November 28, 2022, both sides briefed the legal issues raised in Mr. Heidemann's demurrer. On December 2, 2022, the Court sustained Mr. Heidemann's demurrer with prejudice. Following a suspending order entered on Ms. Heidemann's Motion to Reconsider, the Court vacated the Order dismissing Partition II by

order on February 8, 2023. In the accompanying Letter Opinion, the Honorable Richard E. Gardiner wrote: "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" and that (in speaking to the sale of embryos) "they may be valued and sold, and thus may be considered "goods or chattels" within the meaning of Code § 8.01-93." See Letter Op. at 9.

Following the Order vacating the prior order dismissing Partition II, the undersigned entered a substituted appearance as counsel for Mr. Heidemann. Both parties, given the intervening reversal of the Court's dismissal of the action, requested a continuance of the trial date, which was set to begin June 26, 2023. The Court denied the requested continuance. The parties subsequently consented to a second nonsuit.

D. Ms. Heidemann files her partition suit for a third time ("Partition III").

On June 14, 2023, in the present matter styled as Honeyhline K. Heidemann v. Jason E. Heidemann, Case No. 2023-8845, Ms. Heidemann filed her third Complaint for Partition of Personal Property ("Partition III"). The Partition III Complaint is identical to the Partition II Complaint.

On August 18, 2023, the Court entered the parties' consent Order of Incorporation, incorporating the pleadings and orders that had been filed and entered in Partition II, including the incorporation of all discovery that had been completed in Partition I. The purpose of this Order of Incorporation was to resume Partition III from the point where Partition II left off while preserving both parties' objections to the rulings made therein. This matter is now ripe for trial.

## III. Applicable Legal Standard

One of the fundamental issues in this case is whether Virginia's partition statute may be used to resolve disputes between the progenitors of human embryos. Assuming human embryos are in fact partitionable, the next issue is what type of relief, if any, Plaintiff is entitled to seek under the partition statute. As a threshold proposition, no court in Virginia (or in any other state or jurisdiction of the United States) has ever used partition to resolve questions concerning the future use and disposition of human embryos. Defendant will argue that the partition remedy is wholly incompatible with a proper consideration of the important personal and constitutional questions to which this case and others like it give rise.

### A. The partition statutes

Partition is the "division of real or personal property between co-owners, resulting in individual ownership of the interests of each." Henry Campbell Black, Black's Law Dictionary, 1008, 5th Ed. (1979). Partition comes in three forms: partition in kind, partition by allotment, and partition by sale. A partition in kind is a division of the property itself among the co-owners. Partition by allotment, which is not available in all jurisdictions, is where the court awards full ownership of land to a single owner or subset of owners and orders them to pay the person or persons divested of ownership the value of their interests in the property. In a partition by sale, the court orders a judicial sale of the property and divides the proceeds among the owners in proportion to their respective interests in the property.

Many states have partition statutes. Because partition in kind was a remedy available at common law, however, courts have wrestled with the notion of whether a party could invoke equity to obtain relief not otherwise available under the partition statutes. The Virginia Supreme

Court resolved such question in favor of strict adherence to the partition statute. In Virginia, partition is exclusively a creature of statute. Phillips v. Wells, 147 Va. 1030, 1042 (1926) (stating "A partition proceeding is entirely statutory…"); Price v. Simpson, 182 Va. 530, 534 (1944) (stating "Since our decision in Phillips Wells . . . it has been settled law that 'a partition proceeding is entirely statutory and finds its authority in . . . the Virginia Code'); Cauthorn v. Cauthorn, 196 Va. 614, 619 (1955) (stating "Equity has no inherent jurisdiction to order a sale of land for the purpose of partition.").

Virginia law provides different methods for partitioning real property and personal property. Virginia Code § 8.01-83, which relates to the partition of **land**, authorizes the court, "when partition cannot be conveniently made," to make an allotment of the entire subject property to one or more parties and to order the party or parties accepting the subject property to pay the other interested party or parties the value of their interest. Alternatively, "in any case when 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," then the court "may order such sale, or an allotment of a part thereof to any one or more of the parties who will accept it, and pay therefor to the other parties such sums of money as their interest therein may entitle them to."

The language of Virginia Code § 8.01-93, relating to **personal property**, is strikingly different. It provides that "[w]hen an **equal** division of goods or chattels cannot be made in kind" (emphasis added), the court may only "direct the sale of the same" and distribute the proceeds among the parties. The term "goods or chattels" is a generic one. According to Black's Law Dictionary, "the phrase is a general denomination of personal property, as distinguished from

real property." Black's Law Dictionary, 624, 5th Ed. (1979). Both Virginia Code § 8.01-83 and Virginia Code § 8.01-93 require the court, where practicable and as a first recourse, to divide in kind the property in question. Virginia Code § 8.01-83 authorizes partition by allotment or by sale only if the court first determines that partition in kind "cannot be conveniently made." Virginia Code § 8.01-93 makes no provision for partition by allotment. Rather, where the court determines that an equal division of the property in question cannot be made, Virginia Code §8.01-93 requires that such property be sold.

B. Differences between the partition and equitable distribution statutes

The Virginia Court of Appeals recognizes that ""equitable distribution" does not mean "equal distribution."" Marion v. Marion, 11 Va. App. 659, 662 (1991). In equitable distribution, the Court is required to consider enumerated equitable factors found in Virginia Code §20-107.3E when deciding how to distribute marital property in the event of a dissolution of marriage. Id.

Virginia's equitable distribution statute was enacted on July 1, 1982. Since its passage, the statute has undergone numerous legislative amendments, including one in 1988 that, for the first time, permitted the divorce court to itself order the transfer of jointly owned property between divorcing spouses. Prior to these amendments, the divorce court had no power to order the transfer of property and was only permitted to weigh equitable factors to make a fair and equitable monetary award and then partition marital property under the same framework set out in the partition statutes set forth in §§8.01-81 et seq. See Dale M. Cecka et al., Family Law: Theory, Practice and Forms §§ 11.32 and 11.33, 2023 ed. (Vol. 9. Va. Practice Series); see also Venable v. Venable, 2 Va. App. 178 (1986); Wagner v. Wagner, 4 Va. App. 397, 406-407 (1987)

(affirming that the trial court properly ordered partition despite Wife's offer to purchase Husband's share because the court was without jurisdiction to order a transfer and was only authorized to order partition and sale of the home).

By 1991, Virginia Code §20-107.3 included the authority to order a transfer between spouses, to permit parties to purchase the interest of the other, or to order a private or public sale:

> "As a means of dividing or transferring the jointly owned marital property, the court may (i) order the transfer of real or personal property or any interest therein to one of the parties, (ii) permit either party to purchase the interest of the other and direct the allocation of the proceeds, provided the party purchasing the interest of the other agrees to assume any indebtedness secured by the property, or (iii) order its sale by private sale by the parties, through such agent as the court shall direct, or by public sale as the court shall direct without the necessity for partition."

See Virginia Code Ann §20-107.3 (1991); see also Dale M. Cecka et al., Family Law: Theory, Practice and Forms §§ 11.32 and 11.33, 2023 ed. (Vol. 9. Va. Practice Series).

In its current form, Virginia Code §20-107.3 gives a court must broader authority than a court in partition to divide marital property between two spouses. Virginia Code Ann. §20-107.3 (2022).

C. The applicability of the partition statutes to disposition of embryos

This case presents an issue of first impression not only in Virginia, but in the United States, as to whether a cause of action for partition may properly be used to determine the disposition of human embryos. There are a myriad of legal and public policy reasons why courts should not partition human embryos.

a. Human embryos as "goods or chattels"

In his Opinion Letter, Judge Gardiner found that the "two remaining embryos owned jointly by the Heidemanns were intended by the parties to be "goods or chattels" for the purposes of Virginia Code §8.01-93." See Letter Op. at 5. In making this finding, Judge Gardiner pointed exclusively to the fact that they are listed under the "Division of Personal Property" section of the Agreement as lending to the conclusion that the parties were admitting the embryos were considered goods or chattels. See Letter Op. at 5. Judge Gardiner further found that there was no legal prohibition to the sale of human embryos, and that, therefore, they may be valued and sold and may be considered "goods or chattels" within the meaning of Virginia Code §8.01-93. See Letter Op. at 9. Mr. Heidemann respectfully disagrees with the Court's finding.

To properly state a claim for partition, a plaintiff must allege that the subject property is jointly owned. While it would be correct to state the embryos here "belong" to Plaintiff and Mr. Heidemann as the progenitors, it is another matter to claim they are "owned" by them. The Legal Statement-Embryo Ownership, executed by the parties on January 22, 2015, acknowledged this issue. It provided that "*[t]o the extent that the ownership and control of the embryos may be legally designated …* (emphasis added)," the parties agreed to joint ownership. It is one thing to recognize that the progenitors have a special interest in any embryos they contribute their genetic material to create, and an entirely different thing to brand such embryos as "property" and divide them up like just so many bushels of corn.

Across the country, courts are concluding that embryos belong to a category distinct from property[2]. In the most recent decision, Freed v. Freed, decided in January 2024, the Indiana Court of Appeals reviewed the collection of decisions from other states and concluded:

> "Most courts that have addressed this issue, following the approach taken by the Tennessee Supreme Court in Davis v. Davis, find pre-embryos "occupy an interim category that entitles them to special respect because of their potential for human life." See Freed v. Freed, 2024 Ind. App. LEXIS 17, 16 (2024), quoting Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992).

The Freed court went on to adopt the holding in Davis that "pre-embryos, as neither property nor persons, are in a separate category that entitles them to special respect" and therefore "Father and Mother do not have a true property interest in the pre-embryos, but they do have an interest in the nature of ownership, to the extent they have decision-making authority concerning disposition of the pre-embryos, within the scope of policy set by law." See Davis, 842 S.W.2d at 597; see also Freed at 18.

In Virginia, there is only one published case on the issue of disposition of embryos and it comes out of an equitable distribution award made as part of a divorce. Jessee v. Jessee, 74 Va. App. 40, 866 S.E.2d 46 (2021). In the Jessee case, the Virginia Court of Appeals specifically acknowledged that the parties and the trial court had all agreed to treat the embryo as property

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2 See Jocelyn P. v. Joshua P., 056120022 Md. App (2023) ("the parties' frozen pre-embryo cannot be classified as an interest in property because it concerns interests of far broader dimension…" See also: In re Marriage of Witten, 672 N.W.2d 768, 781, 2003 Iowa Sup. LEXIS 236, 32 (2003) ("whether embryos are viewed as having life or simply as having the potential for life, this characteristic or potential renders embryos fundamentally distinct from the chattels, real estate, and money that are subjects of antenuptial agreements."); Rooks v. Rooks, 2018 Co 85 (conceding that Colorado law provides that pre-embryos are not legal "persons" but states "…pre-embryos contain the potential for human life and are formed using genetic material from two parties with significant, but potentially competing, interests in their ultimate disposition. Thus, we agree with courts that have categorized pre-embryos as marital property of a special character.")

subject to equitable distribution and that it was therefore not addressing the general applicability of the equitable distribution statute to embryos or whether they constitute property under Virginia Law. Jessee at 49. Therefore, whether an embryo can be defined as 'property' under Virginia Law, remains a question of first impression.

b. The role of equity in a partition suit

The partition statute does not invite equitable factors into its determination of a disposition of "goods and chattels." Nothing in the language of §8.01-93 suggests such evidence is relevant to a partition suit where the only issues, absent a valid defense, are whether the embryos are "goods and chattels" that are "jointly owned," whether they may be equally divided, or must they be sold. If the Court conclusively finds that the embryos are goods and chattels, and that they are jointly owned, but then does not find that they can be equally divided, the only remaining remedy available in Virginia Code §8.01-93 is a sale. Ms. Heidemann has suggested, without stating her legal basis, that the Court has the power to allow her to simply buy Mr. Heidemann's interest in the embryos, perhaps by paying Mr. Heidemann half of their "value." That remedy is simply unavailable to her in Virginia Code §8.01-93. As mentioned earlier, that result may have been available to her in equitable distribution, but Plaintiff chose not to avail herself of the opportunity to seek equitable distribution of the embryos prior to entry of the final order of divorce. The Court has already dismissed her effort to reopen the divorce suit and seek equitable distribution of the embryos, so she has elected to proceed under the partition statutes. Plaintiff is now limited to the specific remedies afforded by § 8.01-93: a division in kind, or a sale.

c. There is no statutory authority for the Court to alter the partition statute

Virginia courts have consistently and firmly rejected any attempts by parties in partition proceedings to invoke equity to alter or amend the partition statutes. Fitchett v. Fitchett, 370 S.E. 2d 318, 320, 6 Va. App. 562, 565-566 (1988) (stating "equity has no power to alter the partition statutes . . ."). In Fitchett, a divorce case, the husband appealed the trial court's decision to defer the partition sale of the parties' jointly titled marital residence for two and a half years. Id. In granting the delay, the trial court had accepted wife's argument that, if the property were sold in the ordinary course of a partition suit, that she and the children would effectively lose their home and would have to live in a different environment from which they were accustomed. Id. The Court of Appeals reversed the trial court, holding that where a trial court is empowered to order partition, "it has no right to defer such action but must conduct the procedure in the ordinary course of managing its docket." Fitchett at 566. Although this meant that the Court had no power to avoid the displacement of the children, the Court of Appeals reasoned that "because equity has no power to alter the partition statutes, such issues must be addressed to the legislature not the courts[3]." Id.

Similarly, in Cauthorn, where the record clearly indicated that the land was divisible in kind between the joint owners, the Virginia Supreme Court reversed the trial court's decision to order a sale of the defendant's one-half interest in land to his co-owner in contravention of the partition statute's requirement such sale could not be decreed absent a showing that partition

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3 Of note, that same year, the Virginia legislature amended Virginia Code §20.107.3 and specifically authorized a divorce court to order the transfer or division of marital property. See Dale M. Cecka et al., Family Law: Theory, Practice and Forms §§ 11.32 and 11.33, 2023 ed. (Vol. 9. Va. Practice Series).

could not be conveniently made. Cauthorn v. Cauthorn, 196 Va. 614, 626 (1955). "[W]e have held in numerous cases," the Cauthorn court stated, "that these statutes create and confer special statutory jurisdiction upon courts of equity for the partition and sale of land. Failure to substantially comply with the provisions of the statutes is fatal to the proceedings. Equity has no inherent jurisdiction to order a sale of land for the purpose of partition." Cauthorn, 196 Va. at 619.

The rule that courts cannot alter remedies provided in the partition statutes is merely an extension of the maxim that equity follows the law, *equitas sequitur legum*. Courts of equity can no more disregard statutory provisions than courts of law. "[W]herever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation" Hedges v. Dixon County, 150 U.S. 182, 192 (1893) (holding that equity cannot give validity to a contract declared void by an express statutory provision). See also City of Norfolk v. Stull, 102 Va. Cir. 283, 285 (2019) (stating "When a statute clearly controls the rights of the parties, courts do not look to equity to contradict the statute."). In short, using only the framework provided in the partition statutes, there is simply no legal basis for this court to allot the embryos to Ms. Heidemann.

Even if allotment were permissible by the partition statutes, none of the basic purposes of partition would be served by partitioning the embryos in dispute here. As her Complaint recites, Plaintiff "wishes to use the cryopreserved embryos in order to have a child or children . . ." (Compl. ¶23) As the evidence will show, Mr. Heidemann does not intend to relinquish his parental rights to any child brought to term by Plaintiff using the embryos. Thus, partitioning the embryos will not end the disagreement between the parties, but merely transform it from one

over the use and possession of human embryos to one over custody of a child or children. Rather than disentangling the parties and promoting peace and harmony, partition will bind ever more closely in dissension two parties who have already chosen to divorce one other.

d. The human embryos are incapable of an "equal division" in kind.

Both Virginia Code § 8.01-83 and §8.01-93 presuppose that property subject to partition, whether real or personal, is marketable. When "partition cannot be conveniently made" (in the case of § 8.01-83), or "[w]hen an equal division of goods or chattels cannot be made in kind" (in the case of § 8.01-93), the Virginia Code authorizes the court to sell the property subject to partition and distribute the proceeds in accordance with the interests of the parties in the property.

Although Ms. Heidemann argues as part of her alternate relief that the Court would be able to equally divide the embryos in-kind by simply giving one embryo to her and one to Mr. Heidemann, Mr. Heidemann will conclusively demonstrate that an equal division in kind is impossible. Each embryo is distinct, varying in every way each human being is unique from every other. Moreover, as will be established by Mr. Heidemann through the testimony of his expert witness, Dr. James Wheeler, and other lay witnesses, there are documented and graded differences between the two embryos that impact the likelihood, if they are transferred to a human host, of their resulting in a successful pregnancy. Thus, they cannot be "equally divided" and partitioned in kind. Under Virginia Code § 8.01-93, then, the court's only recourse is to sell them and distribute the proceeds between the parties.

e. There is no market for the sale of human embryos

At the demurrer stage of these proceedings, the Court found no legal prohibition on the sale of human embryos. In so finding, Judge Gardiner concluded that they may, then, be valued and sold and considered "goods or chattels" within the meaning of Virginia Code § 8.01-93. See Letter Op. at 9. While Judge Gardiner is correct that there exists no legal barrier to the sale of human embryos in Virginia, human embryos are not fungible in either the moral or practical sense. Ms. Heidemann is missing the fundamental predicate for a partition suit: a commercial market.

Both parties' experts will agree that, as distinguished from human sperm and eggs, there are strong ethical prohibitions in the field of reproductive medicine against the purchase and sale of human embryos. "[T]he selling of embryos per se is ethically unacceptable." See American Society for Reproductive Medicine, Fertility and Sterility, "Guidance regarding gamete and embryo donation", 1395-99, Vol. 115 No. 6 (June 2021). This latter fact calls into question the feasibility of using partition, specifically § 8.01-93, as a judicial vehicle for resolving disputes between progenitors over the future use and disposition of cryogenically stored human embryos. Not exclusively, but most glaringly in the case of a dispute over an odd number of human embryos, the feasibility of using the partition statute to resolve embryo disputes depends on the existence of a commercial market, when, in reality, none exists. Thus, before accepting the invitation by the Plaintiff to use Virginia Code § 8.01-93 to resolve this dispute, and by extension future disputes over the use and disposition of human embryos, this Court should consider the moral and public policy implications of its being compelled by statute to order the sale of human embryos in the face of a strong ethical prohibition against such practice.

D. Mr. Heidemann's equitable defenses and his right to procreational autonomy

Mr. Heidemann will argue that awarding sole ownership of either (or both) of the embryos to Ms. Heidemann would violate the parties' prior agreement regarding the disposition of the embryos in the event of a dispute between them as expressed in the Legal Statement and Agreement. Mr. Heidemann will also argue that awarding sole ownership of either (or both) of the embryos to Ms. Heidemann, who admits she intends to use them to have more children (Compl. ¶23), would force Mr. Heidemann to procreate against his wishes and therefore violate his constitutional right to privacy under the 14th Amendment of the United States Constitution and Article 1, Section 11 of the Constitution of Virginia.

As to the latter issue, the United States Supreme Court has long recognized that the United States Constitution guarantees individuals autonomy over reproductive choices. In Skinner v. Oklahoma, decided over seventy-five years ago, the United States Supreme Court recognized procreation as one of the basic civil rights and deemed marriage and procreation "fundamental to human existence and survival." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). These rights have since been found to extend to the right to access contraception. See Griswold v. Connecticut, 381 U.S. 479, 484-486 (1965) (The decision to use contraception to avoid procreation "concerns a relationship lying within the zone of privacy created by several constitutional guarantees."); see also Eisenstandt v. Baird, 405 U.S. 438, 454 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

a. Virginia recognizes that the disposition of embryos implicates parties' constitutional rights in Jessee v. Jessee:

In 2021, in the case of Jessee v. Jessee, the Virginia Court of Appeals adopted a balancing approach to the division of embryos between two divorcing spouses. Jessee v. Jessee, 74 Va. App. 40, 866 S.E.2d 46 (2021). Although the Jessee Court was dealing with the division of embryos in the context of the Virginia equitable distribution statutes, the Court of Appeals explicitly acknowledged that there are unique and constitutional rights at stake when one owner requests the award of an embryo over the objection of, and to the exclusion of, the other owner. Jesse, 74 Va. App. at 53 (citing Obergefell v. Hodges, 576 U.S. 644, 666 (2015) (stating "Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.")).

Virginia's decision in Jessee relies on the reasoning articulated by the Supreme Court of Tennessee in Davis v. Davis, which was the first published case in the country related to the disposition of human embryos, and the first to adopt the balancing approach. Under the "Balancing Approach," the court is charged with balancing the constitutionally protected right to procreate against the similarly constitutionally protected right not to procreate. See Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).

The Court of Appeals in Jessee stated:

> "In determining the best approach to resolving this case, we recognize and make clear that the disposition of the viable pre-embryo implicates both parties' constitutional rights." 74 Va. App. at 53.
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> "We hold that if a contract exists, it should be the controlling

> mechanism to resolve the dispute." 74 Va. App. at 55.
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> "Absent such a contract, a court should employ the balancing approach, which balances the parties' interests to best respect their opposing constitutional rights… We agree with this approach because it addresses constitutional concerns by taking the parties' competing constitutional issues into account." 74 Va. App. at 55.
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> "Balancing the parties' respective interests in preserved pre-embryos requires consideration of numerous factors. Those circumstances include 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," and "*the potential burden on the party seeking to avoid becoming a genetic parent* (emphasis added)." 74 Va. App. at 55.
>
> "In addition, courts should consider the possibility of a party's "bad faith and attempt to use the frozen pre-embryo[s] as leverage in the divorce proceeding." *Id.*
>
> "Finally, the Court should consider any other factors pertaining to the parties' procreational autonomy." *Id.*

While this is a partition case, there is no way to avoid the fact that both parties have important constitutional rights at stake. In her Complaint, Ms. Heidemann alleges that because she is infertile (Compl. ¶25), that an "equitable balancing test weighs in favor" of the Court awarding "her sole ownership of the embryos." (Compl. ¶27). In her Motion in Limine, Ms. Heidemann reverses course and now rejects the notion that the Court may employ an equitable balancing test when partitioning property. In her Motion in Limine, Ms. Heidemann misses the point of Jessee. As is made clear by the Court of Appeals, the factors it was adopting when it decided Jessee were factors that it would require any court to consider when called upon to decide between two parties' competing constitutional rights to procreational autonomy.

b. Applying the Jessee factors to this case

If the Court finds, despite the arguments herein, that Ms. Heidemann does have a legal avenue to request sole ownership of the embryo(s) in a partition suit, the Court must apply the Jessee factors to appropriately balance the competing constitutional interests at stake between Mr. and Ms. Heidemann.

Applying the Jessee factors to this case, the balancing approach favors Mr. Heidemann. First, there is evidence of the Heidemanns' pre-dispute wishes is in the form of the Legal Statement, wherein Plaintiff and Mr. Heidemann expressed their "intentions regarding the use and disposition of any frozen embryos which are not yet utilized for the purpose of initiating a pregnancy." The Heidemanns expressed their intent to dispose of the embryos "jointly" and, in the event "for any reason" their wish to dispose of the embryos jointly could not be fulfilled, to donate or destroy them. This agreement should be deemed controlling under Jessee. However, even if this agreement is found not to be controlling, the potential burden to Mr. Heidemann in becoming a genetic parent against his wishes outweighs Ms. Heidemann's wishes to use the embryos to achieve another pregnancy.

In her effort to minimize and marginalize Mr. Heidemann's rights to avoid procreation, Ms. Heidemann claims that under Virginia's assisted conception statue, Virginia Code § 20-158, "[Mr. Heidemann] would not be the legal father of any child resulting from the stored embryos being carried to term, unless he were to consent to be a parent in writing" and thus "would face no unwanted parental responsibilities or obligations . . . if Plaintiff is allowed to use the embryos to bring a child to term" (Complaint ¶26). Virginia Code § 20-158.A3 specifically provides that "[a] donor is not the parent of a child conceived though assisted conception unless the donor is the

husband of the gestational mother." Virginia Code § 20-158.C further provides in relevant part as follows:

> Any person who is a party to an action for divorce or annulment commenced by filing before in utero with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the filing can reasonably be communicated to the physician performing the procedure or (ii) the person consents in writing to be a parent, whether the writing was executed before or after the implantation.

No statute, however, can sever the biological connection Mr. Heidemann would have to any child born from Ms. Heidemann's use of the embryos or the emotional and moral implications for Mr. Heidemann of his being forced to be a parent again with Plaintiff. Moreover, this is not a case where Plaintiff could conceive a child (or children) using the embryos and forever disappear from Mr. Heidemann's life. As the evidence will show, the Heidemanns already have one child together, Emma, who is in Mr. Heidemann's primary care. The Heidemanns regularly interact with each other pursuant to a robust visitation schedule for Emma. Plaintiff's suggestion that she can introduce another child, one fathered by Mr. Heidemann, into her family without such act profoundly altering the lives of Mr. Heidemann, Emma, and Emma's extended family members, is utterly absurd. Rather than buttress her argument, Plaintiff's appeal to Code of Virginia §20-158, only serves to underscore the extent to which constitutional concerns surround the issues in this case and, in fact, any case involving assisted conception.

Mr. Heidemann will further demonstrate that he has significant and legitimate concerns with Ms. Heidemann's parenting, her propensity for conflict, and her mental health; all of which

are critically important for this Court to consider when weighing the burdens facing him in becoming a genetic parent of a child in her care against his will.

**IV. Conclusion:**

This court should dismiss Plaintiffs' Complaint for Partition of Personal Property, with prejudice, and leave the embryos in cryogenic storage at GIVF and subject to the terms the parties' agreed upon – joint ownership or donation.

Respectfully submitted,
JASON E. HEIDEMANN
By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2024, a copy of the foregoing Defendant's Pre-Trial Memorandum was mailed and faxed to counsel for Defendant, Jason F. Zellman, SUROVELL ISAACS & LEVY PLC, 4010 University Drive, Second Floor, Fairfax, Virginia 22030.

Counsel