

STATE OF MICHIGAN
COURT OF APPEALS

JUDE LONGINUS STRATFORD,

Plaintiff/Counter Defendant-
Appellee,

v

JAYANE HELEN STRATFORD,

Defendant/Counter Plaintiff-
Appellant.

UNPUBLISHED
February 16, 2012

No. 300925
St. Clair Circuit Court
LC No. 08-000111-DO

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant Jayane Stratford appeals by leave the court's order modifying the parties' judgment of divorce. The modification order addressed a post-judgment dispute that had arisen between the parties regarding a cryopreserved embryo.¹ The modification order stated, "Plaintiff [Jude Stratford] may provide for the embryo to be donated anonymously by the fertility clinic for the purpose of adoption by another willing couple." We conclude that the order is invalid, for two reasons: (1) the order affects and imposes obligations and responsibilities upon the fertility clinic that was not a party to this appeal or the divorce action; and (2) the order's use of the permissive term "may" renders the order vague, in the event plaintiff opts not to donate the embryo for adoption by "another willing couple." Accordingly, we vacate the court's order, and we order that the status quo of the embryo remain in effect until the parties to the divorce reach an accord with the fertility clinic concerning the embryo, or until such time as any contractual issues (implied-in-law, express or otherwise) are decided by a court of competent jurisdiction.

I. FACTS AND PROCEEDINGS

The facts underlying the divorce action are undisputed. The parties married in 2001, and in 2003 they consulted the Comprehensive Fertility Center concerning in vitro fertilization. Several embryos were created using defendant's ova and plaintiff's sperm. On three separate occasions, medical staff implanted embryos into defendant, but none of the implantations

¹ The term embryo is used in this opinion because that was the term used by the trial court below. Biologically, a fertilized egg that has divided by mitosis is known as a "blastocyst." *Human Physiology/Pregnancy and birth*, <<http://en.wikibooks.org/wiki>> (accessed February 9, 2012).

resulted in a live birth. With the parties' consent, the fertility clinic cryopreserved one embryo. Defendant testified that she had spoken with the clinic and that "they gave us every option" regarding the future of the cryopreserved embryo. This testimony put into doubt the stipulation from the parties that disposition of the embryo was not included within a contract with the clinic. Whether such a contract expressly or impliedly impacts the ultimate disposition of the embryo remains to be seen. Certainly, one would expect a contract to address the obligations of the clinic, cryopreservation, duration of the obligation to preserve, payment of fees, disposition upon non-payment of fees and abandonment. However, the parties did not attach a contract to their briefs, nor was it made a part of the lower court record, so neither we nor the trial court could determine its actual content.

In 2008, the parties divorced. A judgment of divorce was entered on August 8, 2008. On February 10, 2009, the parties, by stipulation and with the accord of the court, modified the judgment of divorce on an issue regarding possession of the dog. Nearly two years after the court entered the final judgment of divorce, plaintiff filed a motion informing the court that the parties, through mutual mistake, had failed to disclose to the court the existence of the cryopreserved embryo. The motion indicated that the clinic was continuing to preserve the embryo, and that the parties could not agree as to what to do with the embryo. Plaintiff requested that the court "allow the embryo to be donated to the Comprehensive Fertility Center, for in vitro fertilization or such similar procedure, so that a life can be created." Defendant opposed plaintiff's motion, instead requesting that the court "allow the parties' embryo to be donated for purposes of medical research only."

After an evidentiary hearing, the court issued a well-researched opinion addressing, among other things, constitutional privacy issues. The court noted that there is no Michigan precedent controlling the issue as presented by the parties, and that there are no Michigan statutes that resolve the issue. The court reviewed opinions from other jurisdictions and determined that the proper resolution in the absence of an agreement between the parties required a balancing of the parties' interests in the embryo. And, the court was not unmindful of the sensitive nature of the judiciary deciding such intimately personal decisions. The court concluded that as between the parties, plaintiff had the superior interest.

II. ANALYSIS

As noted at the commencement of this opinion, we vacate the trial court's order because (1) the order impacts the rights and obligations of a third party, which is beyond the power of a circuit court, and (2) the order is too vague and permissive to be properly enforced. We address these issues first. Then, in concluding, we point out several other apparent deficiencies that may have otherwise precluded proceeding on plaintiff's motion.

The court's order states, "That the plaintiff may provide for the embryo to be donated anonymously by the fertility clinic for the purpose of adoption by another willing couple." We conclude that the use of the permissive term "may"—as opposed to the mandatory term "shall"—renders the order inoperative. The court's written opinion suggests that the court intended to resolve the dispute by granting plaintiff's request to donate the embryo to the fertility clinic. Nonetheless, the order neither grants nor denies the request. Rather, the order permits plaintiff to decide when and whether to donate the embryo. The order could be interpreted to

both grant plaintiff full authority to decide the future of the embryo and the sole authority to communicate with the fertility clinic concerning the embryo. Conversely, the order could be interpreted to grant plaintiff the authority to donate the embryo only and to leave any other decisions to be resolved by the parties or by the fertility clinic. The order not only creates confusion as to the proper means of complying with the order, but it overlooks the possibility that one or both of the parties may change their position regarding the future of the embryo. We observe that academic studies have documented the difficulty some parties encounter in deciding what to do with cryogenically preserved embryos. See Forman, *Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer*, 24 J Am Acad of Matrimonial Law 57, 70-71 (2011). Similarly, studies have indicated what common sense tells us—that parties’ views often change significantly over time regarding their preferences for the disposition of embryos. *Id.* at 72-74. Given the lack of a time limitation in the order and the vagueness of the order regarding the parties’ respective responsibilities, the order was insufficient to apprise the parties and the clinic of the proper means of complying with the order.

Aside from the permissive nature of the order, the order imposed upon the clinic several obligations that the clinic may be unwilling to accept or unable to perform. For example, the record does not indicate whether the clinic is able to make the embryo available for adoption.² Similarly, the record contains nothing to demonstrate that the clinic is willing or able to accept the order’s apparent restriction that the embryo be adopted only by a willing couple. In addition, the record does not identify who, if anyone, is currently paying for any of the clinic’s costs arising from cryogenic preservation of the embryo, and who, if anyone, will pay for continued preservation until a “willing couple” is available for adoption. We are further left to assume from this record that there is preservation in fact, viability, and, non-abandonment of the embryo. Moreover, in the event plaintiff opts not to donate the embryo, the record does not indicate whether the clinic is willing or able to continue to preserve the embryo indefinitely.³

A court may not render an adjudication that affects the rights of an entity that is not a party to the action. *Shouneyia v Shouneyia*, 291 Mich App 318, 323; ___ NW2d ___ (2011), quoting *Capitol S & L Co v Std S & L Ass’n*, 264 Mich 550, 553; 250 NW 309 (1933). Furthermore, a divorce court’s jurisdiction is, except under circumstances not applicable here, limited to determining only “the rights and obligations between the husband and wife, to the exclusion of third parties” *Estes v Titus*, 481 Mich 573, 582-583; 751 NW2d 493 (2008), quoting *Yedinak v Yedinak*, 383 Mich 409, 413; 175 NW2d 706 (1970). On the basis of these principles, we conclude that because of the unique facts of this case, the court erred in issuing a modification of divorce judgment that affected the rights of a nonparty, i.e., the fertility clinic.

² Plaintiff testified that embryos can be donated to embryo adoption agencies. The record does not indicate whether any of these agencies are affiliated with the Comprehensive Fertility Center.

³ The lack of information about the fertility clinic’s interests contrasts with the information in *Bohn v Ann Arbor Reproductive Med Assoc*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 1999 (Docket No. 213550). The documents in *Bohn* gave “the medical staff vast discretion as to whether the zygotes would ever be transferred or even preserved.” Slip op p 4. The *Bohn* record also demonstrated that the frozen zygotes at issue could remain frozen indefinitely. Slip op p 5.

See generally *In re Marriage of Witten*, 672 NW2d 768, 783 (Iowa, 2003) (arriving at a similar conclusion on other grounds).⁴

We now turn to several issues that were not raised by the parties, but could have directly impacted the trial court's ability to decide the motion. First, defendant did not raise, and therefore the court did not consider, the propriety of modifying its final judgment. Neither the motion nor the answer address the authority upon which the court was permitted to modify a final judgment based on mutual mistake more than two years after the judgment was final. While clerical mistakes in judgments may be corrected at any time, MCR 2.612(A)(1), an adjudication of a substantive issue never presented to the court is hardly a clerical mistake. Rather, the invitation to proceed should have been presented to the court pursuant to MCR 2.612(C)(1). See *Rose v Rose*, 289 Mich App 45, 58; 795 NW2d 618 (2010) (well-settled policy considerations favoring finality of judgments circumscribe relief). Had plaintiff proceeded under the correct court rule, the court would necessarily have determined the appropriateness of proceeding in light of the one year prohibition contained in MCR 2.612(C)(2), which provides, "The motion (for relief from judgment) must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a) [mistake] . . . within one year after the judgment . . . was entered." Plaintiff's motion based on mutual mistake was filed well beyond the one-year limitation.

Second, nothing within the judgment itself granted the court jurisdiction to modify the judgment for mutual mistake two years post entry. Although the judgment contains a general reservation of jurisdiction to enforce the terms of the judgment, with the entry of the qualified domestic relations order on January 15, 2009, and the transfer of possession of the dog on February 10, 2009, there was nothing left in the judgment requiring the court's intervention.

Additionally, there appears to be a significant question whether the family division had jurisdiction to decide this issue. As we explained in *Hayford v Hayford*, 279 Mich App 324, 327; 760 NW2d 503 (2009), while quoting from *Bert v Bert*, 154 Mich App 208, 211; 397 NW2d 270 (1986), "jurisdiction in divorce cases is purely statutory and every power exercised by the circuit court must have its source in a statute or it does not exist" See also *Estes*, 481 Mich at 582-583 ("This Court has long recognized that the jurisdiction of a divorce court is strictly statutory . . . ") and *Reed v Reed*, 265 Mich App 131, 158; 693 NW2d 825 (2005) ("Thus, the trial court's jurisdiction is limited to the dissolution of the marriage, and to matters ancillary to the marriage's dissolution, such as child support, spousal support, [and] an equitable division of marital assets" [internal citation omitted].)

The Michigan Legislature granted circuit courts the ability to decide divorce cases through enactment of MCL 552.6. *Smith v Smith*, 218 Mich App 727, 730; 555 NW2d 271

⁴ The court neither considered the impact of its order upon the fertility clinic, nor determined the willingness of the clinic to act as intermediary to accomplish the dispositional effect of its order. We suspect the manner of the presentation in the face of the parties' stipulations relative to an agreement with the clinic did not alert the court to scrutinize any agreement that did exist as referenced by defendant relative to disposition of the unused embryo. The court may have gleaned from the document a different or an implied intent of the parties concerning disposition of the embryo at a time when they were cooperating and were in accord.

(1996). Several statutory provisions give the circuit court the power to resolve certain issues that typically arise in a divorce proceeding. Specifically, MCL 552.19 grants the circuit court the power to distribute marital assets (see also MCL 552.17a) while the Child Custody Act grants circuit courts the power to declare a “child’s inherent rights and establish the rights and duties as to the child’s custody, support and parenting time” in accordance with the act. MCL 722.24. See also MCL 722.21 *et seq.*⁵ The parties have not argued that these statutory provisions (or any other, for that matter) are applicable to this issue.⁶

The trial court’s order is vacated, and the matter is remanded. The status quo of the embryo is to remain in effect until an agreement is reached among the parties and the fertility clinic. We do not retain jurisdiction.

No costs, neither party having prevailed in full. MCR 7.219(A).

/s/ Peter D. O’Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

⁵ Other statutory provisions grant circuit courts the power to award spousal support (MCL 552.23) and child support (MCL 552.17a). These statutory powers would afford no jurisdiction to the circuit court in this case.

⁶ As the court thoroughly discussed, several courts have developed tests or standards for deciding this issue in the absence of legislation. There are at least two reasons why the tests previously adopted by some of our sister states’ courts are not appropriate for use in Michigan. First, the Legislature should be the governmental branch determining whether courts are even to be involved in these intimate disputes, or whether a particular moral choice should prevail, if one is to be mandated at all. There are many complicated and personal issues that surround a decision like the one presented here, some of which were recognized by the court and by the Iowa Supreme Court in *Witten*, 672 NW2d at 778. If any rule on this very narrow issue is to be adopted for this state, it should come from our policy-making branch, the Legislature. The legislative process allows for public hearings and the gathering of facts and opinions through input from the public and special interest groups, all of which affords the Legislature the ability to gauge public sentiment and any policy implications for the state. The Michigan Legislature has legislated on some peripheral issues, see, e.g., MCL 722.855 and MCL 333.2685, but has not addressed who can decide, or what can be decided, relative to unused frozen embryos. See also Const 1963, art 1, § 27. We are not in the business of gauging public sentiment; our constitutional role is to decide cases based on existing law. See *Krohn v Home-Owners Ins Co*, 490 Mich 145, 172; 802 NW2d 281 (2011), citing *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803).

Second, the tests adopted by other courts contain no real guideposts, instead merely instructing courts to essentially consider what is best under the circumstances. All such a test does is permit a court to decide one of the most intimate, personal decisions a couple can make based on virtually unfettered discretion.