

In the Matter of the Marriage of Dahl and Angle (2008)

In the 2008 court case *In the Matter of the Marriage of Dahl and Angle*, the Court of Appeals of Oregon upheld a written in vitro fertilization (IVF) consent form signed by Laura and Darrell Angle, who had each contributed their genetic material to the creation of several preembryos during their marriage. Its decision followed the general framework for resolving such disputes provided by the Supreme Court of Tennessee in *Davis v. Davis* in 1992, which was subsequently followed by many courts across the US. The decision by the Court of Appeals of Oregon reinforced the idea that agreements that reflect the couple's intent at the time of undertaking IVF should be upheld, regardless of a later change of heart.

Married in March 2000, Laura Lee Dahl and Darrell Lee Angle had their first child by conventional means. After experiencing difficulty conceiving a second time, the couple decided to attempt IVF at the Oregon Health and Science University (OHSU) in Portland, Oregon, in May 2004. After several unsuccessful IVF attempts, the couple decided to divorce but disagreed about the use of six cryopreserved preembryos that had not been utilized during their marriage.

As part of the IVF process, Laura and Darrell had signed an "Embryology Laboratory Specimen Storage Agreement" with OHSU. In the agreement, the couple indicated that Laura would have the sole and exclusive right to direct OHSU to transfer or dispose of the preembryos if the couple did not jointly authorize OHSU's actions. As part of the divorce proceedings, Laura testified that the former couple had only intended to use the preembryos during their marriage. Laura contended that they had agreed to donate any unused preembryos to scientific research, which would result in destruction of the preembryos. She opposed either using the preembryos to create a child herself or allowing another couple to use them. Darrell, who strongly opposed destruction of the preembryos based on his belief that they were his children, requested court authority to donate them to another couple attempting to conceive.

After hearing arguments from both sides, the trial court in Oregon City, Oregon, issued an order in to destroy the preembryos as part of its divorce judgment. Despite Darrell's assertions that he neither signed the OHSU agreement in the presence of a notary nor recalled reading or initialing it, the court concluded that Darrell's recollections were inaccurate. Instead, the court concluded that both parties had signed the consent form with the notary present and that the form represented their agreement.

Darrell appealed to the Court of Appeals of Oregon in January 2008 in Salem, Oregon. Expressing his view that the preembryos are living beings, Darrell's lawyer argued that preserving their lives should outweigh Laura's preference to avoid the preembryos' development into genetic children. Laura's lawyer requested affirmation of the trial court's order to destroy the preembryos, seeking enforcement of the couple's original agreement. Alternatively, with Darrell's agreement, Laura would permit donation of the preembryos to scientific research.

The Court of Appeals, led by Judge Rex Armstrong, first considered whether state law permitted it to distribute the preembryos as part of the divorce proceedings in its written decision on 8 October 2008. Under Oregon state law, during divorce proceedings a court may determine a just and proper distribution between the parties of any personal property. The court cited a definition of property from the Oregon Supreme Court's 1999 case *In re Marriage of Masee* as "something that is or may be owned or possessed, or the exclusive right to possess, use, enjoy, or dispose of a thing." Based on this definition, the Court of Appeals concluded that the contractual right to possess or dispose of the cryopreserved preembryos was a form of personal property subject to just and proper distribution.

Next, the appeals court determined what would constitute a just and proper distribution of the property. Oregon's case law only addressed the apportionment of marital property that could be viewed in terms of its monetary value, a view that the court did not find reasonably applicable under the circumstances. Further, there was no state public policy to guide its decision, nor had Oregon enacted legislation about cryopreserved preembryos. This lack of Oregon legal authority prompted the court to consider the outcome of similar cases from other states.

The Court of Appeals focused on whether other courts had expressly or implicitly adopted the general framework for resolving disputes over cryopreserved preembryos set forth in *Davis v. Davis*, in Tennessee in 1992. After the ruling, *Davis* was subsequently reinforced in *Kass v. Kass*, in New York in 1998, and other cases, such as *Litowitz v. Litowitz*, in Washington in 2002, and *Roman v. Roman*, in Texas in 2006. The court summarized the *Davis* framework as, first and foremost, upholding the preferences of the progenitors, those who contributed their genetic material. In the event of a dispute, however, any prior agreements between the progenitors should be presumed valid, binding, and, ultimately, enforced.

The Court of Appeals of Oregon noted that not all courts followed the *Davis* framework. For instance, the Supreme Court of Massachusetts in *A.Z. v. B.Z.* in 2000 had declined to enforce an IVF consent form that violated public policy, while neither accepting nor rejecting the *Davis* framework. Further, the Supreme Court of New Jersey's decision in *J.B. v. M.B.* in 2001 and the Supreme Court of Iowa's *In re Marriage of Witten* decision in 2003 required the contemporaneous, or ongoing, mutual consent of the parties as to the utilization or destruction of the preembryos.

Despite these competing viewpoints from prior decisions, the Court of Appeals found the approach in *Davis* persuasive and compatible with Oregon state laws. Reviewing the case before it from this standpoint, the court upheld the trial court's determination that the signed consent form represented the original intent of the parties. Although the form did not expressly indicate what would happen to the preembryos upon divorce, it did designate Laura as the individual authorized to decide in the event of a disagreement. Based on its conclusion that courts should enforce agreements expressing the intent of the parties and that the parties had named Laura as the decision-maker under the circumstances, the Court of Appeals affirmed the lower court's decision, ordering destruction of the preembryos. The Supreme Court of Oregon denied Darrell's request for review in March 2009.

Sources

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