

In re Marriage of Witten (2003)

In re Marriage of Witten, decided by the Iowa Supreme Court in 2003, held that neither Tamera nor Arthur (Trip) Witten could use or destroy several cryopreserved preembryos created during their marriage using in vitro fertilization (IVF), unless the former couple could reach a mutual agreement. Tamera and Trip Witten, unable to conceive conventionally during their marriage, had attempted to start a family together using IVF at the University of Nebraska Medical Center (UNMC) in Omaha, Nebraska. When Trip sought to dissolve the marriage in April 2002, following several unsuccessful IVF attempts, seventeen of their preembryos were in storage at UNMC. The former couple disagreed about what should happen to the preembryos and asked the court for a resolution as part of the marital dissolution action. The high court of Iowa's decision to restrict both individuals from using the cryopreserved preembryos without the other person's consent reflected a belief that Tamera and Trip shared equal decision-making authority over the preembryos.

Prior to reaching the Iowa Supreme Court, the parties had each asked the lower district court in Sioux City, Iowa, to decide the matter in their favor. Tamera requested custody, as she called it, of the preembryos and opposed their destruction or donation to another couple. Trip, while not requesting destruction of the preembryos, opposed Tamera's request that she be permitted to attempt to implant them. Trip sought a permanent injunction, which would prohibit either party from using the preembryos without the written consent of both parties. The district court granted the injunction based on a provision in the "Embryo Storage Agreement" signed by Trip, Tamera, and a representative of UNMC before the IVF process began. The agreement, although not directly addressing what would happen to the preembryos should the couple divorce, included a general provision requiring signed approval from both Tamera and Trip before the preembryos could be transferred, released, or otherwise utilized. The trial court enforced this agreement, preventing use of the preembryos without the other person's written consent.

On appeal to the Iowa Supreme Court in Des Moines, Iowa, Tamera argued that the preembryos were children and, therefore, the trial court should have performed a "best interests" analysis under Iowa law, which requires courts to consider the best interests of any children when a couple divorces. The court considered the legislature's intent for passing the law and concluded that the legislature intended the law to maximize a child's contact with both parents following a divorce, as well as to encourage the parents to share child-rearing responsibilities. The law, however, did not govern the Wittens' dispute, which contemplated who should be given decision-making authority over cryopreserved preembryos, as opposed to who would receive custody of children who had already been born.

The court, led by Justice Marsha Ternus, disagreed with Tamera's remaining arguments. Tamera argued that her fundamental right to procreate should override Trip's opposition. The court concluded that, based on other courts' decisions, the fundamental right not to procreate ordinarily takes precedence over the right to procreate. Tamera also unsuccessfully argued that the contract at issue violated public policy because it allowed Trip to revoke his earlier agreement to reproduce with her. The court found no public policy requiring the use of cryopreserved preembryos over the other person's objections. To the contrary, the court concluded that it would violate public policy to enforce such a prior agreement when either person changed his or her mind.

In reaching its conclusion, the court identified three main approaches suggested by legal scholars for resolving disputes over cryopreserved preembryos: the contractual approach, the contemporaneous mutual consent model, and the balancing test. The contractual approach considers prior IVF agreements as valid, binding, and enforceable. The Court of Appeals of New York in *Kass v. Kass*

in 1998 emphasized the importance of holding parties to their earlier choices regarding the use or disposal of cryopreserved preembryos. Without enforcement of these agreements, according to the Kass court, the seriousness and integrity of the IVF consent process would diminish. The second approach, the contemporaneous mutual consent model, allows either party to change his or her mind until the preembryos are actually used or destroyed. It differs from the contractual approach, which holds the parties to their initial contractual decisions regardless of any future change of heart. The third approach, the balancing test, allows courts to weigh the interests of the parties to decide what should be done with the preembryos. In courts applying the balancing approach, the party seeking to avoid procreation is likely to prevail.

The Supreme Court of Iowa criticized several aspects of the contractual approach. In particular, it regarded judicial enforcement of IVF contracts after a person requested a different outcome for their preembryos as failing to protect that person's right to make reproductive decisions contemporaneous with their changing desires and values. Under the contractual approach, the court would be intervening and holding that person to choices made at the beginning of the IVF process. The court reasoned that it would violate public policy to enforce an agreement affecting future family and reproductive decisions after one party had changed his or her mind, particularly because it can be difficult for a person to foresee what the future holds. Further, the court felt that handling preembryo disputes like a purely contractual matter would undermine important familial and reproductive values.

The Iowa Supreme Court also disfavored the balancing test. Such an approach would allow the court to improperly substitute its own judgment for that of the progenitors, the people who contributed their genetic material to create the preembryos. By weighing the interests of the parties, the court would be stepping in as the decision maker, as opposed to allowing the progenitors to retain decision-making authority over the preembryos.

The court adopted the contemporaneous mutual consent model in reaching its decision because it allowed decision-making authority to remain with the progenitors, while not violating the public policy of Iowa. According to the Iowa Supreme Court, the mutual consent model recognizes that it can be difficult to make rational, intelligent decisions in advance of actual events, particularly related to whether or not to undertake parenthood. Under the mutual consent approach, advance instructions addressing what should happen to cryopreserved preembryos upon divorce would not be binding, should a party later change his or her mind. Instead, the status quo would be maintained, with the preembryos kept in their frozen state unless the parties reached an agreement.

To support its decision to apply the contemporaneous mutual consent model, the court pointed to various state statutes and judicial decisions reflecting respect for an individual's right to make personal familial and parental choices consistent with his or her current preferences and beliefs. For instance, Iowa state law requires birth parents to wait seventy-two hours before releasing parental rights, allowing them time following the birth of a child to reconsider the prior decision to relinquish parental rights. The Supreme Court of Iowa had also declined to force parties to marry or divorce, despite a contract to that effect. Based on these considerations, the court concluded that personal reproductive decisions are beyond the proper reach of judicial enforcement. Until the preembryos are actually used or destroyed, the parties would be allowed to modify the decisions they made as a married couple.

Although the court declined to enforce the IVF informed consent agreement signed by Tamera and Trip, it concluded that such agreements remain enforceable and binding, and do not violate public policy, absent a change of heart by one of the progenitors. Furthermore, the court acknowledged that the purpose of IVF agreements is to govern the respective rights and responsibilities of IVF clinics and participants. When a former couple no longer agrees how the preembryos should be handled, enforcing their original agreement violates public policy. The same is not true, however, if a dispute arises between the couple, as a unit, and the IVF clinic. Within this context, the parties should continue to rely on their contractual agreements.

The Supreme Court of Iowa took a unique approach by applying the contemporaneous mutual consent model. Absent joint consent, the preembryos would be kept in their cryopreserved state and the person opposing destruction would pay the storage expenses. Given this decision, the preembryos

created by Tamera and Trip Witten would remain in storage indefinitely unless the former couple could reach a mutual agreement or until UNMC's obligation to store the preembryos expired.

Sources

1. Coleman, Carl H. "Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes" *Minnesota Law Review* 84 (1999): 55-128.
2. *Kass v. Kass*, 696 N.E. 2d 174 (N.Y. 1998). http://scholar.google.com/scholar_case?q=Kass+v.+Kass&hl=en&as_sdt=806&case=14938404874386785087&scilh=0 (Accessed December 3, 2013).
3. *In re Marriage of Witten*, 672 N.W.2d 768 (2003).http://scholar.google.com/scholar_case?case=6136526753403985723&q=In+re+Marriage+of+Witten&hl=en&as_sdt=806 (Accessed December 5, 2013).