

J. B. v. M. B. (2001)

In 2001, the Supreme Court of New Jersey decided a dispute between a divorced couple over cryopreserved preembryos created through in vitro fertilization (IVF) during the couple's marriage. The former wife (J.B.) wanted the preembryos destroyed, while her former husband (M.B.) wanted them to be used for future implantation attempts, such as by an infertile couple. In *J.B. v. M.B.* (2001), the court declined to force J.B. to become a parent against her will, concluding that doing so would violate state public policy. Instead, the Supreme Court of New Jersey decided that agreements directing the allocation of cryopreserved preembryos will be enforced, unless one party changes his or her mind prior to the preembryos' use or destruction. Should a party revoke an earlier decision about the preembryos, New Jersey courts should weigh the parties' interests with special weight given to an individual's right to not procreate.

Early in the marriage between J.B. and M.B., which began in February 1992, the couple elected to pursue IVF with the Cooper Center for In Vitro Fertilization, P.C. (Cooper Center) in Marlton, New Jersey, after they experienced difficulty conceiving a child. In May 1995, doctors used IVF to create eleven preembryos from J.B.'s egg cells and M.B.'s sperm cells. Doctors then transferred four of the preembryos to J.B.'s uterus, and the remaining seven preembryos were cryopreserved—frozen at subzero temperatures—for possible future use.

In conjunction with the IVF procedure, the couple signed the Cooper Center's consent form. The form explained the IVF procedure and outlined how the preembryos would be handled if, for instance, the couple failed to pay the clinic, if the couple divorced, or if both J.B. and M.B. died. The form required the couple to relinquish their control of the preembryos to the Cooper Center upon dissolution of their marriage unless a court designated such control to a specific individual.

J.B. gave birth to a daughter in March 1996. J.B. and M.B. soon separated, however, and J.B. filed for divorce later that year. She then sought a court order requesting the remaining cryopreserved preembryos be discarded, which M.B. challenged. In April 1998, J.B. filed a motion for summary judgment, asking the trial court to resolve the dispute in her favor. A trial court judge can grant a request for summary judgment if there are no material facts for a jury to decide. As part of her motion, J.B. claimed that she only intended to use the preembryos during her marriage with M.B. and that the couple never discussed what would happen to the preembryos if their marriage ended. To the contrary, M.B. asserted in his July 1998 cross-motion that his religious beliefs had prompted extensive discussions between the couple prior to their decision to undertake IVF. He contended that, as a result of his moral and ethical concerns, they had privately agreed, separate from the IVF consent form, to give any cryopreserved preembryos a "chance at life," by either using the preembryos or donating them to another couple. J.B. and M.B. finalized their divorce in September 1998, but the dispute over the preembryos remained unresolved.

The trial court granted J.B.'s motion for summary judgment, in part because the couple no longer desired to build a family together, which was the original motivation for creating the preembryos. The trial court noted that M.B., as a fertile individual, could still become a genetic parent in the future, concluding that J.B.'s interests outweighed M.B.'s desire to donate the preembryos to another couple. The trial court also declined to further consider M.B.'s contention that the parties had privately agreed to use or donate any remaining preembryos, noting the absence of a written contract.

M.B. appealed the trial court's decision to the Superior Court of New Jersey, Appellate Division. M.B. claimed that the trial court's ruling violated his rights to due process and equal protection under the law, as well as his constitutional right to procreate. J.B. counter-argued that she had con-

stitutional rights to privacy and to not procreate. Although the Appellate Division did not decide on constitutional grounds in its June 2000 decision, the court considered the competing constitutional rights. It rejected M.B.'s contention that destruction of the preembryos would impinge his constitutional rights, reasoning that destroying the preembryos would not substantially impair M.B.'s reproductive rights because he retained the option to reproduce later, albeit without use of the cryopreserved preembryos. Granting M.B.'s request to use the preembryos, however, would impair J.B.'s constitutional right not to procreate if her biological child was born to another couple.

The Appellate Division focused its analysis on New Jersey public policy, while recognizing the importance of constitutional principles in shaping that public policy. Agreeing with the reasoning of the Supreme Judicial Court of Massachusetts in *A.Z. v. B.Z.* (2000), which rejected forced procreation as contrary to Massachusetts public policy, the Appellate Division concluded that a contract compelling an unwilling party to procreate would also be unenforceable and contrary to New Jersey public policy. The Appellate Division acknowledged the decisions of the Supreme Court of Tennessee in *Davis v. Davis* (1992) and the New York Court of Appeals in *Kass v. Kass* (1998), which stated that agreements signed by IVF participants should ordinarily be enforced. Yet, neither case involved enforcing a contract to procreate; therefore, the Appellate Division asserted that its ruling was not inconsistent with either *Davis* or *Kass*.

In reaching its public policy decision, the Appellate Division also looked to case law in New Jersey. In particular, it took guidance from *The Matter of Baby M.* (1988), whereby the New Jersey Supreme Court had decided that a contract requiring a surrogate mother to relinquish her parental rights after giving birth was unenforceable and violated public policy. The Appellate Division found a similarity between *The Matter of Baby M.* and the present case, in that J.B. potentially could lose parental rights to her own biological child should another couple successfully implant the preembryos. Taking note of the decision in *A.Z. v. B.Z.*, the court determined that agreements to enter into familial relationships after one party reconsiders should not be enforced. Thus, the Appellate Division affirmed the trial court's ruling, granting summary judgment in favor of J.B. and ordering destruction of the preembryos.

In September 2000, the Supreme Court of New Jersey agreed to hear M.B.'s second appeal. M.B.'s attorneys restated his religious belief that the preembryos should not be destroyed, a belief that LifeNet, Inc., an organization in Montclair, New Jersey, supported with an amicus curiae brief. M.B. argued that his constitutional rights were violated by the trial court and appellate court decisions, including his right to the care and companionship of his children. M.B. maintained that his constitutional right to procreate outweighed J.B.'s right not to procreate, pointing out that the decision would not impact J.B.'s body, unlike a pregnant woman seeking an abortion. He asserted that J.B.'s interests should not outweigh his religious beliefs or the state's interest in protecting potential life. M.B. also argued that the trial court inappropriately denied him the opportunity to offer evidence of the couple's alleged private agreement to allow the preembryos a chance at life.

J.B. countered that any alleged agreement to use or donate the preembryos would violate public policy and should be unenforceable. Her attorney referenced New Jersey's recognition that agreements requiring the formation of familial relationships, or otherwise intruding into intimate matters of family life, should not be binding. Finally, J.B. claimed the court could only avoid violating either person's constitutional rights by ruling in her favor. Destroying the preembryos would not interfere with M.B.'s opportunity to procreate in the future, she argued, but allowing their use would violate her constitutional right not to procreate. The American Civil Liberties Union of New Jersey, the American Society for Reproductive Medicine, and the National Infertility Association known as RESOLVE filed amici curiae briefs to argue that public policy disfavors enforcement of agreements compelling implantation on non-consenting individuals and that the right not to procreate generally outweighs the right to procreate.

In a decision on 14 August 2001, Justice Deborah Poritz and a unanimous court affirmed the decision of the appellate court. Addressing M.B.'s appeal, the court first attempted to determine whether the parties had formed an enforceable contract regarding the preembryos. The court concluded that the IVF consent form did not clearly state the couple's intent relating to the preembryos should their marriage end. It found the form ambiguous because it required J.B. and M.B. to relinquish control of the preembryos to the Cooper Center in the event of divorce, but it also allowed the court

to overturn that requirement.

The court next considered M.B.'s assertion that the couple had privately agreed to use or donate the preembryos. The court denied M.B.'s request that it order the lower court to hear more evidence on that point, citing the lack of a formal, unambiguous agreement verifying M.B.'s assertion. Instead, the court declined to recognize the IVF consent form or the alleged private agreement and held that J.B. and M.B. had not formed any binding contract to use or donate the preembryos.

The Supreme Court of New Jersey determined that the parties had agreed to allow a court to decide what should happen to the preembryos. Although it felt the couple, as the providers of the sperm and egg cells (gametes) necessary to create the preembryos, should retain decision-making authority over the preembryos, the court acknowledged its responsibility to develop a way to resolve disputes between the gamete providers in the absence of legislative guidance.

Because both J.B. and M.B. claimed a constitutional right to privacy and procreational autonomy, the court considered several relevant US Supreme Court cases which upheld one's freedom from unwarranted government interference with matters of procreation, although the US Supreme Court had not directly addressed the issue of cryopreserved preembryos. The New Jersey Supreme Court referenced its own prior decision in *The Matter of Baby M.*, which recognized the fundamental right of procreation, and agreed with the Supreme Court of Tennessee's decision in *Davis* that the interests of the parties must be balanced, with the right to not procreate ordinarily expected to prevail. The court also agreed with the Appellate Division's determination that M.B.'s right to procreate would not be lost, regardless of which party prevailed, but that J.B. would lose her right to not procreate if M.B. prevailed.

The court declined to force J.B. into unwanted parenthood, focusing the majority of its rationale on public policy considerations. Noting that "the laws of New Jersey... evince a policy against enforcing private contracts to enter into or terminate familial relationships," the court determined that enforcing a contract to implant preembryos after one party reconsidered raised similar public policy issues. This same public policy had influenced various statutes in New Jersey, as well as the outcome in *The Matter of Baby M.* more than a decade prior.

The Supreme Court of New Jersey contrasted the benefits of enforcing IVF agreements, as described in *Davis* and *Kass*, with the conclusions in *A.Z. v. B.Z.* and of the lower Appellate Division in *J.B. v. M.B.* that agreements compelling people into unwanted procreation violate public policy. The court adopted the rule that agreements, such as IVF consent forms, directing use or destruction of the preembryos would be enforced, unless one party to the agreement revoked his or her consent before the stated disposition had been carried out. In the event of a dispute, New Jersey courts should weigh the gamete providers' interests, with special weight given to an individual's right to not procreate. The court expressed no opinion on the circumstance of a permanently infertile gamete provider seeking implantation of cryopreserved preembryos over the objections of the other gamete provider.

The Supreme Court of New Jersey unanimously ruled in J.B.'s favor and affirmed the Appellate Division's decision to destroy the preembryos, but with one modification. During oral argument, J.B. indicated she did not object to allowing continued storage of the preembryos should M.B. continue to pay the associated storage fees. The lower court's decision was modified to allow M.B. this option; otherwise the preembryos would be destroyed.

Sources

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