

Roman v. Roman (2006)

In the case *Randy M. Roman v. Augusta N. Roman* (2006), the Court of Appeals of Texas followed courts in other states and upheld the validity and enforceability of in vitro fertilization (IVF) consent agreements. The Romans, a divorced couple, each sought different outcomes for their cryopreserved preembryos created during their marriage. Randy Roman sought to have them destroyed, and Augusta Roman sought to implant them in an attempt to have biological children. The Texas court, citing several related cases, declared that the written IVF consent form the Romans had signed would govern the outcome of the cryopreserved preembryos.

The Romans married in July 1997 and thereafter were unable to conceive conventionally. Their attempts at artificial insemination also did not result in a pregnancy. In August 2001, the couple visited the Center for Reproductive Medicine (the Center) in Clear Lake, Texas. Augusta later underwent laparoscopic surgery, and doctors tried to artificially inseminate Augusta three additional times. When these procedures all failed, Vicki Schnell, the Center's Medical Director, suggested that they participate in IVF.

As part of the IVF process, in March 2002 the Romans both signed numerous forms related to the IVF procedures. One document was titled "Informed Consent for Cryopreservation of Embryos," in which both Augusta and Randy agreed to allow the Center to cryopreserve the preembryos until the Center identified the ideal time to transfer them to Augusta. In addition, the Romans agreed in the consent form to allow the Center to discard any cryopreserved preembryos should they later divorce.

In April 2002, doctors extracted thirteen eggs from Augusta and fertilized six of the eggs with Randy's sperm. Three of the resulting preembryos developed enough to attempt implantation and were cryopreserved. Though Augusta was scheduled to have the preembryos transferred to her uterus later that month, Randy withdrew his consent the night before the procedure. In May, the Romans again agreed to attempt to implant the preembryos. The Center provided them with a new contract, which they signed. The new contract required approval from a counselor prior to transfer of the preembryos, but the Romans did not fulfill their contractual obligation to undergo counseling. Thus, the agreement did not take effect, and the preembryos remained in cryopreservation.

After Randy filed for divorce in December 2002, the Romans divided all of their marital property, but they could not agree on what should happen to the preembryos. The 310th Judicial District in Houston, Texas, heard testimony in the case in December 2003 and February 2004. Randy expressed his preference to uphold the written agreement to discard their preembryos. Augusta requested that the trial court give her authority to use the preembryos, as she still desired to have a biological child, and stated that Randy would not have parental rights or obligations. In February 2004, the trial court concluded that the preembryos were community property and awarded them to Augusta, a decision the court regarded as a fair and equitable division of the parties' property.

Shortly after the trial court's decision, Randy appealed to the Court of Appeals of Texas in Houston, Texas, and the appellate court considered the case in 2006. Randy argued that the trial court should have enforced the agreement the Romans had signed. He interpreted the contract to reflect their joint decision to discard the frozen preembryos in the event of divorce. While Randy argued that the agreement was valid, and ought to be enforced, Augusta disputed the contract's validity, as well as Randy's interpretation.

The appellate court surveyed cases from other states about frozen preembryo disputes, given that there was no Texas case law addressing the enforceability of IVF consent forms under the circum-

stances. Although no written agreement had existed in the earliest dispute over frozen preembryos, *Davis v. Davis* (1992), the Supreme Court of Tennessee had stated that agreements between the progenitors should be presumed valid and enforced. *Kass v. Kass* (1998) reinforced this opinion, wherein the Court of Appeals of New York unanimously chose to uphold a consent agreement to donate the couple's preembryos to research.

In *J.B. v. M.B.* (2000) the Supreme Court of New Jersey ruled that it would enforce IVF agreements, subject to the right of either progenitor to change his or her mind about the allocation of the preembryos at a later time. *A.Z. v. B.Z.* (2000) reinforced this position, when the Massachusetts Supreme Judicial Court indicated that consent agreements should not be enforced if one party later prefers a different result for the preembryos. Finally, the Supreme Court of Washington in *Litowitz v. Litowitz* (2002) enforced a provision to destroy the preembryos after five years in cryopreservation, and the Supreme Court of Iowa proclaimed in the case *In re Marriage of Witten* (2003) that neither party could use their preembryos without the other party's contemporaneous mutual consent.

The Texas Court of Appeals was mindful of, but not legally bound by, these decisions from other courts, and next looked to state laws in Texas related to reproductive technologies. In 2001, Texas had passed the Uniform Parentage Act, which included laws about gestational agreements and assisted reproduction, such as IVF. The court determined that Texas policy allowed a couple to determine in advance what should happen to their preembryos in the case of divorce. Citing *Kass* and *Davis*, the court concluded that IVF consent agreements about preembryos should be presumed valid and enforced, although subject to change if both parties agree on a different outcome. Thus, Justice Evelyn Keyes, writing the opinion for the unanimous Texas Court of Appeals, stated in February 2006 that the trial court should have enforced the progenitors' prior agreement to discard the preembryos.

In explaining its decision to reverse the lower court's ruling, the court stated that Augusta understood her decision and the contract expressed her intent. The court disagreed with Augusta's interpretation of the contract, which Augusta claimed only allowed destruction of the remaining preembryos after implantation had been achieved. Instead, the court determined that the couple specifically elected to discard any cryopreserved preembryos upon divorce. The court supported this conclusion by pointing out that the couple had made a different choice in the event that one or both of them died. Under those circumstances, the surviving spouse would receive the preembryos. Thus, the couple was aware of other options but chose to discard the preembryos upon divorce. Furthermore, both the Uniform Parentage Act and the agreement signed by the Romans permitted either party to withdraw his or her consent as to the allocation of the preembryos, but neither party had done so.

The Court of Appeals of Texas reversed the decision of the trial court in February 2006 and ruled in favor of Randy, upholding the written IVF consent agreement to discard the preembryos created during his marriage to Augusta. Like other frozen preembryo disputes settled in the courts, Roman confirmed the enforceability of IVF consent forms, while giving the parties the option of mutually modifying the agreement later. The Romans had not mutually changed their initial agreement to discard the preembryos. Therefore, the court ordered them destroyed in accordance with the terms of the initial agreement. The Texas Supreme Court denied Augusta's appeal in October 2007, and in March 2008 the Supreme Court of the US declined to hear Augusta's case.

Sources

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