

A. Z. v. B. Z. (2000)

In *A.Z. v. B.Z.* (2000), the Supreme Judicial Court of Massachusetts in Boston, Massachusetts, affirmed a lower court's decision, ruling that contracts that require a party to become a parent against his or her will are unenforceable and contrary to public policy. The case centered around A.Z. and B.Z., a divorced couple who had previously used in vitro fertilization (IVF) to start a family together during their marriage and had several preembryos cryopreserved as part of the process. While undertaking IVF, the couple signed multiple consent forms requiring them to decide what should happen to the cryopreserved preembryos in the event of certain listed contingencies, such as death or separation of the couple. The couple indicated their preference that B.Z., A.Z.'s now former wife, could use the cryopreserved preembryos if the couple later separated. When their relationship deteriorated, however, A.Z. objected to B.Z.'s attempt to have additional children using the preembryos, leading to a lengthy legal battle. The court case *A.Z. v. B.Z.* established Massachusetts public policy that people should not be forced to become a parent against their will, even if they previously agreed to provide their genetic material for reproduction.

A.Z. and B.Z., married in 1977 and residing in Virginia, failed to get pregnant within the first two years of marriage. After B.Z. suffered a miscarriage following an ectopic pregnancy in 1979, she had her left fallopian tube surgically removed. For several years, the couple unsuccessfully underwent further fertility treatments in Virginia and Maryland, eventually relocating to Massachusetts. In 1988, the couple underwent fertility treatments at a Massachusetts clinic.

Initially, the couple chose a procedure called Gamete Inter-Fallopian Transfer (GIFT) to attempt to get B.Z. pregnant. Doctors used the GIFT procedure to remove eggs from B.Z. and then transfer them, simultaneously with A.Z.'s sperm, into B.Z.'s remaining fallopian tube. GIFT attempts to mimic conventional pregnancy, where fertilization occurs in the woman's fallopian tube, after which the resulting embryo implants itself in the uterus. Although GIFT had a higher success rate than IVF, the procedure was unsuccessful and B.Z. experienced another ectopic pregnancy. Doctors then removed her right fallopian tube, leaving IVF as her only option for having a genetic child.

The couple tried IVF for nearly three years, from 1988 through late 1991. In a typical IVF procedure the woman is injected with hormones that trigger her ovaries to release multiple egg cells. The egg cells are extracted from her body and placed in a petri dish, where sperm is introduced to egg cells deemed suitable for fertilization. Fertilized egg cells develop into four-to-eight celled entities, sometimes called embryos or pre-zygotes, but commonly called preembryos. The doctors at IVF clinics create more preembryos than necessary for a single pregnancy attempt, thereby reducing the number of times the woman must undergo hormonal stimulation and egg extraction. The remaining preembryos, not immediately required for reproductive purposes, are cryopreserved in liquid nitrogen at -196 degrees Celsius, which stops their development while preserving them for possible future use.

Each time the doctors removed eggs from B.Z. for fertilization, the couple signed the clinic's consent form, which described the IVF procedure and cryopreservation process. B.Z. underwent seven egg retrievals, requiring the couple to sign seven consent forms between 1988 and 1991, with the final consent form governing the later dispute between them. The forms required the couple to decide what would happen to any cryopreserved preembryos under certain contingencies, such as B.Z. reaching menopause, the death of either party, or separation of the couple. B.Z. filled out the first form, and then A.Z. signed it. In court A.Z. claimed that he signed the next six forms while they were blank, which B.Z. later filled out with her preferences. All of the forms, including the first one, stated that B.Z. should be allowed to implant any unused preembryos upon separation of the

couple.

The IVF procedure was successful for A.Z. and B.Z., resulting in the birth of their twin daughters in 1992. Then in early 1995, B.Z. attempted to implant one of the cryopreserved preembryos without A.Z.'s knowledge, although pregnancy did not occur. A.Z. filed for divorce later that year and asked the Suffolk County Probate and Family Court in Boston, Massachusetts, to permanently prohibit B.Z. from using the four cryopreserved preembryos that remained at the clinic.

In March 1996, the probate judge ruled in A.Z.'s favor, declining to enforce the couple's signed consent form. The probate judge concluded that although consent forms should usually be enforced, the circumstances had drastically changed in ways the original signing parties did not anticipate. According to the probate judge, the couple had experienced a significant change in circumstances by becoming parents, experiencing marital difficulties, and ending their relationship. Although the court acknowledged that the preceding events—the success of the IVF process, the couple's later separation, the potential use of the cryopreserved preembryos in future implantation attempts—were foreseeable in isolation, the court found that the parties could not have foreseen all of those events as a whole. Rather than hold them to the terms of the agreement, the judge balanced each party's interests and determined that A.Z.'s interest in avoiding procreation outweighed B.Z.'s interest in having additional children using the preembryos, noting that B.Z. could still undergo IVF with another partner or adopt a child. The probate judge's order prohibiting B.Z. from using the preembryos became part of the final divorce decision.

After B.Z. appealed the decision in May 1996, the Supreme Judicial Court of Massachusetts transferred the case to its own court, skipping the appellate court. Although A.Z. did not appear before the court or file a brief, B.Z. filed a lengthy brief in 1999. She argued that the consent form was a valid contract and that, contrary to the probate court's conclusion that a significant change in circumstances had occurred, the parties had indicated that B.Z. could use the preembryos if the couple separated. She noted that A.Z. had signed consent forms seven times during three years of treatments in Massachusetts. According to B.Z., A.Z.'s involvement in the consent and counseling process was evidence of his consent. She also argued that any balancing of the parties' interests should tip in her favor because she could not endure another decade of infertility treatments in pursuit of more children, nor did she desire to pursue adoption.

Until the *A.Z. v. B.Z.* case, Massachusetts had never addressed the allocation of cryopreserved preembryos after a divorce or in cases where the parties disagreed about what to do with their preembryos. Although IVF had been offered for over two decades, very few cases or legislation across the United States had addressed the enforceability of contracts regarding cryopreserved preembryos. When *A.Z. v. B.Z.* came before the Supreme Judicial Court of Massachusetts, two cases with similar facts, *Davis v. Davis* (1992) and *Kass v. Kass* (1998), preceded it. In those cases, heard by the highest state courts in Tennessee and New York respectively, the courts expressed an opinion that states should ordinarily enforce agreements directing the allocation of cryopreserved preembryos. Yet neither *Davis* nor *Kass* were binding precedents for Massachusetts law, and in neither case would enforcing the agreement have forced someone to unwillingly become a parent.

The Supreme Judicial Court of Massachusetts affirmed the probate court's judgment on 8 February 2000, and Justice Judith Cathy Arnold Cowin authored the court's unanimous opinion, published on 31 March 2000. The court affirmed the earlier decision to prevent B.Z. from using the preembryos. It did not enforce the consent form due, in part, to the lack of binding agreement between A.Z. and B.Z., the ambiguity of A.Z.'s intent, and the amount of time that had passed since the form was signed. According to the court, the consent form primarily explained the risks and benefits of the IVF procedure and provided guidance to the clinic if the couple mutually decided not to use the preembryos at a later time. In the court's view, the consent form did not constitute a binding agreement between A.Z. and B.Z. as individuals. The court viewed the form as only defining the relationship between the clinic, on the one hand, and the married couple as a unit, on the other hand.

The Supreme Judicial Court of Massachusetts also decided that the consent form should not be enforced due to lack of legal validity. The form did not directly address the actual circumstances of the case, as it only specified how the clinic would handle the preembryos upon the couple's

separation, which is legally different from divorce. Furthermore, the form did not address the custody rights and child-rearing responsibilities of the parties in the event that B.Z. successfully implanted the preembryos and a child was born. Given these factors, and considering that the couple had divorced since signing the form, the court declared the form unenforceable, concluding that it did not unambiguously represent the couple's intent under the circumstances.

In reaching its conclusion, the court acknowledged the public's interest in freedom of contract, or the right to freely choose whether to enter into a contract without unnecessary governmental interference. It also recognized the role of agreements between IVF participants and IVF clinics. Such agreements are essential to a clinic's ability to function, guiding its actions under certain circumstances. Despite these factors, the court concluded that the state's public policy against forcing procreation on an unwilling party was the most important consideration.

The court noted several related Massachusetts laws and judicial decisions that supported its public policy interpretation. The legislature, for instance, had passed statutes against forced formation or termination of familial relationships, such as contracts to marry or agreements to give up one's child for adoption immediately after giving birth. The court itself had also declined to interfere with what it described as delicate and intimate marital matters, and it had previously declined to enforce contracts binding individuals to decisions regarding future family relationships, such as marriage or parenthood.

Based on the inadequacies of the consent agreement, as well as the state's prior judicial and legislative decisions, the Supreme Judicial Court of Massachusetts determined that forcing individuals to enter into undesired family relationships would violate the state's public policy. It determined that IVF consent forms having this effect should not be legally enforced out of respect for individual privacy and liberty, as well as the freedom to decide regarding familial relationships without compulsion. Furthermore, the court asserted that, as a matter of public policy, it would not have enforced even a legally sufficient agreement under the facts of this case.

Sources

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