Litowitz v. Litowitz (2002)

In a dispute over the allocation of cryopreserved preembryos, the Supreme Court of Washington resolved the case of David J. Litowitz v. Becky M. Litowitz (2002) by reaching a decision that neither party wanted. David Litowitz sought to find adoptive parents for two cryopreserved preembryos created during his marriage to Becky Litowitz when the couple was attempting to have children using in vitro fertilization (IVF). Becky sought to implant the preembryos in a surrogate in an effort to parent a child. In June 2002, the court instead determined that the preembryos should have been destroyed. The court focused on the former couple's written consent agreement signed at the time of their participation in the IVF program, which stated that the preembryos would be destroyed after five years of storage.

The Litowitzes had a son, Jacob, born on 15 July 1980, after which Becky underwent a hysterectomy. This procedure left her incapable of egg production, gestation, and childbirth. After marrying in February 1982, the couple decided to have another child using IVF and a surrogate mother. Therefore, Becky and David Litowitz enlisted the help of the Center for Surrogate Parenting of Loma Linda University's Gynecology and Obstetrics Medical Group (henceforth referred to as the Center) in Loma Linda, California.

Given Becky's inability to produce eggs, the couple entered into a contractual agreement with an egg donor, J.Y., and her husband, E.Y., and all parties signed the document between March and April 1996. The contract identified each individual's role, designating Becky and David as the intended mother and natural father, respectively, and the Litowitzes collectively as the intended parents.

In March 1996, the Litowitzes signed two consent forms with the Center regarding the cryopreservation of some of the preembryos that were to be created. The forms stated that the couple must mutually agree on the future use or destruction of their cryopreserved preembryos. In the absence of a mutual agreement between them, the couple agreed to petition a court for instructions regarding what should happen to the preembryos. The couple also elected to have the Center thaw the preembryos, preventing them from further development, under certain circumstances, such as after the death of both parties or if the preembryos had been cryopreserved for five years. The listed circumstances did not address what would happen to the preembryos should the couple dissolve their marriage.

Doctors surgically retrieved eggs from J.Y. and fertilized the eggs with David's sperm to create five preembryos in 1996. Of the five preembryos, doctors implanted three in a surrogate mother and cryopreserved the remaining two preembryos. The surrogate mother gave birth to a child, Micah, on 25 January 1997. Prior to Micah's birth, however, the Litowitzes separated.

As part of the divorce proceedings, in December 1998 the Pierce County Superior Court, in Tacoma, Washington, awarded the two cryopreserved preembryos to David. David intended to make them available for out-of-state adoption, contrary to Becky's desire to implant them in a surrogate mother to raise another child herself. In reaching its decision, the trial court applied a "best interests of the child" standard, stating that David should seek to find a married couple to adopt the preembryos. The court indicated that neither a single parent nor divorced parents would most benefit a child resulting from successful implantation of the preembryos.

Becky appealed the decision to the Court of Appeals of Washington, in Tacoma, Washington. This court concluded that the trial judge inappropriately applied the best interests analysis, which should not have been the only consideration. Yet, the Court of Appeals did not award the preembryos to Becky and instead affirmed the lower court's ruling in October 2000.

The appellate court's decision partly relied on David's genetic contribution to the preembryos, given that Becky's eggs were not used. The court concluded that David's status as a progenitor gave him authority to control the preembryos, further stating that he was not contractually obligated to become a parent, as Becky had contended. While Becky's lawyer argued that Becky should be awarded the preembryos based on the egg donor contract, the court was not convinced. The court instead focused on the IVF consent form, which required the Litowitzes to petition a court for instructions regarding the preembryos if they were unable to reach a mutual agreement. The Court of Appeals concluded that there was no express agreement to enforce because the consent form did not address what should happen to the preembryos in the event of a disagreement or if the couple divorced.

The Court of Appeals affirmed the trial court and determined that David was not contractually obligated to have another child with Becky. The court concluded that Becky, who contributed no gametes to the preembryos, lacked a constitutional right to procreate in this instance. As a sperm donor David did have a constitutional right to avoid procreation. The court reasoned that David, who was willing to allow another couple to adopt the preembryos, invoked his constitutional right not to procreate in a limited way, one that would permit the preembryos to develop while avoiding an unwanted parenting role on his part. Thus, the court awarded the preembryos to David based on his constitutional right not to procreate.

The Supreme Court of Washington, located in Olympia, Washington, granted Becky's request for review in April 2001, and the court heard arguments in September 2001. Becky claimed a contractual right to the cryopreserved preembryos based primarily on the egg donor contract. She argued the egg donor contract gave the parties equal rights to the resulting preembryos, asserting that the court should not solely focus on the parties' biological relationships to the preembryos. She also claimed to have a constitutional right to custody of the preembryos, which she called children. David argued that neither the egg donor contract nor the IVF consent forms granted Becky the right to use the preembryos upon their divorce. Justice Charles Smith wrote the opinion of the court in June 2002. He explained the Supreme Court's decision to reverse the Court of Appeals and to not favor either party's position. The court acknowledged that the case differed from similar cases in other states, such as Davis v. Davis (1992) in Tennessee, Kass v. Kass (1998) in New York, A.Z. v. B.Z. (2000) in Massachusetts, and J.B. v. M.B. (2001) in New Jersey, in that only David had a biological connection to the preembryos at issue, as opposed to both parties. Any rights Becky may have to the preembryos could only arise by contract.

Although the court acknowledged that the egg donor contract granted Becky equal rights to the donated eggs, the court said that the egg donor contract was unrelated to the resulting preembryos. The court concluded that the eggs no longer existed because following donation they had been fertilized and, thereby, transformed into preembryos. The court declined to decide whether a preembryo could be defined as a child, which it regarded as an irrelevant inquiry. Further, the court did not decide the rights of the egg donor, as this was not an issue before it.

The Litowitzes, having failed to reach a mutual decision regarding the preembryos, had petitioned the trial court for a decision about the allocation of the preembryos, with Becky taking the matter all the way to the Supreme Court of Washington. The Supreme Court determined that the cryopreservation consent form the former couple had signed in March 1996 failed to address what would happen to the preembryos upon divorce. Rather than choose between the outcomes requested by the Litowitzes, the court instead relied on a provision that indicated the couple's final two preembryos would be thawed and prevented from further developing after five years of cryopreservation. Though the exact date when the preembryos were cryopreserved was unknown, the court determined that more than five years had passed based on the probable date that the other three preembryos had been transferred to the surrogate mother, in April 1996, resulting in the subsequent birth of Micah. It is likely that the unused preembryos were cryopreserved at that time. The court further noted that it was unknown whether the two cryopreserved preembryos continued to exist or had already been destroyed by the Center.

The Supreme Court of Washington reasoned that the Litowitzes' preembryos should have been destroyed over a year before its decision, and it opted not to grant the requested relief of either party. The one dissenting justice criticized the decision because the Litowitzes sought a court determina-

tion, as required by their contract, well before the five years had elapsed. The dissent supported the trial court's decision that the preembryos should be donated for adoption. In February 2003, the Supreme Court of the United States denied Becky's request to hear the case.

Sources

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