

# Kass v. Kass (1998)

Court: New York Court of Appeals  
Citation: Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998)  
Status as current law: Probable  
Value as precedent: Low

## **Case significance:**

In a case of first impression in the state of New York, the highest state court decided that a prior written agreement between progenitors of frozen embryos regarding the disposition of their “pre-zygotes” in the event of divorce is binding. By copying the general result arrived at by the Tennessee Supreme Court in *Davis v. Davis* in 1992, the New York court magnified the weight of authority in favor of upholding prior written agreements for in vitro fertilization practices.

## **Case Summary:**

- Facts—Mr. and Mrs. Kass entered into a contract for IVF and cryopreservation of embryos that provided in the event of a divorce, the frozen embryos would be donated to the IVF clinic for research. During the lengthy IVF process, Mrs. Kass miscarried once and suffered an ectopic pregnancy once. After a failed attempt to implant four frozen embryos in Mrs. Kass’ sister as surrogate, the couple divorced. Mrs. Kass won custody of the remaining five frozen embryos in the trial court.
- Law—Basic contract law prevailed. The frozen embryos were not persons.
- Ruling—The Court of Appeals held that: (1) agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them, and (2) the informed consents signed by the parties before cryopreservation required that the custody dispute be resolved by donating the pre-zygotes to the IVF program for research.

## **Quotes:**

“Supreme Court granted appellant custody of the pre-zygotes and directed her to exercise her right to implant them within a medically reasonable time. The court reasoned that a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus, and that appellant had not waived her right either in the May 12, 1993 consents or in the June 7, 1993 ‘uncontested divorce’ agreement.”

“While a divided Appellate Division reversed that decision, all five Justices unanimously agreed on two fundamental propositions. First, they concluded that a woman's right to privacy and bodily integrity are not implicated before implantation occurs. Second, the court unanimously recognized that when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.”

“Like the Appellate Division, we conclude that disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as ‘persons’ for constitutional purposes. The relevant inquiry thus becomes who has dispositional authority over them. Because that question is answered in this case by the parties’ agreement, for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to special respect.”

## **This case cites to these authorities:**

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)  
The word 'person' in the U.S. Constitution does not include a fetus.

Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)  
In a dispute over the disposition of frozen embryos in the event of divorce, the court should ordinarily look to a contract for resolution.

**This case was cited in:**

A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000)  
Prior written agreement between a husband and wife regarding the disposition of frozen embryos in the event of a divorce was unenforceable.

J.B. v. M.B., 783 A.2d 707 (N.J. 2001)  
Prior written frozen embryo disposition agreement was unenforceable because it would infringe on the fundamental right to not procreate.

Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002)  
Pursuant to an embryo disposition contract, a husband and wife had to petition the court for instructions because they could not reach an agreement about what to do with the frozen embryos.

In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003)  
If no agreement can be reached between the parties, the frozen embryos cannot be used regardless of what a prior written disposition agreement states.

Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz.App. Div. 1 2005)  
The word "person" in Arizona's wrongful death statute does not include an in vitro frozen embryo.

Roman v. Roman, 193 S.W.3d 40 (Tex.App.-Hous. (1 Dist.) 2006)  
Embryo agreement between former husband and wife which provided that frozen embryos were to be discarded in the event of divorce was valid and enforceable.