

Kass v. Kass (1998) ^[1]

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In *Maureen Kass v. Steven Kass* (1998), the Court of Appeals of New York in Albany, New York, ruled that the state should generally consider consent forms signed by participants in an [in vitro](#) ^[4] [fertilization](#) ^[5] (IVF) program valid, binding, and enforceable in the event of a dispute. The court indicated that decisions regarding the handling of cryopreserved pre-zygotes, often called preembryos, contained within these consent forms should be upheld. Although Steven and Maureen Kass had signed IVF consent forms agreeing to donate unused preembryos to research, during their divorce Maureen argued for custody of the preembryos. The New York Court of Appeals ruled in favor of Steven Kass and concluded that the [informed consent](#) ^[6] forms signed by the former couple had clearly manifested the couple's mutual intent to donate any preembryos to research in the event of a dispute.

Maureen and Steven Kass married in July 1988. By August of the following year, the New York couple realized that Maureen could not conceive conventionally. That month, they sought reproductive assistance at the John T. Mather Memorial Hospital in Port Jefferson, New York. After [conception](#) ^[7] through [artificial insemination](#) ^[8] proved unsuccessful, the couple joined the IVF program. Following five [egg](#) ^[9] retrievals and nine transfers of fertilized eggs to Maureen's [uterus](#) ^[10], Maureen became pregnant twice. Her first [pregnancy](#) ^[11] in October 1991 resulted in a [miscarriage](#) ^[12], and she terminated her second, an [ectopic pregnancy](#) ^[13], a few months later.

In their final IVF procedure in 1993, the couple chose to cryopreserve their remaining preembryos for later use. The method of generating multiple eggs at once limited both the medical and physical costs of the overall IVF procedure, as doctors could extract several of Maureen's eggs, fertilize them to create preembryos, and then cryopreserve any extra preembryos for later use, as opposed to retrieving eggs from her ovaries before every individual attempt at [implantation](#) ^[14].

In conjunction with the IVF and [cryopreservation](#) ^[15] procedure in May 1993, the couple signed four consent forms provided by the Mather Hospital's IVF program. In one agreement, the couple permitted the IVF program to donate their cryopreserved preembryos to research if Maureen and Steven later disagreed about whether to use them for reproductive purposes. Another clause specifically addressed the allocation of the cryopreserved preembryos if the couple divorced, stating that any dispute over ownership of the preembryos must be determined in a property settlement in court, and the preembryos would be allocated to research, disposal, [implantation](#) ^[14], or further [cryopreservation](#) ^[15] according to a court order.

In May 1993, doctors obtained 16 eggs from Maureen, resulting in nine eggs successfully fertilized with Steven's [sperm](#) ^[16]. Two days later, the doctors transferred four preembryos into Maureen's sister, who volunteered as a [surrogate](#) ^[17] for the [pregnancy](#) ^[11]. The remaining five preembryos were cryopreserved. After Maureen's sister did not become pregnant with the transferred preembryos, she declined to continue with the IVF program, and

Maureen and Steven decided to divorce.

In June 1993, a few weeks after Maureen and Steven had signed the consent forms and attempted [implantation](#) [14] of the preembryos, they signed an uncontested divorce agreement. The agreement indicated that the five cryopreserved preembryos would be handled as the couple had initially indicated in the IVF consent forms. The agreement further stated that neither party would claim custody of the preembryos. Later that month, however, Maureen notified the hospital and her IVF physician that she opposed destruction or research use of the preembryos. In fact, she once again wished to attempt [implantation](#) [14], claiming that the preembryos represented her only opportunity to achieve genetic parenthood.

In July 1993, Maureen sought sole custody of the preembryos. Steven objected, arguing that the preembryos should be donated to research, an outcome he claimed the couple had agreed to in the IVF consent forms. In December 1993, the couple resolved all issues in their divorce except the dispute regarding the preembryos, which they asked the court to decide. The court entered a divorce judgment in May 1994, while the dispute regarding the preembryos remained open.

The initial fact-finding court in New York, the Nassau County Supreme Court, ruled in favor of Maureen in January 1995, granting her exclusive authority over the fertilized eggs. To determine what rights progenitors ought to have when they pursue [in vitro](#) [4] [fertilization](#) [5], the court analyzed the rights of progenitors when conventional [fertilization](#) [5] occurs. The court noted that a genetic father lacks the procreational right to terminate a woman's [pregnancy](#) [11] in the case of conventional [fertilization](#) [5]. The Supreme Court, Nassau County, reasoned that the same outcome should result following participation in an IVF program, that a woman participating in IVF has exclusive control over any resulting preembryos.

On Steven's appeal, the Appellate Division of the Supreme Court of New York, Second Division reversed the Supreme Court's ruling in a split vote in September 1997. Three Justices ruled in favor of Steven, while two dissented. All five Justices agreed that, preceding [implantation](#) [14], a woman's right to privacy and control over her body, as discussed in [Roe v. Wade](#) [18] (1973), did not apply to disputes over cryopreserved preembryos, which are not yet implanted in the woman's body, unlike when she is pregnant. They also unanimously recognized that consent forms signed by participants in an IVF program should control the allocation of any unused preembryos. The panel did not agree, however, whether the consent forms signed by Maureen and Steven Kass clearly stated how they intended their preembryos to be handled in the event of a later disagreement. Two Justices felt that the agreements expressed the parties' intent to donate the preembryos to research. Although the concurring Justice found the consent ambiguous, he nevertheless agreed to reverse the lower court's decision based on his belief that Steven, and others in his position, should have the power to veto proposed [implantation](#) [14] by a former spouse. The two dissenting Justices also found the agreements ambiguous, concluding that the parties' interests should be balanced following a full hearing by the trial court.

Following this reversal of the lower court's decision, Maureen appealed to the Court of Appeals of New York, the highest court in the state, which heard arguments from the parties in March 1998. Although IVF procedures had been available for more than twenty years, the court noted that this case was the first of its kind to come before the court. Further, only a few states had adopted statutes addressing the allocation of cryopreserved fertilized eggs, including Florida, New Hampshire, and Louisiana, but not New York. Absent New York case

law or statutory law addressing cryopreserved preembryos, the Court of Appeals looked to the analytical framework provided by the Supreme Court of Tennessee in *Davis v. Davis* (1992). It also noted the significant legal commentary discussing pre-embryo disputes and acknowledged a comprehensive report recently released by the New York State Task Force on Life and the Law (Task Force), which included recommendations for regulating assisted reproduction technologies. Although the Task Force suggested that IVF preembryos should not be implanted, destroyed, or donated to research if an individual with decision-making authority later objects, the Court of Appeals ultimately did not follow this recommendation.

Affirming the decision of the Appellate Division in Steven's favor, Chief Justice Judith Kaye wrote the court's unanimous May 1998 decision. She said that IVF consent forms signed by those who provide the [sperm](#) [16] and [egg](#) [9] cells for IVF (gamete providers) generally should be considered valid, binding, and enforceable in the event of a dispute. This means that no sole IVF participant could later override the decisions contained in the IVF consent forms addressing how the IVF clinic should handle the cryopreserved preembryos in the event of divorce or other circumstances. Although neither party argued that the consent forms failed to express their intent, Maureen argued that the consent forms were ambiguous. Yet, the Court of Appeals agreed with the Appellate Division's decision that the couple had clearly expressed a mutual intent in the signed consent forms to donate the preembryos to research under the circumstances. The court reasoned that the provision in the IVF consent forms, stating that any dispute over ownership of the preembryos must be determined in a property settlement in court, was only an attempt by the IVF clinic to shield itself from liability, should a legal dispute arise due to divorce.

The Court of Appeals emphasized that the gamete providers, not the state or courts, should mutually decide whether or not to procreate using the preembryos. The court indicated that Maureen and Steven's consent forms reflected the couple's agreement to jointly decide what would happen to the preembryos, as opposed to allowing a court or other third party to decide for them. According to the court, the couple had made a joint decision when they signed the IVF consent forms, and a later dispute should not be permitted to undo that earlier agreement. Further, the forms indicated the couple's mutual and written consent was required for the IVF program to release the preembryos from storage for any reason.

Enforcing the consent forms signed by Maureen and Steven, the court concluded the preembryos should be donated to research. To explain its decision, the court discussed the importance of enforcing explicit agreements. Noting the role of contracts to avoid expensive litigation in business matters, the court viewed such agreements as even more necessary in personal matters involving reproduction. Such agreements reduce misunderstandings and clarify the gamete providers' consent and mutual decisions, as well as set standards for the IVF program to follow regarding handling of the IVF preembryos. Although the court acknowledged the uncertainties involved in the IVF process, as well as the possibility of changed circumstances during [cryopreservation](#) [15] of the fertilized eggs, it concluded that these factors only further support the need to enforce the parties' original, mutual choices made prior to any dispute, unless the parties later mutually agree otherwise. If courts enforce such jointly-made decisions, IVF participants would be put on notice that they must carefully consider their wishes before signing IVF consent forms.

The Court of Appeals stated that preembryos are not constitutionally recognized as persons, although it did not decide whether they were entitled to special respect as the *Davis* court had concluded. Further, the court agreed with the Appellate Division that a woman's right to

privacy and control of her body, as recognized in [Roe v. Wade](#) ^[18], are not relevant to decisions about cryopreserved preembryos. The court acknowledged the equal interests of the [sperm](#) ^[16] and [egg](#) ^[9] providers, citing *Davis*.

Kass v. Kass, building on the *Davis* court's opinion, further entrenched the view that control of frozen preembryos rests with the gamete providers, not the courts. The Court of Appeals viewed its final decision to donate the cryopreserved preembryos to research as most accurately reflecting the joint agreement initially made by both parties, as outlined in their pre-divorce IVF consent forms. By regarding such documents as valid, binding, and enforceable, the court took a position that would continue to evolve in later cases, such as *A.Z. v. B.Z.* (2000) in Massachusetts and *J.B. v. M.B.* (2001) in New Jersey.

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Publisher

Arizona State University. School of Life Sciences. Center for Biology and Society. Embryo Project Encyclopedia.

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Format

Articles [41]

Last Modified

Wednesday, July 4, 2018 - 04:40

DC Date Accessioned

Friday, November 1, 2013 - 23:39

DC Date Available

Friday, November 1, 2013 - 23:39

DC Date Created

2013-11-01

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