

[Davis v. Davis \(1992\)](#) ^[1]

By: Chapman, Jennifer E. Zhang, Mark Keywords: [Embryo](#) ^[2] [IVF](#) ^[3]

In *Davis v. Davis* (1992), the Supreme Court of Tennessee decided a dispute over cryopreserved preembryos in favor of Junior Lewis Davis, who sought to have the preembryos destroyed over the objections of his former wife, Mary Sue Davis. The decision in *Davis*, although not binding in other states, suggested a framework for resolving similar disputes in the US. That framework established that courts should follow the wishes of those who contribute their [sperm](#) ^[5] and [egg](#) ^[6] cells, or gamete providers, to create preembryos. In the event of a dispute, courts should enforce any prior agreement between the gamete providers and in the absence of such an agreement, the court should weigh the interests of the parties, ordinarily ruling in favor of the party who wishes to avoid [procreation](#) ^[7].

Mary Sue and Junior Davis met while they were both stationed in Germany with the US army in the spring of 1979. They married in April 1980 in the US and within six months of returning to their posts in Germany, Mary Sue experienced an [ectopic pregnancy](#) ^[8], a type of [pregnancy](#) ^[9] in which an embryo implants outside the uterine cavity, usually in a fallopian tube, and is unable to survive. Ectopic pregnancies usually occur when a condition obstructs or otherwise hinders the progress of a [fertilized egg](#) ^[10] through the fallopian tube toward the [uterus](#) ^[11]. In Mary Sue's case, the embryo implanted in her right fallopian tube, which she later had removed. After her fifth [ectopic pregnancy](#) ^[8], Mary Sue chose to surgically seal her left fallopian tube, leaving her unable to conceive conventionally.

After the Davis' attempt at adoption failed, the couple, living at the time in Tennessee, paid 35,000 dollars for [six in vitro](#) ^[12] [fertilization](#) ^[13] (IVF) treatments beginning in 1985 at the Knoxville Fertility Clinic in Knoxville, Tennessee. All six attempts to conceive through IVF ultimately failed. The couple chose to wait until November 1988 to begin the next round of IVF treatments, when the clinic could cryopreserve any unused preembryos for later transfer. The couple never discussed, nor entered into an agreement regarding, what should happen to the preembryos should the couple ever divorce.

In December 1988, a gynecologist retrieved nine ova from Mary Sue for [fertilization](#) ^[13] in petri dishes. After a failed transfer of two preembryos to Mary Sue's [uterus](#) ^[11] later that month, seven preembryos remained cryogenically preserved. Junior filed for divorce from Mary Sue in February 1989. The parties reached an agreement on all matters except what would happen to the seven cryopreserved preembryos, which Mary Sue sought to use for future [pregnancy](#) ^[9] attempts while Junior preferred to keep cryopreserved until he decided whether or not to allow Mary Sue's request. Given her inability to conceive conventionally, Mary Sue asked the Maryville, Tennessee, trial court overseeing the divorce proceedings for permission to utilize the frozen preembryos to produce a genetic child, whereas Junior asked the court to keep them cryopreserved.

The trial court heard testimony in August 1989, during which experts disagreed about the proper terminology for the preembryos. Jerome Lejeune, a geneticist from France, claimed that the four-to eight-cell entities were early human beings and could be called either embryos or preembryos. Irving Ray King, the gynecologist who performed the IVF procedures testified that the accepted term was preembryo, a claim that was supported by the [American Fertility Society](#) ^[14], headquartered in Birmingham, Alabama, and other experts who testified. The trial court rejected the distinction between embryo and preembryo, defining the entities as children [in vitro](#) ^[12].

The trial court reached a verdict in September 1989, awarding Mary Sue custody of the preembryos for use in future [implantation](#) ^[15] attempts. It accepted Lejeune's theory that human life begins at [conception](#) ^[16] and that the preembryos were human beings. Based on this perspective, the trial court decided the matter according to the best interest of the children. The best interest of the children, in this case, meant attempting to bring them to term, so the trial court awarded custody to Mary Sue.

Junior appealed the trial court's decision to the Tennessee Court of Appeals, asserting that the lower court's judgment had violated state and federal law and was requiring him to become a parent against his will. The Court of Appeals reversed the trial court's decision in September 1990, finding that Junior had a constitutional right not to become a parent against his will, given that no [pregnancy](#) ^[9] had taken place. The Court of Appeals awarded joint custody of the preembryos to Mary Sue and Junior, deciding that the parties would only become parents of the preembryos if they both agreed to do so.

Mary Sue appealed the Court of Appeals' decision to the Supreme Court of Tennessee in December 1990, challenging the constitutional validity of the appellate court's ruling. By the time the case reached the Supreme Court of Tennessee in 1992, both parties had remarried to different partners and abandoned their original positions. While Mary Sue sought to donate the preembryos to a childless couple, Junior sought to have them destroyed. The Supreme Court of Tennessee reviewed the case, in part, because it wanted to develop the law regarding new reproductive technologies. At the time, the court had no Tennessee case law or statutes addressing disputes over cryopreserved preembryos to guide its decision.

Judge Martha Craig Daughtrey, writing for the Supreme Court of Tennessee, authored the court's opinion. Daughtrey and the other justices unanimously affirmed the appeal in favor of Junior Davis. Daughtrey emphasized the importance of semantics in the case, not because the terminology used would decide the outcome, but because inaccurate terminology might lead to misanalysis. Based on the expert testimony at trial, Daughtrey accepted that the cryopreserved entities were preembryos, although many, especially in the media, called them frozen embryos.

The Supreme Court of Tennessee addressed the legal status of the preembryos, deciding whether to regard them as persons, property, or some other designation under the law. This was partly a response to requests by dozens of national organizations participating as *amici curiae* in the case. The court cited *Roe v. Wade*^[17] (1973) for the proposition that federal law does not recognize the unborn, including preembryos, as persons. Although Tennessee state laws did not directly address the legal status of cryopreserved preembryos, the court gleaned the state public policy from various relevant statutes. For instance, a *viable*^[18] *fetus*^[19] must be *born alive*^[20] in order to fit within the meaning of the term "person" under the Tennessee *wrongful death*^[21] statute. Further, the state allowed *abortion*^[22] before a developing *fetus*^[19] achieves *viability*^[23], and even after *viability*^[23] if needed to save the mother's life. The court determined that existing state and federal laws reflected a public policy that even a *viable*^[18] *fetus*^[19] in the *womb*^[24] is not entitled to the same protection as persons who are already born. A four- to eight-cell preembryo is even less developed or *viable*^[18] than a *fetus*^[19] and, likewise, would not be protected as a person under state law.

The Supreme Court of Tennessee agreed with the Court of Appeals that preembryos lack legal *personhood*^[25], but it also felt that the Court of Appeals went too far towards treating the preembryos as property. Though the Court of Appeals had not explicitly stated that the preembryos were property, it had awarded Junior and Mary Sue joint custody, reflecting the parties' joint interest in the preembryos without clearly defining that interest. The Court of Appeals had also relied on *York v. Jones* (1989), a case in Virginia involving a couple's property interest in a single cryopreserved preembryo. Thus, in reaching its decision, the Court of Appeals implied that the parties had a property interest in the cryopreserved preembryos.

The Supreme Court of Tennessee resolved the issue of *personhood*^[25] under Tennessee state law by stating that preembryos are neither persons nor property. Rather, preembryos belong to an "interim category that entitles them to special respect because of their potential for human life." Although unborn children lack the legal rights of a person already born, the court reasoned that they warrant more respect under the law than property due to the potential for life. Mary Sue and Junior lacked property interests in the preembryos, but the court concluded that as the providers of the genetic material they had the authority to make decisions about the preembryos.

Although no contract had been signed in the *Davis* case, the court opted to discuss the general enforceability of IVF contracts to offer guidance to future participants in IVF procedures. The court recognized the emotions involved with *infertility*^[26] and the changes in one's life that may occur during the IVF process. It acknowledged that, given the potential for such change, it would be difficult for IVF participants, at the onset of the process, to provide truly *informed consent*^[27] regarding their cryopreserved preembryos in the event of a later dispute. The court determined that parties should be permitted to modify their initial IVF contracts by mutual agreement. Absent such a mutual modification, courts should enforce the original agreement as a means of ensuring the gamete providers retained joint decision-making authority over the preembryos.

Without a contract to consult, the court decided the case based on the constitutional right to privacy. It described the right of privacy, although not directly discussed in either the US or Tennessee constitutions, as inherently present in both documents. In particular the constitutional concept of individual liberty is reflected in the Fourteenth Amendment of the US Constitution. The right to privacy is the right to be let alone, free from unwarranted government interference with intimate personal matters. As it relates to *procreation*^[7], this right was addressed by the US Supreme Court's decisions in cases like *Skinner v. Oklahoma* (1942), which struck down a law permitting the *sterilization*^[28] of criminals, and in *Eisenstadt v. Baird* (1972), which recognized a relationship between the right to privacy and the individual right to decide whether to become a parent. Additionally, as the Supreme Court of the United States concluded in *Griswold v. Connecticut*^[29] (1965) and *Roe v. Wade*^[17] (1973), the right to procreational autonomy is inseparable from notions of liberty.

The court determined that in cases of IVF, gamete providers stand equal in their rights to make decisions regarding the resulting preembryos. This is contrary to the genetic parents' rights in *abortion*^[22] cases, where the impact of *pregnancy*^[9] on the woman's body allows her to control an *abortion*^[22] decision over the objections of the genetic father. Further, the gamete providers alone have authority to decide whether to attempt to gestate preembryos created during the IVF process, and not even the state's interest in protecting potential human life can justify infringing upon that power.

The court then turned to the question of how to resolve disputes involving conflicting, yet equal, procreational autonomy rights. In the absence of precedential case law or statutory authority, the court considered various recommendations by medical-legal scholars and ethicists. The court opted not to establish a bright-line test to settle similar disputes, as many scholars had recommended, but instead the court applied its own framework of weighing the interests of each party in the absence of an agreement between them, focusing on the burden each party would bear if the other party prevailed.

In its June 1992 decision, the court decided that Junior's burden of enduring unwanted parenthood outweighed Mary Sue's burden of being unable to donate the preembryos to another couple. If Junior's genetic child was born to another couple, Junior would potentially lose both his procreational autonomy and his ability to raise his child. Mary Sue, on the other hand, could still

achieve genetic parenthood through future IVF treatments, even if the existing preembryos were destroyed.

Davis v. Davis made Tennessee one of the first states to address a dispute over cryopreserved preembryos, even though at least 20,000 cryopreserved preembryos existed at the time. The Supreme Court's affirmation of the judgment of the Court of Appeals permitted the Knoxville Fertility Clinic to follow its usual practice for disposing of unused preembryos. The Supreme Court of the United States denied Mary Sue's request for review in February 1993.

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