Litowitz v. Litowitz [Brief] (2002) [1]

By: Heathcotte, Brock Keywords: Fertilization [2]

Court: Washington Supreme Court
Citation: *Litowitz v. Litowitz*, 48 P.3d 261 (Wash. 2002)
Status as current law: Probable
Value as precedent: Low

Case significance:

Pursuant to an express provision of the embryo disposition contract they both signed, a husband and wife had to petition the court for instructions because they could not reach an agreement about what to do with frozen embryos when they divorced. The trial court awarded the pre-embryos to the husband and the Court of Appeals affirmed this decision. However, the Washington Supreme Court ruled that the pre-embryos should be thawed out and allowed to expire because the dispute had not been resolved within a five year time frame prescribed by the Cryopreservation Agreement. A dissenting opinion filed by one judge argued that the five year limit should not apply because of judicial delay in reaching a final decision.

Case Summary:

- Facts—Mr. and Mrs. Litowitz married in 1982 at which time they already had one biological child together and two children from a prior marriage of Mrs. Litowitz. Mrs. Litowitz was unable to have further children because of a hysterectomy [4] after the birth of her third child. In 1996, the couple consulted with the Center for Surrogate Parenting, Loma Linda University Gynecology and Obstetrics Medical Group to have another child by *in vitro* [5] fertilization [6]. Five pre-embryos were created from the combination of donor eggs and Mr. Litowitz' sperm [7]. Three of the pre-embryos were implanted in a surrogate [8] mother and the remaining two pre-embryos were cryopreserved for possible future use. The Litowitz' fourth child was born to the surrogate [8] mother in 1997, but by then the Litowitz' had already separated. In the marriage dissolution proceedings Mr. Litowitz asked the court to allow him to put the two frozen embryos up for adoption by another infertile couple, but Mrs. Litowitz asked the court to allow her to use another surrogate [8] mother to bring the frozen pre-embryos to term as her own children.
- Law—Basic contract law was applied to the facts to arrive at a decision. The relevant contract provision signed by Mr. and Mrs. Litowitz and the Loma Linda Clinic under the heading Legal Status and Dispositional Choices, stated "We agree that because both the husband and wife are participants in the cryopreservation [9] program, that any decision regarding the disposition of our pre-embryos will be made by mutual consent. In the event we are unable to reach a mutual decision regarding the disposition of our pre-embryos, we must petition to a Court of competent jurisdiction for instructions concerning the appropriate disposition of our pre-embryos."
- Ruling—The Cryopreservation Agreement authorized the Loma Linda clinic to thaw out the pre-embryos and allow them to expire after five years. It had been more than five years since the agreement was signed so the pre-embryos should be allowed to expire.

Quotes:

"Respondent would not need written permission from the egg [10] donor to donate the pre-embryos because the egg [10] donor contract only required written permission for transfer of the donated eggs. The court correctly observed that the eggs no longer existed as they were identified in the egg [10] donor contract because they were later fertilized by Respondent's sperm [7] and their character was then changed to pre-embryos. The Court of Appeals did not rule on the rights of the egg [10] donor under the egg [10] donor contract because that matter has not been before the court at any stage of these proceedings. Even if it were, it is doubtful that the egg [10] donor would have a remaining contractual right once the eggs have been fertilized and become pre-embryos."

"It is not necessary for this court to engage in a legal, medical or philosophical discussion whether the pre-embryos in this case are "children," nor whether Petitioner (who was not a biological participant) is a progenitor as is Respondent (who was a biological participant)."

"We base our decision in this case solely upon the contractual rights of the parties under the pre-embryo cryopreservation [9] contract with the Loma Linda Center for Fertility and In Vitro Fertilization dated March 25, 1996. Under that contract Petitioner and Respondent gave direction to the Loma Linda Center for disposition of the remaining pre-embryos resulting from fertilization [6] of five eggs they acquired under the egg [10] donor contract. They directed that the remaining pre-embryos be "thawed out but

not allowed to undergo further development" and disposed of when the pre-embryos "have been maintained in cryopreservation [9] for five (5) years after the initial date ofcryopreservation [9] unless the Center agreed, at the Litowitzes' request, to extend their participation for an additional period of time." The record does not indicate whether the two cryopreserved pre-embryos are still in existence. Neither Petitioner nor Respondent has requested an extension of their contract with the Loma Linda Center. Under terms of the contract, then, the remaining pre-embryos would have been thawed out and not allowed to undergo further development five years after the initial date of cryopreservation [9], which by simplest calculation would have occurred on March 24, 2001."

(Quote from the dissenting opinion) "One thing the parties obviously did not intend was to destroy the whole object of the contract, the pre-embryos, simply because this litigation was prolonged beyond five years after the initial date of cryopreservation [9] while the parties were patiently waiting for appropriate court "instructions concerning the appropriate disposition of their pre-embryos," nor has either party even argued for that unimagined result. But the majority's disposition apparently calls for the destruction of unborn human life even when, or if, both contracting parties agreed the pre-embryos should be brought to fruition as a living child reserving their disagreement over custody for judicial determination [11]. Thus the majority denies these parties that option left by Solomon in lieu of chopping the baby in half. The wisdom of Solomon is nowhere to be found here."

This case cites to these authorities:

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.

Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998)
Prearranged agreement between progenitors of frozen embryos regarding the disposition of their "pre-zygotes" in the event of divorce is binding.

A.Z. V. B.Z., 725 N.E.2d 1051 (Mass. 2000)
A 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 [12] disposition agreement was unenforceable because it would infringe on the fundamental right to not procreate.

This case was cited in:

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.

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