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In Re Marriage of Witten: Subordinating Contract to "Public Policy"

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In re Marriage of Witten[1] is a case about a divorcing couple fighting over the fate of frozen embryos.[2] It is a sad case—divorce cases usually are. It is also a good example of a bad contracts case.

Tamera and Trip Witten were a married couple who hoped to start a family. Eventually, they turned to in vitro fertilization (IVF). After seven-and-a-half years of marriage and several unsuccessful IVF attempts, Trip filed for divorce. At issue was whether Tamera Witten could use one of the seventeen frozen embryos which were in storage at the University of Nebraska Medical Center (UNMC). Tamera testified that if she were able to have a child using one of the embryos, she would give Trip the option of exercising or terminating his parental rights.[3] In other words, she was not asking him to be a co-parent or to be involved in supporting or raising the child; she was merely opposed to destroying or donating the embryos. Trip, however, did not oppose donating the embryos to another couple—he just did not want Tamera to use them.[4]

Before starting the IVF process, the Wittens had signed documents prepared by the UNMC, including the "Embryo Storage Agreement," which contained a provision that the embryos would be released "only with the signed approval of both Client Depositors."[5] UNMC's obligation to store the embryos would terminate if the parties died, if they authorized the destruction of the embryos, if they failed to pay the annual storage fee, or if ten years passed after the date of the agreement.[6]

On appeal, Tamera argued that the storage agreement was silent with respect to what would happen to the embryos in the event that the parties divorced. In other words, she was making an "omitted terms" argument. But rather than arguing for an interpretation based upon the intent of the parties, she argued that an Iowa statute should apply to award her "custody" of the embryos. That Iowa stat-

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1. 672 N.W.2d 768 (Iowa 2003).

2. As the court noted, the "embryo[s]" were likely "pre-zygotes" or "preembryos." *Id.* at 772 n.1. However, the court used the term "embryo" because that was the term used in the Witten's contract with UNMC. *Id.* Because the court adopted the term "embryo," I do so for the purposes of this essay.

3. *Id.* at 772.

4. *Id.* at 772-73.

5. *Id.* at 772.

6. *Id.*

ute set forth various standards which courts should use to determine the custody of children in divorce proceedings.[7]

As the court noted, Tamera was essentially arguing that "the embryos are children and their best interest demands placement with her."[8] Trip, on the other hand, argued that "the frozen embryos are not children and should not be considered as such" under Iowa law.[9] Tamera's argument thus boxed the court into a politically uncomfortable corner. In order for the court to rule in her favor, the court would have had to find, at least by implication, that embryos were equivalent to children. Because Tamera's argument was based on policy rather than contract, the court was forced to base its interpretation on legislative intent rather than on the reasonable expectations of the parties.

The court considered the legislative purpose underlying the relevant statute and concluded that "the legislature did not intend to include fertilized eggs or frozen embryos within the scope" of the relevant law.[10] Tamera also made the argument that the contract violated public policy because it allowed a participant in an IVF program to renege on an agreement to become a parent.[11] But rather than argue on the basis of detrimental reliance, Tamera again strayed into volatile territory by trying to convince the court that it was against public policy to enforce an agreement which allowed "a donor to abandon [IVF] attempts when viable embryos remain."[12] The court pushed back against this argument, again making a distinction between "children who have been born" and "fertilized eggs that have not even resulted in a pregnancy."[13] The court's decision on these two points is wise in light of how Tamera framed the issue. The court simply could not side with her without also equating embryos with children—something which would likely have unfortunate implications given the political heat which surrounds the right to abortion. The court noted that the power to invalidate a contract on public policy grounds must be exercised "cautiously and only in cases free from doubt."[14]

But then the court turned its back on contract law in favor of public policy in the area of reproduction: "We think, however, that it would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of repro-

7. *Id.* at 774-74.
8. *Id.* at 774.
9. *Id.*
10. *Id.* at 776.
11. *Id.* at 780.
12. *Id.*
13. *Id.*
14. *Id.*

ductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos."[15]

The court noted that family and reproductive decisions are "emotional in nature and subject to a later change of heart"[16] and thus concluded that judicial enforcement of contracts between couples on "future family and reproductive choices would be against . . . public policy."[17] It then noted that agreements between donors and fertility clinics, however, *were* enforceable.[18] The court jettisoned the ability of couples to enter into contracts involving matters of family planning in favor of a "contemporaneous mutual consent" model which allows either party to change his or her mind. This no-contract approach ignores one of the primary purposes of contracts—to assist in planning for the future and to encourage acts of reliance that are a necessary part of such a planning process. Furthermore, the contemporaneous mutual consent model completely ignores the inherently unequal nature of the IVF process. It is the woman who bears the painful, physical burdens which the process involves. Thus, it is the woman who will undertake acts of detrimental reliance upon a promise to participate in the IVF process. The woman is also the one who feels more keenly the effects of time on fertility. Often, as it was in the case of Tamera and Trip, it is also the woman who would be financially unable to undergo another round of IVF procedures after a divorce.[19] The contemporaneous mutual consent model presumes an equality which just does not exist when it comes to the IVF process.

The court held that "there can be no use or disposition of the Wittens' embryos unless Trip and Tamera reach an agreement."[20] It then added, either cluelessly or mean-spiritedly, that the party who opposes destruction of the embryos is responsible for storage fees.[21] The court's decision thus put Tamera in the humiliating position of trying to wheedle consent from Trip while continuing to make payments to keep the eggs in storage.

On the first day of class, I tell my contracts students about the bargain principle. I tell them that, with a few caveats, courts will not review the adequacy of consideration or the fairness of contractual

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15. *Id.* at 781.

16. *Id.* at 782.

17. *Id.*

18. *Id.*

19. Trip's income was "substantially larger" than Tamera's. *Id.* at 784. According to documents submitted to the court, Tamera earned $3,087, $3069, $0 and $15,623.27 during the years 1999, 2000, and 2001, respectively. *See* Respondent-Appellant's/Cross-Appellee's Reply Brief at 2, *In re Witten,* 672 N.W. 2d 768 (2003) (No. 03-0551), 2003 WL 24314608.

20. *Witten,* 672 N.W. 2d at 783.

21. *Id.* at 784-85. The court also overturned the trial court's order that Trip pay Tamera cash for her share of his retirement account. *Id.* at 785.

terms. Contract law is about autonomy, individualism, and freedom. Contract law is tough, I say; it expects you to say what you mean and mean what you say.

But students soon learn that the law is full of qualifiers and exceptions. Contract law, it turns out, is not so tough after all. The most obvious examples of contract law's compassionate side are unconscionability, duress, and the changed circumstances doctrines. But flexibility is an integral part of every aspect of contract law. Consideration, mistakes, good faith and fair dealing, interpretation standards—every contract doctrine has nestled within it some expectation of fairness—some ceding to context and social norms of decency. To calm the skittish who fear the slippery slope, "fairness" and "justice" often masquerade as "reasonableness" and "good faith." Nevertheless, wise judges understand that there are some bargains which should not be upheld, and conversely, that there are some promises which must be kept. The equitable doctrines also play their part. Promissory estoppel, quasi contract, restitution, moral obligation—these contractual kin accomplish their goals to the extent necessary to avoid injustice.[22]

In re Witten relegates contracts to second-class status. Much of the blame lies with Tamera's legal counsel. Tamera's arguments about "custody" of fertilized eggs and a "fundamental right" to pregnancy ring alarm bells for anyone concerned about abortion rights and reproductive freedom. It is not difficult to imagine that the court made its ruling with a worried eye to those who might use the case for political ends. But by expressly dismissing the power of contracts in the realm of intimate relations and ignoring the flexibility of contract doctrines to fulfill reasonable expectations and prevent injustice, the *Witten* court went too far and diminished reproductive freedom. Couples make promises to each other all the time. Sometimes, those promises result in acts of heartbreaking reliance. Contract law and its equitable kin allow judicial enforcement of promises in such cases. *In re Witten* should have been one of those cases.

22. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §86 (AM. LAW INST. 1981) (stating that a promise made in recognition of a benefit conferred bindes the promisee "to the extent necessary to prevent injustice"); *Id.* §89 (modification without consideration binding "to the extent that justice requires enforcement"); *Id.* §90 (promise which induces reasonable detrimental reliance is binding "if injustice can be avoided only by enforcement of the promise").