
CANADA / JUDGMENT

J.C.M. v. A.N.A.

2012 BCSC 584

COURT

Supreme Court of British Columbia

DECIDED

23 April 2012

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.C.M. v. A.N.A.,

2012 BCSC 584

Date: 20120423

Docket: E113741

Registry: Vancouver

Between:

J.C.M.

Claimant

And

A.N.A.

Respondent

Before: The Honourable Madam Justice Russell

Corrected Judgment: The first page of the judgment was corrected on April 25, 2012 where the spelling of the name of first counsel for the claimant was corrected and a second counsel for the claimant was added

Reasons for Judgment

Counsel for Claimant:

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Counsel for Respondent:

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Place and Date of Hearing:

Vancouver, B.C.

April 2, 2012

Place and Date of Judgment:

Vancouver, B.C.

April 23, 2012

- [1] This is a summary trial application under Rule 11-3 of the Supreme Court Family Rules by the claimant. The claimant seeks an order declaring 13 sperm straws stored at Genesis Fertility Clinic to be her sole property. The respondent opposes the application, requesting the sperm straws be destroyed by order of this court.

Background and Context

- [2] The parties agree on the facts. They are as follows.
- [3] In October 1998, J.C.M. and A.N.A. began a spousal relationship. During the course of that relationship, they each gave birth to one child using therapeutic insemination with sperm provided from a single sperm donor. A.N.A. gave birth to their first child in 2000 and J.C.M. gave birth to their second child in 2002.
- [4] The couple separated in 2006. They entered into a separation agreement in 2007.
- [5] The agreement provided for custody and support. The first child resides primarily with A.N.A., but visits J.C.M. on Mondays and Saturdays. The second child resides primarily with J.C.M., but visits A.N.A. on Wednesdays, Fridays and Sundays. J.C.M. pays A.N.A. child support for both children.
- [6] The agreement also divided all joint property of the relationship. The 13 sperm straws remaining from the sperm donor were inadvertently not divided under the agreement.
- [7] The sperm straws are stored at Genesis Fertility Centre in Vancouver. According to a registered nurse working at the centre, one of the purposes of Genesis is to "facilitate donor insemination with gametes from anonymous donors."
- [8] Evidence on the science and biology involved in therapeutic insemination was not provided to me for the purpose of this summary trial. I understand a sperm straw to be a vial that the sperm donation is placed in to be properly stored for future use, such as assisted insemination, as was the case here. At the risk of oversimplifying the biology involved, it is

also my understanding that "gametes" describe either a male's sperm or a female's ovum. I will use gametes interchangeably with sperm for the purpose of this decision, unless indicated otherwise.

- [9] The parties purchased the donor sperm from a sperm bank in the United States, known as Xytex, in 1999. They paid approximately \$250 per sperm straw.
- [10] At the time the parties chose their donor, Genesis advised them that this donor had "retired from the program." As a result, only the sperm remaining with Xytex was available. The donor would not be available for further donation.
- [11] J.C.M. met T.L. in 2009. They began a spousal relationship in 2010. T.L. wishes to have a child with J.C.M. using the remaining sperm straws so that their child will be biologically related to the children of her relationship with A.N.A.
- [12] J.C.M. emailed A.N.A in September 2011 and advised of her wish for T.L. to have a child using the sperm straws. She offered to purchase what she determined to be A.N.A.'s half interest in the sperm straws (6 ½ straws) for \$250 per straw. A.N.A. responded that after careful consideration she would prefer the sperm straws be destroyed. She requested that the parties meet in person to further discuss their "thoughts/feelings" on the issue. Whether that discussion took place is unclear.
- [13] Counsel for J.C.M. sent a letter to A.N.A. in October 2011 asking her to reconsider her position that the sperm straws be destroyed.
- [14] In the fall of 2011, J.C.M. researched the sperm donor database and found another family who had used the same sperm donor. She contacted the woman who was listed on the database as having given birth to children from that donor. She was advised that the woman did not have any "extra" sperm straws available.
- [15] In November 2011, J.C.M. contacted Xytex and learned that the donor of the sperm straws was no longer on file. She also learned Xytex had no contact information for the donor. She was advised it would be expensive to pay for an attempt to find the sperm donor.
- [16] Also in November 2011, J.C.M. confirmed with Genesis that the parties did not have a contract with either Genesis or Xytex that defined their rights to the sperm straws.
- [17] After receiving A.N.A.'s refusal to consent to the release of the sperm straws, and with no other way of obtaining sperm from the same donor, J.C.M. filed this application.

Issues

[18] The issues are as follows:

1. Are the sperm straws property?

2. Is it relevant for the court to consider the best interests of the existing children and any future donor offspring when deciding whether the claimant should be awarded the sperm straws?
3. Is insemination from an anonymous sperm donor proscribed in British Columbia?
4. If the answer to 1 is yes, how should the sperm straws be divided between the claimant and the respondent?

Issue 1: Are the sperm straws property?

- [19] The claimant argues that on the facts of this case, the sperm straws should be treated as property. She says that based on case law from the United States and the United Kingdom, as well as one case from Canada, if awarding the gametes to one party does not create a parental obligation on another party who does not wish to procreate, there is "no logical reason to treat the gametes as other than property."
- [20] The claimant cites first the Canadian case of *C.C. v. A.W.*, 2005 ABQB 290. This case involved, mainly, a child access dispute between the parties. The children, twins, were born to C.C. through a donation of sperm from A.W. However, the parties were also arguing over the four embryos that remained from the in vitro fertilization. A.W. refused to consent to the embryos' release given the difficulty he had faced from C.C. over access to the twins. He was concerned she would use them to have another child.
- [21] The court found that the embryos were C.C.'s property, stating at paras. 20-21:
- [20] When Mr. A.W. provided his sperm to assist in the conception of children, he did so as a friend of Ms. C.C.'s. He was not her spouse. They were not in a relationship of interdependence of some permanence. Their intimate relationship was over. He extended a courtesy to a friend by giving her a gift of his sperm. He knew what it would be used for. He anticipated that she would use it in order to conceive a child. Initial efforts in this endeavour were not successful. Success was not achieved by Ms. C.C. until more than three years after the gift was provided.
- [21] The gift was an unqualified gift given in order to conceive children. Mr. A.W. fully knew that Ms. C.C. could use the fertilized embryos when and as she chose. That was implicit in his gift to her. The remaining fertilized embryos remain her property. They are chattels that can be used as she sees fit. Mr. A.W. is not in a position to control or direct their use in any fashion. They shall be returned to Ms. C.C.. Conversely, as they are not Mr. A.W.'s property and he has no legal interest in them, he is not responsible for paying for their storage. That responsibility lies with Ms. C.C. who owns the embryos.
- [Emphasis added.]
- [22] The claimant also relies on the U.K. case of *Jonathan Yearworth & Ors v. North Bristol NHS Trust*, [2009] EWCA Civ 37. This case involved six men who had provided semen samples before undergoing chemotherapy for cancer. They had been advised by medical

professionals that the chemotherapy might make them infertile. The semen samples were intended to assist the men in biologically fathering children in the future should they need it. The samples were frozen and stored in a lab at the Southmead Hospital, for which the defendant Trust was responsible.

- [23] In June of 2003, the liquid nitrogen in the tanks used to freeze the samples fell below the required amount needed to keep the samples frozen. The samples thawed and the sperm perished. The six men brought an action in negligence for damage to property against the Trust claiming mental distress and psychiatric injury.
- [24] The court reviewed the history of common law's refusal to "recognize a substance generated by the body as capable of being owned": at para. 29. The origins of this were outlined at para. 30:
30. "Dominus membrorum suorum nemo videtur" (no one is to be regarded as the owner of his own limbs): Ulpian, Edict, D9 2 13 pr. The common law has always adopted the same principle: a living human body is incapable of being owned. An allied principle is that a person does not even "possess" his body or any part of it: *R v. Bentham* [2005] UKHL 18, [2005] 1 WLR 1057. Notwithstanding these principles, the law compensates by making an elaborate series of rules for the protection of the body and bodily autonomy: see, eg, *Airedale NHS Trust v Bland* [1993] AC 789. One consequence of the principles, albeit not recognised until the nineteenth century, is that, if our bodies cannot be our own property, it follows that they cannot be the property of other persons; and that therefore we cannot sell ourselves, or be sold, to others. Another consequence is that, if we do not own our bodies, we have no right to destroy them, i.e. to commit suicide; in this respect it was necessary for Parliament, by s.1 of the Suicide Act 1961, to legislate the necessary reform to the criminal law.
- [25] This principle was not only applied to living human bodies. The court discussed the case law surrounding ownership of corpses which was also specifically forbidden, with a limited exception: at paras. 31-34. The exception, founded in the Australian case of *Doodeward v. Spence* (1908), 6 C.L.R. 406 at 414 (H.C.A.), allowed for ownership where:
- a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial
- [26] The court reviewed more recent English cases that have also held that ownership of parts of a human corpse are not allowed unless they fit into the exception of *Doodeward*: *Yearworth*, at paras. 34-36.
- [27] Finally, the court considered jurisprudence on owning parts and products of a living human body. Without any English precedent to assist them, they turned to two cases from California: *Moore v. Regents of the University of California*, 51 Cal. (3d) 120 (Sup. Ct. 1990) and *Hecht v. The Superior Court of Los Angeles County*, 16 Cal. App. (4th) 836 (Ct. App.

1993). In Moore, the court disallowed the plaintiff's claim for ownership over organ tissue removed during surgery. The court in Hecht found that a testator's semen sample did amount to property for the purpose of being disposed of under his will. These cases will be discussed in more detail below.

- [28] Upon the facts of Yearworth, the court, in finding it was time for advancement in the "common law's treatment of and approach to the issue of ownership of parts or products of a living human body", ultimately concluded that the plaintiffs had a property interest in the semen samples: at para. 45(a), 45(f). However, they declined to so find on the basis of the principle in Doodeward stating, "We are not content to see the common law in this area founded upon the principle in Doodeward": at para. 45(d). They further explained their refusal to follow Doodeward at para. 45(d):
- (d) ... Such ancestry does not commend it as a solid foundation. Moreover a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical. Why, for example, should the surgeon presented with a part of the body, for example, a finger which has been amputated in a factory accident, with a view to re-attaching it to the injured hand, but who carelessly damages it before starting the necessary medical procedures, be able to escape liability on the footing that the body part had not been subject to the exercise of work or skill which had changed its attributes?
- [29] The court's finding of sperm as property was based on the following reasoning at para. 45(f):
- (f) In our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated:
- (i) By their bodies, they alone generated and ejaculated the sperm.
- (ii) The sole object of their ejaculation of the sperm was that, in certain events, it might later be used for their benefit. ...
- (iii) Ancillary to the object of later possible use of the sperm is the need for its storage in the interim. ...
- (iv) The analysis of rights relating to use and storage in (ii) and (iii) above must be considered in context, namely that, while the licence-holder has duties which may conflict with the wishes of the men, for example in relation to destruction of the sperm upon expiry of the maximum storage period, no person, whether human or corporate, other than each man has any rights in relation to the sperm which he has produced.
- (v) In reaching our conclusion that the men had ownership of the sperm for the purposes of their present claims, we are fortified by the precise correlation between the primary, if circumscribed, rights of the men in relation to the sperm, namely in relation to its future use, and the consequence of the Trust's breach of duty, namely preclusion of its future use.

- [30] The U.S. cases cited by the claimant all arose in the course of divorce and disputes over the use and possession of frozen embryos. In the first case, from Tennessee, *Davis v. Davis*, 842 S.W. 2d 588 (Sup. Ct. 1992), the parties attempted to have a child by in vitro fertilization using Ms. Davis's ova and Mr. Davis's sperm. They were unsuccessful. After their marriage broke down, there were still frozen embryos remaining. Ms. Davis wished to donate the frozen embryos to another couple. Mr. Davis wished the frozen embryos to be destroyed.
- [31] The court considered whether the frozen embryos were property. It stated at 597:
- We conclude that pre-embryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life. It follows that any interest that Mary Sue Davis and Junior Davis have in the pre-embryos in this case is not a true property interest. However, they do have an interest in the nature of ownership, to the extent that they have decision-making authority concerning disposition of the pre-embryos, within the scope of policy set by law.
- [32] Absent an agreement between the parties for disposition of the unused embryos, the case was decided by balancing the right to procreate with the right to avoid procreation. In this case, the balance fell in favour of Mr. Davis, particularly as Ms. Davis's intent was to donate the frozen embryos and not to use them herself: at 597-598, 603-604.
- [33] The claimant cites five additional U.S. cases involving disputes over frozen embryos: *Kass v. Kass*, 91 N.Y. (2d) 554 (Ct. App. 1998); *A.Z. v. B.Z.*, 431 Mass. 150 (Sup. Jud. Ct. 2000); *J.B. v. M.B.*, 783 A. (2d) 707 (N.J. Sup. Ct. 2001); *Litowitz v. Litowitz*, 146 Wash. (2d) 514 (Sup. Ct. 2002) and *In the Matter of the Marriage of Dahl and Angle*, 222 Or. App. 572 (Ct. App. 2008).
- [34] In *Kass*, the court agreed with Davis that agreements between the parties regarding the disposition of the frozen embryos on the dissolution of the marriage, or any other contingency, should be honoured: at 565. The court found the parties had previously agreed to donate the embryos to research should they be unable to come to a consensus on a disposition in the event of a divorce: at 562. The agreement was enforced.
- [35] The courts in *A.Z.* and *J.B.* both looked to previous agreements of the parties in order to determine their intention. However, finding them legally insufficient or ambiguous, the court instead weighed the right to procreate with the right not to procreate. They both found in favour of the right to avoid procreation.
- [36] In *Litowitz*, the couple involved received an ovum from a third party and, using Mr. Litowitz's sperm, had a surrogate carry their child. When their marriage broke down, a dispute arose over the remaining frozen embryos. The court based its decision solely on the contractual rights of the parties under the contract with the fertility centre. In that contract, the parties had agreed to allow the court to resolve the issue of the remaining embryos should they be unable to agree: at 519. The parties had also expressed a desire in the agreement to have the embryos thaw and expire after five years. Since the five years had expired, the court ordered the embryos thawed: 533-534.

[37] Finally, in Dahl, the court upheld the parties' agreement to have the wife instruct the fertility centre what to do with the frozen embryos if the parties could not agree: at 583. In this case, the wife wished the frozen embryos to be destroyed (or donated to research); the husband wished to have them donated for implantation. In the course of their decision, the court discussed whether the embryos were marital property at 579-581:

... Marital property "constitutes the entire class of property subject to the dispositional authority of the court in a marital dissolution action." *Massee and Massee*, 328 Or 195, 206, 970 P2d 1203 (1999). Given the statutory language, we first must determine whether the contractual right to dispose of frozen embryos is "personal property" for purposes of the statute. If it is not, then the court has no authority in a dissolution proceeding or judgment to deal with those contractual rights. If the court does have such authority, we will need to determine what distribution of that property is just and proper in all the circumstances.

...

Indeed, although the language of the embryo storage agreement does not control what constitutes personal property under ORS 107.105, it does indicate that the parties understood that husband and wife had the "exclusive right to possess, use, enjoy, or dispose of" frozen embryos that were stored under the agreement. ...

...

We acknowledge that there is some inherent awkwardness in describing those contractual rights as "personal property," as we discuss in more detail below. However, we nonetheless conclude that the contractual right to possess or dispose of the frozen embryos is personal property that is subject to a "just and proper" division ... The trial court did not err in treating it as such.

Given that conclusion, the question of what constitutes a just and proper distribution of that right presents a significantly more difficult question. The division of property rarely gives rise to this level of deeply emotional conflict and, notwithstanding the idea that some properties are unique and personally meaningful, a decision to award particular property to a party generally can be considered to be a decision that is ultimately measured in monetary (or equivalent) value. A decision about the contractual right to direct the disposition of embryos cannot reasonably be viewed that way, as the parties appear to agree. As such, our case law controlling the just and proper distribution of property in a marital dissolution proceeding--all of which addresses the distribution of property to which some sort of monetary value can be ascribed--offers little assistance in our task here. Nor can we identify any express source of public policy in our constitution, statutes, administrative rules, or elsewhere that could inform the distribution of property of this nature.

[38] The claimant submits that the U.S. cases stand for the proposition that the "pivotal question is whether procreation creates a parental obligation on the party who wants to restrain procreation." Where it does not, the gametes must be treated as property.

[39] The respondent submits that there is no Canadian legislation, federal or provincial, or Canadian case law that treats gametes as property. She argues the issue of treating sperm as property is a moral one. She states that the question of whether sperm is property should be answered in the negative.

[40] The respondent cites several academics in support of her position. In her article "Sperm as Property" (1995) 6:2 Stan. L. & Pol'y Rev. 57, Dr. Bonnie Steinbock discusses the moral issues surrounding treating sperm as property. She argues at 57 that:

To characterize something as property suggests that certain things may be done with it ... If there are entities that ought not to be treated in these ways, if, that is, there are good moral reasons why they should not be treated in these ways, then they should not be considered as property.

[41] She discusses the U.S. cases of Hecht, Moore and Davis, focusing mainly on Hecht.

[42] She notes that in Moore, the court "declined to answer the question of how much of the law of property applies to body parts": at 59-60. Instead, they found that courts should turn to statute "for guidance on the disposition of human biological materials": Moore, at 137; see also Steinbock, at 59-60.

[43] Dr. Steinbock points out that this approach was followed in Hecht: Steinbock, at 60. Hecht, as was noted above, involved a dispute over whether a deceased testator could bequeath his frozen semen to his girlfriend. The court found that the testator had, at the time of his death, an interest in his sperm and that the sperm would constitute property under the applicable probate legislation; general property law did not govern under the circumstances. The court cited Davis, noting that the interest was in an "interim category" given the sperm's "potential for human life": Hecht, at 846.

[44] Dr. Steinbock stated at 60:

Thus, Hecht, Moore and Davis all represent judicial decisions to eschew a categorical approach to the ownership issues raised by disputes over bodily parts and gametes. In this new and challenging area, the law is shaped by application of public policy to the unique facts of each case.

[45] Dr. Steinbock discusses three possible moral issues with sperm as property: posthumous reproduction (as arose in Hecht), the commercialization of reproduction and the treating of the body as a commodity: at 62-66.

[46] She concludes that it is only after we determine the purpose the sperm will be used for that we will be able to determine whether it is property: at 62, 66. For example, she states, "If there is a strong moral, legal, or policy argument against allowing individuals to store sperm for the purpose of posthumous reproduction, then sperm should not be considered property for that purpose": at 66.

- [47] I note that since the Steinbock article was written, the California Court of Appeal has once again heard a petition from Ms. Hecht: see *Hecht v. The Superior Court of Los Angeles County*, 50 Cal. App. 4th 1289 (1996) [Hecht, 1996] (Note: this case was ordered not to be published in the Official Reports by the Supreme Court of California on January 15, 1997: see 1997 Cal. LEXIS 131). With the direction that the testator had a property interest in the sperm for the purposes of disposing of it in his will, the Court of Appeal had sent the matter back to the trial court. There, the court had given Ms. Hecht 20% of the sperm vials based on a settlement agreement of the dispute between herself and the testator's children over the will. She was awarded three of the 15 sperm vials. She petitioned for the remaining vials, but was denied. She appealed: Hecht, 1996, at 1293-1294.
- [48] The Court of Appeal addressed under which legal instrument the sperm vials should be disposed of: the will or the settlement agreement. The court stated that the sperm was a "unique form of "property"" and was "not subject to division through an agreement": at 1295. While Ms. Hecht could use the sperm vials to conceive her deceased boyfriend's child, even she was not legally entitled to sell or donate the sperm to another. The disposition was determined only by the intent of the donor; the sperm was property for him only: at 1295-1296.
- [49] The respondent cites two other scholarly articles in support of her application. The first is from Dr. Ernest Waintraub entitled "Are Sperm Cells a Form of Property? A Biological Inquiry into the Legal Status of the Sperm Cell" (2007-2008) 11 *Quinnipiac Health L.J.* 1. Dr. Waintraub cites the Davis and Hecht cases and discusses the courts' position that a frozen embryo is neither a person nor property, but an "interim category": at 1-7.
- [50] Dr. Waintraub discusses the biology of sperm. He notes that sperm is "an indispensable contributor to the creation of a person" and it is from this that it derives its value: at 11.
- [51] Dr. Waintraub notes that critics of the Hecht decision argue the only way to predictably and consistently determine disputes resulting from the disposition of sperm will be in property law. Scientific advancements that legislation cannot keep up with, as well as the inadequacy of other areas of the law to compensate for lost sperm (the example given is identical to the facts from *Yearworth*), result in property law being the appropriate choice for these actions. He rejects these arguments noting that an action in negligence would give rise to mental anguish and other claims not known in property law. He also points out that property law may give rise to circumstance where the donor's kin is making determinations for the sperm's disposition if the donor dies without outlining his intent. This may lead to a disposition inconsistent with the donor's wishes: at 14.
- [52] Dr. Waintraub concludes that the Hecht decision was "rightly decided" in that it aligns with scientific conclusions. He states that property law is not the proper tool to analyze legal issues arising from stored sperm: at 16.

[53] Finally, the respondent cites Heidi P. Forster's article "Law and Ethics Meet: When Couples Fight Over their Frozen Embryos" (2000) 21:4 Journal of Andrology 512. The author reaches the following conclusions regarding the consensus of the case law for disputes over frozen embryos at 514:

1. Embryos are considered neither persons nor property, but "special entities" that have the potential to become persons and, therefore, warrant respect;
2. Pre-procedural agreements between couples regarding the disposition of the embryos should be considered a binding contract;
3. In the absence of such an agreement, the party wishing to avoid procreation should be awarded the embryos, except in circumstances where the other party has no other way of becoming a parent; and
4. The rights of both donors should be considered equally.

Analysis

- [54] I will start this analysis by first commenting that I appreciate that this is a difficult situation for both parties. In determining whether the sperm donation they used to conceive their children is property, I am in no way devaluing the nature of the substance at issue. I do recognize that sperm used to conceive two children for two loving parents does not have the same emotional status as a vehicle or a home. Ultimately, however, this claim involves a dispute over the sperm straws and their disposition. The claimant wishes to use them to conceive another child; the respondent wishes to have them destroyed. I must, therefore, use the tools at my disposal to make a determination on whether the sperm straws are property and, if so, how they should be divided between the parties. There is no intent on my part to trivialize this matter.
- [55] After careful consideration of the authorities provided to me, I am persuaded that on the facts of this case the sperm straws that remain at Genesis should be treated as property and divided between the claimant and respondent as such. I rely mainly on the Canadian case of C.C. and the U.K. case of Yearworth, although I recognize that there are important distinctions between those cases and the facts before me.
- [56] While the case of C.C. involved a dispute over frozen embryos, in my view many of its facts are analogous to the case before me. In C.C., the sperm used to conceive the twins was given as a gift to the plaintiff. Here, the parties purchased the sperm. Either way, were the sperm to be considered property it would be the property of the person(s) to whom it was given or by whom it was purchased. The starting point is, therefore, the same in both cases.

- [57] The court in C.C. had no reservations about finding that the sperm became the property of the plaintiff to do with as she chose once it was given to her. In my view, this simple approach is equally applicable to the facts of this case. Once the claimant and respondent purchased the sperm straws, those sperm straws were their property to be used for their benefit.
- [58] Further support for this position is found in the Yearworth case. This decision provided a much more detailed basis for a finding of sperm as property. As is acknowledged in that case, typically the common law did not allow for human beings, living or deceased, or their body parts and products to be considered property. This was, no doubt, for good reason. However, I agree with the court of appeal's finding that medical science has advanced to a point where the common law requires rethinking of this point.
- [59] It is helpful to return to how the court commenced its analysis for the purposes of the claim in negligence at para. 28:
28. A decision whether something is capable of being owned cannot be reached in a vacuum. It must be reached in context; and in this section of our judgment the context is whether an action in tort may be brought for loss of the sperm consequent upon breach of the Trust's duty to take reasonable care of it. The concept of ownership is no more than a convenient global description of different collections of rights held by persons over physical and other things. In his classic essay on "Ownership" (Oxford Essays in Jurisprudence, OUP, 1961, Chapter V) Professor Honoré identified 11 standard incidents of ownership but stressed that not all of them had to be present for ownership to arise. He suggested that the second incident was "the right to use" and he added, at p.116, that:

"The right (liberty) to use at one's discretion has rightly been recognised as a cardinal feature of ownership and the fact that certain limitations on use also fall within the standard incidents of ownership does not detract from its importance "

We have no doubt that, in deciding whether sperm is capable of being owned for the purpose which we have identified, part of our enquiry must be into the existence or otherwise of a nexus between the incident of ownership most strongly demonstrated by the facts of the case (surely here, the right, albeit limited, of the men to use the sperm) and the nature of the damage consequent upon the breach of the duty of care (here, their inability to use it notwithstanding that this was the specific purpose for which it was generated).

- [60] Surely, here the parties, having purchased the sperm straws, have the choice to use them. In fact, unlike the circumstances in Yearworth, the parties here did use the sperm straws. They had two children from that use. While there may be a limit on the use the parties can make of the gametes and while they may be prohibited from certain uses of the sperm by the Assisted Human Reproduction Act, S.C. 2004, c. 2 (this point was not argued before me and, therefore, remains unclear) they still can use and have used the sperm. As well, I note that the plaintiffs in Yearworth were also limited in the use of their sperm by legislation.

- [61] There are some difficulties with applying the Yearworth decision to the facts of the case before me. The court based its finding of the men's sperm as property on the basis that the men were the donors of that semen. They had ejaculated it. The intention was to use it for their benefit in the future if necessary: at para. 45(f).
- [62] Furthermore, the court stated explicitly that "for the purposes of their claims in negligence, the men had ownership of the sperm": at para. 45(f) [emphasis added].
- [63] In this case, I am dealing neither with a claim in negligence nor sperm that came from either of the parties. I do not find, though, that this makes the need for advancements in the common law to keep up with medical science to be any less compelling. In fact, the Court of Appeal in Yearworth concluded that advances were needed in common law regarding the issue of ownership of body parts and products for the purposes of the negligence claim before them as well as for other purposes: at para. 45(a). Additionally, while the court was making a determination regarding semen samples intended to be used by the men who had produced them, they did not ignore that sperm could be owned by another; they simply pointed out they were not asked to determine this point: at para. 45(b).
- [64] Overall, I find that along with the parties' right to use the sperm straws for their benefit, the parties have an ownership interest in the sperm straws.
- [65] I do not find the U.S. cases cited by the claimant to be of much assistance in this case. They deal with frozen embryos where, in most cases, the parties each contributed a gamete.
- [66] I do note that they assist the claimant's case in that embryos have more "potential for human life" than a gamete alone. Accordingly, the argument that sperm is in the same "interim category" between person and property is not as compelling.
- [67] I do agree, however, with the claimant that the U.S. cases demonstrate the importance of balancing the right to procreate with the right to avoid procreation. But there is no need to balance these rights in this case. A.N.A. will not be the biological parent of any child conceived using the sperm straws. She will not have any parental obligations or responsibilities to any child conceived whether the child is conceived by T.L. or J.C.M. A.N.A.'s right to avoid procreation is not being infringed by dividing the sperm straws between the owners as property.
- [68] I have also considered the respondent's arguments, but I find I must reject them for several reasons. First, the court is ill equipped to handle moral and philosophical arguments. While I appreciate the approach suggested by Dr. Steinbock, it is not the role of the court to choose the correct approach to such existential questions. As well, Dr. Steinbock's assertion that we first need to determine what "may permissibly be done" with sperm - i.e. whether it can be donated, sold, stored etc. - before we can determine whether it is property is of no help here. In this case, the sperm has already been donated, sold and stored.

- [69] Second, it is clear to me in the context of this dispute that the sperm is the property of the parties. The sperm has been treated as property by everyone involved in the transaction, from the donor to Xytex, Genesis and the parties. It has been purchased; the parties have a right to deal with it. They have made use of it to their benefit. The respondent's moral objections to the commercialization of reproduction or the commoditization of the body seem to me to be too late. Certainly, they are interesting arguments for the respondent herself to make given she participated in purchasing and using a donation of sperm from an anonymous donor.
- [70] I recognize that in Canada the federal government has prohibited the purchase of sperm (and ova). Section 7(1) of the Assisted Human Reproduction Act reads:

Purchase of gametes

7. (1) No person shall purchase, offer to purchase or advertise for the purchase of sperm or ova from a donor or a person acting on behalf of a donor.

(While much of this Act was recently declared ultra vires the federal government in the recent Supreme Court of Canada decision *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, section 7 was not challenged: at para. 10.) However, for the reason outlined above, that the sperm has been treated as property up until this point, in my view the legislation does not dictate or even influence whether or not the gametes in this case are property.

- [71] Furthermore, I note that in her article Dr. Steinbock acknowledges that, while not ordinarily the case, a person can own property he/she is not entitled to sell. The example she gives is of the Queen of England, who owns land and artifacts she is not entitled to dispose of: Steinbock, at 61.
- [72] Third, I do not find either the Waintraub or Forster articles helpful to the respondent's case. The Forster article addresses the same US cases cited by the claimant. It offers nothing towards an analysis of whether or not sperm should be treated as property.
- [73] The Waintraub article opines that property law is not the proper area of law to address issues arising from sperm donation. He suggests other areas, such as negligence, as being more helpful. This is not the reality of the case before me, however. There is no claim in negligence here.
- [74] Furthermore, Dr. Waintraub applauds the Hecht case for finding that property law should not govern the disposition of the testator's sperm. The testator's sperm could not otherwise be disposed of by agreement of others, but only by his own intent. Even the beneficiary of the bequest could not dispose of the sperm. We are well past that point on the facts of this case. The donor has provided his sperm, by sale or donation, to Xytex (or to another party from whom Xytex acquired it). The parties then purchased the sperm from Xytex. For that reason, even if I found Hecht applicable to these circumstances, the precedent it establishes has already been made inapplicable. Consequently, this analysis is of little help.

[75] On the facts of this case, I find that the gametes should be treated as property for the purpose of dividing them upon the dissolution of the spousal relationship of the parties. The parties are joint owners of the sperm they used in their successful attempts to conceive children. I will deal with the division after I address issues 2 and 3.

Issue 2: Is it relevant for the court to consider the best interests of the existing children and any future donor offspring when deciding whether the claimant should be awarded the sperm straws?

[76] The respondent argues that an order awarding the sperm vials to J.C.M. is not in the best interests of their two children. She argues it is not in the best interests of any child to be conceived using the sperm. She states that the birth of another half-sibling to two children who are already half-siblings "complicates and further fragments the two households currently established" by J.C.M. and herself. Furthermore, if J.C.M.'s and T.L.'s relationship were to fail, three children would be split among three households and three families.

[77] The respondent relies on findings made by Madam Justice Adair in *Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656. In *Pratten*, the plaintiff was conceived through insemination with sperm from an anonymous donor. Ms. Pratten wished to discover information about her biological father, but found that there was no legal basis on which she was entitled to the information. She brought a constitutional challenge based on ss. 15 and 7 of the Canadian Charter of Rights and Freedoms. The s. 15 claim sought the government's recognition of the "questions about biological origins and feelings of loss and incompleteness" experienced by adoptees through the enactment of the Adoption Act, R.S.B.C. 1996, c. 5: at paras. 3, 6. Through the Adoption Act, information about adoptees must be recorded and preserved. Adoptees also have the opportunity to access that information. No such legislation applied to donor offspring.

[78] The argument for a violation of s. 7 was that donor offspring's liberty and security rights were infringed as the Province had failed to protect "fundamental aspects of their personal autonomy and health" through legislation: at para. 7.

[79] Madam Justice Adair made the following findings regarding the circumstances of anonymous donor offspring, which are relied on by the respondent in this case, at para. 111:

[111] I summarize my findings and conclusions, based on this evidence, as follows:

- (a) donor offspring fear that their health can be compromised, and may be seriously compromised, by the lack of information about their donor. ...;
- (b) because of a lack of information, donor offspring can face delayed medical treatment, and an inability to have conditions that are inherited or genetic diagnosed and treated. ...;
- (c) it is important, psychologically and medically, for donor offspring to have the ability to know identifying and non-identifying information about their donor, and their psychological and medical needs in that respect are substantially the same as adoptees;

- (d) for donor offspring, having information - both identifying and non-identifying - matters deeply, both to complete their personal identities and to alleviate the stress, anxiety and frustration caused by not knowing. ...;
 - (e) donor offspring experience sadness, frustration, depression and anxiety - in other words, they suffer psychological and psychosocial difficulties - when they are unable to obtain information. They feel the effects both for themselves and, when they become parents, for their own children;
 - (f) donor offspring commonly, and legitimately, fear inadvertent consanguinity. ...;
 - (g) the secrecy that often surrounds the process of conception, even when done with the best of intentions, can have devastating effects on donor offspring when the truth is revealed. Moreover, knowing the truth (that the other biological parent was a donor), but having no means to discover what the truth means for one's life, can be a significant source of anxiety, depression and frustration for donor offspring;
 - (h) while recognizing that parents have an important and legitimate interest in deciding what their child will know and when she or he will know it, anonymity and secrecy tips the balance heavily in favour of donors and parents, and away from the best interests of donor offspring; and
 - (i) donor offspring and adoptees experience similar struggles, and a similar sense of loss and incompleteness. However, donor offspring do not have the benefit of the kind of positive institutions and legislative support provided to and for adoptees in B.C.
- [80] The claimant argues that an analysis by the court regarding the best interests of the children, existing or potential, has no place in this petition. She says that whether the children are affected by an additional child in the family is not relevant to her right to procreate. The respondent is attempting to restrict the claimant's and her partner's right to procreate by having the court complete an analysis on the best interests of the children. The claimant states the respondent is using the best interests of the children as a "proxy for her interests."
- [81] Furthermore, the claimant points out that the respondent could not obtain an order restricting the claimant from finding the original sperm donor and obtaining more semen. She would also be unable to obtain an order restricting the claimant from having another child herself; that child would be biologically related to one of their children.

Analysis

- [82] In my view, an analysis of the best interests of the children born to the parties, as well as any potential child conceived by the claimant and her partner, is not appropriate on the circumstances of this case.

- [83] In regard to a child who may possibly be conceived using the sperm donation jointly purchased by the parties, an analysis of the best interests of that child is, at best, speculative. Accordingly, it would be both impractical and improper for me to engage in such an exercise.
- [84] I take no exception to the findings of fact made by Madam Justice Adair in Pratten with respect to children born of anonymous sperm donors. However, those facts were found in an entirely different context than the case before me. As will be discussed further below, the issue in that case had to do with disclosure of medical, social and personal information of sperm donors to their biological children. The findings from Pratten have no role to play in a case where two former partners have a dispute over the use of gametes they jointly purchased.
- [85] With respect to the children's best interests, I also decline to engage in such an analysis. Hypothetically, if this case involved a male, A, and a female, B, B would not be able to stop A from fathering children with as many other females as he wished. The children conceived by the other females would all be half siblings of B's children. Yet, B would have no right based on the best interests of her children to restrict A's right to procreate. I do not see why this situation should be any different. In fact, for me to engage in any such analysis would be borderline discriminatory to couples, such as the parties, who must conceive through sperm donation should they wish to have children that are biologically their own.
- [86] For these reasons I will not engage in a discussion of the best interests of the children.

Issue 3: Is insemination from an anonymous donor proscribed in British Columbia?

- [87] The respondent submits that based on the Pratten decision, anonymous sperm donation is proscribed in British Columbia. Her argument goes as follows. The Province argued in Pratten that "Ms. Pratten seeks an unprecedented remedy, and that, in effect, she seeks to have an entire legislative scheme - one that would prohibit, both prospectively and retrospectively, anonymous gamete donation - created by judicial decree": at para. 10. Despite this argument, the court found that assisted reproduction using anonymous sperm donation is not in the best interests of donor offspring: at para. 215. The court also found the Adoption Act and the Adoption Regulation, with a limited exception, violated s. 15 of the Charter because they created a distinction between adoptees and donor offspring that is discriminatory. Accordingly, the respondent says, the potential result asserted by the Province was realized.
- [88] The claimant argues that the respondent's interpretation of Pratten is not correct. She says that Pratten concerned keeping records for anonymous sperm donations, not about conceiving with anonymous sperm donations.

- [89] The claimant says that Pratten does not restrict an individual's right to obtain and use anonymous sperm donation in B.C. It is simply a Charter case directed at the Province's failure to protect donor offspring. She acknowledges that in the future it may require fertility clinics in B.C. to use only the sperm donated by those willing to release their identity. Nevertheless, it has no application in the case before this court.
- [90] The claimant argues Pratten does not require the production of records from other jurisdictions, such as in this case where the records, if there are any, are in the U.S.

Analysis

- [91] I do not accept the respondent's assertion that I should determine this application on the basis that anonymous sperm donation is proscribed in British Columbia. I come to this conclusion for several reasons.
- [92] The first two reasons have to do with procedural aspects of Pratten. The declaration that the Adoption Act and the Adoption Regulation unjustifiably contravened s. 15 of the Charter was stayed for 15 months from the date of judgment of May 19, 2011. Furthermore, Pratten is on appeal to the British Columbia Court of Appeal. It was heard February 14 and 15, 2012. Judgment was reserved. Accordingly, Pratten itself has not been fully resolved.
- [93] Moreover, a determination by this court regarding the legality of anonymous sperm donation in B.C. is outside the scope of this application. Substantively, Pratten dealt with the larger social issue of whether donor offspring should be entitled to information regarding their origins in the same manner as adopted children are. This case before me requires a determination of the disposition of gametes bought by the parties in order to conceive children. There is no basis for me to make sweeping declarations regarding the legality of anonymous sperm donation in British Columbia.
- [94] In any event, the sperm here has already been donated anonymously. The parties have already purchased it. Even if Pratten were to hold what the respondent asserts it does, it is too late to apply in this case.

Issue 4: If the answer to issue 1 is yes, how should the sperm straws be divided amongst the claimant and the respondent?

- [95] The parties lived in a spousal relationship. Upon the dissolution of that relationship they entered into an agreement to divide their joint assets. Clearly, they had it in mind to divide their assets fairly. However, they inadvertently failed to divide the sperm straws they had jointly purchased.

[96] As is consistent with their approach, I find that the remaining 13 gametes should be divided between the parties. Assuming it is not possible, or that it is impractical, to divide one sperm straw in half, I award seven sperm straws to the claimant, J.C.M., and six sperm straws to the respondent, A.N.A. J.C.M. will pay A.N.A. \$125 for the extra one-half straw she is receiving. Should A.N.A. wish to sell her share of the gametes to J.C. M. that will be her prerogative. She may dispose of them as she wishes.

Costs

[97] Due to the nature of this case, I think it appropriate that each party bear their own costs.

"L.D. Russell J."

The Honourable Madam Justice Loryl D. Russell

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