

CANADA / JUDGMENT

K.L.W. v. Genesis Fertility Centre

2016 BCSC 1621

COURT

Supreme Court of British Columbia

DECIDED

31 August 2016

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2016 BCSC 1621 K.L.W. v. Genesis Fertility Centre

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.L.W. v. Genesis Fertility Centre,

2016 BCSC 1621

Date: 20160831

Docket: S166962

Registry: Vancouver

Between:

K.L.W.

Petitioner

And

Genesis Fertility Centre

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(Redacted Version)

Counsel for the Petitioner:

Lawrence A. Kahn, Q.C.

& J. Aucoin

The Respondent:

No one appeared

Place and Date of Hearing:

Vancouver, B.C.

August 17, 2016

Place and Date of Judgment:

Vancouver, B.C.

August 31, 2016

INTRODUCTION

[1] The petitioner, K.L.W., applies for the following relief:

1. A declaration that the human reproductive material of [A.B.], deceased, (the "Reproductive Material") is the sole legal property of the petitioner.
2. The Reproductive Material shall be released by Genesis Fertility Centre to the petitioner, K.L.W., for her use absolutely, to create embryos for the reproductive use of the petitioner, and for no other purpose.
3. This file shall be sealed.

[2] [A.B.], the petitioner's husband, died intestate at [content redacted].

[3] Throughout his life, [A.B.] struggled with [content redacted]. The petitioner and [A.B.] shared an intense desire to have a family. However, [A.B.] suffered from a succession of severe medical conditions related to [content redacted] that disrupted and postponed their plans to conceive a child. The petitioner and [A.B.] agreed that she would use the Reproductive Material to conceive a child, regardless of whether [A.B.] died as a result of his [content redacted].

[4] Unfortunately, [A.B.] passed away without giving his written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo, as required by s. 8(1) of the Assisted Human Reproduction Act, S.C. 204, c. 2 ("AHRA") and ss. 3(1) and 4(1) of the Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137 (the "Regulations").

[5] While Genesis Fertility Centre ("Genesis") has continued to store the reproductive material, it will not release that material to the petitioner without [A.B.]'s written consent.

[6] Genesis, although named and served as a respondent, did not participate in these proceedings. Accordingly, the petition is unopposed.

ISSUES

- [7] This application raises the following issues:
- (a) Is the Reproductive Material property?
 - (b) If so, did property in the Reproductive Material pass to the petitioner as the sole beneficiary of [A.B.]'s intestate estate?
 - (c) In the circumstances of this case, may the Court order the release of the Reproductive Material to the petitioner, notwithstanding the lack of the donor's written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo?

FACTS

- [8] From the affidavit materials filed in support of the petition, I make the following findings of fact.
- [9] The petitioner is a [content redacted].
- [10] The parties met in [content redacted], began to live together in [content redacted] and were married on [content redacted].
- [11] At the age of 10 months, [A.B.] was diagnosed with [content redacted]. Throughout his childhood, and as an adult, [A.B.] suffered [content redacted]. Despite numerous hospitalizations due to [content redacted], [A.B.] was able to graduate from high school in 1996 and win a [content redacted] to a community college. However, as a result of his [content redacted], [A.B.] had to forego his [content redacted]. Between 1996 and 2002, he spent approximately half of his time in [content redacted] Hospital.
- [12] From the beginning of their relationship, the petitioner was aware of [A.B.]'s medical problems. Throughout their relationship, she was a devoted and caring partner to [A.B.]
- [13] In September 2000, the parties moved to [content redacted] to enable the petitioner to complete her Bachelor of Arts degree in Psychology.
- [14] By 2002, with the benefit of an effective pain control regime, [A.B.] enrolled in a community college [content redacted] program. He also worked as a sales associate at a [content redacted] store in the summer of 2003.
- [15] In [content redacted], the petitioner obtained her Bachelor of Arts degree in psychology.
- [16] In 2004, [A.B.] secured employment in [content redacted], while the petitioner returned to the University [content redacted] to study [content redacted].

- [17] In 2004, [A.B.]'s treating physicians first advised the parties that [A.B.] might require a [content redacted]. [A.B.] continued to work at the [content redacted] and graduated in March 2005 from the community college with a diploma in business administration and a certificate of [content redacted].
- [18] [content redacted]
- [19] [content redacted]
- [20] By September [content redacted], [A.B.] was no longer able to work due to his medical complications.
- [21] [content redacted]
- [22] From an early stage in their relationship, the parties discussed having children together.
- [23] Both the petitioner and [A.B.] understood that because [content redacted], they would likely require in-vitro fertilization in order to conceive a child. They decided to postpone having children until they completed their post-secondary education and until [A.B.]'s health stabilized.
- [24] While they waited for the [content redacted], the parties began to take steps to ensure that they could have a child, even if [A.B.] died.
- [25] The [content redacted] clinic referred the parties to Dr. [content redacted], a fertility specialist. K.L.W. and [A.B.] wanted to make all of the arrangements and complete the fertility procedures, so they could have a child even if [A.B.] died [content redacted], or following surgery.
- [26] [content redacted]
- [27] [content redacted]
- [28] While [A.B.] was still in the hospital and receiving treatment for ongoing complications, he and the petitioner met with the fertility specialist, Dr. [content redacted], who advised that [A.B.] would have to wait until he was able to reduce his medications and his health was more stable before proceeding with the parties' plan to have children.
- [29] In early 2008, the parties returned to British Columbia where the petitioner began her final practicum for her Bachelor of [content redacted] degree and [A.B.] obtained employment at a [content redacted].
- [30] In June 2008, [A.B.] was hospitalized again in Vancouver for [content redacted].
- [31] In August 2008, K.L.W. completed her Bachelor of [content redacted] and obtained employment as a [content redacted] in a community [content redacted].

- [32] By 2009, [A.B.]'s health stabilized, enabling him to reduce his medications. The parties decided to renew their efforts to have a child. They met with Dr. [content redacted], a director of Genesis in Vancouver, British Columbia. [A.B.] also met with an urologist at Vancouver General Hospital to discuss undergoing an MESA/TESA procedure for the extraction of his sperm. [content redacted].
- [33] On January 29, 2009, [A.B.] had a further semen analysis, and signed a consent form authorizing Genesis to release the results of that analysis to the petitioner.
- [34] [content redacted]
- [35] Nonetheless, in October 2009, [A.B.] underwent the MESA/TESA procedure under sedation at UBC Hospital. His sperm was extracted, frozen, and stored at Genesis.
- [36] [content redacted]
- [37] Between March and August 2010, [A.B.] was hospitalized for treatment of complications with his pain medications. From [content redacted], [A.B.] was hospitalized on multiple occasions for [content redacted] infections.
- [38] In late January 2011, the parties received advice that [A.B.] would not be discharged from the hospital until he [content redacted].
- [39] [content redacted]. However he suffered a post-operative infection, resulting in further surgery on [content redacted]. By [content redacted], [A.B.]'s kidneys ceased to function and sadly, on [content redacted], [A.B.] died as a result of multi-organ failure.
- [40] Shortly before [A.B.] passed away, the petitioner promised him that she would have their baby.
- [41] Before [A.B.]'s death, no one advised the petitioner or [A.B.] that his written consent was required for the petitioner to make use of his stored sperm for reproductive purposes in the event of his death.
- [42] During the time [A.B.] and the petitioner consulted with Genesis, the respondent had no consent form for recording a donor's written consent to his spouse's reproductive use, following his death, of his stored sperm.
- [43] The petitioner only learned of the requirement for [A.B.]'s written consent to her use of his human reproductive material as a result of a telephone conversation with Dr. [content redacted] shortly after her husband's death. Dr. [content redacted] advised that Genesis was able to store [A.B.]'s sperm. However, he also informed the petitioner that under Canadian law, she would not be able to use the sperm to conceive a child in Canada when [A.B.] had not stipulated his consent in a will.

- [44] By a note dated March 6, 2012, Dr. [content redacted] confirmed that Genesis was not able to use the stored sperm for reproductive purposes in Canada in circumstances where [A.B.] had died without providing his written consent in a will.
- [45] I pause here to note that rather than requiring any kind of testamentary grant or consent, s. 8(1) of the AHRA requires a donor to provide his written consent, in accordance with the Regulations, to the use of the human reproductive material, (in this case by his spouse), for the purpose of creating an embryo. Later in these reasons I will return to the Regulations.
- [46] Genesis has also informed the petitioner that in the event she wishes to destroy the stored sperm, she must consent in writing to its disposal. By the terms of Genesis' consent for disposal form, the signatory transfers all property in the stored sperm to Genesis for the purpose of disposing of the sperm and waives "all rights, claims or causes of action related to the property in storage and disposal of these Specimens".
- [47] Since [A.B.]'s death, the petitioner has paid more than \$1,000 to Genesis in storage fees for [A.B.]'s sperm. The Genesis invoices, addressed to the petitioner, refer to the "storage fee for your sperm."
- [48] During [A.B.]'s lifetime, he and the petitioner advised P.M., his [content redacted] social worker; A.T., a registered nurse at the [content redacted] clinic; his aunt; his brother-in-law; and his family physician, Dr. R., of their plan to conceive a child and have a family, even if [A.B.] passed away.
- [49] P.M. has sworn an affidavit providing a detailed account of various discussions he had with both the petitioner and [A.B.] regarding their plan to have a baby, and how [A.B.]'s [content redacted], subsequent complications and [content redacted] delayed their plan. P.M. has also deposed that on February 2, 2011, [A.B.] told him that he wanted the petitioner to have their baby so that she would have a child in her life should he pass away.
- [50] On or about April 4, 2007, while [A.B.] was awaiting the [content redacted] in [content redacted], he and the petitioner met with A.T., a nurse who specializes in [content redacted] reproductive issues. The petitioner and [A.B.] discussed their plan to have a family, and to conceive a child, even if [A.B.] died. A.T. counselled them on the potential obstacles; including the very real risk that [A.B.] might not live to see their child grow up. The petitioner and [A.B.] both confirmed that they wanted to proceed with their plan to have a child.
- [51] Dr. R. provided two letters, attached as exhibits to K.L.W.'s affidavit in support of the petition. In his first letter dated June 23, 2011, Dr. R. confirmed that he and [A.B.] had discussed in great detail his patient's plan to have a family with the petitioner, and that on several occasions they discussed the details of the procedure for sperm extraction and storage.
- [52] On June 30, 2016, Dr. R. provided a second letter, in which he stated:

This is an undated letter about [J's] wishes.

As his family doctor [until] the time of his unfortunate death in 2011, I want to reiterate the fact that [J] and I had numerous discussions about his plans to have sperm collected and preserved for possible future fertility treatment. His wishes also were for his wife, [K], to proceed with the plans of trying to conceive with his preserved sperm, in the event that he may pass away due to the complications of his disease. I also need to note that both him and his wife [were] very sure about [their] wishes for a possible future pregnancy.

[53] [A.B.] died without a will and leaving a spouse but no surviving descendants. Under s. 20 of the Wills Estates and Succession Act, S.B.C. 2009, c. 13, ("WESA") his estate must be distributed to the petitioner:

20 If a person dies without a will leaving a spouse but no surviving descendant, the intestate estate must be distributed to the spouse.

[54] At the time of his death, [A.B.] had no significant assets. The parties' joint savings account passed to the petitioner by survivorship, as did the vehicle they jointly owned. In these circumstances, the petitioner was not required to apply for a Grant of Administration.

[55] The petitioner is the sole beneficiary of [A.B.]'s estate. No other person claims any interest in [A.B.]'s Reproductive Material.

[56] I find that during their marriage, the petitioner and [A.B.] made a carefully considered plan to try to conceive a child using the Reproductive Material. The petitioner and [A.B.] agreed that even in the event of [A.B.]'s death, the petitioner would use the Reproductive Material for the purpose of conceiving a child through in-vitro fertilization. [A.B.] expressed his consent to his spouse's use of the stored sperm not only to the petitioner, but also to his [content redacted] social worker, to the nurse who counselled the parties on [content redacted] reproductive issues, and to his family physician.

[57] Further, in their consultations with Dr. [content redacted], the parties both expressed their wish to have a child together through in-vitro fertilization, using the sperm retrieved from [A.B.] and stored at Genesis.

[58] Unfortunately, no one informed [A.B.] of the requirement for his written consent to the petitioner's use of the Reproductive Material.

[59] In light of [A.B.]'s enduring wish, throughout their relationship, to conceive a child with the petitioner, I have no doubt that had the requirement for written consent been brought to his attention, [A.B.] would have promptly given his consent in writing to the petitioner's use, following his death, of the Reproductive Material.

DISCUSSION AND ANALYSIS

(a) Is the Reproductive Material Property?

- [60] In particular contexts, courts in various jurisdictions have held that human sperm or ovums stored for reproductive purposes are property: *C.C. v. A.W.*, 2005 ABQB 219; *J.C.M. v. A.N.A.*, 2012 BCSC 584; *Lam v. University of British Columbia*, 2015 BCCA 2; *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37; *Kate Jane Bazley v. Wesley Monash IVF Pty. Ltd.*, [2010] QSC 118 (Queensland SCTD); *Jocelyn Edwards: Re the Estate of the late Mark Edwards*, [2011] NSWSC 478.
- [61] In *C.C. v. A.W.*, the parties disputed access to twins born to C.C. through a donation of sperm from A.W. Each party also claimed the four fertilized embryos that remained in a Toronto clinic. A.W. refused to consent to the release of the remaining embryos to C.C. for her use in another attempt to become pregnant.
- [62] At paras. 20 and 21, the court found that A.W. had provided his sperm as an unqualified gift to C.C. to assist her to conceive children. The remaining fertilized embryos remained C.C.'s property. They were chattels she could use as she saw fit.
- [63] In *J.C.M. v. A.M.A.*, the parties, during the course of their spousal relationship, each gave birth to one child using artificial insemination from sperm provided by a single donor. When the parties separated, they entered into a separation agreement that divided all joint property of their relationship. Through inadvertence, the separation agreement did not divide the 13 remaining sperm straws stored at Genesis. Madam Justice Russell concluded that the remaining sperm straws should be treated as property for the purpose of dividing them upon the dissolution of the parties' spousal relationship. In reaching that conclusion, Russell J. relied primarily upon *C.C.* and the decision of the England and Wales Court of Appeal in *Yearworth v. North Bristol NHS Trust*, [2009] EWCA Civ 37.
- [64] In *Yearworth*, the Court held that stored sperm was property for the purposes of an action for negligent damage to property. The appellants were all diagnosed with cancer. They received treatment at a hospital operated by North Bristol NHS Trust and accepted advice that before undergoing chemotherapy, they could produce semen samples that the respondent would store for their future use. Before any of the appellants attempted to use the sperm, the hospital's freezing system failed and the sperm perished.
- [65] The Court of Appeal began its analysis 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 Honore 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.l 16, 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).

[66] In *Yearworth*, the Court recognized that historically, the common law did not allow any property interest in the human body, or body parts, living or dead. The Australian High Court in *Doodeward v. Spence*, (1908) 6 C.L.R. 406 created an exception to this rule when it recognized the right of ownership in a two-headed fetus preserved for commercial display as a curiosity. For the majority, Chief Justice Griffith held:

[W]hen a person has by the lawful exercise of work or skills so dealt with a human body or part of the body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it

[67] The Court in *Yearworth* held at para. 45(a) that developments in medical science "now require a re-analysis of the common law's treatment of and approach to the issue of ownership of parts or products of a living human body, whether for present purposes (viz. an action for negligence) or otherwise."

[68] At para. 45 (d), the Court stated that it was not content to see the common law in this area founded upon the principle in *Doodeward*, "which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of the human corpse. Such ancestry does not commend it as a solid foundation."

[69] At para. 45(f), the Court held that for the purposes of their negligence claims, the appellants had ownership of the sperm which they had generated and ejaculated for the sole purpose of its later use for their benefit. Although their rights to use the sperm were limited by legislation, no person other than the appellants had any right in relation to the sperm.

[70] In *Yearworth*, at para. 45(b), the Court of Appeal emphasized the claim concerned products of a living human body intended for use by the persons whose bodies had generated them. The Court was not asked to consider whether there was any significant difference between such claims and claims in respect of donated products intended for use by others brought by the donors or by the donees of such products.

- [71] In J.C.M., Russell J., referring to Yearworth, commented at para. 63 that the need for the common law to keep up with medical science is compelling. At para. 69, she found that in the context of the dispute before her, the sperm was the property of the parties. Madam Justice Russell observed that the sperm had been treated as property by everyone involved in the transaction, including the donor, Genesis and the parties.
- [72] Equally, in the case at bar, [A.B.], Genesis and the petitioner all treated the Reproductive Material as property.
- [73] In *Lam v. University of British Columbia*, the Court of Appeal upheld the trial judge's finding that frozen human sperm is property for the purposes of the Warehouse Receipt Act, R.S.B.C. 1996, c. 481 ("WRA"). The facts of *Lam* are similar to *Yearworth*. The respondent, Mr. Lam, was the representative plaintiff in a class proceeding against the University of British Columbia. Members of the class had cancer. Before undergoing radiation treatment, they stored their frozen sperm in the appellant's freezer. As the result of a power failure, the stored sperm was damaged or destroyed.
- [74] In *Lam*, Chiasson J.A., at para. 51, considered the Court in *Yearworth* had taken the correct approach to the development of the common law in holding that developments in medical science required a re-examination of the issue of ownership of parts or products of a living human body. However, in concurring reasons for judgment, Bennett J.A., writing for herself and Frankel J.A., emphasized at para. 110 that in *Yearworth*, the Court was determining whether human sperm was property in a very narrow context, and was not determining whether sperm in other contexts, such as probate or matrimonial law, could be considered property.
- [75] At paras. 113 and 114, Bennett J.A. stated:
- [113] The nature and scope of property interests that a person can have in human sperm need not be decided on the facts of this case. This case, unlike for example, *J.C.M. v. A.N.A.*, 2012 BCSC 584, does not deal with competing property interests in human sperm. This case considers whether Mr. Lam, a cancer patient, has ownership of the sperm he produced, such that he can contract for its storage to enable his personal use of the sperm at a later date. If so, the sperm is property, as something must be property if it is capable of being owned. There may also exist things that are property that cannot be owned, but that is not something that needs to be decided in the context of this case.
- [114] Not all of Professor Honoré's 11 incidents of ownership need to be present for ownership to arise (*Yearworth* at para. 28). Ownership of body parts must be contextual, and often limited by legislation because of public policy reasons. No one would argue that if a cancer patient cut her hair and stored it for the purpose of later making a wig after treatment that she did not "own" her hair in that context. On the other hand, legislation prevents the selling of sperm and organs such as kidneys, but does not prevent their donation. The prohibition on sale does not necessarily mean the legislation is inconsistent with ownership. It has provided limits to ownership in some contexts.

- [76] In concluding that each of the sperm donors had sufficient ownership of their stored sperm for it to be "property" and thus "goods" within the meaning of the WRA, Bennett J.A. applied the same analytical framework as the Court had adopted in *Yearworth*. The donors had ejaculated the sperm; contracted to store the sperm for their own future use; paid a fee for storage; and could consent to the sperm being tested. Further, they could terminate the storage agreement; could consent to the release of the sperm to their physician to be used by their spouse; and could exclude all others from using the sperm. Although legislation or the storage agreement precluded the donors from disposing of the sperm by leaving it to someone in their will or from selling the sperm, they nonetheless had sufficient rights in relation to their own sperm for it to be defined as property.
- [77] In *Bazley v. Wesley Monash IVF Pty. Ltd.*, the applicant's husband was diagnosed with liver cancer. Before his death, he provided a semen sample before undergoing chemotherapy. The respondent continued to store the semen samples following Mr. Bazley's death. When the applicant requested that the respondent continue to store the sperm, a spokesperson for the respondent informed her that in the absence of specific reproductive and assisted technology legislation in Queensland, the respondent operated under national guidelines for the use of assisted reproductive technology. The guidelines provided that clinics must not store or use gametes from deceased persons unless there was a clearly expressed written directive from the donor consenting to the use of the gametes. Mr. Bazley had died without providing such a direction. The respondent informed the applicant that in the absence of such a directive, it was prevented by the guidelines from continuing to store Mr. Bazley's sperm or using it to procure a pregnancy.
- [78] The applicant applied to the Queensland Supreme Court for an order requiring the respondent to continue to hold and maintain stored semen belonging to her deceased husband, and restraining the respondent from destroying the semen until further order.
- [79] Mr. Bazley had left a will by which he appointed the applicant and his accountant as executors and trustees, and made the applicant the principal beneficiary of his estate. However, his will contained no directive concerning the posthumous use of his sperm.
- [80] The court characterized the question for determination as whether sperm extracted and stored could be described as "property" and thus form part of Mr. Bazley's estate. In the course of reviewing the authorities, the Court referred to the conclusion of the Court of Appeal in *Yearworth* that developments in medical science required a re-analysis of the common law's treatment of the ownership of parts or products of a living human body. In *Bazley* at para. 27, White J. also found helpful the Court of Appeal's conclusion in *Yearworth* that since the appellants had ownership of their sperm for the purposes of claims in negligence, they had sufficient rights to the sperm to give rise to a gratuitous bailment of the sperm by them to the storage facility.

- [81] After reviewing the factors the Court of Appeal took into account in *Yearworth* in finding the appellants had ownership of stored sperm for the purposes of their claims in negligence, White J. concluded in *Bazley* at para. 33:
- [33] The conclusion, both in law and in common sense, must be that the straws of semen currently stored with the respondent are property, the ownership of which vested in the deceased while alive and in his personal representatives after his death. The relationship between the respondent and the deceased was one of bailor and bailee for reward because, so long as the fee was paid, and contact maintained, the respondent agreed to store the straws. The arrangement could also come to an end when the respondent died without leaving a written directive about the semen, but plainly the bailor, or his personal representatives, maintained ownership of the straws of semen and could request the return of his property.
- [82] In *Jocelyn Edwards; Re the Estate of the late Mark Edwards*, [2011] NSWSC 478, the applicant sought a declaration that she, as the administrator of the estate of her late husband, was entitled to possession of sperm extracted from his body shortly after his death.
- [83] *Edwards*, is distinguishable from the case at bar in so far as that case involved a claim by a spouse to possession of sperm posthumously extracted from her deceased husband.
- [84] The court was not asked to recognize any property entitlement in the stored sperm beyond the applicant's entitlement to possession.
- [85] Hulme J., applying *Doodeward*, held at paras. 82 and 83 that because the removal of the sperm was lawfully performed pursuant to orders of the court in a process involving the application of work and skill, it was property. The medical personnel who removed and then preserved and stored the sperm, did so as agents for Ms. Edwards.
- [86] Ms. Edwards' counsel argued that she was entitled to possession, not on the basis that the semen was part of the assets of the estate, but rather on the ground that as "incidental to her duty as administrator in relation to the disposal of the deceased's body", she had a "right to possession of any part thereof". However the Court, referring to *Doodeward*, held Ms. Edwards' duty entitled her to do no more than give the deceased's body a "decent internment".
- [87] Instead of basing his decision on Ms. Edwards' rights as an administrator, Hulme J. concluded that Ms. Edwards was the only person in whom an entitlement to property in the deceased's sperm would lie. The deceased was her husband; the sperm was removed on her behalf and for her purposes; no one else had any interest in the sperm specimens.

- [88] One of the discretionary considerations the court took into account was whether there was any consent, either express or inferred, given by the patient. The court accepted Ms. Edwards' evidence of the desire she and her husband shared to have a child together, but refrained from expressing any view as to the strength of the inference that Mr. Edwards was in favour of the claimant having their child even after his death.
- [89] Here, I have found that [A.B.] expressed his consent both to the petitioner and to various care providers, to the use by the petitioner of the stored sperm for reproductive purposes after his death.
- [90] Hulme J. recognized that Ms. Edwards would not be permitted to use the sperm to obtain assisted reproductive treatment in New South Wales. The assisted reproductive treatment legislation of that State prohibited fertility clinics from providing treatment to a woman using a gamete unless the deceased donor had consented to the use of his gametes after his death. The New South Wales legislation required a donor to give a treatment provider "written notice setting out [his] wishes in relation to the gamete", which Mr. Edwards had not done.
- [91] While Ms. Edwards would not be able to undergo in-vitro fertilization in New South Wales, it was possible that she would be able to obtain assisted reproductive treatment elsewhere.
- [92] In Edwards at para. 149, the court noted that there was no suggestion that anyone other than Ms. Edwards claimed any entitlement to possession of the sperm. The clinic holding the sperm had not asserted any interest. Only two outcomes were possible: either Ms. Edwards would take possession of the sperm or it would be destroyed. The court granted the declaration that Ms. Edwards was entitled to possession of the sperm recovered from the body of her late husband.
- [93] Here, [A.B.] generated the sperm that was surgically retrieved from him, frozen and stored at Genesis.
- [94] The sole purpose for extracting and storing the sperm was to preserve it for later use by [A.B.] and the petitioner to attempt to conceive a child. While [A.B.] was alive, Genesis stored the frozen sperm on his behalf and treated it as [A.B.]'s property. Only [A.B.] could consent to the use of the stored sperm for reproductive purposes permitted under the AHRA.
- [95] While [A.B.] could not sell the stored sperm, only he could authorize its reproductive use by his spouse following his death, or donate it for the reproductive use of a third party.
- [96] I find that [A.B.] had rights of use and ownership in the Reproductive Material sufficient to make it property.
- (b) Did property in the Reproductive Material pass to the petitioner as the sole beneficiary of [A.B.]'s intestate estate?
- [97] For ease of reference, I reproduce s. 20 of WESA here:

20 If a person dies without a will leaving the spouse but no surviving descendent, the intestate estate must be distributed to the spouse.

[98] Section 1 of WESA contains the following definitions:

"estate" means the property of a deceased person

"personal property" means every kind of property other than land

"property" means land and personal property.

[99] Under s. 29 of the Interpretation Act, R.S.B.C. 1996 c. 238 "property" includes any right, title, interest, estate or claim to or in property.

[100] Here, though its use was restricted by legislation, the Reproductive Material was personal property of [A.B.]

[101] Since [A.B.]'s death, Genesis has stored the Reproductive Material for the petitioner and she has paid the annual storage fees. In the event that the petitioner were to decide to discard the stored sperm, Genesis would require her written consent to its disposal.

[102] No one other than the petitioner claims any right to the Reproductive Material.

[103] [A.B.] intended that the petitioner would use the stored sperm for reproductive purposes following his death.

[104] The claimant has paid the storage fees in order to store, preserve and maintain the stored sperm for her own reproductive use.

[105] In these circumstances, I find that following [A.B.]'s death, property in the Reproductive Material vested in the petitioner as [A.B.]'s spouse and sole beneficiary of his intestate estate.

(c) In the circumstances of this case, may the Court order the release of the Reproductive Material to the petitioner, notwithstanding the lack of the donor's written consent to the petitioner's use of the Reproductive Material for the purpose of creating an embryo?

[106] Section 8(1) of the AHRA provides:

8(1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

[107] Under section 3, donor means

(a) in relation to human reproductive material, the individual from whose body it was obtained, whether for consideration or not; and

(b) in relation to in vitro embryo a donor is defined in the regulations.

human reproductive material means a sperm, ovum or other human cell or human gene, and includes any part of any of them.

[108] Part 1 of the Assisted Reproduction (Section 8 Consent) Regulations contains the following provisions relevant to this application:

1(3) For the purposes of these Regulations, the written consent of a donor must be signed by the donor and attested by a witness.

Consent Given Under Subsection 8(1)

3 Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have a document signed by the donor of the material stating that, before consenting to the use of the material, the donor was informed in writing that

- (a) subject to paragraph (b), the human reproductive material will be used in accordance with the donor's consent to create an embryo for one or more of the following purposes, namely,
 - (i) the donor's own reproductive use,
 - (ii) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner,
- (g) if the human reproductive material is used to create in vitro embryos for the reproductive use of the person who, at the time of the donor's death, is the donor's spouse or common-law partner and there are in vitro embryos in excess of the spouse or common-law partner's reproductive needs, the excess in vitro embryos will be used in accordance with the spouse or common-law partner's consent and, if the use is providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research, the consent of the donor in accordance with section 4;

4 (1) Before a person makes use of human reproductive material for the purpose of creating an embryo, the person shall have the written consent of the donor of the material stating that the material may be used for one or more of the following purposes:

- (a) the donor's own reproductive use;
- (b) following the donor's death, the reproductive use of the person who is, at the time of the donor's death, the donor's spouse or common-law partner;
- (2) A donor's consent stating that the donor's human reproductive material may be used for a purpose mentioned in paragraph (1)(b) or (c) shall also state whether any in vitro embryos that are not required for that purpose may be used for providing instruction in assisted reproduction procedures, improving assisted reproduction procedures or other research.

[109] The Regulations clearly specify the content and scope of the written consent required from a donor under s.8 of AHRA.

- [110] In Reference re Assisted Human Reproduction Act, [2010] 3 S.C.R. 457, the majority of the Court upheld the constitutional validity of s. 8 as valid criminal law. As McLachlin C.J. stated at paras. 89 and 90:
- [89] Section 8 prohibits the use of reproductive material for the artificial creation of embryos, unless the donor has consented in accordance with the regulations: Assisted Human Reproduction (Section 8 Consent) Regulations, SOR/2007-137 (June 14, 2007). It is backed by penalties, specified in s. 60 of the Act.
- [90] Section 8 is grounded in valid criminal law purposes. As the Baird Report put it, "gamete donors . . . have a unique moral interest in the use of their genetic material" (p. 639). This morality interest stems from the danger that reproductive material may be used against a donor's will to create a human being, as well as from the possibility that an embryo, donated with the intent of creating a human being, could be used for different purposes, such as research. At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. The combination of the embryo's moral status and the individual's interest in his or her own genetic material justify the incursion of the criminal law into the field of consent. There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.
- [111] Here, the moral interest of [A.B.], shared by the petitioner, was to use the Reproductive Material to attempt to conceive a child with his spouse, a purpose permitted under AHRA. The danger that human reproductive material might be used for a commercial purpose or for prohibited experimentation does not arise in this case.
- [112] During the Hansard debate on the Assisted Human Reproduction Act (Bill C-13) (2nd Sess. 37th Parl.), the Minister of Health, the Honourable Anne McLellan identified free and informed consent and the prohibition of commercial trade in reproductive capacity as fundamental objectives of the AHRA.
- [113] The Minister said this:

Bill C-56, an act respecting assisted human reproduction, is important because it would provide a legislative framework to protect the health and safety of Canadians and their offspring. It would, at the same time, offer new hope for infertile people, as well as those suffering from illness and disease.

it is important because it will fill a void. At present, Canada has no law to prohibit or regulate activities relating to assisted human reproduction. And it is equally important, because these issues are not easy ones. Nor should they be, as they go to the very heart of our values as a society, with regard to the way we build our families...

The bill before us today speaks to one of the most fundamental human desires, having a family. The truth is that approximately one in eight Canadian couples faces the challenges of infertility. Bill C-56 seeks to provide a measure of comfort and protection through various means.

There is another overarching purpose to this legislation. It is to make clear to Canadians and to the world our position on this complicated and fast changing issue. This legislation would clearly prohibit the cloning of human life. We will not let people profit from the creation of a baby or favour one type of child over another just because we have the technical capacity to do so.

The legislation opens with a statutory declaration, six principles that would guide the interpretation of the proposed law. These principles assert that: the health and well-being of children born through AHR techniques must be paramount: human health, safety and dignity in the use of assisted human reproductive techniques and related research much be protected; AHR technologies affect all Canadians but women most particularly: the principle of free and informed consent is fundamental to the application of AHR technologies: there should be no trade in the reproductive capacity of women or men, or any commercial exploitation of children or adults involved in AHR; and human individuality and diversity as well as the integrity of the human genome must be safeguarded. [Emphasis added]

[114] By s. 2 of the AHRA, the Parliament of Canada recognizes and declares that:

- (d) the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies.

[115] Unfortunately, [A.B.] was never informed of the requirement for his written consent to the petitioner's use of the Reproductive Material. As a consequence, he died without having the opportunity to provide that consent in writing.

[116] Counsel for the petitioner referred to two recent English authorities where donors of gametes had passed away without having fully complied with statutory requirements for their consent.

[117] In *Warren v. Care Fertility (North Hampton) Ltd. and another*, [2014] EWHC 602 (Fam), the claimant's husband was diagnosed with a brain tumour. Before undergoing treatment, he had a quantity of his sperm frozen at a fertility clinic. The husband gave his written consent, as required under the applicable regulations, to the storage and use of his gametes after death and named the claimant as the person to use his gametes in any treatment. However he died without having given his written consent to the storage of the gametes for a period in excess of 10 years. Under the regulations that consent was required for the extended storage of the gametes.

[118] The Human Fertilization and Embryology Authority ("HFEA"), which regulates the storage and use of gametes and embryos in England, concluded that the requirement for written consent to extended storage had not been met.

[119] When the claimant applied for an extension of storage, the court allowed her claim on the ground that the clinic had failed to fulfil its statutory obligation to the husband to provide him with relevant information concerning the options available to him for the storage of his sperm. As a consequence of that failure, the husband was deprived of the opportunity to meet the requirements of the regulations for extended storage of his sperm. The court

considered that allowing the gametes to perish would be contrary to the husband's intentions and would be grossly and conspicuously unfair to the claimant.

- [120] In Warren at para. 136, the Court held that Parliament intended to enable a deceased man's sperm to be used by the named person, in this case his widow, provided that was the deceased's wish recorded in writing. The husband's wish was known although it was only partially recorded in compliance with the regulations.
- [121] The Court sought to interpret the statutory provisions in a purposive way that was compatible with the applicant's right under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to decide to seek to become a parent by her deceased husband. In Warren, where the clinic failed to inform the husband of his options and the requirement for written consent for storage beyond 10 years, the court concluded that it was right and proper to make the declaration sought by the claimant, authorizing the extended storage of the deceased's gametes.
- [122] Counsel for the petitioner also drew to this court's attention the recent decision of the English Court of Appeal in *R (On the application of I.M. and another) v. Human Fertilization and Embryology Authority*, [2016] EWCA Civ 611. In *R*, the applicants' daughter, A, had consented to treatment for egg removal and storage, and to the use of her eggs after her death.
- [123] The applicants applied to HFEA to export A's eggs from the facility where they were stored in England to a fertility centre in the United States. In order to give effect to their late daughter's wishes, the applicants intended to use her eggs to create an embryo with anonymous donor sperm, and to implant an embryo in A's mother, the second applicant. Any child born would be brought up as the appellants' grandchild.
- [124] Under the Human Fertilization and Embryology Act 1990 ["HFE Act"], a fertility clinic could only provide services using a person's gametes with that person's effective consent. To that end, the HFE Act provides that, before treatment, a person must be given "such relevant information as is proper", and offered counselling.
- [125] While A had consented to treatment for egg removal and storage and to the use of her eggs after her death, she had not completed any form providing detailed, precise use of her eggs.
- [126] Under the United Kingdom legislation, HFEA could waive the requirement for consent to be in writing and signed by the person giving it when approving the export of the gametes. However, HFEA concluded there was insufficient evidence that A had consented to the proposed use of her gametes after her death and refused approval.
- [127] The applicants applied for judicial review of the ground that the HFEA decision was irrational and took into account matters which ought not to have been considered. After a High Court Judge refused to set aside the decision, the applicants appealed.

- [128] The applicant mother had given evidence of conversations she had with A regarding A's desire to have her mother act as a surrogate and for the applicants to raise her children. On its review of the application, HFEA concluded it had inadequate evidence of both consent and the offer of information concerning the export of the gametes, their admixture with donor sperm, the use of a surrogate and the use of the gametes in treating A's mother, rather than A.
- [129] The Court of Appeal concluded that the reasons of HFEA were irrational. Where A had consented to the use of her eggs after her death, HFEA should have considered whether it was inherently probable that A would have refused her consent to an anonymous sperm donor if that was the only way her wishes could be implemented.
- [130] These cases are of only limited assistance. In each case, the result flowed largely from the court's analysis of the applicable statutory framework. However, it is noteworthy that in Warren, as in the case at bar, the donor, through no fault of his own, was deprived of the opportunity to fulfil the statutory requirements for written consent.
- [131] The circumstances of this case are extraordinary. [A.B.] freely and repeatedly expressed his consent to the petitioner's use, following his death, of the Reproductive Material. He communicated his agreement to the petitioner's use of his stored sperm to the petitioner, to his social worker, to a nurse at the [content redacted] hospital where his [content redacted] was performed, to his family doctor, and to Genesis.
- [132] [A.B.] fully understood that the Reproductive Material would be used in accordance with his wishes to create an embryo, and would be used, following his death, by the petitioner to attempt to conceive a child.
- [133] One of the guiding principles of the AHRA is the promotion and application of free and informed consent as a fundamental condition for the use of human reproductive technologies. Another guiding principle, set out in s. 2(b), is that the benefits of the technology for individuals, families and society can be most effectively secured by appropriate measures for the protection and promotion of human health, safety and dignity. Here, [A.B.] and the petitioner sought to use the technology in order to have a child of their own. They took appropriate steps to ensure that the [content redacted] would not be passed to any child they conceived through in-vitro fertilization. They consulted with medical specialists about the safe use of the technology.
- [134] To deny the petitioner the use of the Reproductive Material intended by [A.B.] would be both unfair and an affront to her dignity.
- [135] [A.B.] expressed his consent to the petitioner's use of the Reproductive Material after he had the benefit of professional counselling from his [content redacted] social worker, a nurse trained in [content redacted] fertility issues and his family doctor.

[136] I conclude that in the circumstances of this case, [A.B.]'s consent, although not in writing, specifically contemplated the petitioner's reproductive use of his stored sperm after his death, and was sufficient to satisfy the fundamental objective of the AHRA that the donor's consent must be both free and informed. Accordingly, the Court may order the release of the Reproductive Material to the petitioner to enable her use of that material for the purpose of creating an embryo.

RELIEF

[137] This Court declares that the Reproductive Material of [A.B.] stored at Genesis is the sole property of the petitioner.

[138] The Reproductive Material shall be released by Genesis Fertility Centre to the petitioner, K.L.W., for her use to create embryos for the reproductive use of the petitioner, and for no other purpose.

[139] The sealing order made in this proceeding on August 5, 2016 by the Honourable Justice Griffin remains in force and effect.

"PEARLMAN J."

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