SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 62
P273/20

Lord Justice Clerk
Lord Glennie
Lord Woolman

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition

by

SB

Petitioner:

against

(1) THE UNIVERSITY OF ABERDEEN, (2) NHS GRAMPIAN, (3) THE HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY, (4) THE LORD ADVOCATE, AND (5) THE ADVOCATE GENERAL FOR SCOTLAND

Respondents

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Petitioner: M Ross QC; Morton Fraser LLP
Respondents: C O'Neill (sol adv); Brodies LLP

25 September 2020

Introduction

[1] The petitioner wishes to undergo IVF (in vitro fertilisation) treatment using the sperm stored for her late husband at a fertility clinic at the commencement of a serious illness. The day before his death, by which point he was unconscious, it was discovered that the forms he had previously completed provided consent only to the use of his sperm in IUI

(intra uterine insemination) and other similar treatments, but not IVF which involves the creation and storage of embryos. The petitioner, following expert advice, wishes to pursue IVF as being the most likely method of success; and for this purpose she seeks to have the period for storage of the deceased's gametes extended beyond the normal statutory period of ten years. The deceased's will contained a clause relating to the storage and use of his sperm. The question for the court is whether in the absence of the customary consent forms the will, either alone or in combination with the forms which the deceased had signed, constitutes consent for the use of his sperm for IVF, as required in terms of schedule 3 of the Human Fertilisation and Embryology Act 1990?

The statutory provisions

[2] A detailed statutory framework, principally contained in the 1990 Act and regulations made thereunder, regulates human fertilisation and embryology. Specific provision is made in relation to consent in the use of such material in schedule 3. A distinction is made between consent which involves the creation of an embryo and that which does not. Paragraph 6 provides in particular that a person's cells or gametes cannot be used for the creation of any embryo *in vitro* unless there is effective consent by that person, and in terms of paragraph 6(4) the consent must be in addition to that provided for the purposes of paragraph 5.

Schedule 3

[3] The relevant provisions of schedule 3, for current purposes are as follows:

Paragraph 1(1):

> "A consent under this Schedule, and any notice under paragraph 4 varying or withdrawing a consent under this Schedule, must be in writing and, subject to sub-paragraph (2), must be signed by the person giving it."

Paragraph 2(1):

> "A consent to the use of any embryo must specify one or more of the following purposes –
>
> (a) use in providing treatment services to the person giving consent, or that person and another specified person together,
>
> (b) use in providing treatment services to persons not including the person giving consent,
>
> […]"

Paragraph 3(1):

> "Before a person gives consent under this Schedule – (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and (b) he must be provided with such relevant information as is proper."

Paragraph 5:

> "(1) A person's gametes must not be used for the purpose of treatment services [...] unless there is an effective consent by that person to their being so used and they are used in accordance with the terms of the consent.
>
> (2) A person's gametes must not be received for use for those purposes unless there is an effective consent by that person to their being so used.
>
> (3) This paragraph does not apply to the use of a person's gametes for the purposes of that person, or that person and another together, receiving treatment services."

Paragraph 6:

> "(1) A person's gametes or human cells must not be used to bring about the creation of any embryo in vitro unless there is an effective consent by that person to any embryo, the creation of which may be brought about with the use of those gametes or human cells, being used for one or more of the purposes mentioned in paragraph 2(1)(a), (b) and (c) above.
>
> (2) An embryo the creation of which was brought about in vitro must not be received by any person unless there is an effective consent by each relevant person in relation to the embryo to the use for one or more of the purposes mentioned in paragraph 2(1)(a), (b), (ba) and (c) above of the embryo.

(3) An embryo the creation of which was brought about in vitro must not be used for any purpose unless there is an effective consent by each relevant person in relation to the embryo to the use for the purpose of the embryo and the embryo is used in accordance with those consents.

(4) Any consent required by this paragraph is in addition to any consent that may be required by paragraph 5 above."

Paragraph 8

"(1) A person's gametes must not be kept in storage unless there is an effective consent by that person to their storage and they are stored in accordance with the consent.

(2) An embryo the creation of which was brought about in vitro must not be kept in storage unless there is an effective consent, by each relevant person in relation to the embryo, to the storage of the embryo and the embryo is stored in accordance with those consents"

Background

[4] The petitioner is the widow of the late JB, who died in 2019. At the onset of his illness, JB's doctor advised him that he should store his sperm in order to allow him to have children later should his fertility be affected by the course of treatment upon which he was about to embark. At that time (about 10 years ago) JB did not have a partner, and had not met the petitioner. Accepting this advice JB attended a local fertility centre where he provided the relevant samples. He was given various consent forms to complete. The forms he should have been given to complete were a "GS" form, consenting to the storage of his sperm, and a "CD" form, consenting to disclosure of identifying information. These were the appropriate forms to be completed by men without partners but requiring long-term storage. JB was given and did complete and sign both such forms. He was also presented with additional forms, designed for men with a partner: an "MGI" form, for consent to the use of his sperm in artificial insemination, and an "MT" form, for consent to treatment and

storage, which would have included consent to IVF. The former was completed and signed, the latter partially completed but not signed. Although the date on the MGI form is a day before that on the GS and CD forms, it seems likely, from an affidavit of a consultant at the relevant clinic, that the forms were completed by JB on the date of his visit and that a member of staff had earlier inserted the date in the MT form in preparation for that visit. It is suggested in the affidavit that during the visit a member of staff realised, before its completion, that the MT form was not appropriate to JB's circumstances, hence it was left uncompleted. The forms completed by JB did not include consent for IVF, which would only have been included in the MT form.

[5] In succeeding years, the centre asked JB to confirm his wishes regarding the sperm stored, and on each occasion he replied that the centre should continue to hold the semen in store.

[6] In due course JB met and married the petitioner. He suffered a recurrence of serious illness. During his final illness JB and the petitioner commenced fertility treatment to enable them to have a family. They consulted their GP who referred them to a consultant. The consultant, now retired, states in her Affidavit that both were fully committed to proceeding with the treatment, and wished to use the stored sperm. They were frank about JB's limited life expectancy. The consultant does not recall whether any specific treatments were discussed, but referred them back to the clinic to use the stored sperm for treatment "as the specialist clinic saw fit". She asked that they be seen urgently, given the state of JB's health, and wrote to the clinic subsequently asking for their treatment to be expedited.

[7] Meanwhile, it seems that the clinic did not apprehend the gravity of the situation and by the time an appointment was offered, JB was receiving palliative care. At this stage it became apparent that the only forms hitherto completed by JB were those appropriate to a

man without a partner and that further consents were required, appropriate to someone with a partner and to the use of IVF. By this stage JB was unconscious and unable to sign any forms.

[8] An affidavit from the petitioner (whose veracity was not challenged) provides more detail of the meeting with the GP and referral to the consultant. Her recollection of the meeting with the GP makes it clear that IVF was discussed. Furthermore, the consultant indicated that she would recommend IVF treatment rather than IUI as it was more likely to be successful in the circumstances. The petitioner and JB understood that there is an increased risk of twins with IVF, and considered that this would be a happy outcome. She has no doubt that IVF was a form of treatment in the contemplation of the deceased.

[9] During JB's last illness, and as his condition deteriorated, he discussed with his father what he wanted to do with his estate, and specifically in respect of his stored sperm. In consequence he had his solicitor insert a clause into his will, in the following terms:

> "**Human Fertilisation and Embryology**
>
> I direct my executors to ensure that my donation of sperm will be, for as long as possible, and for as long as she may wish, available to [SB]."

[10] The appointment which had been offered to the petitioner and JB was postponed to enable the clinic to take legal advice, it having been discovered that no additional forms relevant to a man with a partner had been completed by the deceased and that the original forms did not cover IVF. The medical advice to the petitioner was that her only real prospect of having a child was by IVF but that in the absence of the relevant consent this could not be provided.

[11] JB's treating consultant clinical oncologist has provided an opinion stating that JB was likely to have experienced premature infertility or significant alteration of the gonadal function as a result of the treatment provided to him.

[12] SB petitions this court asking it to exercise its powers under the *nobile officium* and grant certain orders to allow her to use her late husband's stored sperm for IVF treatment. Although the matter for decision by the court at this stage is restricted to the question of the effect of the clause in the deceased's will, the petition contains averments tending to suggest that the distinction made in the legislation between IVF and other forms of treatment is "of no materiality" and is artificial, with the suggestion that this should not prevent treatment by IVF even where the relevant consent has not been provided. Following discussion between parties, and with the approval of this court, a restricted hearing was fixed to consider the single question of whether the will executed by JB (alone or in combination with other material) was sufficient to constitute his consent to the posthumous use of his gametes in IVF treatment.

[13] Answers have been lodged by the Human Fertilisation and Embryology Authority ("HFEA"), NHS Grampian and the Advocate General for Scotland on behalf of the Secretary of State for Health and Social Care ("SSHSC"). NHS Grampian has no opposition to the grant of the petition. The SSHSC's interest in the petition is restricted to what is necessary to defend the legislative scheme and to assist the court with its interpretation and application. On the hypothesis that the court were satisfied that the will, alone or with completed forms, constituted effective consent in terms of the legislation to any embryo, the creation of which may be brought about with the use of his gametes, being stored and used in providing treatment services to the petitioner, the granting of appropriate orders was not opposed.

Otherwise opposition was maintained on the basis that the result would subvert the statutory scheme.

[14] The HFEA, established under section 5 of the 1990 Act, has functions accorded to it under section 8 of the Act. One is to provide, to such extent as it considers appropriate, advice and information to those providing or receiving relevant treatment. It accepts that completion of the relevant form or forms is not the only means by which effective consent for the purposes of Schedule 3 to the 1990 Act may be given. In a case raising issues of whether effective consent has been given there may be material sufficiently clear and uncontroversial for it to express a positive view on compliance which clinics and individuals may rely on. However, in cases of ambiguity the HFEA is not in a position to adjudicate on the matter, that being an issue for the court. In the present case the HFEA:

(a) recognises that IVF treatment appears to have been in the contemplation of the deceased;

(b) considers that effective consent was given by Mr B for his gametes to remain in storage after his death (fulfilling the requirement for consent in Schedule 3, paragraphs 2(2)(b) and 8(1)). That view was reached by reference to the terms of the GS form read with the MGI form and, in particular, because the latter contained consent to the use of his gametes in his partner's treatment (without the creation of embryos in vitro) in the event of his death;

(c) considers that effective consent was given by the deceased for his gametes to be used in the treatment of the petitioner (fulfilling the requirement for consent in Schedule 3, paragraph 5). That view was reached by reference to the terms of the MGI form together with Mr B's will;

(d) accepts that it is appropriate to distinguish between information and opportunities for counselling offered at the outset of JB's illness, when his sole purpose in storing samples was preservation of fertility, and that offered when he and the petitioner subsequently sought treatment;

(e) accepts that there is no inconsistency between the affidavit of the consultant to whom the GP referred JB and the petitioner, who had no recall of a discussion of specific forms of treatment, and that of the petitioner who did have such a recall, which the authority had no basis for challenging; but

(f) has been unable to conclude that JB gave effective consent for the purposes of paragraph 6 of Schedule 3 to the 1990 Act, for the following reasons:

(i) the MT form was only partially completed and not signed;

(ii) the MGI form gives consent to the use of gametes in IUI or similar treatment but without the creation of embryos in vitro; and

(iii) the will does not make any reference to the creation of embryos or more specifically to the purpose for which the gametes may be used.

[15] However, should the court find that the requirements of paragraph 6 of Schedule 3 have been met, the Authority considers that there would be no impediment to IVF treatment for the petitioner using her late husband's gametes.

[16] The main interest of the Authority, as with the Advocate General, was to defend the integrity of the legislative provisions and to contest any argument that, if the will did not provide effective consent, it might be possible for certain statutory provisions to be waived.

[17] NHS Grampian was not represented at the hearing since it did not oppose the petition. With the court's permission the Advocate General for Scotland was excused from appearing at the hearing.

[18] Submissions were made on behalf of the petitioner and the HFEA. We do not require to rehearse them, as their essential terms will be apparent otherwise in this opinion.

Analysis and decision

Competency

[19] It might appear that the issues could have been addressed in an action for declarator. That is true only to the extent that the agreement of parties limited the issues to be addressed at this first hearing. However, should the court find against the petitioner there remain other and more complex issues relating to the materiality of the statutory distinction between IVF and other forms of treatment. Senior counsel for the petitioner submitted that this would require examination of the whole legislative scheme and whether it afforded a remedy for this unforeseen situation or whether there was a gap requiring the exercise of the court's powers under the *nobile officium.* In the whole circumstances we are persuaded that the petition is competent.

The requirements of effective consent

[20] We proceed on the basis that the requirements of an effective consent to use of the deceased's gametes for IVF treatment are that:

(a) It must be in writing;

(b) It must be signed by the deceased;

(c) It must specify the purpose of use, and be clear that it encompasses consent to the creation of any embryo *in vitro*;

(d) The individual must have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and have been provided with such relevant information as is proper; and of the consequences in

respect of the possibility of variation or withdrawal of consent as specified in schedule 4, paragraph 4; and

(e) It must not have been withdrawn.

In our view, the terms of the deceased's will constitute sufficient consent to meet these requirements. It is in writing, it is signed and it has not been withdrawn. The remaining two conditions for effective consent relate to the opportunity for counselling and whether the terms of the clause are sufficiently clear to provide consent for the specific form of treatment that is involved in IVF.

[21] As to the first of these, it is clear that the deceased was, at the time of his first visit to the clinic at the start of his illness, provided with suitable and appropriate opportunities for counselling in respect of the steps which he was then undertaking. What is "a suitable opportunity to receive proper counselling", or provision of "such relevant information as is proper" is, as is accepted by the HFEA, situation specific. The context in which the deceased and the petitioner consulted their GP and were referred to the consultant and thus to the fertility clinic, was one in which they were investigating the possibility of having a child in the face of JB's impending death. It seems clear to us, taking together the affidavits of the consultant and the petitioner, that the terms of paragraph 3 of schedule 6 were adequately met before the deceased signed his will about two months after being seen by the GP and consultant. In addition, during their consultation with the consultant, the couple completed and signed a fertility clinic "Welfare of the Child" consent form. Under the heading "we have considered the following issues", they ticked a box stating "Our possible need for and the availability of independent counselling". The form was signed by both of them. The referral letter from the consultant to the clinic stated "The couple seem to have considered the difficult road ahead". The Authority accepts that treatment by IVF appears to have been

in the contemplation of JB, and the affidavit of SB makes this clear. We consider therefore that there was a discussion, albeit limited, about IVF which was in the circumstances sufficient to meet the statutory requirements.

[22] The remaining issue relates to the construction of the clause in the will. It is axiomatic that we should start by examining the plain meaning of the words in the context in which they occur. We regard the following features as important. First, it is a testamentary document in which JB was not only making disposition of his estate but, by this clause, expressing his wish for the future use of his stored gametes. Second, he and his wife had sought and been referred for treatment to enable them to have a child. Third, although it is expressed as a direction to his executors, in reality it is an expression of his wishes. For present purposes, we are not concerned with whether the clause could be given testamentary effect. The only question is whether it can be construed as granting the necessary consent. In our view there is no doubt that it can. It is the sort of provision that would only sensibly be made by a man contemplating his death in the near future, and seeking to make his wishes clear. The heading refers not merely to fertility but to "embryology". The clause itself is expressed unconditionally and in the widest terms. It specifies that the material be "available" to SB, in other words available for her unqualified use, thus covering the prospect of her treatment, given the known context, and meeting the terms of paragraphs 6(2) and 2(1)(b) of the schedule. All these factors point unerringly toward JB having given consent to IVF treatment. Consent to use of the gametes for the purpose of IVF must impliedly include consent for the storage of any embryos thereby created, thus meeting also the terms of paragraph 8 of the schedule.

[23] Where it is desired to store gametes for a period in excess of ten years for the provision of treatment services there must be written consent of the donor and a medical

opinion to the effect that that person was, or may have been likely to become, prematurely infertile (Human Fertilisation and Embryology (Statutory Storage Period for Embryos and Gametes) Regulations 2009, regulation 4(3)(a) and 4(3)(b); and *In re Warren* [2015] Fam. 1). The clause in the deceased's will, specifying that the material be available to the petitioner for "as long as possible", together with the opinion of the treating oncologist as to the deceased's state of fertility, clearly meet these requirements.

[24] In the circumstances we are therefore minded to grant the orders sought. The precise wording was the subject of some discussion, it being accepted that the original wording of the orders sought in the petition was not appropriate. Following discussion between both sides of the bar, a form of wording was suggested which we readily adopt. We will therefore find and declare that the late JB:

(i) gave effective consent to the storage of his gametes for the purposes of paragraphs 2(2)(b) and 8(1) of Schedule 3 to the Human Fertilisation and Embryology Act 1990;

(ii) gave effective consent to the use of his gametes to bring about the creation of an embryo or embryos *in vitro*, and to any such embryo or embryos being used for the provision of treatment services to SB, for the purposes of paragraphs 2(1)(b) and 6(1) to 6(3) of Schedule 3 to the Human Fertilisation and Embryology Act 1990; and

(iii) gave effective consent to the storage of any embryo or embryos, the creation of which may be brought about with the use of his gametes, for the purposes of paragraph 8(2) of Schedule 3 to the Human Fertilisation and Embryology Act 1990, and that such storage is subject to the statutory storage period of ten years, in terms of section 14(4) of the Human Fertilisation and Embryology Act 1990.