



Jocelyn Edwards

(2011) 81 NSWLR 198; [2011] NSWSC 478

Country: Australia

Region: Oceania

Year: 2011

Court: Supreme Court of New South Wales

Health Topics: Chronic and noncommunicable diseases, Hospitals, Informed consent, Occupational health, Sexual and reproductive health

Human Rights: Right to property

Facts

Jocelyn and Mark Edwards were happily married and intended to have a child. They encountered some difficulties in conceiving and consulted a fertility clinic. Both subsequently agreed to in vitro fertilization (IVF) treatment. Mark had earlier expressed the importance to him of Jocelyn having their child before he was "unable" to, which was positively supported by his extended family. Unfortunately, Mark passed away prior to signing the IVF consent forms.

Ms. Edwards was awarded, and subsequently implemented, a court declaration (Preservation Order) authorising a doctor to remove sperm from Mark's body for preservation pending a further Court order. In giving the order, the Court consulted the New South Wales (NSW) State Coroner's office, who confirmed that they had previously authorised the same.

Following the preservation of Mr. Edwards's sperm, Ms. Edwards sought an ex parte order for possession. The Attorney General of NSW appeared in the matter as amicus curiae. In this matter (Possession Declaration), Ms. Edwards sought a Court declaration in reference to the Human Tissue Act 1983 (HT Act) and the Assisted Reproductive Technology Act 2007 (ART Act) to possess the sperm.

It is important to note that the Preservation Order additionally sought extraction of the sperm to be used by Ms. Edwards in IVF treatment. The Possession Declaration only sought a right of possession over the sperm.

Decision and Reasoning

The Court held:

The declaration in the Preservation Order was compliant with legislative provisions of the HT Act, despite Mr Edwards not providing formal consent;

Ms. Edwards was entitled to the Possession Order;

Ms. Edwards was not able to use the sperm for IVF treatment in NSW; and

Ms. Edwards could, however, carry the sperm into another jurisdiction

The Court noted that under the HT Act, semen must not be removed from someone, after death, except by consent or through an authority stipulated in Part 4 of the HT Act. Under Part 4, an authorised officer of the hospital could conduct, for therapeutic purposes, the "treatment" of sperm removal if approved by the next of kin, no objection was raised from the senior next of kin, an objection to the procedure was not expressed by the deceased during his lifetime, and the Coroner's consent was obtained.

The Coroner's consent had been given, as Edwards's death was reportable under s 21 of the Coroners Act 2009. There was also no issue of the deceased or next of kin's objection. However, there were no written records of the hospital's officer's authorisation for therapeutic purposes.

Nevertheless, the Court noted that had attention been drawn to this issue "it is possible that the discretion would have been exercised in favour of authorisation" (para. 37). Moreover, it was noted that the only other case with similar facts, which had found that a removal was not therapeutic, was distinguishable to the present case because the HT Act had since changed significantly, and that case raised differing issues.

Finally, as the order had already been implemented, and the declaration sought did not concern the legality

of the previous order, the Court held that the requirements of the HT Act would not “have been insurmountable hurdles if there had been a correct understanding of the statutory provisions” (para. 40).

The Court also held that Ms. Edwards was entitled to the Possession Order. The Court detailed various precedents concerning any property rights over the bodies and bodily tissues of dead people, and noted that proprietary rights can be declared over bodily tissue, both during and after a deceased’s life.

The Court did not go so far as to declare that the sperm was property, noting that a “consideration of rights that flow from a recognition of something as “property” is complex and beyond the scope of need of this judgment” (para. 77). The Court described the sperm as a “real object; a physical thing. It has a value or worth in an intangible sense. Indeed, it has ... potentially enormous human importance to Ms. Edwards and her family. These are matters that the law should recognise and protect” (para. 80). It affirmed that “lawful exercise of work or skill” was capable of creating a proprietary right in body tissue removed from a deceased’s body.

However, the Court held that any proprietary right in Ms. Edwards did not extend from the estate of Mr Edwards, as the sperm was not an asset of his estate. Instead, Ms. Edwards held a proprietary right because the doctors were acting as Ms. Edwards’s agents. The Court did not decide whether Ms. Edwards was entitled to employ the “agents” as this was not necessary for the orders sought, but suggested that such an entitlement may have been incident to being administrator of Mr. Edwards’s estate.

The Court further held that Ms. Edwards was not able to use the sperm for IVF treatment in NSW. The Court held that ss 17 and 23(a) of the ART Act required written consent from Mr Edwards, which did not exist. Furthermore, the Court deduced that the intention of the ART Act was to protect the interest of women receiving and children born as a result of treatment, whilst ensuring individuals have control over their genetic material. Therefore, Ms. Edwards was not able to use the sperm for IVF treatment in NSW.

However, the Court held that Ms. Edwards could carry the sperm into another jurisdiction, as she would not be exporting the sperm from NSW. Because she had “possession,” they would be “released” from the law and carried into another jurisdiction, and this would not breach the ART Act, either in relation to articles 21 and 22 (which prohibit exporting without consent), or the objects of the Act.

Decision Excerpts

“There is a sample of sperm being stored by IVF Australia. It is a real object; a physical thing. It has a value or worth in an intangible sense. Indeed, it has, as Mr Kirk put it, potentially enormous human importance to Ms. Edwards and her family. These are matters that the law should recognise and protect.” Para. 80.

“Mr Kirk submitted that examples of why a person might not be prepared to consent to such use included that “one partner might prefer the other to move on with their life in the event of their death, and/or might prefer not to have a child who does not have two parents alive.” These are valid possibilities and serve to illustrate that circumspection is required in making assumptions as to what a deceased gamete provider’s wishes may have been.” Para. 107.