Neutral Citation Number: [2018] EWCOP 18

Case No: COP13280890

IN THE COURT OF PROTECTION

**IN THE MATTER OF THE MENTAL CAPACITY ACT 2005**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/08/2018

**Before**:

MRS JUSTICE KNOWLES

- - - - - - - - - - - - - - - - - - - - -

**Between :**

|  |  |  |
| --- | --- | --- |
|  | **Y** | Applicant |
|  | **- and -** |  |
|  | **(1) A HEALTHCARE NHS TRUST**  **(2) THE HUMAN FERTILISATION AND EMBRYOLOGY AUTHORITY**  **(3) Z (BY HIS LITIGATION FRIEND, THE OFFICIAL SOLICITOR)** | Respondents |

- - - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - - -

**Mr Michael Mylonas QC** (instructed by **Vardags**) for the Applicant

**Miss Claire Watson** for the First Respondent (details of instructing solicitors omitted in the interests of anonymity)

**Miss Kate Gallafent QC** (instructed by Human Fertilisation and Embryology Authority) for the Second Respondent

**Miss Sophia Roper** (instructed by the Official Solicitor) for the Third Respondent

Hearing dates: 12 July 2018

- - - - - - - - - - - - - - - - - - - - -

Judgment Approved

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Mrs Justice Knowles:**

1. This application was made by Y on 12 July 2018 when I was sitting as the emergency applications judge. It required urgent determination by reason of the critical medical condition of Z, Y’s husband. Y sought the following relief:

a. A declaration that, notwithstanding her husband’s incapacity and his inability to consent, it was lawful and in his best interests for his sperm to be retrieved and stored prior to his death;

b. An order pursuant to section 16 of the Mental Capacity Act 2005 [“the Act”] directing that a suitable person should sign the relevant consent form for the storage of Z’s sperm on her husband’s behalf.

1. The Respondents were the hospital trust in which Z was currently receiving medical treatment (represented by Miss Watson), the Human Fertilisation and Embryology Authority [“the HFEA”] (represented by Miss Gallfent QC), and Z by his litigation friend, The Official Solicitor (represented by Miss Roper). I express my thanks to the advocates for their assistance and for the careful and sensitive manner in which they approached the unusual circumstances of this case.
2. In coming to my decision, I considered a detailed statement from Y and heard submissions from all the parties. Y did not attend court she remained at her husband’s bedside in hospital. I announced my decision at the end of the hearing and indicated that I would reserve judgment. The following day I was informed that my order had been effected.
3. I made an order forbidding the identification of Z and his family or the doctor who was due to retrieve Z’s sperm.

The Background

1. Z was aged 46 years at the time of my decision. He married Y in August 2014, the couple having been in a relationship for about four years before their marriage. Y gave birth to their son in January 2016. The couple had always wanted a brother or sister for their son and tried for a further pregnancy as quickly as they could after his birth. Unfortunately, they were unable to conceive naturally and in September 2017 they decided to investigate assisted conception with the help of their GP. Initial medical tests on the couple were reassuring and so they were referred for a fertility clinic appointment. Prior to that appointment, Z provided a sperm sample for the purpose of sperm analysis.
2. Prior to attending for their fertility clinic appointment in May 2018, the couple completed a large number of forms, a small portion of which were appended to Y’s statement. Y recalled that the forms asked the couple which types of fertility treatment they wished to undertake, including collection of Y’s eggs and Z’s sperm, their storage and use in fertility treatment. It was clear from the contents of Y’s statement that the couple discussed the storage of their genetic material and the uses to which this material might be put, including the creation of embryos and the ethics of discarding the same. Additionally, the couple talked specifically about what would happen if one of them were to die. Y’s statement recorded that Z had talked about the storage of his sperm and what would happen if he died, her recollection being that this issue had been raised specifically in the clinic form which he had to complete. Y recalled asking Z specifically what they would do if he died whilst they were having fertility treatment on the evening that they completed the clinic consent forms. Z told Y that he was happy for her to do it - that is, have the treatment - if it was what she wanted. Y said to Z that she would want to go ahead with treatment because she wanted their son to have a brother or sister and she recalled Z being in complete agreement with her about this issue.
3. The couple attended for their fertility clinic appointment in May 2018 and it was recommended that they begin in vitro fertilisation [“IVF”], subject to one medical test on Y being clear. As the couple already had a child, they were not eligible for IVF treatment and thus opted to pay privately for this. During their clinic appointment they did not discuss the forms they had completed with their consultant. Y attended for her medical test later that month and the result was clear. The couple were due to see their consultant on 16 July 2018 in order to begin IVF treatment.
4. Following their clinic appointment in May 2018, the couple discussed IVF treatment on a number of occasions. They were excited about being able to embark on this process as all the relevant medical tests were clear and there seemed to be a good prospect of success. They discussed how many embryos they wished to implant and debated how they felt about keeping unused embryos. They also discussed putting them into storage and deferring a decision but, because they could not afford too many rounds of private treatment, they decided that they would implant more embryos than one. They also had discussions about these issues with friends and family.
5. On 5 July 2018 Z was travelling to work on his motorcycle when he was struck by a van. He sustained a catastrophic brain injury together with massive internal abdominal injuries. Imaging of Z’s brain revealed that the damage from the initial trauma and consequent lack of oxygen meant that he would never recover any function or awareness or indeed regain consciousness. Z would also be unable to breathe on his own. Given that bleak prognosis, Z’s clinical team recommended that, once all the medication had been flushed from Z’s body, they would undertake brainstem testing. If no brain activity was identified, Z would be pronounced dead and taken off life support for organ donation.
6. Y wanted to retrieve Z’s sperm before he died in order to continue to have the IVF treatment on which they were both agreed so that their son could have a brother or sister. It was extremely important to her that Z’s death would not have been in vain and she was extremely worried that any flaw in the paperwork they had completed for their fertility treatment might mean that she was unable to conceive a further child with her husband’s sperm. She told me in her statement that this “*would leave an irreplaceable hole*” in her life, the life of her son and the lives of their family.

The Law

1. Section 15 of the Act confers on the Court of Protection the discretionary power to make declarations as to:
   * 1. whether a person has or lacks capacity to make a decision specified in the declaration;
     2. whether a person has or lacks capacity to make decisions on such matters as are described in the declaration; and
     3. the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.
2. Section 16(1)(a) of the Act applies if a person lacks capacity in relation to a matter or matters concerning their personal welfare and permits the court (a), by making an order, to make the decision or decisions on a person’s behalf in relation to a matter or (b) by appointing a person (a deputy) to make decisions on the person’s behalf in relation to a matter. Section 16(3) provides that the powers of the court pursuant to section 16 are subject to the provisions of the Act and, in particular, to section 1 (the principles) and 4 (best interests).
3. Section 1 sets out the principles on which the act is based. These are as follows:
   * 1. a person must be assumed to have capacity unless it is established that he lacks capacity (section 1(2));
     2. a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success (section 1(3));
     3. a person is not to be treated as unable to make a decision merely because he makes an unwise decision (section 1(4));
     4. an act done, or decision made under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests (section 1(5));
     5. before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the persons rights and freedom of action (section 1(6)).
4. Section 4 of the Act sets out a checklist of factors that must always be considered when determining whether a decision made on behalf of a person lacking capacity to make that decision for themselves, or an act carried out in connection with the person’s care or treatment, is in that person’s best interests. There is no statutory definition of best interests since this will depend on the particular act or decision in question and the individual circumstances of the person concerned. In the particular circumstances of this case, I consider that the following factors listed in section 4 appear to be engaged.
5. First, the court must consider all the relevant circumstances and take account of the following matters. It must consider whether it is likely that Z will at some time have capacity in relation to the matter in question and if it appears likely that he will, when that is likely to be (section 4(3)). Then, it must consider, so far as is reasonably ascertainable;
   * 1. the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
     2. the beliefs and values that would be likely to influence his decision if he had capacity,
     3. and the other factors that he would be likely to consider if he were able to do so (section 1(6)).
     4. The court must also take into account, if it is practicable and appropriate to consult them, the views of anyone named by the person as someone to be consulted on the matter in question or on matters of that kind and anyone engaged in caring for the person or interested in his welfare (section 1(7)).
6. Given that the court was being asked to authorise that a suitable person execute the relevant consents for the storage of Z’s sperm, the provisions of the Human Fertilisation and Embryology Act 1990 apply [“the HFE Act”]. Schedule 3 of the HFE Act deals with the consents to use or store gametes, embryos or human admixed embryos. The consent provisions are carefully drawn for sound public policy reasons, namely that consent is central to effective regulation in this area. They are couched in the imperative for that very reason.
7. A gamete is either a human egg or a human sperm. Instead of referring to Z’s gametes in this judgment, I have used the more readily understandable term “sperm”. However, my order uses the term “gametes” as this is the term used in Schedule 3 of the HFE Act.
8. Sub-paragraph 1(1) of the Schedule states that:

“*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*.”

A consent under this Schedule by a person who is unable to sign because of illness, injury or physical disability may comply with the requirement of sub-paragraph 1(1) as to signature “*if it is signed at the direction of the person unable to sign, in the presence of the person unable to sign and in the presence of at least one witness who attests the signature*.”

The Parties’ Positions

1. The draft order submitted by the parties invited the court to declare that, by reason of his traumatic brain injury, Z lacked the capacity to provide his written consent for fertility treatment for the purposes of the HFE Act, such written consent being required for the storage and use (but not for the retrieval) of his sperm. In addition, the court was invited to declare that it would be lawful for a suitable qualified clinician to retrieve Z’s sperm and that it would be lawful for those sperm to be stored both before and after his death. Finally, pursuant to s.16(2)(a) of the Act the court was asked to direct that a relative – not Y - had the authority to sign the relevant consents for the storage of Z’s sperm in accordance with sub-paragraph 1(2) of Schedule 3 to the HFE Act. I note that the relative would have to execute the consents in Z’s presence before he died or was declared to be dead and in the presence of a witness in order to comply with the strict requirements of sub-paragraph 1(2) of Schedule 3 of the HFE Act.
2. Given the urgency of the medical time frame, I was provided with scant information as to whether Z had, in fact, given consent to the storage and use of his sperm in compliance with the strict requirements of Schedule 3 of the HFE Act. The clinic attended by the couple in May 2018 had produced some records relating to that appointment which were appended to Y’s statement. These did not include the forms completed by the couple prior to their clinic appointment or any consents by Z for the storage and use of his sperm. I have proceeded on the basis that it is doubtful such consents exist in the correct form required by the HFE Act.
3. The hospital trust treating Z agreed the order sought as did the Official Solicitor on behalf of Z. Miss Gallafent QC on behalf of the HFEA did not resist the order sought but did not consent to it. After some discussion I had with the advocates during the hearing, the order sought altered as did the parties’ respective positions. I deal with this below.

Discussion

1. I accept the witness statement made by Y. Though it was untested in oral evidence, no party took issue with its contents. It was beyond doubt that, by reason of his catastrophic brain injury, Z lacked the capacity to give the consents sought in relation to fertility treatment. Given that the clinical team proposed to undertake brainstem testing imminently, Z was also unlikely to recover capacity. In those circumstances, the court’s decision-making powers under the Act were fully engaged.
2. Before Z’s accident, I am satisfied about the following facts and so find that:
3. Z and Y had a settled intention to have a brother or sister for their little boy;
4. Z and Y had been unable to conceive a second child naturally and, as a result, had sought a referral for fertility treatment;
5. Z and Y were under the care of a consultant obstetrician and gynaecologist in order to receive IVF treatment and had an appointment on 16 July 2018 to progress that treatment; and
6. Z had discussed with Y the posthumous use of his sperm and had agreed to posthumous use.
7. In reaching my decision, I have taken those factors into account as well as Y’s wishes as to what would be in Z’s best interests, she being a person presently caring for Z by reason of her presence by his bedside and a person concerned with and interested in his welfare. I have also taken account of what Z would choose to do about this issue if he knew that he was catastrophically injured, was being kept alive by means of life-support and was on the point of that medical treatment being withdrawn resulting in his death. It seems to me that Z would have chosen to allow clinicians to retrieve his sperm so that it might be stored and then used after his death so that his little boy might be able to have a brother or sister. That choice was entirely consistent with the evidence before me and consistent with what I had learned about Z’s hopes and dreams for a family life with Y and children of their own. I was also satisfied that Z had contemplated what might happen if he died and that family life might not include him in person but might, however, include a child conceived by Y after his death using his sperm. Standing back and applying the law to the facts of this case, I am in no doubt that the decisions I have taken on Z’s behalf were in his best interests even though his death was imminent.
8. I have already referred to the terms of the draft order which I was invited to approve. In discussion with counsel, I queried why I was only being asked to approve authority for the consent of the storage of Z’s sperm and not also consent for the use of that material and any embryos formed from that material. Given my findings of fact, it seemed to me that Z would want his sperm not only to be stored but also to be used. Storage and then use were essential parts of a process which Z had embarked upon in the hope of providing his son with a brother or sister. Furthermore, if the consent to use was not executed before Z died, I was told by counsel that, given the strict provisions of sub-paragraph 1(2) of Schedule 3 of the HFE Act, there might be real obstacles to the use of Z’s stored sperm after death in the absence of a valid pre-death consent. Further legal proceedings might well be required. It seemed to me that the last thing Z would have wanted for Y was that the fertility treatment they both had embarked upon might be put at risk or delayed by the outcome of further legal proceedings.
9. I indicated to counsel that it would be undesirable and inconsistent with the facts of this case for the court not to authorise the execution of consents for use as well as storage prior to Z’s death. Mr Mylonas QC on behalf of Y agreed as did the hospital trust. The Official Solicitor had not considered this matter prior to it being raised by me and, having had no time to investigate this issue, adopted a neutral position on the authorisation of consent for the use of Z’s sperm. Notwithstanding the position of the Official Solicitor, I was satisfied that I should exercise my powers to direct the execution of a consent for both the storage and the use of Z’s sperm.
10. My order declared that, by reason of his traumatic brain injury, Z lacked capacity to provide his written consent for fertility treatment for the purposes of the HFE Act, such written consent being required for the storage and use (but not for the retrieval) of his gametes. Notwithstanding that Z lacked capacity, I declared that it was lawful for a doctor to retrieve his gametes and lawful for those gametes to be stored both before and after his death on the signing of the relevant consents storage and use and that it was lawful for his gametes and any embryos formed from his gametes to be used after his death. I also declared that the court was satisfied that the requirements of Schedule 3 to the HFE Act in relation to consent were met in those circumstances. My order provided for a relative to sign the relevant consents in accordance with the provisions of sub-paragraph 1(2) of Schedule 3 to the HFE Act.

Conclusion

1. This was a tragic case where the court was invited to exercise its powers with the aim of allowing Z and Y a further chance to become parents albeit after Z’s death. My decision is fact specific though I hope that, should another such case arise, the court will, from the outset, consider the execution of consents to both storage and use of gametes rather than consent to storage alone.
2. That is my decision.