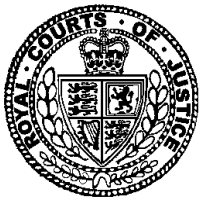

Neutral Citation Number: [2022] EWCOP 48

Case No: COP 14016777

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2022

Before:

MR JUSTICE POOLE

- -

Re X (Catastrophic Injury: Collection and Storage of Sperm)

Between:

V and W

Applicants

- and -

(1) X (By his litigation friend, the Official Solicitor)

(2) King's College Hospital NHS Foundation Trust

Respondents

- -
- -

Richard Jones and Melissa Elsworth (instructed by Burgess Mee) for the **Applicants**
Stephanie David (instructed by Hill Dickinson) for the **Respondent**
Nageena Khalique KC for the **Official Solicitor on behalf of X**

Hearing dates: 3 November 2022

- -

JUDGMENT

Mr Justice Poole:

1. This is an urgent application in the Court of Protection heard out of hours. I gave a ruling and reasons for that ruling at the hearing but this is my full written judgment. The person with whom I am concerned is X. I have made a Transparency Order prohibiting the identification of X, any members of his family or the healthcare professionals treating him. The Respondent Trust can be named. The Order remains in force until further order.

2. The application is brought in tragic circumstances by X's parents, his father V and his mother W. At the time of the hearing X lies unconscious in intensive care following a sudden collapse. There is virtually no prospect that he will recover. He may be assessed as being brain stem dead within the next 24 hours. The application is for a declaration that it would be lawful for a doctor to retrieve X's gametes and lawful for those gametes to be stored both before and after his death on the signing of the relevant consents. Further, the applicants seek an order that V may sign the relevant consents in accordance with the provisions of sub-paragraph 1(2) of Schedule 3 to the Human Fertilisation and Embryology Act 1990 ("The 1990 Act").

3. The 1990 Act defines "gamete" as including live human sperm. In this judgment I shall refer to X's sperm rather than to gametes. The applicants do not seek any orders in respect of the use of X's sperm once collected and stored. That, they say, is for another day. However, it is clear that the applicants want X's sperm to be collected and stored in order that it might be used in the future for the conception and birth of a child or children.

4. The family is Chinese. At the hearing, V had the assistance of his brother-in-law to act as an interpreter. W was not in attendance. The applicants were represented by Mr Jones, Counsel. The Trust was represented by Ms David, Counsel, through whom I have been given uncontested information about X's condition and the process that would be used to collect and store his sperm. The Trust takes a neutral position on whether the declarations and orders sought are in X's best interests. The Human Fertilisation and Embryology Authority ("HFEA") wished to appear at the hearing but could not do so out of hours. Nevertheless, I was provided with a detailed letter from the HFEA setting out their opposition to the application as they understood it to be made. The Official Solicitor does operate an out of hours service, which is extremely helpful to the court and the other parties, and was represented by Miss Khalique KC, who told the court that the Official Solicitor aligns herself with the HFEA's position.

5. X is a student at a University in the South West of England. He is 22 years old and previously fit and healthy. He is his parents' only child. On 24 October 2022 he was playing sport when he collapsed. He had suffered a stroke. He was taken to a hospital in the South West and then by intensive care transfer to the care of King's College Hospital NHS Foundation Trust in London. I have a written report from a consultant neurosurgeon at the hospital. He says that X suffered a cryptogenic stroke (meaning that it has an unknown cause) which he described as a malignant, middle cerebral artery stroke. X has suffered brain stem ischaemia. Whilst initially his eyes were open and he responded to some commands, he deteriorated. He underwent surgery to decompress his brain but since 27 October 2022 his pupils have been fixed and dilated and there have been no motor responses. The neurosurgeon reports,

> "There is evidence of transtentorial herniation bilaterally with severe tonsillar descent below the foramen magnum and effacement of the basal cisterns. A CT angiogram demonstrates that there is no perfusion of either hemisphere above the level of the upper basilar. Overall, the appearances are consistent with a very extensive bi-hemispheric ischaemic insult."

6. I am told by Ms David on behalf of the Trust that it is thought that X is now brain stem dead but that a formal brain stem death assessment has not yet been performed. In the circumstances his death has not been confirmed and I proceed on the basis that X is alive. X is intubated and supported by mechanical ventilation. He has no cough or gag to suctioning and exhibits no spontaneous respiratory activity. The prognosis is very poor and he is not expected to survive. It may be possible to keep him on ventilation for an uncertain period of time but multi-organ failure is anticipated and his heart may stop at any time. If so, there would be no justification for resuscitation.

7. There is no dispute that X lacks capacity to make the decisions under consideration. Neither is there any dispute that he is extremely unlikely to recover capacity to make those decisions. Sections 1 to 3 of the Mental Capacity Act 2005 ("MCA 2005") apply. I need not dwell on the test for capacity because there can be no doubt in this case that X lacks capacity to make the relevant decisions.

8. By s.1(5) of the MCA 2005,

> "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."

I must consider X's best interests having regard to the provisions of s.4 the MCA 2005 and the Code of Practice. Section 4 provides:

> "4 Best interests
>
> (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
>
> (a) the person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.
>
> (2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
>
> (3) He must consider—

> (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
>
> (b) if it appears likely that he will, when that is likely to be.
>
> (4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
>
> (5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.
>
> (6) He must consider, so far as is reasonably ascertainable—
>
> (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
>
> (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
>
> (c) the other factors that he would be likely to consider if he were able to do so.
>
> (7) He must take into account, if it is practicable and appropriate to consult them, the views of—
>
> (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
>
> (b) anyone engaged in caring for the person or interested in his welfare,
>
> (c) any donee of a lasting power of attorney granted by the person, and
>
> (d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).”

9. I have been provided with a statement from V who says,

> “I know that the court will have particular regard to my son’s past wishes and feelings and in particular any written statement made by him when he had capacity as to what he wanted for the future. My son had a girlfriend Y, and he has for many years spoken to me about wanting children of his own. For example,

> he has made sure he has kept his own toys and even his junior golf clubs to give to his own child one day.
>
> "I make it clear to the court that my wife and I would raise the child, but the girlfriend, who is aware of this application, has expressed a desire to carry his child. I appreciate that we cannot speak for her, and the court has no evidence from her, but it seems right that we make the court aware of this and that in any event, what we are clear about, is that our son has always wanted a family and we would wish very much to fulfil that wish in any event.
>
> "In relation to X's beliefs and values, he was very family focused and we discussed on WeChat on many occasions family life and what type of father he would be (these will be produced in due course once they are translated). I know that he spoke to his friends at university about being a dad, even to the extent of discussing what type of dad he would be.
>
> "In due course we would of course wish to bring further evidence before this court but in the interests of time I set out what is the most relevant information for the court to consider. The hospital is aware of our desire and the need for speed.
>
> "Finally, I am aware that this application, because of its urgency, is being made out of hours and without notice. On that basis, I am asking for a proportionate order, namely that my son's sperm be extracted from him until such time as the court can deal with this matter fully. In due course, I will be asking for that sperm to be used to create embryos but for the purposes of today I limit the application to extraction and storage only."

10. I have no evidence directly from X's girlfriend, Y. As V fairly says, he cannot speak on her behalf. I have no evidence of any discussions between X and Y, no evidence of whether they wish to start a family, and I do not know Y's position in relation to this application. V says that she is aware of it and "has expressed a desire to carry his child." I take that evidence into account, but there has been no opportunity to explore with her what that means in terms of the present application.

11. There is no advance decision in this case nor is there any evidence as to X's views and beliefs as they might have been relevant to a decision such as this. It is one thing to have a consistent and heartfelt desire to be a living, caring father. It is quite another thing to wish to have one's sperm collected and stored when unconscious and dying, with a view to the possibility of the sperm being used for conception after one's death, and without having expressed any view when living about how the sperm should be used.

12. The information I have as to the process of collection is limited. It would not be by induced ejaculation – that is not possible for X. Instead, one of X's testes would be

wholly or partially removed and then sperm extracted from it. The sperm would then be frozen and stored at the hospital pending any further permission or order. It is highly unlikely that X would be aware of the process or suffer pain, but the process is clearly invasive. I have been told that the process could not be performed until tomorrow morning because of the unavailability overnight of the skilled personnel needed to carry it out.

13. The applicants impressed upon the court the urgency of the application and their strong wish that it should be heard out of hours notwithstanding the absence of the HFEA and the limited evidence before the court. There is no application to collect sperm posthumously. Within a few hours it may be too late to hear the present application. Even though the process of collection and storage could not take place until the morning, the applicants want the least delay possible. I decided to accede to the applicants' request to proceed to hear their application out of hours and with only the written representations of the HFEA in their letter.

14. Schedule 3 of the 1990 Act deals with consents to the use or storage of gametes. As the HFEA has set out in its letter in response to this application (or anticipated application at the time when it was written), the provision of consent is central to effective regulation in this area.

15. Section 4(1) of the 1990 Act provides that no person shall store any gametes except in pursuance of a licence. Section 12(1) of the 1990 Act makes it a condition of every licence granted under the Act [with an exception which is immaterial to the present case] that the provisions of Schedule 3 of the Act shall be complied with.

16. Paragraph 1 of Schedule 3 to the 1990 Act provides that,

> 1 (1) A consent under this Schedule, any renewal of consent, 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.
>
> (2) A consent under this Schedule by a person who is unable to sign because of illness, injury or physical disability (a "person unable to sign"), any renewal of consent by a person unable to sign, and any notice under paragraph 4 by a person unable to sign varying or withdrawing a consent under this Schedule, is to be taken to comply with the requirement of sub-paragraph (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."

17. Paragraph 2(2) of Schedule 3 to the 1990 Act provides, among other things, that consent to storage of any gametes must specify the maximum period of storage and state what is to be done with the gametes, embryo or human admixed embryo if the person who gave the consent dies or is unable, because the person lacks capacity to do so, to vary the terms of the consent or to withdraw it. Paragraph 3(1) of Schedule 3 to the 1990 Act provides that before a person gives or renews 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.

18. None of these requirements can be met in the present case.

19. The HFEA points to the court's decision in *L v HFEA* [2008] EWHC 2149 (Fam). Macur J had heard and granted an out of hours application for a declaration that it would be lawful to retrieve sperm from a recently deceased man. However, at the full hearing, Charles J concluded that "I am not satisfied that it is possible to lawfully remove, or authorise the removal of, gametes from a dead person (who has not given an effective advanced consent to this)." The HFEA also refers to the judgment of Theis J in *Jennings v Human Fertilisation and Embryology Authority* [2022] EWHC 1619 (Fam) in which at [104] she concluded,

> "Parliament intended to enable a deceased person whose gametes had been used to create an embryo with their partner for that partner to be the named person to use that embryo after their death, provided it was the deceased's wish recorded in writing. In my judgment the court can and should read down the requirement in Schedule 3 to dispense with the requirement for written and signed consent in this limited situation where a person has been denied a fair and reasonable opportunity in their lifetime to provide consent for the posthumous use of their embryos and there is evidence that the court concludes, directly and/or by inference, that if that opportunity had been given, that consent by that person would have been provided in writing."

20. The letter from the HFEA concludes:

> "As far as we are aware, there would not appear to be any evidence in this case to suggest that patient X was ever denied the opportunity to consent to posthumous use or storage of his sperm. Further, there would also appear to be insufficient evidence to support the proposition that it was X's clear wish for his sperm to be stored posthumously and used to give birth to a child via surrogacy arrangements.
>
> For the avoidance of doubt, the provisions in the Human Tissue Act 2004 which allow next of kin to provide consent to the harvesting of other body tissues do not apply to gametes".

21. The cases referred to by the HFEA concern the use of gametes from a deceased person. They do not concern the application of the MCA 2005 in relation to the collection and storage of gametes in the case of a living but incapacitous person. I note the case of *R v HFEA ex parte Blood* [1999] Fam 151 in which it appears that semen was taken from Ms Blood's husband whilst he was in a coma without court order. The judgment of the

Court of Appeal concerned the use of the collected and stored sperm and therefore is not directly relevant to the present case.

22. My attention has been drawn to the decision of Knowles J in *Y v A Healthcare Trust* [2018] EWCOP 18, another urgent decision involving a dying man. The application was brought by the man's partner and mother of their child. He was called Z and she was called Y in the judgment. Y and Z had struggled to conceive after having their first child and they had begun to explore the opportunity to have fertility treatment. Indeed they had been referred to a fertility clinic and had had initial meetings. Knowles J recorded,

> "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."

23. The application was for,

> "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."

Knowles J allowed the application concluding:

> "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 1990 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 [for] 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 1990 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 1990 Act."

24. The application before me is limited to the collection and storage not the use of X's sperm. The provisions of Schedule 3 of the 1990 Act do not require consent to the collection of sperm from a person, only to its storage. However, if sperm is not used "live" or if it is not stored effectively within a short time of its collection, it will be useless. The purpose of collection of sperm in this case would be to store it with a view to its possible use for conception.

25. The issues which Knowles J had to address are similar to those in the present case but the two cases are factually far apart. The application before me is brought by X's parents not his life partner. X has a girlfriend, but I have no evidence of any discussions he has had with her or others about whether he would want his sperm to be collected and stored in the event of his becoming unconscious with a very limited life expectancy. There is no evidence that X and his girlfriend were in the process of trying to conceive nor that they have tried in the past. There is no evidence of the nature of their relationship. X may have wanted one day to have children, but that is not the same as wishing for his sperm to be collected and stored when unconscious and dying. I cannot know what his wishes and feelings about that decision would be. Unlike in *Y v A Healthcare Trust*, there is no direct evidence that X ever contemplated the issue. Nor do I have any evidence as to his values and beliefs from which I could infer what his decision would have been. I cannot infer from the fact that he wanted one day to be a father that he would have wanted his sperm collecting and storing with the potential that it could be used for the conception and birth of a child he would never know.

26. I take into account the views of V and W that the collection and storage of their son's sperm is in his best interests and what he would have wanted. The Trust takes a neutral position and I do not have the benefit of the views of those caring for X at the hospital.

27. X's sudden collapse and deterioration at such a young age is a tragedy. The urgency of the application is due to his deteriorating condition and the fact that his heart may stop beating at any moment. I am conscious that if I do not make the declarations sought now, sitting out of hours, it may well be too late for the declarations and the decisions sought by the parents to be made at all or to take practical effect. However, I cannot

allow the urgency of the application and the tragedy of the circumstances to dictate the decision of the court.

28. If I declared in this case that it was lawful to collect and store X's sperm without any evidence that that is what he would have chosen for himself, then it would follow that the same declarations might be made in many other cases where parents or other relatives wanted their loved one's gametes to be collected and stored with a view to decisions about their use being made at a later stage. I have no evidence as to the practice in hospitals in England and Wales in such circumstances but it would be unlawful under the 1990 Act to store collected sperm without the consents referred to earlier in this judgment. Here, the Trust has not agreed to the procedure and is concerned that without X's actual consent it would be acting unlawfully to collect and store his sperm. If the Court of Protection were routinely to authorise the collection and storage of gametes in cases where there is no or little evidence that the incapacitous, dying person would have consented, then it would undermine the regulatory provisions within the 1990 Act which require actual consent.

29. The requirements for consent set out in the 1990 Act are clear. For the purposes of this out of hours application I proceed on the basis that the Court of Protection does have the power to declare the retrieval of gametes from an incapacitous person, and their storage, to be lawful notwithstanding the absence of written consent. For the purposes of this out of hours application I also accept that in an exceptional case, such as *Y v A Healthcare Trust*, where there was strong evidence that the incapacitous individual would have wanted their sperm to be collected and stored so that it could be used after their death for their life partner to conceive and give birth, such a declaration may be given. This is not such a case.

30. It might be said that there would be no harm in allowing the sperm to be collected and stored and that an interim declaration would at least allow a fully considered decision about the use of X's sperm to be made at a later date. However, the process of collecting sperm from an unconscious individual is an invasion of privacy. It involves extracting sperm in circumstances that a conscious person would find invasive and some might find humiliating. The sperm might eventually be used to lead to conception and the birth of a child or children. Decisions about whether or not to become a parent are part of a person's private life. Article 8 of the European Convention on Human Rights (ECHR) covers reproductive rights. As such the decision raised by this application engages X's Article 8 rights under the ECHR and the collection and use of his sperm would be an interference with those rights.

31. The European Court of Human Rights has held that the ability of an applicant to exercise a conscious and considered choice regarding the fate of her embryos concerned an intimate aspect of her personal life, of her right to self determination, and thus of her private life - *Parrillo v. Italy* (Application no. 46470/11):

> "159. The Court concludes that the applicant's ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate aspect of her personal life and accordingly relates to her right to self-determination. Article 8 of the Convention, from the standpoint of the right to respect for private life, is therefore applicable in the present case."

32. The decisions that the court is invited to make are not free of consequence. They are important and they engage X's Article 8 rights. In *K v LBX and others* [2012] EWCA Civ 79 Thorpe LJ held,

> "I conclude that the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate."

I adopt that approach. For an interference with X's Art 8 rights to be lawful, it must be necessary and proportionate to achieve a legitimate aim.

33. Having considered all the circumstances, applying section 4 of the MCA, and considering whether the interference with X's Art 8 rights is necessary and proportionate, I have decided to refuse the application. It would not be in X's best interests to make the declarations sought. Assessment of his best interests involves not merely an analysis of the risks and benefits of the proposed procedure, but also of X's past and present wishes and feelings, his views and beliefs, and his autonomy. His right to privacy and to self-determination in relation to reproduction must be considered. There is no evidence before the court to persuade me that X would have wished for his sperm to be collected and stored in his present circumstances. I cannot accept that there should be a default position that sperm should be collected and stored in such circumstances as being generally in a person's best interests. I cannot conclude that making the declarations as sought would be in accordance with X's wishes, values or beliefs. The process of collecting X's sperm is physically invasive and there is no evidence that X would have consented to it or would have agreed to its purpose. I take into account the views of his parents about X's best interests. However, weighing all the relevant matters in the balance I conclude that it is not in X's best interests to make the declarations sought. The declarations if made would lead to a significant interference with his Article 8 rights and I am not persuaded that the interference would be necessary or proportionate.

34. I therefore dismiss the application.

35. I express my sympathies to V and W for the terrible situation in which they find themselves.

Postscript

On 8 November 2022 I was informed that X had been declared brain stem dead and that his parents had taken the difficult decision not to make any further applications. They would honour X's wishes to donate his organs so that others could benefit from their son's tragic, premature loss of life. They agreed to my adding that information to this judgment. They have my condolences. May their son rest in peace.