



Neutral Citation Number: [2022] EWHC 1619 (Fam)

Case No: FD21F00088

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/06/2022

**Before:**

**MRS JUSTICE THEIS**

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**Between:**

**Ted Jennings**

**Applicant**

**- and -**

**Human Fertilisation and Embryology Authority**

**Interested Party**

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**Ms Jenni Richards Q.C, Ms Catherine Dobson and Ms Stephanie David**

(instructed by **Hill Dickinson LLP**) for the **Applicant**

**Ms Kate Gallafent Q.C & Mr Ravi Mehta** (instructed by **Blake Morgan LLP**)

for the **Respondent**

Hearing date: 5<sup>th</sup> May 2022

Judgment: 22<sup>nd</sup> June 2022

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**Approved Judgment**

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MRS JUSTICE THEIS

## **Mrs Justice Theis DBE:**

### **Introduction**

1. The application made by Ted Jennings seeks a declaration that it is lawful for him to use an embryo created using his sperm and the eggs of his late wife, Fern-Marie Choya, in treatment with a surrogate. The embryo was created in 2018 when Mr Jennings and Ms Choya were undergoing fertility treatment to fulfil their wish to have children of their own. The embryo is currently stored at the Centre for Reproductive and Genetic Health ('CRGH').
2. Tragically, and without warning, Ms Choya died in February 2019 whilst she was 18 weeks pregnant with twins. There is one remaining embryo which Mr Jennings wishes to use with a surrogate, he says to fulfil their joint wish for this to take place in such circumstances. He accepts there is no written consent by Ms Choya for that to take place but says they were not given sufficient information or opportunity to give that written consent and, if they had been, the court can infer from all the evidence Ms Choya would have given it.
3. This application was served on the Human Fertilisation and Embryology Authority ('the HFEA') and the Secretary of State for Health and Social Care ('the Secretary of State'). The HFEA is an interested party and has filed evidence from its Chief Executive, Mr Thompson. The Secretary of State decided not to participate in the proceedings.
4. The court heard oral submissions on 5 May 2022 and reserved judgment. There was insufficient time on 5 May 2022 for Ms Richards Q.C., on behalf of Mr Jennings, to reply to Ms Gallafent Q.C.'s submissions on behalf of the HFEA. Directions were made for written responses. Ms Richards filed hers on 20 May 2022 and on 26 May 2022 the HFEA informed the court no further submissions would be made in response on their behalf.
5. The HFEA oppose the declaration sought on the basis that there was not a valid written consent by Ms Choya at the relevant time to use the remaining embryo in the way sought by the declaration in the event of her death. The statutory scheme requires such consent to be in writing and the HFEA submit Ms Choya had sufficient information and opportunity to give that written consent.
6. The court is extremely grateful to all counsel for their detailed written representations, supplemented by their focussed and insightful oral submissions in this difficult case. Ms Richards Q.C., Ms Dobson, Ms David and their instructing solicitors all acted pro bono, which I have no doubt greatly assisted Mr Jennings in being able to make this application.

### **Relevant background and evidence**

7. Mr Jennings and Ms Choya had been in a loving and committed relationship since 2007. They married in 2009 and wanted to have a family of their own. They experienced difficulties in conceiving naturally, sought fertility advice and underwent three cycles of IVF treatment at the Hammersmith Hospital in 2013 and 2014 which were not successful. Ms Choya conceived naturally in 2015 and 2016 but both pregnancies ended

in miscarriage due to ectopic pregnancy. Mr Jennings and Ms Choya underwent further cycles of IVF treatment, re-mortgaging their home to fund private treatment at CRGH.

8. Their final cycle of treatment was in late 2018. At that point they only had one embryo, so prior to the embryo transfer underwent two further batching cycles to acquire more embryos to enable them to have more than one child. Once they had two embryos in storage they proceeded with the single embryo transfer in November 2018. A positive pregnancy with twin girls was confirmed in November 2018. Ms Choya developed complications in her pregnancy at 18 weeks, which resulted in a uterine rupture, and she died on 25 February 2019. It is the remaining embryo that is the subject of this application.
9. As part of their fertility treatment Mr Jennings and Ms Choya completed a number of forms. They were first treated at Hammersmith Hospital and then CRGH.
10. Prior to the fourth and final treatment at CRGH, Mr Jennings and Ms Choya were given a further set of forms to complete, including both internal clinic forms and HFEA pro forma forms.
11. Ms Choya was asked to complete an HFEA WT form ('Women's consent to treatment and storage (IVF and ICSI)') (and Mr Jennings completed an HFEA MT form ('Men's consent to treatment and storage (IVF and ICSI)').
12. The MT form provides a man with the opportunity to consent to an embryo created using his sperm being used for his partner's treatment if he dies. It provides, at section 6.2 "*Do you consent to embryos (already created outside the body with your sperm) being used for your partner's treatment...If you die...If you become mentally incapacitated*". The MT form goes on at section 6.4 to state under the heading "*Other uses for your sperm or your embryos*" that "*if you wish to use your sperm or embryos in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information*". The form explains that the person signing would need to complete an additional form, namely the "*Men's consent to the use and storage of sperm or embryos for surrogacy*" form.
13. The WT form used at the material time did not provide any opportunity for a woman to consent to a partner-created embryo being used for her partner's treatment if she dies. A partner-created embryo is defined as '*Embryos created using the gametes of a man and a woman who declare that they have an intimate relationship*' (see paragraph 12 Schedule 3A to the 1990 Act). At section 6.2 the WT form asks whether the woman consents to eggs and embryos being used for training purposes in the event of her death or mental incapacity. It then states, under the heading "*Other uses for your eggs or embryos*": "*If you wish your eggs or embryos to be used in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information. Depending on your circumstances, you will need to complete one of the following: • 'Your consent to donating your eggs' (WD form), • 'Your consent to donating embryos' (ED form), or • 'Women's consent to the use and storage of eggs or embryos for surrogacy' (WSG form).*"
14. According to Mr Jennings, as they had discussed and completed the forms before, Ms Choya completed all of them and marked where Mr Jennings should sign them. The forms are both signed and dated 21 May 2018. The medical records record on that day

an entry by Kathya Djalo “*Couple seen for consent return. Already completed via docuSign. Printed and signatures witnessed on hardcopy. Sent for 2<sup>nd</sup> check. Research consents not completed. Given to couple to consider and return. Bloods taken with consent for CRGI as previous results expire more than one year*”.

15. Ms Choya completed the MT form signed by Mr Jennings. Notably, she ticked the box to record Mr Jennings’ consent to their partner-created embryos being used in Ms Choya’s treatment in the event of Mr Jennings’ death.
16. Ms Choya completed and signed the WT form consenting to: (a) the use of her eggs to create embryos for use in her treatment with Mr Jennings and (b) the storage of embryos created with her eggs for a period of ten years (the maximum storage period available to Ms Choya).
17. Three of the four WT forms which Ms Choya completed over the course of her IVF treatment recorded her consent to the storage and use of embryos for training purposes in the event of her death or incapacity. In the final WT form, dated 21 May 2018, Ms Choya did not consent to embryos created using her eggs being used for training purposes in the event of her death or incapacity. This is because, according to Mr Jennings, she and Mr Jennings had only one normal embryo remaining in storage and it was their intention that this embryo would be used with a surrogate in the event that IVF treatment was unsuccessful. In his statement Mr Jennings states:

*“I do not recall that we had any negative emotions towards parenthood in the event of using a surrogate, donated embryos or adopting a child. Our emotional journey was going from the helplessness of the infertility compounded by the feeling of unjustness given all the other medical issues already faced. We eventually got to the position of accepting that having given IVF our best shot, this would be the last time and the final embryo would be saved for surrogacy.”*
18. Mr Jennings sets out in his statement that he and Ms Choya did not appreciate the significance of the paragraph entitled “Other uses for your eggs and embryos” at section 6.2 of the WT form when they completed the forms. He does not recall discussing it or its implications with the staff at CRGH or of it being drawn to his attention. No one raised the issue with them that he had provided posthumous consent yet Ms Choya had not.
19. Mr Jennings acknowledges that by the time of their fourth cycle of IVF he and Ms Choya were familiar with the MT and WT forms and had discussed their answers on previous occasions. Ms Choya completed all of the forms and marked where Mr Jennings should sign.
20. The statement from Dr Seshadri (Consultant Gynaecologist at CRGH) filed by the Applicants describes what the usual practice is, that the WT and MT forms are discussed as part of the nurse consent consultation. She states “*I understand from my colleagues that there is usually some reference to the option of completing additional forms during this consultation, but the take-up is very low - probably because we treat relatively young people in good health*”. There is nothing in the HFEA Code of Practice which advises clinics to inform women in these circumstances of the need to complete additional forms in order for their partner to use embryos in the event of the woman’s death.

21. According to Mr Jennings', statement he is sure that if Ms Choya had been offered a WSG form, she would have completed this providing her consent to the posthumous use of their embryo in treatment with a surrogate. He describes Ms Choya's determination that they should have a child together and how they had begun to discuss other treatment options, including using a surrogate. Ms Choya had discussed this with her sisters and close friends. One of Ms Choya's sisters had volunteered to be a surrogate but they decided against this, opting to find a surrogate based in the UK. He sets out that they intended to use the single embryo remaining in storage in the event that the final treatment they had embarked on was unsuccessful.
22. The statements from Ms Choya's four sisters and her close friend confirm the discussions Mr Jennings has referred to and their views of Ms Choya's wishes.

### **The Relevant Legal Framework**

23. There is little, if any dispute, between the parties about the legal framework. This issue is how it applies to the circumstances of this case.
24. The donation, storage and use of gametes and embryos are regulated by the Human Fertilisation and Embryology Act 1990 ("the 1990 Act"), as amended by secondary legislation and the Human Fertilisation and Embryology Act 2008 ("the 2008 Act").
25. Schedule 3 of the 1990 Act provides that no person shall keep or use an embryo except in pursuance of a licence or in pursuance of a third party agreement. Section 12 (1)(c) of the 1990 Act sets out that compliance with the consent provisions in Schedule 3 shall be a general condition in every licence granted under the Act.
26. The relevant part of Schedule 3 of the 1990 Act that relates to consent provides as follows:

*"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.*

*(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"), 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.*

*(3) In this Schedule "effective consent" means a consent under this Schedule which has not been withdrawn.*

*[...]*

*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,*

*(ba) use for the purpose of training persons in embryo biopsy, embryo storage or other embryological techniques, or*

*(c) use for the purposes of any project of research,*

*and may specify conditions subject to which the embryo may be so used.*

*(2) A consent to the storage of any gametes, any embryo or any human admixed embryo must—*

*(a) specify the maximum period of storage (if less than the statutory storage period),*

*(b) except in a case falling within paragraph (c), 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, and*

*(c) where the consent is given by virtue of paragraph 8(2A) or 13(2), state what is to be done with the embryo or human admixed embryo if the person to whom the consent relates dies,*

*and may (in any case) specify conditions subject to which the gametes, embryo or human admixed embryo may remain in storage.*

*[...]*

### ***Procedure for giving consent***

**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.*

*(2) Before a person gives consent under this Schedule he must be informed of the effect of paragraph 4 and, if relevant, paragraph 4A below.*

**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 that purpose of the embryo and the embryo is used in accordance with those consents.*

[...]

*(3E) For the purposes of sub-paragraphs (2), (3) and (3B), each of the following is a relevant person in relation to an embryo the creation of which was brought about in vitro (“embryo A”)—*

*(a) each person whose gametes or human cells were used to bring about the creation of embryo A,*

*(b) each person whose gametes or human cells were used to bring about the creation of any other embryo, the creation of which was brought about in vitro, which was used to bring about the creation of embryo A, and*

*(c) each person whose gametes or human cells were used to bring about the creation of any human admixed embryo, the creation of which was brought about in vitro, which was used to bring about the creation of embryo A.”*

27. Turning to the relevant provisions under the European Convention of Human Rights (“ECHR”) and Human Rights Act 1998 (“HRA”), Article 8 of the ECHR provides:

*“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*

*(2) There shall be no interference by a public authority with the exercise of this right except such as is in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the rights and protections of others.”*

28. Section 3(1) HRA provides that:

*“Interpretation of legislation*

*(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”*

29. Section 6(1) HRA states that:

*“Acts of public authorities.*

(1) *It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*”

## Submissions

30. Ms Richards summarises the requirements for providing consent to use of an embryo created *in vitro* in treatment under Schedule 3 of the 1990 Act as follows:
- (a) It must be in writing and signed.
  - (b) It must be provided by each person whose gametes were used to bring about the creation of the embryo.
  - (c) It must specify one or more of the purposes mentioned in paragraph 2(1)(a), (b), (ba) and (c) of Schedule 3.
    - (i) None of the purposes listed in paragraph 2(1) of Schedule 3 expressly addresses the scenario where a partner-created embryo is used in treatment with a surrogate. The use of a partner-created embryo pursuant to a surrogacy arrangement involves providing treatment services to both the commissioning parents and the surrogate. Therefore, consent for use of a partner-created embryo in treatment with a surrogate must specify both the purposes mentioned in paragraphs 2(1)(a) (“*use in providing treatment services to the person giving consent and another specified person together*”) and 2(1)(b) (“*use in providing treatment services to persons not including the person giving consent*”) of Schedule 3 to the 1990 Act.
    - (ii) The 1990 Act does not state that a person must provide consent to that use being posthumous. This contrasts with the position in relation to the posthumous storage of embryos, which must state what is to be done with the 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 2(2) of Schedule 3.
  - (d) The individual providing consent must have been “*provided with such relevant information as is proper*” within the meaning of paragraph 3(1)(b) of Schedule 3 and must have been given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps. The 1990 Act does not specify what information has to be given before a person’s consent is effective or what “*proper counselling about the implications of taking the proposed steps*” involves.
  - (e) The individual providing consent must specifically be informed of the circumstances in which consent to the storage or use of an embryo may be varied or withdrawn.
  - (f) The consent must not have been withdrawn. Consent is not automatically revoked on death or loss of capacity: *Mr and Mrs M v Human Fertilisation and Embryology Authority (“M v HFEA”)* [2016] EWCA Civ 611 (per Arden LJ) at paragraph 20.



31. As Ms Richards identifies, the issue between the parties relates to the requirement that consent be recorded in writing and signed by the person giving it. She structures her submissions in the following way.
- (i) The requirement for consent is the cornerstone of the statutory scheme, not for written consent.
  - (ii) The evidence is that Ms Choya would have wanted Mr Jennings to be able to use their partner-created embryo in treatment with a surrogate in the event of her death. The court can infer that she would have provided written consent to this had she been given the opportunity to do so.
  - (iii) Ms Choya was not given that opportunity.
  - (iv) The decision preventing Mr Jennings from using the remaining embryo in this way constitutes a very significant interference with his Article 8 rights.
  - (v) In the circumstances of this case the interference with those rights would be disproportionate.
  - (vi) It is possible within the meaning of s 3 HRA to read Schedule 3 of the 1990 Act so as to enable the evidence of consent to be provided other than in writing, and as that reading is possible, s3 HRA requires the court to read those provisions in that way.
32. Ms Richards relies upon a number of authorities to support her submissions that the legislative aim underpinning the requirement for consent is to ensure respect for individual autonomy and give effect to the wishes of gamete donors.
33. In *Evans v United Kingdom* (2008) 43 EHRR 21 the Strasbourg Court determined this was a legitimate aim, stating at paragraph 89;
- “Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature’s decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent”.*
- Also, in *L v Human Fertilisation and Embryology Authority* [2008] EWHC 2149 (Fam) Charles J, commenting on Schedule 3 to the 1990 Act, observed at paragraph 49 that *“the need for (effective) consent and thus the respect that gives to the autonomy of the individuals involved plays a central part in the scheme”.*
34. Ms Richards submits the focus on consent as recognition of the individual autonomy of the donor is the cornerstone of the legislative scheme rather than the need for consent to be evidenced in writing. Whilst she recognises the requirement for the consent to be evidenced in writing can promote certainty there may be other cases where there is clear evidence of the donor’s wishes, but they are not recorded in writing because there was not an opportunity to do so. She submits the requirement for consent to be evidenced in writing may frustrate the primary legislative objective that a donor’s wishes are respected.

35. Second, although Ms Richards acknowledges Ms Choya did not explicitly discuss what should happen to the embryo in the event of her death she submits it is clear from the wishes she did express that is what she would have wanted. She relies upon a number of matters to support that position, namely: (i) The written consent Ms Choya provided to the use of the embryos in treatment services to her and Mr Jennings in accordance with Schedule 3 paragraph 2 (1)(a) of the 1990 Act. It was not withdrawn and is not automatically revoked on Ms Choya's death. (ii) Ms Choya completed the WT form for Mr Jennings, ticking the box to record his consent to the embryos being used in Ms Choya's treatment in the event of his death. Ms Richards submits this demonstrates Ms Choya contemplated use of the embryos in the event of one of their deaths. (iii) The evidence that Ms Choya wanted the embryo to be used in treatment with a surrogate in the event their fourth cycle was unsuccessful. This had been discussed between Mr Jennings and Ms Choya, discussed in general terms with Dr Seshadri and discussed with the wider family (which is supported by their statements) and they resolved that if the fourth treatment was unsuccessful they would use the single embryo remaining in storage in treatment with a surrogate.
36. Ms Richards submits this evidence provides a foundation for the court to draw the inference that Ms Choya consented to the use of the embryo in this way and would have recorded it in writing had she been given the opportunity to do so.
37. Ms Richards submits this approach accords with what has taken place in other circumstances in the following cases.
38. In *Warren v Care Fertility (Northampton) Limited and Other* [2014] EWHC 602 (Fam) ("*Warren*") the circumstances were that Mrs Warren's partner had not provided written consent to his gametes being stored for a longer period than 10 years. Hogg J concluded that Mr Brewer's intentions were clear having regard to the forms he did complete during the course of his treatment, taken together with the evidence of his widow, parents and treating doctor (see paragraphs 94 – 98).
39. A similar approach was taken in *SB v The University of Aberdeen and Others* [2020] CSIH 62 ("*Aberdeen*") where the Inner House of the Court of Session granted a declaration allowing a widow to use her late husband's sperm for IVF treatment. In that case he had only provided consent for the use of his sperm in IUI, and not IVF, which involved the creation and storage of embryos. His will provided that '*my donation of sperm will be for as long as possible and for as long as she may wish, available to [the widow]*'. The Inner House concluded that the terms of the will were sufficiently clear to provide consent for IVF and in reaching its decision the Inner House had regard to the will, the context in which it was written, other forms the deceased had completed during the fertility treatment and the written evidence from his widow and his treating consultant (see paragraphs 20-22).
40. The Court of Appeal took this approach in *R (M) v Human Fertilisation and Embryology Authority* [2017] 4 WLR 130 ("*M*"). This case concerned the issue of whether the HFEA had acted lawfully in refusing to permit a mother to export her dead daughter's frozen eggs to the United States. Part of the rationale for concluding that decision was flawed was because it failed to take account of evidence (which was not written) of the daughter's wishes about posthumous use of her eggs (paragraphs 63 – 68). The court concluded the HFEA could make appropriate inferences from that evidence.

41. Third, Ms Richards submits the only reason Ms Choya did not record her wishes in writing is because she was not given an opportunity to do so. The pro forma WT form created by the HFEA was unclear about what steps were required to enable a man to use partner-created embryos in the event of his wife's death. She submits it is not clear from the wording '*if you wish your eggs or embryos to be used in someone else's treatment if you die or become incapacitated, please speak to your clinic for more information*'. This wording lacks clarity if it was referring to the situation where a woman wanted embryos to be used by her partner following her death. The WT form doesn't contain an option, like the MT form, for a woman to consent to posthumous use of either her eggs or embryos created using her eggs by her partner. Ms Choya provided consent for the embryo to be used for the purpose in paragraph 2(1)(a) of Schedule 3, however she did not record in writing her wish that it be used in treatment with a surrogate for the purposes of paragraph 2 (1)(b). In his statement Mr Jennings sets out that they were unaware of the need for this step to be done, making it clear that if they had known this needed to be done it would have been done. In any event, Ms Richards submits the form that Ms Choya would have been taken to if she had asked for more information is unsuitable for the situation here. Section 6 of the WSG form ("*Woman's consent to the use and storage of eggs or embryos for surrogacy*") is entitled "*In the event of your death or mental capacity*" and then provides a requirement to name the surrogate. Ms Richards submits it is very unclear what form someone in Ms Choya's position completes to provide the necessary consent to enable her male partner to use the embryos in the event of her death. She submits there is a gap in the process, there is nothing in the Guidance to tell clinics to explain as a matter of routine to complete the additional forms which results in this case in Ms Choya not being given the proper opportunity to give this consent.
42. Mr Jennings describes in his statement the counselling he and Ms Choya had, he said;
- "41....We discussed surrogacy with our counsellor but as a potential next step if we were to give up trying to conceive ourselves rather than in the event of one of us dying....*
- 42....We eventually got to the position of accepting that having given IVF our best shot, this would be the last time and the final embryo would be saved for surrogacy.*
- 43. We had no cultural issues or concerns with surrogacy or adoption. I remember discussing that we would tell our child as early as possible about surrogacy...We had no concerns about the impact of surrogacy or adoption on our family or friendships...".*
43. His statement describes the discussions they had about surrogacy and Ms Choya was open to the idea of surrogacy, they decided to undergo one last treatment cycle and keep one embryo in storage as their '*back up*'. He said, every MT form he completed he consented to Ms Choya using the embryos in the event of his death and he is certain that '*had Fern been presented with the form required to give her consent to posthumous use of embryos, she would have consented.*' Later he says '*Fern and I did not make a specific request for an additional consent form to permit the use of our embryo in surrogacy after Fern's death because we were caught up in the process of trying to create a life and had no reason to consider the risks or implications of Fern's death. I note as well that the additional form was never provided to us, and being expected to ask for it is unreasonable in my opinion. This is particularly the case when a separate*

*form was not required to enable me to provide consent to posthumous use of my embryos.'*

44. The evidence from the family speaks with one voice about what Ms Choya would have wanted. In Tricia-Marie Choya's statement she said Ms Choya informed her that if something happened to her during pregnancy everything should be tried to save the babies and she believes '*wholeheartedly*' that Ms Choya would want Mr Jennings to use their frozen embryo in treatment with a surrogate if he so desires.
45. Fourth, the Article 8 right to private life includes the right to respect to become a parent in the genetic sense (see *Evans v United Kingdom* (2008) 43 EHRR at paragraph 72). Ms Richards submits what Mr Jennings seeks is not a challenge to the legislation itself but its application in Mr Jennings' individual case.
46. Ms Richards submits if the court does not make the declaration sought it would constitute a significant interference with his Article 8 rights as it would deprive him of the only opportunity to fulfil his and Ms Choya's joint and long held wish to have a child together. She poses the issue as follows, there is no dispute that the requirement for the consent to be in writing pursues a legitimate aim and the question for the court is whether, in the circumstances of this case, that aim is sufficiently weighty to justify the very significant interference with Mr Jennings' rights under Article 8. The burden is on the State under Article 8(2) to establish that the interference is justified and proportionate.
47. The four-stage proportionality test is well established: (i) is the legislative objective sufficiently important to justify limiting a fundamental right? (ii) are the measures which have been designed to meet it rationally connected to it? (iii) are they no more than are necessary to accomplish it? (iv) do they strike a fair balance between the rights of the individual and the interests of the community? The fourth stage of the assessment requires there to be proportionality between the effects of legislative measures on countervailing rights or interests and the objective that is achieved: *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 at paragraphs 44-45 (per Lord Wilson).
48. Ms Richards submits the insistence on evidence of consent being provided in writing would be a disproportionate interference with Mr Jennings' Article 8 rights for the following reasons. The issue of consent is the cornerstone of the legislation, not the requirement for it to be in writing. The evidence is Ms Choya would have wanted Mr Jennings' to be able to use the embryo with a surrogate in the event of her death. There is no evidence to the contrary, as a result the application does not seek to get round the requirement for consent or to undermine respect for personal autonomy. The only reason the consent was not recorded in writing was through lack of opportunity caused by the lack of clarity in the HFEA forms and the failure of the clinic to provide the relevant information. If this application was refused the interference with Mr Jennings' Article 8 rights would be significant; he would lose his only opportunity to realise his joint aim with Ms Choya to have a child together. Finally, there are no sufficiently weighty countervailing interests to justify the significant interference with Mr Jennings' Article 8 rights. There is no conflict between individual rights and granting the application would not undermine the core objectives of the legislative regime.

49. Ms Richards submits if the court accepts her submissions it is required under s3 HRA to read and give effect to primary and subordinate legislation in a way that is compatible with Convention Rights. The limits on the court's power to construe a statutory provision pursuant to s3 HRA were set out by Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at paragraphs 26 – 33. At paragraph 33 Lord Nicholls stated that the court cannot adopt a meaning '*inconsistent with a fundamental feature of legislation*' and any meaning brought in through s3 '*must be compatible with the underlying thrust of the legislation being construed*' or, adopting the words of Lord Rogers at paragraph 121, the words implied must '*go with the grain of the legislation*'. The task for the court is to identify the fundamental feature or principle of the legislative scheme; providing the integrity of that is kept the court's interpretation under s3 may change the unambiguous meaning of the words in the legislation.
50. Ms Richards maintains in this case the interpretation does not go against the grain of the 1990 Act as the wishes of the gamete providers should remain paramount. The construction of paragraph 1 of Schedule 3 in this case does not dispense with the requirement of consent, it provides for the possibility of it being provided in another way than in writing in circumstances where there is clear evidence of the donor's wishes and the reason why it is not in writing is due to the lack of opportunity to do that. Finally, there is nothing in the legislative history of the 1990 Act that suggests Parliament considered this situation, where the donor has not been given the opportunity to fulfil the requirements of paragraph 1 Schedule 3. The court has previously read a mandatory requirement as being subject to an implied discretion as being within the scope of s3 HRA (*Pomieczowski v District Court of Legnica, Poland* [2012] 1 WLR 1604).
51. On behalf of the HFEA Ms Gallafent Q.C. and Mr Mehta submits that in the absence of written consent it is not lawful to use the embryo in treatment with a surrogate. The requirement of written consent is an express statutory condition, set out in s12(1) (c) and paragraph 1(1) of Schedule 3 of the 1990 Act. It is, they submit, a central requirement to the legislative scheme.
52. They submit the relevant provisions do not give rise to a relevant interference with Mr Jennings' Article 8 rights and if they are wrong about that there is no basis for invoking s 3 as to do so would, as they set out in their written submissions, '*stretch the legislative language beyond its natural and intended meaning and go against the grain of the statutory scheme*'. This goes beyond the powers of the court and is a matter for Parliament.
53. As regards the forms signed by Mr Jennings and Ms Choya, the MT form completed by Mr Jennings provided that, in the event of his death or mental incapacity, he consented to the embryo (already created outside the body with his sperm) being used in his partner's treatment (section 6.2 of the MT form) and for training purposes. Section 6.4 of the MT form also provided, under the heading "*Other uses for your sperm or embryos*", that "*if you wish to use your sperm or embryos in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information*" and explained that, depending on the circumstances, the person signing would need to complete an additional form, namely, for the donation of sperm or embryos or "*Men's consent to the use and storage of sperm or embryos for surrogacy*" (MSG form)".

54. The WT form signed by Ms Choya did not contain an equivalent provision to section 6.2 of the MT form for practical reasons, since a man could not have been treated using the embryo in storage after the death of his partner. It did, though, contain the equivalent of section 6.4 in respect of training purposes: on her form, Ms Choya indicated that she did not consent to the use of her embryos upon her death for such purposes (see section 6.2 Ms Choya's WT form).
55. The WT Form also included information on "*Other uses for your eggs or embryos*", which stated: "*If you wish your eggs or embryos to be used in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information. Depending on your circumstance, you will need to complete one of the following - 'Your consent to donating your eggs' (WD form) – 'Your consent to donating embryos' (ED form), or – 'Woman's consent to the use and storage of eggs or embryos for surrogacy' (WSG form).*"
56. Ms Gallafent submits the statutory language is clear. Paragraph 1(1) of Schedule 3 requires not only that written consent is given for a particular treatment but also that this is attested to by the person's signature. She submits the form signed by Ms Choya did not provide written consent for the posthumous use of her embryo and it expressly recorded Ms Choya's decision that such an embryo should not be used for training purposes.
57. She refutes any suggestion that Ms Choya was not given an opportunity to consent as the form signed by her indicated she should speak to her clinic for more information were she to wish for her embryos to be used in someone else's treatment, including by way of surrogacy. In her oral submissions regarding the WT form completed by Ms Choya she submitted section 6 of the form specifically refers to the relevant forms which act as prompts for the clinicians and patients. There are two different types of use, namely donation or surrogacy. When looked at logically there are only two options, donation or surrogacy; the latter can only be for the benefit of the birth partner otherwise it would be donation. She submits the clinic cannot anticipate every situation, there is an obligation on the patients as well. She submits it is clear from this form these options exist. She relies on the evidence from Dr Seshadri that this issue is generally raised as part of the nurse consent consultation and submits that to have all the necessary consents relating to either donation or surrogacy would make the form unwieldy, hence why it is managed by the prompts in the current form.
58. Ms Gallafent refutes the suggestion that the form is unfair and the HFEA do not accept Ms Choya was not given the opportunity as Ms Richards suggests, as the issue was flagged up in the form in the way described. As a consequence, she submits the situation in this case can be distinguished from that in *Warren*. As she pithily put it; there was no failure as it was a matter of common sense against the background that the form makes a clear warning in the introduction to section 6 that unless consents are given the embryo will be allowed to perish and cannot be used for treatment.
59. As regards the suggestion that the WSG form is not apt for the situation in this case Ms Gallafent states it is necessary to look at this form in the context of taking into account that they are anticipating the worst-case scenario. This form is relevant as it is being done in the context of a future surrogacy as Plan B. Section 2 of the WSG form specifically states the name of the surrogate can be given if known at the time of consent. Section 6.4 of the WSG form under the sub-heading of "*In the event of your*

*death or mental capacity*’ asks ‘*Do you consent to embryos (already created outside the body using your eggs) being transferred to the surrogate?*’. The WSG form is not limited to the circumstances in the event of death but is fit for purpose in a situation where consent is being given prior to death.

60. Ms Gallafent submits the circumstances in *Warren* can be distinguished as in that case the clinic completed the relevant part of the form and did not tell Mr Brewer of the option of extending the storage time (see paragraph 96). That is not the situation here. The default position here is that the form made clear that in the absence of the consent the embryos would be allowed to perish. In her situation Ms Choya would have known a third party would need to be involved as Mr Jennings could not carry a child. In so far as Ms Richards’ submissions are based on the lack of opportunity as the WT form was not clear the HFEA reject that as not being justified.
61. Ms Gallafent took the court to the relevant parts of the evidence and submitted there should be caution in concluding there is evidence of Ms Choya’s wishes and submits the evidence may not have the weight Mr Jennings’ ascribes to it. The court should start with the evidence of his frank admission that they did not discuss, for very understandable reasons, what would happen in the event of Ms Choya’s death.
62. As regards any suggestion about inferring consent Ms Gallafent submits that Mr Jennings’ evidence is that through choice, understandably, they had not discussed the position in the event of Ms Choya’s death. The fact that it was not discussed cannot be placed at the door of the clinic. Also, the suggestion that Ms Choya completed Mr Jennings’ MT form before he signed it meant she knew about the consent he had given in the event of his death, in those circumstances it is difficult to see why it was not discussed in the context of completing the WT form. The discussions the parties had about surrogacy were in the context of them being both alive, so, she submits, are only of limited relevance.
63. In the *Warren* case Mr Brewer’s intentions were known as to what should happen after his death. At paragraph 131 the court states ‘*Mr Brewer clearly by word and document indicated the wish to give his widow the opportunity to have his child after his death*’. In the *Aberdeen* case it turned on the construction of the will. In this case Ms Gallafent submits the court is being asked to fill a void.
64. Ms Gallafent takes issue about the need for written consent as being the cornerstone of the legislative framework, submitting that it is provided for in the 1990 Act in section 12 and Schedule 3. She relies on the detailed evidence from Mr Thompson about the background to the 1990 and 2008 Acts and what was said at the time in Parliament.
65. As regards the claim under Article 8 Ms Gallafent submits the application does not give sufficient weight to the limits upon the interpretive exercise which the court may carry out under s3 HRA, and in any event this would be an impermissible alteration of the meaning and effect of primary legislation. She relies on what was said in *Evans* at paragraph 90 where in the context of the legislative requirement for written consent it stated ‘*In the Court’s view, these general interests pursued by the legislation are legitimate and consistent with Article 8.*’.
66. In support of her submission that Schedule 3 does not create a legislative incompatibility with Article 8, Ms Gallafent relies on what the Court of Appeal set out

in *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 at paragraph 42 where the court set out the exercise which the courts must perform when assessing compatibility of primary legislation with the Convention. First, the court's task is an objective one, to assess the compatibility of the legislation with Convention rights, by reference to the well-known criteria, such as whether it has a legitimate aim and whether it confirms with the principle of proportionality. Second, the task has to be performed at the time when the issue comes before the court. Thirdly the court is not concerned with the adequacy of the reasons which were put forward by ministers or others for the legislation.

67. Ms Gallafent submits the whole scheme of the 1990 Act lays great emphasis on consent. Hale LJ (as she then was) stated in *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565 at paragraph 24 stated '*The requirement of consent for those participating in the treatment*' is one of the two '*most important principles*' underlying the 1990 Act.
68. In her written submissions she maps out how the significance of written consent has gained importance over time. Paragraph 1 (1) of Schedule 3 was amended by the 2008 Act by providing that a consent must be signed by the person giving it. Save where the person is '*unable to sign*' effective consent must be given by the gamete provider personally and must be given in writing, attested by their signature. In her written submissions she sets out that the debates in Parliament at the time of the passing of the 2008 Act '*reflects the fundamental objective of the regime to maintain and reinforce effective consent provisions in Schedule 3 of the 1990 Act.*'
69. This obligation for written consent she submits does not create a relevant interference with Mr Jennings' Article 8 rights. She describes it as a '*neutral rule which applies equally to all persons regulated by the 1990 Act, and imposes a very limited, but important, burden on those wishing to proceed with relevant treatment services. Significantly, unlike the position in Evans, the application of the rule does not lead to the opposition of rights protected by the Convention.*' The court cannot infer from the circumstances the consent for posthumous treatment with a surrogate where the legislative provisions provide for consent to be in writing and signed to avoid the factual analysis and drawing of inferences that Mr Jennings now invites the court to undertake.
70. As regards the issue of proportionality Ms Gallafent submits the issue of consent is the cornerstone of the relevant legislative framework, there is no evidence Ms Choya wanted to use the embryo in the way now being suggested, it was not discussed. If there is not clear evidence (as there was in *Warren*) it cannot be right to permit Mr Jennings to act in accordance Ms Choya's wishes where the evidence is unclear, it impacts on her autonomy. There needs to be a fair balance between the rights of the individual and the interests of the community, here the certainty of written consent should prevail.
71. Turning to the limits on the exercise of the power under s 3 HRA Ms Gallafent submits they are well established by Lord Nicholls of Birkenhead in *Re S (Care order Implementation of Care Plan)* [2002] 2 AC 291 at paragraphs 38 – 40 where he states that '*a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.*' The limits were also set out in *Mendoza* (ibid) where any words implied should go with the '*grain of the legislation*' as to do otherwise would be to '*cross the constitutional boundary section 3 seeks to demarcate and preserve....The meaning*



*imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed’.*

72. Ms Gallafent emphasises that what is proposed on behalf of Mr Jennings replaces what she calls the ‘bright line’ of written signed consent with a fact specific provision for effective consent, where there may not always be consensus. The issue of requiring written consent has specifically been considered by Parliament on more than one occasion. In those circumstances to rely on s 3 would be contrary to and undermine the position adopted by Parliament to date. She submits that neither *A v P* [2012] Fam 188 nor *In Re Warren* [2015] Fam 1 concerned one of the two most important principles underlying the 1990 Act. Ms Gallafent relies upon the observations by Wall J (as he then was) in *Evans* (*ibid*) when he stated at paragraph 254 ‘...in this sensitive area of the law, it is for Parliament to legislate. It is an area in which the courts have only a limited role to play. Parliament has chosen a carefully structured system of regulation, with clear rules based on mutual consent and the interests of the unborn child...If any changes in the law are appropriate, it is for Parliament to make them’.

### **Discussion and Decision**

73. I am reminded, as Sir James Munby was in *Samantha Jeffries v BMI Healthcare Limited and others* [2016] EWHC 2493 (Fam), of what Hale LJ (as she then was) said in *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565, paragraph 24:

*"The whole scheme of the 1990 Act lays great emphasis upon consent. The new scientific techniques which have developed since the birth of the first IVF baby in 1978 open up the possibility of creating human life in ways and circumstances quite different from anything experienced before then. These possibilities bring with them huge practical and ethical difficulties. These have to be balanced against the strength and depth of the feelings of people who desperately long for the children which only these techniques can give them, as well as the natural desire of clinicians and scientists to use their skills to fulfil those wishes. Parliament has devised a legislative scheme and a statutory authority for regulating assisted reproduction in a way which tries to strike a fair balance between the various interests and concerns. Centres, the HFEA and the courts have to respect that scheme, however great their sympathy for the plight of particular individuals caught up in it."*

74. As Sir James observed at paragraph 28 of *Jeffries*;

*‘This does not mean that the judge must approach a case such as this bereft of humanity, empathy, compassion and sympathy. What it does mean is that the judge cannot allow his judgment to be swayed, or his decision to be distorted, by those very human emotions. After all, the duty of the judge in a case such as this, as in every case, is that demanded by the judicial oath: to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. Happily for Samantha in this case, the outcome, as determined by that stern test, is the outcome she seeks.’*

75. Whilst the court cannot help but have enormous sympathy for the very difficult position Mr Jennings is in, it must keep in mind that the outcome in this case must be determined by that stern test and within the framework as outlined above.

76. It is not in dispute that Mr Jennings and Ms Choya had been trying for a number of years to fulfil their wish to have a child of their own. They had undergone a number of tests and investigations and had to manage the emotional roller-coaster of unsuccessful fertility treatment. Whilst it is clear they had the support from the wider family it must have been, at times, a very difficult period for them both. It is understandable, in those circumstances, that they may not have been able to discuss all the eventualities in the event of either of them dying as Mr Jennings described their focus was on having a child and the treatment they had undergone for so many years being successful.
77. In one sense the situation if Mr Jennings' died was relatively straightforward as the parties agreed the remaining embryos could be transferred to Ms Choya. The MT form provided for that in a very clear way in section 6, where 6.2 specifically refers to '*your partner's treatment*'.
78. It is less straightforward the other way round, Mr Jennings cannot carry a child so the stark options in the WT form are either to consent for the embryo to be donated or for surrogacy or, as the form sets out, in the event of no consent the embryo will be allowed to perish. The position of the HFEA is that the WT form makes those stark choices clear, as Ms Gallafent submitted it was a matter of common sense which was flagged up in the form.
79. Ms Richards takes issue with that. She submits neither the HFEA's statutory Code of Practice ("the Code"), nor the HFEA's Guidance for Clinics (which is aimed to provide practical advice to clinics to enable them to ensure that the right consent forms are completed) explains what consent needs to be provided, or what forms need to be completed, in order for a woman to provide consent for posthumous use, by her partner, of a partner-created embryo. Neither the Code nor the Guide for Clinics tells or informs clinics to advise patients that additional forms are required in order for a woman to provide consent to posthumous use, by her partner, of a partner-created embryo.
80. The HFEA rely on the terms of the WT form to provide sufficient 'prompts' for clinicians to offer and/or for patients to request additional forms or information. In particular, reliance is placed by the HFEA on what is set out in the WT form under the heading in section 6 '*Other uses for your eggs or embryos*' continuing '*If you wish your eggs or embryos to be used in someone else's treatment if you die or become mentally incapacitated, please speak to your clinic for more information. Depending on your circumstances, you will need to complete one of the following: 'Your consent to donating your eggs' (WD form). 'Your consent to donating embryos' (ED form), or 'Woman's consent to the use and storage of eggs or embryos for surrogacy' (WSG form)*'. That coupled with the other references in the form that if no consent is provided the embryos will perish provided sufficient opportunity, submits Ms Gallafent, for Ms Choya to consider this issue, and if she wanted it, request advice or information from the clinic.
81. Ms Richards submits it would not be clear to someone reading the WT form that these additional steps would be necessary to provide consent to posthumous use of any embryo by her surviving partner. The reference to '*someone else's treatment*' is not sufficiently clear to give the necessary prompt for a patient to understand from this paragraph the need to request additional forms that relate to posthumous use by a partner. There is a direct reference to partner in the MT form which is absent in the WT

form, thereby making the connection that it related to what her partner could or could not do being much less clear.

82. Whilst it is right to acknowledge the issue of consent is the cornerstone of the statutory scheme and that the statutory scheme requires such consent to be in writing that cannot, in my judgment, be considered in a vacuum. It is necessary to consider the circumstances in which such consent is considered, the information that was available and what opportunity was given for that consent to be given.
83. The statutory scheme in Schedule 3 of the 1990 Act provides at paragraph 3 that there must be a suitable opportunity to receive proper counselling (paragraph 3 (1)(a)) and be provided with '*such relevant information as is proper*' (paragraph 3 (1)(b)).
84. The requirements for providing consent to use of an embryo created *in vitro* in treatment under Schedule 3 of the 1990 Act must be in writing and signed, it must be provided by each person whose gametes were used to bring about the creation of the embryo and it must specify one or more of the purposes mentioned in paragraph 2 (1) (a), (b), (ba) and (c) of Schedule 3.
85. None of the purposes listed in paragraph 2(1) of Schedule 3 expressly deals with the situation where a partner-created embryo is used in treatment with a surrogate. The use of a partner-created embryo pursuant to a surrogacy arrangement involves providing treatment services to both the commissioning parents and the surrogate. Consequently, consent for use of a partner-created embryo in treatment with a surrogate must specify both the purposes mentioned in paragraph 2 (1)(a) ("*use in providing treatment services to the person giving consent and another specified person together*") and 2 (1)(b) ("*use in providing treatment to persons not including the person giving consent*") of Schedule 3 of the 1990 Act.
86. The 1990 Act does not specify what information has to be given before a person's consent is effective or what the counselling referred to involves but, by definition, it has to be meaningful information that will inform the person considering the issue of consent.
87. Neither the outward-facing HFEA statutory Code of Practice nor the internal HFEA Guide for Clinics set out what consent needs to be provided or which forms need to be completed in order for a woman to provide consent to posthumous use, by her partner, of a partner-created embryo. Neither do either of these documents flag up to advise patients that additional forms are required to be completed for a woman to provide consent to posthumous use, by her partner, of a partner created embryo.
88. In my judgment, whilst it is right the WT form does give some prompts about what a woman should do about providing consent to posthumous use by her partner of a partner-created embryo, they are far from clear. To understand the position they would need to;
  - (i) read into the reference to the term '*someone else's treatment*' in section 6 of the WT form as a reference to treatment for or for the benefit of their surviving partner;

- (ii) make the connection between that and the reference to the need to fill in the ‘*Woman’s consent to the use and storage of eggs or embryos for surrogacy*’ (WSG form);
  - (iii) do this at a time when they are likely to be completing many other forms; and
  - (iv) manage and understand this somewhat opaque terminology in the context of undertaking IVF treatment and the prospects of its success.
89. The HFEA position stresses the need to address posthumous use of gametes or embryos is highlighted at the start of the form where it states if no consent is given they will perish in the event of death and the forms should be a starting point for a conversation. The evidence in this case was that there was no such conversation with the clinic. Dr Seshadri’s evidence sets out the appointments she had with Mr Jennings and Ms Choya. Her statement deals with the issues of CRGH’s consent procedure in very generalised terms, referring to the ‘*consent process will usually have at least two stages*’ (emphasis added), the first is to provide the information and the second stage involves confirmation that the patient still wants to go ahead, followed by completion of the consent forms. She continues ‘*These forms [WT and MT forms] are discussed as part of the nurse consent consultation. I understand from my colleagues that there is usually some reference to the option of completing additional forms during this consultation, but the take up is very low – probably because we treat relatively young people in good health. If a patient were to express an interest in the donation of their gametes or embryos in the event of their death, they would be advised that further screening would be necessary because they would be considered a donor and would need to consent and screen in accordance with HFEA donation requirements*’ (emphasis added). In dealing with the MT form Dr Seshadri notes ‘*It is much easier for a male patient to consent to the use of their sperm by their partner after their death, as no additional testing is needed and they can consent directly on the MT form*’. There is no statement from the nurse who had any meetings with Mr Jennings or Ms Choya at the relevant time. The written records are as set out in paragraph 14 above, the forms had been completed prior to that appointment and there is no record of any discussion about other forms. This accords with the evidence from Mr Jennings. He states in relation to this part of the WT form ‘*There was no confirmation box to tick to say that you had read the paragraph or its implications with the staff we met at CRCG, nor of it being brought to our attention...No one at CRGH raised the fact that whilst I had provided consent to posthumous use of our embryos, Fern had not completed the additional paperwork necessary to record her consent to posthumous use of the embryos*’.
90. Whilst it is right the WT form does raise the prospect of asking the clinic for more information so it is open to the patient to do that, equally there is a requirement in Schedule 3 paragraph 3 for the person giving consent to be provided with such relevant information as is proper. There is no evidence Ms Choya was given any information about this by the clinic, they are not prompted to do this by the HFEA’s own Code of Conduct or Guidance for Clinics. The WT form is not clear on the face of the form that the term ‘*someone else’s treatment*’ and the reference to the surrogacy form relates to posthumous use by her partner of a partner-created embryo. In my judgment it can and should have been made clearer on the face of the WT form. As a result I do not consider they were given sufficient opportunity to give the consent in writing.

91. The position is not rescued by the WSG form, even if Ms Choya got to that stage, as the way that form is expressed relates to a surrogacy arrangement during the woman's lifetime and Ms Richards submits '*is plainly inapt for pure posthumous use. Had Fern stumbled across it would not have been apparent to her that it was the form she needed to complete*'.
92. Turning to the issue of Ms Choya's consent I am satisfied that, in the circumstances of this case, the court can infer from all the available evidence that Ms Choya would have consented to Mr Jennings being able to use their partner-created embryo in treatment with a surrogate in the event of her death. This is being considered in the context where, in my judgment, she had not been given relevant information and/or a sufficient opportunity to discuss it with the clinic.
93. The evidence from Mr Jennings is that they did discuss what should happen in the event of Mr Jennings' death and in the event of what should happen to the twin girls she was pregnant with in the event that she died or there was a risk of either her or the twins dying. Ms Choya was adamant that the girls should be saved in the event there had to be a choice between her and the children. This demonstrates that she would have wanted Mr Jennings' to have their children in the event of her death. The fact that they had not discussed specifically the posthumous use of the embryo in the event of Ms Choya's death is because, in my judgment, it was not raised by the clinic or obvious from the forms Ms Choya was asked to sign. The fact that Ms Choya changed her position in relation to use of the embryos for training in the WT form she signed on 21 May 2018, when considered with the other evidence, it provides support for the conclusion in relation to Ms Choya's consent regarding the embryo in the event of her death. She wished that embryo to be retained for that purpose in the context, as Mr Jennings describes, where they had gone through a number of unsuccessful IVF treatments and this was the last remaining embryo.
94. The conclusion reached about Ms Choya's consent is supported by the written evidence from the family and her friend. Whilst the focus of that evidence relates to Ms Jennings and Ms Choya having a child together, it underpins the importance for Ms Choya of them having a child, which she had contemplated in the event of Mr Jennings' death and in the circumstances where she was pregnant with the twins and died.
95. Turning to consider the way Ms Gallafent sought to distinguish the cases Ms Richards relied upon I accept Ms Richards' submission that these cases were by way of illustration of the Court's ability, in appropriate cases, to look wider than the written consent forms to determine a donor's wishes.
96. Ms Gallafent submitted *Warren* could be distinguished as Mr Brewer's wishes and intentions were known and, in that case, Mr Brewer had been denied the opportunity as on the facts of that case the clinic had partially completed the forms.
97. Ms Richards accepts what Hogg J stated at paragraph 131 that Mr Brewer had '*Clearly by word and document indicated the wish to give his widow the opportunity to have his child after his death*'. He had completed the MT form providing his consent to the use of his sperm by Mrs Warren. The issue in that case centred on whether he had given the consent required under the statutory framework to store sperm for a period of 10 years and Hogg J found at paragraphs 95 – 98 he had not been given the opportunity to do so. Hogg J concluded, drawing on the evidence of Mrs Warren, his parents and consultant

oncologist that she was in *'no doubt that had he had the relevant information and the opportunity he would have consented to a period beyond ten years'* (paragraph 97).

98. In relation to the second point Ms Richards submits Hogg J made clear at paragraph 96 and 97 her rationale also included Mr Brewer not being given the relevant information stating *'He was not given the relevant information, nor the opportunity to complete a form which would have enabled him to opt for a period in excess of ten years'*.
99. Ms Gallafent distinguishes reliance on the *Aberdeen* case on the basis that the requirement for written consent was provided by the terms of the will. I accept Ms Richards' response that whilst that was part of the factual circumstances in that case, in fact the court drew on a wider evidential canvas as the issue was whether the deceased would have consented to the use of his sperm in IVF treatment. In considering the terms of the will, which was expressed in general terms, with no reference to that particular form of treatment and use of gametes the Inner House considered other evidence to reach the conclusions that it did. As was stated at paragraph 21 *'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'*.
100. The only issue Ms Richards relies upon in relation to the *M* case is the Court of Appeals' approach as to how the HFEA in that case should have determined whether there was sufficient evidence of the donor's consent to the proposed use of her eggs and considered the HFEA could take account of circumstantial evidence about the patient's wishes as being sufficient evidence of consent.
101. I recognise Ms Gallafent places great reliance on the cornerstone of the legislative framework being written consent, that is what is set out in the 1990 Act and the court needs to take very great care that it does not cross what Ms Gallafent described as the 'bright line' between what the court has jurisdiction to do and what remains a matter for Parliament. However, the court needs to consider the wider statutory scheme, in particular the mandatory requirement for relevant information *'as is proper'* to be provided before someone gives consent. As Ms Richards observes *'the logical conclusion of [Ms Gallafent's] argument about the role of written consent is that even if the HFEA forms contained no reference at all to posthumous consent and even if a clinic repeatedly failed to ask a couple to complete any forms, the Court could be powerless because it would go 'against the grain' of the legislation. That cannot be correct, and does not flow from the 1990 Act, or from any Article 8 compliant reading of the 1990 Act'*. I agree. Consent is a critical issue within the statutory scheme but what is important is to consider the role and purpose of consent in the statutory scheme, which is to ensure that gametes and embryos are used in accordance with the relevant person's wishes. The reference to written consent is an evidential rule with the obvious benefits of certainty but it is not inviolable where the circumstances may require the Court to intervene.
102. In my judgment this is one of those cases. Mr Jennings' Article 8 right to respect for the decision to become a parent in the genetic sense has been interfered with. The interference with that right is not proportionate on the facts of this case. Whilst the requirement for writing undoubtedly pursues a legitimate aim, in the circumstances of this case, where, on the findings the court has made, there was a lack of opportunity to

Ms Choya to provide that consent in writing, in circumstances where I conclude she would have given that consent, the interference with Mr Jennings' Article 8 right would be significant, final and lifelong. There are no weighty countervailing factors to justify the significant interference, there is no conflict of individuals' rights and permitting the application would not undermine a fundamental objective of the statutory scheme, namely the requirement for consent.

103. Section 3 HRA requires the court, so far as is possible, to read and give effect to primary and subordinate legislation in a way which is compatible with Convention rights. In undertaking this task the Court cannot adopt a meaning '*inconsistent with a fundamental feature of the legislation*' and *must go with the grain of the legislation*' (per *Mendoza*).
104. This is a case very much on its own particular facts. I agree with Ms Richards it will not open any floodgates. 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. This does not, in these very limited circumstances, go against the grain of the legislation and ensures Mr Jennings' Convention rights are respected.
105. In the light of this decision the HFEA may want to consider whether the WT form should be reviewed in order to provide the clarity required and avoid this situation occurring again.