JUDICIARY OF
ENGLAND AND WALES

Case No FD13P02273

6 March 2014

Before:
Mrs Justice Hogg DBE

Between:
Elizabeth Warren - Claimant
-v-
(1) Care Fertility (Northampton) Limited
(2) Human Fertilisation and Embryology Authority - Interested Parties

Summary of Judgment

Mrs Warren seeks a Declaration that it is lawful for the sperm of her husband Warren Brewer who died on 7 February 2012 to be stored beyond 18 April 2015 and for a period of up to 55 years until 18 April 2060 so that it can be used by her for the purposes of conceiving a child or children.

I have granted that Declaration.

Sadly Mr Brewer was diagnosed with a brain tumour in about April 2005. After operative treatment he required radiotherapy. A well-known likely consequence of such treatment would be to render him infertile.

He wished to keep open his option open to become a father of his own child. Thus he was referred to the Clinic for collection and storage of sperm before he received radiotherapy. This was undertaken in April 2005.

Mrs Warren met Mr Brewer in 2004. Over the years the relationship developed and deepened, they became engaged to be married in October 2010 and were married in December 2011 in the Hospice shortly before his death.

They had spoken of marriage, a life long commitment, and the prospect of having children. It was their mutual wish to become parents. In 2008 Mr Brewer formally named Mrs Warren as "his partner" to enable her to use his sperm after death, and for him to be named on the birth certificate of any child created with his sperm. He subsequently told Mrs Warren that he had done this, and as he wanted to enable her to

have his children if she wished. Thereafter it was an accepted matter as between them.

I have heard Mrs Warren in evidence and read statements from his parents and consultant oncologist who make it clear what he wished and intended.

I am satisfied that after 2008 Mr Brewer never changed his mind and wanted Mrs Warren to have the opportunity to have his child, or children, after his death.

The Human Embryo and Fertilisation Act 1990 as amended provides for a deceased's sperm to be used by "his named party" to create an embryo. The initial maximum storage period was established as 10 years. The 2009 Regulations enable the extension of that period, subject to certain requirements under Regulation 4 or 7.

Notwithstanding his wishes and intentions and various written consents Mr Brewer did not provide written consent as required by the Regulations, nor did he provide the requisite medical certificate. This was through no fault of his own. The clinic upon which the obligation fell failed to give him relevant information as to the requirements of the Regulations and failed to obtain the requisite long-term consent from him or the appropriate medical opinion.

I am satisfied had he known what was required he would have done that which was necessary. As it was he was not given the information, not advised and thus he did not fulfil the requirement of the Regulations. However, when asked he signed every consent form sent to him, particularly the consent forms for storage, but they were limited in time by the clinic and associated with their own requirements for payment of fees.

I have been critical of the clinic in that respect. After The Human Embryo and Fertilisation Authority learnt of this case it issued further guidance on 31 May 2012 to storage centres. The Authority recognised the clinic and other storage centres, being anxious to secure their fees for storage for a limited period had not or may not have obtained a longer term consent from the sperm provider. The Authority was anxious that the circumstances of this case should not arise in the future.

The Human Rights Act 1998 has come to the aid of Mrs Warren. Specifically Section 3 and Article 8.

Section 3(1) : "So far as it is possible to do so primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention (Human Rights) rights.

Article 8: "Everyone has a right to respect for his private and family life. The state shall not interfere with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder of crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

I have held that Mrs Warren has a right under Article 8 in that she has the right to decide to become a parent by her deceased husband, for which he had made provision and which would accord with his wishes and intentions.

I have considered the exceptions set out in Article 8. None of them apply to this case. In my view the state should not interfere with Mrs Warren's right under Article 8, and following English case law (*Ghaidon –v- Godin-Mendoza 2004 2AC 557).* I have interpreted the statutory legislation with "a broad approach concentrating in a purposive way on the importance of the fundamental right involved" per Lord Steyn.

For these reasons I have made the Declaration.

The Human Fertilisation and Embryology Authority, while resisting her application, have expressed its sympathy for her. May I also add my great sympathy for her. She fell in love with a man, cared for him and loved him. He wanted her to have the opportunity to have his children if she wanted. She has suffered an enormous loss. I know she is supported by her parents-in-law. I wish her and Mr Brewer's parents well, and ultimately whatever her decision may be I wish her and the family much happiness after such a difficult and sad time.

- Read the full Judgment