Neutral Citation Number: [2006] IEHC 221

THE HIGH COURT

[2004 No. 9792P]

BETWEEN

M. R.

PLAINTIFF

AND
T. R.

FIRST DEFENDANT

AND
DR. ANTHONY WALSH SITTING AS SIMS FERTILITY CLINIC DUBLIN

SECOND DEFENDANT

AND
DR. DAVID WALSH TRADING AS SIMS FERTILITY CLINIC DUBLIN

THIRD NAMED DEFENDANT

AND
THE ATTORNEY GENERAL

NOTICE PARTY

Judgment of the Hon. Mr. Justice Brian McGovern delivered the 18th day of July, 2006

1. This case concerns the fate of three frozen embryos created by in vitro fertilisation. The plaintiff and the first named defendant married on the 5th March, 1992. They are now separated but remain husband and wife. In 1994, they sought fertility advice from their general practitioner and were referred to Holles St. Hospital. Tests and examinations were carried out on the plaintiff and no obvious problem of fertility was found. In March, 1996, the plaintiff was checked out for a possible ovarian cyst. The plaintiff received some medical treatment and became pregnant and gave birth to a son in October 1997. Shortly thereafter the plaintiff had surgery for an ovarian cyst and she lost two thirds of her right ovary. As she wished to become pregnant again, she was referred to a doctor in Holles St. and had further investigation and treatment which was unsuccessful. She was then seen by Dr. Helen Spillane in July, 2001 and was referred for IVF treatment. The plaintiff and the first named defendant decided to undergo that treatment at the Sims Clinic in Rathgar, Dublin. Their first appointment in the clinic was in October, 2001. On 29th January, 2002, the plaintiff signed a form entitled "CONSENT TO TREATMENT INVOLVING EGG RETRIEVAL". In that form she gave her consent inter alia to the removal of eggs from her ovaries and the mixing of the eggs with the sperm of her husband. On the same date a consent form was signed by the plaintiff and the defendant entitled "CONSENT TO EMBRYO FREEZING." In this document the plaintiff and the defendant agreed to the cryopreservation of their embryos and to take full responsibility on an ongoing basis for these frozen embryos. Also on the 29th January, 2002, the first defendant signed a document entitled "HUSBANDS CONSENT" whereby he acknowledged that he was the husband of the plaintiff and consented to "the course of treatment outlined above". The agreement also expressed his understanding that he would become the legal father of any resulting child. A final consent document was signed by the plaintiff on the 1st February, 2002. This was entitled "CONSENT TO EMBRYO TRANSFER" by which the plaintiff consented to the placing in her uterus of three embryos. It appears from the evidence that the treatment involving egg retrieval is difficult and painful so a practice has evolved in fertility clinics whereby they try to collect a sufficient number of eggs for fertilisation so as to avoid the possibility of the woman having to undergo egg retrieval if the first attempt at implantation of embryos is unsuccessful. In this particular case after the plaintiffs ova were mixed with the first defendant's sperm six viable embryos were created. Three were immediately implanted into the plaintiff's uterus and the remaining three were frozen.

2. The implantation of the three embryos in the plaintiff's uterus was successful because she went on to become pregnant and delivered a daughter on 26th October, 2002. Unfortunately towards the end of that pregnancy marital difficulties arose between the plaintiff and the first named defendant as the first named defendant had entered into another relationship. Attempts at reconciliation failed and the plaintiff and the first named defendant are now living apart.

3. An issue has arisen as to what should happen to the three cryopreserved or frozen embryos. The plaintiff wishes to have the three frozen embryos implanted in her uterus in the hope of becoming pregnant and having a further child or children as the case may be. The first defendant, for his part, does not want the three frozen embryos implanted in the plaintiff's uterus. He says he never agreed to this and that it would be unreasonable and in breach of his rights to put him in the position that he may become father to a child that he doesn't want and in circumstances where he is now separated from the plaintiff. The plaintiff maintains that the first named defendant had expressly or impliedly consented to the three frozen embryos being used for implantation into her uterus.

4. She commenced these proceedings on the 11th June, 2004 and in the proceedings she claims (at paragraph 7 of the Statement of Claim) that the first named defendant withdrew his consent to the release of the frozen embryos and to the further implantation of any of the frozen embryos in the plaintiff's uterus. The pleadings raise many other issues including a claim that the plaintiff is entitled to an order vindicating the right to life of the three embryos, an order vindicating both the plaintiff's and the embryos right to family life, the return of the frozen embryos to the plaintiff and an order preventing the destruction of the embryos.

5. Having heard argument from Counsel for the parties to this Action I have ruled that the first issue which should be decided in this case is an issue of private law, namely whether the plaintiff and the first named defendant had agreed that the said embryos would be returned to the plaintiffs uterus and, if so, whether the said agreement still binds the parties irrespective of the subsequent marital separation. That is the issue which I am deciding today. The resolution of that issue depends on identifying whether there was an agreement, expressed or implied, between the plaintiff and the first named defendant as to what should happen the frozen embryos in the circumstances that have arisen.

Express Agreement

6. A number of consents were signed by either the plaintiff or the first named defendant and one was signed by both. On the 29th January, 2002, three documents were signed. The first was a consent signed by the plaintiff entitled "CONSENT TO TREATMENT INVOLVING EGG RETRIEVAL". In this document the plaintiff agreed to the removal of eggs from her ovaries and a mixing of the eggs with the sperm of the first named defendant.

7. The plaintiff and the first named defendant signed a document entitled "CONSENT TO EMBRYO FREEZING." In that document they stated "*We consent to the cryopreservation (freezing) of our embryos and take full responsibility on an on-going basis for these cryopreserved embryos*."

8. The first named defendant signed a document entitled "HUSBAND'S CONSENT" in which he acknowledged "I am the husband of M. R. and consent to the course of treatment outlined above. I understand that I will become the legal father of any resulting child."

9. Also on the 29th January, 2002, the first named defendant signed a Semen Collection Form confirming that the sample produced was his.

10. On the 1st February, 2002, the plaintiff signed a form entitled "CONSENT TO EMBRYO TRANSFER." In this she agreed to the placing in her uterus of three embryos and the administration of any drugs or anaesthetics that might be found necessary in the course of the procedure.

11. It is clear from the evidence that the three embryos referred to in that consent form were the embryos which were not frozen and that the purpose of freezing the other embryos was to use them if the first implantation failed. (See evidence of plaintiff, book 2 answer 561 and evidence of the first defendant book 3 answer 139). By good fortune the first implantation of three embryos was successful in that the plaintiff became pregnant and had a successful outcome to the pregnancy. That left the question as to what was to happen to the remaining three embryos which had been frozen.

12. In the course of her evidence the plaintiff stated that the first discussion that took place between her and her husband about the frozen embryos was before he left for the second time. (See book 2 answer 157). The first defendant says that the issue as to what was to happen to the frozen embryos if the first implantation was successful was never discussed. See (book 3 answer 140). He said that it never entered their minds that they would use the frozen embryos if the first procedure succeeded. The plaintiff was asked if there was any specific agreement between herself and her husband about what should happen to the frozen embryos or whether there was any implicit agreement or understanding and she replied "*I believe that we would use the embryos at a later date. If we were still happily married, we would have used them.*" (Book 2 page 212). The first named defendant disputes this and says that there was simply no agreement as to what was to be done.

13. One of the curious features about this case is that there was no document furnished to the plaintiff and the first named defendant by the clinic setting out what was to happen to any frozen embryos, either in the event that the plaintiff became pregnant from the first implantation or in the event of their circumstances changing such as on the death of either party or a separation or a divorce. What is quite clear is that neither the plaintiff nor the first named defendant adverted to the issue until their marriage broke down. I am satisfied therefore that in the absence of the consent forms indicating agreement, either expressly or by implication, there was no agreement as to what was to happen to the three frozen embryos in the circumstances which have arisen and in particular the first named defendant did not give his consent to the use of those embryos for implantation into the plaintiffs uterus.

14. The consent forms which were signed by the plaintiff and the first named defendant are, in my view, unsatisfactory when taken together because:

(a) they were vague in certain important aspects and

(b) they did not cover contingencies which might arise.

15. One of the contingencies which might have been provided for has arisen in this case namely the separation of the plaintiff and the first named defendant. The form entitled "*HUSBAND'S CONSENT*" is a document in which the first named defendant consents "*…to the course of treatment outlined above.*" It is not specified what the "*treatment outlined above*" is. I have seen the original documents and the consent forms are separate and distinct documents. The plaintiff was asked what was the meaning of "*the treatment outlined above*" in that document and replied that it referred to in vitro fertilisation outside the uterus. (See book 2 answers 367 – 370). The first named defendant agreed that the "*treatment outlined above*" meant IVF and went on to elaborate and say that it was "*the fertilisation of the eggs and the implantation of three of them.*" (See book 3 questions 131 and 133). It was quite clear that the three eggs he was referring to were the three embryos initially implanted and not those that were being frozen because he went on to describe how the other three eggs would be frozen and harvested to be used if the implantation failed. He was using the term "*eggs*" when in fact he appears to have been referring to embryos but nothing turns on that. There is nothing in that document which establishes that the first defendant expressly gave his consent to the implantation of the three frozen embryos in the uterus of the plaintiff. Looking at the other documents it is clear that the consent to embryo transfer refers to the placing in the plaintiff's uterus of the three embryos which were not frozen. The first defendant did not sign that document and it cannot in my view constitute an express consent or agreement by the first named defendant to the transfer of the three frozen embryos into the uterus of the plaintiff. The consent to embryo freezing signed by both parties and the semen collection form signed by the first named defendant are not relevant to the question as to whether or not the first defendant gave his express consent to the implantation of the three frozen embryos in the uterus of the plaintiff.

16. Accordingly I hold that there is no evidence that the first named defendant gave his express consent to the implantation of the three frozen embryos in the plaintiff's uterus. I now go on to consider whether the first defendant's consent can be implied.

17. A term might be implied in a contract because of the presumed intent of the parties or because of a rule of law. It has been argued on behalf of the Attorney General that there is no rule of law that governs this issue and I accept that submission. The question which arises is whether there can be said to be presumed intent. The courts have no power to imply a term into a contract merely because it appears reasonable to do so. In *Sweeney v. Duggan* [1997] 2 I.R. 531, the Supreme Court explained the law relating to implied terms. Murphy J. stated:

> *"There are at least two situations where the court will, independently of statutory requirement, imply a term which has not been expressly agreed by the parties to a contract. The first of these situations was identified in the well-known case, The Moorcock (1889) 14 P.D. 64 where a term not expressly agreed upon by the parties was inferred on the basis of the presumed intention of the parties."*

18. He went on to add:

> *"In addition there are a variety of cases in which a contractual term has been implied on the basis, not of the intention of the parties to the contract but deriving from the nature of the contract itself."*

19. On the question of presumed intention of the parties Murphy J. quoted from the judgment of MacKinnon L.J. in *Shirlaw v. Southern Foundries* (1926) Ltd. [1939] 2 K.B. 206 where at page 227 he said:

> *"Prima facie that which in any contract is left to be implied and need not be expressed is some thing so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common, 'oh of course'."*

20. In the light of the evidence in this case and the documents which have been produced it cannot be said that it was the presumed intention of the parties that the three frozen embryo would be implanted in the plaintiffs uterus in the circumstances which have arisen, namely following the success of the first implantation procedure and the legal separation of the plaintiff and the first defendant.

21. The other issue to be considered is whether a contractual term is to be implied from the nature of the contract itself. I have been referred to the case of *Liverpool C.C. v. Irwin* [1997] A.C. 239. When one looks at the consent form signed in this case, it is clear that the parties agreed to the freezing of three embryos. But it has not been established, in my view, that to give effect to the agreement between these parties it is necessary to imply a term that the frozen embryos will be implanted in the plaintiff's uterus. The agreement of the plaintiff and the first named defendant to participate in the IVF treatment indicates that the three frozen embryos would be used if the first implantation failed. But even in that event there were other possibilities which had not been considered namely what would happen to the frozen embryos in the event that one of the parties died or the parties became separated or divorced. It is clear from the evidence which has been given so far in this case that these are matters which were never discussed at the time when the parties entered into the agreement to have the IVF treatment. It seems to me, from the evidence in this case and from the authorities which have been outlined in other jurisdictions, that there are a wide variety of possibilities when it comes to deciding what should happen to the frozen embryos. Looking at all the consent forms signed by the plaintiff and the first defendant and having regard to the evidence I am not satisfied that a term requiring that the frozen embryos should be implanted in the uterus of the plaintiff, derives from the nature of the agreement itself. I accept the submission of the Attorney General that to imply a term, the contractual provisions alleged must be necessary, they must be capable of being formulated with precision and they must be terms both parties would have agreed if suggested at the time of the conclusion of the contract. These principles have been re-stated by the Supreme Court in *Carna Foods v. Eagle Star Insurance* [1997] 2 I.L.R.M. 299 and *Sweeney v. Duggan* [1997] 2 I.L.R.M. 211.

22. For the reasons outlined above I hold that there was no agreement either expressed or implied as to what was to be done with the frozen embryos in the circumstances that have arisen and I further hold that the first named defendant has not entered into an agreement which requires him to give his consent to the implantation of the three frozen embryos in the plaintiff's uterus.