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Mrs U v Centre for Reproductive Medicine

B1/2002/0235

Court of Appeal (Civil Division)

24 April 2002

Neutral Citation Number: [2002] EWCA Civ 565

2002 WL 498902

Before: The Master of the Rolls Lord Justice Mummery , and Lady Justice Hale

Wednesday 24th April, 2002

On Appeal from the High Court of Justice Family Division (The President)

Representation

G Treverton-Jones QC (instructed by Messrs Bartlett Gooding & Weelen) for the Appellant.

Angus Moon (instructed by Bevan Ashford) for the Respondent.

JUDGMENT

Lady Justice Hale:

1. This is the judgment of the court.

2. Mrs U appeals against the order of the President of the Family Division made on 25 January 2002. She ordered that the Centre for Reproductive Medicine at Bristol University be permitted to allow sperm which had been surgically removed from Mrs U's husband on 7 September 2000 to perish or otherwise to destroy it. The day before the sperm were removed, Mr U had signed a consent form agreeing, among other things, that the sperm could be stored and used after his death. He had later changed that aspect of his consent during a consultation with a specialist nursing sister on 25 October 2000. Tragically and unexpectedly, he died on 9 January 2001. His widow wishes to use those sperm in a further attempt to achieve pregnancy by her deceased husband. She argues that the original consent should stand because its withdrawal was the result of undue influence. The President found the decision finely balanced and gave permission to appeal to this court.

Legislative context

3. Section 4(1)(a) of the Human Fertilisation and Embryology Act 1990 provides that no person shall store any gametes except in pursuance of a licence; section 3(1)(a) provides that no person shall bring about the creation of an embryo or keep or use an embryo except in pursuance of a licence. By virtue of section 41(2) contravention of either of these provisions is a criminal offence.

4. Under section 11(1) , the Human Fertilisation and Embryology Authority (HFEA) may grant (a) licences for treatment under paragraph 1 of schedule 2 to the Act, and (b) licences for storage of gametes and embryos under paragraph 2 of schedule 2 . Section 12(c) requires it to be a condition of every licence that the provisions of schedule 3 , governing consents to the use of gametes and embryos, are complied with. The most important provisions of that schedule for the purpose of this case are paragraphs 1, 2(2)(b), 4(1) and 8(1).

5. Paragraph 8(1) of schedule 3 provides that a person's gametes may not be kept in storage unless

there is an effective consent by that person to their storage and they are stored in accordance with that consent. An effective consent is defined in paragraph 1:

> "1. A consent under this Schedule must be given in writing and, in this Schedule, "effective consent" means a consent under this Schedule which has not been withdrawn."

6. Paragraph 2(2) deals with the storage of gametes and embryos:

> "2. —
>
> (2) A consent to the storage of any gametes or any embryo must —
>
> (a) specify the maximum period of storage (if less than the statutory storage period), and
>
> (b) state what is to be done with the gametes or embryo if the person who gave the consent dies or is unable because of incapacity to vary the terms of the consent or to revoke it,
>
> and may specify conditions subject to which the gametes or embryo may remain in storage."

Paragraph 2(4) deals with the use and storage of embryos, including those resulting from stored gametes:

> "2. —
>
> (4) A consent under this Schedule may apply —
>
> (a) to the use or storage of a particular embryo, or
>
> (b) in the case of a person providing gametes, to the use or storage of any embryo whose creation may be brought about using those gametes,
>
> and in the paragraph (b) case the terms of the consent may be varied, or the consent may be withdrawn, in accordance with this Schedule either generally or in relation to a particular embryo or particular embryos."

A person may therefore make different provision for the storage of his gametes and for the storage of any resulting embryos.

7. Also of interest is paragraph 3(1) providing for counselling to be offered and information given before consent is given:

> "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 below."

8. Paragraph 4 deals with variation and withdrawal:

> "4 —
>
> (1) The terms of any consent under this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person

keeping the gametes or the embryo to which the consent is relevant."

Section 46 of the Act deals with the procedure for giving notices, including by delivery, leaving it at the proper address or sending it by post.

Facts

9. Mrs U is 34. Her late husband was some 14 years older. They married in 1993. It was a second marriage for them both. Mrs U had no children. Mr U had two teenage children. He had had a vasectomy in 1978. Mr and Mrs U wanted to have children together. In 1995 there was an unsuccessful attempt to reverse his vasectomy. They then decided to try donor **insemination** and were referred to the Centre by their GP. They were first seen on 9 June 2000 by Dr Jain, who gave them the consent forms to take away and consider, and also offered them the services of the Centre's two independent counsellors. Instead of donor **insemination**, they decided to attempt to retrieve some of Mr U's own sperm by surgical operation (SSR) and use them to treat Mrs U by in vitro fertilisation (IVF): ie retrieving eggs from Mrs U, fertilising them with her husband's sperm by the highly reliable technique of intra-cytoplasmic sperm injection (ICSI) and transferring the resulting embryos to her uterus.

10. They were seen again in August by Dr Gordon, who performed the SSR operation on 7 September 2000. The day before, Mr U completed the Centre's own consent form for the storage and disposal of sperm. The information on this form contained the following passage:

> "Storage and disposal is also subject to important ethical issues. For example, in the event of a man's death his widow might want to be inseminated with his stored sperm to have a baby by him, but we believe that would be wrong. We fully appreciate and sympathise with the reasons for wanting such treatment, but our primary consideration must be from the point of view of any resulting child … We therefore agree to store sperm subject to the sole ownership of the man, to be used and stored for artificial **insemination** only during his lifetime, … It is the ethical policy of this unit not to perform **posthumous insemination**. Possible transfer of sperm to another unit could be discussed at consultation."

11. At the same time, Mr U completed the official form to comply with schedule 2, HFEA (96) 6, *Form for Consent to Storage and Use of Sperm and Embryos* . Under 'II Storage', paragraph c dealt with what was to happen 'If I die or become mentally incapacitated [to] my sperm or the embryo(s) developed in vitro from egg(s) fertilised with my sperm'. Yes/No boxes allowed him to choose, separately for his sperm and any resulting embryos, between (i) allowing them to perish and (ii) continuing to store them for the purposes authorised earlier on the form. Mr U ticked 'no' to (i) and 'yes' to (ii) for both sperm and embryos. Mrs U's evidence was that after signing it he commented to her, 'There you go. If I die you can have my baby still.'

12. Sperm were duly extracted and stored — ie frozen — on 7 September. On 25 October 2000 they went together for a treatment planning appointment with Ms Hinks, a specialist nursing sister at the Centre. During that meeting, Mr U altered the form, by crossing out the tick for 'no' to allowing his sperm to perish after his death or incapacity and instead ticking the 'yes' box; and by crossing out the tick for 'yes' to their continuing in storage and instead ticking 'no'; he initialled both these alterations. He did not alter the 'no' to allowing any resulting embryos to perish and 'yes' to allowing them to continue in storage for the purpose of treating his wife.

13. It is common ground that Sister Hinks asked him to change the form. As is clear from the information form quoted earlier, and was confirmed in evidence by the medical director, Dr Jenkins, the Centre is opposed in principle to the **posthumous** use of gametes (they take a rather more nuanced approach to the **posthumous** use of embryos which have already been created). This is a controversial subject upon which the views of licensed centres differ. The Report of the Warnock Committee on Human Fertilisation and Embryology (1984, Cmnd 9314), which resulted in the 1990 Act, recommended that the use by a widow of her dead husband's sperm should be actively discouraged. Section 28(6)(b) of the Act provides (following the Committee's recommendation) that where the sperm of a man, or any embryo created with his sperm, was used after his death, he is not to be treated as the father of the child. This means that in the eyes of the law such a child has no

father, and thus no paternal relatives, for any purpose including the laws of inheritance and succession. Further, by section 13(5) it is a condition of any treatment licence that a woman is not to be provided with treatment services 'unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father) …' The HFEA's Code of Practice gives advice on the factors to be considered when assessing the child's welfare, and makes special reference to cases 'where the child will have no legal father' (4 th edition, 1998, para 3.19a). Equally, however, **posthumous** use of gametes or sperm is not prohibited and the HFEA have advised centres that they are not permitted to restrict clients' choices on the consent form, because even if one centre is not prepared to carry out their wishes posthumously, the sperm can be transferred to another which is.

14. Sister Hinks subscribed to this Centre's policy. The President gained the clear impression from her oral evidence that 'her belief is strongly and genuinely held' (Judgment, paragraph 21). She also commented that 'As a senior sister and now the Clinical Practice Manager she would carry a lot of authority and would, I have little doubt, be seen as formidable.'

15. Mrs U's evidence was that her husband changed the form reluctantly and under the impression that unless he did so her part of the treatment would not go ahead or at least would be delayed. When asked whether she really felt that her husband had been pressurised into amending the form, she replied 'I feel that he thought that the treatment would not continue if he did not amend the form.' But neither of them asked for time for reflection and they were not angry, although they were shocked that he had been asked to change the form so late in the treatment. The President made the following findings of fact (Judgment, paragraph 22):.

> "22. Ms Hinks told me that she specifically asked Mr U to change the form. She probably did say something like 'it will be necessary to stop and pause and sit down and talk about the implications of **posthumous insemination**'. She would certainly have talked about consultation with a doctor and counselling. She would have explained, I have no doubt, the reasons why she considered **posthumous insemination** to be wrong and would have done so clearly and firmly. I am satisfied that Ms Hinks did not actually tell Mr and Mrs U that the treatment would not continue unless the consent form was changed. I am equally satisfied that she gave to the wife the impression that there would be at least a pause in the treatment cycle with the possibility that it might be interrupted or even brought to a halt. They were already a long way down the treatment road. The husband had completed his part of the programme and the wife was about to start her part two days later. It was, to say the least, an unfortunate moment to embark on this issue. I also do not consider that it was done at all sensitively. Ms Hinks said that the programme was a huge ordeal. Three quarters of the way through an interview dealing with the treatment cycle, the husband was asked straight out to change the consent form. They had not taken up the opportunity for counselling and therefore were unprepared for the request to alter the form and the possible implications for them if the consent was or was not given. It was not suggested that they might go away and think about it. On the contrary I have no doubt that Ms Hinks sat there expecting Mr U to change the form. She did this in all good faith and for the best intentions, but the pressure must have been considerable".

16. Mrs U embarked on drug treatment to stimulate egg production a few days later. On 24 November 2000, they both attended for another consultation and signed the Centre's consent to IVF and ICSI form. Mrs U also signed her own HFEA (96) 7 *Form for Consent to Use of Eggs and Storage of Embryos* . She ticked the 'yes' box for the embryo(s) developed in vitro from her eggs to be allowed to perish should she die. Neither of them made any enquiry or protest on that occasion about what had happened on 25 October. On 27 November eggs were retrieved from Mrs U, three embryos were successfully created in vitro, two were transferred to her uterus (the third was not stored at their request). Unfortunately, the treatment was not successful in establishing a pregnancy. A follow up appointment was arranged for February 2001 but by then Mr H had become ill with asthma and died. This tragedy was both sudden and completely unexpected.

17. After allowing Mrs U some time to come to terms with her loss, the Centre brought these proceedings. Their position is explained in their opening skeleton argument before the President:

> "The Claimant is 'neutral' as to the decision made on the application, in the sense that it

> seeks the Court's guidance as to what it should do in the difficult circumstances in which it finds itself. On the one hand, continued storage of Mr U's sperm is arguably a criminal offence. On the other hand, the Claimant is deeply sympathetic to Mrs U's plight. Nonetheless insofar as the case advanced on behalf of Mrs U relies on duress, undue influence or misrepresentation by the Claimant's nursing staff, those allegations are not accepted."

Undue influence

18. It was common ground before the President that a withdrawal of consent might be vitiated by undue influence. The question was whether the facts as found be her were sufficient to constitute such undue influence as to negative Mr U's withdrawal of consent and restore the consent he had previously given.

19. The only relevant authority quoted to the President was *Re T (Adult: Refusal of treatment) [1993] Fam 95* , in which it was held that the giving of blood to a pregnant young woman whose life was in danger was justified by the doctrine of necessity as her refusal of consent was not such as to bind the doctors to refuse her treatment. After quoting from the judgments of Lord Donaldson MR and Staughton LJ (but not her own) the President reached her conclusion in this case (Judgment, paragraph 28):

> "28. When one stands back and looks at the facts of this case, it seems to me that it is difficult to say that an able, intelligent, educated man of 47, with a responsible job and in good health, could have his will overborne so that the act of altering the form and initialling the alterations was done *in circumstances in which Mr U no longer thought and decided for himself* . I have no doubt that Mr U did not want a pause in the treatment and did want to go along with the Centre. He did not have the opportunity for consultation with his wife, although he could have asked for it. As Mr Jenkins said, it is likely that he and his wife did not really think that there was any likelihood that this part of the form would ever be necessary. He succumbed to the firmly expressed request of Ms Hinks and under some pressure. But to prove undue influence, Mr U has to show something more than pressure. As Lord Donaldson said in re T , it does not matter how strong the persuasion was *so long as it did not overbear the independence of the patient's decision* . The case of Miss T showed the sort of pressure in an emergency which might amount to undue influence. This case is far removed from the case of Miss T. Can it be said that Mr U made the alterations under compulsion? Once one asks the question in this case, the answer has to be no." (Emphases supplied)

This appeal

20. Mr Treverton-Jones QC, on behalf of Mrs U, accepts that the burden of proving undue influence lies upon her. This is not a situation in which undue influence is to be presumed. Nevertheless, he argues that, particularly in the passages highlighted above, the President set too high a test and reached a wrong conclusion when applying the test to the facts. He acknowledges that (as Lord Nicholls emphasised in Royal Bank of Scotland plc v Etridge (No 2) [2001] 3 WLR at 1021 , para 13) this is a question of fact. But he argues that this Court is as well placed as was the President to apply the correct legal test to the facts she found.

21. He points to the President's own words in Re T , at p 120, that 'in equity it has long been recognised that an influence may be subtle, insidious, pervasive and where religious beliefs are involved especially powerful'. He emphasises a number of features which should have led the President to a different conclusion. There was the context in which the consultation on 25 October took place. It was now four and a half months since they had had their initial consultation. Nothing had been said about **posthumous insemination** at either of their earlier appointments. They knew that the Centre was opposed to it but also that sperm could be transferred elsewhere. They had already committed themselves, mentally, emotionally and financially, to the course of treatment. The husband had already undergone his part in it. The wife was about to begin hers. This was a

considerable ordeal and they were both very vulnerable. The question was sprung on them in an interview which they had thought would simply be to plan the next stage. They had the distinct impression that the next stage would be delayed if he did not change the form. Nor did they think it a very important matter as no-one expected Mr U to die. Mrs U was a transparently honest witness and was in no doubt about what her husband's true wishes would have been. The fact that he was an intelligent and sensitive man made it more rather than less likely that in such circumstances he would find it hard to resist the strong moral pressure applied by Sister Hinks.

22. The test these days, he says, is not whether Mr U's will was overborne but whether he had a real choice on that day to refuse to alter the form. In the end, he argues, it comes down to what Mr U really wanted.

23. That is not, however, the question in this case. The question is whether the Centre has an effective consent for the continued storage and later use of these sperm. Without such consent it is unlawful for them to continue to keep it. On the face of it the Centre does not have such consent in this case. There could scarcely be a more obvious way of withdrawing consent than changing the very document upon which it is recorded in the presence of a representative of the Centre and authenticating it for her.

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.

25. In this context, none of the case law on undue influence in other contexts is particularly helpful. This is not like deciding upon the validity or enforcement of a will, gift or other transaction, which may have been procured by the undue influence of the person who will benefit from it. The Centre did not stand to benefit from the withdrawal of consent. Nor, as Mr Moon on behalf of the Centre points out, is it like deciding upon the lawfulness of medical treatment. There are other justifications for performing life-saving medical treatment apart from the possession of an effective consent. There is no other justification for continuing to store human sperm.

26. Hence a Centre having in their possession a form dealing with the matters with which it is required by schedule 3 to the 1990 Act to deal should be both entitled and expected to rely upon that form according to its letter, unless and until it can clearly be established that the form does not represent a valid decision by the person apparently signing it. The most obvious examples are forgery, duress or mistake as to the nature of the form being signed (*non est factum*). The equitable concepts of misrepresentation and undue influence may have a part to play but the courts should be slow to find them established in such a way as to supply a centre with a consent which they would not otherwise have.

27. We do not therefore accept that the President applied too strict a test. Nor do we accept that she should have applied the test differently to the facts of this case. It has frequently been said that undue influence is more easily recognised than defined. The President was much better placed than this court could ever be to decide whether the decision to change the form was valid at the time that it was made. She had the benefit of hearing from two of the three people present. Her judgement of those two people is crucial.

28. In any event, we would have reached the same conclusion. Despite all the factors so skilfully urged upon us by Mr Treverton-Jones, there is little reason to think that at the time when he changed the form, Mr U was not content to do so. As Mrs U said in evidence, they were shocked but not angry. They did not ask for time to discuss it or for further advice, nor did they take up the matter again when they had an obvious opportunity to do so, despite knowing that there was another option. Sadly, it is only with the benefit of hindsight that he might have wished to do otherwise.

29. We can only guess at the feelings of someone who has suffered as Mrs U has suffered, but we can sympathise and even empathise with them. There is a natural human temptation to try to bend the law so as to give her what she wants and what she truly believes her husband would have

wanted. But we have to resist it. The President was right to make the order she did and this appeal must be dismissed.

Order: 1. Appeal and cross-appeal dismissed. 2. Centre to be permitted to destroy sperm taken from Mr U by surgical sperm removal on 7 September 2000. 3. No order as to costs.