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Human Fertilisation and Embryology Act 1990 and the issue of consent: the unresolved problem

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- Under the Human Fertilisation and Embryology Act 1990, the issue of 'consent' has been problematic when dealing with fertilisation issues in England and Wales.
- Although there was an attempt to amend the law in 2008, the issue has not been resolved
- Case law illustrates the need for a change.

Introduction

The Human Fertilisation and Embryology Act (HFEA) 2008 received Royal Assent on 13 November 2008. Technology in the field of human reproduction had advanced so far that the previous HFEA 1990 was struggling to cope with these changes. The 2008 Act attempted to update the law to ensure that it was fit for purpose in the 21st century and amended certain provisions of the 1990 Act. However, the issue of consent under Schedule 3 and 4 of the 1990 Act remained unchanged.

Current Law

Within the current Act, for gametes to be lawfully retrieved, stored and used there is a need for an effective consent. Schedule 3 requires consent for the use or storage of gametes to be in writing. The same Schedule further clarifies this by stating that: 'In this Schedule "effective consent" means a consent under this Schedule which has not been withdrawn.'

Schedule 3 (8) of the HFEA 1990 deals with the consent to use or store gametes. Under Schedule 3 (8)(1) 'A person's gametes must not be kept in storage unless there is an effective consent by that person to their storage and they are stored in accordance with the consent.' Furthermore, Schedule 3 (2) (a) requires such consent to specify the maximum period of storage (if less than the statutory storage period).

The same Schedule also clarifies further the procedure for giving consent. Under Schedule 3 Paragraph 3 (1), before a person gives consent, (a) that person must be given proper counselling about the implications of taking the proposed steps, and (b) must be provided with such relevant information as is proper.

Although the above provisions of Schedule 3 may sound straightforward, they are difficult to strictly comply in a real-life situation. Thus, the following recently decided case will illustrate the complexity of the issue.

Recent Case of Samantha Jefferies

Central to the recently decided case of Samantha Jefferies (Jefferies v BMI Healthcare Ltd and Human Fertilisation and Embryology Authority, [2016] EWHC 2493 (Fam)), was the issue of 'consent'. Mr. and Mrs. Jefferies decided to receive in vitro fertilisation (IVF) in order to have children. For that purpose, embryos were created from the claimant's eggs and her husband's sperm while the couple were undergoing IVF treatment. As required by the HFEA 1990, both the husband and wife consented to the storage of the created embryos. The consent form (MT) was signed by the husband in which he consented to the embryos being stored for a 10 year storage period. At some point thereafter, the form was amended to specify a two-year storage period, which was to reflect the clinic's policy of offering two years of free storage facilities funded by the NHS. However, the amendment was neither signed nor initialled by Mr. Jefferies. In 2014, just before the couple were to undergo a cycle of IVF treatment using the embryos, the husband died unexpectedly. The IVF clinic indicated that, in accordance with the amendment to the husband's consent form (with reference to the clinic's two years free storage offer), the embryos could not be stored beyond August 2015.

When the case was brought to court the claimant, Mrs. Jefferies, submitted that the amendment of the original storage agreement was invalid because it had not been signed or initialled by her husband as required by Schedule 3 Paragraph 1(1) (http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=162&crumb-action=replace&docguid=IFA9F3970E44B11DA8D70A0E70A78ED65) of the Act. As a result of these circumstances, the original consent for the 10-year storage period remained valid. The claimant sought a declaration that three embryos being frozen on 11 August 2013 could lawfully be stored for 10 years from the date of their freezing (until 2023).

Sir Munby presiding in the High Court, granted the declaration. Sir Munby's decision as explained under s 24 -29 of his judgment was based on the following main points. Firstly, the requirement in Schedule 3 Paragraph 1(1), that a consent or any variation or withdrawal of consent having to be signed by the relevant person, did not require a full signature. Thus, either a signature or putting an initial on the amendment would be sufficient. However, Mr. Jefferies had done neither. Therefore, this was sufficient to invalidate the amendment. Furthermore, even if he had intentionally amended the form to reduce the period of his consent to two years, the amendment would be invalid in the absence of his signature or initials. On

this ground alone, the claimant was entitled to the declaration that she was seeking to obtain. Secondly, regardless of whether or not Mr. Jefferies signed the amendment (reducing the storage from 10 years to two years), the requirements under Schedule 3 Paragraph 3 (1) (b) were not met. The amendment required that a 'suitable opportunity to receive proper counselling about the implications' of signing the amendment had to be complied with. The judge concluded that there was no evidence that Mr. Jefferies had been given any counselling regarding the implications of the amendment (Official Transcript, s 30-33).

Mr. Jefferies provided a written consent. However, his written consent for the storage of their remaining embryos had since expired. The couple signed the forms in July 2013 and had two unsuccessful cycles of IVF treatment. The facts illustrate the clear intention of the couple to have a child together. The court considered the fact that the couple twice signed a form called 'Consent for the Cryopreservation and Storage of Embryos (SDFC9)'. This form stated, "**…embryos…be preserved…and stored for a period of not more than ten (10) years from the date of fertilisation. Although the fact that uncertainty around the words 'not more than ten years**" is mentioned. The form SDFC9, not being a consent form, was raised for the court to consider in their decision. The court, instead of just focusing on regulations in only one particular form (MT), looked at the whole documentation to identify the real intention of the deceased. As a result. the court came to the conclusion that the form (MT) was amended to reflect the clinic's free storage offer and not as a result of a change of heart on Mr. Jefferies' part.

Issues associated with human fertilisation and reproduction are complex and very sensitive. As can be seen from the above-mentioned case, procedural requirements coupled with practical considerations about storage issues can result in creating difficulties in establishing a party's real consent. Obviously, these issues are more complex especially when one of the parties is deceased. Perhaps it is time to simplify the paperwork by underlining the fact that consent for usage of gametes should prevail over any other conflicting issues such as storage duration. Clearly, related issues such as free funding facilities for a shorter period of storage will influence the decision of couples when agreeing on storage terms. However, this should not undermine the deceased's consent to allow his partner to use the gametes.

The decision in Mrs. Jefferies' case is promising. However, the most practical way of dealing with this issue is in simplifying the rules, instead of dealing with the issue on a case by case basis. Otherwise, courts will be busy again trying to determine the issue of consent.

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