
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : RE SECTION 22 OF THE *HUMAN TISSUE AND
TRANSPLANT ACT 1982* (WA); EX PARTE CH
[2023] WASC 487

CORAM : SEAWARD J

HEARD : 18 DECEMBER 2023

DELIVERED : 21 DECEMBER 2023

FILE NO/S : CIV 2433 of 2023

EX PARTE

CH
Applicant

Catchwords:

Practice and procedure - Ex parte application by wife for order permitting removal and storage of spermatozoa and associated tissue from the body of her husband - Husband deceased - Jurisdiction of the Court to make an order under s 22 of the *Human Tissue and Transplant Act 1982* (WA) - Where the Coroner gave oral and written consent - Where there is no reason to believe the deceased would have objected to the order - Turns on own facts - Whether order of the court necessary in light of s 22 of the *Human Tissue and Transplant Act 1982* (WA)

Legislation:

Coroners Act 1996 (WA)

Human Tissue and Transplant Act 1982 (WA), ss 22, 23, 24

Rules of the Supreme Court 1971 (WA) O 52 rr 2-3

Result:

Order made permitting removal or spermatozoa and associated tissue
Suppression order made

Category: B

Representation:

Counsel:

Applicant : Ms K A Parker

Solicitors:

Applicant : Greenstone Legal

Case(s) referred to in decision(s):

Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C
[2013] WASC 3

Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte H
[2020] WASC 99

Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M
[2008] WASC 276

Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte P
[2022] WASC 477

S v Minister for Health (WA) [2008] WASC 262

SEAWARD J

SEAWARD J:

1 In the evening of 18 December 2023, I heard an urgent application
for an order for the removal and storage of spermatozoa and associated
tissue from the applicant's husband, Mr H. At the time of the
application, Mr H's body had been taken to the morgue at Sir Charles
Gairdner Hospital (SCGH).

2 The application was supported by an affidavit sworn by the
applicant, Ms H.

3 After hearing from the applicant's counsel, and from the delegate
to the State Coroner of Western Australia by telephone, I made orders
in terms of the application. At the time of making the orders, I gave
very brief oral reasons for doing so and said that I would subsequently
publish more detailed reasons for my decision. These are those
reasons.

Factual background

4 The factual background to the application was set out in the
affidavit of the applicant sworn 18 December 2023, and was
supplemented by her oral evidence. This summary of the facts is taken
from that evidence.

5 The applicant is the wife of the deceased and is 62 years of age.
The deceased was born on 26 January 1962 and was 61 years of age
when he died.

6 The applicant and her husband were married on 4 June 1983 and
had two children. Their daughter was born on 3 January 1984 and their
son was born on 4 October 1988. Tragically, their daughter died in
2013 when she drowned on a fishing trip and their son died in 2019 in a
car accident.

7 The applicant's evidence, both in her affidavit and orally, is that
since the death of her son, she and the deceased had been talking about
having another child using his sperm. The applicant's oral evidence
was that this is something they had continued to talk about regularly up
until his death.

8 The applicant's oral evidence was that she went to visit a fertility
expert, who advised her that due to her age, the applicant could not
have a child. However, the applicant and the deceased also had the

deceased's sperm tested and were advised that it was such that it could be used to have a child.

9 The applicant gave evidence that she has a cousin in the Philippines who is in her twenties and has volunteered to be a surrogate for the applicant and the deceased. However, the applicant's understanding is that the legal requirements in the Philippines are such that the applicant and the deceased would have been required to live in the Philippines for a certain period of time before being able to proceed, and to date they were unable to do so due to work commitments.

10 The applicant's evidence was that other reasons which had stopped the deceased and herself taking any further steps in relation to surrogacy included COVID and the death of the applicant's mother-in-law.

11 The applicant's oral evidence was that she and the deceased did not stop talking about having another child using the deceased's sperm and continued to have those discussions up until his death.

12 The applicant's evidence is that she is informed that a Dr Gayatri Borude from Adora Fertility is willing to perform the sperm removal procedure if the order is granted.

Legislative background

13 Section 22 of the *Human Tissue and Transplant Act 1982* (WA) (Act) is in pt III of the Act which is headed 'Donations of tissue after death. Section 22 is headed 'Designated officer may authorise removal of tissue from bodies in hospital,' and relevantly provides that:

(1) A designated officer for a hospital may, subject to and in accordance with this Part, authorise the removal of tissue from the body of a person who has died in hospital or whose dead body has been brought into the hospital -

(a) ...; or

(b) for use of the tissue for other therapeutic purposes or for medical or scientific purposes.

...

(2) A designated officer for a hospital may authorise the removal of tissue from the body of a person who has died in the hospital or whose dead body has been brought into the hospital -

- (a) ...; or
 - (b) where, after making inquiries, the designated officer has no reason to believe that the deceased person had expressed an objection to the removal after death of tissue from the body of the deceased person for the purpose or a use referred to in subsection (1) and the designated officer is satisfied that the senior available next of kin consents to the removal of tissue from the body of the deceased person for the purpose or a use referred to in subsection (1).
- (3) The authority of a designated officer to authorise the removal of tissue from the body of the deceased person under this section is restricted -
- (a) ...;
 - (b) in the case of the circumstances referred to in subsection (2)(b), by the consent of the senior available next of kin,
- both as to the tissue which may be removed and as to the purpose or use of the tissue.
- (4) The senior available next of kin of a person may make it known to a designated officer at any time when the person is unconscious before death that [they consent] to the removal, after the death of the person, of tissue from the body of the person for the purpose or a use referred to in subsection (1), but the designated officer must not act on such an indication if the person recovers consciousness.

...

14 'Senior available next of kin' is defined in s 3 of the Act and relevantly includes, in the case of a person other than a child, as the first priority the spouse or de facto partner with whom the person is living.

15 Section 23 of the Act requires the Coroner to give consent to the removal if the designated officer believes the death of the person is or may be a reportable death under the *Coroners Act 1996* (WA). I was satisfied that on the facts of this case the death of Mr H was a reportable death. During the course of the hearing, the delegate of the State Coroner for Western Australia, Ms Rachel Whalan, was contacted by telephone. Ms Whalan confirmed that she was the delegate of the

State Coroner and provided her oral consent for the removal of spermatozoa from Mr H in accordance with s 23(4) of the Act, with written confirmation of that oral consent being provided the following day.

16 The effect of an authority under s 22 of the Act is detailed in s 24 of the Act, the precise terms of which were amended by the *Human Tissue and Transplant Act Amendment Act 2022*. Section 24 relevantly provides that:

...

(1A) Subject to subsection (2), an authority under this Part is sufficient authority for the removal of tissue from the body of the deceased person referred to in the authority, for a permitted purpose or use, by —

...

(d) in any other case — a permitted practitioner.

17 A 'permitted purpose or use' is relevantly defined in s 24(1) of the Act as:

permitted purpose or use, in relation to the removal of tissue, means —

...

(b) use of the tissue for other therapeutic purposes or for medical or scientific purposes; ...

18 A 'permitted practitioner' is defined in s 24(1) of the Act as:

permitted practitioner, in relation to an authority under this Part, means a medical practitioner other than —

(a) if subsection (2) applies — a medical practitioner who made a declaration under that subsection relating to the authority; or

(b) the designated officer for the hospital in which the authority was given or a person who has lawfully exercised the designated officer's powers under section 22;

19 A 'medical practitioner' is defined in s 3 of the Act as a person registered under the *Health Practitioner Regulation National Law (WA) Act 2010* in the medical profession.

20 The effect of s 24 of the Act is that an authority issued under s 22 will authorise a medical practitioner who is not the designated officer

who has authorised the removal or is not either of the two medical practitioners who have declared irreversible cessation of all function of the brain of the deceased person, and the respiration and circulation of the blood is being maintained by artificial means, to remove the tissue from the body of the deceased person for a permitted purpose.

Jurisdiction of the court to make the order sought

21 Previous decisions of this court are authority for the proposition that the court has jurisdiction under either s 22 of the Act itself¹ or O 52 r 2 and r 3 of the *Rules of the Supreme Court 1971* (WA) (Rules) together with s 22 of the Act to make an order of the type sought by the applicant, provided the conditions stipulated in s 22 for the removal of tissue are met.²

22 I am satisfied the court has jurisdiction to make an order of the type sought. I am also satisfied that these decisions provide support for an order being made to authorise a legally qualified medical practitioner to undertake the removal of tissue, provided the conditions stipulated by s 22 for the removal of tissue are met.³

Disposition

23 Before I can make an order under the Act, I am required to be satisfied of (relevantly in this case) the following matters:

- (a) Mr H's dead body had been brought into SCGH;
- (b) spermatozoa is 'tissue';
- (c) the proposed removal of the spermatozoa and associated tissue was for 'medical or scientific purposes'; and
- (d) where, after making inquiries, the court has no reason to believe that the deceased person had expressed an objection to the removal after death of the spermatozoa from his body for medical or scientific purposes and that the senior available next of kin consents to the removal of the spermatozoa for that purpose.

¹ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3 [4] - [19].

² *S v Minister for Health (WA)* [2008] WASC 262 [5] - [18]; *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M* [2008] WASC 276 [5] - [6].

³ *S v Minister for Health (WA)* [23], [25]; *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M* [1], [5]; *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [19].

24 The evidence of the applicant is that Mr H was pronounced dead by ambulance officers at their home on the morning of 17 December 2023. There was no evidence from the applicant as to the location of Mr H's body, but owing to the urgency of the application I accepted evidence from the bar table from the applicant's counsel that Mr H's body was in the morgue at SCGH.

25 The word 'tissue' as used in s 22 includes spermatozoa by reason of the definition of 'tissue' contained in s 3 of the Act. I accept that the removal of spermatozoa for the purposes of storage for later use in IVF procedures constitutes a 'medical purpose' within the meaning of s 22(1)(b).⁴

26 I am satisfied that the applicant is the wife of Mr H and accordingly is the 'senior available next of kin' as defined in s 3 of the Act and has consented to the proposed removal.

27 The final matter on which I must be satisfied is that the Court has no reason to believe that the deceased person had expressed an objection to the removal after death of the spermatozoa from his body for medical or scientific purposes, in this case being storage for later use in IVF procedures. On the basis of the written and oral evidence of the applicant I am satisfied of this matter. In this regard, I observe that during the hearing I asked the applicant a series of questions about the extent to which the deceased and the applicant had discussed their desire to have another child using the deceased's sperm, including when such discussions took place. I also asked the applicant questions about what steps, if any, had been taken by the couple to attempt this process. I asked these latter questions not because it is necessary for the purposes of s 22 of the Act for the applicant to establish that steps had been taken by the couple, but rather as part of my assessment of the reliability of the applicant's evidence in relation to this matter.

28 In all the circumstances, I am therefore satisfied of each of the required matters for the purposes of s 22 of the Act.

Orders

29 At the conclusion of the hearing, I made orders in the following terms (which reflect the orders sought by the applicant, amended to reflect the amended wording of s 24 of the Act):

⁴ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex Parte C* [16(2)].

1. There be permission for Dr Gayatri Borude of Adora Fertility or another permitted practitioner within the meaning of s 24 of the *Human Tissue and Transplant Act 1982* (WA) (HTT Act) forthwith to remove spermatozoa and associated tissue from the body of [Mr H] and such spermatozoa and associated tissue shall be stored in accordance with the HTT Act.
2. The spermatozoa and associated tissue so removed and stored not be used for any purpose without an Order of this Court.
3. No names of the parties to the proceedings or of [Mr H] be published until further order of this Court.

30 In making these orders, I was aware they were limited in their operation and did not permit the spermatozoa and associated tissue removed from the body of Mr H to be used in any way. The effect of my orders was therefore restricted to permitting something to happen which, if it did not happen urgently after the death of Mr H, would forever preclude the applicant from making use of Mr H's spermatozoa in an attempt to conceive a baby. As I made clear during the hearing, these orders are limited to permitting the removal of the spermatozoa and do not constitute authorisation for the spermatozoa to be used by the applicant, and do not in any way consider whether the applicant can or could meet any statutory criteria in that regard.

31 In making order 3, I was conscious of the need for the court to be cautious in making orders suppressing the names of parties to proceedings or the names of people associated with the proceedings. However, similarly to the approach taken by Martin CJ in *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M*⁵ and Derrick J in *Re Section 22 of the Human Tissue and Transplant Act 1982(WA); Ex parte H*,⁶ I concluded that it was in the public interest for people in the position of the applicant to be able to come to court without fear their privacy will be invaded at a time of obvious stress and trauma.

Other matters

32 As can be seen from the requirements of s 22 of the Act, it is not necessary that a person seeking an order for the removal of tissue obtain a court order to that effect. Rather, s 22 of the Act sets out a

⁵ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M* [8].

⁶ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte H* [2020] WASC 99 [27].

process whereby a designated officer in the relevant hospital can grant that authorisation.

33 During the hearing I asked counsel for the applicant whether attempts had been made to obtain the authorisation from the designated officer. The court was informed that the applicant had made those attempts, but the hospital did not make the designated officer available, despite a request from counsel for the applicant to speak to the designated officer, and there was (to the best of the applicant's understanding) no consideration of the applicant's case by the designated officer.

34 As this urgent application was made on an ex parte basis, I do not have the benefit of any explanation from the hospital as to what occurred or why. However, it is disappointing that it appears that, once again, an applicant has been required to attend court on an urgent basis and in traumatic circumstances to obtain an order that may, if the designated officer considered all criteria to be met, be granted in a faster and more streamlined manner. In this regard I endorse the following observations of Edelman J in *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C*:⁷

23 The *Human Tissue and Transplant Act* establishes a relatively straightforward regime. In this case the hospital was aware of, and had, a designated officer under the Act. Section 4 of the Act provides that the designated officer may, in writing, delegate any of his or her powers (other than the power to delegate). The authorisation for the removal of the spermatozoa from Ms C's deceased husband could have been given by the authorised officer, or someone delegated to make the decision (and inquiries of Ms C) on his behalf.

24 In future, the most efficient procedure to follow in an urgent case such as this would be for any request for extraction of spermatozoa to be directed by the hospital to the designated officer who can consider the matters raised in s 22 of the *Human Tissue and Transplant Act* which I have described above. If the designated officer is unavailable he or she can, in writing (by email or fax) delegate the power to another officer. The delegation can occur beforehand or at the time of the request.

35 See also the decisions of Derrick J in *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte H*⁸ and Fiannaca J in

⁷ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C*.

⁸ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte H* [17] - [18].

SEAWARD J

*Re Section 22 of the Human Tissue and Transplant Act 1982 (WA);
Ex parte P.*⁹

⁹ *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte P* [2022] WASC 477 [35] - [38].

SEAWARD J

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CH

Associate to Justice Seaward

21 DECEMBER 2023