Regulatory rules versus common sense

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Family analysis: Natalie Gamble at specialist fertility law firm Natalie Gamble Associates says that like various other recent fertility law cases, R (IM and another) v Human Fertilisation and Embryology Authority highlights the tension between regulatory rules which are designed to give clarity and certainty, and the need to temper those to deal with the human consequences of real situations.

Original news

R (on the application of IM and another) v Human Fertilisation and Embryology Authority [2016] EWCA Civ 611, [2016] All ER (D) 06 (Jul)

The Court of Appeal, Civil Division, allowed the applicants' appeal against a refusal to set aside the decision of the respondent Human Fertilisation and Embryology Authority (HFEA) not to allow them to export their late daughter's eggs to a clinic in the US to be fertilised with donor sperm and implanted in the applicant mother with the intention that any resulting child would be raised as the applicants' grandchild. The decision had contained material misstatements of evidence concerning the daughter's wishes, had failed to give reasons why it had considered that the daughter had had to have certain information before she could have given effective consent to the applicants' proposed actions and had failed to have decided what relevant information the Human Fertilisation and Embryology Act 1990 (HFEA 1990) had required the daughter to have had.

Briefly, what was the background to this case?

The case involves a young woman (A) who died of cancer in her 20s. During a period of remission, she had undergone treatment to collect three eggs which were frozen and which she later referred to as 'my babies on ice'. When storing the eggs, A completed a consent form which asked what she wanted to happen in the event of her death. She wrote 'yes' to the eggs being stored 'for later use', and 'no' to the eggs 'being allowed to perish'. She did not specify in writing how she wanted the eggs to be used after her death, but she was never given any additional forms by the clinic where her eggs were stored, and at the time of storage (and until her death) she was single.

After A died in 2011, her parents (Mr and Mrs M) sought to give effect to their daughter's wishes and to try to conceive a child (with donor sperm) who Mrs M would carry and who they would raise as their grandchild. Mrs M had discussed this with A on several occasions, including after A knew she would not survive. A told her mother that she hadn't gone through fertility treatment for nothing and that her babies would be 'safe with them'. The family thought that all the paperwork required was completed and in place. However, the UK clinic where the eggs were stored declined to offer treatment, citing a lack of written consent to the treatment proposed by A's parents.

Mr and Mrs M, with the clinic's support, instead sought to export the eggs to the US where a clinic was identified that was prepared to help. The problem was that the HFEA, which has a general discretion to permit or refuse to allow eggs to be exported, refused the UK clinic's application for export of the eggs.

Mr and Mrs M sought a judicial review of the HFEA's decision but the High Court ruled that the HFEA was right to conclude that there was insufficient evidence of A's wishes and was therefore entitled to refuse consent to export. Mr and Mrs M appealed that decision.

What were the issues at appeal?

The main issue in the appeal was whether the HFEA, which had refused permission to export the eggs under its discretionary power because it said there was insufficient evidence that A consented, had wrongly assessed the evidence of A's wishes. The case turned on what A wanted, and the requirements for demonstrating consent to the posthumous use of gametes.

What did the Court of Appeal decide? Why is the decision significant?

The Court of Appeal said that the HFEA (and Ouseley J) had erred in their assessment of the evidence. Although A had not completed additional written consent forms explaining the terms of her initial consent, all available evidence indicated that A wanted the eggs to be used by her mother after her death, and there was no evidence that A wanted the eggs to be allowed to perish. The Court of Appeal said that it had been unreasonable to expect A to have considered the prospect of export (which she could not have anticipated) or to have set out in detail matters which she had reasonably left to her parents to decide (such as the choice of sperm donor, and the potential risks to her mother in carrying a pregnancy). The HFEA should therefore not have concluded that A would not have consented to the course now proposed.

The ruling means that the HFEA will now need to consider again whether to exercise its discretion to permit export of the eggs. They must take into account the Court of Appeal's conclusions, and since A's lack of consent was the reason for their previous refusal.

Does the case expose any grey areas in HFEA 1990 and its application?

The decision follows a long battle to honour the wishes that A clearly expressed to her mother before she died. Rather than changing the law, the ruling gives effect to one of the UK's most basic legal principles on assisted reproduction: that the person who has given eggs or sperm should decide what happens to them. It highlights how important it is for anyone storing eggs or sperm to record as clearly as possible in writing what they wish to happen if they die. However, it also makes clear that, where there are gaps in respect of the detail recorded in writing, issues of consent have to be considered in their full context, and not just with a formulaic approach to whether clinic consent forms have been completed. Other evidence of someone's wishes—such as conversations with family members—can also be taken into account.

To what extent has the court clarified the law, especially in relation to consent requirements?

The facts of this case are very specific, perhaps unique, but the principle that consent must be looked at in a common sense way in areas of HFEA discretion, rather than just as a matter of paperwork, will undoubtedly be significant for other cases in the future.

How does this case fit in with other developments in the law relating to fertility/surrogacy?

Like various other recent fertility law cases, this case highlights the tension between regulatory rules which are designed to give clarity and certainty, and the need to temper those to deal with the human consequences of real situations. It follows a trend of similar decisions in which the court has, for example, loosened apparently mandatory time limits in surrogacy cases, made declarations of parentage even though parents had not complied with statutory procedures to nominate non-biological parents as legal parents before conception, and extended time-limits for embryo storage where the correct consents had not been signed before one partner died.

Natalie is recognised internationally as the UK's leading fertility lawyer and was the first solicitor to pioneer fertility law in the UK. Natalie Gamble Associates has handled many of the leading cases on surrogacy, assisted reproduction and LGBT families. In R (IM) v HFEA, the firm represented the appellants.

Interviewed by Kate Beaumont.

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