Neutral Citation Number: [2020] EWHC 691 (Fam)

Case No: FD19P00694

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/03/2020

Before :

President of the Family Division
- -

Re AB

- -
- -

Ms Jenni Richards QC and Ms Catherine Dobson (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Applicant**
Ms Claire Van Overdijk (instructed by **DAC Beachcroft LLP**) for the **Respondent**

Hearing date: 19th February 2020
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE PRESIDENT OF THE FAMILY DIVISION

Sir Andrew McFarlane P :

1. AB, the Applicant in these proceedings, is the brother of CD. CD died two years ago. AB is the personal representative of his deceased brother's estate. AB understands that, some five or more years prior to his death, CD made arrangements for the Respondent fertility clinic ("BC") in England for the freezing and storage of his sperm. Following CD's death, AB, as his personal representative, has requested the fertility clinic to provide him with a copy of all records relating to the arrangements for the storage and use of CD's sperm and/or any embryos created using his sperm. The clinic, conscious of the need to maintain confidentiality unless there is a clear duty of disclosure, has declined that request. AB has therefore applied to this court for a declaration as to the lawfulness of the request and an order requiring the clinic to disclose the relevant records.

Procedural context

2. Before turning to the substance of the application, it is both necessary and, hopefully, informative to consider the procedural context. AB's application was made to the High Court, Family Division by a "Application Notice" under Part 18 of the Family Procedure Rules 2010 ("FPR 2010"). At the commencement of the hearing of the application, it was necessary to consider the jurisdictional and procedural context, in part in order to determine whether the application was "family proceedings" to which, therefore, FPR 2010 applied or "civil proceedings" to which the Civil Procedure Rules 1998 ("CPR 1998") applied.

3. The Applicant's case is based in the alternative firstly upon a statutory right and, secondly, in reliance upon the inherent jurisdiction of the High Court to make declarations and other orders with regard to the body or other physical remains of a deceased person.

4. The statutory right is said to arise under the Access to Health Records Act 1990 ("AHRA 1990").

5. By AHRA 1990, s 2(1) an application for access to a health record, or to any part of a health record, may be made to the holder of the record by a number of categories of individual. AB maintains that as the deceased's personal representative he is one of the individuals entitled to apply under s 3(1). AHRA 1990, s 3(2) provides that where an application has been made under s 3(1) the holder of the record "shall, within the requisite period, give access to the record, or the part of a record, to which the application relates". By AHRA 1990, s 3(5)(b) the "requisite period" is the period of 40 days beginning with the date upon which the request for access was made.

6. Failure by the record holder to comply with a valid request for disclosure of a health record under AHRA 1990, s 3 triggers a right for the applicant to apply to "the court", which, if the court is satisfied that the holder has indeed failed to comply with any requirement under s 3, may order the holder to comply with that requirement. The jurisdiction of the court is established by AHRA 1990, s 8(1) and "the court" is defined in s 8(5) as "the High Court or the county court" in England and Wales.

7. In so far as the alternative limb of the Applicant's claim arises under the inherent jurisdiction of the High Court, the Applicant submits that such applications relating to

the storage of sperm, eggs or embryos have been heard by the Family Division. Reference was made to a number of cases:

> *Samantha Jefferies v BMI Healthcare Limited and the HFE Authority* [2016] EWHC 2493 (Fam)
>
> *Mrs U v Centre for Reproductive Medicine* [2002] EWCA Civ 565
>
> *Re Warren* [2014] EWHC 602 (Fam)
>
> *Evans v Amicus Healthcare Ltd and others* [2003] EWHC 2161 (Fam)

8. Although AHRA 1990, s 8 establishes a statutory right to apply to a court in the event of the failure of a record holder to comply with a valid request, the nature of the application and its attribution to one or other division of the High Court is less than clear.

9. On close inspection, it is apparent that an application under FPR 2010, Part 18 is not appropriate. FPR 2010, r 18.1(2) establishes the limit of the Part 18 process:

> "(2) an applicant may use the Part 18 procedure if the application is made:
>
> (a) in the course of existing proceedings;
>
> (b) to start proceedings except where some other Part of these rules prescribes the procedure to start proceedings; or
>
> (c) in connection with proceedings which have been concluded."

10. The Part 18 procedure provides a useful facility so that applications for which no other formal process is available may be made prior to proceedings, during proceedings or after the proceedings have concluded. Part 18 is, however, an ancillary process the life of which is dependent upon there being some other form of "proceedings". Here, the Part 18 process is itself the proceedings which are before the court. No other application or process is currently contemplated by the Applicant.

11. A further difficulty is that the FPR 2010 is, understandably, limited so that the "rules apply to family proceedings in the High Court and the Family Court" (FPR 2010, r 2.1). The term "family proceedings" is defined in Matrimonial and Family Proceedings Act 1984, s 32 as proceedings which "are family business". "Family business" is defined in the same section as meaning business of any description which in the High Court is for the time being assigned to the Family Division and to no other division by Senior Courts Act 1991, s 61 ("SCA 1981") and Schedule 1. It is common ground that an application under AHRA 1990, s 8 is not specifically defined as family business by SCA 1981, Schedule 1.

12. For the Applicant Ms Jenni Richards QC accepts that, with hindsight, FPR 2010, Part 18 is not an apt procedural vehicle for this application. Ms Richards has told the court that under the CPR 1998 it may be possible to issue an application for the required relief under Part 7 or Part 8. Alternatively, outside the FPR 2010 an application might be made to the Family Court by an Originating Summons and, certainly with respect to the application to engage the inherent jurisdiction, an Originating Summons would be the appropriate procedural channel to commence proceedings.

13. Ms Richards rightly submitted that the allocation of business between one division of the High Court and another, and determining which of the procedural rules might apply, should not cause a court to lose focus upon the overarching jurisdiction that each judge of the High Court is afforded by SCA 1981, s 4(3) which provides that "All the judges of the High Court shall, except where this Act expressly provides otherwise, have in all respects equal power, authority and jurisdiction." In addition, whilst SCA 1981, s 5 establishes the three divisions of the High Court, namely the Queen's Bench Division, the Chancery Division and the Family Division, SCA 1981, s 5(5) expressly establishes that "Without prejudice to the provisions of this Act relating to the distribution of business in the High Court, all jurisdiction vested in the High Court under this Act shall belong to all the Divisions alike."

14. It follows that a judge of the High Court, and in this context that includes the President of the Family Division, has jurisdiction in relation to any matter over which any other member or division of the High Court may have jurisdiction and that must expressly include an application under AHRA 1990, s 8 which by s 8(5) is expressly attributed to the High Court (or the county court).

15. Drawing these matters together, I am satisfied that, irrespective of the erroneous procedural channel under FPR 2010, Part 18 which was utilised to bring this application before the court, a High Court judge sitting in the Family Division has jurisdiction to hear it. Further, given the developing and accepted practice of matters relating to fertility treatment being assigned for hearing in the Family Division under the inherent jurisdiction, it is plainly sensible for all of the applicant's applications, which include those with respect to the inherent jurisdiction, to be determined in this division.

16. These are not, however, "family proceedings" as defined by the Statute and the Rules. They are, by default, therefore civil proceedings to which the CPR 1998 applies.

17. That conclusion is important in determining whether, as a starting point, the proceedings are to be heard in public or in private. CPR 1998, Part 39.2 provides that all proceedings are to be heard in public, subject to certain exceptions. FPR 2010, r 27.10 provides that family proceedings are to be held in private, subject to the court's power to direct otherwise. In a short judgment given at the start of the hearing, following submissions from both parties and full written submissions on behalf of three media organisations, I determined that because of particular factual matters related to these proceedings, and irrespective of the starting point determined by the nature of the proceedings (civil or family), they should be heard in private, that media representatives should attend, but their attendance would be subject to a Reporting Restrictions Order prohibiting the reporting of any information other than a short statement indicating the nature of the application and the fact that a Reporting Restrictions Order had been made.

The Applicant's AHRA 1990 application

18. It is accepted that any records that might be held by a fertility clinic come within the definition of "health record" under AHRA 1990. The primary basis for the Applicant's application arises from AHRA 1990, s 3(1):

> "3(1) An application for access to a health record, or to any part of a health record, may be made to the holder of the record by any of the following, namely:
>
> …
>
> (f) where the patient has died, the patient's personal representative and any person who may have a claim arising out of the patient's death."

19. It is possible for a patient to exclude a person's right of access. AHRA 1990, s 4(3) provides:

> "Where an application is made under subsection (1)(f) of section 3 above, access shall not be given under subsection (2) of that section if the record includes a note, made at the patient's request, that he did not wish access to be given on such an application."

The Respondent does not suggest that the deceased made such a request in this case.

20. The right to disclosure of the full record is also curtailed by AHRA 1990, s 5(1) which provides that access shall not be given under s 3(2) to any part of a health record which in the opinion of the holder of the record would disclose "information relating to or provided by an individual, other than the patient, who could be identified from that information." Protection is therefore given to information relating to or provided by a third party. In these proceedings the applicant accepts that such records as may be disclosed should, certainly at this stage, be redacted so as to remove information relating to or provided by any third party.

21. The general right of access to a relevant health record is, however, further curtailed by AHRA 1990, s 5(4) and it is this subsection which is at the centre of the dispute between the parties before the court. AHRA 1990, s 5(4) states:

> "(4) Where an application is made under subsection (1)(f) of section 3 above, access shall not be given under subsection (2) of that section to any part of the record which, in the opinion of the holder of the record, would disclose information which is not relevant to any claim which may arise out of the patient's death."

22. In addition to the AHRA 1990, which deals with medical records in general, specific provision as to disclosure of information held under the Human Fertilisation and Embryology Act 1990 ("HFEA 1990") is made by HFEA 1990, s 33A.

23. By HFEA 1990, s 33A(1)(e) "a person to whom a licence applies" (that is the Respondent clinic in this case) is prohibited from disclosing any information of the type

listed in s 31(2) which includes, for the purposes of this application, information relating to "the keeping of the gametes of any identifiable individual or of an embryo taken from any identifiable woman and the use of the gametes of any identifiable individual other than their use for the purpose of basic partner treatment services" [HFEA 1990, s 31(2)(c)(d)].

24. The general prohibition on disclosure in HFEA 1990, s 33A(1) is relaxed on various alternative bases by s 33A(2) which provides that subsection (1) does not apply where:

> "(r) the disclosure is made under section 3 of the Access to Health Records Act 1990"

25. The Applicant's primary case is that the application for disclosure is made under AHRA 1990, s 3 and is therefore permitted by HFEA 1990, s 33A(2)(r) and that, when properly construed, AHRA 1990, s 3(1)(f) is clear: a personal representative's right to access health records is free-standing and is not confined to disclosure of information which is relevant to a "claim which may arise out of the patient's death".

26. Ms Richards submits that the language in s 3(1)(f) clearly refers to two distinct and disjunctive categories: (i) the patient's personal representative and (ii) any person who may have a claim arising out of the patient's death. Applying the general presumption that the legislator has used legislative language "correctly and exactly" [*Spillers Ltd v Cardiff (Borough) Assessment Committee* [1931] 2 KB 21 at 43], the only interpretation supported by the language is that the requirement that a person has a claim does not apply to a patient's personal representative.

27. Secondly, if it were the case that the clause "who may have a claim arising out of the patient's death" applied also to a patient's personal representative, it would make the reference in s 3(1)(f) to a patient's personal representative otiose, as the clause could simply have referred to "any person who may have had a claim arising out of the patient's death".

28. Thirdly, AHRA 1990, s 5(4), as a proviso which qualifies the right to conferred under s 3, must be read and considered in relation to the principal matter to which it is a proviso [*Thompson v Dibdin* [1912] AC 533 at 544 and *Re Memco Engineering Ltd* [1986] Ch 86 at 98D]. Section 3 is the provision in the AHRA which confers a right of access to health records on certain categories of person. Section 5 is the provision which qualifies that right of access. Ms Richards therefore submits that, without s 5, every category of persons listed in s 3 would have a right of access to the entirety of a patient's health records subject to such qualifications as may apply under s 4 and s 5(1) and (3). The Applicant's case is that, when read in the context of, and in relation to, s 3(1)(f), it is clear that s 5(4) only applies to the second category of person referred to in s 3(1)(f). Such an interpretation, it is said, makes perfect sense as it is a proportionate limit on the access to records afforded to a person who may bring a claim.

29. In support of the Applicant's case, Ms Richards relies upon guidance issued by the Department of Health: "Guidance for Access to Health Records Requests" (February 2010) which states at paragraph 38:

> "The personal representative is the only person who has an unqualified right of access to a deceased patient's record and need give no reason for applying for

> access to a record. Individuals other than the personal representative have a legal right of access under the Act only where they can establish a claim arising from a patient's death.

30. Ms Richards notes that guidance to the contrary effect has been issued by the British Medical Association [see paragraph 36 below]. Such guidance should, however, she submits, be afforded less weight than that which has been issued by the DOH, which is the relevant government department.

31. The Applicant's secondary case asserts that he may have a claim arising out of the deceased's death and therefore a right to access to the health records under AHRA 1990, s 3(1)(f) in any event. For reasons which will become clear, it is not necessary for me to consider this aspect of the claim at this stage. In any event, the Applicant's case in this regard is, at best, inchoate and difficult to determine without further detail.

32. In the alternative, the Applicant seeks an order under the court's inherent jurisdiction that the respondent should disclose information to the Applicant on the basis that (a) the disclosure is sought for the purpose of ensuring that the deceased's sperm are stored, used and disposed of in accordance with such consent as he provided; and (b) now that the deceased has passed away, his personal representative is the only person who can act in the deceased's interests to ensure that the Respondent clinic stores, uses and disposes of the sperm in accordance with such consent as he may have provided.

The Respondent's case

33. For the Respondent, Ms Van Overdijk adopted a neutral position on the application generally, save for the absolute need to ensure compliance with the stringent regulatory requirements placed upon a clinic by HFEA 1990. The Respondent does, however, dispute the Applicant's interpretation of AHRA 1990, s 3(1)(f). It is the Respondent's case that a patient's personal representative may only have access to health records under s 3(1)(f) if they "may have a claim arising out of the patient's death".

34. In oral submissions, Ms Van Overdijk accepted that s 3(1)(f) does establish to classes of individuals but the requirement to tie any request for access to records must relate to a potential claim. She submits, however, that, in order for the court to be persuaded that AHRA 1990, s 5 does not apply to personal representatives, it would first need to be satisfied that there is ambiguity in the words used in s 3(1)(f) and s 5. If it is so satisfied, the court would then need to be persuaded that it would be appropriate to apply the mischief rule to look at the rationale of the legislation to interpret the ambiguity. The Respondent's position is that there is no ambiguity in s 3(1)(f) and s 5(4) and that the natural and ordinary meaning of s 5(4) is that a holder of a health record cannot allow access either by a personal representative or a person who may have a claim arising out of the patient's death to any information/records it holds which, in their opinion, would disclose information which is not relevant to any claim which may arise out of the patient's death.

35. In support of that contention, it is submitted that as there is no distinction made in s 5(4) between personal representatives and "any person…", the natural and ordinary meaning of the section is that it applies generally to all persons referred to in s 3(1)(f).

36. The Respondent relies upon British Medical Association guidance issued in August 2014 which is in line with its submissions ['Access to Health Records: Guidance', paragraph 5.2]:

> "**Who can apply for access?**
>
> Unless they requested confidentiality while alive, a patient's personal representative and any person who may have a claim arising out of the patient's death has a right of access to information in the deceased person's records directly relevant to a claim. It is the BMA's opinion that under section 5(4) of the Access to Health Records Act, no information which is not directly relevant to a claim should be disclosed to either the personal representative or any other person who may have a claim arising out of the patient's death."

37. In so far as the Applicant relies upon DOH Guidance and submissions from the Department of Health and Social Care [DOHSC], to which I will shortly turn, the Respondent submits that the government position is either an incomplete or an inaccurate statement of the law.

38. Finally, and separately, the Respondent submits that there is no legal provision which permits a personal representative to step into the individual patient's position to request disclosure of records under HFEA 1990, s 33A(5) which states:

> "(5) Subsection (1) does not apply to the disclosure to any individual of information which:
>
> a) falls within subsection (2) of section 31 of this Act by virtue of any of paragraphs (a) to (e) of that subsection, and
>
> b) relates only to that individual or, in the case of an individual who is treated together with, or gives a notice under section 37 or 44 of the HFEA 2008 in respect of, another, only to that individual and that other."

39. In this context, it is submitted that the grant of probate in itself is not enough. A grant of probate does not directly cause the estate of a deceased to vest in a personal representative. Rather, the grant of probate is, it is said, merely the means of proving the personal representative's title to the satisfaction of the court.

Submissions of the Department of Health and Social Care

40. The court is grateful to the DOHSC, which responded to a request to make written submissions and, in particular, to Robin Hopkins, counsel who prepared them.

41. The DOHSC has oversight of the statutory scheme which is the subject of this application. In summary, the DOHSC agrees with the Applicant's primary submission that AHRA 1990, s 3(1)(f) encompasses two distinct categories of applicant for the health records of a deceased person. Those categories are, it is submitted, disjunctive, with the result that a personal representative does not need to establish that he has or may have a claim arising out of the death of the person whose health records are sought.

42. The DOHSC stands by paragraph 38 of the DOH 2010 guidance which is clear that a personal representative "need give no reason for applying for access to a record".

43. Further, the DOHSC concurs with the Applicant's submission that AHRA 1990, s 5(4) is a qualification that applies only to the second category of applicant identified in s 3(1)(f).

Discussion and Conclusion

44. The outcome of this application turns upon a short and straightforward issue of statutory interpretation, namely, does AHRA 1990, s 5(4), which limits disclosure that is otherwise permitted under s 3(1)(f), apply to both of the categories of individual identified in that subsection or only to "any person who may have a claim arising out of the patient's death"?

45. The starting point is that it is common ground between the parties for this court that s 3(1)(f) does establish two distinct categories of individual: (a) the patient's personal representatives and (b) any person who may have a claim arising out of the patient's death.

46. I accept the submission made by Ms. Richards that the wording of s 3(1)(f) is plain on its face. The two categories are, indeed, disjunctive and the reference to "a claim arising out of the patient's death" is expressly tied to the second, and not to a personal representative. I also accept that, if all those claiming under this subsection where required to establish that they had a claim arising out of the patient's death, there would be no need to identify a personal representative specifically for inclusion in the provision.

47. With respect to Ms Van Overdijk, the submission summarised at paragraph 34 above, to the effect that the court could only entertain the Applicant's case if it were satisfied that there is ambiguity in the words of s 3(1)(f) and s 5(4) is unsustainable and could only succeed if s 5(4) is interpreted as being the primary provision to which s 3(1)(f) is subservient. For the reasons advanced by Ms. Richards, the contrary is plainly the case. Section 5(4) is in the form of a proviso which provides a reasonable and proportionate limitation on the degree of access to a deceased's medical records which is to be afforded to an individual who seeks to make a claim arising out of the patient's death. Such an individual can only see records on a "need to know" basis, rather than being given open-ended disclosure of the entire content of the record. There is no ambiguity in these provisions, and it is not necessary to undertake the more convoluted process that the Respondent submits is required.

48. Whilst it is clear from the conclusion that I have already expressed that the statutory language is clear and that there is no need to look for external support for one interpretation or another, it is of note that the DOHSC, which is the government department responsible for the administration of these provisions, has consistently maintained the same interpretation as that argued for by the Applicant and now endorsed by the court.

49. The Respondent's subsidiary argument is to the effect that a grant of probate does not, of itself, entitle a personal representative to stand in the shoes of a deceased and request disclosure of medical records under HFEA 1990, s 33A(5) as the grant of probate does not vest the estate in the personal representative. This argument, which was not advanced in detail in oral submissions, does not, with respect, have any relevance to the present application which is made under HFEA 1990, s 33A(2)(r) and not under s

33A(5). By s 33A(2)(r), the prohibition on disclosure in s 33A(1) is disapplied with respect to disclosure that 'is made under section 3 of the AHRA 1990'. This application is one that is made under AHRA 1990, s 3 where, by s 3(1)(f), for the reasons that I have given, a 'personal representative' may make an application for access to the health record of a patient who has died. A personal representative is expressly identified as a category of applicant. There is no requirement for that individual to prove that the deceased's estate has vested in them. All that is required is for that individual to establish that they are deceased patient's 'personal representative' and there is no dispute in the present case that AB does, indeed, have that status.

50. It follows from the conclusions that I have reached that the Applicant has made out his case. He has made a valid application for disclosure of the deceased's medical records held by the Respondent clinic, subject to the agreement that information relating to, or provided by, third parties should, at least at this stage, be redacted. Under the terms of the legislation the clinic was obliged to provide the disclosure that was sought.

51. I will therefore make the declarations that the Applicant has sought in the following terms:

i) It is lawful for the Respondent to provide the Applicant with a copy of all records relating to the arrangements for the storage and used of the Deceased's sperm and/or embryos created using his sperm, such records having been redacted to remove any information relating to or provided by an individual, other than the Deceased, who could be identified by that information.

ii) The Respondent is required to provide the Applicant with a copy of all records relating to the arrangements for the storage and used of the Deceased's sperm and/or embryos created using his sperm, such records having been redacted to remove any information relating to or provided by an individual, other than the Deceased, who could be identified by that information.