Inheritance Rights of Embryos

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Australia has had many firsts in the practice of artificial conception. Australia is an acknowledged world leader in the science and medicine of *in vitro* fertilisation. Victoria pioneered the world's first legislation to regulate the conduct of artificial conception procedures. Now, in the case of *In the matter of estate of the late K and in the matter of the Administration and Probate Act 1935; ex parte the Public Trustee*,[1] an Australian Supreme Court has become the first to recognise inheritance rights for untransferred embryos.

The Facts

G and S began living together in 1991. S had three children from a previous marriage. In August 1993, G and S entered an IVF programme. The couple used their own gametes and five embryos were produced. Following usual clinical practice in IVF, three embryos were transferred, and in May 1994, G gave birth to a son. The couple married in March 1995, and the following month S died intestate. It had always been the intention of G and S to have the remaining two embryos transferred to G in the hope of having another child.

Under s 44 of the *Administration and Probate Act* 1974 (Tas) [the Act], the wife was entitled to a statutory payment of $50,000 from the estate and to one third of the residue. The children, as issue, were entitled to the remaining two thirds. Under the terms of the Act, these shares were to be held:[2]

> in trust, in equal shares if more than one, for all or any of the children ... of the intestate, living at the death of the intestate, who attain the age of 18 years or marry under that age...

The Issues

Knowing that G intended to have the remaining embryos transferred, the Public Trustee applied to the Court for a determination of two

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1 Supreme Court of Tasmania, Unreported decision A16/1996 (22 April 1996), Slicer J.

2 Section 46(1)(a) of the *Administration and Probate Act* 1935 (Tas).

questions, namely:

a) whether two embryos, the product of the ova of the widow of a deceased person and the semen of the deceased, are issue pursuant to the Administration and Probate Act and, if so, whether they were living at the date of death of the husband,

and, in the alternative:

b) whether the two embryos become children of the deceased husband upon their being born alive.

The Decision

Slicer J first held that it was appropriate, as a matter of discretion rather than jurisdiction, for the court to answer the questions by the Public Trustee in spite of the fact that the embryos had not been transferred and that the interests of any child born remained contingent.[3]

The First Question: Are Frozen Embryos Issue for the Purposes of the Act?

His Honour answered the first question in the negative, holding that the embryos[4] were not issue under the terms of the *Administration and Probate Act.*

In reaching this conclusion, Slicer J reviewed the common law authorities which deal with the limited legal rights of the foetus until birth and separate existence from the mother.[5] His Honour noted that a child *en ventre sa mere* is entitled to share in the estate of the father,[6] contingent on the birth of that child.[7] In this respect the common law is not dissimilar in England,[8] the United States[9] or Can-

3 See *In re Staples Owen v Owen* [1916] 1 Ch D 322 per Sargeant J at 326.

4 One embryo had been frozen at the two-cell stage, the other at the four-cell stage so that they had reached the zygote stage of development.

5 *Attorney-General for Queensland (Ex rel Kerr) v T* (1983) 57 ALJR 85; *Re F (in utero)* [1988] 2 All ER 193; see also *Watt v Rama* (1972) VR 353 on contingent interests of the foetus which vest upon its birth in respect of succession or tort claims.

6 *Doe in the Demise of Clark v Clark* (1797) 2 HBL 400: 126 ER 617; *Goddale v Gawthorne* (1854) 65 ER 443; *In re Burrows, Cleghorn v Burrows* [1895] 2 Ch D 497; *In re Griffiths' Settlement, Griffiths v Waghorne* [1911] 1 Ch D 246.

7 *Schofield v Orrell Colliery Co Ltd* [1909] 1 KB 178; see also *Re Bruce* [1979] Tas R 110; *Wilcox v Police* [1994] 1 NZLR 243.

8 *Patton v Trustees of the British Pregnancy Advisory Service* [1978] 2 All ER 987; [1979] QB 276.

9 *Roe v Wade* (1973) 410 US 113 at 163.

ada.[10] However, as neither a foetus nor a child *en ventre sa mere* is recognised by law as being a human being until the child is born, the embryo could not be treated as *issue* for the purposes of the Tasmanian Act.

The Second Question: Do the Embryos Become Children of the Deceased Upon Their Being Born Alive?

Whilst Slicer J held that the embryos were not, for the purposes of s 46 of the Act, 'children ... living at the death of the intestate', the issue was rather whether the law, as a matter of policy, should distinguish 'between a child, *en ventre sa mere*, and his or her sibling who was at the same time a frozen embryo'.[11] Posed as a rhetorical question, His Honour asked: 'should a right by way of the application of a legal fiction be denied because medicine and technology have overtaken the circumstances existent in the 19th century when the legal fiction was applied?'[12]

Slicer J noted that the provisions of the *Status of Children Act* 1974 (Tas) dealing with children born as a result of IVF procedures were neutral as to this issue, neither affording nor detracting from any vested rights of a child once born. On the question of inheritance, his Honour turned to the various Law Reform Commission reports on IVF.

The English Warnock Report recommended that:[13]

> Any child born by AIH [artificial insemination using husband's sperm] who was not in utero at the date of the death of its father shall be disregarded for the purpose of succession to and an inheritance from the latter

while, on the other hand, the Ontario Law Reform Commission recommended that a posthumously conceived child was entitled to a share of the undistributed estate of the father.[14]

The New South Wales Law Reform Commission considered succession rights in its 1988 report,[15] recommending that specific testamen-

10 *R v Morgentaler* [1988] 1 SCR 30.

11 *In the matter of estate of the late K* at 5.

12 Ibid.

13 Report of the *Committee of Enquiry into Human Fertilisation and Embryology* (1984) HMSO Cmnd 9314 London, para 10.9.

14 Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters* (1985) vols 1 & 2, at p 182.

15 New South Wales Law Reform Commission Report No 58, *In Vitro Fertilisation* (1988), Recommendation 39.

tary gifts could be made to a posthumously conceived child and that that child should be able to make a testator's family maintenance claim under the *New South Wales Family Provisions Act* 1982. This report specifically dealt with posthumous IVF births and stated that:[16]

> where an ovum of a widow is fertilised in an IVF procedure, by the posthumous use of her deceased husband's semen and transferred to her by embryo transfer, the resultant child should be recognised as the lawful child of the dead husband *except* for the purposes of inheritance and succession.

These recommendations were based on pragmatic grounds, recognising the great burden which would be placed on executors or administrators who would not be able to confidently make a distribution of assets until 'exhaustive investigations had been undertaken to ensure that there was no possibility of the subsequent birth of persons who may be regarded as children of the deceased'.[17]

However, Slicer J did not, for a number of reasons, consider that the court was required 'to pay regard to such practical difficulties.' First, the problem identified by the NSW Law Reform Commission was equally applicable to family provisions or testator's family maintenance legislation. Secondly, such practical difficulties would arise in very few cases. Thirdly, executors or administrators are afforded protection by s 6 of the *Status of Children Act* 1974 (Tas) which limits their obligation to enquire as to the existence of children to children governed by that Act and protects them from claims of which they had no notice. Fourthly, his Honour noted that the other children sharing in the residue could give an undertaking to the executor or administrator.[18]

Slicer J concluded that an IVF child born posthumously is in all respects (except temporal) identical to a child *en ventre sa mere* and that the same legal principles ought to apply to both.

> [A] child, being the product of his father's semen and mother's ovum, implanted in the mother's womb subsequent to the death of his father is, upon birth, entitled to a right of inheritance afforded by law.[19]

16 Id, Recommendation 39(ii); emphasis added.

17 Id at p 102.

18 See *Bullas v Public Trustee* [1981] 1 NSWLR 641.

19 *In the matter of estate of the late K* at 7.

Comment

The decision of Slicer J is the first reported decision in any common law jurisdiction dealing with the succession rights of embryos. It is a decision which has and will continue to excite much academic comment and which brings into stark relief the differences which exist between the various jurisdictions of Australia. After some 17 or so major national or State reports on artificial conception, there is still no uniform national approach in the area.[20]

In three States, G would be unlikely to be able to have the embryos transferred after the death of her husband. In South Australia and Western Australia, legislation governing the practice of reproductive technology requires that an embryo transfer involve a couple.[21] New legislation in Victoria[22] will outlaw any fertilisation procedure involving gametes of a person known to be dead. However, Slicer J's decision reminds us that we cannot necessarily legislate away problems in this area.

Slicer J's decision is limited to the question of succession rights and expressly excludes any consideration of the wider and more controversial issue of the legal and moral status of the embryo. His Honour specifically stated that the Court was not concerned with 'any philosophical or biological question of what is life since the question [in issue] relates solely to the status recognised by law and not to any moral, scientific or theological issue.'[23] The court was solely concerned with the contingent interest of an embryo for succession purposes rather than the question of 'capacity or potential for life'. Interestingly, the distinguished philosopher Professor Max Charlesworth has commented publicly on the moral conundrum posed by this case, expressing the view that it is morally more defensible to have embryos transferred than discarded.

Finally, the judgment of Slicer J has been placed on the agenda of the National Uniform Succession Committee (comprising representatives of all Commonwealth and State Law Reform bodies) which will report to the Standing Committee of Attorneys-General.

20 The Australian Health Ethics Committee of the NHMRC is revising its recommendations dealing with artificial conception but any guidelines produced will be subject to State legislation.

21 *Reproductive Technology Act* No 10 of 1988(SA); *Human Reproduction Technology Act* No 22 of 1991(WA).

22 *Infertility Treatment Act* No 63 of 1995(Vic) assented to on 27 June 1995, but not yet in force.

23 *In the matter of estate of the late K* at 5.