

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
HUMAN RIGHTS DIVISION
HUMAN RIGHTS LIST**

VCAT Reference: HP11/2013

CATCHWORDS

Assisted reproduction – Extension of storage of embryos – Review of decision of Patient Review Panel – *Assisted Reproductive Treatment Act 2008* (Vic) ss 5, 33 and 33A – *Assisted Reproductive Treatment Amendment Act 2013* (Vic) – *Interpretation of Legislation Act 1984* (Vic) s 14(2) – Reasonable grounds for extension – Exceptional circumstances – Decision of Patient Review Panel set aside – Extension granted.

APPLICANT: HA

RESPONDENT: Patient Review Panel

WHERE HELD: Melbourne

BEFORE: Justice Greg Garde AO RFD, President
Genevieve Nihill, Senior Member
Anna Dea, Member

HEARING TYPE: Hearing

DATE OF HEARING: 30 August 2013

DATE OF ORDER: 27 September 2013

CITATION: HA v Patient Review Panel (Human Rights) [2013]
VCAT 1628

ORDER

- 1 Pursuant to s 96(d) of the *Assisted Reproductive Treatment Act 2008* (Vic) and s 51(2)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), the Tribunal orders that:
 - (a) the decision of the Patient Review Panel of 27 March 2013 is set aside; and
 - (b) the period of storage of the ten embryos formed from the gametes of Ms HA and Mr HB is extended to 5 April 2018.

Justice Greg Garde AO RFD
President

Genevieve Nihill
Senior Member

Anna Dea
Member

APPEARANCES:

For Ms HA: Ms E Dias of Counsel

For the Patient Review Panel: Ms K Miller, Solicitor

REASONS

Introduction

- 1 This is an application by Ms HA for an extended storage period for ten embryos ('the embryos') formed from gametes of Ms HA and her former partner, Mr HB, currently in storage with a treatment provider in Melbourne.
- 2 In March 2013, the Patient Review Panel ('the Panel') granted Ms HA a short-term extension of storage for 3 months, but did not grant her the 5-year extension that she sought.
- 3 Ms HA seeks review of the Panel's decision under s 96(d) of the *Assisted Reproductive Treatment Act 2008* (Vic) ('the ART Act')¹ and s 51(2)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('the VCAT Act').
- 4 There is no dispute as to the facts.

Background facts

- 5 In February 2008, Ms HA was diagnosed with an aggressive form of breast cancer. She underwent surgery, and required chemotherapy. Before commencing chemotherapy, Ms HA and Mr HB signed a 'Consent to Operative Treatment for IVF and Related Procedures' and a 'Principal IVF Consent Form'.
- 6 On 5 April 2008, the embryos were formed from the gametes of Ms HA and Mr HB. The embryos were permitted to be stored until 5 April 2013 under s 52(4)(b)(i) of the *Infertility Treatment Act 1958* (Vic), and subsequently under s 33(2)(b)(i) of the ART Act.²
- 7 In March 2010, Mr HB commenced working overseas. Contact between Ms HA and Mr HB became sporadic. On 1 August 2010, Ms HA ceased her cancer medication in preparation for IVF. On 2 September 2010, Mr HB advised Ms HA that he no longer wished to continue their relationship. Ms HA advised Mr HB that she wished to use the embryos for IVF.
- 8 On 4 November 2010, Ms HA and Mr HB attended a counselling session with an IVF counsellor. The counsellor advised that, before Ms HA could use the embryos for IVF, Mr HB would need to consent to their use. Ms HA asked Mr HB to advise of his position as to the embryos. Mr HB did not advise of his position. On 6 December 2010, Ms HA met with Mr HB to discuss her desire to use the embryos for IVF. Again, Mr HB did not advise Ms HA of his position.
- 9 Ms HA has sent numerous emails to Mr HB. Mr HB last responded to an email on 16 September 2010. There have been two subsequent emails from

¹ All references to the ART Act within this decision are references to version 008, effective from 28 May 2013, unless expressly stated otherwise.

² The ART Act came into force on 12 December 2008.

Ms HA to Mr HB on 29 January 2011 and 12 April 2011. Neither has attracted any response. On 6 May 2011, Ms HA's then solicitors wrote to Mr HB concerning Ms HA's desire to use the embryos for IVF. There was no response.

- 10 On 22 January 2013, Melbourne IVF wrote to Ms HA advising that the 5-year storage period for the embryos would expire on 5 April 2013.
- 11 On 26 February 2013, Ms HA applied to the Panel for an extension of the period of storage of the embryos until 5 April 2018. The hearing before the Panel commenced on 14 March 2013. The Panel published its decision on 27 March 2013.
- 12 On 22 April 2013, Ms HA applied to the Tribunal for review of the Panel's decision. On 7 May 2013, the Tribunal directed that it would post copies of the Tribunal's orders, the application for review, and the Panel's decision to Mr HB. The Tribunal also ordered that Mr HB may, if he chose, file any application to be joined as a party to this proceeding by 31 May 2013. No application by Mr HB to be joined as a party was received by the Tribunal.
- 13 On or about 20 June 2013, an officer of the Panel received a telephone call from Mr HB. Mr HB advised that he had arrived in Australia, and had just received the correspondence from the Tribunal. On 24 June 2013, an associate of the Panel met with Mr HB. She explained the background to the proceeding, and suggested that Mr HB obtain his own legal advice. There has been no further contact with Mr HB.
- 14 Since 2009, Ms HA has paid, and continues to pay, the fees for the storage of the embryos.

Consents given by Ms HA and Mr HB

- 15 Ms HA and Mr HB signed two written consents. They are:
 - (1) 'Consent to Operative Treatment for IVF and Related Procedures' dated 5 March 2008. This consent advised of risks associated with the procedures, and provided information related to treatment.
 - (2) 'Principal IVF Consent Form' dated 6 March 2008. This form contains 3 parts:
 - (a) 'CONSENT TO TREATMENT FOR IN-VITRO FERTILISATION AND RELATED PROCEDURES'

This part confirmed that the treatment and procedures had been explained and gave advice as to the rights of Ms HA and Mr HB.
 - (b) 'CONSENT TO THE FREEZING AND STORAGE OF ONE OR MORE OF OUR EMBRYOS'

This consent confirmed that the freezing and storage of embryos had been explained to Ms HA and Mr HB. The consent recorded that Ms HA and Mr HB might withdraw

consent to the storage of embryos at any time and may request at that time that they be removed from storage or made available for research or donated to another couple. The consent noted that the *Infertility Treatment Act 1995* (Vic) (which was in force at the time) provided that:

- ‘there is a legal limit of 5 years storage for embryos’; and
- ‘it is our responsibility to request an extension of time from the Infertility Treatment Authority.’

(c) ‘CONSENT TO MY HEALTH INFORMATION BEING UTILISED FOR TREATMENT, LICENSING, REGULATORY AND ACCREDITATION PURPOSES’

This consent related to the management of Ms HA’s and Mr HB’s health information.

- 16 On 9 April 2008, the treatment provider wrote to Ms HA and Mr HB confirming that the embryos had been frozen and placed into storage. The letter advised:

These embryos will be held in long term storage [sic] for a maximum of 5 years, whether or not you are pregnant as a result of this treatment cycle.

...

Freezing embryos is a routine part of IVF. Under current Victorian Legislation embryos cannot remain frozen for more than 5 years unless the couple obtains an extension from the Infertility Treatment Authority (ITA).

Couples must decide what to do with their embryos before the statutory time period has expired.

...

Relevant statutory framework

- 17 On 26 February 2013, when Ms HA made her application to the Panel for an extension of the period of storage of the embryos, and on 22 April 2013, when Ms HA made her application to the Tribunal for a review of the Panel’s decision, s 33 of the ART Act was in force and provided:³

33 Storing embryos for later transfer

...

- (2) A registered ART provider must not cause or permit the embryo to remain in storage—
- (a) if one of the persons who produced the gametes used to form the embryo has specified a storage period of less than 5 years, after that period; or

³ The ART Act (version 006, effective from 22 June 2011) s 33.

- (b) in any other case, after the latest of the following days—
 - (i) the day that is 5 years after the day the embryo was placed in storage;
 - (ii) if the persons who produced the gametes from which the embryo has been formed consent to storage for a period of not more than 5 years in addition to the period referred to in subparagraph (i), the day that is the end of that additional period;
 - (iii) if the Patient Review Panel gives approval under subsection (3) for a longer period of storage, the day that is the end of the period approved by the Panel.

Penalty: 240 penalty units or 2 years imprisonment or both.

- (3) The Patient Review Panel may give written approval for a longer period for storage of an embryo if it considers there are reasonable grounds for doing so in the particular case.
- (4) An approval under subsection (3) may be subject to conditions.

18 Under s 33(3), the Panel can give written approval for a longer period of storage 'if it considers there are reasonable grounds for doing so in the particular case.'

19 Section 5 of the ART Act sets out the guiding principles:⁴

5 Guiding principles

It is Parliament's intention that the following principles be given effect in administering this Act, carrying out functions under this Act, and in the carrying out of activities regulated by this Act—

- (a) the welfare and interests of persons born or to be born as a result of treatment procedures are paramount;
- (b) at no time should the use of treatment procedures be for the purpose of exploiting, in trade or otherwise—
 - (i) the reproductive capabilities of men and women; or
 - (ii) children born as a result of treatment procedures;
- (c) children born as the result of the use of donated gametes have a right to information about their genetic parents;
- (d) the health and wellbeing of persons undergoing treatment procedures must be protected at all times;

⁴ The ART Act s 5.

- (e) persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.
- 20 The guiding principles stand to be applied in all decisions and activities under the ART Act, whether by the Tribunal, Panel or a treatment provider.
- 21 On 23 April 2013, the *Assisted Reproductive Treatment Amendment Act 2013* (Vic) ('the ART Amendment Act') came into force. Section 33 was amended, and a new s 33A inserted into the ART Act. The new s 33A provided:⁵

33A Patient Review Panel may approve longer or further storage of embryos

- (1) If the persons who produced the gametes from which the embryo has been formed have given written approval for a specified longer storage period, the Patient Review Panel may approve the longer storage period if it considers there are reasonable grounds to do so in the particular case.
 - (2) If a person who produced gametes from which the embryo has been formed is unable to give written approval, or the person's written approval is unable to be obtained, the Patient Review Panel may approve a longer storage period if it considers there are exceptional circumstances for doing so in the particular case.
 - (3) If an application is made for approval under subsection (1) or (2) after the period for storage of the embryo referred to in section 33(2)(b) has expired, the Patient Review Panel may approve a further storage period if it considers there are exceptional circumstances in the particular case for failing to seek approval before the expiry of the period.
 - (4) An approval under this section may be subject to conditions.
- 22 Section 33A significantly alters the test that must be satisfied before the Panel may approve a further storage period if a person who produced gametes from which the embryo has been formed is unable to give written approval, or if the person's written approval is unable to be obtained.
- 23 Whereas previously the Panel could give approval 'if it considers there are reasonable grounds for doing so in the particular case',⁶ now it can only give approval 'if it considers there are exceptional circumstances for doing so in the particular case',⁷ and only where either:
- (a) 'a person who produced gametes from which the embryo has been formed is unable to give written approval'; or

⁵ The ART Act (version 007, effective from 23 April 2013) s 33A.

⁶ The ART Act (version 006, effective from 22 June 2011) s 33(3).

⁷ The ART Act s 33A.

(b) ‘the person’s written approval is unable to be obtained’.⁸

24 In *R v Kelly (Edward)*, guidance was given as to the meaning of the word “exceptional”:⁹

We must construe ‘exceptional’ as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

25 Dictionary meanings of the word “exceptional” include:

(a) ‘forming an exception or unusual instance; unusual; extraordinary’;¹⁰ and

(b) ‘of the nature of or forming an exception or unusual instance; unusual, out of the ordinary; special...’¹¹

26 In *Leeder v Mayor, etc., of the Town of Ballarat East*, Cussen J analysed the flexible meaning of the word “unable” and said:¹²

By these words the Legislature seems to assume “inability” in a case where a notice has not been given, and to impose on the plaintiff the obligation of showing why there was inability. The great difficulty is caused by the word “unable”. It is a word not of definite but of flexible meaning. Sometimes, where it is used with reference to a person, it connotes an act or series of acts which no human being could do; sometimes an act or series of acts which the particular person referred to could not in any circumstances do; sometimes an act or series of acts which this person could not in existing circumstances do; and sometimes an act or series of acts which in existing circumstances this person could do if he directed his mind to nothing else, but which, having regard to other circumstances, he could not reasonably be expected to do. It therefore sometimes involves a comparison of the various circumstances influencing action or inaction. If the contemplated action and its consequences are of trifling importance, very little may be sufficient to induce a person to say that he is unable to do it. The examples of an invitation to dinner or to join in a walk will illustrate this class of cases. On the other hand, there are cases of which those involving the giving of notice under this Statute may be examples, where much graver reasons would be required before a person should be able to say that he was “unable.”

27 Dictionary meanings of the word “unable” include:

⁸ Ibid s 33A(3) (emphasis added).

⁹ [2000] QB 198, 208 (Lord Bingham of Cornhill CJ).

¹⁰ *Macquarie Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 5th ed, 2009) 577.

¹¹ *Shorter Oxford English Dictionary: On Historical Principles* (Oxford University Press, 6th ed, 2007) vol 1, 885.

¹² [1908] VLR 214, 223 (emphasis added).

- (a) ‘not able (to do something); lacking ability or power (to do something); weak; impotent’;¹³ and
- (b) ‘chiefly of a person: not having ability or power.’¹⁴

28 The meaning of the word “unable” is discussed in *Cullinane v Mercer Benefit Nominees Ltd*,¹⁵ where it was described as dependent on context. The Court noted that there was authority for the proposition that it should not be used as equivalent to “impossible”.

Which provision should the Tribunal apply?

29 Section 14(2) of the *Interpretation of Legislation Act 1984* (Vic) provides:

14 Provision as to effect of repeal etc. of Acts

...

(2) Where an Act or a provision of an Act—

- (a) is repealed or amended; or
- (b) expires, lapses or otherwise ceases to have effect—

the repeal, amendment, expiry, lapsing or ceasing to have effect of that Act or provision shall not, unless the contrary intention expressly appears—

...

- (d) affect the previous operation of that Act or provision or anything duly done or suffered under that Act or provision;
- (e) affect any right, privilege, obligation or liability acquired, accrued or incurred under that Act or provision;

...

- (g) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as is mentioned in paragraphs (e) and (f)—

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if that Act or provision had not been repealed or amended or had not expired, lapsed or otherwise ceased to have effect.

¹³ *Macquarie Dictionary* (Macquarie Dictionary Publishers Pty Ltd, 5th ed, 2009) 1784.

¹⁴ *Shorter Oxford English Dictionary: On Historical Principles* (Oxford University Press, 6th ed, 2007) vol 2, 3408.

¹⁵ (2006) 152 FCR 1, 14 [71] – [72] (Tamberlin, Weinberg and Allsop JJ). See *Leeder v Mayor, etc., of the Town of Ballarat East* [1908] VLR 214, 218 (A’Beckett J). See also *Lui v Federal Commission of Taxation* (2009) 178 FCR 289, 295 [22], 296 [27] (Stone, Edmonds and Jagot JJ); *Re A Former Student and Secretary, Department of Employment, Education, Training and Youth Affairs* (1997) 49 ALD 692, 696-297 [18]-[21] (DP Blow) where the Administrative Appeals Tribunal gave the word “unable” the meaning of “not reasonably able”.

- 30 In *Esber v The Commonwealth of Australia*, Mason CJ, Deane, Toohey and Gaudron JJ held as to s 8(c) – the equivalent provision to s 14(2) in the *Acts Interpretation Act 1901* (Cth):¹⁶

Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely "a power to take advantage of an enactment". Nor was it a mere matter of procedure; it was a substantive right. Section 8 of the *Acts Interpretation Act* protects anything that may truly be described as a right, "although that right might fairly be called inchoate or contingent". This was such a right. It was a right in existence at the time the 1971 Act was repealed. That being so, and in the absence of a contrary intention, the right was protected by s. 8 of the *Acts Interpretation Act* and was not affected by the repeal of the 1971 Act.

- 31 There are no transitional provisions in the ART Amendment Act. There is no contrary intention in the ART Amendment Act or in the ART Act. There is no indication in either Act that an application made prior to the commencement of the ART Act is to lapse upon the commencement of the ART Amendment Act. Ms HA has a substantive right to have the decision of the Panel considered under the provisions of the ART Act as in force at the time Ms HA made her application to the Panel.
- 32 It follows that the correct test to be applied to the application by Ms HA for an extension of the period of storage of the embryos is that stated in the former s 33(3) viz:

Does the Panel [Tribunal] consider that there are reasonable grounds for approving a longer period of storage of the embryos?

- 33 This is the test we have applied in paragraphs 47-56 of our reasons.

In what circumstances might extension be granted by the Panel?

- 34 Assistance is given in extrinsic material as to the circumstances in which extensions of time may be considered.¹⁷
- 35 In the Second Reading Speech for the Assisted Reproductive Treatment Bill 2008 (Vic), the Attorney-General referred to the establishment of the Panel by that Bill, and said that the particular applications to be determined by the Panel include:¹⁸

¹⁶ (1992) 174 CLR 430, 440-1 (citations omitted); *Azevedo v Secretary, Department of Primary Industries and Energy* (1992) 35 FCR 284, 300-1 (French J); *Lee v Secretary, Department of Social Security* (1996) 68 FCR 491, (Cooper and Moore JJ, Davies J dissenting); *Ungar v City of Malvern* [1979] VR 259; *Sisters Wind Farm Pty Ltd v Moyne Shire Council* (2012) 193 LGERA 126.

¹⁷ Extrinsic material may be utilised in the interpretation of legislative provisions under s 35(b) of the *Interpretation of Legislation Act 1984* (Vic).

¹⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 September 2008, 3451 (Mr Hulls – Attorney-General) (emphasis added).

Determine periods of storage for gametes and embryos, when the maximum storage time has been met or when there is a dispute about the storage.

36 The Attorney-General went on to say that:¹⁹

The bill provides for the extension of storage past this time [5 years] upon the approval of the Patient Review Panel. Also, where there is a dispute between the persons whose gametes formed the embryo about how long it should be stored, the Patient Review Panel will determine whether it should continue to remain in storage or not.

37 The Explanatory Memorandum to the Assisted Reproductive Treatment Amendment Bill 2012 (Vic) gives two examples as to 'exceptional circumstances' for the purposes of s 33A(2).²⁰

For example, the embryos in storage were formed using donor sperm and the donor's written approval to continued storage cannot be obtained prior to the expiry of the permitted statutory period because the donor cannot be found or contacted by the ART provider.

...

Exceptional circumstances may arise, for example, where the persons for whom the embryo is stored did not receive notification from their ART provider about the impending expiry of the statutory storage period and they intend to retain their remaining embryos for their own use or donation to another couple.

38 Further examples of situations where s 33A is intended to operate are given in the Second Reading Speech for the Assisted Reproductive Treatment Amendment Bill 2012 (Vic):²¹

the gamete provider experiences temporary incapacity from an accident or illness and is unable to advise on further storage in the lead-up to the expiration of the storage period;

a clinic has had some contact from the couple and it is apparent the couple need more time to decide what to do with their remaining embryos or are unable or reluctant to make the difficult decision to have them removed; or

a donor gamete provider's consent to continued storage cannot be obtained prior to the expiry of the permitted statutory period because the donor cannot be found or contacted by the clinic.

39 The Second Reading Speech also provides assistance in its discussion as to the application of s 33A:²²

This first category of the exceptional circumstances provision is about providing clinics the opportunity to lawfully preserve patients' stored

¹⁹ Ibid 3452 (emphasis added).

²⁰ Explanatory Memorandum, Assisted Reproductive Treatment Amendment Bill 2012 (Vic) 5.

²¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 12 December 2012, 68 (Dr Napthine – Minister for Ports).

²² Ibid 68-9 (emphasis added).

embryos and gametes to enable further efforts to obtain clear instructions from patients about the future storage or disposal of their stores.

...

In circumstances where donor gametes have been used to form the embryo and the donor cannot be located in a timely manner prior to the expiration of the storage period, an extension of storage under the exceptional circumstances provision may be granted by the panel in order to preserve the recipient couple's access to their embryos, whilst the clinic undertakes further reasonable efforts to locate and obtain written approval from the donor.

It is also intended that the exceptional circumstances provision also provides the panel with a broad discretion to approve a longer storage period if it considers there are exceptional circumstances for doing so in a particular case, such as when the donor cannot be found to provide written approval to a specified longer storage period.

...

This will ensure that such couples are not disadvantaged by donors who cannot be contacted, or generally demonstrate apathy to further involvement following their initial donation.

- 40 The examples and guidance found in the extrinsic material make it clear that the former s 33 and the new s 33A are intended to operate in a wide range of circumstances. They include circumstances where a donor's consent to continued storage cannot be obtained because:
- (a) the donor cannot be found or contacted by the treatment provider;
 - (b) notification was not given to the donors by the treatment provider about the impending expiry of the statutory storage period;
 - (c) one of the donors experiences temporary incapacity or illness, and is unable to advise on further storage;
 - (d) the donors need more time to decide what to do with their remaining embryos;
 - (e) further efforts are needed to obtain instructions from donors about the further storage or disposal of their embryos;
 - (f) the donors are unable or reluctant to make the difficult decision to have the embryos removed; or
 - (g) one or both of the donors cannot be contacted or generally demonstrated apathy to further involvement following their initial donation.
- 41 The circumstances of each individual case must be considered by the Panel and on review by the Tribunal. However, each of these examples illustrates circumstances where an extension of the period of storage might be considered by the Panel.

Requirements for the use of the embryos

- 42 The issue for the Tribunal in this proceeding is whether the period for storage of the embryos should be extended. It is not about whether, and in what circumstances the embryos should be used. The decision as to the use of the embryos is one for the treatment provider under the ART Act.
- 43 There are a number of important considerations for the treatment provider to take into account in relation to the use of the embryos. The guiding principles found in s 5 of the ART Act apply. Sub-sections 10(1) and (2) of the ART Act deal with the requirements before treatment procedures can be undertaken. Section 16(2) of the ART Act is concerned with the giving of consent by donors.
- 44 The Tribunal is not concerned with these matters, or with the criteria for treatment that must be considered by the treatment provider. Its decision is only as to storage. Whether treatment is subsequently provided to Ms HA is a matter for the treatment provider and not for the Tribunal.

Application of the guiding principles

45 The Tribunal has considered the guiding principles set out in s 5 of the ART Act insofar as relevant to this proceeding, and considers that the extension of the period of storage for the embryos is consistent with these principles, particularly the health and wellbeing of the mother Ms HA.

46 An extension of the period of time for storage of the embryos is consistent with the guiding principles.

(a) the welfare and interests of persons born or to be born as a result of treatment procedures are paramount

Unless the period of storage of the embryos is extended, the embryos will be lost for the purposes of treatment procedures under the ART Act, whether by Ms HA or other persons, if they were to be donated for use by others.

(b) at no time should the use of treatment procedures be for the purpose of exploiting, in trade or otherwise—

(i) the reproductive capabilities of men and women; or

(ii) children born as a result of treatment procedures;

The extended storage of the embryos is for the benefit of the donors Ms HA and Mr HB. It is not intended that the embryos be exploited in trade or otherwise.

(c) children born as the result of the use of donated gametes have a right to information about their genetic parents;

This principle is not relevant in the present circumstances.

(d) The health and wellbeing of persons undergoing treatment procedures must be protected at all times;

The extended storage of the embryos is consistent with the health and wellbeing of Ms HA. She is a primary school teacher having taught at her present school for 8 years, and before that at another school for 17 years. The evidence suggests that she would be a loving and caring mother, and would be supported by her family. As a result of treatment for cancer, her only prospect of becoming a mother is by the use of the embryos. She is likely to be extremely disappointed, and may suffer adverse impacts, if the period of storage of the embryos is not extended, and the embryos lost.

- (e) **Persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion,**

No issue as to discrimination arises.

Are there reasonable grounds for an extension of the period for storage in the present case?

- 47 Ms HA is a primary school teacher, and has been at her current school for the past eight years. She was at a previous school for 17 years, and has graduate diplomas in education and special education. She is now 46 years old, and lives by herself.
- 48 She met Mr HB in 2004, and commenced living with him in 2005 or 2006. Ms HA and Mr HB sought to conceive a child from early 2007, and sought medical advice in relation to fertility in around mid-2007. In early February 2008, Ms HA and Mr HB commenced preparation for IVF treatment.
- 49 Unfortunately, Ms HA was diagnosed with an aggressive form of breast cancer, and required surgery to remove the breast cancer followed by an 18 week course of chemotherapy. She underwent urgent surgery on 22 February 2008.
- 50 Following medical advice, and a number of counselling sessions, Ms HA and Mr HB decided to form embryos using Ms HA's eggs and Mr HB's gametes. On 5 April 2008, a total of 10 embryos were formed.
- 51 From April to August 2008, Ms HA underwent chemotherapy. Subsequently, she was treated with cancer medication. In July 2010, she obtained positive results to tests. It was then possible to stop use of cancer medication and to commence preparation for IVF treatment.
- 52 Mr HB commenced working overseas in March 2010. The relationship between Ms HA and Mr HB continued but contact was sporadic. The relationship was strained by August 2010.
- 53 In its decision, the Panel appears principally to be concerned about two matters viz:
- (a) Mr HB had not given his consent to the extension of the period of storage; and

- (b) at the time of its decision, Mr HB had not been informed of Ms HA's application and the Panel was concerned that he should be afforded natural justice.
- 54 As to the first concern, the Panel has the statutory power under s 33(2)(b)(iii) and (3) to approve a longer period of storage if it considers that there are reasonable grounds for doing so in the particular case. This is a very different situation from that in *AB v The Attorney-General for the State of Victoria*,²³ where the operative provisions required the actual consent of the applicant's deceased husband from whom the sperm was taken. As he was deceased, and had not given his consent before he died, that consent could not be obtained, or the legislative requirement satisfied.
- 55 As to the second concern, Mr HB has now been informed of the existence of the proceeding and been given the opportunity to become a party. He has been advised to seek legal assistance. He has elected not to become involved. All requirements of natural justice and procedural fairness have been satisfied.
- 56 The Tribunal is of the view that there are reasonable grounds for an extension of the period for storage. We are of this view for the following reasons.
- (a) Ms HA is 46. She understands that she is unable to conceive naturally. She has been informed by her doctors that she will not be able to have further eggs harvested due to the risk that such a procedure would pose to her health.
 - (b) Ms HA has been advised that she is unlikely to be able to conceive a child naturally due to the chemotherapy treatment she has undergone.
 - (c) As Ms HA is over 35 years of age, she is not eligible to be granted donor embryos.
 - (d) Ms HA was unable to pursue IVF treatment during much of the initial 5-year storage period because she was receiving chemotherapy and medical treatment at the time. She has been deprived of the benefit of much of the initial storage period during which she might have pursued treatment using the embryos.
 - (e) The embryos effectively represent Ms HA's last chance to parent a child. The evidence suggests that she would be a loving and caring mother, and would be supported by her family.
 - (f) An extension of time is consistent with the guiding principles.
 - (g) Mr HB gave consent to the treatment undertaken in 2008. An extension of time for storage would give him an extended opportunity to consider whether he will consent to the use by Ms HA of the embryos.

²³ (2005) 12 VR 485, 500-1 [83]-[85] (Hargrave J)

- (h) An extension of time for storage would give Ms HA and Mr HB another opportunity to consider and resolve any issues as to the use and future of the embryos, and as to the responsibilities that would be assumed by Ms HA were a treatment procedure using the embryos successful, and a child conceived.
- (i) There is no evidence of any medical risk as a result of storing the embryos for a further period of 5 years.
- (j) Mr HB has had the opportunity to become a party to the proceeding before the Tribunal. He is aware of the proceeding and has met with an Associate to the Panel who explained the background to the proceeding and suggested that he should obtain his own legal advice. He has also received emails from Ms HA, and legal advisers.
- (k) No party appeared before the Tribunal to oppose the application for an extension of time for storage of the embryos.
- (l) Further storage of the embryos for a period of 5 years will not have a negative impact on any party or person.

Conclusion

- 57 The Tribunal determines that there are reasonable grounds for an extension of the period of storage of the embryos in the circumstances of this case.
- 58 The Tribunal will order that the decision of the Panel be set aside and the period of storage of the embryos be extended to 5 April 2018.

Justice Greg Garde AO RFD
President

Genevieve Nihill
Senior Member

Anna Dea
Member