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Widow wins right to dead partner's sperm

By **ANDRE JURGENS**

● A widow has won a landmark legal case confirming she is entitled to use the frozen sperm of her dead husband to have another child.

The man had been diagnosed with Hodgkin lymphoma, a form of lymphatic cancer, when the couple married in 2015. Before he underwent chemotherapy he was advised to freeze his sperm to use should he want children later.

Unable to conceive naturally, the couple consulted a reproduction medicine specialist at a fertility clinic with facilities in Gauteng and KwaZulu-Natal. The woman underwent fertility treatment and 16 eggs were retrieved. Only nine were mature, and the others were discarded. Eleven sperm straws were cryopreserved.

In March 2016, while the husband was still alive, an unsuccessful double embryo transfer was performed. A second transfer two months later resulted in the birth of their daughter early in 2017.

The husband died six months later without stipulating in writing what should happen to the remaining sperm straws. There was no agreement with the clinic as to what would happen to the gametes and embryos should one of them die. The only instruction in the man's will was: "Should my wife survive me, I leave my estate to my wife."

The widow sought a court order that ownership of "reproductive material" could be transferred, or alternatively an order that ownership of the sperm straws vested in her.

"This application turns on whether the applicant should be granted permission to use her late husband's stored gametes to extend their family and to give their existing child a sibling," the judgment reads.

According to an affidavit by a medical specialist, other clients of the fertility clinic faced the same predicament. The facility had a policy of not doing IVF procedures in cases of uncertainty over the transferability or ownership of sperm. The specialist supported the court application, saying they hoped "it will bring clarity not only to the applicant but also to [the clinic] and other people in similar circumstances".

South African legislation allows for the use of gametes with the written consent of the donor. "While this is well and good in respect of a living donor, the issue at hand is what to do if the donor passes away before the gamete is used for fertilisation," judges Brenda Neukircher and Jan Swanepoel of the Pretoria high court wrote in their April 14 judgment.

"There is thus no legislative provision that deals with the donation of reproductive material or with its disposal post-mortem."

The judgment noted that the posthumous use of embryos was prohibited in France, and Germany had banned posthumous reproduction. "Courts internationally have, where possible, avoided a classification of genetic material as 'property'. There have, therefore, been instances internationally in which the posthumous use of reproductive material has been prohibited.

"It may well be that, given the facts of a different matter, a court would refuse the relief sought. However, from the facts of this matter, it is clear – and stands uncontested – that the deceased intended the straws to be used for the further expansion of their family. There is also no evidence before us that the deceased withdrew consent for use for that purpose at any time," reads the judgment.

"It is unfortunate that there is no formal contract or written instrument that sets out the express wishes of the deceased vis-à-vis the use of his sperm straws."

The judges said the woman's argument that ownership of the sperm was transferred to her in terms of the will was "not decisive", though it was indeed "an arrow in her quiver".

But the woman made her case "adequately and on the facts, without the necessity to load the bow with the arrow of ownership", the judges said in granting the application.

The ministers of health and social development were respondents but did not oppose the application. The Centre for Child Law was appointed as amicus curiae, and made submissions to court.

Adele van der Walt, a specialist in fertility law, represented the widow and said the case set a precedent for others in a similar situation.

The woman, whose identity is being withheld, told the Sunday Times: "This judgment has not only given me the opportunity to give my daughter a biological sibling, but it has enriched the law in South Africa around fertility ownership. I am truly humbled that my personal loss and story can be the cornerstone for changing the law and helping others in the future."