

SUPREME COURT OF QUEENSLAND

CITATION: *Re Floyd* [2011] QSC 218

PARTIES: **KELLY FLOYD**
(applicant)

FILE NO/S: SC No 6068 of 2011

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: Delivered ex tempore 12 July 2011

DELIVERED AT: Brisbane

HEARING DATE: 12 July 2011

JUDGE: Atkinson J

ORDERS: **1. The Court authorises the removal of any testes and spermatozoa from the deceased, Troy Jarvis;**

2. The Court authorises the provision of that material removed to an IVF organisation nominated by the applicant, Kelly Floyd;

3. The Court authorises any blood tests advised by the IVF organisation to be carried out; and

4. The Court authorises the storage of the sperm obtained pending a future application to the Supreme Court for the use of that sperm.

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where the applicant made an urgent application seeking an order authorising the removal of testes and spermatozoa from her recently deceased partner – whether the applicant could obtain such an order

PERSONAL PROPERTY – OTHER CASES – whether the applicant was entitled to an order for removal of the deceased’s testes and spermatozoa

Coroners Act 2003 (Qld), s 8(3)(b)

Transplantation and Anatomy Act 1979 (Qld), s 23, s 24

Baker v State of Queensland [2003] QSC 002, cited

Bazley v Wesley Monash IVF Pty Ltd [2010] QSC 118, cited

Jocelyn Edwards; Re the estate of the late Mark Edwards [2011] NSWSC 478, followed

Re Gray [2000] QSC 390, cited
Y v Austin Health [2005] VSC 427, cited

COUNSEL: The applicant appeared on her own behalf

SOLICITORS: The applicant appeared on her own behalf with K Parrott and
A McCabe (Crown Law) assisting

HER HONOUR: This is an urgent application that was made orally by phone call to my associate by Ms Kelly Floyd in respect of obtaining an order from the Court allowing the removal of sperm from her deceased partner. He died this morning in a level crossing accident when he was killed by a train and the application has to be heard and the procedure performed within 24 hours to be effective.

The applicant was unable to appear in person because she is, unsurprisingly, in a state of extreme distress and lives in Ipswich and has not been able to get into the city. Accordingly I heard the application by telephone. Mr Parrott of Crown Law appeared as *amicus curiae* to assist the court.

Because the deceased died in a level crossing accident and so suffered a violent death, this is a reportable death under section 8(3)(b) of the *Coroners Act 2003* (Qld). With regard to a death which is not a reportable death, section 23 of the *Transplantation and Anatomy Act 1979* (Qld) provides that if the deceased is not in a hospital, "a senior available next of kin may ... authorise the removal of tissue from the body of the deceased person" for, *inter alia*, "medical purposes".

In a recent decision of the Supreme Court of New South Wales, *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478, Hulme J held at paragraph [32] that the "removal of sperm could be regarded as 'for

medical purposes' where the proposed use is in assisted reproductive treatment": see also *Y v Austin Health* [2005] VSC 427 at paragraph [39] per Habersberger J. As I said, under section 23, the removal of that tissue may be authorised by the next of kin.

However, if it is a reportable death, under section 24 of the *Transplantation and Anatomy Act*, that does not apply unless the Coroner has consented to the removal of the tissue. Section 24(4) provides, "A coroner may give a direction, either before or after the death of a person to whom this section applies, that his or her consent to the removal of tissue from the body of the person after the death of the person is not required and, in that event, subsections (2) and (3) do not apply to or in relation to the removal of tissue from the body of the person."

No direction has been given by the coroner. However the coroner has informed me that should I make an order allowing the removal of the sperm, he will direct the John Tonge Centre, where the body is, to facilitate that happening.

The coroner has also sent me a fact-sheet endorsed by the State Coroner and the Queensland Forensic Pathologist to do with applications of this type. It appears that neither the forensic pathologist nor the coroner, of course, will themselves do the procedure to remove the

sperm. An applicant must engage a person to do that.

Mr Parrott prepared in the short time available a bundle of authorities, including the decision of Justice Chesterman in *Re Gray* [2000] QSC 390, the decision of Justice Muir in *Baker v State of Queensland* [2003] QSC 002, the decision of Justice White in *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118 and some articles that discuss the various policy issues concerned in such a decision.

The applicant was in a de facto relationship with Troy Jarvis. They had planned to marry at the end of this year because they had just built a house together. She said that they had constantly discussed having children and she had made an appointment with an obstetrician gynaecologist, Dr Bob Watson, for 26 July 2011 "to go and see about having a child".

The applicant has a child from a previous marriage but said that the deceased did not have any children, "and all he wanted was a child and we decided to build the house first because otherwise we wouldn't have been able to afford to build a house if we had a child." She has the support in the application from the mother and the rest of the family of the deceased.

Ms Floyd has been in contact with the Sunnybank Private Hospital who indicated they would be willing to perform

the necessary procedure after the court has made an order authorising it.

Mr Parrott undertook to immediately inform the John Tonge Centre of the order, which I authorise to take place by telephone, pending service of the orders in documentary form.

The orders are that:

1. the Court authorises the removal of any testes and spermatozoa from the deceased, Troy Jarvis;
2. the Court authorises the provision of that material removed to an IVF organisation nominated by the applicant Kelly Floyd;
3. the Court authorises any blood tests advised by the IVF organisation to be carried out; and
4. the Court authorises the storage of the sperm obtained pending a future application to the Supreme Court for the use of that sperm.
