

Consent after Death

Ping Yuan v Da Yong Chen [2015] NSWSC 932

Key Points

- Whether extraction of sperm from a patient unable to give consent constitutes medical treatment under the *Guardianship Act 1987 (NSW) (the Act)* (equivalent to the *Guardianship and Administration Act 1990* in Western Australia); and
- Whether Mr Chen, the deceased husband of Ms Yuan, will be found to have consented to the use of his sperm after his death in future proceedings.

Background

Ping Yuan v Da Yong Chen concerns Da Yong Chen who suddenly fell ill and was diagnosed with the rupture of a major blood vessel. Just prior to being admitted for emergency surgery, Mr Chen allegedly told his wife, Ping Yuan, that he wanted to have another child with her. Unfortunately, Mr Chen's condition deteriorated and he did not regain consciousness after the surgery. Mr Chen's treating doctor considered Mr Chen had mere hours to live. Ms Yuan requested the hospital's fertility clinic extract Mr Chen's sperm for storage and insemination at a later date. The fertility clinic advised Ms Yuan it would do so on the condition that it received lawful and effective consent. Since Mr Chen was unable to give consent himself, Ms Yuan made an urgent ex-parte application seeking a declaration that Ms Yuan was able to consent on Mr Chen's behalf to the extraction and storage of his sperm.

The Law

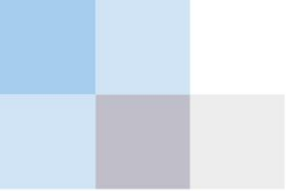
According to section 34, Part 5 of the Act applies to patients who are "incapable of giving consent to the carrying out of medical or dental treatment". Pursuant to section 36 of the Act, where that treatment is "minor", then "the person responsible for the patient" may give the consent on his or her behalf.

Conclusion

The court had no difficulty in concluding that Ms Yuan was "the person responsible" for Mr Chen and that the extraction of sperm was "minor" treatment. The issue was whether the procedure constituted "treatment" under the Act. Since the Act does not define the word, the court looked to its ordinary definition, that being, "the application of medicines, surgery ... etc to a patient to cure a disease or condition."¹ The court conceded that the word "treatment" includes medical procedures undertaken to assist fertility or procure pregnancy. Given the urgent circumstances, the court was unable to resolve the issue but nevertheless granted Ms Yuan the declaration in the terms sought.

The fertility clinic was advised of the court's decision and they carried out the extraction. Mr Chen died 45 minutes later. Upon Mr Chen's death, the fertility clinic and hospital were presented with a new problem. That is, pursuant to section 23(a) of the *Assisted Reproductive Technology Act 2007 (NSW)* (equivalent to the *Human Reproductive Technology Act 1991* in Western Australia), the fertility

¹ Macquarie Complete Australian Dictionary



clinic could not inseminate Ms Yuan with Mr Chen's sperm unless he consented to its use after his death. The court found that Ms Yuan would have been able to provide this consent before Mr Chen died and in accordance with the declaration granted. The proceedings were listed for directions on 14 July 2015 and Ms Yuan was restrained from using the sperm until further order of the court.

Lessons Learnt

The present case is a perfect example of how hospitals face many obstacles in obtaining consent from patients. Here the hospital was able to obtain consent from Ms Yuan to extract and store Mr Chen's sperm. However, when he died shortly thereafter, the hospital could not inseminate Ms Yuan because they required Mr Chen's consent to use his sperm after his death. The present case evidences the importance for medical practitioners to maintain effective communication with a patients' family, particularly when there are consent issues. Whilst medical practitioners may be expected to foresee the various consent issues that may arise and plan ahead, this is not always possible or practical.

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