Court of Appeal says consent can be withdrawn for use of frozen embryo

S.H. v. D.H. is the first such case to be decided in which neither party — a divorced couple — had a genetic connection to the embryo

A DIVORCED woman will not have the right to keep an embryo that she and her then-husband contracted to have frozen and preserved, because her former spouse has not given his consent to the embryo being used, the Court of Appeal for Ontario ruled recently.

In *S.H. v. D.H.*, 2019 ONCA 454, the appellate court found that it was the issue of consent under the Assisted Human Reproduction Act and not property or contract law that determined the matter, even though the couple's contract had stipulated that the wife's wishes would prevail.

"Contract law was the lens that was applied in the decision below, but we see that shift to the application of the act, notwithstanding the contract between the parties."

Adam Black, Torkin Manes LLP

Justice Michal Fairburn, who wrote the decision for the panel, "is saying you can't contract out the requirement for donor consent," says Adam Black, a family lawyer at Torkin Manes LLP in Toronto. "You can't make an agreement between the two of you that would be inconsistent with the legislation," i.e., the Assisted

Human Reproduction Act, federal legislation that came into effect in 2004.

"The regulations define these two individuals as donors, notwithstanding the source of the reproductive material," Black adds, noting that this was the first such case in Canada to be decided in which neither party — a now-divorced couple — had a genetic connection to the embryo, which was created in a U.S. laboratory in 2012 using *in vitro* fertilization and was stored at a fertility centre in Mississauga, Ont.

The parties had signed a contract in 2012 that provided that, in the event of divorce or legal separation, the fertility centre that was storing the embryos should respect the wife's wishes. Four embryos had been created; of the four, two embryos were viable and one was used shortly conception that resulted in the live birth of the couple's son in December 2012. The couple separated nine days later, and in July 2018, the wife brought court proceedings seeking to be declared the owner of the remaining embryo, after her former husband refused to give his consent to have the remaining embryo released to her.

> "At the Court of Appeal for Ontario, 'we see a shift in the analysis,' says Adam Black of Torkin Manes LLP in Toronto. 'Rather than looking at it from property and contract law, we're now looking at through the Assisted Human Reproduction Act.'

In 2018, a Superior Court of Justice trial judge had looked at the case through the lens of contract and property law, and neither party argued the case in any other way, Black says. The judge looked to the contract between the couple that said the wife's wishes should prevail, and "on that [contractual] basis, the trial judge says that the embryo ought to be released to the wife."

However, in the appellate court decision, authored by Fairburn, "we see a shift in the analysis." Rather than looking at the case from the standpoint of property and contract law, it is being viewed via the Assisted Human Reproduction Act. In that act, Black explains, "Parliament has imposed a consent-based rather than contract-based model. . . . You can see the importance of consent in the preamble to the act, which states 'the principle of free and informed consent must be promoted and applied as a fundamental condition of the use of human reproductive technologies.'"

Section 8(3) of the act states: "No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose." Contravening the act's regulations can make one liable for a prison term, a fine of $250,000 or both. "The importance of and need for ongoing consent is paramount, even if parties previously agreed to defer to the other party's wishes," says Black, quoting from the appellate court's decision. "The idea that donor consent can become frozen in time, rendered unsusceptible to changes of mind, belies the central importance placed upon consent in the statutory scheme." Fairburn described the issue of consent as being "on a time continuum," Black adds. "At any point on that continuum, there will need to be consent, which can be withdrawn in writing. Importantly, the wife's wishes won't govern here but will be governed by the act. For these people who have no genetic connection to the reproductive material, yes, consent of both donors is always required, and consent can be withdrawn." The ruling recognizes that things change over time and that "you can't contract out for a need for that consent." LT