SUPREME COURT OF QUEENSLAND

CITATION:	*Re Cresswell* [2018] QSC 142
PARTIES:	**AYLA BELINDA CRESSWELL** (applicant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (*amicus curiae*)
FILE NO/S:	BS No 8583 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	20 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	15 September 2017
ORDER:	**The order of the court is that:** **1. Order 4 made by this Court on 24 August 2016 be discharged.** **2. The applicant is entitled to possession and use of the spermatozoa on the following conditions:** **(a) Queensland Fertility Group (QFG) is to transfer directly the spermatozoa to Women's Health Only (WHO) on the applicant's direction;** **(b) The applicant must provide the Court and QFG seven days' written notice of any such direction to transfer the spermatozoa;** **(c) On receipt of the written direction, QFG shall:** **(i) After 7 days, take such steps as are necessary to deliver the spermatozoa to WHO; and** **(ii) Within 7 days of such transfer, inform the Court in writing of the transfer.** **(d) The applicant pay the costs of such transfer;** **(e) The spermatozoa must only be used in a treatment procedure or procedures;** **(i) In conjunction with an oocyte or oocytes produced by the applicant; and** **(ii) To produce an embryo or embryos to be implanted in the applicant.** **(f) The spermatozoa must be used only under the control and supervision of QFG and/or WHO.**

JUDGE: Brown J

CATCHWORDS: HEALTH LAW – ASSISTED REPRODUCTION REGULATION – where the applicant applies for declarations that she is entitled to possession of sperm of her late partner, extracted shortly after his death pursuant to an order of this Court, for use in assisted reproductive treatment – where the *Transplantation and Anatomy Act* 1979 (Qld) applies to the removal of sperm from a deceased person in Queensland – where there is no statutory regime in Queensland that applies to the use of posthumous sperm – where authorities diverge as to the Court's power to order removal of sperm from a deceased person and whether there is any power to grant final relief – whether there was compliance with the *Transplantation and Anatomy Act* 1979 (Qld) in removing the sperm

PERSONAL PROPERTY – DEFINITION AND CLASSIFICATION – OTHER CASES – whether the sperm removed is property capable of being possessed

PERSONAL PROPERTY – OWNERSHIP AND POSSESSION – POSSESSION – RIGHTS OF POSSESSION — whether the applicant has an entitlement to possession and use of the sperm removed – if such an entitlement exists, whether discretionary factors favour the making of the declarations sought

Criminal Code 1899 (Qld) s 236
Research Involving Human Embryos Act 2002 (Cth) s 8, s 11
Transplantation and Anatomy Act 1979 (Qld) s 4, s 6, s 22, s 24, s 48

AB v Attorney-General (Supreme Court (Vic), Gillard J, 23 July 1998, unreported)
AB v Attorney-General (2005) 12 VR 485
Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
Baker v State of Queensland [2003] QSC 002
Bazley v Wesley Monash IVF Pty Ltd [2011] 2 Qd R 207
Boyd v Halstead; Ex parte Halstead [1985] 2 Qd R 249
Edwards; Re Estate of Edwards (2011) 81 NSWLR 198
Doodeward v Spence (1908) 6 CLR 406
Dobson v North Tyneside Health Authority [1997] 1 WLR 596
GLS v Russell-Weisz [2018] WASC 79
Hecht v Superior Court (Kane) 20 Cal Rptr 2d 275 (Cal App 2 Dist 1993)
Holdich v Lothian Health Board [2013] CSOH 197
James v Seltsam Pty Ltd [2017] VSC 506
MAW v Western Sydney Area Health Service (2000) 49 NSWLR 231
R v Bentham [2005] 1 WLR 1057

R v Human Fertilisation and Embryology Authority; ex parte Blood [1997] 2 All ER 687
R v Kelly [1999] QB 621
Re Denman [2004] 2 Qd R 595
Re Floyd [2011] QSC 218
Re Gray [2001] 2 Qd R 35
Re H, AE (2012) 113 SASR 560
Re H, AE (No 2) [2012] SASC 177
Re H, AE (No 3) (2013) 118 SASR 259
Re Leith Dorene Patteson [2016] QSC 104
Re Organ Retention Group Litigation [2005] QB 506
Re Section 22 of the Human Tissue and Transplant Act 1982 (WA): Ex parte C [2013] WASC 3
Re Section 22 of the Human Tissue and Transplant Act 1982 (WA): Ex parte M [2008] WASC 276
Reid v Howard (1995) 184 CLR 1
Roblin v Public trustee for the Australian Capital Territory (2015) 10 ACTLR 300
Roche v Douglas as the Administrator for the Estate of Rowan (Dec) (2000) 22 WAR 331
S v Minister for Health (WA) [2008] WASC 262
Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) (1992) 175 CLR 218
Y v Austin Health (2005) 13 VR 363
Yanner v Eaton (1999) 201 CLR 351
Yearworth & Ors v North Bristol NHS Trust [2010] QB 1
YZ v Infertility Treatment Authority [2005] VCAT 2655

COUNSEL:	K McMillan QC with C Templeton for the applicant S Ryan QC with P Clohessy for the Attorney-General as *amicus curiae*
SOLICITORS:	Aden Lawyers for the applicant Crown Law for the Attorney-General as *amicus curiae*

[1] The present case arises out of the most tragic of circumstances. The applicant, Ms Ayla Cresswell and the deceased, Joshua Davies had enjoyed a relationship for approximately three years when Joshua Davies, without any apparent warning signs or any obvious trigger, took his own life. The question that this Court must decide is whether Ms Cresswell has a right to possession of Joshua Davies' spermatozoa,[1] removed some 48 hours after his death. In making this application, Ms Cresswell has the support of her family and Joshua's family, in particular his father Mr John Davies and his mother Mrs Ione Davies.

[2] Ms Cresswell seeks orders that she is entitled to possession and use of the sperm, subject to various conditions.

[1] The more common term "sperm" will be used for the remainder of the judgment.

[3] The Court's power to order the removal and use of posthumous sperm has been the subject of uncertainty, particularly because many cases have had to be determined on an urgent basis, to ensure that the sperm is removed and preserved while it is still viable, within a 24 to 48 hour period after death. While there is a statutory regime in Queensland for removal of sperm from a deceased person, there is in the present case a question as to whether that applies and whether it was satisfied. There is no statutory regime in Queensland which applies to the use of posthumous sperm. There has been no consideration in Queensland of the Court's jurisdiction to make orders as to whether a party is entitled to possess and use any sperm that has been removed. Such a determination depends on whether the sperm can be characterised as property, and if it is, who has rights in relation to that property. As the removal of the sperm was pursuant to an order of this Court, and the relief sought is declaratory, discretionary factors also have to be considered in making any orders. In the present case, one of those factors is whether the original order for removal was made when the statutory preconditions had not been met, and whether that affects any order that may now be made by this Court in this application.

[4] There are four issues to be determined in this case:

(1) First, the legal basis for the removal order made on 24 August 2016 and its present status;

(2) In relation to the sperm that has been removed, whether it is property capable of being possessed;

(3) Whether Ms Cresswell has an entitlement to possession and use of the sperm removed from Joshua Davies; and,

(4) If Ms Cresswell does have such an entitlement, how is it affected by discretionary factors which must be considered in determining whether any declaration may be made in Ms Cresswell's favour.

[5] There was no contradictor to the orders sought by Ms Cresswell. The Attorney-General appeared as *amicus curiae*.

Chronology leading to this application

[6] Ms Cresswell met Joshua Davies in 2013. They became friends and entered into a relationship approximately six months after meeting. They began to live together in January 2016 and were saving for a house. They were discussing getting married and having a family at that time.

[7] Joshua Davies died early on the morning of 23 August 2016. He tragically took his own life. He had previously suffered from and had sought help for depression.

[8] Joshua Davies died intestate. He apparently did not leave any written indication of his testamentary intentions, nor had he orally expressed such intentions. No administrator or personal representative was appointed to his estate.

[9] On the day of Joshua's passing, Ms Cresswell informed Joshua's father, Mr John Davies, that she wished that she was pregnant. Mr Davies rang the Toowoomba Base Hospital to discuss what needs to happen if one wishes to have a child of a deceased person. The Hospital informed him that they would need a court order. After Ms Cresswell stated that she would file the necessary application, Mr Davies spoke to his

wife, Ione, who stated that she was in complete agreement with Ms Cresswell's decision. Mr Davies telephoned the Toowoomba Base Hospital and informed the Hospital that they would be applying for a court order to remove Joshua's sperm. In the early hours of 24 August 2016, Ms Cresswell instructed her legal representatives to file an urgent application to this Court, seeking orders for the removal of sperm from Joshua Davies.

[10] The application was heard urgently on 24 August 2016 by the Supreme Court. An order was made by Burns J that the testes and spermatozoa of Joshua Davies be removed and provided to an IVF clinic nominated by Ms Cresswell for storage, pending a further application to this Court for its use.

[11] Pursuant to the order of 24 August 2016, spermatozoa and testes were removed from Mr Davies at the Toowoomba Base Hospital and transported to a Queensland Fertility Group laboratory for freezing. A letter from Ms Irving, Scientific Director of Queensland Fertility Group, to Ms Cresswell's legal representatives dated 29 August 2016, reported on the success of the procedure. The letter relevantly states:[2]

> "…there would be a reasonable chance of isolating mature sperm, suitable for use in assisted reproductive procedures, if required in the future".

[12] This application is supported by Joshua Davies' immediate family, including his mother, Mrs Ione Davies, and his father, Mr John Davies, each of whom has provided affidavit evidence to the Court in this proceeding. It is also supported by Ms Cresswell's father, Mr Peter Cresswell, and her friends Mr Adam Freeman and Ms Angela Freeman,[3] each of whom also provided affidavit evidence.

Interlocutory order for removal on 24 August 2016

[13] The removal of sperm from Joshua Davies was authorised by an order of this Court. There is however, a threshold question as to the legal basis for the making of such an order.

[14] Both parties accepted that the *parens patriae* jurisdiction of the Court does not apply to the removal of sperm from a deceased person. That jurisdiction is protective in nature and is founded on the need to act on behalf of those who are in need of care and cannot act for themselves.[4]

[15] While there is no Queensland legislation dealing with the use of a person's sperm after death, the Attorney-General submits that the *Transplantation and Anatomy Act* 1979 (Qld) ("**the TAA"**) does apply to the posthumous retrieval of gametes.[5] Ms Cresswell submits that the purpose for which the sperm was removed was for preservation of the sperm and did not require authority under the TAA.

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2 Affidavit of A Cresswell, CFI7, exhibit ABC-2.

3 Who was the partner of Joshua's brother and is the mother of his nephews and niece.

4 *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231 at [31]. In that case O'Keefe J found that the Court's *parens patriae* jurisdiction did not provide the Court with the power to provide consent to remove sperm from a comatose man.

5 *Cf* Donations by living persons where a reference to tissue shall not be read as including a reference to foetal tissue, spermatozoa or ova.

[16] Ms Cresswell refers to the fact that there are divergent authorities in relation to the Court's jurisdiction to order removal of sperm from a deceased person and that some decisions have been made within the inherent jurisdiction of the Court.

Decisions as to removal

[17] In Queensland, there are divergent authorities as to the Court's power to order removal of sperm and whether there is any power to grant final relief. One line of authority considers that the Court has no power to make an order for removal at all, the principal authority being *Re Gray.*[6] Another line of authority, which has been predominantly followed in interlocutory decisions, relies on the inherent power of the Court to permit the making of an order which is in the nature of an interlocutory order, pending a determination of whether there is any jurisdiction for the Court to make orders as to the future use of the sperm, the principal authority being *Re Denman.*[7] In making the removal order of 24 August 2016, his Honour followed the *Re Denman* line of authorities, which have also be followed in some other jurisdictions.[8] Western Australian decisions have adopted a third approach which is discussed below.

[18] In *Re Gray*, Justice Chesterman refused an application made on behalf of the wife of the deceased. The deceased had passed away unexpectedly in his sleep. He and his wife had one child and had been planning on a second. The deceased died intestate. His father had consented to the removal. The deceased and his wife had not discussed the possibility of his sperm being used for her impregnation after his death. It was contended on behalf of the applicant that the Court had jurisdiction under s 8 of the *Supreme Court Act* 1991 (Qld) or in its inherent jurisdiction of the type described as *parens patriae*.

[19] His Honour considered that the Court's broad inherent jurisdiction under s 8 would only apply if there was established legal principle to support the decision. His Honour found that the *parens patriae* jurisdiction gave no power to the Court to make such an order.[9]

[20] His Honour considered that the authorities established that at common law there was no property in a corpse, other than a mere right to possession for the purpose of ensuring prompt and decent disposal. He considered that this position was supported by the terms of s 236 of the *Criminal Code* 1899 (Qld). That section makes it a misdemeanour for any person to improperly or indecently interfere with or offer any indignity to any dead body or human remains without lawful justification or excuse.

[21] His Honour considered that s 236 of the *Criminal Code* could arguably be contravened by any interference with the body of a deceased to extract sperm.

[22] His Honour concluded, on the basis of his review of the authorities and s 236:[10]

> "It appears that the underlying principles of law are that those entitled to possession of a body have no right other than the mere right of possession for the purpose of ensuring prompt and decent disposal. The prohibition on

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6 [2001] 2 Qd R 35.

7 [2004] 2 Qd R 595.

8 Eg *AB v Attorney-General* (2005) 12 VR 485 at [138] to [140].

9 In this regard his Honour agreed with the view of O'Keefe J in *MAW v Western Sydney Area Health Service* (2000) 49 NSWLR 231 as to the scope of the jurisdiction.

10 At [18].

> interfering with a body sanctioned by the possibility of criminal prosecution indicates that to remove part of the body for whatever reason or motive is unlawful. The opinion expressed in *Pierce* which goes further than English authority is but a logical extension of it."

[23] At [20] his Honour stated:

> "The principle clearly established, that the deceased's personal representative or, where there is none, the parents or spouse, have a right to possession of the body only for the purposes of ensuring prompt and decent disposal has, I think, the corollary that there is a duty not to interfere with the body or, to use the language found in *Pierce*, to violate it. These principles are inimical to the proposition that the next of kin or legal personal representative may remove part of the body."

[24] His Honour rejected the suggestion that pursuant to the common law principle that whatever is not prohibited is permitted and in the absence of generally recognised property rights in dead bodies, recovery of materials was lawful provided that it does not offend the law on public decency, or against causing indignity to a dead body.[11]

[25] His Honour considered that the TAA had no application as the removal of tissue under the statutory regime must be for the transplantation into the body of a living person or for some therapeutic or other medical or scientific purpose, and the applicant's purpose was none of those purposes.[12] His Honour did not consider the application of the TAA in any detail. His Honour however considered that the Act provided a regime for removal and gave no role to the Supreme Court such that if the statutory conditions were met the tissue could be taken without order of the Court.[13]

[26] His Honour therefore determined that the Court had no jurisdiction to authorise the removal of the sperm from the deceased.

[27] His Honour indicated that even if the Court had some general overriding power to permit a party to remove reproductive tissue, it would be discretionary. He would have declined to exercise any discretion in favour of the applicant for three reasons:[14]

(1) The deceased did not in his lifetime indicate his consent to such a procedure, such that there was no reason to think that he would have wished his wife to be impregnated posthumously even though he may have wanted another child during his lifetime;

(2) The Court could have no confidence that the applicant's desire was a result of careful and rational deliberation given the time between her husband's death and having to make an urgent application;

(3) The interests of any child born as a result of the procedure must be of particular importance in the exercise of the discretion. His Honour did not see how it could be in the best interests of the child to grow up fatherless and because the Court can never know in what the circumstances the child would be born or brought up it would be impossible to know what is in its best interests.

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11 At [21].
12 At [22].
13 At [22].
14 At [23].

[28] In *Baker v State of Queensland*,[15] Muir J[16] approved of *Re Gray* and rejected an argument that the desire of the couple in *Baker* to have children and their stated intentions in that regard was analogous to a contract to deal with property and was capable of enforcement. His Honour agreed with Chesterman J that any change in the law in relation to the subject is best left to the legislature who has the resources to conduct appropriate enquiries and investigations.

[29] Hargrave J in *AB v Attorney-General*[17] considered that the decision in *Re Gray* was correct that, in the absence of a statutory provision, there was no power at common law to permit interference with a corpse and to order the removal of sperm from a deceased person.[18]

[30] Hargrave J considered that there is a duty on those entitled to possession of a corpse not to interfere with it. In his view policy and logic dictate that the inviolability principle[19] should extend to a corpse in the absence of a statute regulating the extent to which violation is permitted.[20] However in the case before him, his Honour considered the matter was governed by the *Human Tissue Act* 1982 (Vic) and not the common law.[21] His Honour found that the order was made in excess of jurisdiction. While his Honour considered that the order authorising removal in that case had not been justified by statute or common law, he found that the removal was authorised by law, being pursuant to the order of a superior court which had not been set aside.[22]

[31] Later decisions of this Court have, however, considered that the Court's jurisdiction to make such orders was an unresolved question.

[32] In *Re Denman*,[23] Atkinson J did not follow the decisions of *Gray* and *Baker*, on the basis that she considered the Court had an inherent jurisdiction to allow behaviour which is not unlawful. In that case, the couple concerned had lived together for five years and had discussed their desire to have two children. They had been married four months prior to the application in order to have children. The husband died unexpectedly and without a will.

[33] While her Honour had due regard to the decisions of *Gray* and *Baker*, she also referred to contrary authorities in the United Kingdom,[24] the United States of America[25] and Victoria,[26] where the use of sperm of a deceased person had been permitted or permission for removal had been given. Her Honour also considered that it was strongly arguable that it would not offend s 236 of the *Criminal Code* if the deceased's widow wished to have the sperm removed in circumstances where the couple had discussed their keen desire to have children.

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15 [2003] QSC 002.
16 As his Honour then was.
17 (2005) 12 VR 485.
18 At [136].
19 As discussed by the High Court in *Marion's case* (1992) 175 CLR 218 where the High Court confirmed that it is unlawful to interfere with the body of a living person without their consent.
20 At [136].
21 At [123].
22 At [143].
23 [2004] 2 Qd R 595; see also *Re Floyd* [2011] QSC 218; *KJR v Attorney-General for Queensland* [2008] QSC 325; *Re Leith Dorene Patteson* [2016] QSC 104.
24 *R v Human Fertilisation and Embryology Authority; ex parte Blood* [1997] 2 All ER 687.
25 *Hecht v Superior Court (Kane)* 20 Cal Rptr 2d 275 (Cal App 2 Dist 1993).
26 *AB v Attorney-General* (Supreme Court (Vic), Gillard J., 23 July 1998, unreported).

[34] Atkinson J considered that there were two questions: whether or not the sperm should be allowed to be harvested in order to determine its future use; and secondly, whether or not the harvested sperm could be used for posthumous insemination. It was only the former that was necessary for her Honour to determine.

[35] Her Honour, treating the matter like an interlocutory application,[27] considered that in the absence of a statutory prohibition on the removal of sperm from a deceased person, there was a serious question to be tried as to whether or not sperm can or should be removed from a deceased person and used for the purpose of posthumous reproduction.

[36] Her Honour relied upon *Boyd v Halstead; Ex parte Halstead*,[28] where McPherson J[29] observed that the Supreme Court is the "heir to the jurisdiction of the common law courts at Westminster" and "has in its favour the presumption that nothing is outside its jurisdiction unless expressed to be so intended." Her Honour differed from the decisions in *Gray* and *Baker* on the basis that "the Court has the inherent jurisdiction to allow behaviour which is not unlawful", and she did not regard the position as to the Court's power to order removal or subsequent use as resolved.

[37] Atkinson J found that the balance of convenience favoured the removal of the sperm, given its short life span after a person has died. If it was not harvested, any subsequent order as to its use would be futile and no relief could be sought by the applicant.

[38] As to the cases relied upon by her Honour, in both *R v Human Fertilisation and Embryology Authority; ex parte Blood* [30] and *Hecht v Superior Court (Kane)*,[31] the sperm had been separated from the donor during their lifetime, the former when the person was unconscious and the lawfulness of the removal was not in issue,[32] and in the latter case by the act of the person themselves.[33] The interlocutory decision of Gillard J in *AB v Attorney-General*[34] did not, given the urgency of the matter, consider the jurisdiction of the Court or the applicable legal principles in any detail. They are of limited application to the present. There are a number of cases, considered subsequent to her Honour's determination,[35] which do provide further support that the Court has jurisdiction to make orders as to the removal and use of sperm, which are considered below.

[39] The approach of her Honour in *Re Denman* has been followed not only in this Court.

[40] In *Y v Austin Health*,[36] Habersberger J followed the approach in *Re Denman* in treating the application like an interlocutory application for an injunction and regarded the power of the Court to order the removal of sperm as falling within its inherent

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26 This approach has been followed in a number of subsequent decisions of this Court including the present interlocutory decision of Burns J.

28 [1985] 2 Qd R 249 at 255.

29 As his Honour then was.

30 [1997] 2 All ER 687.

31 20 Cal Rptr 2d 275 (Cal App 2 Dist 1993).

32 The question of access turned on the construction of the legislation involved.

33 In *Hecht*, the Californian Court held that the sperm was capable of being disposed of by a will and fell within the broad definition of property in the Probate Code.

34 (Supreme Court (Vic), Gillard J, 23 July 1998, unreported).

35 Some of which were considered by her Honour in *Re Floyd* [2011] QSC 218.

36 (2005) 13 VR 363.

jurisdiction,[37] having been satisfied that such an order was not prohibited by legislation.[38] His Honour considered that the relevant provisions of the *Human Tissue Act* 1982 (Vic) were satisfied and that the authorising of the proposed procedure would not result in a breach of s 44 of the Act, which prohibited the removal of tissue from a deceased person, except in accordance with a sufficient consent or authority under the Act. The question of whether the sperm could be used under the *Infertility Treatment Act* 1995 (Vic) was in his view unclear and to be determined on another day. His Honour was satisfied that there was a serious question to be tried.

[41] In *Re H, AE,*[39] an application was made for the removal and preservation of sperm from the applicant's deceased husband. The deceased and his wife intended to have children. The *Transplantation and Anatomy Act* 1983 (SA) permitted, *inter alia*, the removal of tissue from a deceased person with the authority of a designated officer for use of the tissue for, *inter alia*, therapeutic or medical purposes. Gray J was satisfied that the making of the order was within the inherent jurisdiction of the Court as it preserved the subject matter of the proceedings. His Honour considered that it was not necessary to determine whether the removal was within the provisions of the *Transplantation and Anatomy Act* 1983 (SA). His Honour considered, however, that the Act did not prohibit an order for the removal of the sperm.[40] He further considered that the orders for removal were made within the inherent jurisdiction of the Court and stated that there was no reason to exclude the Court's jurisdiction over dealings with the body of a deceased person.[41] His Honour held that given that state legislation envisaged the use of sperm of the deceased person for the purposes of artificial insemination, there was no reason why the ordinary principles relating to the preservation of the subject matter of litigation did not apply.[42] There needed to be an order for extraction to enable preservation to be effected.

[42] In South Australia, the use of the sperm in assisted reproductive treatment was governed by the *Assisted Reproductive Treatment Act* 1988 (SA). There is no such Act in Queensland.

[43] In Western Australia, the courts have taken a different approach insofar as they have determined that the courts have jurisdiction by characterising sperm as property, even when it has not been removed from a deceased person, at least where there is compliance with the *Human Tissue and Transplant Act* 1982 (WA) which is of similar effect to the TAA.[43]

[44] In *S v Minister for Health (WA),*[44] Simmonds J made an order for the removal and storage of sperm and associated tissue from the body of a man who had recently died, on the basis that he was satisfied that it was necessary to preserve the tissue pending a determination as to its use. His Honour followed a decision of Sanderson M in *Roche v Douglas as the Administrator of the Estate of Rowan (Dec),*[45] who had

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37 At [69].

38 His Honour acknowledged that the inherent jurisdiction of the Court does not authorise the making of the orders excusing compliance with obligations or preventing the exercise of authority deriving from statute: *Reid v Howard* (1995) 184 CLR 1.

39 (2012) 113 SASR 560.

40 At [22].

41 At [48].

42 At [49].

43 Although not in the same terms.

44 [2008] WASC 262 at [40].

45 (2000) 22 WAR 331.

determined the Court could make an order for preservation of property under the court rules in respect of tissue removed from the deceased while alive because it was property for the purpose of the rules. Simmonds J considered that the tissue, which relevantly was sperm, was property, even though it had not been removed. In reaching that view, his Honour considered that the conditions in s 22 and s 27 of the *Human Tissue and Transplant Act* 1982 (WA) were met.[46]

[45] In *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C,*[47] Edelman J determined whether the wife of the recently deceased person could obtain orders for the removal and storage of his sperm and associated tissue. The deceased suffered from depression and had committed suicide. His Honour noted a number of the difficult questions raised in terms of whether the common law permitted the sperm from a deceased person to be treated as property and, if so, in what circumstances. His Honour ultimately determined the application on the basis that the removal of the sperm was permitted by the *Human Tissue and Transplant Act* 1982 (WA), finding that "the power of the authorised officer to remove spermatozoa for the purposes of storage for later assistance for another person to become pregnant tissue [sic] falls within "medical purposes" in s 22(1)(b)".[48] The Coroner also informed the Court in that case that he gave consent to the removal of the tissue.

[46] In Edelman J's opinion, the proper approach was for parties to seek the approval of a designated officer for removal of sperm from a deceased person if they satisfied the conditions of the *Human Tissue and Transplant Act* 1982 (WA), rather than coming before the Court.

[47] A number of the above decisions were affected by the relevant state legislation. I turn to consider whether the TAA applied to the removal of sperm, and if so, whether it was complied with. The inherent power of the Court does not permit the Court to make orders excusing compliance with statutory obligations or preventing the exercise of authority deriving from statute.[49] Thus, any non-compliance with the TAA could affect the lawfulness of the order made on 24 August 2016 and potentially any order made in this application.

[48] If the TAA did not apply, the question is then whether any such order for removal was permitted to be made at common law or in the exercise of inherent powers of the Court. This largely turns on the second issue and whether sperm is capable of being property.

Was the removal authorised by the TAA?

[49] The TAA provides, *inter alia*, for a process of authorisation for the removal of tissue after death and for transplanting it to the body of a living person or for other therapeutic, medical or scientific purposes. This Court does not have any statutory role in that process.

[50] Under s 48(1)(c) of the TAA it is an offence to remove tissue from the body of a deceased person without sufficient authority under part 3 for any of the purposes referred to in s 22(1) or s 23(1) of the TAA. The definition of "tissue" in the TAA

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46 [2008] WASC 262

47 [2013] WASC 3.

48 At [16(2)].

49 *Reid v Howard* (1995) 184 CLR 1 per Toohey, Gaudron, McHugh and Gummow JJ.

includes sperm or ova.[50] The question here is whether the removal of the sperm was relevantly for "other therapeutic purposes or for other medical or scientific purposes".

[51] Section 48(3)(b), however, provides that:

> "Nothing in subsection (1) or (2) applies to or in relation to any other act authorised by law."

[52] Section 22 sets out the statutory conditions for the removal of tissue where the body of a deceased person is in a hospital. In the present case, Joshua Davies' body was in the hospital at the time of the removal. Section 22 provides that:

> "(1) Subsection (2) applies if—
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> (a) the body of a deceased person is in a hospital; and
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> (b) it appears to a designated officer for the hospital, after making reasonable inquiries, that the deceased person had not, during his or her lifetime, expressed an objection to the removal after death of tissue from his or her body; and
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> (c) the senior available next of kin of the deceased person has consented to the removal of tissue from the body of the deceased person for—
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> (i) transplanting it to the body of a living person; or
>
> (ii) use of the tissue for other therapeutic purposes or for other medical or scientific purposes.
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> (2) The designated officer may, by signed writing, authorise the removal of tissue from the body of the deceased person under the consent.
>
> (3) The senior available next of kin of a person if he or she has no reason to believe that the person has expressed an objection to the removal after the person's death of tissue from the person's body for any of the purposes referred to in subsection (1)(c), may make it known to a designated officer at any time before the death of the person that the senior available next of kin has no objection to the removal, after the death of the person, of tissue from the body of the person for any of the purposes referred to in subsection (1)(c).
>
> (3A) For subsections (1)(b) and (3), a deceased person is not to be taken as having expressed an objection to the removal after death of tissue if—
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> (a) the deceased person expressed an objection but subsequently withdrew it; and
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> (b) the designated officer, or the senior available next of kin of the deceased person, believes the withdrawal is the most recent and reliable indication of the deceased person's wishes.
>
> (4) Where there are 2 or more persons of a description referred to in section 4, definition *senior available next of kin*, paragraph (a)(i) to (iv) or (b)(i) to (iv), an objection by any 1 of those persons has effect for the purposes of this section notwithstanding any indication to the contrary by the other or any other of those persons.

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[50] In s 4(1)(b)(i), "tissue" is defined to include a substance extracted from an organ, blood or part of a human body.

(5) Where a deceased person, during his or her lifetime, by signed writing consented to the removal after death of tissue from his or her body for any of the purposes referred to in subsection (1)(c) and the consent had not been revoked by the deceased person, the removal of tissue from the body of the deceased person in accordance with the consent for any of those purposes is hereby authorised.

(6) A consent under subsection (1)(c), and a communication under subsection (3) by the senior available next of kin, must be in writing.

(7) However, if it is not practicable for the consent or communication to be given in writing because of the circumstances in which it is given, it may be given orally.

(8) If the consent or communication is given orally under subsection (7), the designated officer must ensure that, as soon as practicable—

(a) the fact of the giving of the consent or communication and the details of the consent or communication are reduced to writing and placed on the deceased person's hospital records; and

(b) reasonable attempts are made to have the consent or communication confirmed in writing by the senior available next of kin.

(9) The designated officer must ensure that a document obtained under subsection (6) or (8)(b) is placed on the deceased person's hospital records as soon as practicable.

(10) Subsection (8) does not affect the operation of subsection (7)."

[53] A designated officer is defined in s 6 of the TAA as:

(1) The medical superintendent of a hospital and his or her nominees (being medical practitioners) appointed by the medical superintendent in writing are, for the purposes of this Act, designated officers for that hospital.

(2) The persons or body having the control and management of a hospital may, in writing, appoint persons to be, for the purposes of this Act, designated officers for that hospital.

[54] Joshua Davies' death was a reportable death to which s 24(1) of the TAA applied.

[55] Where a death is a reportable death, s 24(2) to (6) of the TAA provides:

(2) A designated officer or a senior available next of kin, as the case may be, shall not authorise the removal of tissue from the body of a deceased person to whom this section applies unless a coroner has consented to the removal of the tissue.

(3) Section 22(5) or, as the case may be, 23(3) does not apply in relation to a deceased person to whom this section applies unless a coroner has consented to the removal of tissue from the body of the deceased person.

> (4) 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.
>
> (5) A consent or direction by a coroner under this section may be expressed to be subject to such conditions as are specified in the consent or direction.
>
> (6) A consent or direction may be given orally by a coroner and, if so given, shall be confirmed in writing within 7 days.

[56] The Attorney-General submits that the removal was not properly authorised at least because the consent of the Coroner was not obtained for the removal as required by s 24 of the TAA. Although it does not submit that such non-compliance is fatal to the present application, the Attorney-General submits that an issue in the present case may be whether the unlawfully removed property may be used by the applicant.

[57] Ms Cresswell concedes that arguably the removal was for one of the purposes specified in s 22 of the TAA which required the relevant authority under part 3 of TAA. She submits however that all of the provisions of the TAA were complied with, save that she accepts that there is an issue as to whether the removal was authorised by the Coroner. She submits that the removal was in any event, an act "authorised by law" under s 48(3)(b) of the TAA, because it followed the Court's earlier order of 24 August 2016.

[58] In any event, Ms Cresswell submits that even if the Court's earlier order was not in compliance with the TAA, it is well established that an order of a superior court, even in excess of jurisdiction, is valid unless and until set aside. As such she submits that the Court should determine this application on the basis that the removal was authorised by an order of this Court and the sperm has been removed and preserved.

Did s 22 of the TAA apply?

[59] There is no issue that s 22(1)(a) was satisfied, namely, that the body was in a hospital.

[60] Much of the evidence given in relation to the satisfaction of the provisions of the TAA was hearsay, although no issue was taken as to its admissibility. I have relied on it to the extent that it appears uncontroversial or where it is corroborated by other evidence.

[61] In relation to s 22(1)(b), Dr Byrne was the Executive Director of Medical Services. He appears to be a designated officer for the Toowoomba Base Hospital. He approved the procedure for the removal of the spermatozoa and testes from Joshua Davies. While he was not the medical superintendent, he was more senior to the medical superintendent and answerable to the CEO.[51]

[62] There is no evidence from Dr Byrne of the inquiries he made and his satisfaction of s 22(1)(b) of the TAA.

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[51] Affidavit of D Riwoe filed by leave sworn 15 September 2017.

[63] Both Mr John Davies and Ms Cresswell filed affidavits in support of the interlocutory application, deposing to their previous discussions with Joshua Davies, who had expressed to each of them his desire to have children with Ms Cresswell. Both expressed their belief that Joshua would have supported Ms Cresswell's application. Mr John Davies also informed the Toowoomba Base Hospital of their desire to have Joshua's sperm removed. If Dr Byrne had made such inquiries of Joshua Davies' parents and Ms Cresswell, on the basis of the evidence before me, they would have informed him that Joshua Davies had not expressed an objection to the removal of his sperm after he had died. Had he made the inquiries, the evidence reveals there was nothing to suggest that Joshua would have any objection.[52] On the basis of this evidence one may infer that s 22(1)(b) of the TAA would have been satisfied.

[64] In relation to s 22(1)(c), the evidence shows that both Ms Cresswell and Joshua Davies' mother and father consented to the removal, as was set out in the judgment of Burns J.[53] Mr Davies rang the hospital and it would have been aware of his consent. Ms Cresswell consented and given she made the application and obtained the order which was provided to the hospital, the hospital would have been aware of her consent prior to the removal.[54] The senior next available kin[55] had consented to the removal for the purpose of the sperm being removed and stored so it could be used by Ms Cresswell to conceive by assisted reproductive treatment ("**ART**") such as in vitro fertilisation ("**IVF**"). While such consent is to be communicated in writing under s 22(6), s 22(7) does provide for it to be given orally if it is not practicable for the consent or communication to be given in writing. There is no suggestion of any possible objection by any person listed in the definition of next of kin in s 4 of the TAA, and Ms Cresswell, Joshua's parents and Ms Cresswell's father each depose to knowing of no-one who disagrees with Ms Cresswell's application. There is no evidence suggesting that Joshua Davies would object to Ms Cresswell's proposed use of the sperm. Section 22(4) therefore did not apply.

Therapeutic or medical purposes

[65] In the present case, an authority under part 3 of the TAA was required if the tissue, namely, the sperm, was to be used for "other therapeutic purposes or for other medical or scientific purposes". The consent of the senior next of kin was required for that purpose.

[66] The Australian Legal Dictionary defines " medical purposes" as follows:[56]

> "Any one or more of the following purposes: treating or preventing disease; diagnosing disease or ascertaining the existence, degree or extent of a physiological condition; otherwise preventing or interfering with the normal operation of a physiological function, whether permanently or

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52 See the decision of Edelman J in *Ex parte C* at [16(4)].

53 Affidavit of Mr John Davies at [21] to [22]; Affidavit of Mrs Ione Davies at [8] to [9].

54 The 'Senior next of kin' included the deceased's spouse. Ms Cresswell submits that she was Joshua Davies' spouse. 'Spouse' under Schedule 1 of the *Acts Interpretation Act* 1901 (Cth), includes de facto partner. The evidence of Ms Cresswell supports the fact that she and Joshua Davies were in a de facto relationship. If Ms Cresswell was not the "senior next of kin", Joshua's parents, John and Ione Davies were the "senior next of kin". Given the parents' consent as well as Ms Cresswell's, I do not need to finally determine whether Ms Cresswell was Joshua's "spouse".

55 'Senior available next of kin' is defined in s 4(1) of the TAA. In this case would be Joshua's parents.

56 Submissions of the Attorney-General at [95]; See also Deane J's discussion in *Marion's case* (1992) 175 CLR 218 at 296.

> temporarily, and whether by way or terminating, reducing or postponing, or increasing or accelerating the operation of that function or in any other way."

[67] The Oxford English Dictionary[57] defines 'therapeutic' to mean, *inter alia*:

> "Administered or applied for reasons of health; … having a good effect on the body or mind; contributing to a sense of well-being."[58]

[68] The reference to "medical purposes' is broader, in my view, than medical treatment. Ms Cresswell and the Attorney-General referred me to conflicting authorities in this regard. A number of those authorities accept that the use of sperm from a deceased person for use in reproduction using assisted reproductive technology such as IVF is a "medical purpose" or "therapeutic purpose". That being the case, Ms Cresswell accepts that the removal of the sperm in this case was arguably for a s 22 purpose and required a part 3 authority or authorisation by law in order to comply with the TAA.

[69] In *Re Gray,*[59] the applicant sought an order for removal of the sperm of her deceased husband so she could use it to become pregnant by means of artificial insemination. Chesterman J[60] in that case considered that the removal was not for some "therapeutic … or… other medical or scientific purposes",[61] however there was no discussion by his Honour of the basis of his conclusion. The weight of authority in other States favours the contrary view.

[70] In *AB v Attorney-General*,[62] Hargrave J considered that the transfer of an embryo into the body of a woman was a medical procedure. He stated that, if it had been relevant for him to decide, he would have found that the purpose of removing the sperm was for medical purposes within the meaning of s 26(2)(b) of the *Human Tissue Act* 1982 (Vic).[63]

[71] Habersberger J in *Y v Austin Health*[64] considered that the obtaining of sperm for use in reproduction would be for "medical purposes". In particular, Habersberger J noted that "medical purposes" cannot relate to the needs of the person from whom the sperm is removed as the relevant section proceeds on the basis that the person from whom the tissue is to be removed has died.[65] It is the same position under s 22 of the TAA. That context is significant, in my view, to the interpretation of the phrase.

[72] Atkinson J in *Re Floyd*,[66] appeared to approve both *AB v Attorney-General* and *Y v Austin Health,* and consider that the proposed use in assisted reproductive treatment

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57 Oxford University Press, (online).

58 While Brennan J in *Re Marion's case* (1992) 175 CLR 218 at 269 referred to "therapeutic medical treatment" as treatment "when it is administered for the chief purpose of preventing, removing or ameliorating a cosmetic deformity, a pathological condition or a psychiatric disorder, provided the treatment is appropriate for and proportionate to the purpose for which it is administered", that is of limited assistance to the present case, given it was in the context of drawing a distinction from non-therapeutic treatment in the context of parental or guardian authority with respect to a child.

59 [2001] 2 Qd R 35.

60 As his Honour then was.

61 At [22].

62 (2005) 12 VR 485.

63 At [118]. Section 26 of the Victorian Act was in relevantly identical terms to s 22(1)(c) of the TAA.

64 (2005) 13 VR 363.

65 At [39].

66 [2011] QSC 218.

was use for a "medical purpose" under s 23 of the TAA, which is in materially the same terms as s 22(1) of the TAA.

[73] Hulme J in *Edwards; Re Estate of Edward*s,[67] found that the removal of sperm could be regarded as "for medical purposes" where the proposed use was in assisted reproductive treatment.[68] Edelman J in *Ex parte C* adopted the same view.[69]

[74] In *GLS v Russell-Weisz,*[70] Martin CJ considered s 22 of the *Human Tissue and Transplant Act* 1982 (WA) in the context of the removal of sperm from a deceased person in order that it might be used by his de facto partner at some time in the future to enable her to conceive a baby. Section 22 provided, *inter alia*, that a designated officer for a hospital may authorise the removal of tissue from the body of a person who has died "for use of the tissue for other therapeutic purposes or for medical or scientific purposes". Like the TAA in Queensland, the terms were undefined. His Honour held that in the absence of any definition, the expressions 'therapeutic purposes' or 'medical purposes' were broad enough to include the use of sperm in IVF procedures.[71]

[75] In the present case, the Ms Cresswell submits that the removal of the sperm was for the purpose of its preservation for possible use in assisted reproductive treatment. She therefore submits that the purpose of removal was arguably not for one of the purposes to which s 22 applied. I consider that the distinction sought to be made is an artificial one. The purpose of removal was for the preservation of the sperm for future possible use, namely for assisted reproductive treatment through IVF. It is clear from the reasons of Burns J on 24 August 2016 that the application by Ms Cresswell was for "the storage of the removed tissue pending a future application to this court for the use of that tissue so as to facilitate in vitro fertilisation."[72] As such, the purpose of the removal for preservation of the sperm cannot be considered in isolation from the fact that it was removed pending a further application to determine whether there was an entitlement to use the sperm in assisted reproductive treatment, namely, IVF.

[76] The phrase "other therapeutic purposes or … other medical or scientific purposes" is a broad phrase. Sperm and ova have not been excluded from part 3 of the TAA with respect to removal of tissue from a deceased person.[73] Thus the application of the TAA to the removal of sperm and its subsequent use under part 3 of the TAA was a matter which must have been contemplated by the legislature.

[77] I agree with Martin CJ in *GLS v Russell-Weisz* that the terms "therapeutic purposes" or "medical purposes" are broad enough to encompass the removal of sperm for the purpose of reproductive treatment through IVF, which is supported by the views expressed in *Re Estate of Edwards* and *Y v Austin Health*. It is clear that 'therapeutic purposes' or 'medical purposes' do not refer to the deceased and can apply to use in respect of a third party. As stated above I consider that the phrase extends beyond medical treatment. Assisted reproductive treatment is a medical procedure which interferes with the normal operation of a physiological function. In the circumstances,

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67 (2011) 81 NSWLR 198.
68 At [32]; referred to by Atkinson J in *Re Floyd* [2011] QSC 218.
69 At [39].
70 [2018] WASC 79.
71 At [53].
72 Supreme Court (Qld), Burns J, 24 August 2016, unreported.
73 *Cf* section 8 of the TAA with respect to removal of tissue from a living person.

I consider that the removal of the sperm was for a "medical purpose".[74] An authority for removal of the sperm was therefore required under s 22 and s 24 of the Act.

[78] I am satisfied that consent was given by the senior available next of kin for that purpose.

[79] The evidence supports the fact that Dr Byrne authorised the removal, albeit that there is no evidence that it was in writing as required by the Act.

Was s 24 of the TAA satisfied?

[80] As Joshua Davies' death was a reportable death under the *Coroners Act* 2003 (Qld), s 24 of the TAA required the consent of the Coroner to the removal of the tissue from Joshua Davies' body.

[81] The Attorney-General contends that the removal was not properly authorised because it was done without the Coroner's approval as required by s 24 of the TAA.

[82] At the time of the order of Burns J of 24 August 2016, the consent of the Coroner to the removal had not been obtained.[75]

[83] His Honour noted that Joshua Davies' death was a reportable death pursuant to s 24 of the TAA. His Honour noted that time did not permit the notification of the Coroner before the application had to be determined and that the Coroner's consent had not been obtained. His Honour required the order to be served on the Coroner.

[84] According to the affidavit of Mr Riwoe sworn 15 September 2017, subsequent to the making of the order, he contacted the Coroner by letter sent by email and requested consent for removal of any testes and spermatozoa from Joshua Davies. This followed his being informed by Dr Byrne, the supervising surgeon at the Toowoomba Base Hospital, that the Coroner's approval had to be obtained before he could proceed to remove the tissue from Joshua Davies, notwithstanding the court order of 24 August 2016. The letter sent to the Coroner, dated 24 August 2016, referred to the court order and requested that the Coroner provide their consent to the removal of the testes and spermatozoa and asked that the consent be provided to Mr Riwoe's office and to Dr Byrne. The Coroner subsequently contacted Mr Riwoe and indicated that he had no objection to the proposed application. Mr Riwoe requested that the Coroner telephone Dr Byrne. Dr Byrne subsequently relayed to Mr Templeton (counsel for the applicant) that he had received advice from the Coroner, authorising the removal of the tissue sample. That was relayed to Mr Riwoe.

[85] The Coroner in not opposing the removal did not authorise the removal, as is required by s 24. That is not cavilled with by Ms Cresswell. It is evident, however, that the Coroner did have a conversation with Dr Byrne which according to what was relayed by Dr Byrne to Mr Riwoe, provided him with the relevant authorisation to proceed. In the circumstances, one could infer that the Coroner provided such authorisation or at least informed Dr Byrne it was not necessary for him to give it in light of the court order. This is supported by the fact that Dr Byrne had told Mr Riwoe that he could

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74 Given the terms of s 48(1)(c), if it was not for one of the prescribed purposes in s 22, the carrying out of the procedure pursuant to the court order could constitute "any other act authorised by law", however, this is not a matter I need to finally decide given my findings above.

75 See reasons of Burns J, 24 August 2016 at p 3.

not proceed without the Coroner's consent, notwithstanding the court order. Even if the Coroner had only stated to Mr Riwoe, knowing of the Court's order, that he did not object to the removal of the sperm, in my view that is arguably sufficient in the circumstances to constitute a direction that his consent to the removal was not required as is provided under s 24(4) of the Act.

[86] Thus while the provisions of the TAA were not complied with at the time the order was made by this Court for removal of the testes and spermatozoa on 24 August 2016, the evidence suggests that the Coroner's consent may have been obtained by the hospital prior to the removal of the testes and spermatozoa, or that he had given a direction that his consent was not required. At the very least, his conduct suggests that he was willing to abide by the court order.

Was the TAA complied with?

[87] On the basis of the evidence before me, I cannot conclude that s 22 and s 24 of the TAA were complied with, although it appears likely that the provisions of s 22 and s 24 of the TAA were substantially satisfied at the time Dr Byrne authorised the removal. The TAA was not considered by the Court at the time of making the order of 24 August 2016.[76] In any event, based on the above analysis, it appears that any non-compliance is not of a substantive nature. There are no apparent insurmountable hurdles to compliance with the TAA.

[88] The removal of the sperm was of course authorised by the Court order made on 24 August 2016, even if the conditions for removal in the TAA were not satisfied.

The effect of any order if there was non-compliance with the TAA

[89] Given that I consider that the removal of sperm for use in an assisted reproductive treatment is a 'medical purpose', s 48(1)(c) of the TAA required that any removal be under an authority obtained pursuant to part 3 of the TAA. Section 48(3) of the TAA, however, provides that s 48(1) does not apply to any other act authorised by law.

[90] In *AB v Attorney- General,* Hargrave J considered that, given that the Coroner had not provided consent for the removal as required under the *Human Tissue Act* 1982 (Vic), the removal was not authorised under the Act. As the removal was authorised by a court order, he found it was authorised by law within the meaning of s 44(5)(b) of the *Human Tissue Act* 1982 (Vic) and therefore no question of a breach of s 44(1) of the Act arose. Section 44(5)(b) of the *Human Tissue Act* 1982 (Vic) is in the same terms as s 48(3) of TAA, although the prohibition in s 44(1) of the *Human Tissue Act* 1982 (Vic) is in broader terms than s 48(1) of the TAA. His Honour considered that there was no common law right to authorise the removal of the sperm and he therefore found that the order should not, by reason of s 44(1), have been made, and that it was in excess of jurisdiction.[77]

[91] Hargrave J, however, considered that the fact that the original order had been made in excess of jurisdiction did not prevent him from making the declaration sought. The order that was sought by the applicant in that case was a declaration that s 43 of the *Infertility Treatment Act* 1995 (Vic) did not prohibit the applicant seeking to remove

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76 Nor raised for its consideration, reliance being placed on the Court's inherent jurisdiction in circumstances of urgency.

77 At [145].

the sperm from storage in Victoria for storage in the ACT, where she was intending on undergoing assisted reproductive treatment. His Honour considered that the order was consequential upon sperm being in storage and not being prohibited by the terms of the *Infertility Treatment Act*, not on the removal order.[78] In that regard, his Honour noted that the *Human Tissue Act* 1982 (Vic) did not require a court order for the removal of sperm to be used in a treatment procedure nor did the Act provide for the use of sperm removed. That is the same position as in the present case under the TAA.[79]

[92] His Honour found that the sperm existed because it was removed pursuant to an order of the court. The removal was lawful and therefore the sperm could be used for any legitimate use.[80] That was so, even though Gillard J in making the original order for removal left the question of jurisdiction to be determined when the application was made for use of the sperm.[81] His Honour did not consider that the removal order being made in excess of jurisdiction should cause him to exercise his discretion against making a declaration which had utility, and noted the applicant had sought to, at all times, act appropriately in seeking the authority of the Court.

[93] In the case of *Re Estate of Edwards*, Hulme J found that although the designated officer under the *Human Tissue Act* 1983 (NSW) may have exercised their discretion to authorise removal in favour of the deceased's widow, that authorisation had not been sought and technically there had been a breach of the *Human Tissue Act* 1983 (NSW).[82] His Honour found that any deficiencies in the satisfaction of the Act was a matter to be considered in the exercise of his discretion, noting that the requirements were not insurmountable in that case if there had been a correct understanding of the statutory position.[83] He considered that the order of the Court permitting removal of the sperm was binding and of force until set aside and made in the context where the Supreme Court of New South Wales, like this Court, has a wide jurisdiction to do all that is necessary for administration of justice. His Honour appeared to accept the submission of the Attorney-General that he determine the matter on the facts as they were, namely that the sperm had been removed, whether or not the removal was legally valid. [84]

[94] I consider the reasoning of Hargrave J in *AB v Attorney-General* and Hulme J in *Re Estate of Edwards* to be persuasive in the present application, given the removal was made pursuant to a court order which remains valid. I agree that any order now made as to the use of the sperm is not consequential upon the removal order, albeit that its use is pending further order. In both cases, the requirements for removal under the relevant State legislation, similar to the TAA, were not met. Nor does it appear that consideration was given to whether they were all met. The removal of the sperm was authorised by law under s 48(3)(b) of the TAA, as it was an act authorised by order of a superior court and that order had not been set aside.[85]

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78 At [145] to [146].
79 At [151].
80 At [153].
81 At [156].
82 At [37].
83 At [40].
84 At [40].
85 *Cameron v Cole* (1944) 68 CLR 571 at 590.

[95] The legal foundation for the order by which removal occurred does however remain relevant, for it is by that means that the sperm has become detached from Joshua Davies' body and arguably, become "property". It is relevant to the discretionary considerations of the Court in terms of any declaration to be made if the order was made notwithstanding that the provisions of the TAA were not all satisfied.

[96] I turn to consider the question of whether there is an entitlement to use the sperm removed. That relies on a legal characterisation of the sperm that was removed from Joshua Davies.

Is the sperm property capable of being possessed?

[97] In Queensland, unlike some other States,[86] there is no legislation dealing with the use of removed sperm in circumstances where the donor is deceased.

[98] The absence of jurisdiction on the basis of *parens patriae* suggests that if the Court does have jurisdiction in a case such as the present, then in the absence of legislation, it must lie in notions of property. That calls for consideration of the long established principle at common law that there can be no property in a corpse. Two exceptions recognising rights of possession have at least been recognised in English and Australian decisions: first, personal representatives have a right to custody and possession of a body until its buried or cremated, commensurate with the duty to dispose of the body;[87] and secondly, those who work on and transform a human body, the latter being recognised by the High Court in *Doodeward v Spence.*[88]

[99] Ms Cresswell submits that while the human body is not capable of being owned or possessed, it is now well established that things which are removed from the human body or produced by it can be the subject of property rights. In that regard she particularly relies upon *Doodeward*, and submits that "work or skill" has been applied to remove the sperm in this case and as such it is capable of being property. She further relies on the cases of *Re H, AE (No 2),*[89] and *Re Estate of Edwards.*[90]

[100] Whether sperm is property is a vexed question which has been the subject of much academic writing,[91] as well as some judicial consideration. This is for several reasons.

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86 *Cf Human Reproductive Technology Act* (1991) (WA); *Assisted Reproductive Technology Act* (2007) (NSW); *Assisted Reproductive Treatment Act* (1988) (SA); *Assisted Reproductive Treatment Act* (2008) (Vic).

87 Eg *Williams v Williams* (1882) 20 Ch D 659; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 at 600.

88 (1908) 6 CLR 406; see also Palmer et al (eds), *Palmer on Bailment* (2009, 3rd ed, Sweet & Maxwell) at 29-001.

89 [2012] SASC 177.

90 (2011) 81 NSWLR 198.

91 Heather Conway, 'Utilising parts of the dead' in *The Law and the Dead* (Routledge, 2016); Imogen Goold, Kate Greasley, Johnathon Herring and Loane Skene, *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing, 2016); Sarah Jones and Grant Gillett, 'Posthumous reproduction: Consent and its limitations' (2008) 16 *Journal of Law and Medicine* 279; James Lee, '*Yearworth v North Bristol NHS Trust* [2009]: Instrumentalism and Fictions in Property Law' in Simon Douglas, Robin Hickey and Emma Waring, *Landmark Cases in Property Law* (Hart Publishing, 2015), 25; Erin Nelson, 'Assisted Reproduction: Reproductive Materials and Reproductive Services and Parentage after ART Treatment' in *Law, Policy and Reproductive Autonomy* (2013, Hart Publishing), 290.

[101] One of the reasons is that the delineation of "property" itself and what falls within or outside its description varies with the context in which the term is used. In *Yanner v Eaton*,[92] the plurality of the High Court noted that "property" is often used to refer to something that belongs to another but that the concept of property may be elusive. In a broad sense, the plurality stated that "property" may be used to describe a legal relationship between a person and a thing.[93] Relevantly to this context, the plurality commented that, "Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by "property" in a subject matter".[94] The plurality stated at [19]:

> "'Property' is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not 'a monolithic notion of standard content and invariable intensity'."(citation omitted)

[102] A further reason for the complexity of this question in the context of human body tissue, is the fact that traditionally, there has been the "no property" rule in relation to the human body and particularly to a dead body.[95]

[103] A further suggested reason against the recognition of property rights in the human body or parts of the human body is to avoid the human body being regarded as a commodity.

[104] According to one academic writer:[96]

> "Historically there might be seen to be a certain amount of correlation between the legal recognition of property (or something like it) in bodies and body parts, and tyrannous forms of objectification. That correlation alone might provide reason to tread carefully when recognising new rights of this kind."

[105] In both Australia and the United Kingdom, there are now a number of judicial decisions which have recognised that sperm is property in specific contexts, in relation to human body parts or biological material separated from or produced by the body, both alive and dead. The courts have, however, limited any such recognition to the relief sought in the particular case before them, given the ramifications that could flow from any broad recognition of a part of the human body as property commensurate with all the rights that may attach to such a notion.

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92 (1999) 201 CLR 351.

93 At [17].

94 At [17].

95 Rohan Hardcastle "Law and the Human Body" (Hart Publishing, 2007). The basis for the "no property" rule in relation to a corpse is said to have weak foundations as a misunderstanding of *Haynes' Case* (1614) 12 Co Rep 113; 77 ER 1389 upon which it is based (and commentaries by Blackstone and Sir Edward Coke), however it was explicitly recognised in *Dr Handyside's Case* (1794) 2 East PC 652 and the Court of Appeal in *Yearworth & Ors v North Bristol NHS Trust* [2010] QB 1, and is now so entrenched that it is a part of our common law system. See also Edelman J in *Ex parte C* at [8]; *Cf* Griffiths CJ in *Doodeward v Spence*, discussed below.

96 Kate Greasley, "Property rights and the human body: Co-modification and objectification" in Imogen Goold, Kate Greasley, Johnathon Herring and Loane Skene (eds), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing, 2016)

[106] In *Doodeward v Spence*,[97] the High Court held that a human body or a portion of the human body is capable in law of becoming the subject of property. In that case, the doctor who had attended the birth of a stillborn baby, which had two heads, had removed the body and preserved it with spirits in a bottle. Upon the death of the doctor, the preserved body came to be sold and came into the possession of the appellant. The appellant brought an action in detinue to recover the body specimen after police had seized it. The action in detinue was dismissed by the Supreme Court on the basis that there could be no rights of property in a dead body. Griffith CJ, in considering the Supreme Court's decision that there can be no right of property in the dead body of a human being, noted that all of the authorities relied upon by the Supreme Court bar one related to human bodies awaiting burial. Griffith CJ, with whom Barton J agreed,[98] stated that:[99]

> "… An unburied corpse awaiting burial is *nullius in rebus*. All that is said by the authorities to which we were referred, except *Dr. Handyside's Case*, appears to have been said from this point of view. It does not appear who was the plaintiff in that case, which might apparently have been decided on the ground that the plaintiff had not established any right of possession in himself. But it does not follow from the fact that an object is at one time *nullius in rebus* that it is incapable of becoming the subject of ownership. For instance, the dead body of an animal *ferae naturae* is not at death the property of any one, but it may be appropriated by the finder. So, it does not follow from the mere fact that a human body at death is not the subject of ownership that it is forever incapable of having an owner. If that is the law, it must have some other foundation…."[100]

[107] Griffith CJ did not consider that any of the authorities afforded assistance in the case the Court was considering. He regarded the Court as being free to regard it as a case at first instance arising in the 20th century, and to decide it in accordance with general principles.[101]

[108] In determining the case in accordance with "general principles of law, which are usually in accord with reason and common sense", Griffith CJ stated:

> "The foundation of the argument for the respondent must be that the continued possession of an unburied human body after death by any one except for the purpose of burial is necessarily unlawful. If it is, it follows that no action can be founded upon a disturbance of that possession." [102]

[109] Griffith CJ considered that the question to be determined, then, was whether the continued possession of a human corpse unburied is "*in re ipsa* unlawful." He considered that, if it was, the reason must be that such possession is injurious to public welfare. His Honour found that neither public health nor public decency is endangered by the mere preservation of a perhaps unique specimen of malformation.[103]

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97 (1908) 6 CLR 406.
98 At 417.
99 At 411.
100 At 411 to 412; Although Barton J considered that a "dead-born foetal monster" could not be regarded as an unburied corpse.
101 At 412.
102 At 412.
103 At 414.

[110] His Honour opined that there is no law forbidding the mere possession of a human body, whether born alive or dead, for purposes other than immediate burial. In an oft quoted passage, his Honour stated at 414:

> "If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attribute differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances."(emphasis added)

[111] His Honour found that the body had not come unlawfully into the doctor's possession and that some work and skill had been bestowed by him upon it and that it had acquired an actual pecuniary value. His Honour held that an action would lie for an interference with the right of possession.

[112] Higgins J dissented on the basis that, under British law, no one can have property in another human being alive or dead. His Honour considered it was entrenched by English case law and some American case law, that a corpse was incapable of being property. His Honour therefore found that no action lay to permit recovery of possession, the recovery not being for the purpose of burial.[104] While Barton J agreed with the reasons of Griffith CJ in their entirety, his Honour did not consider the specimen was ever a corpse awaiting burial.[105]

[113] Thus in order to obtain the possessory right to retain the body or a body part (as opposed to ownership) according to Griffith CJ's analysis, it would have to be shown that:

(a) The person claiming property rights has lawful possession of the body or the body part; and,

(b) The person has performed the work or skill on the body or body part;

(c) The body part has acquired different attributes as a result of exercise of the work or skill.

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104 At 420, 422 and 424.

105 His Honour, after agreeing with the reasons of Griffith CJ entirely, added: "I would add that I do not wish it to be supposed that I cast the slightest doubt upon the general rule that an unburied corpse is not the subject of property, or upon the legal authorities which require the proper and decent disposal of the dead" (at 417).

[114] *Doodeward* was subsequently referred to with approval in three English decisions, namely *Dobson v North Tyneside Health Authority,*[106] *R v Kelly,*[107] and *Re Organ Retention Group Litigation.*[108] In *Dobson*, Gibson LJ (with whom Thorpe LJ and Butler-Sloss LJ agreed) while adopting the general principle that there is no property in a corpse, recognised two exceptions to that principle: first, that there is a right of possession for the purpose of burial or disposition of the body; and secondly, that biological materials separated from a body may attain proprietary status following the application of human skill, accepting the correctness of *Doodeward*.[109] In *Dobson*, the deceased's family failed in an action for wrongful interference against a health authority for failing to preserve the deceased's brain following its removal by the Coroner, following which it was sent to the health authority for storage. The Court of Appeal upheld the striking out of the claim on the basis that the deceased's family had no right to possession of, or property in, the brain.[110] The Court of Appeal considered that the preservation of the brain in paraffin was not a sufficient exercise of work or skill for the hospital to acquire possessory rights.[111]

[115] In *R v Kelly,*[112] the Court of Appeal held that 40 body parts taken from the Royal College of Surgeons were capable of becoming property because they acquired different attributes through the application of skill. Thus, the body parts were capable of being stolen. In *R v Kelly,* Rose LJ predicted that the common law may develop in the future such that there may be recognition of property in human body parts even without the acquisition of different attributes based on the fact that they have a use or significance beyond their mere existence.[113]

[116] In *Re Organ Retention Group Litigation*,[114] *Doodeward* was applied in the context of body parts that had been removed from children during post-mortems. Gage J held, *inter alia*, that the removal of the organs was lawful under the *Human Tissue Act* 1961 (UK) and that the Hospitals at least had a right of permanent possession in relation to the body parts. The court applied the principle that if a person was lawfully in possession of the body parts and that possessor does work or exercises skill, and that body part acquires attributes differentiating it from a mere corpse, the body parts constitute property.[115] The pathological process of selection, preservation and dissection of biological materials and creation of tissue blocks was found to be a sufficient exercise of skill.

[117] The Court of Appeal in the decision of *Yearworth & Ors v North Bristol NHS Trust,*[116] appeared to adopt the notion that detachment of a body part was sufficient to found a lawful right of possession. While acknowledging the importance of *Doodeward,* the Court stated that:[117]

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106 [1997] 1 WLR 596 at 600 to 601.
107 [1999] QB 621 at 631.
108 [2005] QB 506.
109 [1997] 1 WLR 596 at 600.
110 At 602.
111 At 601- 602.
112 [1999] QB 621.
113 At 631.
114 [2005] QB 506.
115 At [148].
116 [2010] QB 1.
117 At [45(d)].

> "…we are not content to see the common law in this area founded upon the principle in the *Doodeward* case 6 CLR 406, which was devised as an exception to a principle, itself of exceptional character, relating to the ownership of a human corpse. Such ancestry does not commend it as a solid foundation. Moreover a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical…"

[118] In *Yearworth*, the sperm was removed while the plaintiffs were alive. The plaintiffs had been diagnosed with cancer and were due to undergo chemotherapy treatment at one of the defendant's trust hospitals. Prior to treatment, they were invited to provide samples of semen for frozen storage. The samples ultimately perished and claims were brought on the basis of negligence and for breach of bailment. The Court of Appeal held that the claimants had ownership of the sperm which they had ejaculated. The sole purpose of their sperm was that if certain events occurred, it might be used later for their benefit. While legislation confined all storage of sperm and use of sperm to licence holders, the absence of an ability to direct the use of the sperm did not, in the Court's view, derogate from the donors' ownership. In particular, the provision under the legislation for consent preserved the ability of the men to direct that the sperm not be used in a certain way. The men could order that the sperm be destroyed and no one other than each man had any right to the sperm.[118] The Court of Appeal held that the men had an action for negligent damage to property and breach of bailment.

[119] The Court of Appeal decision sought to depart from the principle recognised by the previous decisions that property rights are created by sufficient work or skill performed on separated biological materials. The Court seemed to rely on the detachment from the human body as the basis of the legal principle applied to determine that the sperm was property owned by the men, however the judgment is unclear.[119] According to *Clerk and Lindsell on Torts*, the decision of the Court of Appeal made it clear that "substances produced by a living person are on principle subject to the ordinary rules of property".[120]

[120] Palmer on Bailment was, however, more cautious:[121]

> "*Yearworth* is undoubtedly a significant case. The Court of Appeal has taken the bold step of ruling that a bodily product can be the property of the person from whose body it came. The Court declined to base its conclusions on the principle of *Doodeward v Spence*….
>
> On a strict interpretation, the case sets a precedent only in relation to sperm, and indeed, only in relation to sperm stored by the man who generated it for the purpose of later use for his benefit. Nonetheless, in *Yearworth* an English court has for the first time ruled expressly that a

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118 At [45(f)].

119 The decision in *Yearworth* has been questioned in *Holdich v Lothian Health Board* [2013] CSOH 197 at [38] to [46] which also questioned *Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207 and *Edwards; Re Estate of Edwards* (2011) 81 NSWLR 198 given their reliance on *Yearworth*.

120 (21st ed, Sweet and Maxwell, 2014) at [17-43].

121 (3rd ed, Sweet and Maxwell, 2009) at [29-021]: see also James Lee, '*Yearworth v North Bristol NHS Trust* [2009]: Instrumentalism and Fictions in Property Law' in Simon Douglas, Robin Hickey and Emma Waring, *Landmark Cases in Property Law* (Hart Publishing, 2015), 25.

> bodily product is capable of being owned without the application of work or skill..."

[121] *Yearworth* was however, different from the present case, insofar as the sperm was provided by the men involved for the specific purpose of allowing the sperm to be used if medical treatment rendered them infertile. However, like the present case, the sperm had been separated from the men involved.

[122] In *Roche v Douglas*,[122] Sanderson M considered whether the Court could order certain body specimens taken from the deceased during surgery, which had subsequently been preserved in paraffin wax, could be subject to testing to determine whether the deceased was the father of the plaintiff. The Court's power to make such orders depended on whether the body tissue was property.

[123] Sanderson M found that there was no decided case in the United Kingdom or Australia directly on point. However, his Honour carried out a careful analysis of English and Australian case law, including *Doodeward* and *Dobson*, as well as academic commentary, and concluded that the human tissue was property.[123] His Honour commented that it would defy reason to not regard tissue samples as property, given that they have a real physical presence.[124] To deny that the tissue samples were property would be to create a legal fiction.

[124] Unfortunately, it is unclear whether the basis upon which his Honour reached his conclusion was that once detached, the tissue had a physical existence and was a thing capable of being property, or whether his Honour regarded its production as being the result of the exercise of work and skill. Martin CJ in *GLS v Russel-Weisz* suggests that it is likely his Honour was extrapolating from *Doodeward*. *Doodeward* was certainly the subject of detailed consideration by Sanderson M, although his Honour did not consider it directly applicable to the case in question.

[125] His Honour's decision in *Roche v Douglas* was followed by Simmonds J in *S v Minister for Health (WA)*[125] and Martin CJ in *Section 22 of the Human Tissue and Transplant Act 1982 (WA*); *Ex parte M*.[126] In the case of *S v Minister for Health*, Simmonds J considered the decision of Roche and determined that there was no distinction between samples of tissue taken from a body before death or samples taken from a body after death. His Honour considered both were 'property', at least for the purpose of O 52 r 3 of the Rules of the Supreme Court, in respect of preservation of property. His Honour therefore ordered the removal of the sperm from the deceased, having been satisfied that the conditions in the *Human Tissue and Transplant Act* 1982 (WA) had been met. Martin CJ made an order for removal of sperm from the deceased in *Ex parte M* on the same basis.

[126] Caution must be exercised in relation to the comment of Simmonds J in *S v Minister for Health (WA)*, that there is no distinction between tissue removed before death and that removed after death. While tissue remains part of a human being, the common law principle is that a living person can be the holder of a property right but that he or

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122 (2000) 22 WAR 331.
123 At [23].
124 At [24].
125 [2008] WASC 262.
126 [2008] WASC 276.

she cannot be the object of it.[127] In *R v Bentham*,[128] the House of Lords held that an unsevered hand or finger was not capable of being possessed. In the case of *Roche* the tissue had been removed, unlike in the case of *S v Minister for Health (WA)*. The separation of tissue or a body part from the human body has been a significant factor in the determination that the relevant tissue or parts are property. The removal of tissue from a living person and the principle of inviolability[129] requires also the consent of that person. Simmonds J in *S v Minister for Health (WA)* did not consider these matters. However, in that case, his Honour was satisfied that the statutory conditions for removal of the sperm from the deceased under the *Human Tissue and Transplant Act* 1982 (WA) had been met. If the conditions of that Act, or some equivalent legislation in another State, are satisfied such that the removal of tissue is to take place, that may provide a foundation for orders as to the preservation of property until a determination can be made as to the subsequent use of the sperm. I do not consider that Simmonds J in *S v Minister for Health (WA)* was supporting a general principle that tissue can be removed from a deceased person, absent legislation, based on a general recognition that all human tissue is property, whether or not it remains part of the human body.

[127] In the case of *Bazley v Wesley Monash IVF Pty Ltd*,[130] White J[131] concluded that, both in law and in common sense, straws of semen stored with Wesley Monash IVF were property, the ownership of which vested in the deceased while alive and in his personal representatives after his death.[132]

[128] In that case, the deceased had provided the straws of semen after having been diagnosed with cancer, in circumstances where he and his de facto partner had one child and wished to have another child. They married later that year but sadly he passed away. The deceased did not provide written consent that the semen could be used after his death. Wesley Monash IVF notified the deceased's wife that they followed the National Health and Medical Research Council (NHMRC) *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*. Under the Guidelines at the time, the IVF clinic said that, in the absence of a directive from the deceased that he consented to the use of the straws of semen, they could not continue to hold the straws of semen and they were to be disposed of. The question for determination was whether the sperm extracted and stored could be described as "property" and thus form part of the deceased's estate.

[129] White J considered *Doodeward, Hecht*,[133] and *Yearworth.*[134] Her Honour gave considerable weight to the Court of Appeal's recognition in *Yearworth* that the rights of property in the bailor, namely each of the men who had provided the sperm, entitled his or her representative to call for the property's return subject to the terms of the contract between them.[135] Her Honour also referred with approval to the decision of

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127 See *R v Bentham* [2005] 1 WLR 1057 at [8].
128 Ibid at [8].
129 As to which see *Marion's Case* (1992) 175 CLR 218.
130 [2011] 2 Qd R 207.
131 As her Honour then was.
132 At [33].
133 20 Cal Rptr 2d 275 (Cal App 2 Dist 1993), where the Court held that there could be property in a deceased man's semen stored ante mortem.
134 [2010] QB 1.
135 At [29] to [30].

Sanderson M in *Roche v Douglas.*[136] As a result of her consideration of the case law, White J, concluded that the straws of semen were property. Her Honour determined that the relationship between the IVF clinic and the deceased was one of bailor and bailee for reward, because so long as the fee was paid and the contract was maintained, the clinic agreed to store the straws. While the arrangement came to an end with the bailor's death, her Honour found that the personal representatives of the bailor maintained ownership of the straws of semen and could request the return of his property.[137]

[130] Hulme J in *Re Estate of Edwards*,[138] considered the decision of the High Court in *Doodeward*, and reviewed a number of Australian and English decisions.

[131] Like the present case, in *Re Estate of Edwards*, the sperm had already been removed from the deceased pursuant to a court order. The plaintiff's husband had died in a workplace accident. The sperm was removed from his body and stored. The plaintiff, who was the administrator of her husband's estate, sought a declaration that she was entitled to possession of the sperm. The provisions of the *Assisted Reproductive Technology Act* 2007 (NSW) did not permit her to use the sperm for assisted reproductive treatment in New South Wales.

[132] While his Honour considered that the *Human Tissue Act* 1983 (NSW) provided a statutory basis for removal, it did not address the question of use, which was dealt with by a separate Act, the *Assisted Reproductive Technology Act* 2007 (NSW). His Honour noted that a consideration of rights that flow from the recognition of something as property is complex and beyond the scope of the judgment. His Honour considered relevant Australian and English authority and concluded that:

> [82] Applying Griffiths CJ's test in *Doodeward* to the facts of the present case, the removal of the sperm was lawfully carried out pursuant to the orders made by Simpson J. Work and skill was applied to it in that it has been preserved and stored. Accordingly, on this long standing and binding authority the sperm removed from the late Mr Edwards is capable of being property…
>
> [83] *Bazley* and the cases from other jurisdictions provide support for the conclusion of property. Although they are not binding, they are, collectively, persuasive of the view that the law should recognise the possibility of sperm being regarded as property, in certain circumstances, when it has been donated or removed for the purpose of being used in assisted reproductive treatment. *Yearworth* shows a preparedness of the England and Wales Court of Appeal to extend the law considerably beyond *Doodeward*. However, the conclusion of property in the present case can be made under the High Court's long-standing authority without any need for further exploration of the limits of the law.
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> [84] Sanderson M in *Roche* saw a distinction between the case before him, involving tissues removed from a body, and authorities that

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136 (2000) 22 WAR 331. Sanderson M stated "…it defies reason to not regard tissue samples as property. Such samples have a real physical presence. They exist and will continue to exist until some step is taken…".

137 [2011] 2 Qd R 207 at [33].

138 (2011) 81 NSWLR 198.

> were concerned with whether a deceased body can be property. There may well be an importance in some circumstances of recognising such a distinction. However, the authorities to which I have referred demonstrate a repeated application of *Doodeward* to the property status of body parts or tissues removed from a body. For the purpose of the case at hand I do not see that any distinction is significant. (emphasis added)

[133] His Honour considered whether Ms Edwards had a right of property in the sperm. His Honour noted that the reference to a property entitlement should be understood by reference to the relief that was sought, namely a declaration that Ms Edwards was entitled to possession.[139]

[134] On the basis of the decisions endorsed in *Doodeward,* his Honour concluded that Mr Edwards did not have property in his semen when he was alive and that it did not form part of the assets of his estate upon his death.[140] His Honour considered that Ms Edward's "duty" as administrator did not give her any entitlement other than to give the corpse a decent internment.[141] His Honour considered that the better view was that Ms Edwards was entitled to possession of the sperm on the basis that the doctors who removed the sperm and the doctor and technicians who then preserved and stored it did not hold property in the sperm, as they performed these functions on behalf of Ms Edwards. His Honour found that they were in effect acting as her agents and so did not acquire any proprietary rights for their own sake.[142]

[135] His Honour concluded that it was open for the Court to decide that Ms Edwards was the only person entitled to possession of the property of the sperm, as the deceased was her husband and the sperm was removed on her behalf and for her purposes. No one else had any interest in the sperm.[143] His Honour went on to consider whether he should exercise his discretion to make the declaration sought. His Honour determined that he should do so, notwithstanding that Ms Edwards could not use the sperm in obtaining assisted reproductive treatment in New South Wales. [144]

[136] In *Re H, AE (No 2),*[145] Gray J considered an application for a declaration that the wife of a deceased man who was killed in a car accident was entitled to the possession and use of the sperm of her late husband, extracted shortly after his death. The couple had made preparations to have a child prior to the husband's death. Gray J considered that the sperm had been lawfully extracted pursuant to orders he had made.[146]

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139 His Honour considered the Court should not go beyond the relief sought, given the complexities surrounding the question of property.

140 At [87].

141 At [89].

142 At [88].

143 At [91].

144 At [140]. The *Assisted Reproductive Technology Act* 2007 (NSW) required the express consent of the deceased: s 23. His Honour found, however, that that did not prohibit the handing over of the sperm so she could take it to another State where its use was not prohibited. *Cf* Martin CJ in relation to s 22 of the *Human Tissue and Transplant Act* 1982 (WA) in *GLS v Russell-Weisz*, where his Honour suggested that the Western Australia Act may provide for rights as to use, at lease insofar as directing the transfer of a sperm: at [126] and [134].

145 [2012] SASC 177.

146 At [55].

[137] Gray J determined that work or skill had been applied to the deceased's sperm by the preservation of it performed by staff at the laboratory and the deceased's sperm could be treated as property, at least to the extent that there is an entitlement to possession.[147] His Honour particularly relied on *Doodeward* and *Re Organ Retention Group Litigation* in determining what constitutes work and skill.

[138] His Honour followed the decision of Hulme J in *Re Estate of Edwards* to conclude that the applicant was the only person in whom the entitlement to possession of the sperm could lie, it having been removed on her application.[148] He considered that the laboratory staff, in exercising work and skill, were acting as agents of the applicant. Consistent with established principle, the sperm did not form part of the deceased's estate.[149] His Honour found that the applicant had a *prima facie* entitlement to possession of the sperm, but that the entitlement was subject to conditions that the Court may impose in its inherent jurisdiction. The Court did not make orders, pending the applicant addressing whether she was able to be lawfully provided with in vitro fertilisation treatment using the deceased's sperm under the *Assisted Reproductive Treatment Act* 1988 (SA).

[139] Subsequently, an order was made by Gray J in *Re H, AE (No 3)* granting the applicant use of the sperm under the supervision and control of a clinic in the Australian Capital Territory, on the basis that she was entitled to possession of the sperm, even though she could not be provided with assisted reproductive treatment in South Australia.[150] His Honour considered that the applicant could satisfy the *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*, which were required to be complied with for the relevant clinic to maintain accreditation although that was a matter for the clinic.[151] The orders made by his Honour relied on his finding that the applicant was entitled to the possession of the sperm and that the Court maintained control of the use of the sperm in its inherent jurisdiction. That is similarly the position in Queensland.

[140] Master Mossop in *Roblin v Public Trustee for the Australian Capital Territory*,[152] held that stored sperm taken with consent was property. The sperm was deposited after the deceased was diagnosed with cancer, on advice that treatment for the cancer would likely affect his fertility. His Honour considered *Roche v Douglas*, *Yearworth* and *Bazley*, where tissue samples or semen were extracted while the person was alive. On the basis of those authorities, particularly *Bazley*, his Honour was satisfied that the stored sperm was property. His Honour stated:[153]

> "The mere fact that the semen was formerly part of a human body is not sufficient to deny that it is property. The fact that the sperm constitutes human gametes is not sufficient at common law to take it out of the conception of property. There has been no legislative intervention that requires it to be treated differently to other material that might constitute property because it was formerly part of a human body, or because of its particular status as being human gametes."

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147 At [58].
148 At [60].
149 At [60].
150 *Re H, AE (No 3)* (2013) 118 SASR 259.
151 At [19] although his Honour stated it was a matter for the clinic to reach its own conclusions.
152 (2015) 10 ACTLR 300.
153 At [28].

[141] In that case, his Honour considered that the stored semen was owned by the deceased when he was alive and after his death, by his personal representative. He made a declaration that the sperm was the property of the estate.

[142] In *James v Seltsam Pty Ltd*,[154] Zammit J concluded that an explanted lung was property within the meaning of rule 37.01 of the *Supreme Court (General Civil Procedure) Rules* 2015 (Vic).[155] Her Honour approved the analysis of Sanderson M in *Roche v Douglas.* Her Honour stated that the ruling was confined to the context in which it was made, noting that Griffith CJ in *Doodeward* foreshadowed that whether something is property may vary between different legal settings.[156]

[143] Edelman J (then of the Supreme Court) in *Ex parte C*,[157] determined an urgent application where a wife sought orders for the removal and storage of spermatozoa and associated tissue from her husband who had died the previous day. The applicant and her husband had been trying to conceive for two years and had been undertaking a programme of IVF. The applicant's husband suffered bouts of depression and had committed suicide.

[144] His Honour stated at [7]:

> "The principle that a human body cannot be the object of a property right does not apply in relation to tissue or body parts once they are removed from a human body. It is now clear that things which are removed and separated from the living human body, such as human tissue, can sometimes be the object of property rights. As a recent monograph has acknowledged, the most extensive judicial discussion on this point in Australian common law is the decision of Master Sanderson in this jurisdiction in *Roche v Douglas (as administrator of the Estate of Rowan (dec'd))*. I am indebted to his Honour's summary of key principles in this area. That decision reflects the modern recognition that things removed and separated from the living human body can be the objects of property rights. The conclusion reached by Master Sanderson has also been reached in relation to removal of spermatozoa from a living person in the context of different legislation, as well as the common law, in England and the United States. In the Supreme Court of Queensland, White J has recently supported Master Sanderson's conclusion as sound 'both in law and in common sense'. Of course, a different and sometimes difficult question may be who holds property rights over the removed matter.

[145] His Honour noted the position was different in relation to a deceased person and that for hundreds of years it has been asserted that there is "no property in a corpse" or in parts of a corpse.[158] His Honour did not finally determine whether parts of or tissue or material from the body of a deceased person are capable of being the object of property rights because it was necessary for him to do so. His Honour concluded that the *Human Tissue and Transplant Act* 1982 (WA) applied and permitted the removal of the sperm.

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154 [2017] VSC 506.
155 At [71].
156 At [71].
157 [2013] WASC 3.
158 At [8].

[146] Edelman J, writing extra-curially in an article *Property Rights to our Bodies and Their Products*,[159] considered the questions of whether gametes taken from a living body could be the subject of property rights and whether the position was any different after a person has died.

[147] In relation to the first question, his Honour considered that as a matter of principle, a part of a person's body when removed from that body must be capable of ownership simply because it is a thing, and all things are capable of being owned.[160] Further, his Honour considered that it was not correct to say that things cannot be the subject of a property right unless they have a "useful significance beyond their mere existence", which had formed the basis of the reasoning of the Court of Appeal in *R v Kelly*. His Honour considered that property rights could arise in a person as a result of the exercise of work and skill by them, or as first possessor, depending on the circumstances.[161]

[148] His Honour considered the position was no different in principle where the person has died, although the development of the common law has been constrained by the principle that there is no property rights in a corpse. His Honour concluded that the same principles of property which have been developed and adapted over hundreds of years, particularly having regard to Roman Law, should govern rights to tissue which is separated from human bodies, whether from living or deceased bodies.[162]

[149] In *GLS v Russell-Weisz*,[163] Martin CJ considered an application by the partner of the deceased and her entitlement to transfer the sperm to the Australian Capital Territory. His Honour did not need to determine whether the plaintiff's rights in relation to the stored sperm were proprietary in nature, however, he did make some useful observations and comments by way of *obiter dicta*. In that case, the sperm had been removed from the deceased following permission being granted under s 22 of the *Human Tissue and Transplant Act* 1982 (WA). As the partner of the deceased was not entitled to use the sperm under the *Human Reproductive Technology Act* 1991 (WA), she applied to transfer the sperm to the Australian Capital Territory where there was no prohibition upon the posthumous use of gametes. Martin CJ determined that the deceased's partner did have the right to direct the clinic storing the sperm to transfer it from Western Australia to the Australian Capital Territory.

[150] His Honour agreed with comments of Edelman J, writing extra-curially, that it does not follow from the principle that there is no property in a corpse that there can be no property in a part of the body.[164] His Honour, having reviewed the various cases dealing with similar circumstances, in particular *Re Estate of Edwards, Bazley* and *Re H, AE (No 2)*, stated that:[165]

> "There are, therefore, three decisions at first instance in the Supreme Courts of Queensland, New South Wales and South Australia in factual circumstances very similar to the present case in which the binding authority of *Doodeward v Spence* has been applied to produce the

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159 Justice James Edelman "Property Rights to Our Bodies and Their Products", (2015) *University of Western Australia Law Review* 39(2), 47.

160 At 55.

161 At 62.

162 At 69.

163 [2018] WASC 79.

164 At [114].

165 At [125].

> conclusion that rights of property can exist in relation to samples of sperm removed posthumously and that such rights will generally be enjoyed by the person who caused the sperm to be extracted rather than the deceased, or the relevant medical personnel, or the administrator of the deceased estate. As the reasoning in those cases appears to me to be correct and consistent with binding authority, there is no reason why I should not follow those decisions and conclude that the plaintiff has rights with respect to the sperm samples currently in storage which can be categorised as proprietary in nature."

[151] His Honour was not required to determine the entire ambit or scope of the plaintiff's rights for the purpose of the case. His Honour did, however, note that the rights of the deceased's partner could be constrained by the operation of s 22 of the *Human Tissue and Transplant Act* 1982 (WA) and the purpose for which the sperm was removed in accordance with the authority conferred by the relevant section.[166]

[152] In my view, the weight of authority in the most recent cases in Australia and England supports the fact that the common law recognises that sperm removed from an individual, to which work and skill is applied so it can be preserved, is capable of being property. That recognition has developed as an exception to the principle that there is no property in a corpse and as an extension of the principles in *Doodeward* which recognised that body parts are capable of being property capable of being possessed. The law has developed significantly since the decision of Chesterman J in *Re Gray*. I consider the reasoning of *Re Estate of Edwards*, *Re H, AE (No 2)*, and *GLS v Russell-Weisz* while not binding, to be highly persuasive.

[153] I agree with Martin CJ in *GLS v Russell-Weisz,* that the present state of the law in Australia is that the recognition that rights of property can exist in posthumous samples of sperm is based on the application of *Doodeward* to the circumstances of the particular case.[167]

[154] The law in this country has developed by extrapolating and applying the principles in *Doodeward* to recognise that human tissue and some body parts are capable of being property capable of being possessed. In order to obtain rights of possession a party must lawfully apply work or skill to the human tissue. Consistent with *Doodeward*, the property rights which have been recognised as attaching to sperm that has been removed have generally been confined to the context of the particular decision and not extended beyond a recognition that it is a right of permanent possession, save that White J in *Bazley* appeared to recognise that the deceased[168] had rights of ownership. In *Re H, AE (No 3),* Gray J made orders as to use of the sperm which were made by the Court exercising its inherent jurisdiction.

[155] The recognition of proprietary rights in *Doodeward*, *Re Estate of Edwards* and *Re H, AE (No 2)* has been of a right of permanent possession. That right is held by the person undertaking the lawful exercise of work or skill in relation to the body part. The

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166 Section 22 of the *Human Tissue and Transplant Act* 1982 (WA) is arguably in more restrictive terms than the TAA in Queensland, making it explicit that the designated officer can only provide authority for one of the stated purpose and in accordance with *inter alia* the consent of the next of kin.

167 see also discussion Lyria Bennett Moses, "The Problem with Alternatives to Property" in *Persons, Parts and Property: How we should Regulate Human Tissue in the 21st Century*, Goold, Greasley, Herring and Skene (eds), (Hart Publishing, 2016).

168 And subsequently the personal representatives: see [33].

decisions of *Re Estate of Edwards* and *Re H, AE (No 2)* have extended that entitlement to the person for whom the person carrying out the work and skill was acting as agent. There is no reason in principle why the concept of principal and agent should not be applied.

[156] There is no doubt that there are some difficulties with the notion of the application of the exercise of work or skill to a body part such that it acquires different attributes when the body part such as sperm remains in the same form and has been preserved for use. That was not the subject of any substantive discussion in *Re Estate of Edwards* or *Re H, AE (No 2).* However, the work and skill required to be carried out to separate and preserve the sperm was accepted as sufficient and it appears the preserved form of the sperm has been accepted as sufficient to acquire an attribute different from the corpse from which it has been removed. Insofar as it has a separate existence and is in a preserved form it has different attributes from when it remained a part of the body. That is consistent with *Doodeward* insofar as the body in question was only preserved in its original form.

[157] Some decisions appear to have abandoned the requirement of "work or skill" derived from *Doodeward* and have found that human tissue including sperm is property based on the fact that it is separated from the body and has a separate physical existence. Those cases, such as *Bazley, Roche* and *Yearworth*, are limited to where the sperm was removed while the donor was still alive and consent to removal was given.

[158] I agree with Edelman J that in principle there is no reason to treat tissue separated from a living person differently from tissue separated from a deceased person. The development of the common law has not however extended the principles applied to tissue removed from a living person to tissue removed from a deceased person. Given that legislation such as the TAA permits the removal of tissue including sperm from a deceased such an extension of the common law principles may well occur in the future.

[159] The recognition of sperm as property has generally occurred once the sperm has been removed from the body and been subject to work and skill, not while it remains a part of the human body, living or deceased.

[160] In Queensland, the power to remove sperm for use in assisted reproductive treatment is removal for use of the sperm for a medical purpose. Therefore the statutory regime in the TAA applies. That regime limits the purpose for which consent can be provided for the removal of the tissue and gives paramountcy to the consent of the next of kin, while ensuring due regard is had to the wishes of the deceased. Such limitations preserve the dignity of the deceased.

[161] Given that I determined that the TAA would apply in case such as this, I do not have to determine whether the common law has developed to the extent of recognising sperm, while it remains a part of a deceased's body, as property. However, consistent with the notion that one does not hold property in one's body, I do not presently consider that the common law does recognise sperm as property until it is separated from the human body. Further, my analysis of the authorities does not support the existence of any common law principle pursuant to which sperm may be ordered to be removed from a deceased absent legislation. As it is not necessary for me to determine this question in this case I do not finally decide it. Whether the inherent jurisdiction of the Court may permit such an order must be determined according to

the circumstances of the particular case. In that regard, caution must be exercised in the analysis of decisions of other States, which have differing legislative schemes with respect to the removal and use of sperm.

[162] I agree with Edelman J in *Ex parte C*, that the statutory regime in Queensland, like the statutory regime in Western Australia, does not require parties to apply to this Court for a court order for removal of the sperm. The TAA provides a regime for a designated officer and the Coroner, in the case of a reportable death, to provide such authorisation in accordance with the statutory regime. I do not agree with the Queensland government document "Guidelines for removal of sperm from deceased persons for IVF: consent, authorisation and role of IVF organisations" which provides that a court order for removal is necessarily required. The question of removal is different from the question of the determination of the use of the sperm, which is outside the statutory regime.

Summary of conclusions as to law

[163] While it is not possible to reconcile all of the cases, on the basis of the analysis of the above, I consider the position in Queensland to be as follows:

(a) The removal of sperm from a deceased person for use in assisted reproductive treatment is for a "medical purpose" under s 22 of the TAA;

(b) The TAA provides for a statutory regime for the removal of sperm which does not require parties to come before the Court for authorisation to permit removal of the sperm, but rather requires the authorisation of the designated officer and in some cases, the Coroner to be obtained;

(c) There does not appear to be any common law principle which empowers a Court to order removal of a deceased's sperm, as the sperm while it remains a part of the human body is not recognised as "property". However, if the provisions of the TAA were satisfied such that removal was to occur, there is a possibility based on *Ex parte M* and *S v Minister for Health (WA)* that, given the sperm to be removed is capable of being recognised as property, it may be property such that a court may have jurisdiction to make a preservation of property order;

(d) Sperm removed from the deceased is capable of constituting property, where work and skill is exercised in relation to the removal, separation and preservation of the sperm. While *Doodeward* referred to the body part acquiring different attributes as a result of the exercise of work or skill, in *Doodeward*, the body in question was only preserved (albeit that it acquired pecuniary value). The state of the preserved sperm has been found to be sufficient for it to be capable of being property.

(e) While there is some support for the notion that sperm or tissue separated from the human body is a thing which is property capable of ownership, without the exercise of any such work or skill, those cases are limited to where the separation occurred while the donor was living and the donor consented to the removal of the sperm.

(f) The sperm of a deceased, not removed while they are living, is not capable of being property and does not form part of the assets of his estate upon death;

(g) *Prima facie*, the person entitled to possession of any sperm removed and preserved will be the party who has exercised the work and skill to extract and preserve the sperm or the principal for whom they act.

Whether Ms Cresswell is entitled to possession

[164] The sperm is not the property of Joshua Davies or his estate as it was not at the time of his death separated from his body.[169]

[165] I am satisfied on the evidence that has been presented to me that pursuant to the orders of Burns J, work and skill has been applied by the laboratory staff of the Queensland Fertility Group to the sperm, in separating the collected sperm from the testes and freezing it in 15 ampules containing a liquid designed to protect it from damage by ice crystals as they are frozen and then storing it in liquid nitrogen at -190 degrees Celsius.[170] It has through that process acquired different attributes and is capable of being property. By reference to the relief that is sought in the application, I am satisfied that the stored sperm is property[171] capable of possession by the party entitled to that possession in assisted reproductive treatment.

[166] I consider that the reasoning of Hulme J in *Re Estate of Edwards* and Gray J in *Re H, AE (No 2)* applies to the present case and I find that the laboratory staff, in carrying out the process deposed to by Ms Irving,[172] were acting as agents for Ms Cresswell. Ms Cresswell is the only party who has claimed possession and she has done so with the consent of Joshua Davies' parents. Ms Cresswell is the only person who has a *prima facie* entitlement to the sperm. That entitlement, consistent with the relief sought, is one of permanent possession.

[167] I turn now to consider the discretionary factors to determine whether to make the declarations sought, including that Ms Cresswell is entitled to possession of the sperm.

Do the discretionary considerations support the declarations sought?

[168] Given declarations are sought by Ms Cresswell, the Court must exercise its discretion to determine whether it is appropriate to grant such declarations.[173] Gray J in *Re H, AE (No 2)* considered that given the Court in its inherent jurisdiction retained control of the use of the sperm having ordered its removal, the sperm could only be used in the manner approved by the Court.[174] His Honour had regard to, *inter alia*, a number of discretionary considerations similar to those addressed by Hulme J in *Re Estate of Edwards.* He regarded the interests of the child that may be conceived as paramount. In the present case, given the removal of the sperm was authorised by an order of this Court exercising its inherent jurisdiction, the Court does retain control of the use of the sperm. The position may, however, be different where the removal was authorised by a designated officer under the TAA.

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169 *Re Estate of Edwards* at [87] followed by *Re H, AE (No 2)* at [60]; *cf S v Minister for Health (WA).*

170 In this regard see *Yearworth & Ors v North Bristol NHS Trust* [2010] QB 1, where the Court of Appeal referred to the fact that freezing the sperm and preserving it in nitrogen would have been sufficient to satisfy the work and skill requirement as discussed in *Doodeward*, even though the Court did not decide the case on that basis.

171 The recognition of proprietary rights in something does not mean it has all the indicia of other things called proprietary rights: *Zhu v Treasurer (NSW)* (2004) 218 CLR at 530; *Re Estate of Edwards* at [72]-[78].

172 CFI10 at [8] to [9].

173 *Edwards; Re Estate of Edwards* (2011) 81 NSWLR 198 at [141] to [149]. The discretion is a broad one: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ.

174 At [44].

[169] Discretionary factors to which the courts have had regard in determining whether to grant declarations in the nature of those sought in the present case, which will not necessarily apply in every case, include:[175]

(a) Whether the sperm can be legally used in assisted reproductive treatment;

(b) Any consent, whether express or inferred, given by the deceased;

(c) The likelihood that the sperm of the deceased, if extracted, would be used for the impregnation of his partner;

(d) The best interests of any child that may be conceived as a result of the use of the sperm;

(e) Whether there are any generally held community standards in respect of the situation proposed and whether the proposed orders accord or do not accord with such standards;

(f) Whether the applicant's desire is a result of careful or rational deliberation as opposed to an emotional response to grief.

[170] They are relevant to the utility of the declarations, the interests of the child and the autonomy of the deceased. It is also relevant to consider the evidence of the deceased's desire to have children with Ms Cresswell and the nature of their relationship as well as the views of the deceased's family. The question of consent seems to accord with the legislation and guidelines relevant at the time.[176] The wishes of the deceased are obviously relevant.

[171] The Attorney-General submits that if the Court was to declare that the sperm retrieved from the deceased and stored is the applicant's property, then it is for the applicant to approach relevant facilities for reproductive treatment. It raised the possibility that the Court may wish to consider the relevant guidelines for assisted reproduction using sperm posthumously before making the declarations sought. While I have regard to the guidelines insofar as they may inform the Court about matters relevant to the exercise of the Court's discretion, the application of those guidelines and whether they are satisfied are matters to be considered by any clinic that may assist Ms Cresswell in the IVF process, should she decide to proceed.

[172] Ms Cresswell submits that, on the evidence before the Court, the discretionary factors favour the granting of the order.

Can the sperm be legally used for assisted reproductive treatment?

[173] As stated above, in contrast to a number of States, there is no legislation in Queensland which deals with the use of a person's gametes after death, although their removal is provided for under the TAA.

[174] Commonwealth legislation provides for an accredited Assisted Reproductive Treatment ("**ART"**) centre to provide IVF services.[177] The Reproductive Technology

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175 See *MAW* at [64], although in *MAW* the court was considering whether it could exercise its *parens patriae* jurisdiction to give consent to removal where the individual concerned was unconscious; *Edwards; Re Estate of Edwards* at [141]; and *Re Gray* at [23]. While Ms Cresswell also provided the guiding principles that apply to the *Surrogacy Act* 2010 (Qld) and the *Adoption Act* 2009 (Qld), I do not consider that they provide any assistance in this context.

176 And the exercise of the *parens patriae* jurisdiction.

177 *Research Involving Human Embryos Act* 2002 (Cth), s 11.

Accreditation Committee of the Fertility Society of Australia is responsible for accreditation.[178] That committee issues a code of practice for assisted reproductive technology units, which must be complied with to achieve or maintain accreditation. That code provides for compliance with the Australian Government National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* ("**the NHMRC guidelines"**).

[175] In Queensland, only an accredited ART centre may provide IVF services and that ART centre must abide by the NHMRC guidelines (to maintain its accreditation) in respect of the use of gametes posthumously. They are, however, guidelines only, and do not have legislative force. The 2017 NHMRC guidelines provide for the use of gametes posthumously in clauses 8.22 and 8.23 as follows:

> **8.22 Respect the wishes of the person for whom the gametes or embryos were stored**
>
> …
>
> 8.22.1 Where permitted by law, clinics may facilitate the posthumous use of stored gametes or embryos to achieve pregnancy, if:
>
> ◊ The deceased person left clearly expressed directions consenting to such use following their death (see paragraph 4.6.4)
>
> ◊ The request to do so has come from the spouse or partner of the deceased person, and not from any other relative
>
> ◊ The gametes are intended for use by the surviving spouse or partner
>
> ◊ The conditions of paragraph 8.23 are satisfied.
>
> 8.22.2 Where the deceased person has left clearly expressed directions that object to the posthumous use of their stored gametes or embryos, clinics must respect this objection and not facilitate the posthumous use of the stored gametes or embryos to achieve pregnancy.
>
> 8.22.3 Where the deceased person has not left clearly expressed directions regarding the posthumous use of their stored gametes or embryos, where permitted by law, clinics may facilitate the posthumous use of stored gametes or embryos to achieve pregnancy, if:
>
> ◊ The request to do so has come from the spouse or partner of the deceased or dying person, and not from any other relative
>
> ◊ The gametes are intended for use by the surviving spouse or partner for the purposes of reproduction

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178 *Research Involving Human Embryos Act* 2002(Cth), s 8.

◊ There is some evidence that the dying or deceased person would have supported the posthumous use of their gametes by the surviving partner, or at the very least, there is no evidence that the deceased or dying person had previously expressed that they do not wish this to occur

◊ The surviving spouse or partner provides valid consent (see paragraph 4.5)

◊ The conditions of paragraph 8.23 are satisfied.

8.23 Allow sufficient time before attempting conception and/or pregnancy

8.23.1 Given the enduring consequences of the decision, clinics should not attempt conception or a pregnancy using stored gametes or embryos unless:

◊ Sufficient time has passed so that grief and related emotions do not interfere with decision-making

◊ In addition to the requirements outlined in paragraph 4.1, the surviving prospective parent (the spouse or partner) is provided with sufficient information to facilitate an accurate understanding of the potential social, psychological and health implications of the proposed activity for the person who may be born

◊ The surviving prospective parent (the spouse or partner) has undergone appropriate counselling (see paragraph 4.3)

◊ An independent body has reviewed the circumstances and supports the proposed use.

[176] The NHMRC guidelines are said to be in line with community expectations. The 2017 NHMRC guidelines are broader than the guidelines considered in *Re Estate of Edwards* and *Re H, AE (No 3)*. Express consent to the use of the sperm by the deceased is not required under the 2017 NHMRC guidelines. While it is not for this Court on this application to determine whether the guidelines have been complied with, they have some relevance insofar as 8.22.3 envisages access to stored gametes without the express consent of the deceased, on the proviso that the posthumous use of the gametes was not opposed by the deceased.[179] The NHMRC guidelines envisage that the gametes may be used by a spouse or partner.

[177] It is clear that under the NHMRC guidelines, an ART Centre could legally use the sperm from Joshua Davies to help Ms Cresswell achieve pregnancy if they are satisfied that the guidelines are met. There is evidence before me which is capable of satisfying the guidelines. I do not consider that the proposed orders lack utility on the basis that there could be no successful impregnation under Queensland law. It is for the ART centre and not this Court to determine whether they are satisfied that the guidelines permit them to proceed.[180]

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179 This has been included in the 2017 guidelines but was not provided for in the 2004 guidelines.

180 See *Edwards; Re Estate of Edwards* at [137] and [146].

Consent and wishes of the deceased

[178] While the sperm is not Joshua Davies' property or part of his estate, the autonomy of the deceased is relevant. It would be a significant factor, which would weigh against the exercise of the Court's discretion, if the use of the sperm for use in IVF was against the wishes of a deceased person. The wishes of the deceased must be considered in determining whether to authorise the removal under part 3 of the TAA. As set out above, I am satisfied that s 22(1)(b) of the TAA would have been satisfied insofar as there is no evidence that Joshua would have objected to the removal of the sperm.

[179] Ms Cresswell in her affidavit has set out the history of her relationship with Joshua Davies.[181] That is supported in certain respects by the other affidavit evidence provided by her family, Joshua's family and friends. The evidence is uncontradicted and I have no reason not to accept Ms Cresswell's evidence and I do accept her evidence. Similarly, I accept the evidence provided by members of her family, Joshua's family and friends as to Joshua's expressed intentions, although I give less weight to matters of opinion which are generally inadmissible.

[180] The evidence shows that Ms Cresswell and Joshua Davies had been in a relationship since late 2013 or early 2014 and had been planning their lives together since 2015. They had commenced living together in January 2016. They had tried to do so in 2015 but the accommodation arrangements were not successful. In May 2016, they had begun to save for a house and bought home furnishings for the unit they rented. They had also taken out joint insurance and had established a shared bank account.

[181] They had discussed having children and had taken steps towards ensuring that, medically, there was no impediment to having children together. Both Ms Cresswell and Joshua Davies had discussed with friends and family their intention to have children together and their plans to marry. Joshua had sent a text to his friend, Adam Freeman, in 2016, stating he would be happy if Ms Cresswell fell pregnant because she was the one. In particular, Joshua had discussed with his mother and father the plans he and Ms Cresswell had to have children and when they would get married. Joshua had also told his father that he and Ms Cresswell were living in a de facto relationship, and that they may accelerate having children when Ms Cresswell was worried she may have some medical issues.

[182] Although the relationship was not of the length considered in *Re Estate of Edwards* or *Re H, AE (No 2)*, and Ms Creswell and Joshua Davies were relatively young, the evidence supports the fact that Joshua Davies and Ms Cresswell were in a permanent, committed relationship. I am satisfied that they planned to marry and start a family at the time of Joshua's death and had begun to take positive steps in that regard.

[183] Joshua Davies took his life on 23 August 2016 without warning and left no note. He had suffered depression in the past and had attended counselling sessions which Ms Cresswell also attended on one occasion. The week before he died, he was hospitalised with severe concussion. There is no suggestion of any unhappiness with his relationship or any change of intention in relation to his future plans with Ms Cresswell at any the time prior to his death.

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181 CFI 7.

[184] Neither Ms Cresswell nor Joshua's father, Mr John Davies, are aware of him leaving a will or any note stating his wishes after his death. Given that there is no evidence that he was contemplating his own death, that is unsurprising.

[185] On the evidence before me, Joshua's family and friends are of the belief that Joshua would support the application by Ms Cresswell. That belief would appear to be based on his expressed intentions while he was alive, and the actions taken by Joshua Davies and Ms Cresswell in setting up a life together.

[186] Expressing a desire to have a child with the person whom you consider is going to be a life partner when you are living, is quite different from expressing an intention that that person have a child using your sperm after your death. While Joshua Davies' family and friends believe he would support the decision of Ms Cresswell to make this application and the orders sought, that is based on his express desires premised on them both being alive. That must be treated with a degree if circumspection insofar as such beliefs may stem from an understandable desire that a loved one continue to live on after their death.

[187] There is clear evidence that Joshua Davies expressed a desire to have children. There is no evidence that he expressed any objection to Ms Cresswell having his child in the event that he passed away or to her using his sperm in such an event, although that is likely to be because Joshua had not contemplated his own death at such a young age. While Joshua took his own life, and struggled with depression, the evidence suggests that he had been planning a future with Ms Cresswell and planning to have children with her. I do not infer that his suicide was the result of any dissatisfaction with their relationship or change of intention to have children, even though that was the result of his actions.

[188] The NHMRC guidelines did not previously permit the use of a deceased person's sperm without the consent of the deceased having been given. In 2017, the NHMRC guidelines changed the position to permit a clinic to facilitate the use of stored sperm posthumously if a number of conditions are satisfied, including that there is at least no evidence that the deceased expressed opposition to their sperm being used in the event of their death. I am satisfied that there is evidence capable satisfying this requirement. This requirement will be a matter considered by any clinic in determining whether to proceed with the use of Joshua Davies' sperm posthumously to impregnate Ms Cresswell.

[189] In the present case, I consider that Joshua Davies did intend to have children with Ms Cresswell prior to his death. There is no evidence that he objected to the use of his sperm by Ms Cresswell in the event of his death. Given his statements of intention when he was alive, I am satisfied that the granting of the declarations sought would not be contrary to his wishes.

Likelihood that sperm would be used

[190] The evidence of Ms Cresswell and the terms of the orders proposed, which limits the use of the sperm to use by Ms Cresswell to produce an embryo to be implanted in her, support the fact that Joshua Davies' sperm will be used to impregnate Ms Cresswell and not for any other purpose.

[191] Dr Cerqui opines that Ms Cresswell is medically fit to have a child and that IVF with intracytoplasmic sperm injection would be a good option if she wished to achieve a pregnancy with stored sperm. Dr Cerqui and Ms Cresswell have discussed the process that would have to be undertaken in order for her to receive IVF treatment, including the need to comply with the NHMRC guidelines.

[192] Naturally, an accredited ART provider will have to be satisfied that they should proceed having regard to the NHMRC guidelines. Dr Cerqui has stated that he is familiar with such guidelines. The medical evidence indicates that there is a reasonable chance of isolating mature sperm suitable for use in assisted reproductive treatment, although there is always a risk that the sperm did not survive the freezing procedure. I am satisfied on the evidence that Ms Cresswell can afford the costs associated with assisted reproductive treatment.

[193] I am satisfied that there is a real prospect that the sperm will be able to be used if the ART centre determines that it will facilitate the use of the posthumous sperm. The orders provide that it will only be used for the impregnation of Ms Cresswell. That is appropriate given that on no view of the evidence had Joshua Davies contemplated having a child with anyone other than Ms Cresswell in the period leading up to his death.

The best interests of the child

[194] While this is an important factor, as the Court identified in *Re Estate of Edwards* and in *MAW*, the best interests of a child who has not been and may not be conceived is difficult to talk about sensibly. Hulme J in *Re Estate of Edwards* commented that, while he acknowledged the force of some of the matters to which O'Keefe J had regard in *MAW*,[182] he considered circumstances to have changed significantly since the time of that judgment in 2000. I tend to agree.

[195] Hulme J stated in *Re Estate of Edwards*:

> "…the evidence before me is clear that any child that will be conceived will be born to a loving mother and with a supportive extended family."[183]

[196] His Honour further commented that whilst conception of children with ART was well accepted in 2000, when *MAW* was decided, it seemed safe to assume that it was even more the case in 2011.[184] One can safely assume that it is even more the case in 2018.

[197] Any child conceived will obviously be without a father, which Ms Cresswell will have to deal with sensitively, and she will need to ensure that the child has the appropriate support in dealing with that fact. Ms Cresswell has indicated that she will have counselling as to how to best explain to the child the circumstances of the child's birth.

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182 See [143] to [144].
183 At [144].
184 At [145].

[198] It is not unusual, in the present age, for children to be brought up by a single parent, including by deliberate choice.[185] Morris J in *YZ v Infertility Treatment Authority*,[186] stated that:[187]

> "… In my opinion, the fact that the child will not have a father is not a sufficient reason to refuse to consent to the export of the sperm. It is trite to observe that many children born naturally do not have a father – or a loving father – yet still live long and happy lives. Further, according to the Victorian Law Reform Commission, there is a growing body of methodologically rigorous studies that demonstrate that it is not family structure that determines emotional, social and psychological outcomes for children, but the quality of family processes and relationships. Indeed, according to the Commission, the marital status requirement in the Act bears no relationship to the health and wellbeing of children. …" (citations omitted)

[199] In the present case, I am satisfied that, on the evidence of Ms Cresswell, her father, Joshua's parents and close friends, no one is aware of any family or friends expressing opposition to Ms Cresswell having possession of Joshua Davies' sperm for the purpose of being impregnated. I am further satisfied that any child conceived using Joshua Davies' sperm will be loved and cared for by his or her mother, grandparents, extended family and close friends, and supported by them. While Ms Cresswell and Joshua's family and friends will always feel his loss, I consider that sufficient time had passed since his death to enable Ms Cresswell and members of his extended family to rationally consider the implications of Ms Cresswell having a child in the circumstances, the needs of that child and whether they could realistically support that child.

[200] Ms Cresswell undertook some counselling after Joshua Davies' death to assist in dealing with her grief. She has discussed with a psychologist the importance of her making a decision to have a baby using Joshua's sperm on her own, without any pressure from any third parties. She has also discussed considerations that she will have to be aware of in relation to the birth of a child in the absence of his or her father and the circumstances of the use of Joshua's sperm.

[201] Ms Cresswell has given evidence that she does not feel that her decision is an emotional one, but is founded on conscious thought and made with a full understanding of the consequences. While it is difficult to determine how grief can affect one's decision making, there is no evidence suggesting to me that Ms Cresswell's decision is not a conscious one with a full understanding of the consequences and the paramount interests of any child who may be conceived. In this respect, I give particular weight to Ms Cresswell's evidence as to what she has done to prepare for such a child, what she will do if she has such a child, including to explain to the child the circumstances of its birth, and the support that she will need. That evidence shows a rational consideration of the issues that will arise in the event that she successfully conceives a child using Joshua's sperm.

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185 A single woman may use donor sperm to become impregnated in relation to which parenting rights are addressed in the *Status of Children Act* 1978 (Qld).

186 [2005] VCAT 2655.

187 At [48].

[202] There are further protective provisions in the NHMRC guidelines to ensure that the individual intending to conceive is capable of undertaking assisted reproductive treatment and has considered the implications of doing so. The current NHMRC guidelines also require that ART providers provide access to counselling for people who are going to engage in the receipt of posthumous gametes and for them to be satisfied, *inter alia*, that the surviving prospective parent has undergone appropriate counselling.

[203] Ms Cresswell's counsel informed the Court that Ms Cresswell is willing to engage in any further additional counselling that may be required. Dr Cerqui, a doctor employed by Women's Health Only Medici Medical Centre, has also told Ms Cresswell that she will have to undertake further counselling as required by the NHMRC guidelines.[188]

[204] Ms Cresswell has deposed to the fact that she is well aware of the challenges of being a single mother as she has two friends who are single mothers. Ms Cresswell is a young woman and may in the future meet someone else with whom she wants to have a relationship and perhaps have children. That will no doubt require adjustments not only by Ms Cresswell, but by Joshua's family as well. There is nothing to indicate to me that all concerned will respond in any other way than what would be in the best interests of any child. Ms Cresswell has discussed the realistic possibility of a blended family with a psychologist and the considerations which she would need to take into account, particularly in relation to Joshua's child in such a situation.

[205] The evidence satisfies me that Ms Cresswell has ensured that she has taken steps to have the financial security and her own home to bring up any child, and provide a stable living environment.

[206] She has looked at the terms of her employment and found that she can obtain parental leave as well as flexible arrangements to work days and hours that suit her needs. Joshua's mother has deposed to the fact that she will be able to assist in child minding and is willing to do so. Ms Cresswell's father has also deposed to the fact that she would have the full support of his family to assist her with the raising of Joshua's children.

[207] I am satisfied on the evidence that any child which may be conceived as a result of the use of Joshua Davies' sperm will be loved, cared for and able to be financially and emotionally supported, not only by Ms Cresswell but by the extended family. In those respects there is clear evidence that the best interests of the child will be served in the event that Ms Cresswell determines to proceed and the ART centre consents to assisting her in that regard. While one cannot predict what may eventuate in the future, there is nothing to suggest to me that it is against the best interests of any child that may be conceived for the declaration to be made.

Community standards

[208] In *MAW v Western Sydney Area Health Service*,[189] O'Keefe J expressed the view that he had no research which could assist in relation to the existence or nature of the particular community standard applicable to the circumstances of the case before him. His Honour indicated that it was not appropriate for him to postulate as to the community standard based on a personal view. That is clearly correct. That is a matter

188 Affidavit of A Cresswell, CFI7 at [62].
189 (2000) 49 NSWLR 231.

for Parliament. However, I consider that this is only a relevant matter for the courts to consider to the extent that the question of community standards may impact on the best interests of the child or the making of a declaration such as the present is contrary to government policy. There is nothing suggesting that to be the case here.

[209] In *MAW*, His Honour stated that, reasoning from first principles, namely, that children are normally born during the lifetimes of their parents or within a relatively short time after the death of one or both of the parents, he would conclude that there was a general community standard which would not expect children to be conceived and born long after the death of the father. His Honour opined that, even if that was not correct, the most that could be said was that there was no applicable community standard which would support the exercise of any discretion in favour of creating a situation of the kind postulated by the application in that case. Chesterman J in *Re Gray* expressed that it was not in the best interests of the child to allow reproductive tissue to be taken from the deceased's body when the child would not have the father.[190]

[210] The unpredictable nature of life means that there is always a risk that a parent may pass away when their child is at an early age or even before the child is born. The notion of someone choosing to be a single parent is not unusual in the present day.

[211] The nature of society and what is regarded as acceptable and not acceptable changes over time. While no doubt, the notion of having a child without a father after the father's death would have been unthinkable in the 1960's, that would not appear to be the case now. Single parents are choosing to have children alone. While it is likely that Australian society would still regard the traditional family unit as the best situation for a child's upbringing, there are studies suggesting that, of itself, it is not detrimental to a child to be born using ART and brought up in more unconventional households.[191]

[212] Although of limited weight, Dr Cerqui expresses the view, based on his practice, that it is not relatively uncommon for single women to engage the services of IVF treatment and states that he has personally been involved in the care of single women who have had successful pregnancies with the assistance of IVF using donor sperm and that the children have been raised by their mother and extended family.

[213] Decisions in this area also raise a number of ethical issues. The Attorney-General referred the Court to an article by Benjamin Kroon et al, which discusses the difficult ethical issues in relation to the posthumous collection and use of sperm.[192] That article stated that:

> "When a man unambiguously documents his intent/desire to undergo PMSR, most ethicists would agree that the procedure is ethically permissible. Matters become more complicated where there is no explicit written consent, a situation where the question of evidence of intent becomes of central importance. Without explicit consent, it may be

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190 [2001] 2 Qd R 35 at [23(c)].

191 Victorian Law Reform Commission "Outcomes for children born of ART in a diverse range of families" at, for example, p 67. The report was taken into account by the Victorian Law Reform Commission in its 2005 report on access to and eligibility for assisted reproductive technology.

192 Kroon, Kroon, Holt, Wong and Yazdani, (2012) "Post-Mortem sperm retrieval in Australasia", *Australian and New Zealand Journal of Obstetrics and Gynaecology*, 52: 487-490 at 487; See also, Frederick Kroon (2016) "Presuming consent in the ethics of posthumous sperm procurement and conception", *Reproductive BioMedecine and Society Online*, 1: 123-130.

> unclear whether the deceased man would have wanted to father a child that he himself would not be able to raise. …"

[214] Dr Rebecca Collins, however, considers that the question of the deceased's consent seems to have disproportionate weight in a case where a person has died suddenly, where the rationale of consent is to protect autonomy. She states:[193]

> "Indeed, in circumstances where the majority of requests for posthumous reproduction come from surviving spouses whose partners have died suddenly, it is appropriate to consider whether the presumption against consent is justified."

[215] Some States, such as New South Wales, Western Australia, South Australia and Victoria,[194] condition the use of any sperm removed from a deceased person on the deceased having consented to its use after his death. Notwithstanding that prohibition, decisions in those States have held that a deceased person is entitled to the possession of the sperm removed, even though the deceased's partner intended to take it out of the State to a jurisdiction where there was no such prohibition.[195]

[216] While the deceased's wishes must be considered under the TAA and the NHMRC guidelines, there is no requirement in Queensland that the deceased must have given his express consent for the use of his sperm posthumously.

[217] While there are no doubt conflicting views in society as to the above issues, the above issues are broader issues for consideration by Parliament and do not have significant weight in the present context.

[218] Section 236 of the *Criminal Code* does not suggest any policy against the making of the declarations in circumstances such as the present.

[219] The Attorney-General, appearing as *amicus curiae*, did not suggest that allowing Ms Cresswell's application would be contrary to any community standards.

[220] There is nothing suggesting that the making of the declarations sought would be contrary to public policy.

Whether the decision is a rational decision

[221] This is a matter which is relevant to the best interests of any child that may be conceived. Based upon the evidence of Ms Cresswell and her family, Joshua's family, friends and the medical evidence, I am satisfied that Ms Cresswell's decision to proceed with this application is rational and motivated by her wanting to have a child, specifically Joshua Davies' child, and is not an irrational response to grief. As I have outlined, the evidence shows that before Joshua's death, Ms Cresswell and Joshua Davies both held the desire to have children and had taken steps in that regard. Her

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193 Rebecca Collins (2005) Posthumous Reproduction and the Presumption Against Consent in Cases of Death caused by Sudden Trauma", *Journal of Medicine and Philosophy*, 30(4): 431-442 at 442.

194 The Victorian Law Reform Commission report on access to and eligibility for assisted reproductive technology in 2005 did not espouse that gametes should be removed from a person who lacks decision making capacity or who has died, unless that person expressly consented to such a procedure.

195 *Edwards; Re Estate of Edwards* at [140]; *GLS v Russell-Weisz* [2018] WASC 79 at [126] although the decision in that case turned on the terms of the relevant legislation; *Re H, AE (No 3)* (2013) 118 SASR 259 at [12] and [19]; *AB v Attorney-General (Vic)* (2005) 12 VR 485 at [160].

desire to do so now is consistent with the plans that they had made but her evidence shows a realistic assessment of the difference in her situation now and the prospect of being a single mother.

[222] The NHMRC guidelines specifically provide for the ART clinic to be satisfied that sufficient time has passed so that grief and related emotions do not interfere with decision-making.

Any non-compliance with the TAA

[223] I am satisfied that all parties concerned sought to act lawfully in relation to the removal of the sperm. To the extent that the provisions of the TAA were not complied with it appears to be due to a lack of understanding by the applicant as to their effect, in circumstances requiring urgent action.

[224] On the basis of the evidence before me, I am satisfied that the removal of the sperm was done with the authority of the court order, but also with the consent of the senior next of kin, the authority of a designated officer and at least without opposition from the Coroner, such that, like in *Re Estate of Edwards*, any failure to comply with the TAA was not the result of insurmountable hurdles.

[225] Given that the removal of sperm from Joshua Davies was sanctioned by an order of this Court, and the sperm was lawfully removed pursuant to that order, it was an act authorised by law.[196] To the extent that there was any non-compliance with aspects of the TAA, it was not the result of any deliberate flouting of important statutory provisions, nor is the order sought in the present case consequential upon that earlier order, albeit that the sperm the subject of the present application came into existence as a result, at least in part, of that order.[197]

[226] In the present case, the applicant has at all times sought to act lawfully in seeking the authority of this Court before taking any steps to implement her wish to become pregnant using the sperm of her late partner, Joshua Davies. In the circumstances, I am satisfied that any non-compliance with the TAA would not cause me to refuse the declaration.

Exercise of discretion

[227] The present case is a difficult one. This is not because of any concern I hold that Ms Cresswell will be anything other than a loving and supportive mother or that her family and Joshua's family and friends will be anything other than caring and supportive of any child that may be conceived.

[228] A particular concern arises from the absence of any expressed wish from Joshua Davies as to what he intended or would have wished upon his death in relation to the use of his sperm and particularly its use to have a child who he would never know.

[229] However, as I have stated above, the TAA contemplates the removal of sperm in circumstances where there is no evidence that a person has objected to its removal and the 2017 NHMRC guidelines also provide for the use of sperm where there is no

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196 *AB v Attorney-General* (2005) 12 VR 485 at [143] See also *Re Estate of Edwards.*

197 Given that there is evidence to suggest the procedure was authorised by a designated officer and the Coroner consented or directed his consent was not required.

evidence of consent, but also no evidence of any objection to its use. The Attorney-General did not oppose or consent to the making of the order. Moreover the application is made with the support of Joshua's family. There is no evidence suggesting to me that Joshua Davies taking his own life was in any way connected with any change in view of his relationship with Ms Cresswell or the plans that they held for the future. Of course, what was in his mind that morning is something that no one will ever know.

[230] The evidence satisfies me that Ms Cresswell is acting with the support of Joshua's family and her father and that it is not contrary to Joshua's wishes if she has a child with his sperm. I am also satisfied that Ms Cresswell is acting responsibly and rationally and has taken appropriate steps to ensure that any child that may be conceived is financially and emotionally supported and that the extended family will support any child and Ms Cresswell and it is not contrary to the best interests of any child that may be conceived that the declarations sought are made.

[231] Balancing all of the factors, which I have discussed, I do not consider that any of the discretionary factors weigh against the *prima facie* entitlement Ms Cresswell has established to possession of the sperm of Joshua Davies and to the making of the declarations in the terms sought.

Summary of Conclusions

[232] On the basis of the analysis above I find that:

(a) The removal of the testes and the sperm for use in assisted reproductive treatment was for a medical purpose and an authority was required under part 3 of the TAA. It is likely that the removal of the sperm from Joshua Davies was in compliance with the part 3 of the TAA but in the absence of further evidence I cannot be satisfied that it did in fact comply with the TAA. I am satisfied that there were no insurmountable hurdles to compliance with the provisions had they been addressed at the time that the order for removal was made. The removal was, however, carried out under a court order of a superior court which is valid and was therefore lawful;

(b) Once the sperm was separated from the body of Joshua Davies, it was property capable of permanent possession given that its removal, separation and preservation was the result of the lawful exercise of work and skill;

(c) Ms Cresswell was *prima facie* entitled to possession of the sperm as Joshua Davies' partner, as the medical and laboratory staff were acting as her agents in undertaking the work and skill required to separate and preserve the sperm;

(d) The discretionary factors weigh in favour of making the declarations sought and the declarations should be granted.

[233] The applicant seeks declarations that she is entitled to possession and use of the sperm subject to conditions. The orders made in *Re Estate of Edwards* provided that the applicant was entitled to the possession of the sperm and not as to its use. The question of its use was to be determined by the ART clinic in the ACT upon its satisfaction with its guidelines. Gray J in *Re H, AE (No 3)* made orders as to the use of the sperm consistent with the Court exercising its inherent jurisdiction. I have determined that Ms Cresswell has a right of permanent possession to the sperm. Any use of the sperm for reproductive assisted treatment must be through an accredited ART centre by

reference to the NHMRC guidelines of which the ART centre must be satisfied. However, given the removal was ordered pursuant to the Court's inherent jurisdiction, I am satisfied that it is appropriate to make the orders in the proposed terms confining the use of the sperm in the exercise of the Court's inherent jurisdiction. The constraints in the order are also consistent with the medical purpose for which the sperm was removed. While the terms of TAA may not have been strictly complied with at the time of the removal, it is appropriate for the order to limit the purpose of its use to the purpose for which it was removed consistent with the terms of the TAA. The limitations on its use are also consistent with the fact that Joshua Davies was planning to have children with Ms Cresswell. I am satisfied, however, that the question of what should occur in relation to any unused sperm or embryos at the completion of treatment and procedures should be determined on the basis of the NHMRC guidelines or any other applicable statutory requirements. Given the other limitations in the orders to be made, I do not consider it necessary to make an order in terms of 2(g) of the application.

[234] Notwithstanding the conclusions of this Court, it remains a matter for the ART clinic concerned to determine whether it is satisfied to proceed to facilitate the use posthumously of the sperm removed from Joshua, having regard to its guidelines, including the NHMRC guidelines. The terms of the order does not require the ART clinic to use the sperm or carry out any procedure. The ultimate decision as to whether to proceed at all, of course, remains with Ms Cresswell and no one else.

[235] It is apparent from the reasons that this is a complex and developing area of the law. There are a number of matters which are unresolved in this area that do not arise for decision in the present case. It may be an area which it may be considered would be appropriate for consideration by a body such as the Law Reform Commission, even though there are a number of issues which are likely to need to be resolved by Parliament.

Orders

[236] The orders that I propose to make are that:

(1) Order 4 made by this Court on 24 August 2016 be discharged.

(2) The applicant is entitled to possession and use of the spermatozoa on the following conditions:

(a) Queensland Fertility Group (QFG) is to transfer directly the spermatozoa to Women's Health Only (WHO) on the applicant's direction;

(b) The applicant must provide the Court and QFG seven days' written notice of any such direction to transfer the spermatozoa;

(c) On receipt of the written direction, QFG shall:

(i) After 7 days, take such steps as are necessary to deliver the spermatozoa to WHO; and

(ii) Within 7 days of such transfer, inform the Court in writing of the transfer.

(d) The applicant pay the costs of such transfer;

(e) The spermatozoa must only be used in a treatment procedure or procedures;

(i) In conjunction with an oocyte or oocytes produced by the applicant; and

(ii) To produce an embryo or embryos to be implanted in the applicant.

(f) The spermatozoa must be used only under the control and supervision of QFG and/or WHO.

[237] I will hear the parties as to whether any order should be made as to costs.