



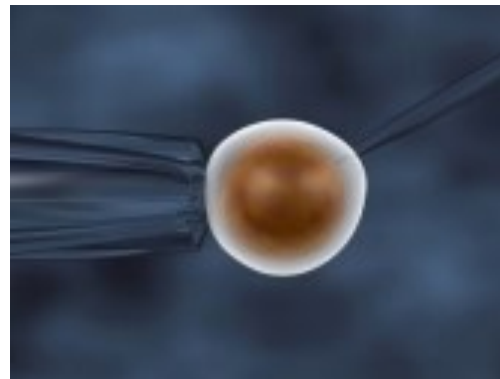
THE UNIVERSITY OF
WESTERN AUSTRALIA

FACULTY OF LAW

Posthumous Reproduction: A Legal Perspective

Dr Brenda McGivern

Associate Professor, Faculty of Law, UWA



ACHIEVE INTERNATIONAL EXCELLENCE



Overview

- What governs the posthumous use of gametes and embryos in WA (and what alternative models exist)?
- Key concepts
 - Use
 - Storage
 - Removal
 - Consent
- Practical and jurisdictional issues
- Considerations for reform



WA: Human Reproductive Technology Act

22. (1)(a) the gametes of a person shall not be used, or for such a use be received by a licensee or participant, unless ... there is an effective consent, by that person, to the gametes being so used; and the gametes are used in accordance with that consent

(b) the gametes of a person shall not be kept in storage unless ... there is an effective consent, by that person, to the storage; and the gametes are stored in accordance with that consent ...

(8) For the purposes of this Act a consent ... shall not be taken to be effective unless ... it is given in writing ... and it has not been withdrawn



WA: Directions

8.9 No posthumous use of gametes

Any person to whom the licence applies must not knowingly use or authorise the use of gametes in an artificial fertilisation procedure after the death of the gamete provider.

[Note **Human Reproductive Technology Act 1991, s3:** *this Act* includes a reference to ... such directions as are published in the Gazette]



VIC: Assisted Reproductive Treatment Act

46. A registered ART provider may use a person's gametes, or an embryo created from the person's gametes, in a treatment procedure after the person's death only if :

- (a) the treatment procedure is carried out ... on the *deceased person's partner* ...; and
- (b) the deceased person provided *written consent* for ...a treatment procedure *of that kind*; and
- (c) the Patient Review Panel has approved the use of the gametes or embryo; and
- (d) the person who is to undergo the treatment procedure has received counselling ...



Practical and jurisdictional issues

- ↘ Distinction between use, storage and removal
- ↘ Human Tissue and Transplant Act – Part III (donations After Death)
 - s22 – may authorise removal of tissue from dead body for transplantation, or other therapeutic or scientific purposes, if deceased consented or if no reason to believe deceased objected
 - ss 23, 27 – consent of Coroner to remove tissue if reportable death
- ↘ Jurisdiction of Supreme Court
 - Inherent jurisdiction
 - O52 r 3, Supreme Court Rules – taking samples of property



Practical & jurisdictional issues ... and considerations for reform

Consider the distinctions between:

- ↘ Death of a person who has begun ART and has embryos / gametes in storage
- ↘ Person who has embryos / gametes in storage but has not begun ART
- ↘ Person who has no gametes or embryos in storage
- ↘ Person who has consented to use of gametes or embryos for reproductive purposes, but has not considered posthumous use
- ↘ Person who has consented to use of gametes or embryos for posthumous reproduction
- ↘ Person who has never expressed a view on assisted reproduction or posthumous reproduction



Thank you

Note that the content of this paper and the comments of the author are intended only to facilitate discussion of the topic; they are not intended to be, and should not be relied upon as, legal advice.