

SUPREME COURT OF QUEENSLAND

CITATION: *Re Leith Dorene Patteson* [2016] QSC 104

PARTIES: **RE LEITH DORENE PATTESON**
(applicant)

FILE NO: BS 4099 of 2016

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED EX TEMPORE ON: 21 April 2016

DELIVERED AT: Brisbane

HEARING DATE: 21 April 2016

JUDGE: Burns J

ORDER: **The court orders that:**

- 1. The testes and any spermatozoa of the deceased, Tony Brian Deane, (“the Removed Tissue”) be removed;**
- 2. The Removed Tissue be provided to an IVF organization nominated by the applicant, Leith Dorene Patteson;**
- 3. Any blood tests advised by the IVF organization be carried out; and**
- 4. The Removed Tissue be stored pending a future application to the Supreme Court for the use of the Removed Tissue.**

The court directs that this Order be served by telephone call and email from the applicant’s solicitors to:

- 1. The IVF organisation;**
- 2. The facility at which the body of the deceased is currently being stored; and**
- 3. The family of the deceased, through their solicitors, Munro Legal, Ground Floor, 154 Hume Street, Toowoomba, 07 4659 9958, bill@munrolegal.com.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where the applicant made an urgent application seeking an order authorising the removal and

storage of the testes and any spermatozoa from her recently deceased partner – whether such an order should be made

Transplantation and Anatomy Act 1979 (Qld), s 24

Baker v State of Queensland [2003] QSC 2

KJR v Attorney-General for Queensland [2008] QSC 325

Re Denman [2004] 2 Qd R 595

Re Floyd [2011] QSC 218

Re Gray [2001] 1 Qd R 35

COUNSEL: K McMillan for the applicant
K Parrot for the *amicus curiae*

SOLICITORS: Aden Lawyers for the applicant
Crown Law for the *amicus curiae*

- [1] HIS HONOUR: The applicant before the court is Leith Doreen Patteson. Her fiancé, Tony Brian Deane, died late last night when the life support machine to which he was connected at the Toowoomba Base Hospital was disconnected. Ms Patterson has applied to the Court for orders authorising the removal of the testes and any spermatozoa from Mr Deane's body, the provision of what is removed to an IVF organisation nominated by her, the carrying out of any blood tests advised by the IVF organisation and the storage of the testes and any spermatozoa pending a future application to this court for their use.
- [2] Ms Patteson is represented on this application by Ms McMillan QC. Mr Parrott, who has considerable experience in this area, appears as *amicus curiae* and Mr Munro, who represents Mr Deane's family but, in particular, Mr Deane's parents, appears by telephone.
- [3] Mr Parrott does not oppose the making of the orders sought and has very properly drawn to the court's attention the doubts previously expressed as to whether the court may ultimately entertain an application such as this. See: *Re Gray* [2001] 1 Qd R 35; *Baker v State of Queensland* [2003] QSC 2.
- [4] However, in *Re Denman* [2004] 2 Qd R 595, Atkinson J permitted the removal of tissue, on an interim basis, pending an application to use the tissue. In other words, the orders made by her Honour in *Re Denman* allowed an extraction, but on terms that required the applicant to come back to the court before any

use was made of what was extracted. That approach has been followed in several subsequent decisions of this court (see, for example, *KFJ v Attorney-General for Queensland* [2008] QSC 325) as well as in other Australian jurisdictions.

[5] Following the same approach, the question for me is whether the testes and any spermatozoa should be allowed to be removed from Mr Deane's body in order to determine its future use. That is a question that must be determined quickly for the reason that, to be viable, the sperm and/or testes must be removed and processed within 24 hours of death.

[6] The affidavit material before me establishes that Ms Patteson first met Mr Deane in August 2015. They commenced a relationship on 7 September 2015. Shortly thereafter, Mr Deane was diagnosed with a serious and rare form of blood disease. There is evidence that he was unable to work in consequence and that Ms Patteson cared for him. By then, Mr Deane had moved in with Ms Patteson and Centrelink was advised that they were in a de facto relationship. Then, on 9 October 2015, Mr Deane and Ms Patteson became engaged to be married. They hoped to do so in the middle of this year and had made some plans to that end.

[7] The evidence before me from Ms Patteson and a number of other persons who have sworn affidavits establishes that both Mr Deane and Ms Patteson were very anxious to have a child together. They started "trying for a child" earlier this year. Indeed, it was their dream to start a family and buy a house. At one point, Ms Patteson thought she was pregnant and she and Mr Deane were "ecstatic", but when it was discovered that this was not the case they "continued to keep trying". They made no secret of their attempts to conceive a child. It was common knowledge among friends and family alike.

[8] Very sadly, on Monday, 18 April 2016, Mr Deane made an attempt on his life. Shortly afterwards, he was discovered by Ms Patteson, who called the ambulance. He was transported to the Toowoomba Base Hospital, but was

found to be brain dead. His life support machine, as I have already mentioned, was switched off at 11.30 pm last night.

- [9] The circumstances of his death are such that it is a reportable death under s 24 of the *Transplantation and Anatomy Act* 1979. By s 24(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.

- [10] As was the case in *Re Floyd* [2011] QSC 218, no direction under that Act has been given by the Coroner. However, the evidence confirms that the Coroner will abide the order of this Court. As such, if I make an order in the terms proposed allowing for the removal of the testes and any spermatozoa from Mr Deane's body, the Coroner will abide that order.

- [11] For the reasons largely expressed in argument with Ms McMillan and Mr Parrott, I am firmly of the view that the approach taken by Atkinson J in *Re Denman* should be followed in this case and that the balance of convenience is strongly in favour of the orders sought.

- [12] Those orders will, to use the language of the Senior Judge Administrator in *KJR v Attorney-General for Queensland* [2008] QSC 325, permit mature reflection by Ms Patteson whether to proceed with the use of any extracted material and, if an application for use for the purposes of fertilisation is made, the orders proposed today will ensure that such an application will not be rendered futile through loss of viability of the sperm if it should be held that there is power to grant such relief.

- [13] It should be apparent from what I have said that, to the extent that doubt remains about the jurisdiction of this Court to make an order for the use of the sperm, that is an argument that can be had if and when such an application for use is advanced on behalf of Ms Patteson.

[14] Orders as per the draft, initialled by me and placed with the papers.