SUPREME COURT OF QUEENSLAND

CITATION:	*In the matter of Gray* [2000] QSC 390
PARTIES:	**IN THE MATTER OF WARREN ANDREW GRAY** (deceased)
FILE NO:	No 8459 of 2000
DIVISION:	Trial Division
DELIVERED ON:	12 October 2000
DELIVERED AT:	Brisbane
HEARING DATE:	27 September 2000
JUDGE:	Chesterman J
ORDER:	**Application refused**
CATCHWORDS:	PERSONAL PROPERTY – OWNERSHIP AND POSSESSION – NATURE AND MEANING OF OWNERSHIP OF AND PROPERTY IN PERSONALTY – application by wife of deceased husband for order to remove sperm sample – whether *parens patriae* jurisdiction applicable – whether applicant had proprietary rights in body *Criminal Code* (Qld), s 236 *Infertility Treatment Act* 1995 (Vic), s 43 *Supreme Court of Queensland Act* 1991, s 8 *Transplantation & Anatomy Act* 1979 (Qld), s 23 *AB v Attorney-General of Victoria* BC 9803488, 12 July 1998; 23 July 1998 *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 *Doodeward v Spence* (1908) 6 CLR 406 *Fountain v Alexander* (1982) 150 CLR 615 *MAW v Western Sydney Area Health Service* BC 200003155, 24, 25 April; 3 May 2000 *Peirce v Swan Point Cemetery* 14 Am Rep 667 *Rees v Hughes* [1946] KB 517 *Reg v Sharpe* Dea & Bell CC 160 *Secretary, Department of Health and Community Services v JMB & SMB* (1991-1992) 175 CLR 218 *Williams v Williams* [1882] 20 Ch D 659
COUNSEL:	D A Skenner for the applicant
SOLICITORS:	Hogan & Besley Lawyers for the applicant

[1] **CHESTERMAN J:** The applicant's husband died in his sleep between 10 pm on 26 September 2000 and 6 am on 27 September. He was 37 and was believed to be in good health. His death was completely unexpected. He and the applicant had lived together for about 14 years. They married in 1994 and had one child, a son born on 13 August 1999. The applicant is 42 years old. She and her husband had discussed having another child. It was their intention to attempt to do so in the near future.

[2] The applicant wishes to become pregnant by means of artificial insemination utilising semen taken from her dead husband. The feat is technologically possible but to have any chance of success the fluid must be extracted within 24 hours of death.

[3] The extraction of semen, if it is to be done, would be performed by a doctor associated with Monash IVF Queensland. The procedure apparently involves the surgical removal of a section of testicle. Monash IVF will not perform the operation without an order of the Supreme Court. According to its fact sheet:

> "• Little is known about sperm quality after death. The attempt at sperm recovery may be ultimately unsuccessful or ineffective . . .
> • Ethics committee approval would be required . . . and Monash IVF would not agree to proceeding with treatment unless a year had passed since the death and evidence of appropriate counselling had been obtained".

If the extraction is to proceed the body samples taken from the corpse will be kept frozen by Monash IVF for at least the period mentioned when it will be used in an attempt to impregnate the applicant, if that is still her wish, and if she demonstrates that it is appropriate given her then situation.

[4] To have any chance of success the removal of tissue had to occur by 10 pm on 27 September. The application which, of course, was *ex parte* was heard urgently at 8 pm. The point involved is, to say the least, novel and the exigencies of the situation meant there was little time for research. I was however provided with a decision in a case of a similar kind by a judge of the Supreme Court of New South Wales and another by the Victorian Supreme Court. In that case, *AB v Attorney-General of Victoria* BC 9803488 Gillard J noted that:

> "The question of the court's jurisdiction and the exercise of it are matters which will have to be explored, as will the question of the use of the sperm hereafter, if at all. . . . a question which arises for consideration is whether the personal representative has a right to cause the removal of bodily tissue and fluids from the body. Another question is, assuming there is that right, what right does the personal representative have to use what has been removed . . ."

Because of the need to act urgently and because of the uncertainties identified his Honour ordered:

> "That permission be given to a legally qualified medical practitioner to remove spermatozoa and associated tissue from the body of (the deceased) . . . and . . . are not to be used for any purpose without an order from this Court."

It is perhaps worth noting that s 43 of the (Victorian) *Infertility Treatment Act* 1995 makes it unlawful for a woman to be inseminated with the sperm of a dead man.

[5] There is no legislation in Queensland which touches the subject matter of the application. The only reasoned decision in a similar case is adverse to the applicant. Influenced by these considerations her counsel asked for orders that would permit the taking of semen and its storage but would prevent its use without a further order of the court. Such an order would preserve the applicant's position if further research or the passage of legislation might show a right to proceed with the insemination.

[6] Some further facts should be mentioned. The applicant's husband died intestate. The applicant will almost certainly be entitled to a grant of administration over her late husband's estate. The deceased's father, his next of kin, gave his consent by affidavit to the removal of a testicular sample for the purposes of freezing and subsequent insemination. The deceased had given his consent, recorded on his current driver's licence, to the removal of organs in the event of his death. Counsel for the applicant informed me that the applicant and her husband had never discussed the possibility of her impregnation by semen taken after death.

[7] It did not appear to me that the court had any power to make the orders sought but that, if it did, the power should not be exercised in the manner sought by the applicant. Accordingly I refused the application and indicated that I would give written reasons at a later date. These are my reasons.

[8] It is curious that Monash IVF requires the express authority of the Supreme Court before it will remove or store reproductive tissue given that there is no established jurisdiction to make such an order. It is presumably a Reproductive Medicine Unit which must obtain accreditation from the Reproductive Technology Accreditation Committee. (see Chapter 2 of the "*Ethical Guidelines on Assisted Reproductive Technology"* published by the National Health and Medical Research Council, an entity established by Commonwealth legislation of that name.) Chapter 11 of the Guidelines describes "Prohibited/unacceptable practices" which include:

> " 11.11 The use in ART treatment programs of gametes or embryos harvested from cadavers."

Gametes are reproductive cells which would include semen. The Guidelines have an uncertain status. They appear to have no statutory force (see "*The Legal Regulation of Foetal Tissue Transplantation"* Vol 4 *Journal of Law and Medicine* by Anita Stuhmcke) but are obviously statements of considered ethical positions. It may be that Monash IVF insists upon a court order to avoid a charge that it is acting unethically. It is not, in my view, a sufficient reason to make an order of the kind sought to protect a service such as Monash IVF from the consequences of acting in breach of the Guidelines.

[9] The applicant submitted that the court had power to make the order by reason of s 8 of the *Supreme Court of Queensland Act* 1991 and/or its inherent jurisdiction of the type described as *parens patriae.* Section 8 provides that the court has all jurisdiction that is necessary for the administration of justice in Queensland and, subject to the Commonwealth Constitution, unlimited jurisdiction at law, in equity and otherwise. I apprehend that the section does not confer power on the judges of the court to do whatever accords with their own, perhaps idiosyncratic, views of justice. The jurisdiction is to afford justice to litigants according to law, ie established legal principle. The difficulty in the present case is identifying any principle which would justify making the order. The application is itself an implicit acceptance that neither the widow nor next of kin has a right to interfere with the body. Nothing I have found suggests that the court can create or regulate such a power.

[10] The jurisdiction *parens patriae* does not supply the deficiency. By the ancient concept of royal authority the sovereign was obliged to protect the persons and property of his subjects, especially those unable to look after themselves. This obligation was in time delegated to the Lord Chancellor and through him to the Courts of Chancery and thus to courts whose jurisdiction is defined by reference to the jurisdiction of that court, such as the Supreme Court of Queensland. See *Fountain v Alexander* (1982) 150 CLR 615 at 633 per Mason J and *Secretary, Department of Health and Community Services v JWB & SMB* (1991-1992) 175 CLR 218 at 279-280 per Brennan J, who noted that the jurisdiction "has become essentially protective in nature". Its subject matter appears now to be limited to the questions of custody, guardianship and welfare of children, and the protection of property subject to a charitable trust. As to the latter see *Halsburys Laws of England* 4th ed Vol 5 para 870.

I am not aware of any authority which would make the jurisdiction exercisable with respect to a dead body.

[11] O'Keefe J reached the same conclusion in the case I have mentioned, *MAW v Western Sydney Area Health Service* BC 2 0000 3155, a decision made on 3 May 2000. Though similar that case had an important difference. The person from whom it was desired to extract semen had not died. He was the plaintiff's husband who had suffered severe brain damage in an accident. His life was being maintained by mechanical means and his death was imminent. The court found its *parens patriae* jurisdiction did not extend to giving consent, on behalf of the comatosed and dying man, for the removal of semen because the procedure could not be said to be for his welfare or protection. Except in the special case of non-therapeutic sterilisation his Honour thought that:

> ". . . operative procedures that are not necessary to preserve the life or ensure improvement or prevent deterioration in the physical or mental health or wellbeing of an incapable person are not able to be consented to by the Court under its *parens patriae* jurisdiction . . ."

I respectfully agree with that opinion. Its expression highlights the impossibility of invoking the jurisdiction in the case of a body from which life has departed.

[12] An examination of the law shows, in my opinion, apart from statute, there is no right to interfere with a body.

> "It is quite clearly the law of this country that there can be no property in the dead body of a human being. . . . neither does our law recognise the right of any one child to the corpse of its parent . . our law recognises no property in a corpse . . . the executors are entitled to the possession and are responsible for the burial of a dead body . . . although there is no property in a dead body the executors have such a right. . . to have the dead body delivered up to them. Accordingly the law in this country is clear, that after the death of a man, his executors have a right to the custody and possession of his body (although they have no property in it) until it is properly buried."

Per Kay J in *Williams v Williams* [1882] 20 Ch D 659 at 662-665.
In *Rees v Hughes* [1946] KB 517 Scott LJ said (523-4):

> "There is an obligation at common law, in the nature of a public duty, which rests on certain persons in whose possession a dead body may be – a husband being one – to bury it. . . . where a man dies possessed of personal property, the duty of burying his body falls primarily on his personal representatives . . . and this duty entitles the personal representative to absolute priority of reimbursement out of the estate."

At 527-8 Tucker LJ said:

> "And in the interests of public decency the law allowed a stranger, who had voluntarily incurred and paid (funeral) expenses, without any request . . . to do so to recover them . . ."

[13] In an article "Dead Bodies" in 2 *Sydney Law Review* 109 SG Hume points out:

> "Under the English legal system there has always been provision, as there must be under any civilised legal system, that the bodies of persons dying within the territory over which the system operates should be decently interred or otherwise disposed of so as to prevent the creation of a nuisance."

The author proceeds to discuss on whom the obligation rests and concludes (surely correctly) that it includes the wife of a deceased husband because:

> "the moral obligation of a wife to bury her husband's body can be no less than that of a husband to bury his wife's body and therefore it is submitted that in any case in which the question arose a decision it would not be held that a wife is subject to the incidents of the duty to bury her deceased husband's body."

[14] These principles were confirmed by the High Court in *Doodeward v Spence* (1908) 6 CLR 406 which however held, by majority, that in some circumstances there may be a right of property to a body. According to Griffith CJ:

> "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 attributes differentiating it from a mere corpse awaiting burial, he acquires the 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 . . ." (414)

Higgins J who dissented would not have recognised the exception. His Honour having reviewed both English and American authority concluded that the right of an executor or next of kin to possession of the body was for the purposes of burial only. His Honour said (422):

> "It must be remembered that the imperious necessity for speedy burial (or other disposition) of the dead, which is at the root of the doctrine that there can be no property in a corpse, is recognised and enforced by the common law of England, irrespective of the particular facts or expediency of each case. . . . the right of burial was a common law right . . . there is a duty to bury . . ."

[15] In one of the American cases cited and apparently relied upon by Higgins J, *Peirce v Swan Point Cemetery* 14 Am Rep 667 it was said:

> "That there is no property right in a dead body, using the word in the ordinary sense, may well be admitted. . . . there is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the parts of others to abstain from violation."

[16] The English Court of Appeal has recently reaffirmed the principle stated by Higgins J in *Doodeward.* Speaking for the court Peter Gibson LJ said, in *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 at 600:

> " . . . the executors or administrators of the deceased or other persons charged by the law with the duty of interring the body have a right to the custody and possession of it until it is properly buried . . . the other persons who are charged by the law with the duty of interring the body include, for example, the parent of an infant child . . . but I am not aware that there is any authority that there is such a duty on the next of kin as such. If there is no duty, there is no legal right to possession of the corpse. However, even if that is wrong and the next of kin do have some right to possession of the body, there is no authority stating that right is otherwise than for internment or other proper disposition of the body."

[17] It should also be noted that s 236 of the *Criminal Code* makes it a misdemeanour for any person, without lawful justification or excuse the proof of which lies on the

accused, to improperly or indecently interfere with or offer any indignity to any dead body or human remains. On an indictment prosecuting such an offence it would no doubt be for the jury to decide what is improper or indecent, or an indignity, but it would seem at least arguable that removing part of the testicles of a dead man would come within the ambit of those words. In *Reg. v Sharpe* Dea & Bell CC 160, a son who caused his mother's coffin and body to be disinterred for the purpose of being reburied in consecrated ground was convicted of a cognate offence despite his having acted without disrespect for the dead and from subjectively good motives.

[18] 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 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 *Peirce* which goes further than English authority is but a logical extension of it.

[19] According to Meyers, the author of "*The Human Body and the Law"*:

> "The person with the legal right to possession of the cadaver is entitled to receive it in the same condition as when death occurred."

The authority cited is an article *"Medical-Legal Aspects of Tissue Homotransplantation"* 18 U. Detroit L.J. 271 at 273 by Vestal, Tabor and Schumaker. The author goes on:

> "Their right to possession of the body for burial is normally a right to the body intact:
>
> > "The theory is that an unauthorised autopsy interferes with this custodial right because the dissection of the body prevents burial in a proper manner" ".

The authority cited for the second proposition is Chayet, *"Consent for Autopsy"* 274 New England Journal of Medicine 268. No doubt American authority on this as on all topics must be treated with reserve because of the considerable differences in jurisprudence. Nevertheless these expressions appear consistent with the more reticent expressions in English and Australian authority.

[20] 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.

[21] In an English work, edited by Kennedy and Grubb "*Principles of Medical Law"* in a section entitled *"Legal Status and Medical Uses of Corpses"* it is said (p 888):

> "On 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 appears lawful provided that it does not offend the law on public decency, or against causing indignity to a dead body."

I cannot agree. On the expressed supposition there is no reason why the right to take parts of a body could be limited to the legal personal representative, or surviving spouse, or next of kin. Anybody with access to the body may help themselves to part of it. The limitation imposed by the laws defending public decency or s 236 of the *Criminal Code* appear altogether too uncertain to determine who may and who may not plunder a corpse and for what purposes. In any event the principle I have mentioned, that the right to possession is conferred for, and is limited to, the express purpose of burial, does prohibit the removal of bodily parts.

[22] Part 3 of the *Transplantation and Anatomy Act* 1979 regulates the removal of tissue (which is defined in such a way as to include semen) from dead bodies. The removal must be for transplantation into the body of a living person or for some "therapeutic . . . or . . . other medical or scientific purpose". The applicant's purpose is not one of these so the Act does not apply. It may be noted in passing that s 23(3) permits the removal of tissue for any of the specified purposes from a person who has "during his or her lifetime, by signed writing consented to the removal after death of tissue from his or her body". The husband's driver's licence contained such a consent. The scheme of the Act is to allow the removal of tissue subject to the restrictions provided for by a medical superintendent of a hospital or appropriate next of kin. The Act does not give the Supreme Court any role in the process. If the statutory conditions are satisfied tissue may be taken without any order of a court.

[23] If it were right that the court had some general overriding power to permit the applicant to have reproductive tissue taken from her husband's body it would presumably be a power the exercise of which was discretionary. If the power existed I would decline to exercise it in the present case for three reasons.

(a) The deceased did not in his lifetime indicate his consent to such a procedure. He did not, naturally enough, ever turn his mind to such an eventuality. While it may be accepted that he desired another child it was a desire he wished to consummate in his lifetime. There is no reason to believe he wished his wife to be impregnated posthumously.

(b) The court could have no confidence that the applicant's desire is a result of careful or rational deliberation. Given the need for urgent removal and the circumstances of her husband's death the applicant must have been suffering greatly from grief and shock. The decision made under the effect of such emotions is one she may well come to regret. It may not reflect her true desire or her assessment of what is best for herself and her child.

c) The interests of any child born as a result of the procedure must be of particular importance in the exercise of the discretion. I cannot see how it can be said that the interests of such a child will be advanced by inevitable fatherlessness. The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in its best interests.

[24] Artificial reproduction is part of rapidly changing and expanding medical technology. As science progresses the law will obviously face frequent challenges for which there may be no adequate precedent, although I do not myself accept that this is such a case. It is not a proper criticism of the law that it has not developed a specific principle applicable to the opportunities presented by such change. The law should not have to cater for every technological possibility. Good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise. When they are not the appropriate legal response should be provided by Parliament which can properly access a wide range of information and attitudes which can impact upon the formulation of law that should enjoy wide community support.

[25] It was for these reasons that I refused the application.