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ONTARIO COURT ESTABLISHES EMBRYO AS LEGAL PROPERTY UNDER CONTRACT LAW

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A. INTRODUCTION

On July 25, 2018, the Ontario Superior Court of Justice released a precedential decision in Ontario in *SH v DH* which dealt with a contract dispute regarding the ownership of an embryo in the event of a divorce.[1] This case is significant in that "there is no law on point that has considered how to dispose of embryos when neither party has a biological connection to the embryo"[2] and also provides much needed clarity in Ontario with respect to the treatment of biological material as legal property. Further, comments by the court regarding the relevance of certain factors when determining the ownership of the embryo provide guidance in the area of law regarding reproductive technology and legal rights.

B. FACTS

The embryo in dispute was one of four embryos which had been created by a fertility centre in Ontario using eggs and sperm that were purchased by the parties, a then-married couple, from a fertility centre in Georgia, United States. Contracts had been made and signed by the parties with respect to both fertility clinics. Of the four embryos, only two were viable, and only one of the two viable embryos was implanted into the Respondent and brought to term during the couple's marriage. After the couple divorced, the

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[1] *SH v DH*, 2018 ONSC 4506 [*SH*].
[2] *Ibid*, at para 17.

Respondent wished to use the remaining embryo for herself, but the Applicant sought to have it donated instead.

C. ANALYSIS

In this case, the court accepted the treatment of the embryo as legal property because the parties had agreed to such terms in the contracts with both the Georgia and Ontario fertility clinics, and because there was no dispute with respect to this matter.[3]

With regards to the disposal of the embryo, the court concluded that contract law and the intention of the parties should govern because the *Family Law Act*,[4] which normally applies in the equalization and determination of ownership of marital assets, was inadequate in dealing with an embryo which could not be physically divided.[5] As such, the courts turned to the relevant contracts: between the parties and the fertility centre in Georgia ("Georgia Contracts") and the fertility centre in Ontario ("Ontario Contract"). In determining whether the contracts were valid, the court noted that no arguments of undue influence, mistake, misrepresentation or other basis to invalidate the contract had been made. Further, while noting that there was a potential issue of contract illegality with respect to the Georgia Contracts due to the prohibition against purchase and sale of embryos under the Canadian *Assisted Human Reproduction Act*,[6] it declined to deal with this issue since it had not been brought up by either party. Accordingly, the provisions in the contracts were fundamental to the court's determination on the matter.

In releasing the embryo to the Respondent, the court used both Georgia and Ontario Contracts to establish jurisdiction over the matter and then to determine the parties' intention with respect to the disposal of the embryo. First, the Georgia Contracts placed the full responsibility of determining such ownership on the court:

> In the event of divorce, separation, or marriage dissolution we understand the legal ownership of any stored embryo(s) must be determined in a property settlement and will be released as directed by order of a court or competent jurisdiction.[7]

[3] *SH, supra* note 1 at para 19.
[4] *Family Law Act,* RSO 1990, c F3.
[5] *SH, supra* note 1 at para 20.
[6] The *Assisted Human Reproduction Act,* SC 2004,c2 prohibits and therefore makes illegal a contract of purchase or sale of an embryo in Canada. Since the purchase contract in this matter was made in Georgia, and not in Canada, it was not immediately clear whether such contract would be considered illegal in Canada.
[7] *SH, supra* note 1 at para 23.

Second, to determine the parties' intentions with respect to the contracts, the court turned to the Ontario Contract which had provided the parties with three options for what to do in the event of divorce or legal separation. In this case, the parties gave the authority to decide on the disposal of the embryo to the Respondent:

> In the event of divorce or legal separation between the patient and her partner, the Agent shall … respect the patient's wishes.[8]

The court noted that both parties understood the terms to which they had agreed to, and that it would be "contrary to contract law were [the court] to decide that the wishes of the parties at the time of entering into this contract were other than what they agreed to. One cannot apply buyer's remorse."[9] As such, the Respondent's wishes were followed, and the embryo was given to her.

Although the embryo was released to the Respondent, the Applicant was entitled to reimbursement for his portion of the value of the embryo. In arriving at this conclusion, the court referenced a landmark decision dealing with the property division of sperm straws in *JCM v ANA* where a party was ordered to pay a certain amount to the other party as compensation when the equal division of straws was not physically possible.[10] Taking the total cost of all four jointly owned embryos, which amounted to $11,500 USD, the court determined that the cost of the embryo at issue was one-quarter of the total amount, at $2,875 USD. Of that amount, the Applicant was entitled to half, which resulted in an award of $1,438 USD.

D. ADDITIONAL GUIDANCE: IRRELEVANT FACTORS IN DETERMINING OWNERSHIP OF EMBRYO

The court's treatment of the embryo as property is in itself remarkable under Ontario law. However, the court made important comments regarding whether certain factors are relevant in the determination of the ownership of the embryo in these circumstances. These comments, while not binding to the decision, provide some direction in this developing area of law regarding biological reproduction and technology. In summary, the court held that the following factors were irrelevant in their deliberations: the best interests of the parties' existing son, the chance of a live birth from the implantation of the embryo, and the financial means of the Respondent.

[8] *Ibid.*
[9] *SH, supra* note 1 at para 31.
[10] In *JCM v ANA*, 2012 BCSC 584 [*JCM*], the parties were seeking court direction with respect to the disposition of thirteen sperm straws upon their separation. The court, treating the straws as property, divided the straws so that one party received five while the other received six; the party with the additional sperm straw was ordered to pay $125 to the other party as reimbursement for the extra one-half of the sixth straw.

The Applicant argued that the Respondent should not be entitled to use the embryo because such use would not be in the best interests of their existing child. The court, again referencing *JCM*,[11] dismissed the submission as inappropriate and stated that doing so would be "highly speculative and potentially discriminatory".[12] Further, the court stated that chances of a live birth resulting from the implantation as well as the financial means of the Respondent were not relevant considerations when determining the ownership of the remaining embryo. In justifying this statement, the court cited a landmark Supreme Court of Canada decision, *R v Morgentaler*, which affirmed that people had a "right to make decisions of fundamental importance affecting their private lives, such as having (or not having) children, without unwarranted interferences". [13]

E. CONCLUSION

As reproductive technologies have progressed and become more widely used, the courts continue to deal with complex legal and ethical issues regarding the legal treatment of biological material. This case is important in that it clearly confirms that embryos are legal property, which for now is the law in Ontario. However, the court declined to address other matters that may arise in similar cases, namely, how other legislation such as the *Assisted Human Reproduction Act* and conflicts of laws may apply to the validity of contracts governing the sale of biological material. Further, it is unclear whether, and to what extent, the principles established in this case may be applied to other types of biological material, or other fact scenarios.

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[11] *Ibid*, at paras 82-85. The court held that it would be "both impractical and improper" to analyse the best interests of a child who may be conceived from the sperm donation, and also inappropriate to analyze the best interest of existing children with respect to the matter as it would be "borderline discriminatory to couples".
[12] *SH, supra* note 1 at para 25.
[13] *R v Morgentaler*, [1988] 1 SCR 30 at 26.