

## Evans v Amicus (2003)

**[2003] EWHC 2161 (Fam); (2004) 2 WLR 713 : (2003) 4 All ER 903 : (2004) 1 FLR 67 : (2004) 75 BMLR 115 : Times, October 2, 2003 : Independent, October 14, 2003**

01/10/2003

### Court

Family Division

### Summary

The female claimants were not entitled to use frozen embryos created by IVF treatment after the claimants had separated from their male partners who had withdrawn their consent to treatment.

### Facts

Application for declarations and injunctions relating to the use and storage of certain frozen embryos and for declarations (if necessary) that provisions of the Human Fertilisation and Embryology Act 1990 were incompatible with the European Convention on Human Rights. The two female claimants ('E' and 'H') underwent IVF treatment with male partners from whom each subsequently separated and with whom neither had a continuing relationship. In each case there remained in existence embryos, frozen in storage, created from the gametes of each claimant and her former partner. Each claimant wished to remove the embryos from storage in order to have the embryos transferred into them with a view to becoming pregnant. E sought an injunction requiring her former partner to consent to the use of the embryos. Both claimants sought declarations that such use would be lawful. H argued that three of the embryos created by herself and her former partner had been unsuccessfully transferred on a previous occasion and therefore the two remaining embryos in storage had also been "used" for the purposes of Sch.3 para.4(2)(a) to the 1990 Act. The former partners argued that the 1990 Act gave them an unqualified right to withdraw their consent before any embryo was used and that they had withdrawn their consent to use of the embryos. They contended that the stored embryos had not been "used" as they had not been transferred into a woman. The Human Fertilisation & Embryology Authority and the Secretary of State for Health were joined as defendants and argued that the terms of the 1990 Act precluded the court from granting the relief sought.

(1) In the case of both couples no post-separation agreement was reached in relation to the stored embryos, but in any event no such agreement would have been binding. (2) The consents in these cases were for "treatment together" and the attempt by the claimants alone to use the embryos was not treatment within the consents as required by Sch.3 para.6(3) to the 1990 Act. The treatment that the couples were receiving together had come to an end and the consents given by the male partners to being treated together with the claimants no longer applied. The clinics concerned would be in breach of their licences if they treated the claimants in the circumstances. The claims therefore failed. (3) The

stored embryos had not been “used” and it was therefore not too late for consent to be withdrawn under Sch.3 para.4. In the context “use” meant the transfer of an embryo into the claimant. (4) Art.2 was not engaged in this case since an embryo was not a human life. (5) The wishes of the claimants to continue with IVF treatment and to have the embryos released from storage and transferred into them engaged their right to respect for their private lives under Art.8, which was also engaged by the former partners’ opposition to that course of action. The provisions of Sch.3 to the 1990 Act which permitted the former partners to refuse to allow the claimants access to the embryos was an interference with their Convention rights but that interference was both necessary for the protection of the rights of all four parties and proportionate. It was entirely appropriate for the State to require that couples embarking on IVF treatment should all consent and should be able to withdraw that consent individually at any time before the embryos created in the process were used by being transferred into the woman. There was therefore no breach of Art.8. (6) There was no breach of Art.12. (7) The 1990 Act did not discriminate against women undergoing IVF treatment within Art.14. (8) The 1990 Act itself excluded the operation of any estoppel which would prevent a male former partner from withdrawing his consent prior to the use of the embryos. In the wider public interest of the proper operation of the scheme under the Act Parliament did not permit him to give such a promise. (9) In any event no promissory estoppel was made out on the facts.

## Permission

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