Access to medical records by personal representatives and applications in the fertility sector (Re AB)

31/03/2020

Private Client analysis: Sir Andrew McFarlane, president of the Family Division, considered the categories of person who can make requests under the Access to Health Records Act 1990 (AHRA 1990) where the patient has died. In particular the judgment confirms that the right of a personal representative to access health records under AHRA 1990, s 3(1)(f) is unqualified, in the sense that it is not necessary to show that the personal representative may have a claim arising out of the deceased's death.

The case further clarifies that when applications for declarations are made in the fertility sector, the proceedings are, by default, civil proceedings governed by the Civil Procedure Rules 1998 (CPR 1998). They are, however, best determined by a High Court judge sitting in the Family Division of the High Court, given the developing and accepted practice of matters relating to fertility treatment assigned for hearing to that division. Written by Stephanie David, barrister, at 39 Essex Chambers.

Re AB (disclosure of medical records) [2020] EWHC 691 (Fam)

What are the practical implications of this case?

First and foremost, this judgment confirms that the right of a personal representative (PR) to access health records under AHRA 1990, s 3(1)(f) is unqualified, in the sense that it is not necessary to show that the PR may have a claim arising out of the deceased's death. This clarification is welcome as there had been suggestions from some quarters, most notably guidance issued by the British Medical Association, that the right was qualified.

The judgment also clarifies the procedure to be followed for *sui generis* applications for declarations clarifying questions of law. Numerous such declarations have been sought in the last few years in relation to issues arising from fertility treatment but it has not been entirely clear by what procedural route they should be brought before the court.

The president stated that applications for declarations under the inherent jurisdiction should be made by originating summons. The Civil Procedure Rules 1998 apply to such applications by default. In terms of allocation, given the accepted practice of matters relating to fertility treatment being assigned to the Family Division under the inherent jurisdiction, it is sensible for all of the applicant's applications to be determined in this division.

This has important practical implications, including that by default proceedings are to be held in public, subject to certain exceptions (see CPR 39.2).

Given the particular facts, the judge determined that the proceedings should be heard in private, that media representatives could attend but their attendance would be subject to a reporting restrictions order.

What was the background?

AB (the applicant) is the brother of CD (deceased) and the PR of CD's estate. The respondent is a fertility clinic in England with whom CD made arrangements for the freezing and storage of his sperm. AB requested a copy of all the records relating to these arrangements for the storage and use of CD's sperm and/or any embryos created using CD's sperm. The clinic declined the request. AB therefore applied to the court.

It was agreed that any records held by the respondent were a 'health record' under AHRA 1990. AHRA 1990, s 3(1) creates a statutory right to access a health record and details those who may make such an application, including 'where the patient has died, the patient's personal representative and any person who may have a claim arising out of the patient's death' AHRA 1990, s 3(1)(f). Access shall not, however, be given, where that is contrary to the patient's recorded wish (AHRA

1990, s 4(3)). Where information relates to, or was provided by, a third party, that can be redacted (AHRA 1990, s 3(2)).

The dispute concerned the interpretation of AHRA 1990, s 5(4), which further limits disclosure in circumstances where the record-holder considers that the record includes 'information which is not relevant to any claim which may arise out of the patient's death.'

Section 33A of the Human Fertilisation and Embryology Act 1990 (HFEA 1990) was also considered: it is a general prohibition on disclosure of the relevant information; however, given the disclosure would be made under AHRA 1990, s 3 that prohibition does not apply (HFEA 1990, s 33A(2)(r)).

What did the court decide?

The starting point was that AHRA 1990, s 3(1)(f) establishes two distinct categories of individual: (a) the patient's PRs and (b) any person who may have a claim arising out of the patient's death.

The president accepted the applicant's submission that AHRA 1990, s 3(1)(f) is plain on its face:

- the two categories are disjunctive: reference to a 'claim arising out of the patient's death' is expressly tied to the second category, not the first
- if all those making a request had to establish they had a claim, then there would be no need to specifically identify a PR

The restriction on access in AHRA 1990, s 5(4) is a 'reasonable and proportionate limitation' afforded to an individual who seeks to make a claim arising out of the patient's death – such a person can only see records on a 'need to know' basis.

The president also observed that the guidance from the Department of Health and Social Care supported that interpretation.

He accordingly declared that it was lawful for the respondent to provide a copy of all the relevant records (with information relating to third parties having been redacted or removed) and the respondent was required to provide such records.

Case details

- Court: Family Division
- Judge: Sir Andrew McFarlane P
- Date of judgment: 23 March 2020

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