



Posthumous Assisted Reproduction

Background

The practice of freezing gametes and embryos has raised a new set of moral and legal questions. In the 1950s it became possible to freeze sperm to be thawed later and used to fertilize an egg. Frozen ova and embryo cryopreservation became common after the dawn of in vitro fertilization. It is now possible for a conception and/or implantation of an embryo to occur after the death of one or both of the gamete donors. When considering the law and ethics surrounding this issue, it is important to consider the intent of the decedent.

Issues

Does the decedent have a property interest in his or her gametes such that they can be considered inheritable property?

Should clear intent of the decedent to procreate posthumously be required? If so, what is the standard to prove consent?

Case Law

Parpaliax v. CECOS, Trib. Gr. Inst. Creteil, Gazette du Palais (G.P.), Sep. 15, 1984

Summary

Alain Parpalaix was diagnosed with testicular cancer. He deposited nine vials of sperm in the Center d'Etude et de Conservation du Sperme (CECOS) without specific instructions regarding its use before he began chemotherapy treatment. Alain married Corrine two days before his death. CECOS denied Corrine access to the samples. She had requested them with the intent of using them to conceive a child.

Parpalaix and Property

The court rejected the idea that sperm should be considered an ordinary moveable property interest. Instead, sperm was described as "the seed of life... tied to fundamental liberty of a human being to conceive or not to conceive."

Parpalaix and the Donor's Intent

The court determined that the donor's intentions would be determinative in deciding whether the sperm could be used for procreation after his death. However, the court did not clearly discuss the guidelines for determining the donor's intent. Here the court stated that Alain's marriage to Corrine two days before his death demonstrated his intent to have Corrine inherit his sperm for procreation as well as the testimony of Alain's parents that he did intend for Corrine to be the mother of his child either during or

after his life. The court did not find that a written contract was needed to demonstrate intent for posthumous reproduction.

The court described this interest as an “interim” category of property that had “special respect because of its potential for human life.”

Hecht v. Superior Court Cal. Rptr. 2d 275 (Cal. App. 1993)

Summary

William E. Kane committed suicide; however, prior to his suicide, he deposited 15 vials of his sperm with California Cryobank, Inc. in Los Angeles. In his will, he bequeathed the sperm to his long-time girlfriend, Deborah Ellen Hecht. The will included specific instructions that he intended her to have the sperm to impregnate her, if she wished. Kane’s two existing children from a previous marriage objected to the inheritance.

Hecht and Property

The court held that sperm being stored with the intent to be used for artificial insemination was unlike other human tissue because it was ‘gametic material’ that could be used for reproduction. The court concluded that the decedent had a clear interest in the sperm and its use for reproduction and that that interest was sufficient to constitute ‘property’ within the meaning of the probate code.

Hecht and the Donor’s Intent

The court accepted the written instructions in Kane’s will as proving his intent to procreate posthumously.

Policy

American Society for Reproductive Medicine (ASRM)

*The Ethics Committee of the American Society for Reproductive Medicine, “**Posthumous reproduction.**” Fertility and Sterility, Vol. 82 (2004)*

The committee acknowledged that decisions regarding whether or not to have a child have been considered a private matter as well as a fundamental right of individual adults. The committee, however, noted limited precedent on how the right is expressed or respected after death.

The committee recommended that programs require donors to make their intentions regarding posthumous reproduction known prior to the donation. If no decision has been made, the committee stated that “one would expect that in most instances this would preclude any posthumous use.” The committee acknowledged situations in which, when one partner faces imminent death or chemotherapy for cancer, the couple will request to have gametes stored. If this does occur, posthumous reproduction may be requested by the surviving partner. The committee concluded that in these cases and other cases relating to posthumous reproduction “it is the responsibility of the specialist in assisted reproduction to insist on full disclosure to all participants, to ascertain that all appropriate informed consents are obtained, and to ensure adequate screening and counselling of all concerned parties.”

European Society of Human Reproduction and Embryology (ESHRE)

Pennings, G., G. De Wert, et al. (2006). "ESHRE Task Force on Ethics and Law 11: posthumous assisted reproduction." Human Reproduction 21(12): 3050.

The task force found that posthumous reproduction within the context of an existing parental project when preserved gametes were used by the surviving partner was acceptable in some situations. The task force distinguished those situations from cases in which third parties request the use of embryos or gametes. In third party cases, "the usual conditions of gamete and embryo donations apply" (relatives other than the intended parent should not receive special treatment).

The task force identified two key concerns when considering the ethics of posthumous reproduction in the context of an existing parental project. First, the task force considered autonomy and intent of the decedent and, secondly, they considered the well-being of the future child.

The task force recommended a opting-in system over an opting-out system of providing consent for posthumous reproduction. In the absence of written consent the existence of cryostored gametes or embryos only demonstrates the existence of a paternal project and does not prove the deceased's acceptance of the continuation of the project after his or her death. Members of the task force were split on the issue of whether explicit consent to continue the project after death was necessary. The members who felt that explicit consent was not necessary developed a framework to consider in determining whether or not to continue with the parental project. They stipulated that the surviving partner could only use the gametes for his or her own reproduction, the gametes could not be donated for the use of others and that the gametes must be destroyed after the death of both parents.

The task force considered different factors that might affect the future child's well-being. These included being raised in a one-parent family, possible stigmatization upon learning that he or she was conceived after death, the use of the surrogate, and being treated as a "commemorative child" or a symbolic replacement of the deceased by the surviving parent. The task force decided the first three concerns created no substantial risk to the child and that extensive counselling could minimize any risk of the child being treated as "commemorative."

The task force also considered the state of mind of the surviving parent and noted that the psychology of bereavement should be taken into account during the decision-making procedure. Individuals undergoing the loss of a partner may be prompted to make hasty decisions influenced by feelings of guilt and idealization of the partner after a loss. However, a waiting period of one year and counselling should ensure competent decisions.

From a philosophical perspective, the task force noted that those who know that their desire to have children posthumously will be respected may experience increased quality of life and decreased anxiety about their family's future. Similar considerations allow individuals to make decisions regarding organ donation and wills.

The task force concluded that posthumous reproduction, in the context of a pre-existing parental project, should have: written consent provided by the deceased obtained at the time of storage or beginning of IVF cycle, counselling for the surviving partner during the decision-making process, and a minimum of a one year waiting period before treatment can be started.

The Model Act Governing Assisted Reproduction Technologies (2008)

Model Act Governing Assisted Reprod. Tech. (2008) available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

The model act provides guidance regarding whether or not children born from posthumous assisted reproduction are entitled to inheritance and social security benefits from the deceased genetic parent. It addresses the requirement of intent of the deceased to procreate posthumously in determining parenthood and benefits to the child. It does not, however, provide guidance on whether or not posthumous reproduction should be allowed.

Studies

Nakhuda, G. S., J. G. Wang, et al. "Posthumous assisted reproduction: a survey of attitudes of couples seeking fertility treatment and the degree of agreement between intimate partners." Fertility and Sterility(0).

This study surveyed couples requesting infertility consultations. The majority of participants (77.8%) responded that they would permit their spouse to harvest their gametes for the purpose of conceiving a child after their death and the majority (80.2%) responded that they believed their spouse would permit the use of their gametes for posthumous reproduction.

Summary

Most of the case law and regulation surrounding issues of posthumous reproduction focus on the establishment of parenthood and the resulting inheritance and social security benefits of an already existing child. Case law also exists regarding the retrieval of gametes posthumously. Outside of *Hecht*, there is no or very little domestic case law or state regulation regarding the ability to engage in posthumous assisted reproduction using gametes stored prior to death.