

Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion

Ethics Committee of the American Society for Reproductive Medicine

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Posthumous gamete (sperm or oocyte) retrieval or use for reproductive purposes is ethically justifiable if written documentation from the deceased authorizing the procedure is available. Retrieval of sperm or eggs does not commit a center to their later use for reproduction, but may be permissible under the circumstances outlined in this opinion. Embryo use is also justifiable with such documentation. In the absence of written documentation from the decedent, programs open to considering requests for posthumous use of embryos or gametes should only do so when such requests are initiated by the surviving spouse or partner. This document replaces the report of the same name, last published in 2012. (*Fertil Steril*® 2018; ■: ■-■. ©2018 by American Society for Reproductive Medicine.)

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KEY POINTS

- Posthumous gamete (sperm or oocyte) retrieval or use for reproductive purposes is ethically justifiable if written documentation from the deceased authorizing the procedure is available. Retrieval does not commit a center to their later use for reproduction, however. Embryo use is also justifiable with such documentation.
- Programs are not ethically obligated to participate in posthumous assisted reproduction. Programs should develop written policies regarding the specific circumstances in which they will or will not participate in such activities.
- In the absence of written documentation from the decedent, programs open to considering requests for posthumous assisted reproduction should only do so when such requests are initiated by the surviving spouse or partner.
- It is very important to allow adequate time for grieving and counseling

- prior to and during any assistance with posthumous reproduction.
- Programs should be aware that state laws vary on whether posthumously conceived children are legally recognized as offspring of the deceased. State laws also may vary on the permissibility of posthumous retrieval or use of gametes or embryos. Clinics should be knowledgeable about and follow any applicable state laws, and should advise patients that they may wish to seek legal counsel regarding state laws that may affect their, and their offspring's, legal rights.

Assisted reproductive technologies facilitate pregnancy and childbirth by means other than those traditionally relied upon for family formation, including reproduction after the death of one or both of the gamete providers. In general, decisions concerning whether or not to have a child have been considered private and a fundamental right of individual adults. In

part, this is because of the importance to individuals of having and rearing their own children. The case of posthumous reproduction, however, is different in a number of respects. First, the deceased obviously will not be able to rear the child. This raises the question of whether an individual can have an interest in reproducing, even when rearing is not possible, and further, whether such an interest ought to be respected. Conversely, the possibility of posthumous reproduction requires considering whether an individual can have an interest in not reproducing after his or her death. Additional ethical considerations include the choices or interests of the surviving spouse or partner who wants to reproduce using the deceased's gametes or embryos, of others who cared about the deceased (such as surviving parents), or of any potential offspring, as well as how these interests should be weighed against the interests of the deceased.

POSTHUMOUS INTERESTS

We begin with whether an individual's interests can ever be said to survive his or her death. It may seem that the

Received March 27, 2018; accepted April 2, 2018.

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Fertility and Sterility® Vol. ■, No. ■, ■ 2018 0015-0282/\$36.00

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<https://doi.org/10.1016/j.fertnstert.2018.04.002>

deceased (and perhaps even those in persistent vegetative states) no longer have any interests, since they cannot feel, think, or experience anything. With the permanent loss of these abilities, how, it may be asked, can they have a stake in anything? How can they be harmed or benefited? This approach presumes an experience-based account of interests, on which people who can no longer experience anything because of their deaths can no longer have interests. In other views, interests may persist after death. One account of these interests locates them in the choices of people while they are living about what will happen in the world after their deaths: people write wills and extract deathbed promises, for example, and thus have interests in these being carried out after their deaths. Another account is that people have critical or legacy interests in the continuation of important commitments and values that they had during their lives (1). From these views, at least some interests of individuals who have died are ethically significant and should continue to be taken into account after death (Feinberg 1984).

INTERESTS REGARDING POSTHUMOUS REPRODUCTION

The creation of children posthumously is something about which most people may be expected to care. This suggests that individuals have interests in control over posthumous reproduction. Recognition of these interests is reflected in the fact that assisted reproduction programs have consent forms that stipulate the disposition of gametes and embryos after the death of one or both of the individuals who contributed the gametes or to the creation of the embryos.

A small number of studies have addressed attitudes toward posthumous use of gametes or embryos. One recent study of the general population found that significant majorities were unfamiliar with posthumous reproduction and that only about half supported the idea (2). Of those in support, a significant majority believed that the posthumous use of gametes is permissible only with prior informed consent (2). Predictors of support included younger age, higher education, higher income, Democratic political affiliation, and current attempts to conceive (2). Another survey study found that 70% of males and 58% of females would support their spouse's use of their gametes; however, the issue of prior consent was not addressed in this study (3).

Attitudes of patients seeking infertility treatment or sperm banking have also been studied. Studies assessing the attitudes of patients banking their sperm at one sperm bank prior to infertility or cancer treatment reported that the majority consented in writing to posthumous use (4). Similarly, the majority of patients presenting for assisted reproduction to a single center indicated that they would permit posthumous assisted reproduction (5).

Despite the interest that most people are likely to have in whether their offspring are brought into the world after their death, it has been argued that a right to reproduce posthumously can be said to exist only if posthumous reproduction implicates the same interests, values, and concerns that reproduction ordinarily entails (6). Such interests, values, and concerns would not exist on an experiential account

of interests, because the experiences that give reproduction its meaning and importance to individuals are by definition unavailable in the case of posthumous reproduction. The dead cannot experience gestation or participate in rearing. The remaining interests are critical interests in such matters as the knowledge that a genetically related child might be born after the individual's death or that a partner might be able to raise a child conceived posthumously. Thus, it has been argued that this interest is "... so attenuated that it is not an important reproductive experience at all, and should not receive the high respect ordinarily granted core reproductive experiences when they collide with the interests of others" (6). This interest is not sufficiently attenuated, however, that it can be dismissed if a spouse or partner shares it. This situation contrasts with that of individuals with an interest in posthumous reproduction who die without an intended partner. In this case, the attenuation of the interests of the deceased is not mitigated by the shared aspiration of a surviving partner, and the case for posthumous use of gametes or embryos is far less compelling.

Some maintain that avoiding posthumous reproduction is parallel to reproducing posthumously. The deceased will not experience unwanted gestation or rearing. They will experience neither anxiety about the welfare of their offspring, nor fear that demands will be made on them. However, the interest in not having children after one's death is more than an interest in avoiding certain experiences (such as rearing or worrying about them). Rather, it is an interest, shared by many people, in avoiding having children that one will not be able to raise and nurture. Many people oppose bringing fatherless or motherless children into the world. If an individual has a strong preference of this sort, and has left explicit instructions forbidding the use of his or her gametes for posthumous reproduction, it would be wrong for these instructions to be ignored or discounted. The most challenging case concerns preserved embryos where the couple has left instructions that they were not to be used after their death but the surviving partner wishes to use them because they are now the survivor's only chance to have a biologically related child. In such cases, the wishes of the deceased are clear, and thus the deceased has an interest in not reproducing that outweighs the survivor's interest in having a biologically related child.

In some cases, especially outside of fertility programs, there may not be explicit or written evidence of the wishes of the deceased regarding posthumous reproduction. In these situations, providers may struggle to establish the desires of the decedent and are obligated to exercise more caution in complying with requests for utilization of cryopreserved gametes or for postmortem gamete harvest than when there is a clear record of the wishes of the deceased. Providers should not provide posthumous assisted reproduction if there is evidence that the deceased would not have wanted it. Moreover, the Committee discourages posthumous assisted reproduction unless there is clear evidence that it would have comported with the decedent's wishes.

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