Posthumous collection and use of reproductive tissue: a committee opinion

Ethics Committee of the American Society for Reproductive Medicine

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Posthumous gamete (sperm or oocyte) procurement and reproduction are ethically justifiable if written documentation from the deceased authorizing the procedure is available. In the absence of written documentation from the decedent, programs open to considering requests for posthumous gamete procurement or reproduction should only do so when such requests are initiated by the surviving spouse or life partner. This document replaces the ASRM Ethics Committee report, "Posthumous reproduction," published in September 2004 (Fertil Steril 2004;82[Suppl 1]:S260-2). (Fertil Steril® 2013;99: 1842–5. ©2013 by American Society for Reproductive Medicine.)

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KEY POINTS

- Posthumous gamete (sperm or oocyte) procurement and reproduction are ethically justifiable if written documentation from the deceased authorizing the procedure is available.
- Programs are not obligated to participate in such activities, but in any case 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 gamete procurement or reproduction should only do so when such requests are initiated by the surviving spouse or life partner.
- It is very important to allow adequate time for grieving and counseling prior to the posthumous use of gametes or embryos for reproduction.

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 as to whether an individual can have an interest in reproducing, even when rearing is not possible, and further, as to whether such an interest ought to be respected. The possibility of posthumous reproduction also raises the question as to whether an individual can have an interest in not having offspring come into existence after his or her death, and if so, how this interest should be weighed against the interest of the surviving spouse or life partner who wants to reproduce with the deceased's gametes.

We begin with the question of whether an individual's interests can ever be said to survive his or her death.

POSTHUMOUS INTERESTS

It may seem that the 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? At the same time, most people do care about what will happen in the world, even after their death. That is why people write wills and extract deathbed promises. Surely, it would be not only wrong, but a wrong to an individual, a violation of that individual's autonomy, to contravene his or her wishes. This suggests that at least some of the interests individuals have continue to exert a claim on us, even after their death (1).

Moreover, the creation of children posthumously is something about which most people hold strong opinions. That is, few would be indifferent about whether their gametes were used after their death to bring children into the world. This suggests at least

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a prima facie right of individuals to control posthumous reproduction. Recognition of such a right 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 to the gametes and embryos.

IS THERE A RIGHT TO REPRODUCE POSTHUMOUSLY?

Despite the interest that most people are likely to have in whether their biological 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 (2). This would seem not to be the case, because most of 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 only remaining interest is the knowledge that a genetically related child might be born after the individual's death. 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" (2). This interest is not sufficiently attenuated, however, that it can be dismissed if a spouse or intimate 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 further preservation of frozen gametes or harvesting of gametes is far less compelling.

IS THERE A RIGHT TO AVOID POSTHUMOUS REPRODUCTION?

Some maintain that the case of avoiding posthumous reproduction is parallel to that of reproducing posthumously; it too is an attenuated interest that does not entail a right of control. 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. In many cases, however, 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 frozen gametes or for postmortem gamete harvest than when there is a clear record of the wishes of the deceased.

IMPLICATIONS FOR INFERTILITY PROGRAMS

Using Frozen Sperm, Ova, or Embryos with Authorization

Freezing sperm is now a routine part of artificial insemination, enabling sperm banks to screen for infectious disease. In addition, men who are concerned about the effect of recent or future occupational exposure to toxins may have their sperm frozen for future use. Similarly, men about to undergo chemotherapy or radiation treatment for cancer may freeze their sperm, in case the treatment leaves them sterile. In most cases, men who freeze their sperm expect to be alive when the sperm are used. That is, they intend to be rearing parents. However, an individual may authorize the use of his stored frozen sperm by his wife, or perhaps a fiancée or girlfriend, for posthumous pregnancy in the case of his death. Where explicit authorization is given, are there any reasons to refuse to honor such a directive?

One concern may be for the grieving survivor, who genuinely may not wish to have a child alone, but who feels pressure to carry out the wishes of her deceased partner. A related concern is that the survivor's decision-making may be clouded by grief. In all such cases, then, counseling should be offered. Moreover, it is strongly encouraged that programs allow adequate time for both counseling and the process of grieving to occur to ensure that the decision to have a child is the autonomous choice of the surviving spouse (3).

Another concern is for the child, who would have only one parent (4). However, many women have children without partners. If a clinic is willing to inseminate a single woman through the use of anonymous donor insemination, it is difficult to see the justification for refusal to inseminate a woman with her dead husband's sperm, designated explicitly for that purpose.

Some women have begun to freeze their eggs in hopes of initiating a pregnancy after chemotherapy or radiation therapy or at a more convenient time for child rearing (5). Freezing eggs poses more difficulties than freezing sperm. Nevertheless, should egg freezing become a routine clinical practice, women would be able to authorize that their frozen eggs be used for posthumous reproduction by their partners. One obvious difference between sperm and eggs is that in the case of surviving male partners, a surrogate would be required to bring the resulting embryos to term; this technology could be applied only in clinics that offer surrogacy services.

A couple that has created embryos together may jointly decide that, in the event of the death of either of them, the survivor should be able, if he or she desires, to use the frozen embryos to create a child or children through embryo transfer or gestational carrier. This wish should be respected, although counseling should be offered to ensure that the survivor is making an autonomous choice to proceed with the reproductive project.

Since accidents are the most common cause of death in individuals of reproductive age (6), programs should ensure

that the consent forms that patients sign when freezing sperm, oocytes, or embryos include specific directions regarding the use of their gametes or embryos after their death.

Should the Lack of a Written Directive Preclude the Surviving Partner from Extracting Gametes or Using Frozen Gametes or Embryos?

Every embryo cryopreservation consent form should address the specific disposition of embryos in the event of death. In the absence of a written directive prohibiting the use of frozen embryos by the surviving partner, however, it seems reasonable to allow surviving partners to reproduce from embryos he or she helped to create for that purpose.

The case of frozen gametes lacking a written directive for disposition after death raises a slightly different issue, since surviving partners do not have the same claim to another's gametes as they have to embryos they helped to create. However, the act of freezing the gametes suggests a joint reproductive desire, which can be brought to fulfillment by the surviving partner. After death, where there is evidence that the deceased would still have wanted reproduction to occur, or at least would not have objected, it seems reasonable to allow the survivor to proceed. Granted, practitioners' good faith efforts to carefully consider such cases will likely be constrained by reliance on second-hand information.

The most difficult situation occurs when no gametes have been frozen, which makes the determination of the existence of a joint reproductive desire more challenging. Moreover, extracting sperm or eggs after death involves an invasive procedure, to which some may object as a violation of bodily integrity. Although the incidence of such situations involving infertility programs may be relatively low (7), it is worth exploring the ethics of removing sperm or eggs from the body of a dead or dying individual for the light it shines on the issue of consent.

For example, a couple's plan to start a family may be thwarted by the sudden illness and death of the husband (8). In such cases, there may be no time to obtain written authorization from the dying man regarding the procurement and use of his sperm after his death. Should doctors comply with his widow's request that his sperm be procured for reproductive purposes? The law in some jurisdictions, for example, Israel, permits the practice. Guidelines there are based on the presumption that a man in a loving relationship with a woman would consent to her having his genetic child after his death (9). In addition, in such jurisdictions, there is a decidedly pro-natal approach to such issues. The guidelines, which have been critiqued on, among other grounds, the welfare of the child (4), weigh the certain and expressed interests of the living partner with the uncertain interests of the deceased. In contrast, in the United Kingdom, it is impermissible to use gametes for reproduction without the consent of the individual who contributed the gametes (7). The rationale for this position is the concept that to use someone's gametes without his or her consent is to treat that individual as a mere thing, as little more than a convenient source of reproductive tissue.

Moreover, it may be argued that the only way to ensure that posthumous reproduction is consistent with the wishes of the deceased is to require written and informed consent. Without written consent, some argue, it is difficult to know what the deceased would have wanted. In some cases, the only evidence of their wishes will be the testimony of a person bearing an apparent conflict of interest, namely the one who wishes to use the deceased's sperm or eggs to reproduce. One may argue, though, that at least in the case of sudden, incapacitating illness or accident, there may be no time to obtain the deceased's written consent, much less to schedule a counseling session to consider the issue. The question then becomes how likely is it that the deceased would have agreed with the surviving partner's plan, if permission could have been sought? If the deceased would have supported, or at least had no objection to, the posthumous use of his or her gametes by the surviving partner, the insistence on prior written consent may seem unreasonable or even cruel.

Such cases raise two issues for physicians. The first is whether a surviving partner's request for the removal of gametes from the deceased is one with which a physician could ethically comply. The second is whether the gametes, once removed, could ethically be used by a physician to enable the surviving partner to reproduce. Although the issues are distinct, the ethics of complying in both cases turns on the determination of whether the deceased spouse/partner would have given permission, if it had been possible to seek it. Because this determination cannot be made with certainty in the absence of a written directive, it is reasonable to conclude that physicians are not obligated to comply with either request from a surviving spouse or partner. Regardless of the actual policy, physicians and programs should develop written guidelines to address all such scenarios before they arise to avoid emergency appeals for guidance to entities such as hospital ethics committees (10). In addition, programs should familiarize themselves with laws in their state, if any, regarding the procurement and/or use of tissue for posthumous reproduction.

The desire of a surviving partner to have a child with the gametes of the deceased, in light of their intention to have a family together, may be viewed with sympathy. A more troubling situation is when the request for gametes for posthumous reproduction does not come from a spouse or life partner, but from the parents of the deceased, who see this intervention as promulgating the legacy of their child or as the only way to become grandparents (11). Ethically, these situations are not comparable. In the case of a surviving parent, no joint reproductive project can ever be said to have existed. Nor do the desires of the parents give them any ethical claim to their child's gametes (11). Programs, then, that are open to considering requests for posthumous gamete procurement or reproduction from surviving spouses or life partners in the absence of written instructions from the decedent should decline requests for such services from other individuals.

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