Analysis: A Legal Perspective

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ABSTRACT

This commentary summarizes the uncertain state of the law regarding consent for posthumous gamete retrieval. The emergence of a legal framework will be aided by the kind of ethical analysis prompted by this family's request for removal and preservation of a deceased patient's ovaries.

In this case of Ms D,[1] in which clinicians and ethics consultants had their hands full with difficult medical, ethical, and (potentially) genetic counseling issues, the law poked its head up like a prairie dog from its burrow. During a discussion with the clinical team to prepare for a family meeting, the topic of property rights[2] in Ms D's eggs was mentioned.

Comments about the law by physicians or other clinicians risk introducing a distracting element and can siphon attention toward a side issue, one that may not actually have anything to do with the case at hand. Fortunately, in this case the legal question proved not to be a distraction. The family meeting was aimed at supporting family members in their grief once they learned that there were no feasible reproductive options for Ms D. This exemplified good practice: Do not let assumptions or vague worries about the law distract from full engagement with the actual issues.

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To be sure, in a case in which the law might have direct impact on the options under consideration, then it should be understood accurately and given due regard in the ethical analysis. Had the retrieval of Ms D's ovaries for future reproductive use been medically feasible, an important legal issue would have emerged: Does the law demand Ms D's consent as a prerequisite to the procedure?

One source of law that potentially would do so is a statute. State legislatures, however, are rarely to be found announcing policy on the frontiers of assisted reproductive medicine and genomic science, and so it is unsurprising that, as a legal scholar recently pointed out, "In the United States, there is currently no statutory restraint or prohibition on gamete retrieval or storage."[3] The American Bar Association's Section on Family Law has proposed that explicit prior consent be made a statutory prerequisite to the collection of gametes or embryos from the deceased.[4] This proposal, however, has not been enacted anywhere.

Nor has any case quite like Ms D's been litigated to a reported decision. This is also unsurprising, given the slow and accretive common law adjudicatory process. The case law about posthumous gamete retrieval is a patchwork, arising from varying fact patterns, and cannot be said to yield a definitive principle. The Massachusetts Supreme Judicial Court, applying inheritance laws in a case involving children conceived with stored semen after the death of their father, held that "affirmative consent" to posthumous parentage was required; "a decedent's silence, or his equivocal indications of a desire to parent posthumously," would not suffice.[5] But that

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is merely one case, in one state, under one set of facts. It is far too soon to say that explicit prior consent is always required.

Law still has much to learn about the collection of gametes from the deceased. The still-open legal space around cases like Ms D's should be seen as an opportunity for clinical ethicists to help shape the law through the kind of nuanced and reflective ethical analysis demonstrated by this case study.

PATIENT AND FAMILY CONSENT

This case has been anonymized, but no other details have been de-identified or modified. The family provided consent for the patient's case to be used and discussed in this publication, which they believe the patient would have wanted.

NOTES

1. L. Guidry-Grimes, "The Case of Ms D: A Family's Request for Posthumous Procurement of Ovaries," in this issue of *The Journal of Clinical Ethics* 27, no. 1 (Spring 2016).

2. Attaching the term "property" to gametes is itself problematic. "Some decisional law [. . .] has suggested that while gametes may have some of the aspects of property, they are not technically property in the fullest sense of the word." C.P. Kindregen, Jr., "Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons," *Journal of Health & Biomedical Law* 7, no. 2 (2011): 147-73, 153-4.

3. C.P. Kindregen, Jr., "Dead Soldiers and Their Posthumously Conceived Children*," Journal of Contemporary Health Law & Policy* 31, no. 1 (2015): 74-95, 76.

4. American Bar Association Section on Family Law, "Model Act Governing Assisted Reproductive Technology," Section 205, *http://apps.americanbar.org/family/committees/artmodelact.pdf.* The ABA proposal would allow for a narrow exception: "In the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating physician, loss of viability would occur as a result of delay, and where there is a genuine question as to the existence of consent in a record, an exception is permissible."

5. *Woodward v. Commissioner of Social Security*, 435 Mass. 536, 552 (2002).