

The Uncharted Terrain of Assisted Reproductive Medicine

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INTRODUCTION

The High Court in London recently made what is considered to be an unprecedented ruling on reproductive rights. The parents of a woman who died at 28 from bowel cancer sought custody of her frozen eggs, claiming their daughter wished for her mother to carry and give birth to her children (her mother's biological grandchildren). Initially, the daughter had her eggs frozen after a cancer diagnosis with hopes that she herself could one day have children. She signed a Human Fertilisation and Embryology Authority (HFEA) form specifying her wish for egg storage after her death. She did not consent to allowing her eggs to perish, but checked a "Yes" so that her eggs would be stored for later use. However, she did not fill out a crucial appendage that would have specified an outcome for her eggs posthumously. Technically, her consent became invalid.

ANALYSIS

Her parents maintained there were multiple conversations expressing wishes for the mother to serve as a surrogate if radiotherapy damaged the daughter's womb. While she was living, the daughter may have wanted her mother to serve as her surrogate but evidence is unclear whether she intended her mother to be a surrogate if she did not survive her disease. The 59-year-old mother and her husband claimed that their daughter's dying wish was to have her mother carry their grandchild. With only one daughter, this was their only chance to become grandparents.

IVF Hammersmith, where the patient's eggs remain frozen, did not offer the mother treatment in the way she proposed. Institution officials explained "that this is beyond what the patient might have consented to and [they could] not assume that these would have been her specific wishes, as there is no documented confirmation for them."¹ Before reaching that conclusion, the unit had consulted the Imperial College Ethics Committee, which had been unable to reach a consensus or definitive conclusion. The parents were unable to find a doctor in the UK agreeable to perform the implantation procedure using a donor sperm. However, a physician in New York City was willing to proceed with IVF.

The Claimants applied for a Special Direction from the HFE Authority, requesting exportation of their daughter's eggs to New York, where they would then be under United States jurisdiction. The HFEA denied this request three times. Under the 1990 HFEA Act, the eggs could not be exported because certain requirements could not be met, notably in relation to written informed consent. The HFEA maintained that there was not enough legal evidence to prove the daughter's intent for the eggs, as posthumous use of

gametes requires the effective consent of the gamete provider. The donor's next of kin, the Claimants, had no apparent right under the Act to decide on the use or disposal of her gametes. The HFEA also considered the context of this case, including the fact that the genetic material are eggs; they are not embryos. Furthermore, she was neither married nor had a partner.

Once the HFEA denied the couple's application to export their daughter's eggs, the couple sought legal action, arguing the HFEA and the IVF clinic had both made a "disproportionate interference" on the family's human rights.¹ The claimants insisted their daughter did not know of another form required for clearer consent. The consent she signed, they claimed, stated she wanted her eggs to be kept "for later use," which implied she wanted them to be implanted into her mother. However, the High Court determined there was no evidence that the daughter had ever "contemplated or consented" to what the parents sought: export of her eggs to be fused with an anonymous overseas sperm donor or one selected by her parents.¹ There was no evidence that the daughter had discussed the question of using a donor sperm with anyone. Furthermore, there was no indication that she understood the implications for her mother's health or the result of her mother acting as a surrogate. Since there was a lack of written proof, the High Court determined that the potential grandparents could not be granted ownership of the eggs. Mr. Justice Ouseley, of the High Court, fairly stated, "I must dismiss this claim, though I do so conscious of the additional distress which this will bring to the Claimants, whose aim has been to honour their dying daughter's wish for something of her to live on after her untimely death."¹

The High Court specified that completion of the forms would have resolved the issues, but their "absence was not fatal at all to a positive decision."¹ It was instead the fact that so many issues were neither discussed nor resolved while the daughter was still alive. The Committee gave examples of ways in which a more clear future for the eggs could have been defined. Along with signing the necessary consent forms, the family could have undergone counseling in relation to the treatments in question; sought more information from others about what might be involved in such arrangements; spoken to others about these wishes and intentions; have others witness wishes and intentions; leave something as a token to the anticipated baby; have formal discussions with the doctors involved in her treatment; requested information about what might be involved in donor insemination, surrogacy, and the implications for parental responsibility. The committee was entitled to conclude that the daughter's expression of her wishes was unclear in many areas where clarity was crucial. While the High Court ruled against the couple, they could still take their case to the Court of Appeal.

Although the high court did not reach its decision on the basis of any adverse view about the mother carrying her daughter's fertilized egg or the welfare of any future child, there are a myriad of ethical issues that come into question. Most notably, this case sheds light on posthumous assisted reproductive medicine and asks whether a woman's reproductive life should extend beyond its natural limits. With regard to using frozen eggs posthumously, one of the most significant aspects to consider is the psychological well being of the "pretermitted" child.² One could argue that many children grow up without meeting one or both of their genetic parents. However, in this instance, the child would be conceived posthumously. There is a question of what psychological effect this might have on the child, who could learn the truth about his or her conception. In this case, the child would not only be without a genetic mother, but also the father would be anonymous.

Another important consideration is the health of the surrogate. In a report developed by the Ethics Committee of the American Society for Reproductive Medicine published in *Fertility and Sterility Journal*, members warn that the risk of gestational diabetes and pregnancy-induced hypertension increases with a woman's age.³ They evaluate the many "physical and physiological risks" accompanied by postmenopausal pregnancy and encourage doctors to carefully consider each patient's condition.³ Generally, fertility clinics will not treat women over 50 due to the limited chances of successful implantation and gestation, as well as the many health risks. In the context of this specific case, the grandmother is well over the recommended age.

CONCLUSION

This specific case highlights the necessity of clear and comprehensive informed consent within assisted reproductive medicine and also brings up an important issue regarding IVF regulations in the US. It makes sense that an American clinic would be willing to perform this procedure, while clinics in the UK refused on ethical grounds. The US has little regulation—local, state or federal—regarding assisted reproductive medicine, leaving fertility specialists to make choices while relying solely on ARSM recommendations and their own experiences. Although it would be difficult in such an expansive country to have a governing body like the UK's HFEA, I believe the US could benefit from a similar establishment overseeing the complex and rapidly growing realm of reproductive medicine.

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2015/06/m-v-hfea.pdf>

² Nakhuda, Gary. "Posthumous Assisted Reproduction." *SRM-ejournal* 10.1 (2012): 28-32. *SRM-ejournal*. Feb. 2012.

³ "Oocyte Donation to Postmenopausal Women." *Fertility and Sterility* 82.1 (2004): S254-255. American Society for Reproductive Medicine.