

I would like this assignment to be considered for the Galloway Cook Allen Prize

The Advisory Committee on Assisted Reproductive Technologies (ACART) is seeking submissions on the review of the current guidelines for posthumous reproduction, through a series of consultation questions. The focus is on whether posthumous reproduction is ethically acceptable in New Zealand, and in what circumstances.¹ This essay seeks to respond to questions 1A, 1B, 4 and 5, which ask whether posthumous retrieval of sperm or eggs/ovarian tissue, posthumous use of gametes retrieved or embryos created "when the deceased was alive and competent" and posthumous use of gametes or reproductive tissue taken from a deceased or permanently incapacitated person, respectively, require "explicit written consent".² If not, it asks whether the standard should be one of verbal consent, inferred consent or no consent but no objection.³ This essay will argue that arguments for explicit consent, to protect deceased's dignity, interests, autonomy and expectations, fail because the deceased does not have interests and most people support posthumous reproduction so this high standard of consent may actually defeat their expectations, autonomy and, therefore, dignity, more often than to protect them. The essay will then consider whether we should have a standard of inferred consent, or no consent but no objection (presumed consent).

What is posthumous reproduction?

Posthumous reproduction relates to the retrieval and/or use of a person's reproductive tissues after their death, or the use of embryos or reproductive issues, retrieved during their lifetime, after death.⁴ Therefore, it is an assisted reproductive technology (ART).

¹ "Posthumous Reproduction: A review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account", Consultation questions (3 September 2018) Ministry of Health website <https://consult.health.govt.nz/acart/posthumous-reproduction/consultation/subpage.2018-06-22.7960277411/>.

² ACART Consultation Questions.

³ ACART Consultation Questions.

⁴ "Posthumous Reproduction: A review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos" (July 2018), Advisory Committee on Assisted Reproductive Technology Website <https://acart.health.govt.nz/posthumous-reproduction-review-current-guidelines-storage-use-and-disposal-sperm-deceased-man-take>.

What does “consent” mean?

Consent is one of the key ethical principles, highlighted by the “Guidelines for the storage, use and disposal of sperm from a deceased man”, 2000 (ACART Guidelines).⁵ This poses a particular challenge for posthumous reproduction because posthumous reproduction is typically requested after a sudden death or incapacitation.⁶ Furthermore, because it is uncommon, the deceased often will not have contemplated it and, hence, not had the opportunity to consent.⁷ The current level of consent is unclear. The Guidelines specify the signing of a consent form, indicating that written consent is required.⁸ The Human Assisted Reproductive Technology Act 2004 (HART), generally, requires “informed consent” prior to the performance of an “assisted reproductive procedure” (s 4(d)).⁹ Therefore, the current standard is likely informed, written consent, in line with the wording of the consultation questions.¹⁰

Sperm versus eggs

No distinction will be drawn between the posthumous retrieval of sperm and ovarian tissue/eggs, even though there is a biological distinction between them, (the latter is more difficult and less common, because it requires a surrogate), because the question is about the standard of consent required.¹¹

Dead versus permanently incapacitated where death is imminent

Distinguishable from dead people, permanently incapacitated people may have delegated authority to consent to someone else. Alternatively, under Right 7(4) of the Code of

⁵ ACART Guidelines for the storage, use and disposal of sperm from a deceased man, (February, 2000) at 3.

⁶ Rebecca Collins, “Posthumous reproduction and the presumption against consent in cases of death caused by sudden trauma” (2005), Vol 30, *Journal of Medicine and Philosophy*, 431 at 432.

⁷ Kelton Tremellen and Julian Savulescu. “Posthumous Conception by Presumed Consent. A Pragmatic Position for a Rare but Ethically Challenging Dilemma.” (2016) *Reproductive Biomedicine & Society Online* 3 (2016), 26 at 27 (hereafter [Posthumous Conception]).

⁸ ACART Guidelines at 5-6.

⁹ HART Act s 4(d), Advisory Committee on Assisted Reproductive Technology. 2018. *Posthumous reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man* to take into account gametes and embryos. Wellington: Advisory Committee on Assisted Reproductive Technology (referred to hereafter as ACART Consultation Document).

¹⁰ “ACART Consultation Questions.

¹¹ Yael Hashiloni-dolev, “Posthumous reproduction (PHR) in Israel: Policy rationales versus lay people's concerns, a preliminary study” (2015) 39(4) *Culture, Medicine and Psychiatry*, 634 at 635, Nicola Peart, “Alternative Means of Reproduction”, in *Health Law in New Zealand* (Thomson Reuters New Zealand Ltd, 2015), 515, at 557.

Health and Disability Services Consumers' Rights treatment can only be given when it is in their best interests, reasonable steps have been taken to ascertain their views and, if those views are ascertained, the treatment is what they would have wanted.¹² However, for the purposes of determining the appropriate standard of consent, no distinction will be drawn.

What are the current guidelines in NZ?

The Human Tissue Act 2008, provides that "human tissue" may be used for specified purposes, with the informed consent of either the individual, or their nominee, family member or close available relative (s 31(2)). However, s 7(2) excludes human gametes and embryos as being "human tissue".

Human gametes and embryos are governed by the HART Act. The HART Act divides ART into three categories; technologies prohibited in subpart 1, technologies allowed with the approval of the Ethics Committee on Assisted Reproductive Technologies (ECART), subject to ACART guidelines under subpart 2 and established procedures that do not require approval.¹³

The ACART Guidelines provides for the posthumous use of donated sperm, by a person/couple who have already used it, or appropriate disposal, or for sperm, retrieved due to medical intervention, use by a designated person, within a specific timeframe or appropriate disposal.¹⁴ However, guideline 2.3 states that the collection of sperm from a "comatose or recently deceased person", without consent, is "ethically unacceptable".¹⁵ In relation to ovarian tissue/eggs, it is suggested that clause 7 of the HART Order 2005 implies that eggs can also be collected posthumously, provided there is consent, but that the eggs cannot be used.¹⁶ In relation to embryos, although the HART Order is silent, it is suggested that the use of an embryo, consisting of the sperm of a deceased man who had consented, and the egg of the female to be implanted with it, would be acceptable.¹⁷

¹² Right 7(4), Code of Health and Disability Services Consumers' Rights.

¹³ HART Act 2008.

¹⁴ ACART Guidelines.

¹⁵ ACART Guidelines.

¹⁶ Peart, at 558, citing HART Order 2005, sch, pt 2, cl 7, as inserted in 2009.

¹⁷ Peart at 558.

Thus, currently sperm and eggs can be collected posthumously, with consent. Sperm, collected during the deceased lifetime, can be used posthumously with consent, either by someone who has previously used it, or a designated person. Eggs cannot be used posthumously. It seems likely pre-existing embryos may be used, provided the woman is alive.¹⁸

Is explicit written consent the correct standard?

Many academics support this high standard of consent, in order to protect the interests, autonomy, expectations and dignity of the deceased.¹⁹ However, others suggest this standard is prohibitive because those who request posthumous reproduction typically die suddenly, without having considered the issue or having had the opportunity to consent.²⁰

Deceased's dignity and interests

Firstly, it is argued that "respect for the autonomy and dignity [of the deceased] requires that the deceased's body should not be used in a way that, in all probability, was never contemplated in life".²¹ Hence, it would be disrespectful, to the deceased, to use their body in a way they did not intend.²² Therefore, consent is required to ensure we respect people's wishes. Furthermore, it is suggested that dead people retain an interest in what happens to them after death.²³ As the decision to reproduce is "deeply personal and important", it is argued there is a surviving interest in it.²⁴ Therefore, consent is required to ensure we maintain these interests

¹⁸ HART Order 2005, sch, pt 2, cl 7.

¹⁹ ACART Consultation Document.

²⁰ Tremellen at 27, Jason Hans, "Posthumous gamete retrieval and reproduction: Would the deceased spouse consent?" (2014) *Journal of Social Science and Medicine*, Vol. 119, 10 at 10.

²¹ Rebecca Collins, "Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma" (2005) *Journal of Medicine and Philosophy*, 30:4, 431, at 437 citing Schiff, A.R, "Posthumous conception and the need for consent" (1999) *Medical Journal of Australia*, 170(2), 53, at 54.

²² Carson Strong et al, "Ethics of post-mortem sperm retrieval" (2000), *Human Reproduction*, vol. 15, 739 at 743.

²³ Collins at 439.

²⁴ Collins at 439, citing Bennett, B. "Posthumous reproduction and the meanings of autonomy" (1999) *Melbourne University Law Review*, 23(2), 286, at 302.

However, critics argue that the deceased do not have interests and, thus, cannot be harmed by posthumous reproduction.²⁵ Harm is defined as something “that frustrates the realisation of an outcome, the existence of which would have improved the interest-holder’s state of affairs”.²⁶ Therefore, it requires the capacity to experience and someone to be the subject of the harm.²⁷ A dead person’s state of affairs cannot meaningfully be changed and, therefore, they cannot experience harm to their interests.²⁸ Moreover, the dead person no longer exists so there is no subject of the harm.²⁹

Joel Feinberg and George Pitcher reject this, arguing that that dead person can be harmed because the subject of the harm is the dead person, when they were alive (ante-mortem person).³⁰ They argue that there is harm to the ante-mortem person, in that their living interests will never be satisfied, although they do not know it at the time.³¹ However, this presumes that harm is objective. It is disputed whether harm is subjective (must be experienced to occur) or objective (the harm occurs even if you do not know of it at the time).³² Feinberg argues for objective harm because temporarily unconscious people are harmed by unknown detriment to their interests.³³ However, the temporarily unconscious will wake up and know of the harm, whereas death is permanent. Therefore, it is unclear whether the harm is subjective or whether the dead can experience it.

There is also an issue of retroactivity, because harm to the ante-mortem person seems to require “backwards causation”.³⁴ Pitcher argues that rather than going back in time and retroactivity causing harm, the previous harm is realised or “[made] true”.³⁵ However, Young argues that the harm still occurs to the ante-mortem person, only when they are

²⁵ Hilary Young, “Presuming Consent to Posthumous Reproduction” (2014) 27 *J. L. & Health*, 68 at 74

²⁶ Daniel Sperling, *Posthumous Interests: legal and ethical perspectives* (Cambridge University Press, Cambridge, 2008) at 10.

²⁷ Sperling at 15, Young at 74.

²⁸ Young at 74.

²⁹ Sperling at 15, Young at 74.

³⁰ Sperling at 22.

³¹ Sperling at 23, citing Joel Feinberg, *Harm to others* (Oxford University Press, New York, 1984) at 91 (hereafter [Harm]), George Pitcher, “Misfortunes of the Dead”, (1984) vol. 21, no. 2 *American Philosophical Quarterly*, 183, at 1 p. 184.

³² Young at 74.

³³ Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 1: Harm to others*, (Oxford University Press, 1987) at 86-87 (hereafter [Moral Limits]).

³⁴ T. M. Wilkinson, *Ethics and the Acquisition of Organs* (Oxford University Press, Oxford, 1968) at 37 (hereafter, *Ethics*).

³⁵ Wilkinson [Ethics] at 35, citing Pitcher at 184.

“no longer a person”.³⁶ Furthermore, even if the harm is to the ante-mortem person, Young argues that this further demonstrates that the dead do not have interest because the harm is to the dead person, when they were alive, rather than to the dead themselves.³⁷

Therefore, it seems unlikely that the dead have interests or can be harmed by detriment to those interests. Furthermore, even if the dead do have interests and can be harmed by them, it seems odd that the interest of the dead should trump the interests of the living e.g. resulting child, family and the general public.³⁸ The child’s interests are not particularly relevant to the question of consent, because posthumous reproduction itself is presumed to be acceptable.³⁹ However, if there is harm to the child, it would have to be argued that posthumous conception is worse than the child being created at all.⁴⁰ This is a very high standard. In terms of the surviving partner, and family, a lower standard of consent may be beneficial because it opens up the possibility of posthumous reproduction, which aids the grieving process.⁴¹ Furthermore, this respects the surviving partner’s right and interest in reproducing with their partner (for example, if they wanted a genetic sibling for another child).⁴² There may also be a public interest in ensuring the interests of the dead are respected, in order to ensure their own interests are respected.⁴³ As discussed below, a high standard of consent does not necessarily ensure this because the majority of people support posthumous reproduction, but may not have explicitly consented.⁴⁴

Deceased’s autonomy and meeting expectations

Secondly, consent is said to reflect our “right to control our bodies”.⁴⁵ Therefore, proponents of explicit consent argue that posthumous reproduction without consent,

³⁶ Young at 75.

³⁷ Young at 75.

³⁸ Tremellen at 28.

³⁹ Young at 75.

⁴⁰ Carson Strong, “Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State” (1999), *Journal of Law, Medicine and Ethics*, vol. 27(4), 347 at 353, citing Feinberg, Harm, at 31-64.

⁴¹ G. Bahadur, “Ethical Challenges in reproductive medicine: posthumous reproduction”, (2004), *International Congress Series* 1266, 295 at 299.

⁴² Young at 78.

⁴³ Collins at 83.

⁴⁴ Hans at 11.

⁴⁵ T M Wilkinson, “Consent and the use of the bodies of the dead” (2012), vol. 37 *Journal of Medicine and Philosophy*, 445, at 449.

infringes on the deceased's personal autonomy because it will likely be contrary to their intentions. For example, someone may not want to posthumously reproduce because they regard it as unnatural or unfair to the child.⁴⁶ Therefore, posthumously reproducing without their consent may go against their expectations and intentions. Hence, consent is required to respect the deceased's autonomy not to reproduce.

However, this presumes that most people do not want to posthumously reproduce. Several surveys have shown that most people support it.⁴⁷ 85% of males and 72% of females would "permit their spouse to harvest their [own] eggs/sperm for the purposes of conceiving a child after their death".⁴⁸ Although, this data was collected during initial fertility clinic consultations and, therefore, may not be representative of the general population, it suggests people may be more likely to consent than not to consent to posthumous reproduction, were they given the option. Thus, explicit consent may actually work against meeting people's expectations because many people who would have wanted to posthumously reproduce will be unable, merely because they did not have the knowledge or opportunity to give explicit consent. Therefore, the standard may be unfairly high.

Moreover, presuming that people do not want posthumous reproduction may disappoint more expectations than presuming people do want posthumous reproduction. There is a negative right against interference with your bodily autonomy, and therefore, not to be made a posthumous parent.⁴⁹ Requiring explicit consent protects this because it ensures you do not posthumously reproduce unless you definitely intended it.⁵⁰ However, this may infringe on positive right to be made a parent because those who want posthumous reproduction may be denied it, simply because they did not have the opportunity to make their consent clear.⁵¹ Although, the pluralistic nature of society makes it impossible to satisfy

⁴⁶ Collins at 435.

⁴⁷ Hans at 11.

⁴⁸ Gary Nakhuda et al. "Posthumous assisted reproduction: a survey of attitudes of couples seeking fertility treatment and the degree of agreement between intimate partner", *Fertility and Sterility* (2011). Vol. 96(6), 1463 at 1466.

⁴⁹ Govert Den Hartogh, "Can Consent be Presumed?" (2011), *Journal of Applied Philosophy*, Vol. 28(3), 295 at 296.

⁵⁰ Bahadur at 299, Frederick Kroon, "Presuming consent in the ethics of posthumous sperm procurement and conception", (2016) *Reproductive Biomedicine and Society Online*, 123, at 124.

⁵¹ Tremellen at 27.

everyone, given the majority support posthumous reproduction, it is argued that this places an unfairly greater burden on those who do want posthumous reproduction.⁵²

Therefore, it is not clear that explicit consent is required, either to protect the deceased's "interests", or to respect their autonomy and expectations. In fact this standard may be prohibitively high and disrespect their expectations more often.

Alternative standard of consent

Therefore, a lower standard of inferred consent may be preferable. In line with the consultation questions, this would allow posthumous reproduction where the deceased had given a written or verbal statement of consent or where their consent is inferred from statements of their "wishes, feelings and beliefs prior to death".⁵³ This standard may be preferable because it would ensure people are not refused posthumous reproduction, merely because they did not consider it or lacked opportunity.

Kroon rejects inferred consent, on the basis that it is insufficiently certain.⁵⁴ He argues that the family member or partner, who is testifying to the deceased's wishes, may have a conflict of interest because they are also invested in its use.⁵⁵ Therefore, they may be more inclined to believe the deceased would have wanted it, than not. Kroon is concerned that the desire to have a child may be conflated with the desire for posthumous reproduction.⁵⁶ Furthermore, as the family/partner are grieving, their capacity for rational decision-making may be decreased.⁵⁷

However, studies have showed that partners accurately predict each other's wishes 79% and 71% of the time, respectively for females and males.⁵⁸ This suggests that partners will accurately predict each other's wishes. Although, it is conceded that family and

⁵² Alison Douglass and Ken Daniels, "Posthumous Reproduction: A consideration of the medical, ethical, cultural, psychosocial and legal perspective in the New Zealand Context" (2002), Vol. 5, *Medical Law International*, 259, at 273.

⁵³ ACART Consultation Questions.

⁵⁴ Kroon at 124.

⁵⁵ Kroon at 125, Strong et al at 745.

⁵⁶ Kroon at 124, citing Jones, S., Gillett, G., "Posthumous reproduction: consent and its limitations." (2008) *J. Law Med.* Vol.16, 279.

⁵⁷ Hans at 15.

⁵⁸ Nakhuda et al. at 1466, Hans at 11.

partner will be less able to make rational decisions, posthumous reproduction is time sensitive.⁵⁹ Furthermore, the majority of retrievals do not result in a posthumous conception.⁶⁰ Therefore, enabling retrieval on the basis of inferred consent followed by a stand-down period for grieving before allowing actual use may be preferable.⁶¹ This may be beneficial to all parties because it is suggested that the possibility of posthumous reproduction and an on-going link to the deceased, actually aids in the grieving process, even if it is not used.⁶²

Moreover, this is an example of the precautionary principle, which argues we should not act unless we have complete evidential backing, because posthumous reproduction requires explicit evidence of consent.⁶³ However, the precautionary approach is criticised for rendering every any action, even inaction, impossible because there is always uncertainty and, therefore, no action is acceptable.⁶⁴ Thus, it may not be the best way to approach this issue.

Therefore, I would recommend that a standard of inferred consent be adopted in the new guidelines. I think this would strike the best balance between protecting an individual's autonomy and right not to posthumously reproduce, whilst also ensuring that others are not unfairly prohibited from doing so, simply for lack of opportunity or specific knowledge. It is clear that there are both valid reasons to and not to posthumously reproduce, and these should be treated equally, rather than favouring the right not to, as explicit consent does.

Should we have presumed consent?

Tremellen and Savulescu, amongst other academics, argue that we should have presumed consent for posthumous reproduction (i.e. no consent, no objection).⁶⁵ This requires an

⁵⁹ ACART Consultation Document at 11.

⁶⁰ Hans at 15.

⁶¹ Bahadur at 299.

⁶² Bahadur at 299.

⁶³ Wingspread Statement on the Precautionary Principle (1998).

www.who.int/ifcs/documents/forums/forum5/wingspread.doc

⁶⁴ Cass Sunstein, *Law of Fear: Beyond the Precautionary Principle*, (Cambridge University Press, Cambridge, 2005) at 13-35.

⁶⁵ Kelton Tremellen and Julian Savulescu, "A Discussion supporting presumed consent for posthumous sperm procurement and conception" (2015), *Reproduction Biomedicine Online*, 6 at 8 citing Rosenblum, A.M., Li, A.H., Roels, L., Stewart, B., Prakash, V., Beitel, J., Young, K., Shemie, S., Nickerson, P., Garg, A.X.,

opt out system, similar to that used for organ donation in many European countries.⁶⁶ They advocate this because the majority of people support or are indifferent to posthumous reproduction, and those who are against will be motivated to revoke their consent.⁶⁷ Therefore, it may meet the expectations of the majority, whilst still respecting the dignity and autonomy of those who do not want it.⁶⁸ Although, under this system, it is possible that a few people will posthumously reproduce where they would not have wanted to, they consider it a “lesser moral wrong” than preventing the greater number of people who want to reproduce but lack explicit consent.⁶⁹

However, in New Zealand we do not have an opt out system for organ donation, we have a mandated opt in system, which can be overridden by family after death.⁷⁰ Therefore, to adopt an opt out system may be a significant cost.⁷¹ Although, we could add consent for posthumous reproduction to the consent for organ donation, Tremellen and Savulescu reject this option, arguing it may result in “coerced unconsidered responses”.⁷² Therefore, an opt out system may not be the most appropriate or practical in the New Zealand context. However, Bahadur, amongst others, argues that posthumous reproduction is distinguishable from organ donation, because it is a deeply personal decision, fundamental to an individual’s identity.⁷³ Furthermore, it is argued that organ donation is a “socially desirable” and lifesaving activity, whereas posthumous reproduction is not, necessarily.⁷⁴ Therefore, it may be inappropriate to compare the two.

Thus, an opt out system for posthumous reproduction may not be appropriate in New Zealand, firstly, because it would be impractical and secondly, because we do not consider it appropriate for organ donation, it seems unlikely that it would be appropriate for posthumous reproduction, which is arguably a more personal and less necessary choice.

“World- wide variability in deceased organ donation registries” (2011), *Transplant. Int.* 25 at 801, (hereafter [Presumed Consent]).

⁶⁶ Tremellen, *Presumed Consent* at 11, citing Rosenblum at 801.

⁶⁷ Tremellen, *Presumed Consent* at 11.

⁶⁸ Tremellen, *Presumed Consent* at 10.

⁶⁹ Tremellen, *Posthumous OCnception* at 27.

⁷⁰ Tremellen, *Presumed Consent*, at 11, citing Rosenblum at 801, “FAQ’s”. *Organ Donation New Zealand Website*. <https://www.donor.co.nz/facts-and-myths/faqs/>.

⁷¹ Tremellen, *Presumed Consent* at 11.

⁷² Tremellen, *Presumed Consent* at 11.

⁷³ Bahadur at 298.

⁷⁴ Young at 96.

Conclusion

Therefore, I conclude that, in response to consultation questions 1A, 1B, 4 and 5 that posthumous retrieval of sperm and eggs, posthumous use of gametes retrieved or embryos created when the deceased was alive and competent and posthumous use of reproductive tissue taken from a deceased or permanently incapacitated person does not require written consent. Instead, the standard should be one of inferred consent.

Explicit written consent is a very high standard. As discussed above, it is not sufficiently demonstrated that explicit consent is required to protect the deceased's dignity, interests, autonomy or expectations. In summary, the dead do not have interests to be protected and studies have found that significantly more people support posthumous reproduction than do not. Thus, the high standard may actually be disrespecting the deceased's autonomy, expectations and, thus, dignity, more than protecting it.

Therefore, a lower standard of inferred consent should be adopted. This would protect the autonomy and dignity of those who do not want it and allow those who do want posthumous reproduction but did not know they needed to or were unable to make their wishes explicitly clear, to do so. Thus, will likely meet more peoples' expectations because the majority of people support it but have not given explicit consent. This may also benefit the partner and family, who may take comfort in the possibility of posthumous reproduction because their requests for retrieval are unlikely to be rejected merely because they did not meet the standard. I do not think the standard should be one of no consent but no objection or presumed consent because it is not practical in New Zealand and given we have not deemed it appropriate for organ donation, it seems unlikely to will be appropriate for posthumous reproduction, which is considered more personal and less necessary.