2003

Currents in Contemporary Ethics

Sharona Hoffmann

Andrew P. Morriss
Texas A&M University School of Law, amorriss@law.tamu.edu

Currents in Contemporary Ethics

Sharona Hoffman and Andrew P. Morriss

New Reproductive Technologies and the Inheritance Rights of Unborn Children

Contemporary developments in reproductive technology hold great promise for those who have difficulty conceiving naturally. However, they have generated extensive debate among lawyers, ethicists, legislators, the media, and the public. Concern has intensified recently in light of claimed attempts to clone human beings. One implication of the new reproductive technologies upon which few commentators have focused is their effect on inheritance rights and on the notorious Rule Against Perpetuities. For example, what impact should the possible existence of frozen sperm or frozen embryos have upon the execution of wills and implementation of the Rule? If one leaves property to one's children but has frozen sperm or embryos that might produce children decades after one's death, what should be done about the distribution of the estate? These difficult questions can no longer be ignored. Because some states apply the Rule to commercial contracts such as options, as well as wills, the development of the new reproductive technologies could have impacts in a wide spectrum of legal arenas.

The Rule Against Perpetuities

The Rule Against Perpetuities has long terrorized law students and lawyers alike, despite its deceptively simple language: "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[1]

To illustrate the basic rule, consider T's will that leaves Blackacre "to my son A, and then to my first grandchild to reach twenty-five." The contingent remainder following A's life estate violates the common law Rule even if T's oldest grandchild is 24 at the time of his death, because the remainder might vest more than twenty-one years from the death of the relevant lives-in-being. To demonstrate, suppose all living grandchildren die and a new grandchild is born after T's death. A then dies before the new grandchild reaches age four. The grandchild's interest could not vest until more than twenty-one years later. The gift is therefore void, since only T, A, and the grandchild who is alive at the time of T's death can be used as lives-in-being. Violation of the Rule results in striking the relevant interest, which leads to receipt of the property in question by someone else, to whom the grantor did not intend to convey the property. Because the Rule is a rule of logical possibility, not likely probabilities, the mere existence of the new reproductive technologies, which offer the opportunity for post-mortem conception, threatens to make many future interests involving children and other descendants void.[2]

New Reproductive Technologies

Several technologies that have been developed during the last several decades raise the possibility of post-humous reproduction. They are briefly described below.

About this Column

Mark A. Rothstein serves as the section editor for "Currents in Contemporary Ethics." Professor Rothstein is the Herbert F. Boehl Chair of Law and Medicine and the Director of the Institute for Bioethics, Health Policy and Law at the University of Louisville School of Medicine in Kentucky.

Cryopreservation of Semen

Cryopreservation is the preservation of biological material, such as semen, at very low temperatures.[3] The semen remains viable after thawing and can be used for artificial insemination. Semen can be preserved by freezing for an unlimited amount of time.[4] Consequently, a man might father a child years or even decades after his death. Some men freeze sperm in order to donate it to a stranger, while others do so for their own purposes, such as in anticipation of fertility-jeopardizing medical treatment or for use during in vitro fertilization procedures.

Posthumous reproduction can be achieved even in cases where a man did not store semen while he was alive. Contemporary medical technology makes it possible for physicians to retrieve sperm from a deceased male within twenty-four hours of his death.[5] In the United States an increasing number of requests for postmortem sperm retrieval are being made by wives, other family members, fiancées, and friends.[6]

Several courts have already been called upon to grapple with the inheritance rights of children conceived from their dead father's frozen sperm. In 2002 the Supreme Judicial Court of Massachusetts ruled that the children could inherit if their mother proved the descendant's paternity and established that he had agreed to reproduce posthumously and to support children that had been conceived from his sperm.[7] That same year, a federal district court in Arizona held that under Arizona intestacy laws, children conceived after their father's death did not "survive" him and could not inherit under state law.[8] Surely, these are only the earliest of many similar cases that will come before the courts in future years.

Cryopreservation of Embryos

The first pregnancy resulting from a frozen embryo was reported in Australia in 1983.[9] Today approximately 400,000 frozen embryos exist in storage facilities in the United States alone.[10] By some estimates, contemporary technology would allow for the safe storage of embryos for fifty years or longer.[11] Consequently, children could be born many decades after one or both of their genetic parents died.

Cryopreservation of Ovum

Cryopreservation of mature, unfertilized eggs is not standard clinical practice at the present time.[12] The mature egg's high liquid content and size make it particularly difficult to freeze, and sperm have generally proven unable to penetrate previously frozen and thawed oocytes.[13]

Nevertheless, ovum cryopreservation is a developing reproductive technology that has already proven successful in isolated instances.[14] Some predict that in the future, ovum preservation combined with semen freezing might replace the cryopreservation of embryos since destruction of gametes that have not been joined to form an embryo will not raise difficult moral and ethical quandaries.[15] After fertilization, the embryos could be implanted either in the egg donor or in another woman. Consequently, the freezing of eggs, like frozen embryo storage, could lead to the birth of children long after one or both genetic parents are dead.

Cloning

Cloning is the most controversial of the new reproductive technologies, and it is yet another mechanism that could enable individuals to reproduce posthumously. Posthumous cloning would be achieved by the insertion of the nucleus of a preserved somatic cell[16] from a deceased individual into an egg that has had its nucleus removed.[17] The egg would then develop into an embryo whose genetic makeup would be nearly identical to that of the deceased.[18] The somatic cell provider may be unrelated to the egg donor and the gestational mother, and thus three different individuals may biologically contribute to the birth of the child.[19]

Scientists have already begun experimenting with the cloning of early-stage human embryos.[20] Despite the initial outcry against the idea of human cloning,[21] cloning may well become an accepted reproductive technology in the future, and some commentators view this development as inevitable.[22]

Summary

Advances in reproductive technology are an established part of the medical landscape. No longer merely the subject of science fiction, new reproductive technologies are more commonly available each year. As these technologies become widespread, the law will need to recognize their existence and consider their impact on legal rules and institutions. Much as family law earlier evolved to include adopted and born-out-of-wedlock children within the legal definition of children,[23] so too will property law need to address the reality of posthumously conceived children. Since at least some of these children will be "planned" posthumous births, simply excluding all such children as heirs by definition, as was done with those born out-of-wedlock in earlier times, is unacceptable.

Recommendation

We propose that if the deceased did not explicitly provide in the will for posthumous children, there should be a rebuttable presumption that the will contains an implicit statement that "nothing in this will shall be construed to provide an inheritance for any posthumously born children." This presumption can be rebutted by evidence showing that the deceased intended at the time of his or her death to provide for posthumously born children but had not yet made such provisions prior to his or her death.

For example, suppose two couples, Amy and Allen and Barb and Ben, created frozen embryos. Allen and Ben were then killed in a car accident on October 15th. Prior to the accident, Amy and Allen had made an appointment with their attorney for October 30th. When they scheduled the meeting, they informed the lawyer that they wished to revise their wills to provide for children who are the products of their stored embryos, even if they are born posthumously. Ben and Barb had no similar conversation with their attorney or anyone else concerning their wills. Amy and Barb both choose to implant the embryos in their wombs. Even though his will had not actually been changed, Allen's intent could be proved based on his discussion with his attorney, and thus, a gift in his will to "my children" would be read to include the children born from the frozen embryos. Since there is no provable intent in Ben's case, his gift to "my children" would not include the posthumous children.

Conclusion

Inheritance problems raised by the new reproductive technologies call for legislative intervention in the immediate future. Adopting our proposed solution would give courts a method for answering these challenging questions when they inevitably arise. Alternatively, a comprehensive revision of parentage laws, intestacy laws, and estate laws to consider the impact of the new reproductive technologies could produce other, more effective means of addressing the concerns of the Rule Against Perpetuities and eliminate the need for a piecemeal reform and, perhaps, for the Rule itself. However, given the contentious nature of the debate over reproductive and family issues generally, and over cloning in particular, we are not optimistic that any such reform will take place soon enough to eliminate the need for our approach. The problems that the new reproductive technologies cause for the Rule Against Perpetuities are instructive in that they establish that advances in medical technology require periodic reexamination of legal rules in a wide range of areas of the law.

References

1. John Chipman Gray, *Rule Against Perpetuities* (4th ed. 1942): 201.

2. *See* Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities & the New Reproductive Technologies, Georgia Law Review* (2004) for a detailed analysis of the Rule Against Perpetuities and how it is impacted by the availability of new reproductive technologies.

3. *Taber's Cyclopedic Medical Dictionary* 435 (16th ed. 1989).

4. *The New York State Task Force on Life on Life and the Law, Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* 292 (1998).

5. Susan M. Kerr et al., "Postmortem Sperm Procurement," *Journal of Urology* 2154, 2154 (1997): at 167.

6. *Id.* at 2156. The authors conducted a study that revealed a total of 82 requests made at 40 facilities in 22 different states in the U.S. between 1980 and 1995. Over half of the reported requests (43) were made during 1994 and 1995. Of the requests, 25 were honored at 14 facilities in 11 separate states. *See id.* at 2154.

7. Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 272 (Mass. 2002).

8. Gillett-Netting v. Barnhart, 231 F.Supp.2d 961, 966 (2002).

9. Alan Trounson & Linda Mohr, "Human Pregnancy Following Cryopreservation, Thawing and Transfer of an Eight-Cell Embryo," 305 *Nature* 707 (1983). The pregnancy, however, ended unsuccessfully when the fetus was stillborn during the 24th week of gestation. *Id.* at 708.

10. Rick Weiss, "Moral, space issues clash as embryos fill up freezers," *The Plain Dealer*, May 8, 2003 at A16.

11. Peter R. Brindsen et al., "Frozen Embryos: Decision Time in the U.K.", *Human Reproduction* 10, 3083, 3084 (1995). In the United States many facilities specify a two to five year storage period, providing the couple an option to extend the time period with mutual written consent. *Task Force, supra* note 4, at 293. In Australia, many programs impose a ten-year limit on embryo storage, after which a couple must agree to the disposition of any unused embryos, or the matter is decided by an institutional ethics committee. *See* Douglas M. Saunders et al., *"Frozen Embryos: Too Cold to Touch? The Dilemma Ten Years On," Human Reproduction* 10 3081 (1995). In England, a 1991 law dictated a five year limit to embryo storage and prohibited cryopreservation of embryos unless couples agreed in advance to the destruction of unused embryos after this period. Brindsen, *supra* at 3083; R. G. Edwards & Helen K. Beard, "Destruction of Cryopreserved Embryos: UK Law Dictated the Destruction of 3000 Cryopreserved Human Embryos", *Human Reproduction* 12:3 (1997). In May of 1996 the law was amended to allow couples who created embryos to obtain a five year extension of the storage period, but British fertility clinics nonetheless destroyed approximately 3,300 embryos for which no one requested extended cryopreservation. Youssef M. Ibrahim, "Ethical Furor Erupts in Britain: Should Embryos Be Destroyed?," *New York Times*, Aug. 1, 1996, at A1.

12. Task Force; *supra* note 4, at 83.

13. *Id.*

14. Geoffrey Sher et al., *In Vitro Fertilization* 171 (1998).

15. *Id.* at 173-174.

16. A somatic cell is a cell other than a sperm or an egg. *Taber's Cyclopedic Medical Dictionary, supra* note 3, at 1704.

17. *Task Force, supra* note 4, at 390-91.

18. *Id*

19. Lori B. Andrews & Nanette Elster, "Regulating Reproductive Technologies," *Journal of Legal Medicine* 21 (2000): 35, 64.

20. *See* Jose B. Cibelli, et al., "The First Human Cloned Embryo," *Scientific American* (November 24, 2001), *available at* http://www.sciam.com. The scientists hope to develop human embryos for therapeutic rather than reproductive purposes.

21. Argentina, Australia, Belgium, Canada, Denmark, France, Germany, Israel, Japan, Norway, Peru, Slovakia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom either have laws against human cloning or have announced plans to pass such laws. *See* H.R. Rep. No. 18, *Human Cloning Prohibition Act Of 2003,* 108th Cong., 1st sess., 2003 WL 550319 (Legal History), (February 25, 2003).

22. *See, e.g.,* Robin McKie, "Dolly dies - but human cloning will still happen," *The Observer* (February 16, 2003).

23. *See* Walter Wadlington, "Artificial Conception: The Challenge for Family Law," *Virginia Law Review.* 65 (1983): 465; Harry D. Krause, "Equal Protection for the Illegitimate," *Michigan Law Review* 65:477 (1967); Charles Nelson Le Ray, Note, "Implications Of DNA Technology On Posthumous Paternity Determination: Deciding The Facts When Daddy Can't Give His Opinion," *Boston College Law Review* 35 (1994): 747, 794-795.