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PERSPECTIVE

Strange new world: restrictions on the right to posthumously procreate

By Mark J. Phillips and Jake V. Phillips

The right of a woman to use the extracted sperm of a deceased partner is a fairly new concept in California, and with the rapid advances in reproductive technology the courts of this state have attempted to keep pace. Now, in *Robertson v. Saadat*, 2021 DJDAR 4334 (May 1, 2020), the 2nd District Court of Appeal has reined in the right to sue for damages resulting from injuries arising from the use of posthumous extracted sperm.

The ownership interest in extracted sperm in California was first discussed in the 1993 case of *Hecht v. Superior Court* (14 Cal. App. 4th 836). The decedent in that case, William Kane, was a bright and mercurial Ivy League lawyer with an ex-wife, two adult children and a girlfriend, Deborah Hecht. Before committing suicide at the Mirage Hotel in Las Vegas in 1991, he deposited 15 vials of sperm at a cryogenic bank with instructions to release them to Hecht, executed a will leaving her all interest in the sperm, and penned a letter to his present and future offspring expressing his wish for Hecht to have his posthumous child.

The court reasoned that the decedent had decision-making authority to use his sperm for reproduction, and that genetic material is a unique form of property "not governed by the general law of personal property" because of its potential for human life. Other property left on death can be dealt with in any way the beneficiary desires; it can be used, discarded, sold or destroyed. Genetic material, however, can only be used in the manner the decedent intended. In *Hecht*, the decedent expressed his intention that Hecht receive and use his sperm, and it was distributed to her over the objections of his family. The full reach of the *Hecht* decision remained unclear when, as fate would have it, she never became pregnant with the sperm deposited by Kane.

Advancements in reproductive technology have outpaced federal and state laws, and many jurisdictions do not currently directly address the legal issues created by posthumous conception.

Cases concerning the legitimacy and inheritance rights of posthumously conceived children began to reach courts in other jurisdictions. In *Woodward v. Comm. Social Security*, 760 N.E.2d 257 (2002), a mother in Massachusetts sought federal benefits for posthumously conceived twins born after their father's cancer death, and the supreme court of that state laid down a rubric for when the law would recognize posthumously conceived children as the child of a decedent, a necessary finding for qualification for benefits. In *Gillette-Netting v. Barnhart*, 371 F.3d 593 (2004), the 9th U.S. Circuit Court of Appeals came to a similar decision based on state law for a similar set of twins conceived after the cancer death of a father, relying on Woodward and other underlying decisions from around the country.

In response to the emerging cases, and the projections of scientists that genetic material could be viable for a hundred years or more causing insurmountable disruption in the ordinary administration of a decedent's assets, California adopted in 2005 new Probate Code Section 249.5. Under the new rules, a child conceived after the death of a decedent is deemed to be born within the lifetime of the decedent and entitled to inherit under the intestacy laws as an omitted child only if all of the following tests are met:

1. There is clear and convincing evidence in writing, signed and dated by the decedent, that a designated third person is entitled to use genetic material of the decedent;

2. Within four months of the date of the issuance of the decedent's death certificate, the designated person gives notice to all persons in possession of a decedent's property of the possibility of a posthumous conception; and

3. The posthumously conceived child is in utero within two years of the issuance of the decedent's death certificate.

Following the introduction of Probate Code Section 249.5, *Estate of Kievernagel*, 166 Cal. App. 4th 1024 (2008), established that it was the intent of the donor that controlled when it came

to the disposition of genetic material.

During life, Joseph and his wife Iris planned to conceive through the use of in vitro fertilization. This process required Joseph to store his sperm at a cryogenic bank in case his live sperm was unusable. The agreement accompanying the sperm storage stated that it was Joseph's sole and separate property and provided two options upon death, to discard the sample or donate it to his wife. The box indicating the sperm sample was to be discarded was checked and initialed. After Joseph's death, Iris, as administrator of his estate, petitioned for distribution of his sperm.

The court denied her request. Ordinary property left to a beneficiary can be used or disposed of by the recipient absent trust or another entity that controls. The court in *Kievernagel*, however, concluded that gametic material was a "unique type of property not governed by the general laws relating to gifts or personal property or transfer of personal property upon death" because of its potential to produce life. Instead, the court cited *Hecht* in ruling that the decedent had an ownership interest and that his intent is the governing factor in the use of such material even after death. The court noted that using the intent of the donor to determine the disposition of gametic material upon the donor's death is consistent with the state's laws of intestacy for posthumously conceived children under Probate Code Section 249.5.

The recent case of *Robertson* continues California's evolving law regarding the property rights to genetic material following the death of a decedent. In *Robertson*, the court held that the surviving spouse was not entitled to use the sperm to conceive and therefore not entitled to tort damages for its loss in the hands of the institution hired to store it.

Decedent Aaron Robertson and his wife, Sarah, wanted to start a family but decided to wait until technological advancements could prevent him from passing on his life-threatening Marfan Syndrome. When he suffered a stroke and fell into a coma at age 29 and the physicians at UCLA Medical Center told Sarah that there was no chance of recovery, she had them extract Aaron's sperm before his death. The Medical Center's ethics panel approved the extraction based on Sarah's representation that the couple wanted children, evidenced by cards and letters written by Aaron prior to his stroke. Ten years after Decedent's passing, when Sarah was ready to begin fertility treatment, she found out that the cryogenic bank had lost the extracted sperm. In the resulting lawsuit for professional negligence, breach of contract, infliction of emotional distress and other causes of action, Sarah and Aaron's parents alleged that defendants knew the vials of sperm had been lost, intended to impregnate her with the sperm of other donors without her knowledge, and worse that they had used Aaron's sperm to impregnate others without their consent and thus potentially passed on his Marfan Syndrome.

Although it was clear that Aaron wished to have children with Sarah while he was alive, the court determined that Sarah was unable to show that she was entitled to use the sperm after his death, because Aaron, who was in a coma, "did not consent to the extraction of his sperm." Thus, she suffered no injury because under California law "the donor's intent governs the disposition of stored gametic material at the time of the donor's death."

Conclusion

Advancements in reproductive technology have outpaced federal and state laws, and many jurisdictions do not currently directly address the legal issues created by posthumous conception. California law has continued to evolve in issues surrounding the ownership interests of extracted sperm, beginning with *Hecht* in 1993 through *Robertson* in 2020. As reproductive technology becomes widely accessible, California will continue to face new and novel circumstances regarding the property right to genetic material, the use of that material, damages that result from its loss or misuse, and the inheritance rights of children born from the use of that material. ■

Mark J. Phillips *is a shareholder at the law offices of Lewitt Hackman in Encino, California. He is the author of numerous articles and the co-author (with Aryn Z. Phillips) of "Trials of the Century" (Prometheus, 2016).* **Jake V. Phillips** *is a student at Georgetown University Law Center.*