



The ethics of non-partner requests for posthumous assisted reproduction

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Abstract

After the death of a loved one, family will occasionally request posthumous assisted reproduction (PAR). Professional medical societies in the US and Europe oppose such requests without written consent except from the surviving partner with whom the deceased presumably shared a joint reproductive project. Here, however, we argue that joint reproductive projects are not limited to two-person romantic partners and therefore ethical policies should not be either. In other words, we argue the criterion of being in a romantic partnership with the decedent is biased and unjustly excludes certain family formations. We begin by describing the professional society guidelines to highlight how they presume a two-person romantic couple is the ideal basis for reproductive projects and families. Then, we discuss examples of alternative parental projects, noting that they are usually grounded in feminist and queer values. Finally, we respond to potential objections about violating the autonomy of the deceased and conflating reproductive and parental projects. In sum, as long as medical societies continue to uphold a policy whereby romantic partners may seek PAR in the absence of written consent, we believe that these societies must also allow for the potential of family formations that do not fit into the dominant paradigm.

Keywords Posthumous assisted reproduction · Ethics · Family formation · Third-party reproduction

In 2019, Peter Zhu, a 21-year-old West Point cadet, died tragically in a skiing accident. Peter had spoken about his desire to have children and continue on the family name while he was alive, but left no written documentation for his parents to procure his sperm in the event of his unexpected death. Nonetheless, a NY Supreme Court judge ruled in favor of allowing his parents to retrieve and use his sperm after he had been pronounced brain dead [1], a process known as posthumous assisted reproduction (PAR). This decision goes against professional medical society guidelines in the US (the American Society for Reproductive Medicine (ASRM))

and Europe (the European Society of Human Reproduction and Embryology (ESHRE)) that oppose parental requests for PAR without written consent. These societies state the only circumstance in which presumed consent *could be* ethically permissible is by partner request. This exception is because the couple may have had plans to parent children together, what the ASRM calls a “joint reproductive project” and the ESHRE refers to as a “parental project.”

We support relying upon a joint reproductive project to determine access to PAR since pinpointing the individual(s) with which someone was planning on raising a child with seems like an appropriate place to start. Our concern, however, is that ASRM and ESHRE seem to have just one criterion for determining a joint reproductive project: being in a romantic partnership with the decedent. Such a narrow conception unjustly excludes certain family formations, many of which already experience discrimination and marginalization. We argue that ASRM and ESHRE should expand their guidelines to include family structures that exist outside of the romantic partner paradigm. We begin by describing the professional society guidelines to highlight how they privilege a two-person romantic couple as the ideal for reproductive projects and families. Then, we discuss examples

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of alternative parental projects, noting that they are usually grounded in feminist and queer values. Finally, we respond to potential objections about violating the autonomy of the deceased and conflating reproductive and parental projects.

Amatonormative approach to PAR

Both the ASRM and ESHRE oppose parents using the gametes of their adult children posthumously without prior written consent. The ASRM describes parental requests for PAR as a “troubling situation” claiming that no “joint reproductive project” exists between a deceased patient and their parents as it does between spouses [2]. The ASRM uses this concept of a “joint reproductive project” between partners or spouses to justify “presuming consent” when the deceased has not explicitly stated they support posthumous reproduction. The ESHRE similarly seeks to exclude parental requests for PAR stating that, “The gametes or embryos can only be put at the disposal of the surviving partner... third parties cannot continue a parental project in which they had no part during the life of the intentional parents” [3]. This idea of a “parental project” closely mirrors the ASRM’s “joint reproductive project,” and clearly excludes the deceased’s parents who, according to ESHRE, “have no say in this matter” [3]. In fact, the “parental project” paradigm excludes any “third-party” (e.g., sibling, cousin, friend) request for PAR, not just parental ones. Since anyone outside the two partners is considered a third party, all PAR requests should be denied, except those from the surviving romantic partner.

In this way, these policies can be described as amatonormative, meaning they uphold “the normative expectation that everyone seeks and flourishes in the same type of dyadic, romantic, sexual love relationship” [4]. Although the ESHRE and the ASRM never explicitly define partners, they seem to be referring to two people in a romantic relationship, especially as the ASRM uses gendered terms like “girlfriend” and “wife.” The examples in their statements seem to involve only heterosexual couples, but both organizations have statements supporting same gender couples [3, 5]. Additionally, neither opposes alternative family formations, including intrafamilial gamete donation (apart from consanguineous arrangements), when all parties are alive since they can be fully counseled and provide written consent [3, 5].

Despite growing acceptance of alternative families, our point is that PAR policy rests upon an amatonormative conception of family as requiring two people in a romantic relationship. This policy reflects broader cultural norms about family relations which relies on the “marital presumption of paternity” to legitimize children born to a married couple. In contrast, children born outside of marriage were historically considered “illegitimate,” with fewer rights and increased

stigma [6]. For the sake of consistency with other guidelines that support alternative family formations, the ASRM and ESHRE should update their PAR guidelines both to maintain consistency with other guidelines that condone alternative family formations and to reflect the existence and suitability of various family formations, not just those consisting of a couple.

Alternative family formations

We now turn to examples of contemporary “parental projects” that exist outside of romantic couples to show how the amatonormative foundation of a joint reproductive project neglects communal (including multigenerational), matrilineal (especially non-western), and queer families.

First, such a narrow conception ignores the wide range of historic and current communal family structures, such as the Israeli kibbutz [7] and coparenting in African-American communities [8]. Multigenerational families were the norm in the US until the twentieth century and are not uncommon today, with 10% of children living in such households. Moreover, grandparents raising grandchildren is a normal practice that can be found around the world. Some posit that multigenerational relations will become more important in the twenty-first century due to increased lifespan and divorce rates, among other factors [9].

Returning to the case of Peter Zhu, his parents cited their Chinese culture and Peter’s commitment to family as reasons to support their request for PAR [10]. Multigenerational families are common in Chinese culture and among Chinese immigrants [11]. Peter was committed to carrying on the cultural and family legacy—an endeavor that would require his genetic material since he was an only child. He expressed the desire for multiple children, and it seems likely his parents would play a significant role in their lives [12].

Second, the current conception of the “parental project” is Eurocentric and excludes family formations more common in matrilineal societies. For example, in some matrilineal societies, such as the Hopi (an indigenous group in what is now considered Arizona) and the Briand Island of Papua New Guinea, a child’s maternal uncle may be more of an authority figure than the child’s father. In Ghana, it is common for children to refer to their father’s brother as “father” while their biological father is still alive, a practice that has legal implications as “in practice, an uncle, whether maternal or paternal, may easily sign as the legal authority” [13].

Third, the concept of a “joint reproductive project” often rejects queer family formations. Due to cis-heteronormativity (broadly as well as in reproductive medicine), queer individuals experience more challenges in accessing assisted fertility care [14]. As a result, they sometimes rely on alternatives to the medical establishment to find alternative

ways to have children, such as lesbian couples relying on gay men as known sperm donors [15]. These arrangements often do not adhere to the two-parent monogamy model and therefore are not legible to law, which is based on a heteronormative nuclear family [16]. Although a few states now legally recognize three or more parents [17], overall the law “discourages the formation of more complex co-parenting relationships ... [and] erases non-normative relationships” [18]. This limited understanding of a family as consisting of two adults in an amorous relationship excludes not only some queer family formations, but also heterosexual people in polyamorous relationships.

Objections and responses

Here we discuss some potential concerns with a broadening of the concept of joint reproductive project. One of the main objections to PAR without explicit consent is that it could potentially violate the autonomy of the deceased and the probability of this could increase if we expand the pool of people who can request PAR. While this is indeed a possibility, we are not positing that *anyone* can request someone’s gametes for posthumous use. Rather, we are claiming that there may be others beyond the genetic parents who can justifiably request PAR. For instance, Daniela Cutas and Anna Smajdor argue that because genetic connections are meaningful—a central reason for supporting assisted reproductive technologies—individuals could also have a valid interest in the genetic material of their genetic relatives [19].

Here, however, we stick with the existence of a joint reproductive project as the appropriate standard but assert that it needs to be applied in a way to include various joint reproductive projects and not just those within two-person romantic relationships. An expanded understanding of joint reproductive projects may be more difficult to adjudicate and may require a higher burden of proof than merely confirming the existence of a romantic couple. We do not have the space to articulate a framework for assessing partner requests but believe that an ethics committee or some other diverse group of individuals with knowledge of the moral complexities raised by such a situation is well positioned to provide guidance.

Another response to concerns about violating the autonomy of the deceased is that the focus on autonomy is the wrong framing for alternative family formations. This is because these formations queer dominant understandings of the family both by including LGBTQIA individuals and by challenging patriarchal, heteronormative conceptions of the family. As a result, the focus on the autonomy of the deceased (usually a man) is misplaced.

Instead of autonomy, some have turned to beneficence to argue that the welfare of the living (including the

partner and prospective child) should be the primary focus and, moreover, that PAR can be beneficial for the decedent [20]). Beneficence is a useful alternative framing because the types of alternative families we are discussing are not grounded in a neoliberal conception of the self in which autonomy is the priority. These family formations tend to be grounded in feminist commitments, and therefore take a more egalitarian approach that centers on relationships rather than individual rights. Indeed, a feminist ethics of care explicitly acknowledges the universality of human dependence on others, thereby identifying benevolence within webs of relationships as necessary for moral action. Such a framework shifts questions about the permissibility of PAR from the individual level—does it violate the decedent’s autonomy? Will the resulting child be harmed?—to the interpersonal and social level—does PAR uphold ethical obligations, particularly caring for those who are vulnerable, Does PAR uphold ethical obligations we have to others based on our relationships, particularly caring for those who are vulnerable?

A different objection to our analysis is that we are conflating reproductive interests (which are often genetic) and parental structures. While these concepts can be teased apart, in most cases, the goal of a reproductive project is to engender a parental project. The closeness of these projects is reflected in professional medical societies using different terminology to refer to the same thing: the ASRM uses a “joint reproductive project” and ESHRE uses “parental project.” Third-party reproduction is a notable exception to these two concepts going hand-in-hand, which is why it can lead to confusion and contestation regarding parental roles. Disagreement about parental status is determined by identifying what the ESHRE refers to as the “intentional parents”—the individuals who began a reproductive project with the intention of parenting resultant children (ESHRE). That intention is the determining factor, regardless of genetic relatedness, demonstrates the intertwined nature of reproductive and parental projects. In short, people who share a joint reproductive project envision a future caring for the resulting child together [21]. The foundation, and ultimately the purpose, of a joint reproductive project is to raise a child together (in whatever chosen parental structure). Obviously this cannot happen in the case of PAR, but an individual can continue some version of the planned reproductive project without the deceased. And, in fact, doing so may be easier in some of the alternative family formations we discussed since they involve multiple people rather than just two.

Conclusion

In this paper, we posit an ethical obligation to expand the ESHRE and the ASRM's guidelines to include family structures that exist outside of the romantic partner paradigm. As reproductive rights continue to erode across the US, a feminist ethics of care helps us recognize care obligations to others, especially those who are marginalized and excluded. In light of the increasing number of bills targeting the LGBTQ+ community, particularly transgender and nonbinary individuals, we should ensure that our policies do not inadvertently exclude non-normative family formations. Thus, we encourage the ASRM and ESHRE to revisit their ethical guidelines regarding PAR to make them as inclusive as possible.

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