

April 2021

In re Zhu: Implied Consent to Posthumous Sperm Retrieval

Mary Kathryn Sapp
Southern Methodist University, Dedman School of Law

Recommended Citation

Mary Kathryn Sapp, *In re Zhu: Implied Consent to Posthumous Sperm Retrieval*, 23 SMU Sci. & Tech. L. Rev. 89 (2021)
<https://scholar.smu.edu/scitech/vol23/iss1/6>

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Science and Technology Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

In re Zhu: Implied Consent to Posthumous Sperm Retrieval

Mary Kathryn Sapp*

I. INTRODUCTION

A. Presentation of the Controversy

In 1980, an American doctor became the first physician to retrieve sperm from a brain-dead man using a procedure called posthumous sperm retrieval (PSR).¹ Although it remains an uncommon procedure, requests for PSR have increased in recent years, sparking debates about the ethical and legal permissibility of posthumous sperm retrieval.² There are various methods by which doctors may posthumously retrieve sperm, including direct extraction using a needle.³ Once the physician retrieves the sperm, a reproductive facility may freeze and store it until the relevant parties decide what to do with the sperm.⁴

In *In re Zhu*,⁵ the New York Supreme Court (Westchester County) granted a deceased man's parents full authority to decide the ultimate disposition of their son's sperm, including its potential use for future procreative purposes.⁶ Even though the decedent had not expressed his intent on the subject of PSR while he was alive, the court relied on the decedent's registration as an organ donor and his past statements and actions in its finding of the decedent's "presumed intent" that his parents were the proper party to make determinations about the ultimate disposition of his sperm.⁷ Over the past few decades, posthumous sperm retrieval has sparked an ethical debate centered on the acceptability of this procedure given concerns about the proper requirement of consent.⁸ This case is important because it was a case of first impression for New York courts and signals a need for updated legislation governing PSR.⁹

* Mary Kathryn Sapp is a 2021 candidate for a Juris Doctor from SMU Dedman School of Law. She received a Bachelor of Arts in Philosophy from Southern Methodist University in 2018.

1. Shai Shefi et al., *Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm*, 21 HUMAN REPRODUCTION 2890, 2890 (2006).
2. Amanda MacMillan, *What is Posthumous Sperm Retrieval? How a Man Can Father Children Even After His Death*, HEALTH (July 26, 2017), <https://www.health.com/pregnancy/posthumous-sperm-retrieval>.
3. *Id.*
4. *Id.*
5. *See In re Zhu*, 103 N.Y.S.3d 775, 776 (N.Y. Sup. Ct. 2019).
6. *Id.* at 781.
7. *Id.* at 778.
8. *Id.*
9. *See id.*

B. Factual Background

At the time of his accident, Peter Zhu was a 21-year-old West Point Cadet scheduled to graduate in only a few months when he suffered severe spinal injuries while skiing on the West Point Campus.¹⁰ First responders transported Peter to a nearby hospital where doctors later declared him brain dead.¹¹ Because he had signed an organ donation card, doctors kept Peter on life support until the scheduled date for his organ removal.¹² The morning that Peter's organ donation surgery was to take place, his parents filed a motion with the court requesting immediate relief.¹³ PSR is only successful if doctors retrieve the sperm within 24–48 hours of the man's death.¹⁴ Although the hospital said that it was neither in favor of nor opposed to the PSR procedure, it asked that the court give an order directing the procedure before it proceeded.¹⁵ The hospital did not have any guidelines covering this scenario.¹⁶

Two facts from the parents' petition were of central importance in the court's ultimate holding: (1) Peter registered as an organ donor; and (2) Peter had periodically expressed his desire to one day have a family of his own.¹⁷ In their petition, Peter's parents explained their request in terms of their son's lifelong wish to be a father, the cultural importance of continuing the family legacy, and as a remedy for their own personal grief.¹⁸

The case came before the court as a motion to show cause, with the parents requesting (1) immediate relief in the form of a direct order asking the hospital to perform the PSR procedure; and (2) granting the parents authority to decide on the matter.¹⁹ The court granted the request for immediate relief and a fertility clinic stored Peter's sperm while the parents awaited the court's holding on the second issue.²⁰

10. *Id.* at 776.

11. *In re Zhu*, 103 N.Y.S.3d at 776.

12. *Id.*

13. *Id.*

14. Sorin Hostiuc, *Informed Consent in Posthumous Sperm Procurement*, 28 ARCHIVES OF GYNECOLOGY & OBSTETRICS 4, 433 (2010).

15. *In re Zhu*, 103 N.Y.S.3d at 776.

16. *See id.*

17. *Id.* at 778.

18. Brief for Petitioner at 2, *In re Zhu*, 103 N.Y.S.3d 775 (N.Y. Sup. Ct. 2019) (No. 53327/2019).

19. *In re Zhu*, 103 N.Y.S.3d at 776.

20. *Id.*

II. LEGAL BACKGROUND

PSR is not regulated in the United States.²¹ A New York State Senator put forth the only proposed legislation on the matter in 1998, but the state legislature never submitted the bill to a vote.²² Today, doctors accept or deny requests for PSR on a case-by-case basis, and they usually only grant requests in response to a court order.²³ Some hospitals have put forth guidelines meant to aid doctors in responding to requests for PSR.²⁴ Such guidelines cover topics related to PSR such as the recommended timing for the procedure relative to the patient's death, acceptable methods of retrieval, and acceptable parties who may request the procedure.²⁵

Some argue that the Revised Uniform Anatomical Gift Act (UAGA) governs sperm retrieval in the United States.²⁶ In 2018, the Ethics Committee of the American Society for Reproductive Medicine (ASRM) published guidelines on posthumous retrieval and use of gametes or embryos.²⁷ According to the ASRM, PSR is "ethically justifiable" if there is "written documentation from the deceased authoriz[ing] it."²⁸ If no such documented authorization exists, the ASRM says that hospitals should only consider requests from "the surviving spouse or life partner."²⁹

Two cases coming out of California have served as general guidelines for addressing legal issues surrounding the disposition of a decedent's sperm; however, these cases involve sperm that the decedent had deposited and stored in a sperm bank and they do not address the retrieval of sperm directly

-
21. See Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 297 (2006).
 22. Jean Denise Krebs, *Any Man can be a Father, but Should a Dead Man be a Dad?: An Approach to the Formal Legalization of Posthumous Sperm Retrieval and Posthumous Reproduction in the United States*, 47 HOFSTRA L. REV. 775, 787 (2018).
 23. Hostiuc, *supra* note 14, at 433.
 24. Katz, *supra* note 21, at 300.
 25. MacMillan, *supra* note 2.
 26. Krebs, *supra* note 22, at 778.
 27. See Ethics Comm. of the Am. Soc'y for Reproductive Med., *Posthumous Retrieval and Use of Gametes or Embryos: an Ethics Committee Opinion (2018)*, AM. SOC'Y FOR REPRODUCTIVE MED., https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/posthumous_retrieval_and_use_of_gametes_or_embryos.pdf [hereinafter *Posthumous Retrieval*].
 28. MacMillan, *supra* note 2.
 29. *Id.*

from a decedent's body.³⁰ In *In re Estate of Kievernagel*, a California appellate court faced a widow's efforts to claim her deceased husband's sperm as her own property, despite the decedent's written request that his sperm, which he had deposited in a sperm bank while he was alive, ought to be destroyed upon his death.³¹ In rejecting the widow's efforts to claim the sperm as her own, the court relied on the decedent's intent as he expressed it in writing during his lifetime.³² In *Hecht v. Kane*, a separate California court of appeal relied on the decedent's expressed consent that his sperm "be stored for possible future use by his longtime girlfriend," despite efforts by the decedent's children to destroy the decedent's frozen sperm.³³ In both California cases, each court prioritized the respective decedent's expressed wishes concerning the ultimate disposition of his sperm and characterized a decedent's interest in his sperm as a unique, quasi-property like interest.³⁴ Neither California court opinion involved PSR as a procedure effected directly upon the decedent; rather, each case dealt with the disposition of sperm that the decedent deposited and stored in a sperm bank while he was alive.³⁵ This approach seems to represent the consensus amongst American courts where a decedent's interest in the disposition of his sperm after his death is most analogous to property rights, but amounts to something more intimate and personal to his personal identity compared to his interest in other organs or tissues that may be donated.³⁶

In re Daniel Thomas Christy represents the sole case cited by the *In re Zhu* court that deals with PSR procedures.³⁷ In this case, the parents of the decedent framed their request for the procedure as necessary to effectuate an "anatomical gift" of the sperm to the decedent's surviving fiancée.³⁸ The Iowa court in that case used Iowa laws of intestacy to justify the parents'

30. See *In re Zhu*, 103 N.Y.S.3d 775, 776 (N.Y. Sup. Ct. 2019) (describing *In re Daniel Thomas Christy*, No. EQCV 6845 (Johnson Cnty. Sept. 14, 2007)); *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Ct. App. 3d Dist. 2008); *Hecht v. Kane*, 16 Cal. App. 4th 836, 838 (Ct. App. 2d Dist. 1993).

31. *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d at 312.

32. *Id.* at 316.

33. *Hecht*, 16 Cal. App. 4th at 840.

34. *Id.*; *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d at 312.

35. *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d at 312; *Hecht*, 16 Cal. App. 4th at 840.

36. See, e.g., *In re Zhu*, 103 N.Y.S.3d 775, 780 (N.Y. Sup. Ct. 2019); *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d at 316; *Hecht*, 16 Cal. App. 4th at 838.

37. *In re Zhu*, 103 N.Y.S.3d at 780 (describing *In re Daniel Thomas Christy*, No. EQCV 6845 (Johnson Cnty. Sept. 14, 2007)).

38. Andrew Joseph, 'They Don't Want His Story to End': Efforts to Save the Sperm of the Deceased Come with Heartache and Tough Questions, STAT (Mar. 13, 2019), <https://www.statnews.com/2019/03/13/postmortem-sperm-retrieval/>.

request for the PSR procedure and subsequent storage of the sperm.³⁹ The court permitted the parents “to make an ‘anatomical gift’ of it to decedent’s fiancé, for possible future procreative use.”⁴⁰

The most on point precedent comes from Texas, where a court granted a mother’s request for her son to undergo PSR and ordered the hospital to retrieve viable sperm from the decedent.⁴¹ The decedent’s mother described her request to perform the PSR procedure as motivated by a desire to fulfill her son’s dream of becoming a father one day, despite his sudden death.⁴² This case is distinct from the aforementioned cases because it involves PSR and it also does not involve a surviving partner’s desire to carry the decedent’s child; rather, the decedent’s mother in *In re Christy* planned on finding a third-party surrogate to provide the egg and carry a viable embryo.⁴³ Although this is the most relevant existing case law, the *In re Zhu* court did not consider this scenario in its opinion.⁴⁴

A. Critical Issue

The court held the parents were the proper party to decide the ultimate disposition of Peter’s sperm. Because Peter never expressed an opinion on the matter of PSR, the court relied on Peter’s “presumed intent” in reaching its conclusion. The court gleaned this presumed intent from Peter’s status as an organ donor, coupled with his parents’ and teacher’s testimony regarding Peter’s lifelong wish to become a father. The court also relied on two statutes as an aid in determining Peter’s presumed intent. Where it relies on a policy of presumed consent, this decision treats a PSR procedure similar to an organ donation procedure. However, the parents relied on anecdotal evidence that does not establish Peter’s presumed intent to PSR should he die.⁴⁵

B. Legal Analysis

In *In re Zhu*, the New York Supreme Court (Westchester County) granted the parents of a deceased young man full authority to decide what to do with their son’s sperm.⁴⁶ That the court analogized PSR with organ dona-

39. *In re Zhu*, 103 N.Y.S.3d at 780.

40. *Id.*

41. Emma Grillo, *The Complex Ethics of Saving a Dead Person’s Sperm*, VICE (May 31, 2019), https://www.vice.com/en_us/article/7xgeyb/the-complex-ethics-of-saving-a-dead-persons-sperm.

42. *Id.*

43. *Id.*

44. *In re Zhu*, 103 N.Y.S.3d at 780.

45. *Id.* at 778–79.

46. *Id.* at 780.

tion is further supported by the statutes it cited to support its finding.⁴⁷ Ethically speaking, the court divided the decision into two parts: first, approving the retrieval of sperm and, second, approving the use of the sperm for subsequent uses.⁴⁸ The Court phrased the issue in *In re Zhu* as: “who, if anyone should be given the authority to determine the disposition of Peter’s genetic material, now preserved in the sperm bank.”⁴⁹

The basis of the court’s holding in favor of Peter’s parents lies in its characterization of a decedent’s sperm as legally analogous to the rest of the decedent’s organs and tissues for purposes of deciding who may decide the disposition of the sperm after the man has died.⁵⁰ This characterization of sperm as legally equivalent to other organs and tissues is evidenced where the court adopted the *In re Christy* court’s characterization of a decedent’s sperm as an anatomical gift.⁵¹ This explains the court’s reliance on evidence pertaining to Peter’s status as an organ donor and his desire to carry on his family legacy, coupled with the court’s citing of the New York version of the UAGA and New York intestacy laws.⁵² The logic of the court’s holding is essentially: because Peter was an organ donor who adored his parents and longed to have a family of his own one day to carry on his cultural tradition, “Peter evinced an intent to leave for future disposition rather than destroy certain bodily parts, tissues, and by extension, bodily fluids that survived him” and that “the disposition of Peter’s genetic material be made in the first instance by his parents.”⁵³

III. PRACTICAL ANALYSIS & IMPLICATION

A. Analysis of the Court’s Reasoning

Given the underlying facts of the case, it was inappropriate for the court to grant Peter’s parents unrestricted authority to decide the ultimate disposition of Peter’s sperm. In analyzing cases conserving PSR, two issues stand out as necessary to address: (1) what level of consent must the court require before granting requests for PSR; and (2) who can request the procedure.⁵⁴ The answer to both questions is informed by a review of existing case law and state statutes; both suggest that the existing law is inapplicable to the

47. *See id.* at 779–80.

48. *Id.* at 775.

49. *Id.* at 779.

50. *See In re Zhu*, 103 N.Y.S.3d at 779.

51. *Id.*

52. *Id.*

53. *Id.* at 780.

54. Nofar Yakovi Gan-Or, *Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law*, 37 COLUM. J. GENDER & L. 109, 110–11 (2019).

facts present in *In re Zhu* and there is a need for legislative clarity on PSR.⁵⁵ Whatever the merit of presumed intent may be in factually distinct contexts, a presumption of consent is not permissible in the PSR context where, as in *In re Zhu*, the requests come from the parents of the decedent and the decedent had made no explicit statements or actions which would support such a presumption of intent.⁵⁶

In the ethical debate regarding consent as it relates to PSR, there is a recognized stance that PSR procedures should not occur “outside the context of a committed romantic relationship without the prior consent of the deceased to donating gametes to a stranger for that purpose.”⁵⁷ In the debate over consent, one might characterize the three main positions as: restrictive, permissive, and hybrid.⁵⁸ However, all approaches agree on one thing: “some form of premortem consent of the decedent is required.”⁵⁹ The restrictive view “requires that the decedent must have executed an advance directive ‘that indicates explicitly his or her willingness to have the procedure performed in these specific circumstances.’”⁶⁰ A more intermediate approach would merely require “reasonably inferred consent” of the decedent before allowing PSR.⁶¹ Those who oppose inferred consent cite a fear that such conclusions about a decedent’s presumed consent would be “colored by the interests, motivations, and purposes of those who are seeking to use the sperm.”⁶²

1. Under these Facts, Presumed Intent is Inappropriate Basis for the Decedent’s Consent

First, the court’s holding is incorrect because it did not establish Peter’s presumed intent. Thus, the court should have limited Peter’s parents’ use of the sperm to non-procreative uses.⁶³ Even granting that presumed intent is an acceptable standard, the court did not establish Peter’s consent to PSR.⁶⁴ Peter’s status as an organ donor was not enough to establish his presumed intent to have his parents possess full authority to decide about the ultimate disposi-

55. *See id.*

56. *See In re Zhu*, 103 N.Y.S.3d at 780.

57. Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27 J.L. & HEALTH 68, 93 (2014).

58. *See Katz, supra* note 21, at 300.

59. *Id.*

60. *Id.* at 302.

61. *Id.* at 304.

62. *Id.* at 300.

63. *But see In re Zhu*, 103 N.Y.S.3d 775, 781 (N.Y. Sup. Ct. 2019).

64. *Id.* at 780.

tion of his sperm.⁶⁵ This is because PSR is distinct from organ donation in several respects. Organ donation and PSR differ such that the same rules of consent should not govern both. Distinctions between the procedures “relate . . . to the nature of the procreation itself” and “the nature of the process involved.”⁶⁶ The two procedures differ in their purpose; whereas the purpose of organ donation is to save lives, the purpose of PSR is to create new life.⁶⁷ Whereas presumed consent is justifiable in the organ donation context, presumed consent to PSR violates the decedent’s reproductive autonomy.⁶⁸

Although the court cited to *Hecht* and *In re Estate of Kievernagel* to show the primary importance of the decedent’s intent in this inquiry, the court did not acknowledge the fundamental factual differences that distinguish the matters in *In re Zhu* from those present in the existing case law.⁶⁹ Presumed consent regarding organ donation gathers support because of a societal need for organ donations, which are valuable to society.⁷⁰ Under the UAGA, even if the decedent did not register as an organ donor, the next of kin may permit organ donation so long as the donation does not go against any explicit wishes or religious views held by the decedent during his lifetime.⁷¹

The facts of *In re Zhu* do not include the fundamental facts present in *Hecht*, *In re Estate of Kievernagel*, and *In re Daniel Thomas Christy* that permit a presumption of consent to PSR.⁷² Unlike the existing case law, Peter made no representations about his wishes regarding the disposition of his sperm in the event of his death, he had not donated his sperm to a sperm bank, and he had no surviving spouse.⁷³ These facts would have lent support to the appropriateness of presumed intent. The court established that Peter consented to his parents deciding about the disposition of his sperm if someone had to make that decision.⁷⁴ However, the court erred in granting the immediate request for relief.⁷⁵ A proper analysis by the court would have

65. *Id.*

66. Gan-Or, *supra* note 54, at 115–16.

67. Hostiuc, *supra* note 14, at 434.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *In re Zhu*, 103 N.Y.S.3d 775, 776 (N.Y. Sup. Ct. 2019) (describing *In re Daniel Thomas Christy*, No. EQCV 6845 (Johnson Co. Sept. 14, 2007); *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312–13 (Ct. App. 3d Dist. 2008); *Hecht v. Kane*, 16 Cal. App. 4th 836, 838 (Ct. App. 2d Dist. 1993).

73. *In re Zhu*, 103 N.Y.S.3d at 776.

74. *Id.* at 780.

75. *Id.*

taken into account the fundamental differences between Peter's situation and the existing case law and conclude that Peter's parents had failed to establish the requisite intent of the decedent.⁷⁶

There are serious conflicts of interest in a situation of PSR requested by a decedent's parents that do not exist in situations of presumed intent with organ donations permitted by the decedent's parents.⁷⁷ The term "post-mortem grandparenthood" describes situations where, for example, parents of a deceased request the post-mortem sperm retrieval.⁷⁸ Regarding such requests by parents of the deceased, most people think parents lack "any ethical claim to their child's gametes."⁷⁹ One major concern in cases of post-mortem grandparenthood is that parents will, intentionally or not, overstate their child's past statements about having kids one day, perhaps even describing their quest for PSR as motivated by a desire to accomplish their son's dream.⁸⁰ Thus, the medical community faces a massive moral dilemma: "how should a request for retrieval be handled if it is made not by the spouse of the decedent but by his partner, parents, or by his surviving children?"⁸¹

2. Existing Statutes Do Not Apply to the Circumstances in *In re Zhu*

The court relied on provisions of the New York Public Health Law (PHL) and the Estates, Powers and Trusts Law (EPTL) for guidance on interpreting the decedent's presumed intent.⁸² Section 4301 of the PHL ("Persons who may execute an anatomical gift") states that "any individual of sound mind and eighteen years of age or more may give all or any part of his or her body for any purpose specified in section forty-three hundred two of this article, the gift to take effect upon death."⁸³ Section 4302 of the PHL is called "Persons who may become donees and purposes for which anatomical gifts may be made."⁸⁴ This section states that "the following persons may become donees of gifts or bodies or parts thereof for the purposes stated: . . . 3. any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy or transplantation."⁸⁵ Although the PHL permits the court to allow the anatomical gift to go to the sperm bank or

76. *Id.*

77. Hostiuc, *supra* note 14, at 434.

78. Gan-Or, *supra* note 54, at 114.

79. *Id.* at 111.

80. *Id.* at 148.

81. Krebs, *supra* note 22, at 777.

82. *In re Zhu*, 103 N.Y.S.3d 775, 779–80 (N.Y. Sup. Ct. 2019).

83. N.Y. PUB. HEALTH LAW § 4301(1)(a) (Consol. 2020).

84. *Id.* § 4302.

85. *Id.* § 4301(2).

storage facility, the issue lies in the permissible purpose where none of the options seem to cover the purpose for which the Zhus had requested to use the sperm—e.g., potential future reproductive use.⁸⁶ Because the Zhus did not have a specific recipient in mind for the “anatomical gift,” it seems like a stretch to say that the PHL governs here.

As for the applicability of the EPTL, the court described section 4-1.1 of the EPTL as “set[ting] forth the order in which those connected to the decedent take his or her property in the absence of a Will.”⁸⁷ On a similar note, the court cited *In re Daniel Thomas Christy* for the proposition that the court “relied solely upon the Iowa laws of intestacy to authorize the recovery and storage of decedent’s sperm by his parents, and to permit them to make an ‘anatomical gift’ of it to decedent’s fiancé, presumably for possible future procreative use.”⁸⁸ Again, this intestacy statute seems inapplicable to PSR, where there is no evidence that the decedent intended for anyone to be the recipient of his sperm after his death.⁸⁹ The court seems to limit its understanding of the decedent’s interest in his sperm after his death to a property interest, without taking into consideration the unique, personal properties that distinguish sperm from other organs and tissues.⁹⁰

Taken together, a survey of relevant case law and state statutes shows that existing New York statutes are inapplicable to circumstances such as those present in *In re Zhu*. Thus, this case shows the need for clear legislation on the subject to aid courts in making these difficult decisions.⁹¹

B. Loose Ends

The author suggests that the New York State Legislature reconsider the bill brought forth by New York State Senator Roy Goodman in 1998. This bill proposed to “ban PSR unless the decedent gave explicit written consent prior to his death and to require that the request only be granted if the spouse or partner of the deceased requested the procedure.”⁹² This seems to be the most appropriate legislation at the moment, when PSR is still a rare procedure; such a law would satisfy notice requirements for decedents and would aid healthcare professionals in their decision-making.

86. *In re Zhu*, 103 N.Y.S.3d at 781.

87. *Id.* at 780.

88. *Id.*

89. *See id.*

90. *See id.*

91. *See id.* at 779.

92. Krebs, *supra* note 22, at 787.

IV. CONCLUSION

In conclusion, *In re Zhu* represents a departure from existing precedent on the subject of PSR because it rests on a much weaker evidentiary basis and the court decides based on the decedent's "presumed intent."⁹³ This case also shows the need for clear state legislation regulating PSR so that grieving families may take advantage of this advancement in reproductive science without navigating the legislative void any longer.⁹⁴

93. See *In re Zhu*, 103 N.Y.S.3d at 779.

94. See *id.*