

Posthumously conceived children under Irish Law

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Last month, world news outlets carried the story of Pei Xia Chen, the wife of murdered New York policeman, Detective First Grade Wenjian Liu, who gave birth to their daughter over two and a half years after his death. According to reports, on the night of the murder, December 20th, 2014, and on the advice of medical practitioners present, Detective Liu's wife requested that her husband's sperm be preserved. The couple had married a mere three months previous.

The legal issues surrounding the posthumous use of genetic material are, perhaps unsurprisingly, beginning to attract increasing attention. Dramatic advances in medical technology, particularly regarding artificial human reproduction, require that questions such as whether the posthumous use of genetic material should be allowed and, if so, what entitlements posthumously conceived children should enjoy must be addressed.

At present, the law in Ireland regarding posthumous conception is unclear. An early draft of the Children and Family Relationships Bill carried provisions which effectively sought to prohibit the posthumous use of genetic material. These provisions were, however, omitted from the final Act ultimately introduced. Yet it seems legislation in this area may be imminent with the issue of posthumous conception being considered by the Department of Health as part of its plan to legislate for 'Assisted Human Reproduction and Associated Research'. Outlining its vision in 2015, the Department stated its intention to propose provisions which would permit the posthumous use of 'stored sperm, eggs or embryos after a person's death by their spouse or civil partner', subject to the person having provided their consent for such a use prior to their death.

What precisely provoked this volte face is unclear. Whatever the reason, such proposals, if advanced, will likely attract considerable comment and debate. Indeed, the need for legislative reform may not end there. If we do legislate to permit the posthumous use of genetic material, we must also consider what entitlements we wish such posthumously conceived children to have. Particularly important questions arise regarding inheritance. Should, for example, such children be entitled to inherit from their deceased parent under their will (perhaps phrased to include future children)? Or should they be entitled to a share under the rules of intestacy? In themselves, these questions have proved quite contentious in many jurisdictions. Although it may be argued that inheritance regimes around the world have long recognised children born after a parent's death, such children were, significantly, required to be '*en ventre sa mère*' and born within 10 months of the deceased's passing. Now, as in the case of Detective Liu, such children may be born many years after a parent's death.

One jurisdiction which has responded with new legislation to facilitate inheritance on intestacy by posthumously conceived children is British Columbia, Canada. Pursuant to its Wills, Estates and Succession Act 2009, subject to certain conditions, a child may inherit on intestacy where they are born within *two years* of their parent's death. Similar law reform has been recommended in Manitoba, Canada. Comparable and, in fact, more extensive provisions are applied under the Uniform Probate Code in the USA allowing children in some states to inherit where they are born up to *three years and nine months* after a parent's death.

The main argument for adopting such reform and recognizing posthumously conceived children for the purposes of inheritance is that it ensures all children of the deceased are treated equally, irrespective of the timing or method of conception. It also makes certain that the best interests of the child are prioritized.

However, notwithstanding the desirability of providing such recognition to children born in these circumstances, strong arguments against such reform can also be advanced. From a purely practical perspective, recognition of posthumously conceived children, like that in British Columbia, significantly slows down the administration of estates on death where the potential arises for such children to be born. Where such an approach is adopted, a deceased's property is effectively frozen for two or more years with its distribution to all beneficiaries postponed. This delay may be considered undesirable. Even in situations where a two year delay is considered broadly acceptable, further difficulties arise. It has been suggested, for example, that placing a time limit on a grieving spouse or partner to make such life altering decisions can in fact encourage rash and impulsive decision-making. Spouses and partners need time and space to process the passing of their loved one before they can be expected to make such decisions regarding the possibility of posthumous conception. When viewed in this light, the introduction of a time limit (although satisfying those concerned with ensuring the timely administration of estates) would potentially prove counter-productive.

As exemplified by the case of Pei Xia Chen - and as recently considered in Paul Kalanithi's profoundly moving memoir, *When Breath Becomes Air* - couples facing their own mortality are increasingly conscious of the need to preserve their genetic material and the potential for posthumous conception. It appears inevitable that the legal implications of these medical advances will have to be addressed in Ireland. What kind of law we would like to govern these scenarios is something which we should start to consider.