

Birth after death:

creating life when a parent has died

All fertility patients storing sperm, eggs or embryos are asked to sign consent forms saying what should happen if one of them dies. Many tick the box to say that their surviving partner can use their gametes or embryos post-death, even if that is not something they expect to happen at the time of storage. However, if your partner does die, having their eggs, sperm or embryos in storage can give the chance to complete a family building journey started as a couple, if that is something you want to do. The law then becomes absolutely crucial, since the circumstances in which embryos and gametes can be used after death are carefully regulated. Understanding the law, and what the forms mean, is sensible for anyone having fertility treatment, just in case the worst happens.

Surviving mothers

A woman who wants to use her deceased partner's sperm (or embryos created with his sperm) needs his written and signed consent, given during his lifetime. This must provide specifically for post-death use. Without this, treatment cannot take place in the UK, although there are now a handful of cases (the best known being that of Diane Blood) where the HFEA has allowed stored sperm to be exported so that it can be used in treatment without formal written consent. However, the best advice is to make good provision during lifetime and to make sure (if you would want your partner to be able to conceive with your sperm after your death) that you provide for this in writing and that your consent is signed.

There are some complicated rules regarding fatherhood and birth certificates. As a general rule, a man who conceives posthumously will not be treated as the legal father of his biological child. The law states this explicitly, mainly to prevent difficulties winding up a man's estate where he has left sperm in storage. Without this rule, a man's estate would have to be left open indefinitely, just in case a child was born in the future who had a claim to inheritance. However, a change to the law was made in 2003 allowing deceased fathers to have some recognition. It is now possible for a special written election to be made by the mother (within 42 days of the birth) which enables a deceased father to be named on his child's birth certificate, even if he is not treated as the father for other legal purposes.

Surviving fathers

A father who wants to use embryos created with his deceased partner's eggs is in a more difficult position. There are the obvious difficulties of making contact with a volunteer surrogate mother, given legal restrictions in the UK on advertising and commercially arranged surrogacy. There are also the difficulties associated with surrogacy as a single person. Single men (like single women) are not included in the legal structure for surrogacy, and so cannot make the normal post-birth court application (for a parental order) which makes the intended parents the legal parents of a surrogate born child. Although the law on surrogacy was extended in 2010 to include same sex and unmarried couples, single men and single women remain excluded (even though single people



can apply for adoption or conceive through donor insemination without a partner).

The same requirements on consent also apply, and a widower father will only be able to conceive in the UK with embryos or eggs from his deceased partner if she gave clear written (and signed) consent to post death use during her lifetime.

Storage periods

One of the issues which most commonly trips people up regarding posthumous conception is storage periods. Until 2009, embryos could only be stored for a maximum of five years. In October 2009, the period was extended to ten years, provided that both partners consented to the longer storage period. The difficulty is that consent can only be changed during a person's lifetime. If the partner who has died only consented to five years' storage (having ticked the maximum five year box on the HFEA form at the time) the consent period cannot be extended post death. It is therefore sensible for couples with embryos currently in storage, who want to allow post-death use, to ensure that they have updated their consent forms to provide for ten (rather than five) years of storage. An alternative solution is to include provision in a Will giving written consent to the longest legally permissible storage (which also protects against future possible changes).

Some couples may be entitled to extended storage. Special rules allow the normal ten year storage period to be extended where one or both partners is 'prematurely infertile' (up to a maximum of fifty five years). However, the death of one partner may affect entitlement, since if extended storage is allowed on the basis of the premature infertility of the partner who has died, it will no longer be available after death.

Things to bear in mind

It may not be an easy subject, but do think about these issues if you are having fertility treatment. Dealing with losing a partner is of course very difficult and particularly where it happens unexpectedly; being deprived of the family you had planned as well may be something you feel strongly about if the worst happens. The key is to discuss honestly what you would want if either of you dies, to make sure you know how long a storage period you are entitled to, and – most critically if you want to keep your options open as far as possible – to get your paperwork in good order during your lifetimes.

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