

Opinion on the transfer of embryos after the decease of a husband or partner. Report.

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Opinion

The position of women wishing to transfer embryos preserved after the decease of their husband has been referred to the National Consultative Ethics Committee for Life Sciences and Health on several occasions. Consequently, the Committee felt it must again consider this question and formulate an opinion. The latter concerns cases in which the husband (or partner) is also the biological father.

Depending on the way a woman reacts to her bereavement, the project of embryo transfer can be considered either as new and different from the initial parental project, or as the continuation of the same project under the new circumstances created by the husband's demise. There is no convincing reason for refusing the woman herself this choice *a priori*.

In certain pathological situations of infertility, a couple decides to make use of a technique of medically assisted procreation. In so doing, the man and the woman manifest their common desire to conceive a child and bring it up together. This is the definition of the parental project. In case of dissolution of the partnership, it is understandable that this project cannot be implemented in the face of opposition from one of the parties. On the other hand, if the man deceases without expressing his wishes regarding the above desire in the case of his demise, it does not seem possible to base an attitude upon this desire. This means that although a request by a woman for insemination with her deceased partner's sperm is questionable, the situation is different when in vitro fertilization has been performed during the man's lifetime and when the embryos have been frozen. In that case, the man's decease indeed does not deprive the woman of the rights that she may consider she possesses to these embryos, jointly created by herself and her deceased partner. The parental project is certainly suspended, since it consisted of the birth of a child to a couple determined to cherish it, and that couple no longer exists. However, the man having deceased, one cannot see who or what authority could, in the last instance, claim rights to these embryos equal to or stronger than those of the woman, or object to her explicitly stated project, about which she has been duly informed, to assume a pregnancy after the transfer of the frozen embryos.

In addition, should the birth be viable, it would be admissible for the child to be either legitimate or natural in the eyes of the law. The freezing of embryos has indeed created a new situation because of the fact that a long period of time may elapse between fertilization and nidation. Thus, the child may be born after the legal period of 300 days following the demise of the husband, beyond which, according to traditional law, the paternity of the deceased can no longer be legally recognized (Article 315 of the French Civil Code). However, in the case of in vitro fertilization, the biological paternity of the husband cannot be doubted, because his gametes were used in the laboratory by the medical team that performed the fertilization and subsequent freezing of the embryo or embryos.

Consequently, the period of 300 days may be considered not to apply here, since the child was conceived without any possible doubt during the father's lifetime, when the fertilization was performed. This point concerns one of the legal stipulations that might be subject to modification. The Committee can only draw the legislator's attention to the new situation created by the freezing of embryos, and its legal consequences.

It is, however, appropriate to question the very different conditions which determine a woman's decision to request the transfer of embryos after her husband's death. It is to be feared that on account of her distress during the days and weeks following this death, she is in no condition to make such a decision. As long as the woman does not, when considering her future and that of her child, take into account the permanent absence of the co-author of the initial project, her request for a transfer might not express a clearly conceived wish. In addition, she may be subject to pressure from those around her, prompted not only by affection, but also by social and legal considerations which do not necessarily correspond to the preservation of her interests and do not ensure the independent nature of her decision. It would therefore be desirable to provide for a period of reflection of at least three months but no more than one year before any such decision is made.

The woman would use this period to think things over, and to acquire, through appropriate discussion, adequate information about the situation she plans to recreate, especially its legal aspects, concerning her future and that of her prospective child or children.

Report

The position of a wife wishing to transfer embryos preserved after the decease of her husband has been referred to the French National Consultative Ethics Committee for Health and Life Sciences on several occasions. Consequently, the Committee wished to consider this question again and to formulate an opinion. The latter concerns cases in which the husband or concubinary is also the genitor.

The problem arises when fertilization occurs outside the woman's body and the embryos thus obtained can be preserved after freezing. Their implantation in the woman's uterus sometimes requires several attempts, and the transfer procedures may thus cover a period of several months.

Under present technical conditions, the birth rate depends on the state of the embryo at the time of transfer. When the embryo is not frozen, this rate is about 10%, but it drops to less than 3% for frozen embryos.

The bills which passed their first reading in the French National Assembly on November 26 1992 provide that " the man and woman constituting the couple, of an age to procreate, must be living and consenting at the time... of the implantation of the embryos" - (art. L.671-2, paragraph 2).

Nevertheless, the CCNE considers it should recommend a less rigid attitude, in view of its knowledge of the circumstances in which this problem has arisen in the past and of the different solutions adopted.

In particular, the singularity and exceptional character of the conditions under which the wife's request can be granted should be stressed.

The arguments for and against acceptance of this request should take into account the real nature of what is known as " the parental project" , the consequences of its non-fulfilment and the interest of a child born in these circumstances.

1. The parental project

Up till now, it has been acknowledged that the techniques of in vitro fertilization are only practised with the aim of palliating the fertility disorders affecting stable heterosexual couples (see the previous CCNE opinions quoted in the bills referred to above). This means that in the vitro fertilization procedure is only undertaken after an agreement is concluded between the potential parents and a specialized medical team. This situation corresponds to what is called the existence of a parental project, which the medical team has undertaken to serve by using its competence and the technical means available.

The possibility of implantation after the freezing of embryos in cases of previous failures constitutes part of these techniques. In principle, such implantation has obtained the informed consent of each member of the couple. If the couple no longer exists because of the husband's death, does the parental project survive ? His demise places the medical team in a new situation, because it no longer has to deal with a couple, but only with the wife.

In its initial form, the parental project in fact no longer exists, and this being so, the wife can decide to abandon it. Sometimes, however, she does not wish to do so, and asks the medical team to help her complete what she perceives and defines as the continuation and fulfilment of the initial project. Nevertheless, this request constitutes a new project which is certainly a continuation of the previous one, but whose motivations cannot fail to be affected either positively or negatively by the husband's death. In these circumstances, to transfer the embryo, or not to transfer it, amounts to accepting or refusing the legitimacy of this new project.

In certain respects, the situation is comparable to the one that would have been created by the sudden death of the husband during the wife's pregnancy, for unlike the situation created by a request for artificial insemination with the sperm of a deceased husband, the embryos have been fertilized and already exist as potential children who may evolve from ovules taken from the wife.

However, in that case, the failure of the initial transfer and the extension of the procedure over a longer period have prevented gestation from starting before the death of the husband. This event gives the woman the possibility of making a choice, which would not exist in the same way if she were pregnant.

The fact that the wife is pregnant when her husband dies can indeed affect her reaction to her bereavement, which is in general difficult to appreciate, but the continuation of the pregnancy does not call for any explicit decision on her part. Any termination of the pregnancy in case of distress does require a decision, but such an option is only legally possible during the first twelve weeks. On the other hand, when the husband dies before any pregnancy has started, the wife can take time to consider her new circumstances, and decide whether or not to pursue her project. Consequently, the transfer which could start a pregnancy and lead to a birth is not inevitable, but necessitates a decision and involves the active cooperation of the medical team.

There are many possible motives for one or other of these decisions, determined by the wife's overall reaction to her husband's death, and by the way in which she overcomes this bereavement during the period of mourning that follows. In view of the uncertainties and hazards of what is termed the "labour of mourning", it is not possible to formulate any general judgement on the nature and value of these motives. That is why there is, a priori, no ethical reason for not complying with the wife's decision.

2. Consequences of non fulfilment of the parental project

When the initial agreement is concluded between the medical team and the couple, there is generally a provision, in a signed document, that if the couple were to dissolve, the medical team would destroy the embryos, or otherwise dispose of them, in accordance with the couple's wishes.

This of course is what happens when the wife abandons her project after her husband's death.

Nevertheless, the existence of this agreement does not in itself justify the need for its application if the wife expresses the wish to fulfil her project after the death of her husband.

In that case the destruction or any other fate of the embryos would be decided against her express wishes. This would constitute an inadmissible violation of her right to decide on the fate of these embryos, which she has helped into existence. Such a violation would run the risk of generating, in addition to the bereavement, a feeling of revolt against arbitrary and cruel regulations.

However, the pursuit of the parental project also has consequences which must be envisaged as lucidly as possible when the decision is made.

If the embryo transfer is successful, it will lead to the birth of one or even several children, because of the relative frequency of multiple pregnancies after successful implantation. It is therefore important for a woman to be able to think over all the consequences of starting a one-parent family for which she alone will have to bear the responsibility.

3. Interest of the child or children

The question arises of defining the interest of a child born into this exceptional environment. Perhaps it is in this respect that comparison with the situation created by the husband's death during the wife's pregnancy is the most pertinent. Thus, from the child's point of view after his birth, the father's accidental death after the child has already been conceived deprives him of his presence in the same way, whether the death occurs before or after implantation. At least the child will feel he was strongly desired by both his father and mother at the outset, and subsequently again by his mother.

In addition, for a viable birth, the child could be regarded as legitimate or natural in the eyes of the law. In this respect, embryo freezing has created a new situation, because a long period sometimes elapses between fertilization and nidation. As a result, the child may be born when the legal period of 300 years after the husband's death has expired. As a rule, the deceased's paternity cannot be legally recognized after that time (Article 315 of the French Code Civil). However, in the case of in vitro fertilization, the husband's biological paternity cannot be doubted, because his gametes were used in the laboratory by the medical team which performed the fertilization followed by freezing of the embryo or embryos.

Consequently, the period of the 300 days could be considered not to apply here, since without a doubt the child was conceived during his father's lifetime, at implantation. In this respect, the laws may have to be altered. The Committee can only draw the legislator's attention to the new situation created by embryo freezing, and to its legal consequences.

4. Conclusion

Depending on how the wife reacts to her bereavement, the fulfilment of the embryo transfer project can be defined either as new and different from the initial parental project, or as the fulfilment of the same project in the new circumstances created by the husband's death.

There is no convincing reason to refuse either definition by the wife herself, unlike what would be the case if she were systematically forbidden to fulfil her project.

Nevertheless, for as long as the wife does not envisage her future and that of her child in the light of the permanent absence of the initial project's joint author, her request for embryo transfer might fail to express a clearly determined wish. It may indeed be feared that a woman overcome by grief after a loss that is inadmissible during the days and weeks that follow it is in no state to arrive at a conscious independent decision. In addition, she may be subject to pressure from those around her, prompted not only by affection but also by social and legal motives which do not necessarily correspond to the preservation of her interests and do not ensure the independent nature of her decision.

There have been cases when a woman who asked for embryo transfer in these circumstances subsequently changed her mind.

To be acceptable, the woman's request must therefore be the fruit of a mature pondered decision. That is why it would be desirable to provide for a period of reflection of at least three months but not more than one year before any such decision is made.

The woman would use this period for reflection, and to acquire information about the situation she envisages creating, especially its legal aspects concerning her future and that of her prospective child or children. Interviews will be proposed to her by the medical team, assisted by advisers able to give her all the information she may need, whether psychological, social, moral, religious or legal. The woman can then, if she so desires, expressly renew her request.

Comments by Pierre Laroque

COMMENTS BY MR PIERRE LAROQUE ON THE OPINION CONCERNING THE TRANSFER OF EMBRYOS AFTER THE GENITOR'S DECEASE

1. The question of knowing whether, and under what conditions, an embryo which has been conceived by a couple whose male member has deceased, and which has been preserved by freezing, can, at the mother's request, be implanted in her uterus, is determined by the legal status of such an embryo. Despite repeated requests by the National Consultative Ethics Committee, the legislator has not, to date, thought fit to fill the existing gap on this point in our legislation.

To comply with requests for an opinion, the Committee has had to define its position on this issue. It considers that the embryo is a " potential human person" , and therefore a human being not yet endowed with all of a person's attributes, but nevertheless with its own existence and rights, and that it cannot be the property even of those who conceived it. The latter possess sui generis rights in relation to the embryo, such as the right to oppose any use of it which they consider unfitting, and the counterpart of these rights is the obligation to safeguard and defend this human being, excluding complete freedom to dispose of it. Although in many respects the embryo depends on those who conceived it, it belongs to no one, no more to its mother than to her husband or partner. Like every human being, it has the right to be protected by the community of which it is part.

2. The mother of the embryo who survived her husband or partner, has, and must have,

priority in deciding the future of the embryo, but under the control of the community and with its protection.

The solution to the question at issue therefore depends on the interest of the child which may be born as a result of the embryo's reimplantation.

His primary interest may appear to lie in having the best possible chance of being born, but it is also to have the best chance of the most favourable life possible. As the child will have no father, the community must guarantee that the mother will be able to compensate for this lack as well as possible, since everyone admits that a child needs both a father and mother. It is up to the community to provide this guarantee, as it does for abandoned children or orphans who are adopted if their parents die, or neglect or illtreat them. The community is therefore in duty bound to conceive and implement procedures or mechanisms to this end.

These procedures or mechanisms must be adapted to each particular situation and comprise the collection of all the items of information about the surviving mother which will make it possible to appreciate to what extent her character and her material and mental resources will enable her to combine the roles of mother and father for the prospective child during his long period of training and development.

3. The surviving wife must also be protected from herself. In the period of distress caused by her widowhood, she may naturally incline towards pursuing the parental project formulated during her husband or partner's lifetime, without exactly sizing up the consequences her decision may have for her own future life, because of the burdens that will result and the difficulties she might experience in constituting a new couple and having one or several more children.

4. In the absence of legislation and regulations in this regard, it does not seem opportune to adopt a definite position on the question at issue without considering all its aspects - those which concern both the child's upbringing and education and the mother's future, and also the legal status which, as our legislation now stands, will be that of a child who, as he has no father, can only be considered as a natural child and cannot have any right to inherit from his late parent.

5. For all these reasons, it seems inopportune to adopt an attitude to the question at issue that only envisages some of the ethical and legal problems on which its solution depends, a solution that can only be found in a joint effort which necessarily calls for the legislator's intervention.