SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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In the Matter of the Application of
MONICA ZHU & YONGMIN ZHU

Index No. 53327/2019

for an Order Directing the Retrieval of
Genetic Material

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COLANGELO, J.,

Petitioners Monica Zhu and Yongmin Zhu ("Petitioners" or the "Zhus") are the parents of Peter Zhu, now deceased. ("Peter" or the "Deceased"). Peter was a cadet at West Point Military Academy ("West Point") in West Point, New York, scheduled to graduate later this year. On February 23, 2019, Peter was involved in a ski accident on the West Point ski slope which resulted in fractures to his spinal cord. Peter was transported to the Westchester County Medical Center (the "Medical Center"). As a result of the accident, Peter was declared brain dead on February 27, 2019, but remained alive through life support, pending organ donation. Peter had previously signed an organ donor card (Exh. A to the Petition) and pursuant to his wishes as set forth on the donor card, Peter was scheduled for organ donation removal surgery at 3 P.M. on March 1, 2019. On the morning of March 1, 2019, Petitioners brought the instant Petition, seeking the following relief:

"a. Directing Westchester Medical Center to retrieve sperm from Petitioners' son **PETER ZHU**, and to provide such sperm to a sperm bank or similar facility of Petitioners' choosing;

b. Allowing Petitioners to use Peter Zhu's sperm for third party reproduction; and

c. Granting such other and further relief as to the Court seems just and proper."

Petitioners also sought immediate interim relief with respect to the retrieval of Peter's sperm. Petitioners had been advised, and the Court had no reason to doubt, that such retrieval would not succeed unless it was effected prior to or contemporaneous with the removal of Peter's organs - - that is, before Peter's demise. Petitioners, through their counsel, Joseph R. Williams, Esq., alerted the Medical Center to the proposed Order to Show Cause and the interim relief sought, and counsel for Petitioners was advised by Barbara Kukowski, Esq., an attorney for the Medical Center, that the "hospital does not object to the relief sought in the Petition as long as a sperm bank or similar facility can be found who will come to Westchester Medical Center to receive and transport the sperm upon retrieval." (Affirm. of Joseph R. Williams, Esq., dated March 1, 2019 (the "Williams Affirm.") ¶9).

Petitioners appeared before this Court on the morning of March 1, 2019 through their attorney, Mr. Williams, and presented the instant Order to Show Cause including the request for immediate interim relief as described above. After hearing from Mr. Williams, the Court contacted the Medical Center attorney Ms. Kukowski, who confirmed that while the hospital did not consent to the procedure, neither did it object and that it would comply with any duly issued order. Ms. Kukowski also suggested that if the Court was inclined to grant the interim relief sought by Petitioners, that it include in its order a provision giving the Medical Center the authority to release to the sperm bank any information regarding Peter that such sperm banks generally require in order to properly effect the sperm transmission - - a provision to which Petitioners did not object.

On March 1, 2019, the Court granted the following interim relief:

"**ORDERED** that the Westchester Medical Center is hereby directed to retrieve sperm from the Petitioner's son, **PETER ZHU**, and to provide such sperm to a sperm bank or similar facility of Petitioners' choosing for storage until further Order of this Court regarding disposition of such sperm, and that the Westchester County Medical Center has the Court's permission to release to said facility all information necessary to effect the transmission of such material to the sperm bank or other facility including but not limited to HIV and hepatitis related information."

As the Court later confirmed with Petitioners, Peter's sperm was successfully retrieved and is being preserved in a local sperm bank. The issue of the ultimate disposition of Peter's sperm remained outstanding. The Court then set March 21, 2019 as the date for further proceedings with respect to the determination of the remaining issues raised by Petitioners' Order to Show Cause.

On March 21, the Zhus appeared by their counsel, Mr. Williams. Since the Zhus reside in California and in light of the circumstances of their loss, the Court permitted them to appear and give testimony by telephone. The Court also heard, telephonically, from Captain Marc Passmore, the Company Tactical Officer of Peter's Company at West Point who had been in charge of supervising and monitoring Peter as well as the other 117 members of his Company.

The Zhus first recounted the events relating to their son's accident and the reasons behind their decision to seek both the temporary and the permanent relief as set forth in their Order to Show Cause: essentially, to preserve the possibility of the use of Peter's sperm in the future in order to posthumously realize his dream of having children and continuing the family line. (See also Petition, dated March 1, 2019, ¶ 15).

Not surprisingly, in view of the shock of their loss and its close temporal proximity, the Zhus testified that they are not now prepared to definitively state that they will use the sperm for third party reproductive purposes, nor have they taken any concrete steps to do so; no potential

surrogate or eggs have been located or even sought after, and no physician retained. The Zhus nonetheless made clear that they would like the Court to designate them, Peter's parents, as the persons who will be charged with the responsibility of deciding upon the disposition of Peter's genetic material. That is the issue which confronts the Court now: who, if anyone, should be given the authority to determine the disposition of Peter's genetic material, now preserved in the sperm bank.

In making this determination, the talisman must be the decedent's intent. On this, the few courts that have addressed this issue and ethicists who have commented with respect to it tend to agree. For example, in the California case of Estate of Kievernagel, 166 Cal. App. 4th 1024 (Ct. of Appeal, 3rd Dist. 2008), a California Court of Appeals held that the intent of the decedent should govern and affirmed an order authorizing destruction of decedent's sperm pursuant to his written request during his lifetime, despite his widow's claim to the sperm as her property under estate law. And in Hecht v. Kane, 16 Cal. App. 4th 836 (Ct. of Appeal, 2d Dist. 1993), the Court held that decedent's estate representative did not have the right to destroy decedent's frozen sperm in light of his expressed written intent that it be stored for possible future use by his longtime girlfriend. See also Posthumous Retrieval and Use of Gametes or Embryos: an Ethics Committee Opinion, Ethics Committee of the American Society for Reproductive Medicine, April 2, 2018 at pp. 2-3; Shelly Simana, Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?, Journal of Law and the Biosciences, 7 August 2018 (PMID 30191068), at pp. 3-8; Browne Lewis, Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously, 60 Case W. Res. L. Rev.1159, 1176-1177 (2010) (Discussing unreported cases that permitted retrieval and

potential procreative use of decedents's sperm on application of wife and parents in light of evidence of decedent's prior expressed intention to father children); cf. In re. Daniel Thomas Christy, No. EQCV 68545 (Iowa Dist. Ct., Johnson Co. 2007), annexed as Exh. D to Petitioners' Memorandum of Law.

Unfortunately, Peter left no express direction with respect to the posthumous disposition or use of his genetic material, including how or whether it could or should be used for procreative purposes. Nonetheless, Petitioner's presumed intent can be gleaned from certain of his prior actions and statements, in conjunction with statutes designed to serve as surrogates for a decedent's intent.

First, as mentioned above, Peter did sign a donor card authorizing the donation of his "organs, eyes, and tissues." (Donor Card, Exh. A to the Order to Show Cause.). When his parents were asked why they believed he had done so, they stated that Peter had always been motivated by a desire to help others. As they advised the Court, thanks to Peter, a 53 year old man now has a healthy kidney and pancreas, and a twelve year old girl a new heart. In addition, Peter's decision to embark upon a career in service to his fellow citizens and, as a military doctor, to his comrades in arms, is further indicia of his generosity of spirit. Thus, even though Peter did not expressly state that he wanted his sperm to be used for reproductive purposes, should his parents chose to do so in the future, it would not do violence to his memory. Indeed, as his parents confirmed in their Petition and testimony, such use would not be contrary to Peter's moral or religious beliefs, but would be consistent with his past conduct and statements.

Second, the determination of which person or entity should be charged with the responsibility for making the decision regarding the disposition of Peter's genetic material is also

informed by statements made by Peter to his parents and others. In seeking to divine Peter's intent from his past statements and actions, there is a consistent thread running through his short life: the primacy of family and family relationships. In what can be discerned from the Petition, testimony, and documents adduced, one thing is clear: considerations of family - - past, present and future - - were vital to Peter. Devotion to family, revealed in various ways, direct and subtle, was evident throughout Peter's young life.

For example, Peter's parents testified to conversations they had over time with Peter, in which he related to them his dream of having several children, and the responsibility he felt to carry on his cultural and family legacy. His parents shared with the Court a card sent by Peter to a religious studies professor after a trip to China, in which he related to the professor that "[y]ou are the type of teacher who I will share with my children. The stories that you told me will be passed on for future generations to come!" (Petitioners Exh. 1). More recently, Peter communicated to his Company's Tactical Officer at West Point, Captain Marc Passmore, his plans for the future, which included a family and children. Captain Passmore, who also testified telephonically on March 21, was in charge of assisting, counseling and mentoring the 117 cadets in Peter's company, including Peter. During his mentoring sessions with Peter, they discussed Peter's work and personal goals, long and short term, and Peter emphasized a goal of having several children. This and the other aspirations were reflected in a writing called a "baseball card" (due to its resemblance to the back, statistical side of a typical major league player's baseball card) which each cadet completes in his or her senior year, as Peter did. Peter's card, completed by him only months ago, lists as his "Family/Goals/Notes" to " [h]ave three kids, Get married before 30; Become a career officer in the military." (Petitioners . Exh. 2).

Thus, whether through his conversations with his parents, reports to his military advisor, or written reflections posted to a professor, the importance of family to Peter was a hallmark. Under such circumstances, the rhetorical question may well be: what better mechanism for determining the ultimate fate of his biological legacy than the decision of Peter's closet kin, his parents. The statutes inform and provide implicit support for this conclusion.

The statutes, particularly the relevant provisions of the Public Health Law ("PHL") and the Estates, Powers and Trusts Law (the "EPTL"), serve as important additional, albeit imperfect guides as to a decedent's - - here, Peter's - - presumed intent. PHL § 4301(2), implicitly relied upon by the Court in its temporary order, authorizes the donation and therefore disposition of bodily organs and, by extension, bodily fluids even in the absence of a potential decedents's express intent. As PHL § 4301(2) prescribes, when a potential donor has failed to leave specific instructions for the donation of his or her organs - - either for or against - - a transfer may nonetheless be effectuated upon the consent and direction of a person or persons close to the potential donor who would presumptively give voice to his ineffable wishes. To that end, the statute establishes a pecking order of consent that mirrors, to a significant extent, the order of those who take from a decedent in the absence of a Will. As GHL §4301(2) provides:

"§4301. Persons who may execute an anatomical gift.

2. Any of the following persons, in the order of priority stated, may, when persons in prior classes are not reasonably available, willing, and able to act, at the time of death, and in the absence of actual notice of contrary indications by the decedent, or actual notice of opposition by a member of the same class or prior class specified in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) of this subdivision, or reason to believe that an anatomical gift is contrary to the decedent's religious or moral beliefs, give all or any part of the decedent's body for any purpose specified in section forty-three hundred two of this article:

(a) the person designated as the decedent's health care agent under article twenty-nine-C of this chapter, subject to any written statement in the health care proxy form,

(b) the person designated as the decedent's agent in a written instrument under article forty-two of this chapter, subject to any written statement in the written instrument,

(c) the spouse, if not legally separated from the patient , or the domestic partner,

(d) a son or daughter eighteen years of age or older,

(e) either parent,

(f) a brother or sister eighteen years of age or older,

(g) a guardian of the person of the decedent at the time of his death,

(h) any other person authorized or under the obligation to dispose of the body.

(Emphasis added).

As Petitioners confirmed, Peter did not have a health care proxy or living will, never had children, and was neither married nor in a domestic partner relationship. His parents, next on the list, would therefore have been able to effect organ donation even if Peter had not signed a donor card. Parenthetically, the Court notes that in the context of Article 43-B of the Public Health Law concerning the organized procurement and storage of "organ, tissue and body parts", while not directly in play here, defines "tissue" to include "spermatozoon" PHL § 4360(10).

Similarly, the Estates, Powers and Trusts Law ("EPTL") sets forth the order in which those connected to the decedent take his or her property in the absence of a Will. As EPTL § 4-1.1 provides in pertinent part:

"§ 4-1.1. Descent and distribution of a decedent's estate

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained

herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8. Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and no issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) A spouse and no issue, the whole to the spouse.

(3) Issue and no spouse, the whole to the issue, by representation.

(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents..

(5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation."

(Emphasis added).

Indeed, in the Iowa case of In re Daniel Thomas Christie, No. EQCV 6845 (Iowa District Court, Johnson County 2007) 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. (A copy of the Christie decision is annexed as Exhibit D to Petitioners' Memorandum of Law).

When examined in this light, both the PHL and the EPTL provisions as well as Peter's past actions and statements point to his parents as the persons Peter would have intended to make decisions with respect to the preservation and disposition of the procreative fluids at issue. Peter did not leave a health care proxy or Will; he left no children, spouse or partner; his parents are next on the PHL and EPTL pecking order. Moreover, by leaving a donor card with respect to his organs, Peter evinced an intent to leave for future disposition rather than destroy certain bodily

parts, tissues and, by extension, bodily fluids that survived him.

Thus, in the instant case, the inferential emanations from the PHL, the EPTL, and Peter's donor card dovetail with Peter's personal history to arrive at the same result: the imperative that the decision regarding the disposition of Peter's genetic material be made in the first instance by his parents.

At this time, the Court will place no restrictions on the use to which Peter's parents may ultimately put their son's sperm, including its potential use for procreative purposes. As far as the Court can discern, no such restrictions are mandated by either New York or federal law. That is not to say, however, that Petitioners may not need to surmount certain obstacles, or confront important residual issues should they chose to seek to use Peter's sperm for reproductive purposes. A specific use, once chosen, may run afoul, or at least merit consideration of, certain legal, practical and ethical concerns, including the potential reluctance of medical professionals to assist in such a procedure. (See, e.g., Posthumous Retrieval and Use of Gametes or Embryos: an Ethics Committee Opinion, Ethics Committee of the American Society for Reproductive Medicine, April 2, 2018, at pp. 3-5 (Discussion of ethical concerns of doctors asked to participate in posthumous reproduction, particularly at the behest of parents rather than a surviving spouse).

In addition, the recognition of a posthumously conceived child as the son or daughter of the deceased may prove problematic; in some states, a child born after a certain period of time following the father's death may not be deemed such father's offspring for certain purposes. See Astrue v. Capato, 566 U.S. 541, 132 S. Ct. 2021 (2012) (Children conceived by in vitro fertilization using late husband's frozen sperm and born 18 months after husband's death held not entitled to social security survivor benefits since such children were deemed not to be his

offspring under the relevant state (here, Florida) intestacy law); Cal. Probate Code §249.5 (A posthumously conceived child is deemed a child of the decedent "[f]or purposes of determining rights to property to be distributed upon the death of a decedent" only if the decedent, in writing, "specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent" and the child was "in utero within two years of the date of issuance of a certificate of decedents's death."); cf. Martin v. Martin, 17 Misc.3d 198 (Surrogates Ct., N.Y. Co. 2007 (The Court interpreted trust agreements to include children conceived posthumously using a decedent's cryopreserved semen as his "issue" and "descendants."). And this is not to mention the challenges and responsibilities necessarily entailed in caring for and raising a child. The aforementioned considerations may well weigh into any decision Petitioners may make regarding the ultimate disposition of Peter's sperm.

The Court is constrained from addressing the range of other potential considerations at this juncture. Any evaluation must perforce await not only the expressed intent of the Zhus, but the presentation to the pertinent medical professionals, medical ethicists and, perhaps ultimately, a court of a concrete plan for that intent's actualization.

In any event, for the reasons set forth herein, the Court concludes that Peter's parents are the proper parties to make decisions regarding the disposition of Peter's genetic material. Accordingly, Petitioners' application is granted to the extent that they shall possess and control the disposition and potential use of their son Peter's genetic material.

The foregoing constitutes the Decision and Order of this Court.

Dated: May 16, 2019
White Plains, New York

Hon. John P. Colangelo
Supreme Court Justice