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A Child Conceived after His Father's Death: Posthumous Reproduction and Inheritance Rights - An Analysis of Ohio Statutes

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A CHILD CONCEIVED AFTER HIS FATHER'S DEATH?: POSTHUMOUS REPRODUCTION AND INHERITANCE RIGHTS. AN ANALYSIS OF OHIO STATUTES

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I. INTRODUCTION

Imagine a happily married couple, Bob and Cathy, in the prime of their lives and careers. Due to their desire to provide a loving, financially stable environment for a child, they have postponed having children until their careers are well established, and they can provide a secure home for their child. Before they have the opportunity to start their family, the unthinkable strikes – cancer. Bob is diagnosed with testicular cancer and told that the required treatment may leave him permanently sterile. With a strong determination to win this battle against cancer and fulfill their dream of a family, Bob deposits sperm for later use by Cathy when his health has returned. Sadly, Bob does not beat the odds and does not survive this deadly disease. Before dying, Bob expresses his intent for Cathy to move forward with their dream of a family utilizing assisted reproductive techniques. After careful consideration and time to overcome her grief, Cathy, who is also rapidly approaching the end of her fertile years, decides to honor Bob's intention and have his child. Lena is born two years after Bob succumbed to cancer. However, Lena may not be recognized as Bob's child. How can Cathy and Lena's rights be protected? Is Bob's sperm property that he could legally pass to Cathy? Should Lena be treated for inheritance

or other survivor benefits as Bob's descendent? Is Lena considered illegitimate? What are the implications of Bob's expressed intent (or the contrary)? These are questions confronting individuals utilizing the technology of today, but dealing with the laws of yesterday.

Today, reproductive technology allows the postponement of reproduction through the preservation of sperm (called gametes[1]) for use at a later time.[2] Although this technology has been available and widely used for years, the law has not kept pace with the technological evolution. A Yale College of Law professor articulated an important difference between medicine and the law when he said "the medical profession looks forward, while the legal profession gazes backward."[3] Without legislative action, the courts have been left to deal with the complicated issues arising from assisted reproduction on a case-by-case[4] basis, outside the confines of the inadequate statutes currently on the books. The questions presented challenge society's notions of family, involve religious and moral beliefs, and make legislation difficult to confront.[5] Science is forcing the confrontation of moral, ethical, political, sociological, psychological and legal concerns.[6] The nature of the discussions has left politicians shying away from adequately developing the necessary legislation. The legal frameworks that have been developed are confusing, cross over several Uniform Codes,[7] and are not adopted by a majority of states.

As recognized by the Prefatory Note of the Uniform Status of Children of Assisted Conception Act, "Once out, the genie will never return to the bottle",[8] it is unrealistic to believe that the technology, now widely available, will not be utilized. In addition, lack of legislative activity is unfair to the innocent children born into this

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[1]Genetic material used in artificial reproduction can be divided into five types: gametes (eggs and sperm), zygotes (single-cell, fertilized eggs), preembroys (four-to-eight cell zygotes), embryos (the state at which cell differentiation develops) and fetuses. James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 746-47 (1998). This Article will focus only on gametes as additional constitutional and property issues develop as to when a "person" is viable when the union of the egg and sperm has taken place in zygotes, preembroys, embryos, and fetuses.

[2]Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 335 (1994).

[3]Lori B. Andrews, *The Stork Market: Legal Regulation of the New Reproductive Technologies*, 6 WHITTIER L. REV. 789, 789 (1984).

[4]*See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (1993); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[5]Kathryn Venturatos Lorio, *Successions and Donations: A Symposium: From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV 27, 28 (1996).

[6]Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 197 (1997).

[7]*See* the Unif. Probate Code, Unif. Parentage Act, and Unif. Status of Children of Assisted Conception Act which are discussed in detail in this Article.

[8]Unif. Status of Children of Assisted Conception Act, 9B U.L.A. 199 (Supp. 1996).

circumstance. It is time for politicians to step forward into this political hotbed and make conscious, thoughtful decisions regarding the status of these children.

Bob, and other men, who want a post-mortem connection established with their children, face many hurdles surrounding posthumous conception. Indeed, a child conceived after Bob's death will be considered illegitimate since his death terminated the marriage leaving Cathy classified as an unmarried woman. A presumption of paternity only exists if Lena was born within 280 days of Bob's death. Most paternity statutes, including Ohio's, do not contemplate posthumous conception. Therefore, unless very liberally construed, the current laws will not allow the child to prove her mother's prior husband was her legal father for purposes of intestacy or survivor's benefits. The current laws present significant obstacles to the achievement of the recognition of the child as the decedent's heir.

This Article will argue that the posthumous child and the rights and responsibilities relating to such a child, are directly related to the fundamental right to procreate, thus statutes must support rather than prohibit posthumous conception. It will argue that legislation must necessarily incorporate that right in determining issues and forming legislation related to the posthumous child. It will show that current legislation, both the various Uniform Codes and Ohio's Revised Code, is not sufficient to protect and provide for this new class of children. In reaching this conclusion, Part II of this Article will review the history of artificial insemination. It will then discuss in Part III the details of posthumous reproduction, with a focus on artificial insemination using sperm from a deceased husband.[9] In setting the stage for legislative perspective, Part IV will discuss the various analytical approaches which have been used by the courts, in the absence of clear legislation, to determine the rights associated with posthumous reproduction and the resulting child's inheritance rights. Part V considers the development of case law as the issues surrounding assisted reproduction make their way to the courts for guidance. As inheritance rights, public policy, and the support of the posthumous child are important areas of concern, Part VI will consider the implications for inheritance involving the posthumous child. Finally, this Article will review the current uniform legislation and Ohio's adoption, or lack of adoption, of these uniform acts to suggest changes addressing the realities of the posthumous child which directly confront issues relating to nonmainstream family situations.

II. HISTORY OF ARTIFICIAL INSEMINATION

Artificial insemination has been around for years.[10] According to a Talmudic document back in 22 A.D., a rabbi discussed the hypothetical status of a woman impregnated by sitting in bath water containing previously deposited sperm.[11]

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[9]This Article will focus on the situation where the gamete is sperm (not egg) and the decedent is the husband of the woman inseminated. *See* Kristin L. Antall, Note, *Who is My Mother?: Why States Should Ban Posthumous Reproduction by Women*, 9 HEALTH MATRIX 203 (1999) for detail concerning posthumous artificial insemination using a deceased woman's egg and a surrogate. Donor artificial insemination will only be considered when comparing current legislation and implications for inheritance.

[10]WARREN FREEDMAN, LEGAL ISSUES IN BIOTECHNOLOGY AND HUMAN REPRODUCTION 23 (1991).

[11]*Id.*

However, the first intentional act of artificial insemination did not occur until 1322 when warring Arab tribes inseminated their enemy's mares with inferior stallion's sperm.[12] In 1770, an English doctor, John Hunter, recorded the first successful human artificial insemination.[13] Dr. Hunter continued and furthered the practice of artificial insemination through 1799.[14] The United States, possibly hesitant to expand beyond coital reproduction, did not adopt the practice of artificial insemination until 1866.[15] Even then, it was not considered praise worthy, but rather disdained.[16] Also in 1866, an Italian scientist, Montegazza, discovered that sperm could survive being frozen and recommended that frozen sperm banks hold sperm in case the widows of men killed at war would want to be inseminated.[17] The process was not very successful until it was discovered in 1949 that adding a small amount of glycerol before freezing increased the sperm survival rate.[18] Currently, sperm which has been stored using glycerol has been used over ten years later to produce healthy children.[19]

Three delineations of sperm types are used for insemination depending upon the status of the sperm donor and his relationship to the female recipient.[20] The seminal fluid can be drawn from the following sources: (1) artificial insemination donor or artificial insemination heterologous (AID), which involves the sperm being donated by a third person or donor; (2) artificial insemination homologous (AIH), which is the sperm donated by the husband; and (3) combined artificial insemination (CAI), which involves the sperm of the donor and the sperm of the husband being mixed together.[21] AID has been widely used and is addressed in the Uniform Parentage Act.[22]

AIH, which is the focus of this Article, involves a simple medical procedure whereby a woman is inseminated during ovulation using a syringe containing her husband's semen which he deposited before he became infertile.[23] For example, AIH was made available to the astronauts in 1961 in the event space travel harmed their

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[12]*Id.*

[13]*Id.*

[14]*Id.*

[15]John A. Gibbons, Comment, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. CONTEMP. H.L. & POL'Y 187, 189 (1997).

[16]E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1986).

[17]Shapiro & Sonnenblick, *supra* note 16, at 234.

[18]Shapiro & Sonnenblick, *supra* note 16, at 234.

[19]Shapiro & Sonnenblick, *supra* note 16, at 234.

[20]FREEDMAN, *supra* note 10, at 24.

[21]FREEDMAN, *supra* note 10, at 24.

[22]The Unif. Parentage Act § 5 9B U.L.A. 287, is discussed in the Uniform Code and Ohio Law section.

[23]Shapiro & Sonnenblick, *supra* note 16, at 238.

reproductive system.[24] Using AIH, they could still father healthy children after returning from space.[25] Also, this form of reproductive technology offers an option for men facing medical treatment that could make them sterile such as radiation or chemotherapy.[26]

AIH typically would present few legal challenges since the resulting child is the biological offspring of the genetic contributors.[27] However, issues arise when the husband is deceased and the wife wants to use the gamete to produce offspring on her own. When these men die, the fate of their frozen sperm must be decided. Should it be destroyed? Who should receive the sperm? Can it be used to produce offspring? These are questions that will be explored further in this Article.

III. REPRODUCTIVE TECHNOLOGY AND POSTHUMOUS REPRODUCTION

The law has long recognized posthumous births as the birth of a child after the death of a husband or male partner.[28] However, these well-accepted posthumous births involved the death occurring during gestation, but after conception.[29] Since the husband or male partner died from illness, accident, war, or as an "act of fate," few ethical or legal issues were raised except those questioning the prudence of starting a family if the death was reasonably anticipated.[30] From an inheritance perspective, these children have long been recognized as afterborn children.[31] Generally, these children have been included as heir's relatives born after the decedent if they are born alive within ten months (normal period of gestation) after the decedent's death.[32] These children have not challenged our traditional concepts of family or other ethical issues. Indeed, these children are typically viewed with sympathy and support from their community and governmental resources such as social security. Again, issues arise when the wife makes the decision to conceive after the death of her husband.

Posthumous conception refers to the conception of a child after the death of one or both of the biological parents. The posthumously conceived child cannot take advantage of the marital presumption of filiation with a deceased parent because the

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[24]Shapiro & Sonnenblick, *supra* note 16, at 238.

[25]Shapiro & Sonnenblick, *supra* note 16, at 238.

[26]John A. Robertson, *Symposium: Emerging Paradigms in Bioethics: Posthumous Reproduction*, 69 IND. L.J. 1027, 1035 (1994).

[27]Guzman, *supra* note 6.

[28]American Society for Reproductive Medicine <http:\\\www.asrm.org> (visited December 23, 1999).

[29]*Id.*

[30]*Id.*

[31]*See* UNIF. PROBATE CODE § 2-108 and OHIO REV. CODE § 2107.34 reviewed in detail in the Uniform Law and Ohio Law section of this Article.

[32]ROGER W. ANDERSEN, ET. AL., FUNDAMENTALS OF TRUSTS AND ESTATES 49 (1996).

husband's death terminates the marital relationship with the wife.[33] To be classified as an after-born child, a child must have been conceived prior to the death of the husband in order to take from the husband's estate.[34] Therefore, the posthumously conceived child may be considered illegitimate based on the timing of conception occurring after the death of the husband. The nature of posthumous conception faces a large gap in our legal framework.[35] Our legal system simply did not contemplate someone desiring or having the ability to conceive a child once they were deceased.[36] One of the first legal questions raised concerns whether the law should sanction the propriety of transferring gametes.[37] Another legal question is whether the law should recognize the use of the donor's sperm for conception of a child whom the donor intends to be viewed as his child.[38] These questions have lead to extensive discussions regarding the nature of gametes as property and the constitutional rights to procreate.[39]

IV. ANALYTICAL APPROACHES TO POSTHUMOUS REPRODUCTION

A. Property Rights

With the lack of legislative direction for posthumous conception issues, the courts have been left to grapple with how to address issues which arise surrounding gametes. One of the fundamental issues which has arisen is how to handle gametes once the provider is deceased. Integral to this discussion is the categorization of the sperm. Should it be considered property and inheritable?[40] Another option is to qualify the sperm as an "interim category that entitles it to special respect because of its potential for human life"?[41] What about classification as human biological material, such as organs, that has no ownership rights?[42] If gametes are property, what bundle of rights come with them?

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[33]Gloria Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 335 (1999).

[34]*See* UNIF. PROBATE CODE § 2-108 and OHIO REV. CODE ANN. § 2107.34 discussed in the Uniform Law and Ohio law section of this Article.

[35]Banks, *supra* note 33, at 264.

[36]Banks, *supra* note 33, at 264.

[37]Lorio, *supra* note 5, at 37.

[38]Lorio, *supra* note 5, at 37.

[39]Additional legal and ethical issues are raised when requests are made to harvest sperm from a dead man. This Article will not venture into the ethical issues this raised when there has been no indication of intent to contemplate a posthumous child nor sperm already stored. This Article will focus on the familial setting where the decedent has already stored his sperm for later use.

[40]Sheri Gilbert, Note: *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 547 (1993).

[41]*Id.*

[42]*Id.*

Some commentators state without hesitation that gametes are "property" because they physically exist.[43] As part of the bundle of rights contained within property, it logically follows that gametes are also owned since someone has them in their possession, or has the authority to decide what to do with them.[44] However, in the most widely cited case regarding property interest in body tissue, *Moore v. Regents of the University of California*,[45] the California Supreme Court held that the plaintiff did not retain a property interest in tissue which had been removed from his body. Although the California Supreme Court held that the plaintiff could not sustain a case for conversion, it did hold that the researcher must obtain informed consent before removing cells.[46] The court's discussion revolving around Moore's potential ownership in removed tissue implies naturally that Moore had a property interest before it was removed.[47] Presumably the court rejected Moore's claim of conversion because removed parts are usually destroyed.[48] Therefore since gametes are not destroyed when removed, and are very important to the individual that deposits them, a property interest in gametes deductively follows.[49]

"The approach adopted by existing case law[50] on the subject, as well as by the American Fertility Society, is to view sperm as a unique kind of property because of its potential for human life."[51] However, none of the current statutes delineate who owns the sperm when it is deposited.[52] Common practice by sperm banks, which also implies ownership in the sperm, is to have the donor sign a waiver of any further rights to the sperm including any future action of paternity.[53] In exchange for waiving their property interest in their sperm, they are contractually promised anonymity from any woman who may utilize their sperm to be impregnated.[54] The sperm bank policy differs when a man has deposited the sperm for his own personal future use.[55] In these circumstances, the man owns his sperm and is required to pay a fee for maintenance and later release.[56] The sperm agreements, as contractual

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[43]Bailey, *supra* note 1, at 758.

[44]Bailey, *supra* note 1, at 758.

[45]793 P.2d 479 (Cal. 1990).

[46]*Id.*

[47]Bailey, *supra* note 1, at 759.

[48]Robertson, *supra* note 26, at 1038.

[49]Robertson, *supra* note 26, at 1038.

[50]Both the French case *Parpalaix v. CECOS* and *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (1993) were decided based on property law. The holdings of these cases will be explored in further detail as this Article evaluates the case law developments in assisted reproduction.

[51]Gilbert, *supra* note 40, at 547.

[52]Shapiro & Sonnenblick, *supra* note 16, at 243.

[53]Shapiro & Sonnenblick, *supra* note 16, at 243.

[54]Shapiro & Sonnenblick, *supra* note 16, at 243.

[55]Shapiro & Sonnenblick, *supra* note 16, at 243.

[56]Shapiro & Sonnenblick, *supra* note 16, at 243.

agreements, typically require the depositor to express his intent for the sperm in case of death.[57] Absent this expressed intent, or a court order obtained by the widow or significant other, the sperm will be destroyed when the sperm bank is notified of the depositor's death.[58] However, numerous Ohio cases[59] have upheld that heirs do hold property rights in the deceased's body. This precedent could be used to argue that heirs have property rights to gametes even without the express consent of the husband.

Considering semen as property also brings the presumption that any directions for posthumous distribution should be honored.[60] As a matter of property or inheritance law, the husband should be able to pass along his property to his wife.[61] However, we must first consider any constitutional state restrictions that may implicate the use or bequeathing of gametes even considering them as property.[62]

B. Constitutional Right to Procreate

Before proceeding to determine what legislation is appropriate involving posthumous children, it is important to determine whether procreation by artificial insemination is considered a fundamental right. Once the Supreme Court determines that a right is a fundamental right, a strict scrutiny test will be applied to any state regulation implemented.[63] To pass a strict scrutiny test, a state must show that they have a compelling interest in the regulation and there is no less burdensome means of protecting that interest. To date, the Supreme Court has not directly addressed the issue of posthumous conception, however it has addressed the constitutional right to procreate through a series of cases.

The first case addressed by the Supreme Court was *Buck v. Bell*[64] which involved the sterilization of a feeble-minded individual. The Court was asked to determine the constitutionality of a statute allowing the sterilization of mental defectives.[65] Ms. Buck was the feeble-minded daughter of a feeble-minded mother who had a feeble-

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[57]Shapiro & Sonnenblick, *supra* note 16, at 243.

[58]Shapiro & Sonnenblick, *supra* note 16, at 243.

[59]*See* Brotherton v. Cleveland, 923 F. 2d 477, 482 (6th Cir. 1991) (noting that a decision as to whether a widow had a "property interest" in her husband's corneas was unnecessary, because "the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body…protected by the due process clause of the Fourteenth Amendment"). *See also* Everman v. Davis, 561 N.E.2d 547 (Ohio Ct. App. 1989) (holding family members have a right to the body for purposes of preparation, mourning, and burial; however, they may not have the right to refuse an autopsy if the person died in an unusual manner); Carney v. Knollwood Cemetery Ass'n, 514 N.E.2d 430 (Ohio Ct. App. 1986) (holding the descendants of decent have a course of action when remains are disturbed).

[60]Robertson, *supra* note 26, at 1039.

[61]Robertson, *supra* note 26, at 1039.

[62]*Id.*

[63]Antall, *supra* note 9, at 221.

[64]274 U.S. 200 (1927).

[65]*Id.* at 205.

minded child of her own.[66] In a short opinion, the Court deemed the law constitutional saying:

> [i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes. . . . Three generations of imbeciles are enough.[67]

Overturning Buck years later in *Skinner v. Oklahoma*,[68] the Supreme Court viewed procreation as "one of the basic civil rights of man," and stated that "marriage and procreation are fundamental to the very existence and survival of the race."[69] The question presented to the court involved the Oklahoma Habitual Criminal Sterilization Act.[70] The Act allowed a habitual criminal to be sterilized.[71] A habitual criminal was defined as "a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude' either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution."[72] The Court found this act unconstitutional on Equal Protection grounds.[73] The Skinner Court set the tone for the Court to rely on the right to privacy as the basis for finding unconstitutional laws that interfered with an individual's decisions concerning childbearing.[74]

In *Griswold v. Connecticut*, the Supreme Court invalidated a statute criminalizing the distribution of contraceptives.[75] Here, the Court found the statute unconstitutional recognizing a fundamental right to privacy for married individuals.[76] In articulating its decision, Justice Douglas determined that "the specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[77] The Court determined that because the right to privacy is comprised of "emanations" from several fundamental constitutional guarantees, any relationship lying within this zone of privacy must be afforded the

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[66] *Id.*

[67] *Id.* at 207.

[68] 316 U.S. 535 (1942).

[69] *Id.* at 541.

[70] *Id.* at 536.

[71] *Id.* at 537.

[72] *Id.* at 536.

[73] *Skinner*, 316 U.S. at 541.

[74] Gilbert, *supra* note 40, at 532.

[75] 381 U.S. 479, 485 (1965).

[76] *Id.*

[77] *Id.* at 484.

same protection as that given to the central rights explicitly provided for in the Bill of Rights.[78]

The Supreme Court extended the right to privacy to include the individual's, not just the married couple's, right to privacy in making procreative decisions in *Eisenstadt v. Baird*.[79] Here, the Supreme Court invalidated a state statute[80] prohibiting the distribution of contraceptives to unmarried adults.[81] The Eisenstadt Court demonstrated the significance of the right to make procreative decisions by holding that the right is so fundamental that it is not reserved for a certain class of individuals, but rather resides within the constitutional protections available to all individuals.[82] In his opinion, Justice Brennan stated "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[83]

Combining the decisions of Griswold and Eisenstadt in *Carey v. Population Services*,[84] the Court clearly recognized the right of the individual to make procreative choices as fundamental.[85] Here, the Court found unconstitutional a New York statute which prohibited distribution of contraceptives to anyone under age sixteen as well as prohibiting distribution to anyone over sixteen by anyone other than a licensed pharmacist.[86] Reviewing the prior cases, the Court stated, "the teaching of Griswold is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."[87]

Considered together, the Court showed in Skinner, Griswold, Eisenstadt and Carey that there exists a fundamental right of the individual, whether married or single,[88] to make procreative choices.[89] This was articulated in Carey when the Court

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[78]*Id.* at 485.

[79]405 U.S. 438 (1972).

[80]The statute being reviewed read as follows: "Whoever . . . gives away . . . any drug, medicine, instrument or article whatever for the prevention of conception," except as authorized in 21A, "shall be punished by imprisonment in the state prison for not more than . . . two and one half years or by a fine of not less than one hundred nor more than one thousand dollars." Under 21A, "[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception."

[81]*Id.* at 454-55.

[82]*Id.* at 453.

[83]*Id.*

[84]431 U.S. 678 (1977).

[85]*Id.*

[86]*Id.*

[87]*Id.* at 687. The Court clarified that the test for determining whether state restrictions that inhibit the privacy rights of minors are valid is whether or not they serve "any significant state interest . . . that is not present in the case of an adult." *Id.* at 693 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976)). The Court found that although the states have more latitude to regulate the conduct of children, there was no significant state interest involved here. *Id.*

[88]*See, e.g.*, Sheri Gilbert, Note, *Fatherhood From the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV 521, 534 (1993). Although this Article is specifically

stated, "where a decision . . . to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[90] Through these cases, the Court dealt with situations where technology was used to prevent the conception of a child. The Supreme Court has not decided whether the privacy protections afford individuals the right to use technology to conceive even though lower courts have been presented with this issue.[91] However, Carey can be interpreted to extend the right to use reproductive technologies to conceive.

Although the United States Supreme Court has never confronted the use of assisted reproduction as a fundamental right, at least one district court has done so.[92] In *Lifchez v. Hartigan*[93] the Northern District of Illinois held unconstitutional an Illinois abortion law[94] which prohibited the sale of or experimentation upon a human fetus unless such experimentation was "therapeutic" to the fetus.[95] In holding the statute unconstitutional, the court found a violation of a woman's fundamental right to privacy, "in particular, her right to make reproductive choices free of governmental interference with those choices."[96] In further expanding the boundaries of the right to privacy and the right to use noncoital (nonintercourse) methods to procreate, the court stated: "It takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[97]

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addressing the situation where the sperm recipient was married to the decedent, for a detailed discussion concerning implications of the Court's holding in Eisenstadt concerning unmarried women.

[89]Gilbert, *supra* note 40, at 534.

[90]*Carey*, 431 U.S. at 686.

[91]Gibbons, *supra* note 15, at 198.

[92]Gilbert, *supra* note 40, at 536.

[93]735 F. Supp. 1361 (N.D. Ill. 1990).

[94]720 ILL. COMP. STAT. ANN. § 510/6(7) (West 2000) (originally cited as 38 ILL. REV. STAT. § 1-26 (West 1989) (providing "quote statute.")

> No person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced. Intentional violation of this section is a Class A demeanor. Nothing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.

[95]735 F. Supp. at 1362.

[96]*Id.* at 1376.

[97]*Id.* at 1377.

C. Ability to Bequeath Gametes

Assuming the constitutional right to procreate,[98] the issue of bequeathing the gametes takes center stage. Passing property at death has been part of the Anglo-American culture since feudal times and is valuable to piece of mind.[99] While the authority of the state and federal governments to control the laws of testamentary disposition and inheritance is clear, the United States Supreme Court in *Hodel v. Irving* observed that, "in one form or another, the right to pass on property…has been part of the Anglo-American legal system since feudal times . . . Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional."[100] In Hodel, the Court declared unconstitutional a statute[101] that restricted the right of owners of fractional interests in Indian Land to give that land by will or intestacy.[102] The Court stated that to limit the descent of the fractional property interests by intestacy or to regulate the number of beneficiaries, a testator could designate to receive the land, but a state could not abolish both the right of descent and devise.[103] Essentially, Hodel's holding indicates that a state may be able to regulate the types of property that can pass by intestate succession, but no state can prevent the bequeathing of one's property.[104]

Applying our previous discussion concerning gametes as "property," it thus follows that one should have the decision-making authority over one's gametes, and the right to give this "property" at death.[105] Indeed, the current case law has developed around the premise that gametes are property. This concept has been integral to the various lower courts' analysis in the developing case law on assisted reproduction technology.

V. DEVELOPMENT OF CASE LAW

Although the courts in Ohio have not yet been challenged to directly decide the fate of gametes or embryos, activity throughout the world and other U.S. jurisdictions indicate that it is only a matter of time before every state will have to

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[98]*See* John A. Robertson, *Posthumous Reproduction*, 69 IND. L. J. 1027 (1994) for an extensive analysis of extending the constitutional right to procreate posthumously to the decedent. Compares posthumous reproductive directives to medical directives such as a living will. Also, at stake are the fundamental rights of procreation for the surviving spouse to reproduce utilizing her sperm of choice.

[99]Djalleta, *supra* note 2, at 341.

[100]481 U.S. 704, 716 (1987).

[101]The statute was enacted in response to succeeding generations of Sioux who had divided up their predecessors' tracts into tiny fractional interests for which the government paid pennies of rent per year. The Indian Land Consolidation Act of 1983 provided that any undivided fractional interest which represented less than 2% of a tract's acreage, and which had earned less than $100 in the preceding year would escheat to the tribe rather than descend by intestacy or devise. Djalleta, *supra* note 2, at 341.

[102]Djalleta, *supra* note 2, at 341.

[103]Djalleta, *supra* note 2, at 341.

[104]Djalleta, *supra* note 2, at 341.

[105]Djalleta, *supra* note 2, at 356.

face the legal ramifications of assisted reproduction.[106] The court systems have been left to unravel cases of first impression, and to use property, contract and constitutional implications to determine each outcome on a case-by-case basis. A number of the challenges presented are discussed below as the winding road of reproductive advancements attempts to cross the legal chasm.

The first legal warning to the impending issues of assisted reproduction was sounded in Melbourne, Australia in 1983.[107] This case involved a married couple, Mario and Elsa Rios, who were both killed in a plane crash during a time that they were participating in a frozen embryo artificial insemination program.[108] Since neither parent's will mentioned their two frozen embryos, the embryos were left in a legal "grey" area[109] that Australian law was not prepared to handle.[110] In an effort to establish an acceptable precedent, the State of Victoria established a committee to decide what to do with the embroyos.[111] After review, the committee recommended destroying the embryos since the parent's intent for any posthumous use of the embryos was not expressed.[112] After this decision was meet with hostility from the Australian right-to-life movement and the Catholic Church, the Victoria legislature was challenged with the task of determining the fate of the embryos.[113] The legislature rejected the committee's recommendations, and determined that the embryos could be implanted in a surrogate.[114] However, the Attorney General of the State of Victoria stripped the embroyos of any legal status, thus disallowing any inheritance from the estate.[115] Although this case arose over fifteen years ago, the warning sound for legislative action has not yet been heeded.

In 1984, another international case won headlines as the French Tribunal decided *Parpalaix v. CECOS*.[116] Similar to our introductory situation, Alain Parpalaix, a citizen of France, was diagnosed with testicular cancer at the age of twenty-four.[117]

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[106]Massachusetts is now another state faced with deciding how to handle frozen embryos. *See* Carey Goldberg, *Massachusetts Case is Latest to Ask Court to Decide Fate of Frozen Embryos*, N.Y. TIMES, Nov. 5, 1999, at A20. According to the article, cases involving divorce and frozen embryos have arisen in Illinois, Michigan, Texas, Alabama and New Jersey in the last year.

[107]Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 1007 (1996).

[108]Mika & Hurst, *supra* note 107, at 1007-08.

[109]Hoping to share in the couple's estate, approximately ninety women volunteered to be impregnated with the "orphaned" embryos. *Id*. at 1008.

[110]Mika & Hurst, *supra* note 107, at 1008.

[111]Mika & Hurst, *supra* note 107, at 1008.

[112]Mika & Hurst, *supra* note 107, at 1008.

[113]Mika & Hurst, *supra* note 107, at 1008.

[114]Mika & Hurst, *supra* note 107, at 1008.

[115]Mika & Hurst, *supra* note 107, at 1008.

[116]Shapiro & Sonnenblick, *supra* note 16, at 229.

[117]Shapiro & Sonnenblick, *supra* note 16, at 229.

After being told that the recommended chemotherapy would leave him sterile, he deposited his sperm in a government run sperm bank in Paris.[118] Unfortunately, Alain's intent for the frozen sperm in the event of his death was not made clear at the time of his deposit.[119] Complicating matters, at the time of his deposit, Alain was living with Corinne Richard but the two were not married.[120] However, as Alain's condition deteriorated, Alain and Corinne were married in a hospital ceremony just two days before his death.[121]

When Corinne's request to secure Alain's sperm for her use in artificial insemination was denied, a legal battle of first impression was set into motion. Corinne and her in-laws claimed they were Alain's natural heirs who had become the owners of the sperm, and were entitled to the sperm under contract law.[122] In addition to a contract law argument, Corinne and her in-laws argued that Alain's intent, although not expressly written, was for Corinne to use the sperm to conceive his child after his death.[123]

Alternatively, CECOS argued they did not have any obligations to Corinne as their agreement was with Alain as the donor.[124] They also argued that the sperm was not divisible from the body, absent express instructions, and therefore is not inheritable.[125] Following from this argument, CECOS contended since Corinne and Alain were not married at the time of the deposit, and Alain did not provide any written directives, the sperm should not be given to Corinne.[126] CECOS's final argument stated that the reason for Alain's deposit was for therapeutic purposes to aid Alain psychologically.[127]

Although the court acknowledged the difficulties presented by this case and the country's outdated laws, it did not apply the simple solution of contract principles.[128] Instead, the court found that human sperm could not be considered movable and inheritable property within the meaning of the French Civil Code, and was therefore

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[118]Shapiro & Sonnenblick, *supra* note 16, at 229.

[119]Shapiro & Sonnenblick, *supra* note 16, at 229.

[120]Shapiro & Sonnenblick, *supra* note 16, at 230.

[121]Shapiro & Sonnenblick, *supra* note 16, at 230.

[122]Shapiro & Sonnenblick, *supra* note 16, at 230. As support for their argument, they relied on Article 1939 of the French Civil Code, which governed contracts of deposit of material goods in general and provided, "In the case of death of the person who made the bailment, the thing bailed may be returned only to his heir. . . . If the thing bailed is indivisible, the heirs must agree among themselves in order to receive it." Under this view, the sperm was to be considered a movable object or property and therefore could be inherited. Shapiro & Sonnenblick, *supra* note 16, at 229.

[123]Shapiro & Sonnenblick, *supra* note 16, at 231.

[124]Shapiro & Sonnenblick, *supra* note 16, at 231.

[125]Shapiro & Sonnenblick, *supra* note 16, at 231.

[126]Shapiro & Sonnenblick, *supra* note 16, at 231.

[127]Shapiro & Sonnenblick, *supra* note 16, at 231.

[128]Shapiro & Sonnenblick, *supra* note 16, at 232.

inapplicable.[129] Alain's intent was the determining factor for the court.[130] In the absence of Alain's written intent, the court found that Corinne and Alain's parents were in the best position to articulate his intentions for the frozen sperm.[131] Thus, the Tribunal ordered CECOS to return the sperm to Corinne.[132] Unfortunately, due to the small quantity and poor quality of the sperm, Corinne was not successful in her desire to bear Alain's son posthumously.[133] Even though a posthumous child did not result from this legal battle, it was the first implication of the procreative rights of those left behind after the death of a loved one.

One of the first cases to determine how the United States would define what gametes or embryos are was *Davis v. Davis*.[134] In this 1992 case, the initial action was for divorce and the frozen embryos became an issue.[135] The wife originally wanted the frozen embryos to have them implanted in a post-divorce effort to become pregnant.[136] The husband was adamantly opposed to becoming a parent under these circumstances and preferred to have the embryos discarded.[137] One of the first things the court noted was the absence of two critical factors:

> When the Davises signed up for the IVF program . . . they did not execute a written agreement specifying what disposition should be made of any unused embryos that might result from the cryopreservation process. Moreover, there was at that time no Tennessee statute governing such disposition, nor has one been enacted in the meantime.[138]

Thus, the Davis court correctly identified two important criteria needed for the future of litigation in this area: expressed intent and legislation!

In their holding in favor of the ex-husband, the court implied that the use of in vitro fertilization is protected under the right to procreate.[139] The court noted that "a person's liberty to procreate or to avoid procreation is directly involved in most decisions involving preembryos."[140] "It is further evident that, however far the protection of procreative autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status."[141]

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[129]Shapiro & Sonnenblick, *supra* note 16, at 232.

[130]Shapiro & Sonnenblick, *supra* note 16, at 232.

[131]Shapiro & Sonnenblick, *supra* note 16, at 232.

[132]Shapiro & Sonnenblick, *supra* note 16, at 233.

[133]Shapiro & Sonnenblick, *supra* note 16, at 233.

[134]842 S.W.2d 588 (Tenn. 1992), *cert denied*, 507 U.S. 911 (1993).

[135]*Id.*

[136]*Id.* at 589.

[137]*Id.*

[138]*Id.* at 590.

[139]*Davis*, 842 S.W.2d at 590.

[140]*Id.* at 597.

[141]*Id.* at 602.

It was not until 1993 that the United States judicial system was faced with its first legal challenge of bequeathing frozen sperm and posthumous conception in the widely cited case of *Hecht v. Superior Court*.[142] In Hecht, the California Court of Appeal considered a decedent's right to give gametes at death and the rights of a post-mortem child to inherit.[143] The Court of Appeal was confronting a case of first impression concerning a trial court's order to destroy sperm left by a decedent in a sperm bank.

The facts of the case are detailed as William E. Kane, the decedent, took great care in ensuring his intent was explicit prior to committing suicide. At the time Kane committed suicide, he was living with long-term girlfriend Deborah E. Hecht.[144] He was also survived by two college-age children from a previous marriage.[145] Prior to committing suicide, Kane deposited sperm at a sperm bank, signing an agreement providing in pertinent part that "[i]n the event of the death of the client, . . . the client instructs the Cryobank to . . . continue to store [the specimens] upon request of the executor of the estate [or] release the specimens to the executor of the estate."[146] Another provision also states, "I, William Everett Kane, . . . authorize the sperm bank to release my semen specimens (vials) to Deborah Ellen Hecht. I am also authorizing specimens to be released to recipient's physician Dr. Kathryn Moyer."[147]

Kane had also executed a will which was filed with the Los Angeles County Superior Court and admitted to probate.[148] The will named Hecht as executor of the estate, and provided, "I bequeath all right, title, and interest that I may have in any specimens of my sperm stored with any sperm bank or similar facility for storage to Deborah Ellen Hecht."[149] In another example of Kane's clear intention, he had left a letter addressed to his children which stated,

> I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide – as I hope she will – to have a child by me after my death. . . . If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born.[150]

After numerous attempts to settle the will, both of Kane's children filed separate will contests.[151] The children also argued that *Moore v. Regents of University of*

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[142]20 Cal. Rptr. 2d 275 (Ct. App. 1993).

[143]*Id.*

[144]*Id.* at 276.

[145]*Id.*

[146]*Id.*

[147]*Hecht*, 20 Cal. Rptr. 2d at 276.

[148]*Id.*

[149]*Id.*

[150]*Id.* at 277.

[151]*Id.* The children asserted that the will was invalid because Kane was under the undue influence of Hecht and because he lacked testamentary capacity.

California[152] should control. The Hecht court distinguished Moore, stating in Hecht, Kane expected to retain control over his sperm after he gave it to the sperm bank where in Moore, the patient did not desire control over the tissue, but rather money.[153] The court also noted the position of the American Fertility Society that "gametes and preembryos are the property of the donors and the donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines."[154]

The California Court of Appeal held that at the time of his death, a decedent had a "property" interest in his frozen sperm, stating he had "an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction."[155] The court also held that allowing insemination of an unmarried woman, specifically posthumous insemination, was not against public policy.[156] The court issued a writ that prohibited destruction of the frozen sperm of the decedent, William E. Kane, and vacated the lower court's order to destroy the sperm.[157] Thus, the Hecht court firmly established the precedent of gametes as property, and the ability to bequeath sperm for posthumous use, at least where the intent of the grantor is explicit.

In 1998, New York was the next state to be confronted with the issue of what to do with embryos as part of a divorce action in *Kass v. Kass*.[158] In this case, the wife wanted the ability to implant the five frozen pre-embryos that her and her former husband had created.[159] The husband did not want to accept the parenting responsibilities, and claimed that the parties agreed at the time they started the process that in the event of divorce, the pre-embryos should be donated to the IVF program for approved research purposes.[160] What distinguishes this case from Davis[161] is that the Kasses had signed a written agreement indicating their intent in a divorce situation. Here, the court recognized this written document concluding

> [t]hat disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are

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[152]Moore v. Regents of University of California, 793 P.2d 479 (Cal. 1990).

[153]*Hecht*, 20 Cal. Rptr. 2d at 281.

[154]*Id.* at 282.

[155]*Id.* at 283. This interest was sufficient to constitute "property" for purposes of the California Probate Code, and therefore the court had jurisdiction to determine its disposition. *Id.* at 281. The California Probate Code defines property as: "anything that may be the subject of ownership and includes both real and personal property and any interest therein." Cal. Prob. Code 62 (West 1993). This is virtually identical to Unif. Probate Code 1-201 (39) (1991).

[156]*Id.* at 286, 289.

[157]*Id.* at 291.

[158]696 N.E.2d 174 (N.Y. 1998).

[159]*Id.* at 175.

[160]*Id.*

[161]Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), *cert denied*, 507 U.S. 911 (1993).

> the pre-zygotes recognized as "persons" for constitutional purposes. . . . The relevant inquiry thus becomes who has dispositional authority over them. . . . Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.[162]

Again, the precedent to follow the expressed intent of the participants is confirmed.

Another case establishing the jurisprudence of frozen sperm is *Hall v. Fertility Institute of New Orleans*.[163] In Hall, following a cancer diagnosis, Barry Hall deposited fifteen vials of sperm with a fertility institute, and executed a formal Act of Donation by which he sought to convey his interest in the vials to his girlfriend, St. John.[164] After his death, his executor requested the semen's transfer to Hall's son or its destruction, noting the son's "extreme emotional upset, embarrassment and anger…at the prospect of posthumous creation of blood relatives."[165] The executor also argued that the transfer of sperm opposed public policy and morals.[166] St. John intervened, alleging that she owned the semen through Hall's donation.[167]

Although it affirmed a decision prohibiting St. John's immediate possession of the sperm, the Fourth Circuit specifically rejected the executor's argument that a gift of frozen sperm contravened public policy.[168] The court also rejected the argument that the sperm's posthumous use would oppose public morals.[169] It held that if the facts at trial show that at the time of the gift the decedent was competent and not under undue influence, the frozen semen was St. John's property, and she had full rights to its disposition.[170] Thus, the court found that the relevant inquiry was Hall's intent and not society's moral regard for the disposition of sperm.

Another gap created by the lack of legislative response was identified by Nancy Young Hart as she applied for social security benefits for her baby girl named Judith Christine Hart.[171] The Social Security Act provides survivor benefits for an insured decedent's marital children and nonmarital children if they would take as heirs under the state's inheritance law, the decedent had been the child's regular source of support, or the decedent had openly acknowledged the child.[172] The issue for Judith Hart involved a Louisiana law which did not determine whether a posthumously

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[162]Kass v. Kass, 696 N.E.2d 174, 179-80 (N.Y. 1998).

[163]647 So.2d 1348 (La. Ct. App. 1994).

[164]*Id.* at 1349-50.

[165]*Id.* at 1350.

[166]*Id.* at 1351.

[167]*Id.*

[168]*Hall*, 647 So.2d at 1351.

[169]*Id.*

[170]*Id.*

[171]Banks, *supra* note 33, at 251. Although beyond the scope of this Article, Banks completes a detailed analysis of the implications of posthumous births for social security and recommended changes to the social security rules.

[172]*See* 42 U.S.C. § 416(h)(2)(A)-(3)(C) (1994).

conceived child born to a decedent's widow of the decedent's frozen sperm was entitled to social security survivor benefits as the decedent's child.

Although a legal battle ensued, the court did not have the opportunity to rule on the case. In a statement before the United States District Court for the Eastern District of Louisiana, Social Security Commissioner Shirley S. Chater announced Judith Hart would receive survivor's benefits if the case was returned from the court to the Social Security Administration.[173] Ms. Chater indicated in her formal appeal that the public policy issues being raised were more appropriately settled by the executive and legislative branches rather than the courts.[174] Ms. Chater made this plea on March 11, 1996, and to date the legislative branch has not responded with adequate statutes.

Turning to Ohio law, Ohio courts have had to deal with issues of artificial insemination and surrogacy. In *C.O. v. W.S.*, a lesbian couple wanted to have a child and obtained sperm from a donor they knew.[175] The donor was to be a male role model for the child but a dispute arose about what parental rights the donor should have.[176] He filed a complaint to determine paternity, custody, support and visitation.[177] The applicable Ohio statute read:

> If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor.[178]

The court felt the statute was designed to provide anonymity and protection to both the donor and the mother.[179] However by using a known donor, this single mother "negated her attempts to cloak her pregnancy under the ambit of the nonspousal artificial insemination law."[180] The court said that if a woman solicits the participation of a donor and agrees that the donor will have a relationship with the child, such statutes do not apply.[181] Even if the statute did apply, its application would be unconstitutional (presumably under the equal protection clause) in these circumstances. "Public policy supports the concept of legitimacy, and the concomitant rights of a child to support and inheritance. A father's voluntary assumption of fiscal responsibility for his child should be endorsed as a socially responsible action."[182]

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[173]Banks, *supra* note 33, at 255-56.

[174]Banks, *supra* note 33, at 256.

[175]639 N.E.2d 523 (Ohio C.P. 1994).

[176]*Id.* at 524.

[177]*Id.*

[178]*Id.* (citing OHIO REV. CODE ANN. § 3111.37(B) (Anderson 1999)).

[179]*Id.*

[180]*C.O.*, 639 N.E.2d at 525.

[181]*Id.*

[182]*Id.*

Although involving a surrogacy dispute, another case is making its way through the Ohio Courts which may further raise the assisted reproduction laws issue.[183] In addition to making its way through the courts, this case has brought media attention as a case of first impression which highlights the inadequacy of the current laws.[184] This case involves two married couples who signed a written agreement whereby Laura J. Cornelius agreed to be a surrogate for the Turchyns.[185] It was agreed that Mrs. Cornelius would be inseminated with Mr. Turchyn's sperm by means of a procedure conducted at one of the party's homes.[186] In addition, the agreement provided that Mrs. Cornelius could change her mind about giving up the baby as long as she did this prior to the birth of the child.[187] Prior to the birth of the child, the Cornelius' decided to keep the child and informed the Turchyns of their decision.[188] Currently, the Turchyns have requested that the court order genetic testing to determine whether he could establish a parent/child relationship.[189] Unfortunately, Ohio statutes do not address this situation and the court will be left to interpret other statutes to determine the outcome of this case.

VI. INHERITANCE AND THE POSTHUMOUS CHILD

As previously addressed, precedent has demonstrated that the right to bequeath sperm as property would probably be supported if challenged at the Supreme Court level. In addition, the fundamental right of the female to use the sperm for procreation should also survive attack at the Supreme Court level. It is now time to turn to what happens to a child conceived and born posthumously from an estate planning and inheritance perspective. In the cases previously discussed, the court frequently focused on the intent of the grantor, whether expressed or implied. Executing the grantor's intent, a fundamental basis of probate, must always remain in the forefront of any discussion of inheritance rights. We will explore the implications of the current laws in providing for the support of a posthumous child.

A. Testate Succession

In testate succession, the grantor has designated through a will, trust or combination of both what property will be transferred and to whom. Courts do not typically interfere with the grantor's intent for beneficiaries, and will enforce testamentary dispositions unless they are contrary to public policy or law.[190] In

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[183]Turchyn v. Cornelius, No. 98 C.A. 86, 1999 Ohio App. LEXIS 4129, (Ohio Ct. App. 1999).

[184]*See* Brian E. Albrecht, *Couple Battle With Surrogate Who Kept Child*, PLAIN DEALER, Jan. 16, 2000, at 1-A.

[185]*Turchyn,* 1999 Ohio App. LEXIS 4129, at *1.

[186]*Id.* at *2.

[187]*Id.*

[188]*Id.*

[189]*Id.* at *3.

[190]Guzman, *supra* note 6, at 214-15.

addition, a child does not have to be in existence at the time of the testator's death.[191] Many wills concerning prospective children and descendants involve a trust as a testamentary or inter vivos method of handling estate assets.[192] "The best view appears to be that such trusts are valid for a child conceived postmortem if the trust also has as a beneficiary some other person already born."[193] As seen in Hecht,[194] the courts have deferred to the intent of the decedent in determining how to handle frozen gametes.

This appears to be the easy case for the courts to decide: the deceased husband has made very explicit his intent to pass on his frozen gametes for posthumous use *and* has explicitly provided for the financial support of a "potential" posthumous child through his personal estate planning. The intent of the decedent[195] can be shown in a number of ways including instructions at a sperm bank, through a will, or trust, but this intent should be honored if expressed. In addition, a serious and specific oral statement indicating the desire to allow posthumous conception should be sufficient.[196] Requiring a written statement may be unduly burdensome for some who do not have the economic backing for legal consultation.[197] As the definition of family changes, the law should not limit testamentary transfers to the spouse of a deceased male.[198] The decedent's wish to procreate with a specific person should prevail, particularly if his intent is explicitly demonstrated.

Of concern in this circumstance is the time allocated to settle probate and respond to the state's desire to have timely settlement of estate taxes and disposition of

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[191]Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 982 (1996).

[192]Chester, *supra* note 191, at 984.

[193]Chester, *supra* note 191, at 984.

[194]Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

[195]For the purposes of this Article, it is assumed that the decedent deposited the sperm prior to his death. A whole different area of concern can arise when a family member requests the harvesting of gametes from a dead body. *See, e.g.*, Ivor Davis, *Posterity Insurance, AIDS, Infertility and Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets*, CHI. TRIB., Apr. 26, at 5-1 (discussing case in which a 15-year-old Los Angeles youth's sperm was extracted at his family's request as he lay in a coma after being shot in a gang-related incident); Ike Flores, *Newlywed Dies in Crash, But Hopes for Children Live in Extracted Sperm*, L.A. TIMES, July 3, 1994, at A10 (reporting sperm extraction procedure performed on 22-year-old Emanuele Maresca at his widow's request, after he was killed in a car accident 16 days after their marriage); Maggie Gallagher, *The Ultimate Deadbeat Dads*, NEWSDAY, Feb. 1, 1995, at A28 (discussing sperm extraction from the body of 29-year-old Anthony Baez, at his widow's request, after Baez died in police custody); *Sperm Taken from Another Dead Man*, S.F. CHRON., Jan. 25, 1995, at A5 (reporting sperm harvested at widows' request from a 34-year-old man killed in a car accident). *See generally Live Sperm, Dead Bodies*, HASTINGS CENTER REP., Jan. – Feb. 1990, at 33 (Commentaries by Cappy Miles Rothman and Judith Wilson Ross).

[196]Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C.L. REV. 901, 953 (1997).

[197]Schiff, *supra* note 196, at 953.

[198]Djalleta, *supra* note 2, at 363.

property. However, this can easily be addressed by setting a specific time limit allowing for the posthumous use of the frozen gamete and subsequent birth of a heir.[199] The situation requires a different analysis if the decedent passes the sperm to his wife or significant other, but does not expressly state that he would like to have a posthumous child nor does he provide for the financial stability of the child through his will or estate. This raises the issues of whether the law of wills should govern or if intestate succession should provide for the posthumously conceived child.[200]

B. Pretermission Considerations

Even the unintentional omission can result in a child having a right to share in an estate through pretermission statutes.[201] These pretermission statutes are designed to protect a child who has been "left out" of a decedent's will typically when a decedent "forgets" to amend his will after having additional children. The Uniform Probate Code addresses this situation in Section 2-302, Omitted Children[202] providing a share to the pretermitted child unless "it appears from the will that the omission was intentional."[203] The Ohio Probate Code addresses pretermitted heirs in Section 2107.34 which is similar to the Uniform Probate Code.[204]

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[199]Recommendations for accommodating both the grantors and state's interests will be made *infra*.

[200]Chester, *supra* note 191, at 983-84.

[201]Guzman, *supra* note 6, at 219.

[202]Uniform Probate Code Section 2-302 Omitted Children states in pertinent parts:

> Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:
>
> If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate…
>
> If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows…
>
> Neither subsection (a)(1) nor subsection (a)(2) applies if:
>
> it appears from the will that the omission was intentional; or
>
> the testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

[203]Unif. Probate Code § 2-302(b)(1).

[204]OHIO REV. CODE ANN. § 2107.34 (1998) in pertinent part states:

> If, after making a last will and testament, a testator has a child born alive, or adopts a child, or designates an heir in the manner provided by section 2105.15 of the Revised Code, or if a child or designated heir who is absent and reported to be dead . . . the will shall not be revoked; but unless it appears in such will that it was the intention of the testator to disinherit such pretermitted child or heir, the devises and legacies granted by such will, except those to a surviving spouse, shall be abated proportionately. . . .

A posthumous child complicates the pretermitted statute situation. Technically, all afterborn children, including posthumous children, should be covered by the pretermission statutes, the purpose of the pretermission statute is to presume the deceased's intent regarding his living children by presupposing that these children were overlooked rather than intentionally excluded.[205] It is presumed that the testator would want to provide for his posthumous child.[206] The simple fact that the testator had his sperm frozen could possibly be seen as an indication of intent and knowledge that a posthumous child was a potential and should receive a share from the estate.[207] Although there has not been any test of the posthumous child and the pretermitted child statute in Ohio, the best course of action for a court would be to apply the statutory assumption that the testator intended for all afterborn children to be included in the testator's will unless other clear indications of contrary intent can be established.[208] Thus, even a posthumous child that does not meet the afterborn requirements should be recognized by the court within a reasonable time after the decedent's death.

C. Implications of the Rule Against Perpetuities

The Rule Against Perpetuities, "Rule," operates with the intent to stabilize title and prevent excessive dead-hand control over property by invalidating any property interest capable of vesting more than twenty-one years after some life in being at its creation.[209] The original purpose of the Rule was to further the alienability of land and limit the length of time questions can go unanswered.[210] When the drafters of this rule created it to limit dead-hand control, they were not contemplating the implications of assisted reproduction or posthumous children. Indeed, the "Fertile Octogerarian" is quite possible now. The "Fertile Octogenarian" presumed the impossible, that a woman past childbearing age, or even having had a hysterectomy could reproduce.[211] Assisted reproduction may almost guarantee the possible violation of the Rule, as the mere chance of something going wrong is enough to invalidate an interest.[212] For example, if a man stores his sperm, the potential for reproduction with his gametes would neither end when he died, nor within twenty-

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Though measured by sections 2105.01 to 2105.21, inclusive, of the Revised Code, the share taken by a pretermitted child or heir shall be considered as a testate succession.

[205]Bailey, *supra* note 1, at 793.

[206]Bailey, *supra* note 1, at 793.

[207]Bailey, *supra* note 1, at 793.

[208]Bailey, *supra* note 1, at 795.

[209]Guzman, *supra* note 6, at 219.

[210]The Rule looks forward and considers what may happen at the time of the creation of the bequest. It applies to bequests containing contingent remainders and vested subject to open interests.

[211]Guzman, *supra* note 6, at 219 n.89.

[212]*See, e.g.*, Melita Marie Garza, *After Lying to Get into an Invitro Fertilization Program, 63 year old has a baby*, CHI. TRIB., April 24, 1997, at 11 (describing how 63 year old woman had a baby after in vitro fertilization).

one years of any validating life. As the length of time a frozen sperm can remain viable may not be limited, the Rule may be violated whenever frozen gametes could have implications on a class gift.[213]

The Uniform Probate Code takes into consideration children born long after a testator's death by stating, "[i]n determining whether a nonvested property interest or a power of appointment is valid [under the Rule Against Perpetuities], the possibility that a child will be born to an individual after the individual's death is disregarded."[214] A second requirement placed under the Uniform Probate Code is that it must vest or terminate within ninety years after its creation.[215] Thus, the gift would be presumptively valid if it met these two requirements.

Many states are changing the Rule to consider actual versus possible events. Two types of reform are now being applied to more closely align with the testator's intent. The cypres doctrine reforms a document to make the bequests conform to the Rule if the testator's intent can be protected.[216] In addition, the wait and see statute considers the validity of interests based on actual, rather than hypothetically possible events to sustain interests that actually do vest.[217] The Uniform Statutory Rule Against Perpetuities considers both techniques for reform and is being adopted by various states.[218]

Specifically considering Ohio, Section 2131.01 of the Ohio Revised Code considers the statute against perpetuities. However, Ohio has also adopted some reform of the original common law through the elimination of the possibilities test.[219] With extreme posthumous children, the Rule still may be violated. Additional legislation would be necessary to encourage the testamentary recognition of the posthumous child.

While it is important to consider the Rule, it is not grounds to require prohibition of testamentary transfers of gametes. Drafters have already developed a means of circumventing the Rule through the use of savings clauses.[220] Properly drafted, these clauses protect the distributions of the testator from the possibility that the Rule will invalidate some bequests and return the property to the grantor's estate to be redistributed.[221] Another possibility is to update the Rule taking into consideration

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[213]Guzman, *supra* note 6, at 221.

[214]Unif. Probate Code § 2-901(d).

[215]§ 2-901(a)(2).

[216]Guzman, *supra* note 6, at 222 n.96.

[217]Guzman, *supra* note 6, at 222 n.96.

[218]The Uniform Statutory Rule Against Perpetuities is contained in the UNIF. PROBATE CODE §§ 2-901-906.

[219]OHIO REV. CODE ANN. § 2131.08(C) (Supp. 1999) states:
> Any interest in real or personal property that would violate the rule against perpetuities, under division (A) of this section, shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate the rule and in reforming an interest, the period of perpetuities shall be measured by actual rather than possible events.

[220]ANDERSEN, ET. AL., *supra* note 32, at 402.

[221]ANDERSEN, ET. AL., *supra* note 32, at 402.

the technology of today. For example, a limited window of opportunity could be allowed, such as two years, for frozen sperm to be used. With this solution, a testator's intent can be preserved, and a child conceived within a reasonable time after death could take inheritance either contingently or as a pretermitted child.

D. Intestate Distribution Implications

If a person dies without a valid will or if it contains an incomplete disposition, the laws of intestate succession will govern what happens to that person's property. Each state has its own intestate succession, or descent and distribution, statues. These statutes help identify interested persons, generally people related to the decedent, who will be able to take from the estate. These statutes attempt to identify who the grantor would have wanted to take the property if they had executed a will. Since intestate statues are designed to follow a traditional donative intent, they are inherently broad and not developed to take into consideration the implications of artificial insemination.[222]

Although details of intestacy statutes vary, they share a number of basic premises. First, a surviving spouse is the preferred taker who may share with the decedent's parents or children.[223] Second, if the decedent did not have a surviving spouse, surviving children or other issue take through representation.[224] Third, if there is not a spouse nor issue, the decedent's ancestors or collateral heirs are next in line.[225] If none of the above exist, the estate will escheat to the state.[226] The Uniform Probate Code details a similar descent and distribution scheme.[227] Ohio's Statute of descent and distribution follows a similar approach.[228]

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[222]Guzman, *supra* note 6, at 222.

[223]Guzman, *supra* note 6, at 222-23.

[224]Guzman, *supra* note 6, at 222-23.

[225]Guzman, *supra* note 6, at 222-23.

[226]Guzman, *supra* note 6, at 222-23.

[227]Unif. Probate Code §§ 2-102 to 103.

[228]OHIO REV. CODE ANN. § 2105.06 (1998).

> When a person dies intestate having title or right to any personal property, or to any real estate or inheritance in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:
>
> (A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes [per representation];
>
> (B) If there is a spouse and one child or his lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of the child, or the first twenty thousand dollars if the spouse is not the natural or adoptive parent of the child, plus one-half of the balance of the intestate estate in the spouse and the remainder to the child or his lineal descendants, per stirpes;
>
> (C) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

To take under intestate statutes, the heir must be alive and must survive the decedent. Three conventional schemes exist to determine a state intestacy law's recognition of a posthumous child.[229] They are as follows:[230](1) If a child is conceived or begotten before the decedent's death, they inherit as if born alive during the decedent's life; (2) Posthumous children inherit just like any of the decedent's children born before decedent's death; and (3) Children in gestation are treated as if living at decedent's death or upon surviving 120 hours after birth. The Uniform Probate Code has taken the third approach in stating that a child conceived before decedent's death, but born thereafter inherits as if born during the life of the decedent.[231] Ohio follows scheme number one under Ohio Revised Code § 1205.14.[232]

Although these statutes sound deceptively simple, semantics and definitions become imperative to the interpretation of these statutes. Presuming they believed certain words are self-explanatory, frequently the drafters of these statutes did not provide definitions of terms such as child. This highlights the questions as to the proper definitions of child, parent, issue, decedent, begotton, gestation, life or death. The term "issue" normally means the decedent's descendants of any generation, whether biological or adopted.[233] Parent and child are two other difficult terms to define. The Uniform Probate Code has attempted to define child and parent to

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(D) If there are no children or their lineal descendants, then the whole to the surviving spouse;

(E) If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;

(F) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(G) If there are no brothers or sisters or their lineal descendants, one half to the paternal grandparents of the intestate equally, or to the survivor of them, and one half to the maternal grandparents of the intestate equally, or to the survivor of them;

(H) If there is no paternal grandparent or no maternal grandparent, one half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;

(I) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(J) If there are no stepchildren or their lineal descendants, escheat to the state.

[229]Guzman, *supra* note 6, at 224-25.

[230]Guzman, *supra* note 6, at 224-25.

[231]Unif. Probate Code § 2-108.

[232]OHIO REV. CODE ANN. § 2105.14 (1998).
Descendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born in the lifetime of the intestate and surviving him; but in no other case can a person inherit unless living at the time of the death of the intestate.

[233]Unif. Probate Code § 1-201(21).

include natural and adoptive relationships but to exclude step, foster and grandparent relationships.[234]

Ohio has struggled with these definitions to the point of litigation. In 1984, a case was brought before the Court of Appeals to determine what "child" meant when used in the state's Statute of Descent and Distribution.[235] The court held, "[t]he word child as used in the Statute of Descent and Distribution, R.C. 2105.06, includes the child born out-of-wedlock as well as the legitimate child if the parent-child relationship has been established prior to death of the father pursuant to the parameters of R.C. Chapter 3111, as effective June 29, 1983."[236] Turning to Chapter 3111 on Parentage, § 3111.01 simply defines the parent and child relationship as "the legal relationship that exists between a child and the child's natural or adoptive parents and upon which those sections and any other provisions of the Revised Code confer or impose rights, privileges, duties, and obligations."[237] Section 3111.03 provides further direction in determining presumptions of paternity.[238] This section states that genetic testing may be conducted in order to determine paternity.[239] This raises issues of how to determine paternity posthumously.

In Ohio, establishing paternity posthumously is not permitted because the relevant statues require paternal acknowledgment or a court order during the potential father's life.[240] In support of a similar statute, the United States Supreme Court upheld New York's rule that an illegitimate child can only inherit from his or her father if a court order declaring paternity had been issued during the father's life.[241] However, the court rulings that have considered these statutes did not involve children who could only have been born after their father's death. While the Supreme Court has upheld such restrictions on proving paternity in the name of public policy,[242] they have not addressed a law that prohibits proving paternity through DNA testing.[243] Even with this precedent and Ohio's existing statute, a

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[234]Unif. Probate Code § 1-201(5), (33).

[235]Beck v. Jolliff, 22 Ohio App. 3d 84 (1984).

[236]*Id.* at 85.

[237]OHIO REV. CODE ANN. § 3111.01 (1998).

[238]§ 3111.03 (Supp. 1999).

[239]§ 3111.03(A)(5) states that:

> A man is presumed to be the natural father of a child under any of the following circumstances:
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> . . .
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> A court or administrative body, pursuant to section 3111.09, 3111.22, or 3115.52 of the Revised Code or otherwise, has ordered that genetic tests be conducted or the natural mother and alleged natural father voluntarily agreed to genetic testing pursuant to former section 311.21 of the Revised Code to determine the father and child relationship and the results of the genetic tests indicate a probability of ninety-nine per cent or greater that the man is the biological father of the child.

[240]OHIO REV. CODE ANN. § 2105.15 (Designation of heir at law).

[241]Lalli v. Lalli, 439 U.S. 259, 275 (1978).

[242]*Id.* at 266.

[243]Bailey, *supra* note 1, at 785.

probate court in Franklin County allowed the disinterment of an alleged father so that the child could prove paternity.[244] In holding that the child should have the opportunity to prove paternity, the court stated, "Today, however, we are entering in to a new area. Science has developed a means to irrefutably prove the identity of an illegitimate child's father…We live in a modern and scientific society, and the law must keep pace with these developments."[245] Although the court's decision dealt with illegitimate children, it is not too difficult to foresee the court allowing posthumous children this same method for proving paternity.

If the goal of intestate statutes is to execute the traditional grantor's intent, careful consideration should be given to frozen genetic material and whether most people consider this close enough to be considered a "child." Circumstances will vary greatly among each genetic contributor. In the hypothetical situation discussed at the beginning of this Article, emotional issues will also be prevalent due to the surrounding circumstances of facing a life threatening illness. Considering this specific fact pattern, intestacy law could presume in favor of heirship, but a different fact pattern could yield a different result. To determine what a "typical" decedent would want is virtually impossible in light of the widely varying motivating factors to freeze sperm or other genetic material. Even a comprehensive empirical analysis to determine society's "typical" view would be too complex to be practical. Therefore, the best method for contributors to ensure their wishes for the frozen sperm, whether to have a posthumous child or destruction, should be expressed explicitly at the time the material is deposited.

VII. UNIFORM CODE AND OHIO ATTEMPTS TO ADDRESS REPRODUCTIVE TECHNOLOGY

Three uniform acts are frequently consulted when determining the inheritance rights involving artificial insemination situations: The Uniform Probate Code (UPC), the Uniform Parentage Act (UPA), and Uniform Status of Children of Assisted Conception Act (USCACA).

A. Uniform Probate Code and Ohio Probate Code

As discussed previously in this Article, the Uniform Probate Code is relied on in determining the inheritance rights of a child in both testate and intestate circumstances. It's many flaws concerning the implications for the posthumous child have been reviewed.

B. Uniform Parentage Act and Ohio Parentage Act

The Uniform Parentage Act was approved in 1973 at a time when state law treated legitimate and illegitimate children differently, including their right to intestate succession.[246] The Uniform Parentage Act establishes a parent-child relationship between a child and the natural or adoptive parents, regardless of the marital status of the parents.[247] Section 5 of the Uniform Parentage Act is the only

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[244]Alexander v. Alexander, 537 N.E. 2d 1310 (1988).

[245]*Id.* at 1314.

[246]Unif. Parentage Act, 9B U.L.A. 296 (1987).

[247]*Id.*

section in the Act which applies to children or reproductive technology and applies only to children born of artificial insemination.[248] However, the Uniform Parentage Act completely ignores the existence of the posthumous child. Therefore, states that have enacted legislation dealing with artificial insemination often inadequately deal with the posthumous child.

Ohio has adopted the Uniform Parentage Act in Ohio Revised Code §§ 3111.30 through 3111.38.[249] Unfortunately, this statute does not take into consideration the posthumous child, as it only deals with non-spousal artificial insemination. Therefore, the only statutory treatment of reproductive technology deals with regulations of non-spousal artificial insemination. This very limited treatment leaves the courts very little guidance regarding the posthumous child.

C. Uniform Status of Children of Assisted Conception Act

The Prefatory Note to the Uniform Status of Children of Assisted Conception Act (USCACA), adopted in 1988, explains that the act "was designed primarily to effect the security and well-being of those children born and living in our midst as a result of assisted conception, and to give those children 'the same rights in property and inheritance as though conceived by natural means.'"[250] Although the Uniform Status of Children of Assisted Conception Act speaks primarily to surrogacy situations, it does address posthumous conception in Section 4, Parental Status of Donors and Deceased Individuals.[251] This section states: "An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[252] Under section 10(b), the parent-child relationship determines intestate succession, probate allowances and exemptions, and the child's eligibility to take under a class gift determined by relationship.[253]

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[248]Unif. Parentage Act 2, 9B U.L.A. 296 (1987). Section 5 states:

> If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
>
> The donor of sperm provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.

[249]OHIO REV. CODE ANN. §§ 3111.30 – 3111.38 (Anderson 1999).

[250]USCACA Prefatory Note, 9B U.L.A. 162.

[251]USCACA Prefatory Note, 9B U.L.A. 162.

[252]USCACA § 4(b), 9B U.L.A. 162.

[253]USCACA § 10(b), 9B U.L.A. 162.

Although Ohio has not currently adopted the Uniform Status of Children of Assisted Conception Act, three states have adopted the Act in varying degrees. North Dakota,[254] Virginia,[255] and Florida[256] have all attempted to address the issues surrounding reproductive technologies. The effectiveness of the Uniform Status of Children of Assisted Conception Act has been challenged based on its limited adoption and that it ignores the intentions of the genetic parents.[257] When a sperm donor and recipient intend to be considered the father and mother of the resulting child, the law should support this intent.[258] Instead, the Uniform Status of Children of Assisted Conception Act has the child remaining fatherless even when this is not the parents' intentions.[259]

VIII. CONCLUSION

The United States Supreme Court has firmly established both a right to procreate and a right to make procreative decisions. Although the Court has not ruled upon the constitutional protections afforded to the use of reproductive technologies, lower courts have established a line of precedent extending constitutional protections to cover the right to use reproductive technology to induce conception. This constitutional right to the use of reproductive technology encompasses the use of post-mortem insemination. However, the continued legislative inaction serves only to complicate and confuse the dilemma as courts search for direction in statutes not intended, nor fully equipped, to address the fact patterns which arise from assisted reproduction.

As we look back to Bob and Cathy who started this Article, it seems that the desire of a wife to honor her love for a recently deceased husband by producing their child through artificial insemination is actually supporting the idea of a family. Our laws should support this expression rather than complicate it or deem the child fatherless. Realizing the state's interest in prompt closure of the decedent's estate, a two-year limiting parameter could be set around the posthumous child. This is a reasonable time to allow for the initial intensity of the grieving process to be complete and the insemination procedure to be conducted. Further, the laws should encourage the deceased father to provide for the financial welfare of his child. If his intent is to have a child posthumously, he should make arrangements for this child to ensure the child does not end up on societal support.

With an attempt to balance the state interests, execute the grantor's intent, and support the surviving spouse, the decedent should be required to explicitly express his intent for the posthumous child and provide for support through the leaving of property in a will or trust. A testator should be allowed to provide for the child directly as long as it is conditioned on the two year limitation rule. If the will contains a trust, or there is a living trust taking the place of a will, the law should

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[254]N.D. Cent. Code § 14-18-04 (1991).

[255]VA. CODE ANN. § 20-158 (Michie 1994).

[256]FLA. STAT. § 742.17 (1999).

[257]Gibbons, *supra* note 15, at 207.

[258]Gibbons, *supra* note 15, at 207.

[259]Gibbons, *supra* note 15, at 207.

facilitate the inclusion of the posthumously conceived child in class gifts and allow direct gifts to such a child in trust, so long as the Rule Against Perpetuities is satisfied. To accommodate the wishes of the decedent would require a number of changes to the current Probate Code and Parentage Act. In addition, the public would need to be educated as to the necessity of expressly stating their intentions and providing for the potential posthumous child. However, this seems a small price to pay when considering a child born of love from a marital union that is now left in legal limbo and practically considered fatherless.

We have only just begun to be faced with the legal implications of the medical technology of assisted reproduction. In this Article, we have just considered the legitimacy and inheritance rights from the perspective of the decedent's estate. Consideration of the rights and obligations of other living blood relatives such as grandparents and other siblings is an interesting issue. Even if a legislative resolution to the immediate parental inheritance is solved, what about the next generations. The issues are many and varied and must be addressed. Continued legislative inaction will only serve to further complicate this already muddy area of law to the unfair detriment of a child brought into this world by love, even after death.

CINDY L. STEEB[260]

[260]I dedicate this Note to my late parents. I thank them . . . thank them for instilling in me the values of hard work, perseverance, and a strong moral foundation knowing right from wrong. It is because of the foundation my parents provided that I have been able to achieve all the successes in my life. I thank them, too, for the wonderful, happy family memories that I will cherish for the rest of my life as they both live on in my heart and soul. Here's to both of them, they have been, and will remain forever, the wind beneath my wings.