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GRAVESIDE BIRTHDAY PARTIES: THE LEGAL CONSEQUENCES OF FORMING FAMILIES POSTHUMOUSLY

Browne Lewis[†]

INTRODUCTION

As a result of reproductive technology, procreation is no longer left to the living. Assisted reproduction has enabled infertile couples, single people, and same-sex couples to create families with children.[1] Traditionally, a family consisted of a husband, a wife and their adopted or biological children.[2] High divorce rates led to single parent families and blended families consisting of stepchildren.[3] As a result of the sexual revolution, some families were made up of a man, his "old lady," and their non-marital children.[4] More recently, the discovery of effective methods to extract and freeze sperm has also allowed some individuals to engage in posthumous reproduction.[5]

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[1] *See* Crystal Liu, Note, *Restricting Access to Infertility Services: What Is a Justified Limitation on Reproductive Freedom? The Categorical Exclusion of Single Women and Same-Sex Couples from Infertility Services and Its Role in Defining What Constitutes Justified and Unjustified Limitations on Reproductive Freedom*, 10 MINN. J.L. SCI. & TECH. 291, 308 (2009).

[2] *See* Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the "Beneficial Family" and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 1 (2005) (describing the stereotypical 1950s American family).

[3] Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 FORDHAM L. REV. 833, 854 (2006).

[4] *Cf.* Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 Utah L. Rev. 93, 104–05 (discussing the dramatic rise in nonmarital children since the 1960s).

[5] Jamie Rowsell, *Stayin' Alive: Postmortem Reproduction and Inheritance Rights*, 41

Therefore, individuals do not have to let a little thing like death prevent them from conceiving children with the loves of their lives. Posthumous reproduction permits families to create living memorials to their dead love ones.[6]

A dead man's sperm can be used to impregnate a woman years after his death,[7] and a surrogate can use the eggs of a dead woman to conceive a child.[8] These are just a couple of the miracles made possible by advancements in reproductive technology. Physicians and other health care providers hail the beneficial uses of reproductive technology and scientists marvel over the developments that make such uses possible. Lawyers and others in the legal community, however, are forced to deal with the mistakes that inevitably occur.[9] Even when everything goes according to plan, families are sometimes forced to deal with the often unforeseen legal consequences that arise from using reproductive technology.

This Essay highlights some of the legal consequences resulting from the widespread availability and use of reproductive technology. The Essay is divided into three parts. Part I examines the steps that must be taken to identify the legal parents of the posthumously conceived children. Part II discusses the reproductive rights of the deceased gamete providers. Since most posthumous reproduction is done using the sperm of dead men, the discussion centers on male reproductive rights. Finally, Part III focuses on the inheritance rights of posthumously conceived children.

I. IDENTIFYING THE LEGAL PARENTS

A key consequence of the existence of children conceived posthumously using reproductive technology is the law's need to identify the parents of those children. Establishing the parent-child relationship is crucial because it determines the child's status as

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FAM. CT. REV. 400, 400 (2003).

[6] Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. & POL'Y 401, 409–10 (1999) ("It seems unfair from the child's perspective to be conceived as a 'loving memorial' or a product of a gift-exchange.").

[7] Janet J. Berry, Essay, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 232 (1997) ("In today's brave new world, children can be conceived after the death of their fathers through post-mortem artificial insemination.").

[8] Kristin L. Antall, Note, *Who Is My Mother?; Why States Should Ban Posthumous Reproduction by Women*, 9 HEALTH MATRIX 203, 210 (1999) (noting that one "theory behind posthumous reproduction is to have a child after the genetic mother has died").

[9] *See* Leslie Bender, *"To Err Is Human" ART Mix-Ups: A Labor-Based, Relational Proposal*, 9 J. GENDER RACE & JUST. 443, 443–53 (2006) (recounting a multitude of cases in which mistakes occurred during the assisted reproduction process).

legitimate or illegitimate.[10] In an Ohio surrogacy case, for example, because the surrogate was not married to the child's father, the child would have been classified as illegitimate had the court recognized the surrogate as the child's legal mother.[11] Although courts and legislatures have taken steps to remove the stigma of illegitimacy,[12] non-marital children still face cultural, emotional, and legal barriers.[13] For instance, in order for a child to receive financial support, inherit under the intestacy system, or collect Social Security and other government benefits, the child must demonstrate the existence of a legal parent-child relationship.[14]

Identifying the legal parents of children conceived using reproductive technology is just one of the challenges the legal system faces as use of this technology becomes more common. To illustrate the problems that can arise from situations involving the use or misuse of reproductive technology, I will rely in this Part on three widely publicized cases, building on their actual facts to demonstrate the breadth of legal issues that may emerge.

A. The Moms

When a child is conceived as the result of a surrogacy agreement, there are often two women involved. Thus, it is possible that each will vie for the legal title of "mother."[15] There are two common types of surrogacy arrangements—traditional and gestational. In a traditional surrogacy arrangement, the surrogate supplies the ova to conceive the child and carries the child in her uterus. Because the traditional surrogate has supplied the genetic material used to create the child,

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[10] *See* Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1038 (2002) (arguing that the law should recognize a child resulting from posthumous conception as the legal child of both genetic parents, not just the living parent).

[11] *See* Belsito v. Clark, 644 N.E.2d 760, 762 (Ohio Com. Pl. 1994).

[12] *See* Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 594 & 594 nn.467–71 (2001) (highlighting legislative and judicial actions to "align the treatment accorded nonmarital children with that accorded marital children").

[13] *See* Patricia J. Miller, Johnson v. Hunter*: Protecting the Nonmarital Child's Interests Despite the Minnesota Parentage Act's Shortcomings*, 10 LAW & INEQ. 81, 88–89 (1991) (evaluating the social stigma and legal consequences that arise when legislation distinguishes between marital and nonmarital children).

[14] *See* Bruce L. Wilder, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law*, 18 J. AM. ACAD. MATRIMONIAL L. 177, 199 (2002) (discussing inheritance issues raised by children born through posthumous reproduction, including their eligibility to receive Social Security benefits).

[15] *See* Suzanne F. Seavello, *Are You My Mother? A Judge's Decision in In Vitro Fertilization Surrogacy*, 3 HASTINGS WOMEN'S L.J. 211, 224–27 (1992) (evaluating the three natural parents created through in vitro fertilization because of the existence of two mothers).

she is the child's biological mother.[16] Genetics alone, however, may not be enough to establish the surrogate as the child's legal mother.[17] In contrast, in a gestational surrogacy arrangement, the surrogate carries a child using the genetic material of another woman. The gestational surrogate is thus not biologically linked to the child to whom she gives birth.[18] Nevertheless, the lack of a biological connection does not prevent the surrogate from being recognized as the child's legal mother.[19]

Recently, the news headlines were awash with stories about Carolyn Salvage, the Ohio woman who, while attempting to undergo in vitro fertilization, was implanted with the wrong embryo.[20] Although Ms. Salvage graciously agreed to serve as a surrogate for the woman who supplied the genetic material that was accidentally implanted into her uterus,[21] the story could easily have ended with a contentious battle for custody of the child.

The issue of the maternity of a child born using a surrogate has not been completely resolved.[22] Legislatures have provided little guidance, leaving courts to deal with the issue on a case-by-case basis. The end result is a common-law system that is confusing and unhelpful.[23]

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[16] *See* Emily Stark, Comment, *Born to No Mother:* In Re Roberto D.B. *and Equal Protection for Gestational Surrogates Rebutting Maternity*, 16 AM. U. J. GENDER SOC. POL'Y & L. 283, 287 (2007).

[17] *See id.* at 288–90 (comparing the "intent test" and the "genetics test" for determining legal motherhood and explaining that neither test is followed universally).

[18] *See* Jamie L. Zuckerman, Note, *Extreme Makeover—Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements*, 32 NOVA L. REV. 661, 663–64 (2008) (discussing the different types of gestational surrogacy arrangements); *see also* Bernard Friedland & Valerie Epps, *The Changing Family and the U.S. Immigration Laws: The Impact of Medical Reproductive Technology on the Immigration and Nationality Act's Definition of the Family*, 11 GEO. IMMIGR. L.J. 429, 452–58 (1997) (discussing the surrogate's possible parental status in several different scenarios).

[19] *See, e.g.*, A.H.W. v. G.H.B., 772 A.2d 948 (N.J. Super. Ct. Ch. Div. 2000) (denying a pre-birth order to establish the intended parents as the legal parents of the child carried by a surrogate on the grounds that such an order would violate New Jersey adoption statutes as well as the clear public policy of that state).

[20] *See, e.g.*, *Carolyn Savage, Ohio Woman Implanted With Wrong Embryo, Gives Birth*, HUFFINGTON POST, Sept. 26, 2009, www.huffingtonpost.com/2009/09/26/carolyn-savage-ohio-woman_n_300710.html.

[21] *Id.*

[22] *See* Golnar Modjtahedi, Comment, *Nobody's Child: Enforcing Surrogacy Contracts*, 20 WHITTIER L. REV. 243, 244–48 (1998) (explaining that because of the disdain for surrogacy contracts under many states' laws, as well as the disagreements that can arise among the parties to a surrogacy arrangement, the legal parenthood of children born of surrogacies is often questionable).

[23] *See id.* (explaining that most state legislatures that have addressed surrogacy by statutory enactment have done so largely to make them illegal and even criminal, leaving courts to determine custody issues on a case-by-case basis, and arguing that only full legal recognition of surrogacy arrangements will give the children born some level of security regarding the

For example, a surrogate who gives birth to a child in New Jersey has the opportunity to be designated as the child's legal mother even if she has no biological connection to the child. In *A.H.W. v. G.H.B.*[24] a New Jersey court referred to the woman as a gestational mother instead of a gestational surrogate,[25] reasoning that a woman who gestates and gives birth to a child should not be treated as though she is merely an incubator.[26] According to the court, the fact that the child stays inside the surrogate for nine months creates a bond between the woman and child that the law should not disregard.[27]

In California, on the other hand, even a surrogate who is the child's biological mother may not be classified as the child's legal mother if evidence indicates that the parties intended a different outcome. In *Johnson v. Calvert*,[28] the California Supreme Court held that the appropriate test for determining the identity of the legal mother of the child was the "intent" test.[29] Specifically, the court stated, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[30]

Other courts have advocated a variety of different tests to adjudicate the legal mother of a child conceived as the consequence of a surrogacy arrangement. For instance, in *Belsito v. Clark*, an Ohio court held that genetics or blood, not intent, is the determining factor.[31] After reviewing the limited case law from other jurisdictions, the court concluded that in order for a person to be deemed a natural parent, the person had to be genetically connected to the child, as established by a DNA blood test.[32] In contrast, the dissenting justice in *Johnson* argued that the "best interests of the child" test was

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identity of their parents).

[24] 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000).

[25] *See id.*

[26] *See id.* at 953.

[27] *See id.*; *cf.* Lawrence O. Gostin, *Surrogacy from the Perspectives of Economic and Civil Liberties*, 17 J. CONTEMP. HEALTH L. & POL'Y 429, 429 (2001) (disagreeing with Judge Posner's view that surrogacy contracts are merely economic transactions in which "[t]he parties are in relatively free and equal bargaining positions, the arrangements are mutually beneficial, and third parties (notably the children) are not harmed," and asserting instead that gestational mothers should not be permitted to waive parental rights in a surrogacy agreement and that legal motherhood should be determined based on the child's best interests).

[28] 851 P.2d 776 (Cal. 1993) (en banc).

[29] *See id.* at 782.

[30] *Id.*

[31] *See* Belsito v. Clark, 644 N.E. 2d 760, 763 (Ohio Com. Pl. 1994). For an analysis of *Belsito*, see Dawn Wenk, Note, Belsito v. Clark: *Ohio's Battle With "Motherhood,"* 28 U. TOL. L. REV. 247 (1996).

[32] *See Belsito*, 644 N.E.2d at 767. According to the court, "[t]he test to identify the natural parents should be, 'Who are the genetic parents?'" *Id.* at 766.

the appropriate standard to apply to determine maternity.[33] Thus, according to Justice Kennard, when adjudicating maternity, the court should strive to protect the welfare of the child rather than merely promote the intentions of the adults.[34] Finally, the Supreme Court of Tennessee recently concluded that the proper standard for adjudicating maternity is a multi-factor test that focuses on all of the circumstances surrounding the particular case.[35] The test is flexible and varies depending on the facts of the case before the court.[36]

Historically, it was easy to identify the legal mother of a child. The woman who gave birth to the child was usually the one who supplied the genetic material that was used to create the child.[37] One of the consequences of assigning those roles to two different women is the increase in litigation. When a surrogate arrangement goes according to plan, it is a beautiful thing. Nonetheless, if the surrogate decides that she cannot bear to part with the child, the court is forced to step in and assume the role of Solomon—perhaps without the appropriate amount of wisdom.

Uncertainty regarding the parental rights of surrogates seriously complicates the already complex issues associated with posthumous reproduction. If a man hired a surrogate to carry a child created using his dead wife's genetic material, he probably would not want the gestational surrogate to be identified as the child's legal mother. However, the courts may be reluctant to designate the child as legally motherless.[38] Since the woman who supplied the genetic material used to conceive the child would be dead, she could not be named as the child's legal mother. Thus, the man may be forced to have some type of relationship with a woman who is virtually a stranger to him.

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[33] *Johnson*, 851 P.2d at 788.

[34] *Id.* at 789.

[35] *See In re* C.K.G., 173 S.W.3d 714, 726–30 (Tenn. 2005) (declining to adopt any specific rule for determining maternity in surrogacy arrangements, but instead analyzing several factors in light of the particular facts of the case, including: genetics, intent, gestation, and whether there is a controversy between competing would-be mothers).

[36] *See id.* at 727 (deeming it appropriate to decide the case on its particular facts); *see also id.* at 730–31 (concluding that crafting a general rule regarding maternity in surrogacy is a job best suited for the legislature and encouraging the Tennessee General Assembly to investigate the issue and produce applicable legislation).

[37] *See* David M. Buss, *Evolution and Human Mating*, 18 HARV. J.L. & PUB. POL'Y 537, 543–44 (1995) (noting that, because of the fundamental reproductive differences between men and women, "women are 100% certain that they are the mothers of their children, while men are always less than 100% certain").

[38] Noa Ben-Asher, *The Curing Law: On The Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1921 (2009) (discussing dissenting opinions in gestational surrogacy cases that "reveal judicial anxiety about the creation of motherless families through the use of reproductive technologies").

Some jurisdictions provide a procedure for having gestational surrogacy agreement preapproved.[39] As a part of the process, the gestational surrogate must agree to surrender the child to the intended parent or parents.[40] This is only a partial solution to the problem. First, only a few states have statutes setting out a prior approval process for gestational surrogacy agreements. Hence, very few potential intended parents are protected by such statutory mandates. Second, at least one court has held that the gestational surrogate could not lawfully surrender the child until at least seventy-two hours after the birth, removing even the possibility of preapproval in that jurisdiction.[41] Third, the language and legislative histories of the existing preapproval statutes indicate that they were meant to apply to situations where all of the parties were alive. The possibility of posthumous reproduction is not discussed. Finally, in most cases, following the statutory mandates only creates a presumption that the surrogacy agreement is enforceable. Since that presumption is rebuttable, the man may still end up in a custody battle.

B. The Dads

In addition to creating complicated issues of maternity, the availability of reproductive technology has also impacted the legal determination of paternity. The oldest and most commonly used form of reproductive technology is artificial insemination.[42] Artificial insemination is simpler and more affordable than other types of assisted reproduction.[43] As a consequence, the majority of state

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[39] Weldon E. Havins & James J. Dalessio, *Reproductive Surrogacy at the Millennium: Proposed Model Legislation Regulating "Non-Traditional" Gestational Surrogacy Contracts*, 31 MCGEORGE L. REV. 673, 686 (2000) (noting that New Hampshire and Virginia actually require judicial preapproval of surrogacy agreements in order to render them enforceable).

[40] *See, e.g.*, FLA. STAT. ANN. § 742.15(3)(c) (West 2007); ILL. COMP STAT. ANN. 47/25(c)(1)(ii) (West 2009).

[41] A.H.W. v. G.H.B., 772 A.2d 948, 954 (N.J. Super. Ct. Ch. Div. 2000). The court indicated that subjecting the surrogate to a binding pre-birth agreement to relinquish parental rights was contrary to state law because the surrogate had a right to change her mind after the child's birth. *Id.*

[42] *See* Elizabeth A. Bryant, Comment, In the Interest of R.C., Minor Child*: The Colorado Artificial Insemination by Donor Statute and the Non-Traditional Family*, 67 DENV. U. L. REV. 79, 79 (1990) ("Artificial insemination is modern reproductive technology's oldest and most common technique." (footnotes omitted)).

[43] *See* Barbara K. Padgett, Note, *Illegitimate Children Conceived by Artificial Insemination: Does Some State Legislation Deny Them Equal Protection Under the Fourteenth Amendment?*, 32 U. LOUISVILLE J. FAM. L. 511, 518 (1993–94); *see also* Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 190–93 (2003) (discussing different types of assisted reproductive technology).

In vitro fertilization is more expensive and not as effective. Nonetheless, some people successfully use it to achieve pregnancy. *See* Keith Alan Byers, *Infertility and In Vitro*

legislatures have sought to regulate that technology.[44] Married couples use artificial insemination when the husband has a low sperm count or when his sperm are insufficiently motile.[45] Artificial insemination using a woman's husband's sperm is not controversial; in those cases, the resulting children are treated as if they were conceived through sexual intercourse.[46] However, difficult legal questions may arise when a man's wife is artificially inseminated using donor sperm. A wife may use donor sperm if her husband suffers from male infertility, which amounts to an inability to produce quality sperm, or if her husband has a genetic disease that would impact the baby's health.[47]

As an example, California couple Katie and Robert Aschero decided to use reproductive technology to start a family. They submitted their genetic material to a San Francisco fertility clinic where the clinic staff was supposed to create embryos by fertilizing Katie's ova with Robert's sperm.[48] The clinic created thirteen embryos using Katie's ova,[49] but seven of those embryos were accidentally created using the sperm of a stranger.[50] Instead of notifying the Ascheros about the mistake, the clinic staff disposed of the seven embryos that were created using the stranger's sperm, and implanted only the embryos made using Robert's sperm.[51]

The situation would have been different, however, if the mistakenly fertilized embryos had been implanted into Katie's uterus. She would have given birth to a child using donor sperm, which may have raised issues about the child's paternity. Legislatures in a majority of states have enacted statutes designating the paternity of

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Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry, 18 J. LEGAL MED. 265, 285 (1997) (noting that in vitro fertilization was involved with 26,000 births in the United States in 1994).

[44] *See, e.g.*, IDAHO CODE ANN. § 39-5403 (2002) (providing an example of a state requirement for consent to paternity arising from artificial insemination).

[45] *See* Milena D. O'Hara & Andrew W. Vorzimer, In re Marriage of Buzzanca*: Charting a New Destiny*, 26 W. ST. U. L. REV. 25, 33 (1999) ("For couples experiencing infertility due to poor sperm count, motility or morphology, artificial insemination is often indicated, whether by use of the husband's sperm or donor sperm.").

[46] *See* Padgett, *supra* note 43, at 517 (noting that few legal issues arise when the donor and mother are spouses).

[47] Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1643–44 (1984); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1107 (1997).

[48] *See* Steven Ertelt, *Fertility Clinics in California, Louisiana Face Lawsuits over Destroying Embryos*, LIFE NEWS, Sept. 29, 2009, http://www.lifenews.com/bio2974.html.

[49] *Id.*

[50] *Id.*

[51] *Id.* The IVF treatment that Katie Aschero underwent was ultimately unsuccessful. *Id.*

children conceived as the result of artificial insemination.[52] Under most of these statutes, a man is not legally responsible for a child his wife conceives using donor sperm unless he gives his consent prior to the insemination.[53] If the rules provided in those statutes were applicable to in vitro situations,[54] Katie Aschero's child would have been legally fatherless. Since he did not consent to the artificial insemination of his wife with donor sperm, Robert Aschero would not have been the child's legal father. Indeed, Robert intended for Katie to become pregnant using *his* sperm, not the sperm of another man. Further, the stranger sperm donor would probably not have been recognized as the child's legal father. In the majority of jurisdictions, the sperm donor is never the legal father of the child.[55] He is either not recognized as having parental rights or is required to waive his parental rights at the time he donates his sperm.[56]

The Nadya Suleman case similarly demonstrates some of the difficult issues raised by the use of reproductive technology. It also highlights some of the consequences of allowing doctors to use reproductive technology to produce children without any effective regulation. In Suleman's case, a fertility doctor implanted eight embryos into the uterus of a single woman who already had six children under the age of seven.[57] The public's initial reaction to Suleman's historic situation was positive.[58] Nonetheless, when the circumstances of Suleman's life came to light, public support turned

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[52] *See* Sharon L. Tiller, Note, *Litigation, Legislation, and Limelight: Obstacles to Commercial Surrogate Mother Arrangements*, 72 IOWA L. REV. 415, 431–32 (1987) (discussing many states' adoption of artificial insemination statutes modeled after the Uniform Parentage Act).

[53] *See, e.g.*, IDAHO CODE ANN. § 39-5405(3) (2002) (providing that "[t]he relationship, rights and obligation" between the child and the artificially inseminated mother are the same as they would be if the mother were naturally impregnated only if "the husband consented to the performance of the artificial insemination"); 750 ILL. COMP. STAT. ANN. 40/3(a) (West 2009) (providing that for a child produced by artificial insemination of a married woman, the husband will be treated as the natural father of the child if the wife is inseminated "with the consent of [the] husband").

[54] At least one court has held, however, that sperm donor statutes are not applicable to IVF. *See In re* Parentage of J.M.K., 119 P.3d 840, 849 (Wash. 2005) (en banc).

[55] *See, e.g.*, IDAHO CODE ANN. § 39-5405(1) ("The donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination.").

[56] *See* Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 973 (2009) [hereinafter Lewis, *Two Fathers*] ("In most jurisdictions, sperm donors are not given parental status.").

[57] *See* Tia M. Young, Comment, *Removing the Veil, Uncovering the Truth: A Child's Right to Compel Disclosure of His Biological Father's Identity*, 53 HOW. L.J. 217, 231 (2009).

[58] *See* Naomi R. Cahn & Jennifer M. Collins, *Eight Is Enough*, 103 NW. U. L. REV. COLLOQUY 501, 501 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/22/LRColl2009n22Cahn&Collins.pdf.

to outrage.[59] Suleman was unmarried, unemployed, and on public assistance.[60] Eventually, Suleman may be able to obtain financial support for both her children and herself. Suleman's fourteen children are themselves financial resources in light of television shows like *Jon & Kate Plus Eight*[61] and *19 Kids & Counting*.[62] These programs indicate that television networks are willing to pay a premium to parents of children who are conceived under unusual circumstances. Nevertheless, the Suleman case is a recipe for disaster. For one, the genetic father of Suleman's fourteen children may be motivated to claim paternal rights on account of the possibility of pecuniary gain to be derived from the babies. Artificial insemination statutes in the majority of jurisdictions make it clear that sperm donors are never recognized as the fathers of the children conceived using their sperm.[63] However, those statutes may not be applicable to the Suleman case. First, most of the statutes only apply to married couples.[64] Second, at least one court has stated that an artificial insemination statute does not apply to situations involving in vitro fertilization.[65] Finally, a Pennsylvania court recently recognized a known sperm donor as the father of a child conceived using his sperm.[66] The Court focused on the fact that the woman knew the sperm donor and that he had developed a relationship with the children.[67] Consequently, if California courts adopt similar reasoning and the known sperm donor is ultimately granted parental rights, these fourteen small children could be caught up in a nasty custody battle. In order to avoid these types of situations, courts should

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[59] *See id.*

[60] *Id.*

[61] *Jon and Kate* was a reality show that aired on the TLC network. It focused on the life of a couple raising eight children. *See* Jon & Kate Plus 8, http://tlc.discovery.com/tv/jon-and-kate/jon-and-kate.html (last visited Sept. 28, 2010).

[62] *19 Kids & Counting* is also a reality show on the TLC network. It focuses on the life of a family consisting of a husband and a wife and nineteen children. The couple plans to continue to have children. *See* 19 Kids & Counting, http://tlc.discovery.com/tv/duggars/ (last visited Sept. 28, 2010).

[63] *See, e.g.*, ALA. CODE §26-17-702 (2009) ("A donor who donates to a licensed physician for use by a married woman is not a parent of a child conceived by means of assisted reproduction."); CONN. GEN. STAT. ANN. § 45a-775 (West 2009) ("A donor of sperm used in A.I.D., or any person claiming by or through him, shall not have any right or interest in any child born as a result of A.I.D.").

[64] *See* Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671, 688–90 (2007) (discussing artificial insemination statutes that only deal with artificial insemination occurring inside the context of marriage).

[65] *See In re* Parentage of J.M.K., 119 P.3d 840, 849 (Wash. 2005) (en banc).

[66] *See* Jacob v. Shultz-Jacob, 923 A.2d 473, 480 (Pa. Super. Ct. 2007).

[67] *Id.* at 480–81 (discussing at some length the sperm donor's contact with and prior financial support of the children in question).

allocate paternity based upon the best interests of the artificially conceived children.

II. PROTECTING THE REPRODUCTIVE RIGHTS OF DEAD MEN

The ability to conceive children using the genetic material of dead people presents unique problems for the legal system. Legislatures and courts have yet to fully deal with the consequences of posthumous conception. In a minority of jurisdictions, legislatures have passed statutes addressing children who have been posthumously conceived.[68] Courts, for their part, have decided a few cases addressing the rights of these children.[69] I consider the issues in these cases to be post-conception issues.

This Part explores pre-conception issues, specifically examining whether permitting posthumous conception interferes with the reproductive rights of the deceased gamete provider. The discussion is limited to the reproductive rights of dead men, and is divided into two sub-parts. The first examines the reproductive rights of a dead man who has taken steps to preserve his sperm in anticipation of death. The second subpart focuses on the reproductive rights of a man whose sperm is extracted after his death. In both types of cases, doctors have to decide if a man's sperm should be used to produce a child, and under some circumstances, doctors may be faced with the difficult task of deciding who has the legal right to possess the dead man's sperm.

A. The Man Stores His Sperm

There are numerous reasons why a man would choose to preserve his sperm for later use. Historically, prior to going to war, men stored their sperm to use it when they returned from combat,[70] and that trend has continued.[71] Fertility clinics have reported that soldiers heading to

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[68] *See* Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 409 (2009) [hereinafter Lewis, *Afterdeath Children*] ("[O]nly eleven states have statutes directly addressing [the inheritance rights of posthumously conceived children].").

[69] Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 177–80 (2009) (discussing cases involving claims for social security benefits brought by posthumously conceived children).

[70] *See* John A. Gibbons, Comment, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. CONTEMP. HEALTH L. & POL'Y 187, 190 (1997) ("[S]oldiers participating in the Vietnam War stored sperm to ensure their ability to become fathers.").

[71] *See* Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 525–26 (1993) (discussing the growing practice of storing sperm at sperm banks, including soldiers cryogenically freezing their sperm before deploying to the Persian Gulf during Operation Desert Storm).

Iraq and Afghanistan are banking their sperm.[72] Soldiers may choose to store their sperm before going to war for several reasons. A wife or significant other may encourage a man to store the sperm so in the event that he does not return from his deployment, she will be able to use his sperm to conceive a child.[73] Under these circumstances, the man will probably agree, often because of a desire to have a child to carry on his bloodline.[74] Even men who are single and not involved in serious relationships are banking their sperm for later use, some out of fear that they may become infertile as a consequence of toxins and other hazards of war.[75]

Soldiers are not the only men who take steps to preserve their sperm. Some men facing terminal illnesses like cancer store their sperm before undergoing treatments that may leave them sterile.[76] In addition, recent medical research has indicated that the quality of a man's sperm may deteriorate with age.[77] Thus, more men may choose to store their sperm when they are young for use when they decide to become fathers later in life.

If a man dies after he stores his sperm, his doctors must decide whether to release the sperm to the man's wife, significant other, or next of kin. The physician's decision is easier if the man has left instructions. Even if a man does not leave instructions, the fact that he banked his sperm may be enough to indicate that he wanted to procreate posthumously. Therefore, the public is not overly concerned when his wife or significant other uses his sperm to conceive his child.

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[72] Major Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military*, ARMY LAW., May 2008, at 1, 2 n.7 (citing Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY, Jan. 27, 2003, at 1A).

[73] *See* Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433, 436 (2009).

[74] *Cf.* Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L.J. 1081, 1128 (1996) (discussing potential reasons why a deceased might want to posthumously reproduce).

[75] *See* Michelle L. Brenwald & Kay Redeker, Note, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 603 (1999) (indicating that sperm banking possibly benefitted soldiers in Desert Storm who wanted to father healthy children despite exposure to toxic chemicals during the conflict).

[76] *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 260 (Mass. 2002) (noting that the plaintiff and her husband arranged for preservation of the husband's semen before he underwent treatment for leukemia), *cited in* Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963, 985 (2003).

[77] *See* Kimberly Horvath, *Does* Bragdon v. Abbott *Provide the Missing Link for Infertile Couples Seeking Protection Under the ADA?*, 2 DEPAUL J. HEALTH CARE L. 819, 821 (1999) ("Age is . . . a factor in male infertility because the number of motile sperm reduces with age.").

1. The Man Leaves Instructions

In cases where the man has left instructions regarding the distribution of his sperm, fertility clinics and courts have tended to respect his wishes.[78] Yet cases still arise because someone challenges the proposed treatment of the dead man's sperm.[79] The issue in these cases is whether to release the man's sperm for use in posthumous reproduction or dispose of it. This in turn raises the issue of whether a man's sperm belongs to him; if it does, he should be permitted to control the its use. Some commentators argue that a man cannot own his sperm because they are uncomfortable with sperm being classified as property.[80] Others claim that sperm should be treated like organs.[81] If a man leaves instructions, those should be honored.[82] If he does not, his next of kin should be allowed to decide what should be done with the sperm. Still other commentators opine that the man's property interest in his sperm is extinguished at death, so his widow should be authorized to make decisions regarding his sperm.[83]

The main goal of the probate system is to carry out the wishes of the decedent with regard to his property. Thus, courts tend to honor a dead person's written request. As long as the decedent has the legal right to dispose of the property, the probate court will carry out his or her intentions.[84] The California case of *Hecht v. Superior Court*[85] is

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[78] *See, e.g.*, Hecht v. Superior Court, 20 Cal. Rptr. 2d. 275, 276 (Ct. App. 1993) (analyzing a letter the decedent sent to a sperm bank authorizing it to release his sperm to his girlfriend in order to effectuate the decedent's intent regarding the use of his stored sperm).

[79] *See, e.g.*, *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d. 311 (Ct. App. 2008).

[80] *See, e.g.*, Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 558 (1996) (identifying three major arguments in opposition to the conception of sperm as property). Shah observes:

> The first argument . . . is that the sale of sperm, ova, and preembryos would encourage "the perception of body parts as interchangeable commodities and undermines the recognition of the human body as the physical embodiment of the personality." The second argument . . . is that, especially in the case of ova and preembryos, such sales could lead to the exploitation of the poor for the benefit of the rich. . . . [The third argument is that] requiring such donations to be "gifts" rather than "sales" reaffirms social values.

Id. (footnote omitted).

[81] *See, e.g.*, Andrea Corvalan, Comment, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 364 (1997) (likening a man's instructions regarding posthumous sperm use to an organ donor card).

[82] *See* Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 66–67 (1999) (comparing organ procurement with post-mortem sperm procurement).

[83] *See* Gilbert, *supra* note 71, at 549–50 ("When the sperm depositor is dead, the sperm's unique characteristic, its potential for human life . . . should sometimes override the decedent's property interest in the sperm.").

[84] *See* Melissa B. Vegter, Note, *The "Art" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from*

one example of a court exercising such respect for the wishes of a dead man. William Kane stored fifteen vials of his sperm in a California sperm bank and later gave the sperm bank a letter authorizing the release of the sperm to his girlfriend, Ellen Hecht.[86] Afterward, Kane executed a will leaving his sperm to Hecht. In his will, Kane made it clear that he wanted Hecht to use his sperm to conceive children and went so far as to mention his potential posthumously conceived children in a letter that he left to his existing children.[87] Kane then committed suicide[88] and Hecht sought custody of the sperm. Although Kane's existing children objected, the court issued an order preventing the sperm bank from destroying the sperm.[89] As a part of a settlement agreement, Hecht received three vials of Kane's sperm.[90]

On the other hand, in *Estate of Kievernagel*,[91] another California court declined to overrule a sperm bank that refused to release the dead man's sperm to his widow. Joseph and Iris Kievernagel had been married for ten years, but could not have children.[92] The couple sought reproductive help from the Northern California Fertility Medical Center. Their hope was for Iris to become pregnant through in vitro fertilization using Joseph's sperm. The Center froze a sample of Joseph's sperm to be used if the insemination with the live sperm did not result in a pregnancy.[93] Before conducting the procedure, the Center had Joseph sign a consent form. On the form, Joseph indicated that, when he died, he wanted the Center to dispose of the frozen sperm instead of releasing it to Iris.[94] After Joseph was killed in a helicopter crash, Iris petitioned the probate court, seeking an order forcing the Center to give her Joseph's sperm.[95] Eventually, the California Court of Appeals ruled that Iris could not use Joseph's sperm to conceive his child, reasoning that the seemingly harsh result

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a Deceased Parent's Estate, 38 VAL. U. L. REV. 267, 299 (2003) ("The primary policy behind intestacy statutes is to carry out the *probable intent* of the decedent. Therefore, when an individual shows significant intent of parenting a child posthumously, the state has an interest in carrying out this wish as well." (footnote omitted)).

[85] 20 Cal. Rptr. 2d. 275 (Ct. App. 1993).

[86] *Id.* at 276.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 291.

[90] *Id.*

[91] 83 Cal. Rptr. 3d. 311 (Ct. App. 2008).

[92] *Id.* at 312.

[93] *See id.*

[94] *See id.*

[95] *See id.*

was merited because the Center had to respect Joseph's wishes and destroy his sperm.[96]

2. *The Man Does Not Leave Instructions*

In cases where a man does not leave instructions regarding the use of his sperm after his death, doctors usually honor the request of his wife or significant other. Thus, if no one objects, the doctors will generally release the sperm so the woman can use it to become pregnant. However, this was not always the case, particularly when the idea of posthumous conception was relatively new. In an early French case, for example, a widow had to fight to get the right to obtain possession of her dead husband's sperm.[97] Frenchman Alain Parpalaix was diagnosed with testicular cancer. The recommended treatment was chemotherapy,[98] a treatment that carried the possibility of a devastating side effect: the inability to have children.[99] Thus, before he started treatment, Alain had his sperm extracted and placed in a sperm bank run by the government.[100] Alain did not sign any paperwork indicating what he wanted to happen to his sperm if he died.[101] Despite treatment, Alain's health did not improve. Two days before he succumbed to cancer, Alain married his girlfriend, Corinne.[102] Corinne wanted to become pregnant using Alain's sperm and asked the sperm bank to give her Alain's sperm.[103] The sperm bank refused Corinne's request because Alain had not consented to have his sperm used after he died.[104] Corinne, however, successfully sought relief from the court, and ultimately gained access to her dead husband's sperm.[105] The outcome of this case indicates that, even if a man does not leave written instructions, his wife may have the opportunity to use his sperm to procreate. The court may have been persuaded by the Alain's desire to have children. Although he did not verbally express his wish to procreate, the court could have implied

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[96] *See id.* at 317.

[97] *See* Parpalaix c. CECOS, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Creteil, Aug. 1, 1984, Gaz. Pal. [1984], 2, pan. jurisp., 560; *see also* E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 229–33 (1986) (discussing *Parpalaix*, which was the first case in France to deal with the issue of post-mortem insemination in 1984).

[98] Shapiro & Sonnenblick, *supra* note 97, at 229.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 229–30.

[102] *Id.* at 230.

[103] *See id.*

[104] *See id.*

[105] *See id.* at 233. Unfortunately for Corinne, her subsequent attempts at artificial insemination proved unsuccessful and she never carried Alain's child. *See id.*

that fact from his actions. If Alain was not concerned about the impact chemotherapy would have on his fertility, he did not have any reasons to bank his sperm prior to starting treatment.

Currently, courts still conduct a case-by-case evaluation when deciding whether to honor a woman's request for her dead husband's sperm. As a part of that analysis, the court looks at all of the surrounding circumstances, including the actions the dead man took to preserve his fertility.

B. The Man Does Not Store His Sperm

The focus of many reproductive freedom debates is the protection of the right to procreate. The United States Supreme Court has recognized that a person has a fundamental right to procreate.[106] Some courts have used this proclamation to conclude that a person has a corresponding right to not procreate.[107] That right may be violated if physicians are permitted to extract sperm from dead men, so that the sperm can be used to conceive a child. Such extraction is especially problematic when the man has not indicated that he wanted a child created using his genetic material after his death. Under these circumstances, there is no gatekeeper. The physician alone must make the decision whether to extract the sperm, and it must be made quickly because sperm is only viable for about thirty-six hours after a man dies.[108] Physicians may be persuaded by the emotional stories of those left behind, and ultimately, most of them grant such requests if no one objects.[109]

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[106] *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of [humans]."); *see also* Jennifer P. Brown, Comment, *"Unwanted, Anonymous, Biological Descendants": Mandatory Donation Laws and Laws Prohibiting Preembryo Discard Violate the Constitutional Right to Privacy*, 28 U.S.F. L. REV. 183, 229–34 (1993) (discussing *Skinner* and other Supreme Court reproductive rights jurisprudence identifying procreation as a fundamental right).

[107] *See* Jennifer L. Carow, Note, Davis v. Davis*: An Inconsistent Exception to an Otherwise Sound Rule Advancing Procreational Freedom and Reproductive Technology*, 43 DEPAUL L. REV. 523, 553–54 (1994) (discussing *Davis v. Davis* and observing that the Tennessee Supreme Court "found that in Tennessee the right of procreation was 'composed of two rights of equal significance—the right to procreate and the right to avoid procreation.'" (quoting Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992))).

[108] Mary F. Radford, *Post-Mortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 33, 35–36 (2009).

[109] *See* Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U. L.J. 451, 456 (2000) (discussing doctors' ability to make ad-hoc decisions regarding posthumous sperm harvesting and the impact of such decisions on the medical profession's ability to self-regulate).

1. To Extract or Not to Extract

Reproductive technology that permits a man to procreate posthumously has been hailed as a medical breakthrough.[110] That technology gives the man the opportunity to carry on his bloodline after he dies—an opportunity that is especially important for men who are members of small families. Many men probably would not object to the procedure because it is not invasive.[111] Further, supporters of the sperm extraction may contend that a wife or significant other should be permitted to have the child of the dead man in order to help her through the grieving process.[112]

Those opposing the extraction of sperm from dead men claim the procedure may force fatherhood upon a man without his permission. This forced fatherhood, they contend, violates the man's right not to procreate.[113] Opponents also argue that it is against public policy to intentionally create fatherless children.[114] This is a big concern because, if the woman dies in childbirth, the child would be an orphan. Some cynics also question the motives. For instance, if Anna Nicole Smith[115] had conceived a child from her dead husband's sperm, that child may have received a substantial part of his billion-dollar estate. Others are troubled by the fact that most people seeking to use the sperm of dead men to create children have modest means[116] and may end up applying for Social Security and other government benefits to support the posthumously conceived child.[117]

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[110] *See* Gibbons, *supra* note 70, at 190 (describing the discovery that sperm could be cryogenically frozen and used later for reproduction as a "medical breakthrough").

[111] *See* Cornell University Department of Urology, Male Infertility—Surgical Sperm Retrieval, http://www.cornellurology.com/infertility/srt/ssr.shtml (last visited Aug. 15, 2010) (describing the process of retrieving sperm from a man's body).

[112] Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter?*, 11 B.Y.U. J. PUB. L. 1, 23 (1997) ("For the donee, to have a child who is genetically-related to the donor may ease the grieving process and aid in the donee's adjustment to life without the donor.").

[113] *See, e.g.*, Michael K. Elliott, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 63–64 (2004) (discussing the judiciary's recognition of a decedent's right of reproductive choice in the face of "forced procreation" after death).

[114] *See, e.g.*, Shuster, *supra* note 6, at 409–10.

[115] For a discussion of the Anna Nicole Smith inheritance case, see Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79, 102–04 (2003).

[116] *See* John Doroghazi, Note, Gillette-Netting v. Barnhart *and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597, 1618 (2005) (noting that Social Security is not supposed to be a general welfare program).

[117] *See id.* at 1619 (proposing a plan to discourage women from conceiving a decedent's child purely for the Social Security Benefits by preventing such women from receiving benefits); *see also* Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 631–33 (2005) (discussing a potential mother's financial

2. To Release or Not to Release

Because the extraction of sperm from dead men is not heavily regulated, physicians are forced to be the decision-makers. After making the difficult decision regarding the removal of the dead man's sperm, they must decide whether to honor requests for the extracted sperm. Traditionally, the person seeking to obtain the dead man's sperm was his wife or significant other, and this still constitutes the majority of requests for the release of dead men's sperm. Nonetheless, other family members have recently started going to court to get permission to take possession of postmortem sperm.[118]

The easy cases are those involving wives and blood relations. In deciding whether to order the physician to release the sperm, the courts generally seek to predict what the dead man would have wanted. The purpose of intestacy is to carry out the testator's presumed intent with regard to the disposition of his property.[119] Because at least one court has recognized sperm as property that can be disposed of by will,[120] this same logic may be applied to distribution of the dead man's sperm. Under the intestacy system, the surviving spouse is awarded a portion of the decedent's estate[121] based on the assumption that the decedent would want his or her spouse to receive a part of the estate.[122] Courts may rely on similar assumptions to conclude the decedent would want his widow to be able to use his sperm to conceive his child.

Cases involving surviving spouses' access to postmortem sperm are becoming increasingly common.[123] The increased number of these requests has caused the courts to get involved. For example, on March 31, 2008, Dayne Darren Dhanoolal lost his life in Baghdad after he

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incentives for using a decedent's sperm).

[118] *See* Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 295 (noting that "requests for [sperm retrieval] have been increasingly frequent and are expected to grow").

[119] *See* Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 173–74 (2006) (discussing the "presumed-will" theory).

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

[121] *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1261–62 (discussing the spousal share in the disposition of a decedent's estate in intestacy).

[122] *See* Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 416–17 (2009) (discussing the theories underlying the spousal elective share).

[123] *See* Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 93–94 (2004) (discussing the increasing practice of "harvesting" sperm from a deceased male).

was killed in an explosion.[124] Kynesha, Dayne's young wife, was determined to ensure that his legacy would not end in the war. Prior to his death, Dayne had made it clear that he wanted to father children, and the couple had thought they had plenty of time to do it.[125] Upon learning of Dayne's death, Kynesha went to court for a restraining order to have his sperm removed before the army could have him embalmed.[126]

Spouses are not the only ones seeking access to sperm for posthumous reproduction purposes. According to the intestacy system in most states, if a man dies without a surviving spouse or children, his estate goes to his parents.[127] In such a case, his parents would have the legal right to make all decisions pertaining to the disposal of his body and his property. Some parents have exercised that right by having the man's sperm removed posthumously.

Marissa Evans, a Texan, loved her son, Nikolas. She probably looked forward to the day when Nikolas would give her grandchildren to spoil. Marissa's hopes were shattered when Nikolas was killed in a bar fight.[128] Although he was only twenty-three, Marissa told a Texas court that Nikolas had always wanted three children. Nikolas's desire for children was allegedly so strong that he had already picked out their names.[129] At the time of his death, it did not appear that Nikolas was involved in a relationship. However, Marissa did not let that fact ruin her plans. Instead, she went to court to get permission to have Nikolas's sperm extracted and released to her, and the court granted her request.[130]

When the situation does not involve a wife or parent, however, physicians have to be cautious. Requests by girlfriends may be problematic for several reasons. First, there may be situations where the man has an active dating life. It would be difficult for the physician to decide to whom to release the sperm, and it is likely

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[124] *See* Plaintiff's Memorandum of Law in Support of Her Emergency Motion for a Temporary Restraining Order at 1, Dhanoolal v. U.S. Dep't of the Army, No. 4:08-CV-42(CDL) (M.D. Ga. Apr. 4, 2008).

[125] *See id.* (noting that Dayne and Kynesha had spoken of having children on numerous occasions).

[126] *Id.* at 2; *see also* Kimberly E. Naguit, Note, *The Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children*, 74 MO. L. REV. 889, 889 (2009).

[127] *See* Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 559 (2001) (observing that the default disposition is to the decedent's parents if he or she dies without a spouse or children).

[128] *See Judge Oks Collection of Dead Man's Sperm*, CBS NEWS, April 8, 2009, http://www.cbsnews.com/stories/2009/04/08/national/main4928335.shtml?tag=mncol;lst;1.

[129] *Id.*

[130] *See id.*

unwise to release it on a first-come, first-served basis. Moreover, neither physicians nor courts want the task of determining with which woman the man would want to conceive his child, and it would be against public policy to release the sperm to multiple women. Second, it may be difficult to verify the existence of a relationship where the couple was not legally married. The decision to release the sperm typically has to be made quickly, so there may not be time to determine the veracity of the woman's claim. Third, people usually assume that a man wants to procreate with his wife. The law presumes that a man is the father of children born to his wife during their marriage.[131] No such presumption exists in non-marital situations.

The story of Johnny Quintana and Gisela Marrero illustrates some of the challenges inherent in non-relative requests for post-mortem sperm. New Yorker Johnny Quintana had a heart attack while watching videos on his computer.[132] Johnny was rushed to the hospital where he was pronounced dead. He was only thirty-one years old and appeared to be healthy.[133] At that time, Johnny was the father of a two-year old boy, whose mother, Gisela Marrero, had been Johnny's girlfriend for thirteen years.[134] Gisela asked the hospital to remove and preserve Johnny's sperm, claiming that she and Johnny had discussed having a second child.[135] Johnny's mother and other family members supported the request.[136] Because the couple was not married, however, the hospital would not act without a court order.[137] The family was informed that Johnny's sperm would only be viable for about thirty-six hours.[138] Racing against the clock, Gisela and Johnny's family sought an emergency hearing before a judge. When the judge finally issued an order granting Gisela permission to have Johnny's sperm extracted, there were only four hours left.[139] Sperm bank operators ultimately harvested Johnny's sperm.[140] Doctors later

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[131] *See* Mary Louise Fellows, *A Feminist Interpretation of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195, 195–96 (1998) ("Very early on, the common law established the presumption that a child born to the wife of a married man was his child unless evidence could be shown that he had no access to his wife.").

[132] *See* Dorian Block, *Dead Man Johnny Quintana's Sperm Can't Impregnate Girlfriend*, N.Y. DAILY NEWS, Apr. 30, 2009, http://www.nydailynews.com/ny_local/bronx/2009/05/01/2009-05-01_dead_man_cant_sire_sibling_for_son.html.

[133] *See NY Woman Planning to Have Dead Lover's Child*, CBS NEWS, Apr. 19, 2009, http://www.cbsnews.com/stories/2009/04/19/ap/strange/main4955256.shtml.

[134] Block, *supra* note 132.

[135] *See id.*

[136] *See id.*

[137] *See NY Woman Planning*, *supra* note 133.

[138] *See* Block, *supra* note 132.

[139] *Id.*

[140] *See id.*

concluded, however, that the sample of sperm was not adequate to be used for artificial insemination.[141] Thus, even after so much effort, Gisela was unable to have Johnny's child.[142]

III. LAUGHING HEIRS[143]

Living beings do not have heirs; a man's heirs are determined at his death. This leads to the question: How should the law categorize children that are conceived *after* the man's death? Laughing heirs are relatives who are so far removed from the deceased that they do not feel the pain of the loss. Typically, laughing heirs are distant relatives who do not have a close connection to the decedent.[144] As a result of posthumous reproduction, a laughing heir may actually be the biological child of the dead person. When a man dies intestate, his children are the first ones in line to inherit his estate.[145] Thus, the existence of posthumously conceived children will clearly impact the distribution of the estate. As a consequence of the use of posthumous reproduction, courts may have a difficult time identifying the man's heirs. Further, the possibility that a man may have children years after his death denies the probate court the opportunity to finalize the man's estate.

A. Legislative Mandates

Only eleven states have attempted to address the inheritance rights of posthumously conceived children.[146] Six of these states have

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[141] *Id.*

[142] *Id.*

[143] For a detailed discussion of the inheritance rights of posthumously conceived children, see Lewis, *Afterdeath Children*, *supra* note 68.

[144] JESSE DUKEMINIER, STANLEY M. JOHANSON, JAMES M. LINDGREN & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 81 (7th ed. 2005)

[145] Joseph H. Karlin, Comment, *"Daddy, Can You Spare A Dime?": Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMPLE L. REV. 1317, 1338 (2006) (noting that all states include children as heirs under their intestate statutes).

[146] CAL. PROB. CODE § 249.5 (West Supp. 2010) (considering a child who is in utero within two years of the decedent's death to be an heir for purposes of property distribution); DEL. CODE ANN. tit. 13, § 8-707 (2007) (requiring written consent for posthumous reproduction in order for the child to be considered an heir); FLA. STAT. ANN. § 742.17(4) (West 2007) (providing that children conceived posthumously may only inherit if specifically provided for in the decedent's will); LA. REV. STAT. ANN. § 9:391.1 (2007) (allowing children conceived posthumously to inherit for up to three years after the decedent's death so long as the decedent provided written consent to the posthumous conception); N.D. CENT. CODE § 14-20-65 (2008) (stating that the provider of genetic material is only the parent of a posthumously conceived child if there is a record of consent having been granted prior to death); OHIO REV. CODE ANN. § 2105.14 (West 2006) (barring inheritance by posthumously conceived children); TEX. FAM. CODE ANN. § 160.707 (Vernon 2008) (requiring consent from the decedent spouse before a posthumously conceived child may be recognized as an heir); UTAH CODE ANN. § 78B-15-707 (2008) (same); VA. CODE ANN. § 20-158B (2008) (recognizing parentage in a deceased spouse

adopted the approach taken by the Uniform Parentage Act.[147] The other five states have set forth independent solutions to the problem.[148] For instance, an Ohio statute specifically denies the posthumously conceived child the opportunity to inherit from his or her father.[149] In contrast, the statutes enacted in eight of the eleven states set conditions for inheritance by posthumously conceived children. In those states, the posthumously conceived child cannot inherit unless the following conditions are satisfied: (1) prior to his death, the deceased man agreed to have children conceived using his genetic material; (2) the person advocating for the child's right to inherit has written evidence of the deceased man's agreement; (3) the child was conceived or born within a certain period of time after the man's death; and (4) the woman who sought to become pregnant using the dead man's genetic material was married to him before he died.[150] Some, such as Louisiana, also grant the decedent's existing heirs standing to challenge the inheritance rights of the posthumously conceived child.[151]

B. Judicial Resolutions

The lack of effective legislative action has forced courts to determine the inheritance rights of posthumously conceived children on a piecemeal basis.[152] In order to determine whether these children should be named as legal heirs of their fathers, courts must balance the interests of the state, the posthumously created child, the man's existing heirs, and the man's stated or presumed preference.[153]

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only if notice of death could not feasibly have been communicated prior to the implantation or if the spouse consented in writing to become a parent prior to implantation); WASH REV. CODE § 26.26.730 (West 2008) (permitting inheritance by posthumously conceived children where the decedent provided written consent to use of his or her genetic material after death); WYO. STAT. ANN. § 14-2-907 (2008) (same).

[147] UNIF. PARENTAGE ACT § 707 (2000). ("If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child."). Those states are Delaware, North Dakota, Texas, Utah, Washington, and Wyoming.

[148] Those states are California, Florida, Louisiana, Ohio, and Virginia.

[149] OHIO REV. CODE ANN. § 2105.14 ("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.").

[150] Lewis, *Afterdeath Children*, *supra* note 68, at 427.

[151] LA. CIV. CODE ANN. art. 190 (West 2007) (creating a cause of action for adversely affected heirs to seek a disavowal of paternity).

[152] *See, e.g.*, Finley v. Astrue, 270 S.W. 3d 849 (Ark. 2008); *In re* Martin B., 841 N.Y.S.2d 207 (2007).

[153] *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 260 (Mass. 2002).

Weighing heavily in this equation is the fact that the probate process can be time-consuming and expensive.[154] In order to preserve limited resources, states prefer that estates are promptly finalized. This need for finality often weighs against leaving the estate open to give the posthumously conceived child the opportunity to be conceived and born.[155] However, most cases involved children that have already been born. In the interest of fairness, these children should be given the same opportunity to inherit as other classes of children.[156] On the other hand, in reaching its decision, courts must also consider the rights of the man's existing heirs, who should not have to wait indefinitely to receive their inheritance.[157] Their interests should also be considered because their inheritance will inevitably be reduced by the creation of additional heirs.[158]

The debate about the merits of posthumous reproduction is ongoing. Regardless of the manner of their births, those children exist.[159] With the advent of posthumous conception, courts will increasingly have to grapple with the difficult balancing act necessary to adjudicate inheritance rights.

CONCLUSION

Lawyers and doctors often look at the same facts through different lenses. Physicians seek to push the boundaries of science; attorneys try to define those boundaries. Scientists are constantly researching methods to enable infertile individuals and people in non-traditional relationships to become parents. As a consequence of advances in reproductive technology, sexual intercourse between a man and a woman is no longer the only way to conceive children. Procedures like artificial insemination and in vitro fertilization make it possible for many people to have children when they otherwise would not be

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[154] Dennis M. Horn & Susan N. Gary, *Death Without Probate: TOD Deeds—The Latest Tool in the Toolbox*, PROB. & PROP., Mar.–Apr. 2010, *available at* http://www.abanet.org/rppt/publications/magazine/2010/ma/DeathWithoutProbate.pdf (outlining various reasons to avoid probate, including its expense and courts' large probate caseload and limited funding).

[155] *Cf.* Fazilat v. Feldstein, 848 A.2d 761, 766 (N.J. 2004) (recognizing, in the context of a claim against the decedent father's estate by the mother of a child born out of wedlock, that the state has an interest in the prompt settlement of estates).

[156] For a discussion of the inheritance rights of different classes of children, see BROWNE LEWIS, THE INHERITANCE RIGHTS OF CHILDREN IN THE UNITED STATES (2010).

[157] *See* Vegter, *supra* note 84, at 294 (addressing the need for timely estate administration).

[158] Morgan Kirkland Wood, Note, *It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873, 903–04 (2010) (arguing that lawmakers must strike a balance between the rights and interests of the decedent's other children with those of any children who are posthumously conceived).

[159] *See id.* at 882–89 (discussing cases involving posthumously conceived children).

able to, and the discovery of a process to freeze the gametes of dead people has led to the possibility of posthumous reproduction.

This Essay briefly explored three of the legal areas that have been impacted by posthumous reproduction—parentage, procreative freedom, and probate. As a result of reproductive technologies, the courts have to deal with custody disputes that may involve as many as five or six adults vying to be recognized as legal parents.[160] The process of artificial insemination may result in two men seeking to be named the child's legal father—the inseminated woman's husband and the sperm donor. Further, custody disputes are no longer limited to paternity adjudications. Because reproductive technology now makes gestational surrogacy possible, the courts are faced with the task of deciding which woman—the contracting woman or the surrogate—to designate as the child's legal mother.

The availability and use of reproductive technology that makes posthumous reproduction possible forces courts to designate legal parents for the children conceived. Further, courts must also decide whether dead people have reproductive rights and determine the steps that are necessary to protect those rights. Doctors need guidance when deciding if they should extract sperm from dead men and turn it over to a requesting party. Once posthumously conceived children are born, legislatures and courts must ensure that they are financially supported. That financial support may take the form of lifetime support, inheritance or government survival benefits.

The fact that most people are now able to become parents is a testament to hardworking scientists and medical professionals. Nonetheless, these advances have created more work for legal professionals, as legislatures and courts have been slow to respond to the consequences wrought by the existence and use of reproductive technology. Scientists will continue to push the envelope when it comes to reproductive technology. Legislatures and courts have to act diligently to regulate that technology. The ability to create life from the dead is a medical miracle that has legal consequences.

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[160] *See In re* C.K.G., 173 S.W.3d 714, 721 (Tenn. 2005) ("We now live in an era where a child may have as many as five different 'parents.' These include a sperm donor, an egg donor, a surrogate or gestational host, and two nonbiologically related individuals who intend to raise the child." (quoting John Lawrence Hill, *What Does It Mean To Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991))), *cited in* Lewis, *Two Fathers*, *supra* note 56, at 951.