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# **Assisted Reproductive Technology Law: Methods, Parental Status, Standards of Care, Contracts/Documents**

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THURSDAY, JULY 18, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

Colleen M. Quinn, Partner, Adoption & Surrogacy Law Center at Locke & Quinn,  
Richmond, Va.

Ellen E. Trachman, Partner, Trachman Law Center, Denver

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# Tort Liability for Lost or Destroyed Embryos

**F**ertility clinics and cryo-banks are storing increasing numbers of frozen embryos, and the incidence of lost or accidentally destroyed embryos is growing as well. Several theories of liability—including tort theories—have evolved to compensate families for these losses.

## One Family's Case

Nancy and Bill created embryos from their own eggs and sperm. They used the embryos to successfully conceive a child and continued to pay for storage for their remaining embryos. A few years later, after initiating the expensive medications to prepare Nancy for the transfer of the remaining two embryos, the clinic advised them that the embryos could not be found.

Bill and Nancy's agreement with their clinic contained a limitation of damages provision entitling them to liquidated damages of \$400 per embryo, as well as the \$300 annual fee for the year in which the embryos were lost or destroyed. However, the actual out-of-pocket costs included \$15,000 for the egg retrieval from Nancy and subsequent creation of the embryos, eight years of storage at several facilities for \$300 per year for a total of \$2,400, and another \$10,000 for the medical procedures and medications required to prepare Nancy for the transfer of the remaining embryos. In addition, Bill and Nancy suffered emotional damages resulting from their loss of irreplaceable property—or some would argue prospective life—especially since Nancy was now older and not capable of producing more quality eggs.

## Theories of Liability for Recovery

Assuming a limitation of damages clause can be defeated, plaintiffs have prevailed on various theories of tort and other types of liability. These have included:

- medical malpractice,
- negligent infliction of emotional distress,

- intentional infliction of emotional distress,
- wrongful death,
- negligence—physical injury,
- fraud,
- breach of fiduciary duty,
- violation of 42 U.S.C. § 1983,
- loss of property,
- property-based detinue,
- breach of contract, and
- bailment.

The cases discussed below illustrate the conflicting policy implications at issue and how courts have interpreted some of these claims.

## *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989)

In this Virginia case, the plaintiffs sought the release and transfer of their pre-zygote from the Jones Institute in Virginia to the Hospital of the Good Samaritan in California. The Jones Institute refused to consent to the interinstitutional transfer.

The court found that the parties' storage agreement created a bailor-bailee relationship. The bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. In other words, the clinic had an obligation to return the pre-zygotes to the patient family. The court's determination that a bailment existed was important because, if property is in the possession of a bailee, an action in detinue accrues upon demand and refusal to return the property or upon a violation of the bailment contract by an act of conversion. A detinue action allows for the recovery of damages, as well as recovery of the property.

Because the Jones Institute was part of the Medical College of Hampton Roads, an arm of the Commonwealth of Virginia, the plaintiffs also alleged a violation of their civil rights pursuant to 42 U.S.C. § 1983. The court deemed this action not precluded by sovereign immunity because of the Medical College's semi-autonomous status under Virginia statutes.

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A prolific author and speaker and the recipient of numerous awards and honors, she specializes in adoption and surrogacy law, estate planning, personal injury cases, and employment law. She is a member of the Assisted Reproductive Technologies (ART) Committee of the ABA Section of Family Law.

**Miller v. Am. Infertility Group of Ill., 897 N.E.2d 837, 840–46 (Ill. App. Ct. 2008)**

An Illinois intermediate appellate court reversed a trial court's decision allowing a wrongful death claim following a clinic's destruction of frozen embryos. The appellate court instructed the lower court that the statute does not allow a cause of action "for loss of an embryo created by in vitro fertilization that has not been implanted into the mother." The trial court judge had found that the state's Wrongful Death Act, amended in 1980, included "the state of gestation or development of a human being." The word "development" was key, according to the trial court judge, in that it indicated that the legislature intended to protect nongestational development outside the womb.

**Berger v. Repro Lab, Inc., No. 07-102987, 2007 WL 997735 (N.Y. Sup. Ct. Apr. 13, 2007)**

A lesbian couple sued for \$3 million the cryo-bank that stored their embryos, alleging that the facility lost the embryos. In their lawsuit, the couple claimed that the "careless, unskillful, negligent" loss of their "irreplaceable property" had caused them "pain, injury, mental anguish and emotional distress," as well as "loss of chance." The suit called Repro Lab "negligent in the hiring and supervision of medical personnel who were careless" and "unskillful."

**Frisina v. Women and Infants Hosp. of R.I., Nos. 95-4037, 95-4469, 95-5827, WL 1288784 (R.I. Super. Ct. May 30, 2002)**

The plaintiffs advanced three theories of recovery, all essentially claiming negligent infliction of emotional distress, contending that they "suffered severe trauma and emotional anguish, pain and suffering" and loss of irreplaceable property.

In Rhode Island, the elements of negligent infliction of emotional distress require a party to be (1) a close relative of the victim, (2) present at the scene of the accident, and (3) suffering serious emotional injury that is accompanied by physical symptomatology. The Rhode Island Supreme Court had yet to bestow any legal status on pre-embryos; therefore a nonviable fetus could not be a "person" within the meaning of the wrongful death statute and could not be considered a victim. Further, the plaintiffs did not witness the destruction of the embryos. The court dismissed the negligent infliction of emotional distress claim but did find, however, that recovery for damages for emotional distress based on the "loss of irreplaceable property" was permissible.

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Through creative lawyering, families are pursuing a wide range of claims in both tort and contract theories to address damages they have sustained due to clinic error. New theories of liability are emerging, and the most consistent trend is that courts are willing to consider a variety of potential claims. To enable our clients to be compensated for the devastating loss of embryos entrusted to fertility clinics or cryo-banks for safekeeping, we must be creative and persistent, thoroughly researching and advancing all reasonable theories of law that might apply. **FA**

  

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PA-003-16-001

# S SAVANNAH LAW REVIEW

## *THE WALKING DEAD: REPRODUCTIVE RIGHTS FOR THE DEAD*

*Ellen Trachman & William E. Trachman\**

### Introduction

Widespread zombie epidemics can quickly and permanently change the conventional wisdom surrounding what it really means to be *alive*. The same is true for the scientific advancements of assisted reproductive technology (also known as ART).<sup>1</sup> ART has forced courts, legislatures, and attorneys to struggle with a new frontier of the law, often in ways that can be confusing and unpredictable. Today, not only can the dead reproduce by having their genetic material preserved before death, but in some cases, genetic material may be harvested from the dead in order to make posthumous conception and procreation possible.

Naturally, the legal consequences of posthumous conception are far-reaching, and affect not just the right to procreate or not to procreate, but also the legal parentage relationship and rights between a posthumously conceived child and the deceased parent. Whether to apply existing law to new situations involving procreation and parentage, or to tread a new path entirely, is a choice that both legislatures and the judiciary have and will continue to confront. To date, some courts and legislative bodies have sought to keep up with the far-reaching legal implications of this paradigm shift. Others, seemingly aware of the impossibility of anticipating the difficulties of an entirely new legal regime, have done little to grapple with these issues. Ultimately, we conclude that the best course in confronting these complicated challenges is to address them head-on, keeping in mind two key elements. First, individuals should be free to enter valid

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<sup>1</sup> Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIMONIAL L. 289, 289 (2015) (describing ART as including all conception “methods that bring children into the family household without sexual intimacy between spouses or nonmarital partners”).

contracts, even if those contracts will not be performed until after death. And second, case law from the U.S. Supreme Court has established that (a) individuals possess constitutional rights to procreation<sup>2</sup> (including, in some cases, the right *not* to procreate),<sup>3</sup> and (b) laws based solely on moral disapproval generally are unconstitutional.<sup>4</sup>

In Part I of this piece, we offer an overview of how ART has changed the rules of the game when it comes to human procreation, particularly in the case of sperm and eggs used for reproduction after the death of the gamete provider. In Part II, we look at judicial and legislative treatment of posthumous gamete use. In Part III, we explore an analogy between post-mortem gamete retrieval and organ donation. In Part IV, we turn to the complicated case of embryos by looking at the current legal status of embryos, how disputes are resolved between competing interests, and the usage of embryos post-death. In Part V, we examine how federal benefits and state probate laws have attempted to grapple with the new reality of children born after a parent's death and how assets and benefits that would normally flow from the deceased parent to his or her children are handled with the increasing situational complexities of families built through ART. In Part VI, we offer a few final thoughts and conclusions on the topic, with an emphasis on the need for explicit consent by the gamete provider as well as a push for practical and proactive solutions.

## I. Science Fiction Has Become Reality

ART has changed the rules of who can become a parent, and when. In 2008, for instance, a woman in India set a new age record—seventy years old—for successfully carrying a pregnancy to birth.<sup>5</sup> Similarly, as many as eight children have—somewhat infamously—been born at once to one woman.<sup>6</sup> And although

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<sup>2</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>3</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347, 349 (1999) (“[W]hen one makes a request while alive to have one’s gametes used (or not used) for procreative purposes after death, or to have gestation continue (or not continue) after death, it is appropriate to speak of procreative freedom.”); *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 316 (Cal. Ct. App. 2008) (“Joseph, as the person who provided the gametic material, had at his death an interest, in the nature of ownership, to the extent he had decisionmaking authority as to the use of the gametic material for reproduction.”).

<sup>4</sup> *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”).

<sup>5</sup> Rahul Bedi & Kate Devlin, *Indian Woman Has First Child at Age of 70*, TELEGRAPH (Dec. 8, 2008, 4:51 PM), <http://www.telegraph.co.uk/news/worldnews/asia/india/3684395/Indian-woman-has-first-child-at-age-of-70.html>.

<sup>6</sup> *Most Children Delivered at a Single Birth to Survive*, GUINNESS WORLD RECS., <http://www.guinnessworldrecords.com/world-records/most-children-delivered-at-a-single-birth-to-survive/> (last visited May 31, 2016) (“She is known as Octomom in the

age is certainly a factor in the ability to deliver children, it is now almost commonplace for contracting parties to enter into gestational carrier or surrogacy arrangements for a woman to carry a child genetically unrelated to her for another individual or couple to parent.<sup>7</sup> Still on the horizon, scientists predict that soon two men or two women will be able to have a child biologically related to both of them.<sup>8</sup>

Perhaps even more surprising than these developments, the advent of the ability to cryopreserve eggs, sperm, and embryos means that the time between the death of a parent and the conception and birth of a child essentially is limited only by the viability of the genetic material over time while cryopreserved; and, in theory, that time could extend into millennia.<sup>9</sup> Understandably, the most recent scientific developments often give rise to both ethical and legal implications for both doctors and lawyers.

The simple, historical scenario in which a child is conceived during the life of the father and the father dies while the child is *in utero* is uncommon but hardly unique. And legal systems throughout the world long have taken into account the approximate forty-week lag between conception and birth concerning parentage and inheritance rights pertaining to the father of a child.<sup>10</sup> But now, thanks to ART, the possible scenarios concerning the death of a parent, conception, birth, and lag time have become both more common and more complicated.

In 2012, a U.S. fertility firm, ReproTech Limited, announced that it had shattered the previous world record for the longest time between the initial cryopreservation of sperm and a live birth resulting from use of that sperm, by

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media, [and] is an American woman who came to international attention when she gave birth to octuplets in January 2009.”).

<sup>7</sup> MAGDALINA GUGUCHEVA, COUNCIL FOR RESPONSIBLE GENETICS, SURROGACY IN AMERICA 27 (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf> (“[W]hat little information is available clearly indicates that an increasing number of surrogates are hired each year. Furthermore, the majority of these women are concentrated in jurisdictions that have failed to implement any legal rules safeguarding surrogate workers’ medical and legal rights.”).

<sup>8</sup> Guy Ringer, *Get Ready for Embryos from Two Men or Two Women*, TIME (Mar. 18, 2015), <http://time.com/3748019/same-sex-couples-biological-children/> (“Stem cell research has demonstrated that human skin cells and fibroblasts (a different kind of adult cell) can be turned into embryonic stem cells. Now, researchers at Cambridge University and the Weizmann Institute of Science in Israel have shown that embryonic stem cells can be programmed to form primordial germ cells. These are the stem cells that can go on to form either eggs or sperm.”).

<sup>9</sup> Andras Z. Szell et al., *Live Births from Frozen Human Semen Stored for 40 Years*, 30 J. ASSISTED REPROD. GENETICS 743, 743–44 (2013) (“Low temperature storage in liquid nitrogen is thought to maintain the viability of cells almost indefinitely because reactions that require molecular motion and/or activation do not occur at -196° C. . . . Live births have been reported from in vitro fertilization with semen stored for 21 years and from IUI with semen stored for 28 years. . . . Here we report the birth of twins from in vitro fertilization using semen stored for approximately 40 years.”).

<sup>10</sup> See, e.g., Cindy L. Steeb, Note, *A Child Conceived After His Father’s Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 141 (2000).

facilitating the birth of a baby forty years after the sperm had been cryopreserved.<sup>11</sup> This was a significant jump from the previous twenty-eight-year record.<sup>12</sup> The new case involved the sperm of a Japanese-American man who felt compelled to continue his bloodline and saw no other avenue for such continuation other than cryopreservation and donation.<sup>13</sup> He preserved his sperm samples in 1971, and sought to donate those samples for decades before finding a match.<sup>14</sup> The ultimate recipients were a couple in California looking for a sperm donor.<sup>15</sup> Twin girls were born to the couple in August 2012.<sup>16</sup>

In this case, the sperm donor was still alive at the time of the resultant child's birth, and there was no uncertainty as to the donor's consent.<sup>17</sup> But another level of complexity arises when the donor is no longer living and his intent may be difficult to discern. An example of post-death conception in the U.S. is that of baby Benton Smith.<sup>18</sup> His parents were trying to conceive before his father, Second Lieutenant Brian Smith, knew he would be deployed to Afghanistan.<sup>19</sup> In order to allow his wife to continue to try to conceive while he was gone, he cryopreserved sperm samples.<sup>20</sup> After his wife received the news that her husband had been killed, she decided to go ahead with attempts to conceive and was successful.<sup>21</sup>

Companies that specialize in sperm cryopreservation often cater to military families. For example, Fairfax Cryobank, one of the largest institutions in the world specializing in sperm cryopreservation, offers the first year of frozen sperm storage for free to active duty military members.<sup>22</sup> Fairfax Cryobank lists a number of reasons on its website why sperm storage makes sense, including fertility preservation before cancer treatment, prior to a vasectomy, and for male-to-female transgender patients.<sup>23</sup> Patient intent for post-death use is not a listed reason; however, the website quotes a People Magazine article stating:

Iraq war widows Maria Sutherland and Kathleen Carol-Smith have beautiful healthy babies—despite the fact that both fathers at the time

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<sup>11</sup> Christopher Snowbeck, *41 Years Ago, a Sperm Donation. Today, Twins*, TWINCITIES.COM (Aug. 31, 2012, 7:07:10 PM), [http://www.twincities.com/ci\\_21446706/40-years-after-sperm-donation-baby](http://www.twincities.com/ci_21446706/40-years-after-sperm-donation-baby) (“Michelsen would not reveal the man's age but said he was ‘at least 25’ when he banked his sperm.”).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Gregg Zoroya, *Science Makes Fallen Soldier a Father*, USA TODAY (Feb. 12, 2007, 12:40 AM), [http://usatoday30.usatoday.com/news/nation/2007-02-11-soldier-child-cover\\_x.htm](http://usatoday30.usatoday.com/news/nation/2007-02-11-soldier-child-cover_x.htm).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Sperm Storage*, FAIRFAX CRYOBANK, <https://www.fairfaxcryobank.com/us/sperm-storage> (last visited May 31, 2016).

<sup>23</sup> *Id.*

of conception had already died. Kathleen used Fairfax Cryobank to store her husband's sperm before he was deployed. Fairfax Cryobank director, William Jaeger is quoted as saying "Technology has given couples options. You can have a child after your spouse passes away."<sup>24</sup>

But things get even more complex when not only is the potential donor deceased, but the potential donor also has not preserved his or her gametes.<sup>25</sup> In 2002, Keivan Cohen, a twenty-year-old, unmarried Israeli soldier, was shot and killed by a Palestinian gunman while on duty in the Gaza Strip.<sup>26</sup> Cohen's mother, Rachel Cohen, immediately requested that Keivan's sperm be extracted and cryopreserved.<sup>27</sup> Keivan had never left any express written consent or instructions to use his sperm upon his death, but Rachel insisted that during his lifetime, Keivan had been clear that he had wished to father a child.<sup>28</sup> The hospital extracted the sperm without objection, but refused Rachel's request to release the samples for use with an unrelated woman.<sup>29</sup> The hospital argued that Israeli law permitted only the wife of a deceased man to use his sperm.<sup>30</sup>

Finally, in January 2007, Rachel, with the help of prominent Israeli attorney Irit Rosenblum, won a ruling that recognized a parent's right over a dead child's sperm that permits the sperm to be used to impregnate a woman unknown to the sperm donor during his lifetime.<sup>31</sup> Notably, the court did not just determine that the sperm could be donated and used like that of an anonymous donor, but also ordered the Ministry of Interior to register any child born from use of the sperm as the children of the deceased donor.<sup>32</sup> Rosenblum extolled the significance of this ruling as permitting the continuation of bloodlines after death.<sup>33</sup>

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<sup>24</sup> *Id.* (quoting Linda Kramer, *He Looks Just Like Dad*, PEOPLE MAG., Sept. 10, 2007, at 111, 111-12).

<sup>25</sup> For an interesting discussion of public policy arguments for and against post-mortem sperm retrieval, see Part IV of Devon D. Williams's article, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 194-200 (2011).

<sup>26</sup> Associated Press, *Israeli Court Lets Family Have Dead Soldier's Sperm*, N.Y. SUN (Jan. 30, 2007), <http://www.nysun.com/foreign/israeli-court-lets-family-have-dead-soldiers-sperm/47675/>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* ("When the family tried to gain access to the sperm, however, the hospital refused, on the ground that only a spouse could make such a request.").

<sup>31</sup> *Id.*

<sup>32</sup> Paul Goldman, *IDF Soldier's Dream to Come True, After Death*, NBC NEWS (Jan. 18, 2007, 10:15 AM), [http://worldblog.nbcnews.com/\\_news/2007/01/18/4376591-idf-soldiers-dream-to-come-true-after-death](http://worldblog.nbcnews.com/_news/2007/01/18/4376591-idf-soldiers-dream-to-come-true-after-death) ("The process of finding a mother for [Keivan] Cohen's child took more than two years. Two hundred women were interviewed, medical tests were conducted, meetings with psychologists took place and finally one was chosen.").

<sup>33</sup> Katy Sinclair, *Israeli Court Allows Use of Dead Soldier's Sperm*, BIONEW (Jan. 29, 2007), [http://www.bionews.org.uk/page\\_12974.asp](http://www.bionews.org.uk/page_12974.asp) ("Irit Rosenblum[] said that the court ruling meant that family lines could now be continued without the written consent of the male prior to death. Of the Cohen family she commented, 'It's a dream come true, on the one hand [the Cohens] lost a child, on the other hand they got some hope.'").

To avoid some of the difficulties inherent in situations where an unmarried individual without express instructions on the disposition of his or her gametes passes away suddenly, Rosenblum introduced the concepts of the “Biological Will” and the “Biological Will Bank” in 2012.<sup>34</sup> The essence of the Biological Will and the Biological Will Bank is that individuals can choose to store their gametes for donation and use for reproduction after their death.<sup>35</sup> Practitioners of ART law frequently see their clients turn to anonymous donors in order to conceive, so to the extent deceased individuals or their next of kin hope to continue their bloodlines, the Biological Will generally results in a win-win for both donors and recipients of genetic material.<sup>36</sup> “Single mothers gain paternal families for their children. Children get paternal families and a known genetic record, and families continue the legacy of lost loved ones.”<sup>37</sup>

Another complex scenario was that of Diane Blood, a 1997 United Kingdom case dealing not only with issues of consent, but also with varying fertility law in nearby countries.<sup>38</sup> A few months after Blood and her husband, Stephen, started attempting to conceive, Stephen contracted meningitis and died quickly and unexpectedly.<sup>39</sup> Diane requested that sperm samples be drawn from her husband and the hospital complied.<sup>40</sup> However, when attempting to use the samples for reproductive purposes, she was blocked by United Kingdom law under the Human Fertilisation and Embryology Act, which forbids use of a man’s sperm without his written consent.<sup>41</sup> Upon appeal, Her Majesty’s High Court of Justice in England (the High Court) confirmed the Human Fertilisation and Embryology Authority’s insistence that extraction and storage of sperm without written consent is unlawful.<sup>42</sup> Despite this conclusion, however, the Human Fertilisation and Embryology Authority ultimately ruled that Diane could seek insemination elsewhere in the European Union.<sup>43</sup> The sperm was shipped to Brussels, Belgium, where Diane was inseminated and gave birth to two sons, one in 1998, and one in 2002.<sup>44</sup> Further, in 2003, she won the legal right to have Stephen recognized as the father of her sons in the United Kingdom.<sup>45</sup> A report

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<sup>34</sup> *Irit Rosenblum’s Precedent Setting Case: First Birth Using Biological Will*, BIOLOGICAL WILL, <http://biologicalwill.com/irit-rosenblums-precedent-setting-case-first-birth-using-biological-will/> (last visited May 31, 2016); *Irit Rosenblum*, NEW FAMILY, <http://www.newfamily.org.il/en/irit-rosenblum/> (last visited May 31, 2016).

<sup>35</sup> *The Biological Will*, BIOLOGICAL WILL, <http://biologicalwill.com/intro/> (last visited May 31, 2016).

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *1997: Widow Allowed Dead Husband’s Baby*, BBC NEWS, [http://news.bbc.co.uk/onthisday/hi/dates/stories/february/6/newsid\\_2536000/2536119.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/february/6/newsid_2536000/2536119.stm) [hereinafter *Widow Allowed Dead Husband’s Baby*] (last visited May 31, 2016).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Letter from Suzanne McCarthy, Chief Exec., Human Fertilisation & Embryology Authority (Feb. 11, 1997), <http://www.hfea.gov.uk/3247.html>.

<sup>42</sup> *Widow Allowed Dead Husband’s Baby*, *supra* note 38.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

following the Diane Blood case noted that “the importance of the rule requiring consent cannot be underestimated and . . . no exceptions should be made beyond the current ones which take account of situations of necessity or which authorise medical intervention where this is in the ‘best interests’ of the person unable to consent at the time.”<sup>46</sup>

Given the pure biological and technological differences between sperm retrieval and egg retrieval, cases of requests for posthumous (or near-posthumous) egg retrieval have been less common, but are starting to emerge.<sup>47</sup> In 2011, an Israeli court considered the plea of parents of a seventeen-year-old girl, who was struck and killed crossing a street, to have her eggs harvested and cryopreserved.<sup>48</sup> The initial request asked that her ova be fertilized with donor sperm.<sup>49</sup> The court ultimately allowed the retrieval, but focused on the wishes of the deceased girl, asking that the parents prove that she wanted to have children.<sup>50</sup> Rosamond Rhodes, Director of Bioethics Education at Mount Sinai School of Medicine in New York, astutely has noted that the Israeli court asked the wrong question.<sup>51</sup> The burden should have been on the parents not to prove merely that their daughter would have wanted children—a fairly common

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<sup>46</sup> SHEILA A. M. MCLEAN, REVIEW OF THE COMMON LAW PROVISIONS RELATING TO THE REMOVAL OF GAMETES AND OF THE CONSENT PROVISIONS IN THE HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990, DEPARTMENT OF HEALTH i (1998); *see also* Sheila McLean, *Consent and the Law: Review of the Current Provisions in the Human Fertilisation and Embryology Act 1990 for the UK Health Ministers*, 3 HUMAN REPRODUCTION UPDATE 593, 615 (“Without an expressed consent, it would be necessary to fall back on either the necessity doctrine or the concepts of best interests, implied consent or substituted judgement, although such tests have never previously been applied to the dead.”).

<sup>47</sup> The technology involving egg extraction and cryopreservation has advanced by leaps and bounds in the last few years. Professor Ray D. Madoff described the 2008 understanding of egg preservation in her excellent book titled *Immortality and the Law: The Rising Power of the American Dead*. “Owing to the delicate cellular structure of eggs, it is very difficult to freeze them for later use. The preferred mode of preserving fertility for a woman is therefore to have eggs extracted and then to create embryos with a known or anonymous sperm donor for later implantation.” RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 42 (2010). Now, reliable vitrification techniques have made egg preservation success rates, while not quite on par, not far off from those with respect to the use of fresh eggs, and a popular fertility preservation technique. *See* Susan Scutti, *Frozen Eggs Versus Fresh Eggs? IVF with Cryopreserved Donor Eggs Resulted in Fewer Live Births*, MEDICAL DAILY (Aug. 11, 2015, 11:39 AM), <http://www.medicaldaily.com/frozen-eggs-versus-fresh-eggs-ivf-cryopreserved-donor-eggs-resulted-fewer-live-births-347158>; Lavanya Ramanathan, *Egg Freezing’s Popularity is Booming, but It’s a Choice that Offers No Guarantees*, WASH. POST (Nov. 20, 2014), [https://www.washingtonpost.com/lifestyle/style/egg-freezings-popularity-is-booming-but-its-a-choice-that-offers-no-guarantees/2014/11/20/6b28752c-6b5b-11e4-9fb4-a622dae742a2\\_story.html](https://www.washingtonpost.com/lifestyle/style/egg-freezings-popularity-is-booming-but-its-a-choice-that-offers-no-guarantees/2014/11/20/6b28752c-6b5b-11e4-9fb4-a622dae742a2_story.html).

<sup>48</sup> Mikaela Conley, *Israeli Court Allows Family to Harvest Dead Daughter’s Eggs*, ABC NEWS (Aug. 11, 2011), <http://abcnews.go.com/Health/israeli-family-permission-freeze-dead-daughters-eggs/story?id=14272156>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

desire—but also whether she would have wanted her biological children to be born *after her death*.<sup>52</sup>

A year earlier, a similar case emerged at Massachusetts General Hospital, in which the husband of an American woman, who had been placed on life support after a sudden pulmonary embolism, requested that his wife's eggs be harvested.<sup>53</sup> The medical team at the hospital, however, refused to perform the procedure.<sup>54</sup> Interestingly, the reason for the hospital's denial did not turn on a lack of consent by the patient (there was no evidence of consent to such a procedure), but on paternalistic concerns about the use of an unrelated surrogate for the gestation of any resulting children and the psychological well-being of a child resulting from the extraction.<sup>55</sup> The doctors also expressed concerns as to whether the patient had been planning for a family (and pointed to evidence that she had not been because she was on birth control) and concern for the patient's current children.<sup>56</sup> These objections seem troubling, however, given the problematic role doctors could play in determining who is entitled to become a parent based on an assessment of the perceived well-being of a posthumously conceived child.

Moreover, while seemingly addressing the issue of consent, the fact that a couple is not presently seeking to procreate is hardly an indicator that consent is lacking. Instead, the issue is whether consent was *ever* expressed. If specific written consent for posthumous conception is required from the patient, then that standard should be firmly established and understood. On the other hand, if a spouse can consent for the patient, then there should generally be little difference in the treatment between egg retrieval and sperm retrieval.

Finally, the physicians pointed to the fact that the retrieval process for the woman would be medically risky and lengthy, requiring an ovarian stimulation protocol ranging from seven to ten days.<sup>57</sup> But in the context of a terminal, comatose patient, the seven-to-ten-day process hardly seems significant, and the risk—argued to be of increased brain damage or death—was likely immaterial, given the patient's imminent and tragic death. One physician, Dr. Anna Smajdor, has argued that posthumous or perimortem (near death) retrieval of eggs or sperm must balance spouses' interests against the need to protect the patient from exploitation.<sup>58</sup> Requiring consent—whether it be written and explicit or else otherwise well-demonstrated—is one way to satisfy that balance.

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<sup>52</sup> *Id.*

<sup>53</sup> Anna Smajdor, *Should Doctors Harvest Eggs from a Comatose Woman?*, BIONEWs (Aug. 22, 2010), [http://www.bionews.org.uk/page\\_68837.asp](http://www.bionews.org.uk/page_68837.asp).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Brian McMichael, *Donating Eggs from an Anoxic Brain Injury Patient?*, PALLIMED (July 30, 2010), <http://www.pallimed.org/2010/07/donating-eggs-from-anoxic-brain-injury.html>.

<sup>58</sup> Smajdor, *supra* note 53.

## II. How Courts and Legislatures Treat Posthumous Reproduction

Around the world, posthumous conception continues to evoke controversy. In France, for instance, after the widow of a cancer patient received consent for sperm to be extracted from her husband and used for insemination, a policy was adopted and upheld by French courts forbidding postmortem insemination.<sup>59</sup> Similarly, Germany, Sweden, and Canada all have laws that prohibit posthumous conception.<sup>60</sup>

No jurisdiction in the United States, however, has enacted such a ban, and courts have generally ruled in favor of posthumous conception, at least when specific intent is present. In *Hecht v. Superior Court*,<sup>61</sup> for instance, a California Superior Court confronted one of the first cases in the United States involving a dispute over cryopreserved gametes that one litigant wished to be used for posthumous conception.<sup>62</sup> In *Hecht*, the deceased, William Kane, had given rights to his stored sperm to his girlfriend, Deborah Hecht, prior to his death, instructed the sperm bank to allow her to use his sperm, and left a will reiterating his wish that his cryopreserved sperm go to his girlfriend for procreation purposes.<sup>63</sup> Indeed, in a letter addressed to his living children, he fully explained that, despite his suicide, he hoped to procreate after death:

I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah [Hecht] will decide—as I hope she will—to have a child by me after my death. I’ve been assiduously generating frozen sperm samples for that eventuality. 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. If you are receiving this letter, it means that I am dead—whether by my own hand or that of another makes very little difference. I feel that my time has come; and I wanted to leave you with something more than a dead enigma that was your father. I am inordinately proud of who I have been—what I made of me. I’m so proud of that that I would rather take my own life now than be ground into a mediocre existence by my enemies—who, because of my mistakes and bravado have gained the power to finish me.<sup>64</sup>

Despite the clear intentions expressed in both legal and non-legal documents, Mr. Kane’s college-aged children from a prior marriage fought to have the samples destroyed; they even succeeded in convincing a trial court to issue such an order.<sup>65</sup> In response, Hecht sought to vacate the order by seeking

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<sup>59</sup> Evelyne Aziza-Shuster, *A Child at All Costs: Posthumous Reproduction and the Meaning of Parenthood* 9 HUM. REPROD. 2182, 2182–85 (1994).

<sup>60</sup> G. Bahadur, *Posthumous Assisted Reproduction (PAR): Cancer Patients, Potential Cases, Counseling and Consent*, 11 HUM. REPROD. 2573, 2575 (1996).

<sup>61</sup> 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 276.

<sup>64</sup> *Id.* at 277.

<sup>65</sup> *Id.* at 279–80.

an extraordinary writ.<sup>66</sup> The appellate court ultimately ruled in favor of Hecht, granting her rights to the sperm and honoring the explicit wishes of the deceased.<sup>67</sup>

*Hecht* represents the paradigmatic case where a court should allow access to genetic material to facilitate post-death conception: (1) the deceased had specifically made his intent to procreate clear in his will; (2) the deceased had bequeathed his genetic material to his girlfriend in the will; (3) the deceased had provided for future children by bequeathing significant assets to his girlfriend; and (4) both individuals intending to become parents, Kane and Hecht, were in agreement about the use of genetic material after death.<sup>68</sup>

By contrast, another California case involving a dispute over the use of cryopreserved sperm reached the opposite result, but for the right reasons. In the case *In re Estate of Kievernagel*,<sup>69</sup> the court denied a request by the deceased's wife for use of the deceased's cryopreserved sperm in light of indications that the deceased did not consent to such use.<sup>70</sup> The court relied heavily on the consent agreement signed by the deceased when his sperm was preserved:

The Agreement provided that the sperm sample was Joseph's sole and separate property and he retained all authority to control its disposition. The Agreement provided for two options for the disposition of the sperm sample upon death or incapacitation: donate the sperm to his wife or discard the sperm sample. The box indicating the sperm sample was to be discarded was checked and Joseph initialed it. The Agreement also provided the sperm sample was to be discarded upon divorce. Iris signed, acknowledging the sperm sample was Joseph's sole and separate property.<sup>71</sup>

In *Kievernagel*, the court was persuaded by the logic of the *Davis* decision (dealing with rights to embryos and discussed in detail Part IV), that the ability to overcome another party's objection to procreation is at its strongest when there is no other means to procreate.<sup>72</sup> But that was true, said the court in *Kievernagel*, only where the party seeking to use the genetic material in fact

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<sup>66</sup> *Id.* at 280.

<sup>67</sup> *Id.* at 283 (“We conclude that at the time of his death, decedent 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. Such interest is sufficient to constitute ‘property’ within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.”).

<sup>68</sup> After over six years of litigation with Kane's ex-wife and children, Hecht was not able to conceive using Kane's preserved sperm. *See* DEBRAN ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA* 457 n.223 (2004) (“In a recent interview, Deborah Hecht revealed that although she tried for several years to become pregnant after the release of William Kane's sperm, the procedure ultimately failed.”).

<sup>69</sup> 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008).

<sup>70</sup> *Id.* at 317–18.

<sup>71</sup> *Id.* at 312.

<sup>72</sup> *Id.* at 316.

contributed to that material.<sup>73</sup> In other words, an embryo with two individuals' genetic material is legally different from sperm, with only one donor.

Some states, such as Colorado, have enacted statutes that require the progenitor's consent to be present in order for parentage to be recognized if his or her gametes or embryos are used posthumously.<sup>74</sup>

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.<sup>75</sup>

Of course, this statute covers the limited scenario contemplated between a married couple where gamete retrieval has already taken place prior to death and only addresses the specific rights of parentage.

It is unsurprising that courts may struggle to answer questions regarding human genetic material, particularly when they attempt to use analogies to traditional property law that take account of a *bundle-of-sticks*.<sup>76</sup> And indeed, courts struggle most when deciding whether or not a deceased or near-deceased donor would consent to the retrieval of his or her gametes.

In a recent case, a British woman in her late-fifties, referred to as Mrs. M, petitioned for permission to use her deceased daughter's eggs to carry a child for her.<sup>77</sup> Mrs. M's daughter had died of cancer four years earlier, and had her eggs extracted prior to cancer treatment in hopes of having a child of her own if she recovered from the treatment.<sup>78</sup> Mrs. M argued that her daughter wished that a child be born from her eggs even after her death, but no clinic in England would agree to perform the procedure.<sup>79</sup> While a clinic in New York was lined up to

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<sup>73</sup> *Id.* at 317–18 (“In this case, there is only one gamete-provider. The material at issue is Joseph’s sperm, not a preembryo. Only Joseph had ‘an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction.’ The disposition of Joseph’s frozen sperm does not implicate Iris’s right to procreative autonomy. That would be so only if she could show that she could become pregnant only with Joseph’s sperm.” (quoting *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 850 (Cal. Ct. App. 1993))).

<sup>74</sup> COLO. REV. STAT. ANN. § 19-4-106(8) (West 2015).

<sup>75</sup> *Id.*

<sup>76</sup> *See Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 489 (Cal. 1990) (“[T]he law governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.”).

<sup>77</sup> Anthony Blackburn-Starza, *High Court Rules Against Mother Wanting to Use Her Deceased Daughter’s Eggs*, *BIO NEWS* (June 22, 2015), [http://www.bionews.org.uk/page\\_538618.asp](http://www.bionews.org.uk/page_538618.asp); Ruth Retassie, *British Woman in Legal Bid to Use Dead Daughter’s Eggs*, *BIO NEWS* (Mar. 2, 2015), [http://www.bionews.org.uk/page\\_500922.asp](http://www.bionews.org.uk/page_500922.asp).

<sup>78</sup> Retassie, *supra* note 77.

<sup>79</sup> *Id.*

assist,<sup>80</sup> United Kingdom's Human Fertilisation and Embryology Authority (HFEA) repeatedly denied Mrs. M's petitions to transport the eggs from England to New York, on the basis that her daughter signed a consent agreement only allowing her eggs to be stored after her death, but that did *not* expressly consent to the use of her eggs for reproductive purposes post-death.<sup>81</sup> In June 2015, the High Court affirmed the HFEA's decision not to permit the transport of Mrs. M's daughter's eggs out of England.<sup>82</sup>

While the situation of a spouse, significant other, or family member attempting to conceive with the genetic material of a recently departed loved one in order to fulfill the decedent's dream of a child is an understandably sympathetic situation, the law must be called upon to answer difficult questions dispassionately. But although the requests for gamete retrieval and posthumous use continue to emerge, no unifying system has yet formed in which legislatures and courts reliably determine when posthumous conception is appropriate or when posthumous use of gametes is appropriate.

### III. The Analogy to Organ Donation

Although it is agreed generally and universally that embryos have unique and special properties in their ability to form new life, it is not unusual to see scholarly comparisons to organ donation. In one piece, Janelle Thompson argues that organ and egg donations are comparable and should be permitted under similar regulatory frameworks that allow both to be compensated but provide oversight.<sup>83</sup> Her Note explores the development and regulation (or lack thereof in the case of egg donation) of the two systems.<sup>84</sup> Most notably, Congress has outlawed the ability to exchange human organs for compensation,<sup>85</sup> while the egg donation system in the United States is, with a few exceptions,<sup>86</sup> unregulated and permits a woman to donate her eggs for compensation.<sup>87</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> Blackburn-Starza, *supra* note 77 (noting that Mrs. M had failed to introduce evidence of "witnesses or informal discussions with doctors, leaving a note or seeking further information or counseling" that could have proven her daughter's intent).

<sup>82</sup> *See id.* ("[S]o many issues of importance were never discussed, and resolved, when there had been time for them all to be discussed with the mother and others, and resolved.")

<sup>83</sup> Janelle E. Thompson, Note, *The Eggsploration of the United States' Organ and Egg Donation Systems*, 48 VAL. U.L. REV. 469, 515-17 (2013).

<sup>84</sup> *Id.* at 507-12.

<sup>85</sup> *Id.*; 42 U.S.C. § 274(e) (2007).

<sup>86</sup> One exception is Louisiana, which has outlawed egg donation for compensation, by making "[t]he sale of human ovum, fertilized human ovum, or human embryo . . . expressly prohibited." LA. STAT. ANN. § 9:122 (2015).

<sup>87</sup> Susan L. Crockin & Amy B. Altman, *Statutory and Case Law Governing the Practice of Third-Party Reproduction*, in PRINCIPLES OF OOCYTE AND EMBRYO DONATION 351, 351-68 (Mark V. Sauer ed., 2d ed. 2013). Although moral concerns abound in the context of ART, the United States is notable for what remains unregulated. *See Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 282 (Cal. Ct. App. 1993) ("One commentator recently noted that although some sperm banks operate as commercial enterprises, they are virtually free from state licensing and other regulation."); Naomi Cahn, *Accidental*

But one place where the analogy can be particularly instructive involves post-death consent for retrieval of genetic material. An interesting facet of the current organ donation legal system is the requirement for consent and what constitutes appropriate consent. An individual can consent to the donation of his or her organs formally through a last will and testament, or by agreeing in writing to be an organ donor. Most of us experience this phenomenon when obtaining a driver's license or state-issued identification card, and the state's Department of Motor Vehicles asks individuals whether or not they would like to become organ donors.

Of course, the special nature of gametes and embryos—the potential for new life as opposed to organs donated to potentially save or improve existing lives—provides a significant distinction between posthumous gamete retrieval and organ donation. But perhaps even more significant is a disparity in knowledge and education as to options when it comes to posthumous use of eggs, sperm, and embryos. Almost every American has been faced with the explicit choice to indicate a preference when it comes to organ donation at least once in one's lifetime, if not more often. In Vitro Fertilization (IVF) clinics and reproductive endocrinologists are becoming more proactive on educating patients as to options with remaining cryopreserved gametes and embryos. More broadly, perhaps standard marriage licenses should start incorporating the provision:

*Should I die, I do hereby (or I decline to) authorize my spouse to retrieve my gametes for reproductive purposes. He or she may (check all that apply): use my gametes for his or her own reproductive purposes, for which I wish to be recognized as the parent of any resulting child; or use my gametes for donation to others, either anonymously or as so selected by my spouse.*

Such a change would be consistent with the Ethics Committee of the American Society for Reproductive Medicine's guidelines on posthumous gamete retrieval.<sup>88</sup> The guidelines provide that: "Posthumous gamete (sperm or oocyte) procurement and reproduction are ethically justifiable if written documentation from the deceased authorizing the procedure is available."<sup>89</sup> The Ethics Committee also states that "it would be not only wrong, but a wrong to an individual, a violation of that individual's autonomy, to contravene his or her wishes."<sup>90</sup>

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*Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 61 (2009) ("[I]n the United States, there are no legally enforceable limits on the number of offspring produced by assisted reproductive technologies, but with more than 40,000 children born from donor eggs and sperm last year, concerns about what is now called 'inadvertent consanguinity' [or accidental incest] are quite real.").

<sup>88</sup> ETHICS COMMITTEE, AM. SOC'Y FOR REPROD. MED., BIRMINGHAM, ALA., POSTHUMOUS COLLECTION AND USE OF REPRODUCTIVE TISSUE: A COMMITTEE OPINION, 99 FERTILITY & STERILITY 1842 (2013).

<sup>89</sup> *Id.* at 1842.

<sup>90</sup> *Id.*; see also NAT'L CONFERENCE OF COMM'RS OF UNIF. STATE LAWS, REVISED UNIFORM ANATOMICAL GIFT ACT (2006) 3 (2009). There is an implied contradiction, however, between these statements and the Ethics Committee's comment

But when it comes to organ donation, the donor is not the only eligible party to give consent. Next of kin of a deceased individual can give consent for that person to donate his or her organs.<sup>91</sup> And the 1987 revision of the Uniform Anatomical Gifts Act (UAGA) also expands who may give consent for organ extraction to include:

- (1) an agent of the decedent at the time of death who could have made an anatomical gift . . . immediately before the decedent's death;
- (2) the spouse of the decedent;
- (3) adult children of the decedent;
- (4) parents of the decedent;
- (5) adult siblings of the decedent;
- (6) adult grandchildren of the decedent;
- (7) grandparents of the decedent;
- (8) an adult who exhibited special care and concern for the decedent;
- (9) the persons who were acting as the [guardians] of the person of the decedent at the time of death; and
- (10) any other person having the authority to dispose of the decedent's body.<sup>92</sup>

The question, of course, is whether reproductive material that is extracted for procreative purposes constitutes an "anatomical gift" under the UAGA.<sup>93</sup> As an initial matter, while some commentators tend to conclude that sperm is insufficiently connected to organ donation to be covered by UAGA, the plain terms of UAGA's exceptionally broad definition of "tissue" may easily include sperm: "'Tissue' means a portion of the human body other than an organ or an eye. The term does not include blood unless the blood is donated for the purpose of research or education."<sup>94</sup>

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that "[i]n the absence of written documentation from the decedent, programs open to considering requests for posthumous gamete procurement for reproduction should only do so when such requests *are initiated by the surviving spouse or life partner.*" ETHICS COMMITTEE, *supra* note 88, at 1842 (emphasis added). Retrieval of gametes and their subsequent use for reproductive purposes must either require the specific consent of the donor, or it need not. But it cannot be both.

<sup>91</sup> Interestingly, other countries go much further in terms of consent by having the opposite of the United States' opt-in system—everyone is presumed to be an eligible organ donor unless the donor or someone on his or her behalf rejects the presumption of donation. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 90, at 3.

<sup>92</sup> *Id.* at 32–33.

<sup>93</sup> UAGA defines "anatomical gift" as "a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education." *Id.* at 10.

<sup>94</sup> *Id.* at 13; IOWA REV. STAT. § 142C.2(35) ("'Tissue' means a portion of the human body other than an organ or an eye, but does not include blood unless the blood is donated for the purpose of research or education."); *but see* Maria Doucetperry, *To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military*, ARMY LAW., May 2008, at 1, 5 n.41 (citing Carson Strong, *Consent to Sperm Retrieval and*

The more difficult question, however, is whether sperm that will be used for procreative purposes falls within one of the purposes outlined by UAGA: transplantation, therapy, medical or dental education, research, or advancement of medical or dental science.<sup>95</sup> To be sure, most commentators agree that UAGA does not govern post-mortem gamete retrievals because posthumous reproduction is not one of the stated purposes for donation under the UAGA.<sup>96</sup>

Despite this, the Sixth District Court of Iowa specifically ruled in favor of posthumous sperm retrieval for procreative purposes, finding the procedure authorized under the Uniform Anatomical Gifts Act.<sup>97</sup> In the case *In re Matter of Daniel Thomas Christy*,<sup>98</sup> Daniel Christy suffered severe head trauma in a motorcycle accident.<sup>99</sup> His fiancée, Amy Kruse, while waiting in the hospital, happened to see a baby and thereafter considered the possibility of retrieving Daniel's sperm.<sup>100</sup> Amy asked Daniel's parents, as his medical surrogate decisionmakers, whether they would ask the hospital to retrieve Daniel's sperm.<sup>101</sup> The parents made the request, but the hospital refused to conduct any such procedure without the order of a court.<sup>102</sup>

When the family sought a court order compelling the hospital to retrieve Daniel's sperm, the judge relied on UAGA provisions that permitted others (such as parents) to make the gift after the donor's death, and concluded that sperm may be donated under the Act.<sup>103</sup> Interestingly, Professor Sheldon Kurtz, the principal author of UAGA 2006, submitted an affidavit in the case, testifying

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*Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 248 (2000) (“Similarly, as the Uniform Anatomical Gift Act (UAGA) permits limited postmortem removal of organs and tissue used for transplantation or therapy, it should not be considered to include or permit posthumous sperm retrieval.”); Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347, 355 (1999) (“[T]he wording of UAGA appears to make it inapplicable to sperm retrieval.”).

<sup>95</sup> Anne Reichmann Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 928 (1997).

<sup>96</sup> *Id.*

<sup>97</sup> See Bethany Spielman, *Pushing the Dead into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J.L. MED. & ETHICS 331, 331 (2009); Samantha Miller, *Judge: Family May Take Dying Son's Sperm: A Case in the Johnson County Courthouse on Thursday Asked Whether Sperm is Eligible for Organ Donation*, DAILY IOWAN, Sept. 14, 2007, at 1A, 4A.

<sup>98</sup> *In re Matter of Daniel Thomas Christy*, Johnson County (IA) Case No. EQCV068545 (Sept. 13, 2007).

<sup>99</sup> Spielman, *supra* note 97, at 332.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (“The hospital’s ethics committee met to discuss the request, but members reached no consensus. The hospital refused to retrieve the sperm without a court order. Daniel’s parents filed a request for an emergency order on September 13th.”).

<sup>103</sup> *Id.* at 333 (detailing that Judge Beckelman, sitting for the Sixth District Court of Iowa “clearly relie[d] on UAGA 2006’s § 2(30); § 4; § 7; and § 9, which establish an individual’s authority to make a gift; the authority to refuse to make a gift; the authority of others to make a gift when the deceased had not done so before death; and the inclusion of sperm as something that may be donated”).

that the retrieval of Daniel's sperm entirely was consistent with the intent of UAGA and its mandates.<sup>104</sup>

The judge in the case, Judge Martha Beckelman, wrote an opinion indicating that her ruling was not based on the transplantation, education, or research prongs of the UAGA.<sup>105</sup> By elimination, commentators assume that Judge Beckelman relied on the "therapy" purpose outlined in the Iowa's UAGA statute.<sup>106</sup> But since Daniel's fiancée hardly was in need of reproductive therapy due to any medical condition, Judge Beckelman's ruling implies that one can seek "therapy" merely in response to a desire to have the child of a deceased loved one.<sup>107</sup>

In some cases, we may conclude that there is little harm in allowing the loved one of an incapacitated or deceased individual to procreate using extracted sperm or ova. Yet, there are sound reasons not to find that UAGA authorizes posthumous gamete retrieval in every circumstance, regardless of the evidence that an individual has expressed a desire to procreate after death.<sup>108</sup>

Disputes among health care professionals, gamete requestors, and would-be gamete recipients will result from importuning into the field of [posthumous gamete retrieval] the cadaveric organ donation field's low evidentiary standard for surrogacy consent; its acceptance of minors as donors; its broad class of acceptable recipients; and the expectation that the practice will be publicly supported.<sup>109</sup>

If gamete and organ donation are analogous under the UAGA, and next-of-kin consent is to be considered sufficient, then cases like that of Diane Blood discussed above, as well as others where a spouse requests use or posthumous retrieval of gametes from a recently deceased partner, become easy cases in which the wishes of the surviving spouse will be honored. But to date, only the *Christy* case has set forth such a rationale.

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<sup>104</sup> *Id.* at 332 ("It is my opinion that this is a circumstance that was contemplated by the [law's] commissioners) in adopting the new Uniform Anatomical Gift Act. . . . Harvesting Mr. Christy's semen with the intention to direct donation to his fiancée is legally permissible under the Iowa act.").

<sup>105</sup> *Id.* at 334.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* ("Judge Beckelman must therefore have interpreted 'therapy' to encompass reproductive treatments not only for those who, in the language of UAGA's commentary, have a 'disease or condition,' but also for those who do not.").

<sup>108</sup> Indeed, we note that if courts are genuinely going to inquire into the evidence of whether an individual wanted to posthumously procreate with a spouse, fiancée, significant other, or another individual, mere expression of wanting to continue a bloodline, have kids with a loved one, or grow a family more broadly, hardly are adequate indicators. Surely, there is a difference between a vague expression of interest in wanting a family and the more specific desire to want children after death, regardless of the circumstances and the impossibility of having an emotional connection to a child conceived post-death.

<sup>109</sup> Spielman, *supra* note 97, at 331.

#### IV. How to Treat Genetic Material: Property, Life, or Something Else?

Courts have struggled for the last twenty-five years on where to place genetic material—particularly embryos—on the spectrum between property and human life. For instance, in *York v. Jones*,<sup>110</sup> one of the earliest cases involving cryopreserved embryos, the court simply analogized the wrongful withholding of a cryopreserved embryo to the wrongful withholding of any other form of property.<sup>111</sup> In *York*, a fertility clinic simply had refused to transfer a couple's embryos to another clinic upon the progenitor couple's request.<sup>112</sup> The court ruled in favor of the couple in determining that embryos were property, and thus subject to the parents' rights under a bailment theory:

While the parties in this case expressed no intent to create a bailment, under Virginia law, no formal contract or actual meeting of the minds is necessary. Rather, all that is needed “is the element of lawful possession however created, and duty to account for the thing as the property of another that creates the bailment . . . .” The essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. The obligation to return the property is implied from the fact of lawful possession of the personal property of another.<sup>113</sup>

In reaching its conclusion, the court in *York* seemed to give weight to a legal fiction that customers of cryobanks expect their genetic material to be returned to them. While certainly such customers intend for their material to be used for their benefit, or as they previously consented for it to be used, this is an odd fit with the law of conversion and bailment.

Notably, posthumous reproductive issues take on another level of difficulty when the dispute at hand involves the use of fertilized eggs (embryos), instead of eggs or sperm alone. The use of embryos increases complexity on a number of levels. First, embryos are formed from the genetic material of two people,<sup>114</sup> each of whom may possess the legal ability to enforce rights to the genetic material respectively. Second, because under some statutes the formation of an embryo is

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<sup>110</sup> *York v. Jones*, 717 F. Supp. 421, 426 (E.D. Va. 1989).

<sup>111</sup> *See id.*

<sup>112</sup> *Id.* at 424.

<sup>113</sup> *Id.* at 425 (quoting *Crandall v. Woodard*, 143 S.E.2d 923, 927 (1965)) (citations omitted).

<sup>114</sup> Notably, in some cases, more than two individuals may provide genetic material for some embryos. *See Inheritable Genetic Modification*, CTR. FOR GENETICS & SOC'Y (Mar. 9, 2015), <http://www.geneticsandsociety.org/article.php?id=6527> (“Several research teams in the United States and the United Kingdom are currently requesting regulatory approval for techniques that would create an embryo with genetic material from three different people and result in inheritable genetic modification (changes that would be passed on to future generations). These techniques have been referred to with several terms, including ‘mitochondria replacement,’ ‘mitochondrial manipulation,’ ‘oocyte modification,’ ‘three-person embryos,’ ‘three-parent babies,’ and ‘nuclear genome transfer’ (the most technically accurate).”).

defined as “conception,”<sup>115</sup> despite the embryo not yet undergoing implantation, the question of what exactly an embryo is—human life, mere property, or something in between—is a deeply unresolved issue.

Perhaps unnerved by the choice between property and life, *Davis v. Davis*,<sup>116</sup> set the groundwork for a popular approach as to how to view and treat embryos under the law. The court suggested that embryos were neither “persons” nor “property” but something in between, deserving “special respect”—a form of quasi-property or property with special rights.<sup>117</sup> The court went further in establishing a framework for resolving disputes over embryos. First, the court recommended looking to any prior agreement between the gamete providers when providing their genetic material for the purpose of embryo formation.<sup>118</sup> In the absence of an agreement, the court held that the interests of the parties should be weighed, ordinarily ruling in favor of the party who wishes to *avoid* procreation.<sup>119</sup> But in cases where the party seeking to procreate has no other method of doing so, courts should then consider discounting the interest of the resisting party, so long as that party intends to use the embryo for himself or herself.<sup>120</sup>

In *Jeter v. Mayo Clinic Arizona*,<sup>121</sup> an Arizona appellate court held that a clinic that had misplaced pre-implantation embryos was not liable in a wrongful death action.<sup>122</sup> Citing *Davis*, the court agreed that “pre-embryos occupy an interim category between mere human tissue and persons because of their potential to become persons.”<sup>123</sup> While the clinic might be liable for negligence, and perhaps subject to damages for medical malpractice, the court rejected the argument that an embryo could be considered a “person” under the state’s wrongful death statute without some clear statement from the state legislature.<sup>124</sup>

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<sup>115</sup> Some definitions of “conception” equate it to fertilization, while others define “conception” as not occurring until after implantation of the embryo occurs. See *Definition of Conception*, MEDICINENET.COM (Aug. 28, 2013), <http://www.medicinenet.com/script/main/art.asp?articlekey=31242>.

<sup>116</sup> 842 S.W.2d 588 (Tenn. 1992).

<sup>117</sup> *Id.* at 597. The court also expressly held that the right to procreate was fundamental under the Tennessee and U.S. constitutions. See *id.* at 600 (“In terms of the Tennessee state constitution, we hold that the right of procreation is a vital part of an individual’s right to privacy. Federal law is to the same effect.”).

<sup>118</sup> *Id.* at 597.

<sup>119</sup> *Id.* at 604 (emphasis added) (“Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question.”).

<sup>120</sup> *Id.* (“If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.”).

<sup>121</sup> 121 P.3d 1256 (Ariz. Ct. App. 2005).

<sup>122</sup> *Id.* at 1270.

<sup>123</sup> *Id.* at 1271.

<sup>124</sup> *Id.* at 1272 (citing *York v. Jones*, 717 F. Supp. 421, 424 (E.D. Va. 1989) (holding that failure to transfer embryos could not give rise to an emotional distress claim because no bodily harm had occurred)).

The court was quick to note that even the legislature, however, would be bound by “constitutional constraints.”<sup>125</sup>

Notably, the *Davis* model, while seemingly more favorable for embryos than a strict property model, can occasionally work to the disadvantage of individuals seeking to procreate. In one case, for instance, a Virginia court dismissed a couple’s torts claims entirely, despite the fact that their cryopreserved embryos were rendered unusable due to albumin contamination.<sup>126</sup> The court nevertheless held that the couple only had rights under contract theories.<sup>127</sup> The court analogized the couple’s situation to one in which a coin collector sued a safe manufacturer for damages sustained by a burglary of his coins, concluding that, like the coin collector, the couple was barred by the economic loss rule from suing in tort, rather than contract.<sup>128</sup> Citing *Davis*, the court held that the embryos were neither life nor property.<sup>129</sup> But since the couple had not alleged privity with either defendant, the couple could not bring any other claim for relief.<sup>130</sup>

At this time, only two publicized embryo dispute cases in the United States have ruled against the party wishing to avoid procreation: *Reber v. Reiss* and *Szafranski v. Dunston*.<sup>131</sup> In these cases, embryos were formed specifically for the purpose of fertility preservation prior to the woman undergoing chemotherapy for cancer. In both cases, the sperm provider (in *Reber*, the now ex-husband, and in *Szafranski*, the plaintiff’s short-term boyfriend at the time she was diagnosed with cancer) wished to stop the use of the embryos for reproductive purposes, but the courts found the women had a special outweighing interest under the circumstances.<sup>132</sup>

The recently publicized case of the non-deceased U.S. businessman, Nick Loeb, and his ex-fiancée, famed actress Sophia Vergara, addressed a similar issue.<sup>133</sup> Together the couple underwent IVF and now, long after their breakup, two embryos remained cryopreserved.<sup>134</sup> Preimplantation genetic diagnosis was

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<sup>125</sup> *Id.* at 1270 (“Such a decision is best left to the elected representatives of the people of Arizona, subject to constitutional restraints, not a court.”).

<sup>126</sup> *Doe v. Irvine Scientific Sales Co.*, 7 F. Supp. 2d 737, 743 (E.D. Va. 1998) (“The goods and services provided by the Jones Institute were unsatisfactory, and the Does’ economic expectations have been disappointed. These losses are neither personal nor property injuries, and are appropriately characterized as economic losses.”).

<sup>127</sup> *Id.* at 742–43.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 743 (“Plaintiffs have alleged no facts and can prove no actionable physical harm or property damage resulting from Defendants’ actions, therefore they fail to state a valid claim for negligence in tort.”).

<sup>130</sup> *Id.* (“Plaintiffs have not alleged privity with Defendants, and are barred from recovering those losses from them.”).

<sup>131</sup> *Reber v. Reiss*, 42 A.3d 1131 (Pa. 2012); *Szafranski v. Dunston*, 993 N.E.2d 502 (Ill. App. Ct. 2013).

<sup>132</sup> *Reber*, 42 A.3d, at 1142; *Szafranski*, 993 N.E.2d, at 515.

<sup>133</sup> Nick Loeb, Opinion, *Sofia Vergara’s Ex-Fiancé: Our Frozen Embryos Have a Right to Live*, N.Y. TIMES (April 29, 2015), [http://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html?\\_r=1](http://www.nytimes.com/2015/04/30/opinion/sofiavergaras-ex-fiance-our-frozen-embryos-have-a-right-to-live.html?_r=1).

<sup>134</sup> *Id.*

performed on the embryos, which determined that resulting children of each of the embryos would be female.<sup>135</sup> Nick Loeb made an emotional public appeal through a New York Times op-ed and numerous televised media appearances, arguing that the embryos are his daughters and deserve a chance at life.<sup>136</sup>

Loeb's position is not without significant support. The Catholic Church, for instance, has long supported the notion that embryos are life and deserving of all the respect as a child or adult human.<sup>137</sup> The Vatican's 2005 Confraternity for the Doctrine of the Faith, issued the *Dignitas Personae*, which states that "cryopreservation is incompatible with the respect owed to human embryos."<sup>138</sup> The document goes further to say that the thousands of abandoned embryos (those embryos created in the IVF process that remain once an individual or couple has decided their family is complete) "represent a *situation of injustice which in fact cannot be resolved*."<sup>139</sup> Under Catholic doctrine, the most common potential solutions for remaining embryos—continued cryopreservation, destruction, donation to research, donation to others for reproductive purposes—are impermissible and unethical.<sup>140</sup> The report purports to support Pope John Paul II's public appeals that "the production of human embryos be halted" and that embryos should be "protected by law as human persons."<sup>141</sup>

The State of Louisiana has passed legislation that defines embryos as "juridical persons."<sup>142</sup> One provision states that "[a]s a juridical person, the in vitro fertilized human ovum shall be given an identification by the medical facility for use within the medical facility which entitles such ovum to sue or be sued."<sup>143</sup> Another directs that "[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person."<sup>144</sup> New Mexico also has statutory language granting special rights to embryos, thus setting them apart from mere property.<sup>145</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* ("A few months later, I asked [Sophia Vergara] to let me have the embryos, offering to pay for all expenses to carry our girls to term and raise them. If she did not wish to share custody, I would take on full parenting responsibilities and agree to have her declared an egg donor. She has refused. Her lawyer, Fred Silberberg, has told reporters that she wants to keep the embryos 'frozen indefinitely.' In my view, keeping them frozen forever is tantamount to killing them.").

<sup>137</sup> William Card & Luis F. Ladaria, *Instruction Dignitas Personae on Certain Bioethical Questions* (Sept. 8, 2008), [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20081208\\_dignitas-personae\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* (quoting John Paul II, Address at the Symposium on "*Evangelium vitae* and Law" and the Eleventh International Colloquium on Roman and Canon Law (May 24, 1996)).

<sup>142</sup> LA. REV. STAT. ANN. §§ 9:131-9:133 (2015).

<sup>143</sup> LA. REV. STAT. ANN. § 9:124 (2015).

<sup>144</sup> LA. REV. STAT. ANN. § 9:129 (2015).

<sup>145</sup> N.M. STAT ANN. § 24-9A-1(D) (2015) ("[C]linical research' . . . is to be construed liberally to embrace research concerning all physiological processes in human

A number of other states have seen “Personhood Amendments” proposals, which are proposed legislation granting embryos the same or similar rights as natural persons.<sup>146</sup> Mississippi rejected one in 2011,<sup>147</sup> and Colorado rejected its third of such proposed amendments to make the ballot in 2014.<sup>148</sup>

Lauren Paulk argues that “the very idea of embryonic personhood is incompatible with the right to privacy, the right to life, and the principle of non-discrimination.”<sup>149</sup> But the other end of the spectrum—treating embryos as property—is also problematic and can lead to perplexing results. One particularly noteworthy case is that of a Texas couple that underwent IVF in order to build their family.<sup>150</sup> The couple was successful, had a son, and their additional embryos (eleven in total) remained cryopreserved.<sup>151</sup> When their son was two years old, the couple was tragically murdered.<sup>152</sup> A Dallas probate court was left with the task of determining the future of the embryos without guidance from the deceased in the form of a will or instructions to the storing clinic.<sup>153</sup> The court ultimately ruled that the embryos would be the property of the two-year-old son, and would continue to be cryopreserved until the son reached the age of eighteen, at which point he could decide what to do with the embryos.<sup>154</sup>

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beings and includes research involving human in vitro fertilization, but shall not include diagnostic testing, treatment, therapy or related procedures conducted by formal protocols deemed necessary for the care of the particular patient upon whom such activity is performed and shall not include human in vitro fertilization performed to treat infertility; provided that this procedure shall include provisions to ensure that each living fertilized ovum, zygote or embryo is implanted in a human female recipient, and no physician may stipulate that a woman must abort in the event the pregnancy should produce a child with a disability.”)

<sup>146</sup> See generally Jonathan F. Will, *Beyond Abortion: Why the Personhood Movement Implicates Reproductive Choice*, 33 AM. J.L. & MED. 573 (2013) (exploring the background of the Personhood Movement, proposed Personhood Amendments, and how they would affect reproductive rights if enacted); see also *Personhood Legislation*, NAT’L INFERTILITY ASSOC., <http://www.resolve.org/get-involved/the-center-for-infertility-justice/personhood-legislation/> (last visited May 31, 2016); *contra Education*, PERSONHOOD, <http://www.personhood.com/education> (last visited May 31, 2016).

<sup>147</sup> Amendment 26 was known as the “Personhood Amendment,” and defined life as beginning at conception. Aaron Blake, *Mississippi Anti-Abortion “Personhood” Amendment Fails at Ballot Box Revisiting the Personhood Amendment*, WASH. POST (Nov. 9, 2011), [https://www.washingtonpost.com/politics/mississippi-anti-abortion-personhood-amendment-fails-at-ballot-box/2011/11/09/gIQAzQI95M\\_story.html](https://www.washingtonpost.com/politics/mississippi-anti-abortion-personhood-amendment-fails-at-ballot-box/2011/11/09/gIQAzQI95M_story.html).

<sup>148</sup> Greg Campbell, *Colorado Personhood Amendment Defeated Again*, DAILY CALLER (Nov. 5, 2014, 1:46 PM), <http://dailycaller.com/2014/11/05/colorado-personhood-amendment-defeated-again/>.

<sup>149</sup> Lauren B. Paulk, *Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, 22 AM. U.J. GENDER SOC. POL’Y & L. 781, 781–84 (2014).

<sup>150</sup> See John A. Robertson, *Two Year Old Boy to Inherit 11 Frozen Embryos*, BILL HEALTH (Feb. 23, 2014), [http://blogs.law.harvard.edu/billofhealth/2014/02/23/two-year-old-boy-to-inherit-11-frozen-embryos/#\\_ftn1](http://blogs.law.harvard.edu/billofhealth/2014/02/23/two-year-old-boy-to-inherit-11-frozen-embryos/#_ftn1).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

Professor John Robertson, of the University of Texas School of Law, contends that the Master in Chancery acted wisely if embryos are to be construed as property or property with special rights.<sup>155</sup> Professor Robertson points out that prior to this case, no Texas or United States courts had determined the inheritance of frozen embryos when both parties had died without leaving instructions as to the embryos disposition.<sup>156</sup> All prior cases generally involved divorcing parties with no previous embryo instructions or wishing to override a previous agreement.<sup>157</sup>

The issue under Texas law was whether the embryos were property and, therefore, subject to Texas intestacy law and the Texas probate court's subject matter jurisdiction.<sup>158</sup> Although no Texas court had previously ruled embryos to be property, the Master of Chancery reasoned that, like property, the embryos clearly had intrinsic value and could be the subject of an enforceable contract.<sup>159</sup>

No doubt the court and Professor Robertson are wise to point to applicable law available under the circumstances of this case; however, the reality of the outcome is difficult to comprehend as the *right* answer. Upon reaching the age of eighteen, this orphaned child will have to decide the fate of his parents' embryos, and, in essence, decide if he should have siblings. Moreover, the court failed to address the basic consent issues tantamount to the judgment of courts determining permissible postmortem use of gametes. Without specific consent that the embryos should be used for procreation after the parents' death, the unfortunate reality is that no court could ever presume to know the true wishes of the deceased parents.

#### V. Benefits of Being Legally Related

Legislators and courts are not just struggling with retrieval, ownership, and use issues with gametes and embryos after a parent has died, but they also face significant issues in the areas of estate planning, probate, and state and federal benefits tied to the legal parent-child relationship. When a child is conceived after the death of one or both parents, the lack of a clear legal relationship can present a number of difficulties.

Chief among the practical difficulties presented by posthumous conception is the ability of an administration to confidently complete the distribution and closure of an estate after a person has died. With the possibility of children being born forty years or more after death, the estate is forced to decide between leaving posthumously conceived children out of an estate, leaving an estate open indefinitely, or searching for middle ground between seemingly intractable positions.

Colorado is an example of a state that recently amended its probate code to specifically address children conceived through assisted reproductive

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

technology. In 2009 and 2010, Colorado in large part adopted the Uniform Probate Code III to find that:

[A] person is a parent of a child created through [ART] when that person has intended and consented to be the parent. A parent-child relationship can exist irrespective of genetic links and who birthed the child. A parent-child relationship can exist even where a child is conceived after the death of the parent.<sup>160</sup>

In order to provide some predictability and to address the logistics of leaving an estate open indefinitely, the revised Colorado Probate Code cut off the ability of a posthumously conceived child to inherit from the deceased parent unless conceived or born within a prescribed timeframe.<sup>161</sup>

If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the time of the individual's death for purposes of [determining parentage]. If this child is: (a) In utero not later than thirty-six months after the individual's death; or (b) Born not later than forty-five months after the individual's death.<sup>162</sup>

Consent of the deceased parent is also a key element under the Colorado statute. For the parent-child relationship to be established between a genetic gamete provider and the child, "[c]onsent to assisted reproduction by the birth mother with intent to be treated as the other parent of the child" must be established.<sup>163</sup> In the case of posthumous conception, the genetic donor parent must have "[i]ntended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence."<sup>164</sup>

Many states have not developed a system enabling recognition of posthumously conceived children, nor have they specifically rejected the notion that rights and benefits can flow from a parent deceased prior to the child's conception. Other state legislatures have scrambled to amend parental regulations and inheritance regulations to consider the legal and practical difficulties should a substantial amount of time pass between the parent's death and the child's birth.

Similarly, states have grappled with applications for social security benefits derived from a parent-child relationship between a deceased parent and a child conceived posthumously. By 2011, the Social Security Administration had received over 100 applications for benefits for posthumously conceived children, with states taking a variety of inconsistent approaches as to when to award

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<sup>160</sup> Elizabeth A. Bryant, Kimberly R. Willoughby & Constance Beck Wood, *Changes to Colorado's Uniform Probate Code*, COLO. LAW., Dec. 2010, at 41, 42, <http://willoughbylaw.com/wp-content/uploads/changes-to-colorado-uniform-probate-code.pdf>.

<sup>161</sup> COLO. REV. STAT. ANN. §§ 15-11-120-21 (West 2015).

<sup>162</sup> COLO. REV. STAT. ANN. § 15-11-120(11) (West 2015).

<sup>163</sup> *Id.* at (6).

<sup>164</sup> *Id.* at (6)(b)(III).

benefits to such children.<sup>165</sup> In *Astrue v. Capato*,<sup>166</sup> the United States Supreme Court addressed the question of whether children born after a parent's death are entitled to social security benefits from that parent.<sup>167</sup> The Court determined that the answer turned on whether applicable state intestacy law allowed posthumously conceived children to inherit from a deceased parent.<sup>168</sup> The key plaintiff in *Astrue* was a resident of Florida who conceived twins eighteen months after their father died of cancer.<sup>169</sup> However, because Florida intestacy law did not recognize inheritance rights for posthumously conceived children, the twins were found not to be entitled to social security benefits from their deceased father.<sup>170</sup>

Legal scholars have made the sound argument that Congress should create a uniform standard for eligibility for social security survivor benefits for posthumously conceived children.<sup>171</sup> Under the current system, a child is subject to the lottery of his or her home state to determine eligibility.

## VI. Conclusions: It's All About Consent (or Should Be)

Self-determination and the choice each of us has to be a parent (or not to be a parent) are vital rights protected by society and the law. A culture and system of protection for a person's right to determine his or her future as a parent, as well as his or her genetic legacy, should be cultivated as technology evolves and the contours of procreation and parentage find new frontiers.

A person's ability to reproduce will continue to expand significantly beyond his or her lifetime—whether it be to provide genetic material to a significant other for future children, or to donate to unknown persons for reproductive purposes.<sup>172</sup> Included in this right, should be the authority to consent to retrieval of genetic material upon death. And that right should be equal as between a woman's ability to donate her eggs and a man's ability to donate sperm, irrespective of the increased medical complexities of post-mortem ova retrieval.

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<sup>165</sup> Martie Gillen & Jason D. Hans, *Social Security Survivors Benefits: Exploring the Effects of Reproductive Pathways and State Intestacy Laws on Attitudes Regarding Benefit Eligibility and Awards*, 59 CONSUMER INT. ANN., 2013, at 1, 1 (discussing that in an attitude study conducted in Florida on state intestacy laws and reproductive pathways, “[b]road support was found for the survivors benefits following normative and posthumous birth pathways, but attitudes were decidedly less favorable when the child was not in utero at the time of parental death”).

<sup>166</sup> *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012).

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 2028.

<sup>169</sup> *Id.* at 2026.

<sup>170</sup> *See id.* at 2033–34.

<sup>171</sup> Alycia Kennedy, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C.L. REV. 821 (2013).

<sup>172</sup> *See Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222, 226 (Cal. Ct. App. 1996) (characterizing the deceased's rights to choose the “genetic inheritance he leaves on this earth” as his “fundamental right”).

Retrieval of genetic material after death is no simple matter, but rather a highly invasive process.<sup>173</sup>

A determination of a person's wishes for procreation is most simply evidenced through the form of consent. Use of all gametes for reproductive purposes should require the consent of the progenitor, whether that person is alive or dead.<sup>174</sup> Similarly, the use of embryos, as they contain the genetic material of two individuals (if not more) for reproductive purposes, should require the consent of all genetic contributors.<sup>175</sup>

Embryos and gametes, with their ability to form new lives, and the rights and responsibilities forever connecting the gamete provider to a resulting child, are not equivalent to organs or tissue, and the law should maintain a higher level of safeguarding than that provided by the terms of organ donation under the UAGA. Requiring specific, express consent to posthumous reproduction is one way, and likely the best way, to ensure that an individual's wishes as to the future of her biological legacy is not taken out of her control.

Practically speaking, medical providers and end-of-life caregivers should be educated as to the possibility of posthumous gamete retrieval and conception, and have forms ready for patients to indicate their wishes. Like do not resuscitate (DNR) orders prior to significant surgeries, patients should be asked their desires concerning post-death reproduction as part of routine, pre-surgery paperwork, as well as paperwork for pre-assisted reproduction procedures. Similarly, estate planning attorneys should include posthumous reproduction questions as part of their basic due diligence and document their clients' wishes.

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<sup>173</sup> Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 923 (2012) ("Like organ donation, harvesting sperm or ova after death can be highly intrusive. Doctors obtain sperm through electroejaculation, or the surgical removal of the testes (orchiectomy). Minimally invasive techniques are also used, such as vasal aspiration, in which an incision is made in the vas deferens in order to insert a catheter and obtain the sperm. Postmortem retrieval of ova requires a surgeon to remove the ovaries in order to obtain the ova.").

<sup>174</sup> Of course, we recognize the difference between the ART context and what courts normally hold in the non-ART context. *See, e.g., Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at \*1 (Ill. Ct. App. Feb. 22, 2005) (holding that a man, who had in fact expressed an affirmative desire *not* to have children with the woman, was nevertheless unable to seek relief for conversion, fraudulent misrepresentation, or intentional infliction of emotional distress, when the woman inseminated herself (and later delivered a baby) using sperm retrieved from that man through oral sex); *see id.* at \*6 ("Plaintiff presumably intended, and he does not claim otherwise, that defendant discard his semen, not return it to him. The essence of conversion is the wrongful deprivation of one who has a right to the immediate possession of the object unlawfully held. Plaintiff is unable to satisfy the second element needed to state a claim for conversion." (internal quotation and citation omitted)).

<sup>175</sup> We do not suggest that such contracts would be free from ordinary contract doctrines such as unconscionability, which could still apply in some cases. *See Kurchner v. State Farm Fire & Casualty Co.*, 858 So. 2d 1220, 1221 (Fl. Dist. Ct. App. 2003) (noting that the sperm bank's insurance policy was carefully crafted so as to avoid liability either for property damage or bodily injury when the sperm bank's refrigeration system failed, causing sperm samples to be unusable).

Ultimately, practical steps should be developed to help individuals understand the new options and possibilities for their biological legacy and to document an individual's wishes for the same. In the absence of consent, the default must be to respect an individual's right not to procreate and see that any further biological continuation possibilities quietly end with the silence of a person at his or her passing.