The Real Sexual Revolution: Posthumously Conceived Children

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THE REAL SEXUAL REVOLUTION: POSTHUMOUSLY CONCEIVED CHILDREN

INTRODUCTION

Over the last several decades, the number of legal questions arising from medical and scientific advances has grown exponentially.¹ Increasingly complex questions regarding the essence of life and the relative importance of the rights of different persons as related to that life² have required courts to delve much deeper into philosophical, religious, and scientific analysis³ than they


² According to Black's Law Dictionary, "life" is defined as, inter alia: "[The] state of... humans... in which... natural functions and motions are performed, or in which... organs are capable of performing their functions. The interval between birth and death. The sum of the forces by which death is resisted." BLACK’S LAW DICTIONARY 923 (6th ed. 1990). As this definition reveals, the nebulous concept of life will not easily conform to the rigors of legal rules.

³ See Davis v. Davis, 842 S.W.2d 588, 590 (Tenn. 1992); Robert H. Blank, REDEFINING HUMAN LIFE: REPRODUCTIVE TECHNOLOGIES AND SOCIAL POLICY 1 (1984); Michael Kirby, Medical Technology and New Frontiers of Family Law, in LEGAL ISSUES IN HUMAN REPRODUCTION 3, 3–4 (Sheila McLean ed., 1989); Machelle M. Seibel, Medical Evaluation and Treatment of the Infertile Couple, in TECHNOLOGY AND INFERTILITY: CLINICAL, PSYCHOLOGICAL, LEGAL, AND ETHICAL ASPECTS 11, 32 (Machelle M. Seibel et al. eds., 1993) (recognizing the legal and ethical considerations of infertility treatments). See generally COUNCIL OF EUROPE, HUMAN ARTIFICIAL PROCREATION (1989) (discussing the ethical, scientific, and legal implications of the latest reproductive technologies in Europe); Bartha M. Knoppers
have been willing and required to in the past. Judges are increasingly faced with the conundrum of reconciling our common law traditions, relying upon the evolution of legal concepts from a historical perspective, with scientific advances that now freely criss-cross the demarcations of life and death that were previously felt to be solid and relatively bright lines. This is particularly true in the realm of reproductive technology, an area that the scientific and medical communities dove into with virtually no legal restraints or regulations. There is now available a wide range of techniques to aid couples who are unable to have chil-


4 When they have been unable to circumvent the question, courts and legislatures have defined the term “life” in a variety of ways that allowed them to resolve the issue at hand without treading too far into uncharted socio-religious arenas. For example, traditionally, criminal homicide statutes required that the fetus be “born alive” to be deemed a “person” within the meaning of those statutes (subsequently, some legislatures specified that a fetus was included for purposes of criminal statutes). See Lori B. Andrews, The Legal Status of the Embryo, 32 LOY. L. REV. 357, 369-77 (1986). On the other hand, the Supreme Court has often used a fetus “viability standard” when faced with questions regarding the constitutionality of abortion. See Roe v. Wade, 410 U.S. 113 (1973), and its progeny. Viability, however, is becoming an out-dated standard as technology progresses. See Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Peter Singer & Deane Wells, Making Babies: The New Science and Ethics of Conception 117 (1985) (“The period in which it is necessary for the human fetus to be in its mother's womb is shrinking from both sides.”). Finally, most probate codes (based on the Uniform Probate Code) require that an heir survive the decedent for at least 120 hours to be considered a person, alive at the time of decedent’s death, for inheritance purposes. See UNIF. PROBATE CODE § 2-104 (1983).


The point of divergence between the two most opposed and basic truths of existence, life and death, is not exactly identifiable, as we assumed in the past. Death is not what it used to be. The invention of... the ventilator and the respirator, plus the skill of the transplant surgeon, have forced us to change our perception of death, and have illuminated our inability to say unequivocally what death is, or, conversely, what life is.

Id.; see also Blank, supra note 3, at 1; Brown, supra note 1, at 73 (noting that medical research is looking forward whereas our legal system looks to the past).


7 The need for legal restrictions and guidance in this area is repeatedly asserted. See id. at 1 (declaring that reproductive technologies offer new opportunities but must be controlled); Zelda Pickup, Selective Reduction, Abortion and the Law, in Reproductive Medicine and the Law 33, 38 (A. Allan Templeton & D. Cusine eds., 1990) (“Reform or re-examination of existing statute law to take into account modern medical technology and practice is required.”).
dren naturally, or more controversially, to aid living persons to parent a child using a deceased partner’s frozen gamete (sperm or eggs) or embryo.

Control of reproductive materials, and the rights of children that are subsequently conceived, have been at the epicenter of an increasing number of legal battles. Putting aside the ethical questions of a child being born after the death of one or both biological parents, and the administrative difficulties this situation creates, issues stemming from rights in reproductive material invariably involve a dispute over proprietary rights that is frequently interwoven with questions of custody and inheritance.

Recently, a wide range of technological advances have spawned issues regarding property rights in the human body.

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8 See PART I infra.
9 Cryopreservation, used in concert with any of a number of available reproductive assistance procedures, can result in a posthumously conceived child, i.e., a child which is not yet in the pregnancy stage of development at the death of one or both biological parents.
13 See Anna J., 286 Cal. Rptr. 369 (granting custody to gamete providers as against surrogate mother); Jhordan C., 224 Cal. Rptr. 530 (awarding visitation rights to sperm provider and holding him responsible for child support); In re Marriage of Adams, 551 N.E.2d 635 (Ill. 1990) (holding husband of woman artificially inseminated by donor sperm liable for child support); C.M., 377 A.2d 821 (acknowledging sperm provider as legal father); Gordon, 501 N.Y.S.2d 969 (holding that children born to the decedent’s son’s wife by artificial insemination using donor sperm during her marriage to decedent’s son, are issue of decedent’s son for inheritance purposes).
14 See, e.g., Brotherton v. Cleveland, 923 F.2d 477 (6th Cir. 1991) (corneas removed for transplant during autopsy); York, 717 F. Supp. 421 (ownership of frozen embryos); Moore v. Regents of the Univ. of Ca., 793 P.2d 479 (Cal. 1990) (in banc)
Whether the issue involves ownership of one's own body parts,\textsuperscript{15} property rights in a decedent's human material,\textsuperscript{16} the validity of a patent based on another person's unique genetic information,\textsuperscript{17} ownership or custody of embryos or gametes,\textsuperscript{18} or the parentage of a child of artificial conception,\textsuperscript{19} the preliminary underlying questions are the same. They include: "Is (Was) there a property right?", "What are the implications for recognizing a right?", and if there are multiple conflicting rights, "Who has the superior right?" These questions take on a heightened level of sophistication and magnitude when they involve the fate of children posthumously conceived using modern reproductive technologies.\textsuperscript{20}

The issues arising from posthumously conceived children can be divided into two categories—rights prior to gestation (i.e.,

\textsuperscript{15} See, e.g., Moore, 793 P.2d at 479 (holding that a leukemia patient does not have a property right in his spleen and bodily tissues to bring an action in conversion against the medical center and doctors who patented his cells and used them in lucrative medical research).

\textsuperscript{16} See, e.g., Brotherton, 923 F.2d at 484 (holding that a decedent's wife did not have a property right in her deceased husband's corneas that would allow her to sue the state for a due process violation when they were removed after an autopsy in opposition to his religion).

\textsuperscript{17} See, e.g., Moore, 793 P.2d at 492–93 (validating doctors and medical clinic's patent on leukemia patient's cells).


\textsuperscript{19} See Singer & Wells, supra note 4, at 85 ("Should long-term embryo freezing become a reality, a child might be born a century or more after the death of its genetic parents. The child would grow up among the great-great-grandchildren of its genetic brothers and sisters."); Monica Shah, Comment, Modern Reproductive Technologies: Legal Issues Concerning Cyropreservation and Posthumous Conception, 17 J. LEGAL MED. 547, 564 (1996) (acknowledging that legislation must regulate the fate of preserved embryos when both parents are killed); see also Janet L. Dolgin, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 92 (1997) (commenting on the unique significance of the parent-child relationship); Andrews, supra note 4, at 402–03 (acknowledging the complications extended preservation could create but disagreeing with recommendations that time limits be established for how long gametes or embryos may be stored).
rights to the reproductive genetic material) and rights post gestation (e.g., right to inherit, custody, and similar issues). This Note covers both categories and provides general information on the technology involved. Part I briefly explains the various current and proposed medical techniques that assist couples who are attempting to conceive a child. Part II explores the issues and current state of the law as it relates generally to property and custody rights of reproductive materials. Part III elucidates the issues raised by the potential birth of posthumously conceived children, such as legally recognized parentage and inheritance. This section also reviews the few decided cases on posthumously conceived children, as well as the preeminent cases in other areas of reproductive technology that may be helpful by analogy, and critically examines relevant statutes, such as the Uniform Status of Children of Assisted Conception Act. Finally, Part IV asserts that the states must legislate soon to provide guidance on the legal status of posthumously conceived children and proprietary or custody rights in frozen gametes and especially embryos, and offers a sample statute. This proposed statute attempts to be flexible enough to allow the courts to fulfill the intentions of the parties and adjust to constantly advancing technology, as well as pass muster under a due process evaluation by the United States Supreme Court.

I. OVERVIEW OF THE CURRENT AND PROPOSED REPRODUCTIVE TECHNOLOGIES

Originally, all reproductive technology was developed as a means to assist couples in overcoming infertility. To this day, infertility is still the primary use of this technology; however, it is also used by single women wishing to be mothers, homose-
ual couples wanting to have children, as well as both men and women hoping to indefinitely prolong their reproductive lifespan. Discussed below is an overview of some of the most widely-used assisted conception techniques currently available or emerging.

A. Artificial Insemination

The oldest and most common form of reproductive technology is artificial insemination. This simple process, which was originally used in husbandry, evolved over hundreds of years, becoming widespread in the 1960s. This process consists of inserting sperm into the mother's uterus via a pipette while she is ovulating. It is a relatively simple procedure that does not require a physician's assistance but, in fact, is usually performed by one, especially if sperm from an anonymous donor is used or if the parties wish to freeze sperm for future use. Additionally, some states have adopted the Uniform Parentage Act ("UPA")

24 See Kirby, supra note 3, at 4 (reporting "occasional reports of homosexual partners who resort to the procedures to avoid heterosexual intercourse"). See, e.g., Nancy S., 279 Cal. Rptr. 212; Jhordan C., 224 Cal. Rptr. 530; Karin T. v. Michael T., 484 N.Y.S.2d 780 (Fam. Ct. 1985).

25 See Jeffrey Klinger, Eggs on the Rocks, TIME, Oct. 27, 1997, at 105 (acknowledging male and potentially female reproductive "insurance").

26 See McAllister, supra note 21, at 58 (citing Judith L.B. Rice, The Need for Statutes Regulating Artificial Insemination by Donor, 46 OHIO ST. L.J. 1055, 1055-56 (1985)).

27 See THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, SURROGATE PARENTING: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 19 (1988) [hereinafter SURROGATE PARENTING]; Moghissi supra note 23, at 117 ("Artificial insemination, first used for humans by John Hunter, a Scottish physician, at the end of the eighteenth century, is a relatively simple procedure from a medical point of view.").


30 See Wadlington, supra note 1, at 472.

31 See McAllister, supra note 21, at 59-60 (noting that under most statutes addressing this situation, physician assistance for AID is essential).
which states that a physician must be utilized in order to cut off all parental rights of the sperm donor. Those states may also require, in accordance with the UPA, that to establish the mother's husband as the legal father, a consent form must be signed by both parties and the physician, and that it be recorded with the state.

When the sperm used in the procedure comes from the woman's husband it is referred to as Artificial Insemination by Husband ("AIH"); when it comes from a third-party donor it is known as Artificial Insemination by Donor ("AID"). An older procedure, but one that is now virtually extinct, is Confused Artificial Insemination ("CAI"), where the husband's sperm is combined with a donor's so that the actual fertilizing sperm is unknown. While this allows the husband to embrace the possibility that he is the child's natural father, and the law will probably recognize him as such, it is being abandoned because of the uncertainty it creates and the difficulties that arise in identifying significant genetic defects and diseases which may affect the child's health. The injected sperm used in artificial insemination can either be fresh or previously-frozen (cryopre-

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32 See Unif. Parentage Act § 5(a), 9B U.L.A. 301 (1987) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."); McAllister, supra note 21, at 60.

33 See Unif. Parentage Act § 5(a), 9B U.L.A. 301 (1987) ("The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [state] . . . ."). Cf., Alexandria S. v. Pacific Fertility Med. Ctr., Inc., 64 Cal. Rptr. 2d 23 (Ct. App. 1997) (holding that fertility clinic's failure to certify signature of mother's husband is not actionable); In re Marriage of Adams, 551 N.E.2d 635, 639-40 (Ill. 1990) (stating in dicta that the Illinois statute, patterned after the UPA, could require the husband's consent be in writing for statutory presumption of paternity to arise).

34 See Surrogate Parenting, supra note 27, at 19 (1988); McAllister, supra note 21, at 59.

35 See Athena Liu, Artificial Reproduction and Reproductive Rights 12 (1991); Wadlington, supra note 1, at 469.

36 See Liu, supra note 35, at 12 (noting that the husband may well be the biological father, however, this would not be known without a paternity test); Wadlington, supra note 1, at 470.

37 See Liu, supra note 35, at 11-12 (noting that CAI diminishes the effectiveness of AID which screens for mental and other hereditary diseases).
served) sperm that has been carefully thawed to enhance the survival rate.38

Although AIH has generally been found, even in Victorian England, to be a legally acceptable if somewhat unconventional practice, AID has not fared as well.39 Often, the practice has been labeled as adultery.40 Regardless, for some couples, particularly those facing male infertility, artificial insemination is their only opportunity for parenthood.41 In addition, cryopreservation of sperm allows a man to take out “fertility insurance” in case his body sustains a trauma, leaving him unable to produce sperm in the future;42 or if he dies wanting to father a child, the sperm may be used posthumously through artificial insemination.

38 See Ex parte Blood, 2 W.L.R. 806, 814 (C.A. 1997) (“Sperm can be used fresh or after it has been preserved.”); McAllister, supra note 21, at 59 (citing U.S. Congress, Office of Technology Assessment, Artificial Insemination: Practice in the United States: Summary of a 1987 Survey—Background Paper, OTA-BP-BA-48, 10 (U.S. Government Printing Office, August 1988)).

39 See Mary Warnock, A Question of Life: The Warnock Report on Human Fertilisation and Embryology 19 (1985) (recounting the opposition to AID and noting that in 1948 the Archbishop of Canterbury, who was highly critical of AID but not AIH, recommended that AID be made a criminal offense); McAllister, supra note 21, at 59–60 (noting that questions arise surrounding the legal relationship between the child and the genetic father).

40 See Wadlington, supra note 1, at 477–78; see also Shapiro & Sonnenblick, supra note 11, at 237 (noting that the court in Doornbos v. Doornbos adopted the reasoning that adultery laws were aimed at preventing children conceived with one other than a spouse, not merely extramarital affairs).

41 See Wadlington, supra note 1, at 478 (“AID offers a possible answer for child-seeking couples when the male partner is infertile.”).

42 See Singer & Wells, supra note 4, at 57 (noting that Alain Parpalaix had deposited sperm after having learned that treatment for testicular cancer might make him sterile); Warnock, supra note 39, at 54 (suggesting that a man may want to preserve semen before undergoing physically traumatic medical procedures or because he is suffering from a condition that could make him sterile and further mentioning that in the future, women may have the same opportunity to extend fertility). Once freezing eggs becomes more widely available, “maternity insurance” will also be available. Kluger, supra note 25, at 106. Cryopreservation was available to astronauts in the 1960s in case space travel injured their reproductive systems. See Karin Mika & Bonnie Hurst, One Way to Be Born? Legislative Inaction and the Posthumous Child, 79 Marq. L. Rev. 993, 995 (1996).
B. In Vitro Fertilization (IVF)

The first successful human birth from in vitro fertilization was in 1978.\textsuperscript{43} Louise Brown of England was dubbed the first "test-tube" baby.\textsuperscript{44} As early as 1957, however, successful testing with mice showed in vitro fertilization to be a viable method of reproduction.\textsuperscript{45} The process of in vitro fertilization ("IVF") begins with the removal of a woman's eggs (oocytes) that have been gathered by a needle aspiration or laparoscopy procedure\textsuperscript{46} either during her normal menstrual cycle or after careful stimulation of the ovaries using a series of hormone injections or oral medications.\textsuperscript{47} These eggs are then combined with either her husband's or a donor's sperm in a culture dish containing fertilization medium.\textsuperscript{48} The eggs are incubated in an environment that mimics the fallopian tubes together with the sperm, which have been specially treated so as to enhance their fertility.\textsuperscript{49} Ideally, within a total of approximately 48 hours from the time the sperm and egg are combined, a pre-embryo of between two and eight cells will develop (a blastomere) which is then introduced into the woman's uterus by catheter with the hope it will implant and grow.\textsuperscript{50} Unfortunately, the current success rate for implantation

\textsuperscript{43} See LIU, supra note 35, at 8 (noting that the year 1978 was a watershed date for in vitro fertilization); SCOTT, supra note 5, at 214.

\textsuperscript{44} See LIU, supra note 35, at 8 (stating that the child was born as the result of a technological breakthrough); SCOTT, supra note 5, at 214 (noting that the birth attracted attention comparable to that of the first successful heart transplant).

\textsuperscript{45} See JENNIFER GUNNING & VERONICA ENGLISH, HUMAN IN VITRO FERTILIZATION: A CASE STUDY IN THE REGULATION OF MEDICAL INNOVATION 2–3 (1993).

\textsuperscript{46} See WARNOCK, supra note 39, at 29 n.2.

The laparoscope is an optical surgical instrument which is used to inspect the internal abdominal and pelvic organs so that minor surgical procedures can be performed including the recovery of one or more eggs from those ovarian follicles that are ripe. Laparoscopy usually requires a general anesthetic but does not usually involve an overnight stay in hospital.

\textit{Id.} Ultrasound techniques can now also be used to aid in egg recovery. See \textit{id.} at n.3.

\textsuperscript{47} See BLANK, supra note 3, at 41; McAllister, supra note 21, at 60.

\textsuperscript{48} See McAllister, supra note 21, at 61; Seibel, supra note 3, at 29.

\textsuperscript{49} See SURROGATE PARENTING, supra note 27, at 21 (1988) (stating that the fertilized eggs in the petri dish are incubated until they are ready to be implanted in the uterus); BLANK, supra note 3, at 41–42; Sam Thatcher & Alan DeCherney, Pregnancy-Inducing Technologies: Biological and Medical Implications, in WOMEN & NEW REPRODUCTIVE TECHNOLOGIES: MEDICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL DILEMMAS 27, 32 (Judith Rodin & Aila Collins eds., 1991).

\textsuperscript{50} See BLANK, supra note 3, at 28; Seibel, supra note 3, at 29.
is low. Only about 60 to 80 percent of IVF attempts at fertilization are successful and most of those do not result in pregnancy. To improve these odds, more than one pre-embryo is usually inserted. This practice, however, commonly results in multiple pregnancies, requiring the treating physician to counsel the mother on her options: to either abort some of the fetuses, or carry all to term and risk losing them all or her own life. Stories of such multiple births from related fertility treatments have become increasingly common in the news.

The possible parental combinations from in vitro fertilization suggest that controversies that could arise. For example, the

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51 See McAllister, supra note 21, at 61; see also WARNOCK, supra note 39, at 30 (noting that while IVF fertilization is successful 75% of the time, abnormalities or poor development of the embryos and complications in utero lower the possible number of successful births); Seibel, supra note 3, at 30 (quoting statistics that only 19% of IVF procedures resulted in pregnancy and only 14% in live birth).
52 See WARNOCK, supra note 39, at 30 (reviewing the reasons for transferring more than one embryo and analyzing the reasons for and against using such a procedure); Dickens, supra note 21, at 32; see also Pickup, supra note 7, at 34.
53 Unlike fertility drugs, which stimulate a woman's ovaries to release many eggs during ovulation to increase the likelihood of a successful pregnancy through normal sexual activity, in vitro procedures are physician-controlled, thereby reducing the number of multiple births above twins. See Seibel, supra note 3, at 30 ("Most IVF centers do not transfer more than four of five embryos to reduce the risk of multiple births."); Gina Kolata, Many Specialists Are Left in No Mood for Celebration, N.Y. TIMES, Nov. 21, 1997, at A32.
54 See Dickens, supra note 21, at 32; Pickup supra note 7, at 34 (describing "selective reduction of pregnancy" in multiple pregnancies arising from infertility drugs or IVF); Pam Belluck, Progress Made By 7 Babies Encourages Their Doctors, N.Y. TIMES, Nov. 21, 1997, at A32; Kolata, supra note 53, at A32; see also WARNOCK, supra note 39, at 30 (citing the potential for added risks from multiple pregnancy such as miscarriage and premature delivery).
55 Most recently, America was awed by the 1998 birth of octuplets to a Houston couple, see Mark Babineck 7 Plus 1 Equals a Rare Birth; Octuplets Are First Known to Survive, BOSTON GLOBE, Dec. 21, 1998, at A3, available in 1998 WL 22240528, and waited expectantly in 1997 for the McCaughey septuplets to be born in Caliste, Iowa, see Belluck, supra note 54, at A32 ("[T]he McCaugheys' startlingly successful birth has been met with . . . celebration and wonder."); Kolata, supra note 53, at A32 ("[C]elebrations and talk of miracles . . . swirled around the birth of septuplets in Iowa on Wednesday"). While these multiple births occur most frequently when fertility drugs are used, as was the case in Houston and Iowa, these drugs are often used in conjunction with other procedures, such as IVF, which on their own often result in multiple births when as many as six eggs are introduced into the uterus to enhance conception odds. See supra note 52; Judy Peres, Giving Birth to Controversy, CHI. TRIB., July 21, 1998, at 1, available in 1998 WL 2878254.
woman providing the egg is not necessarily the woman in whose uterus the fetus will grow. Therefore, who is the child’s mother? In addition, the sperm may come from the mother’s husband or from a third-party donor. So who is the legal father? Sometimes, so as to prevent the woman from having to undergo painful stimulation and ova collection procedures monthly, the physician or fertility clinic will cryogenically preserve fertilized embryos. Are those embryos the “property” of the egg donor, the sperm provider, or on occasion, the fertility clinic? Who can take them, use them, or destroy them? Who are the legal “parents” of those embryos? In courtrooms today, these questions are being asked and judges are struggling, usually unaided, for answers.

C. Intracytoplasmic Sperm Injection (ICSI)

This technique, which is a variation on IVF, only recently became available to the public as an option and is still somewhat controversial. It is primarily used when the male partner’s semen carries few or no sperm capable of reaching the egg. During this process, a single sperm is extracted, usually from the epididymis, and is injected into the egg. There are critics who

have as many as five ‘parents’—a biological father and mother, a gestational mother, and a rearing father and mother.”; see also WARNOCK, supra note 39, at 37 (observing that egg donation was the first circumstance in which the woman providing the genetic information was not the person who would give birth to the child).

See SINGER & WELLS, supra note 4, at 96 (discussing “full surrogacy,” or “rent-a-womb,” in which the embryo carried by the surrogate does not contain any of her genetic information).

See id. at 82–83 (noting that surgery to collect eggs, “the most invasive part of the IVF procedure,” does not need to be performed monthly using cryopreservation of embryos and that some patients become ill or bleed from the uterus after this surgery).

See DOLGIN, supra note 20, at 32. “Faced with the startling consequences of surrogacy and the new reproductive technologies, legislators have been slow to in responding, and courts, uncertain about how to react but compelled to do so anyway, have as a group behaved with confusion and ambivalence.” Id. at 176–77.

See Peres, supra note 55, at 1 (revealing that the American Society for Reproductive Medicine declared this procedure “no longer considered experimental” when less than 100 conceptions have occurred and the oldest children conceived using this procedure are six and would not yet reveal the abnormalities).


argue that despite this procedure's seeming effectiveness at resulting in a viable pregnancy, it should not be used because it can perpetuate birth defects carried by the weak sperm that nature would ordinarily prevent.\(^{63}\)

\section*{D. Gamete Intrafallopian Transfer (GIFT)}

Gamete Intrafallopian Transfer ("GIFT") is another very similar procedure to \textit{in vitro} fertilization, with one exception.\(^{64}\) Using the same methods available for \textit{in vitro} fertilization, eggs and sperm are collected from the parents or donors.\(^{65}\) The difference occurs in the site of fertilization. During \textit{in vitro} fertilization, the egg and sperm are united in a \textit{petri} dish and the resulting embryo is allowed to divide several times before implantation in the uterus is attempted.\(^{66}\) During a GIFT procedure, the egg and sperm are inserted together by catheter directly into the fallopian tube,\(^{67}\) where it is hoped fertilization will occur.\(^{68}\) Since the fallopian tubes are where normal fertilization takes place, this is an attempt to help mother nature along, and to prevent the uterine rejection common with \textit{in vitro} fertilization.\(^{69}\)

GIFT was first introduced in 1984, and by 1987 had surpassed \textit{in vitro} fertilization success rates.\(^{70}\) It appears that GIFT's success rate, coupled with cryopreservation techniques, increases the likely prospect for having a successful birth long af-

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  \item[63] See Peres, supra note 55, at 1.
  \item[64] See McAllister, supra note 21, at 63–64.
  \item[65] See id. at 64.
  \item[66] See DIEDERIKA PRETORIUS, SURROGATE MOTHERHOOD: A WORLDWIDE VIEW OF THE ISSUES 5 (1994); McAllister, supra note 21, at 60–61 (citing INSTITUTE OF MEDICINE, MEDICALLY ASSISTED CONCEPTION: AN AGENDA FOR RESEARCH 3, 2, 18 (1989)).
  \item[67] Zygote Intrafallopian Transfer ("ZIFT") mirrors the GIFT procedure and issues, the only difference being that during ZIFT, an embryo is created outside the body and allowed to divide until it reaches the zygote stage before being inserted into the fallopian tube. See Ricks, supra note 62, at H22.
  \item[68] See McAllister, supra note 21, at 64 (citing INSTITUTE OF MEDICINE, MEDICALLY ASSISTED CONCEPTION: AN AGENDA FOR RESEARCH 3, 19 (1989)).
  \item[69] See id.
  \item[70] See id. at 63–64 (citing Machelle M. Seibel, M.D., A New Era in Reproductive Technology: In vitro Fertilization, Gamete Intrafallopian Transfer, and Donated Gametes and Embryos, 318 NEW ENG. J. MED. 828, 833 (1988); INSTITUTE OF MEDICINE, MEDICALLY ASSISTED CONCEPTION: AN AGENDA FOR RESEARCH 3, 19 (1989)).
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after the gamete collection occurs. Ultimately, the same parenthood and property issues will arise with GIFT as those raised by \textit{in vitro} fertilization, only at a more frequent rate, reflective of its successfulness.\footnote{See id.}

\textbf{E. Cryopreservation}

Cryopreservation is not a reproductive assistance method itself, but is used in connection with \textit{in vitro} fertilization, GIFT, and artificial insemination procedures. This specialized technique of deep freezing slows down the activity, and therefore the aging cycle, of living matter to a point where it virtually stops time for these organisms.\footnote{See infra note 182 (testimony of Jerome Lejuene). Cryogenics is a branch of physics that involves the study of materials at very low temperatures; cryobiology is the study of effects of low temperatures on biological systems. See \textsc{Singer} \& \textsc{Wells}, supra note 4, at 84. Cryobiology was originally developed to preserve and store organs for transplants, but currently the technology allows only for the effective storage of small organisms of very few cells, such as embryos. See \textsc{Moghissi}, supra note 23, at 123 (explaining that cryobiology techniques for humans were a result of discoveries made to improve animal husbandry).} For example, the procedure for "freezing" embryos involves first exchanging all water in the embryo for a special preservative to prevent the formation of tissue-damaging ice crystals, and then exposing it to a succession of liquefied gases to cool the embryo to \(-196^\circ\text{C},\footnote{See \textsc{McAllister}, supra note 21, at 63.} at which point it can be stored, theoretically, for hundreds of years.\footnote{According to one report, embryos could be stored for up to 600 years. See \textsc{Singer} \& \textsc{Wells}, supra note 4, at 81.} When the embryo is to be used, it is slowly thawed, rinsed of the preservative, and re-hydrated.\footnote{See \textsc{McAllister}, supra note 21, at 63.} Then the normal \textit{in vitro} fertilization procedure is followed, and the embryo is inserted into the mother's uterus.

Cryopreservation allows for the long-term storage of sperm (approximately ten years without damage),\footnote{See Elizabeth Ann Pitrolo, Comment, \textit{The Birds, The Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies?}, 19 \textsc{Hous. J. Int'l L.} 147, 151 n.18 (1996) (citing Toby Solomon \& James B. Boskey, \textit{Who Owns the Ova?}, 141 \textsc{N.J. Law.} 20, 20 (1991)).} eggs (duration unknown),\footnote{See id. at 151.} and embryos (theoretically six hundred years).\footnote{See id. at 151.} As a
result, through one harvesting of eggs a woman may become pregnant several times throughout her life and could have children born to a surrogate after her death. Men can now also parent children throughout their lifetime, and after death by freezing sperm or contributing sperm to a preserved embryo. Cryopreservation is the technology that makes possible posthumously conceived children.

F. Embryo Lavage and Transfer and Surrogate Motherhood

In an embryo lavage and transfer procedure, instead of fertilizing a donor egg in a petri dish and inserting it into the mother’s uterus like in IVF, the egg is fertilized in the body of a paid donor through artificial insemination. The resulting embryo is then removed and inserted into the mother’s uterus with the hope that it will embed and grow. The major drawback to this procedure is the possibility that the donor may later choose not to give up the embryo or, more likely, the removal of the embryo will be unsuccessful and the donor will end up with a pregnancy intended for the donee mother. Currently, this is an available, but not widely used procedure.

Whereas artificial insemination is usually associated with male infertility, in vitro fertilization, GIFT, embryo lavage and

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78 See id. at 151 n.18 (citing Solomon & Boskey, Who Owns the Ova?, 141 N.J. Law. 20, 20 (1991)).
79 See Kluger, supra note 25, at 105; Pitrolo, supra note 76, at 154.
80 See WARNOCK, supra note 39, at 39; McAllister, supra note 21, at 64 (citing Machelle M. Seibel, M.D., A New Era in Reproductive Technology: In vitro Fertilization, Gamete Intrafallopian Transfer, and Donated Gametes and Embryos, 318 New Eng. J. Med. 828, 833 (1988)).
83 According to one statistic, there are four reported successful births and two ongoing pregnancies attributed to embryo lavage and transfer. See McAllister, supra note 21, at 65 (citing Leonard Formigli, M.D. et al., Donation of Fertilized Uterine Ova to Infertile Women, 47 Fertility & Sterility 163, 163 (1987)).
transfer, and surrogate motherhood are attempts to overcome female infertility. *In vitro* fertilization, GIFT, and embryo lavage and transfer are all used when the fallopian tubes, the site of fertilization, are damaged or not properly functioning. Alternatively, surrogate mothers are used when the uterus is unable to sustain a pregnancy.

As is commonly known, a surrogate mother agrees, usually for a fee or as a family member, to carry and give birth to someone else's child. Ordinarily, the preferred procedure for surrogacy is *in vitro* fertilization, using the genetic mother's egg and her partner's sperm. This creates a child that is truly the genetic offspring of the two gamete providers, and should help to avoid any legal questions as to who are the child's parents.

Alternatively, if eggs from the donee mother are unavailable, artificial insemination of a surrogate mother using the sperm of

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84 See BLANK, supra note 3, at 41; see also SINGER & WELLS, supra note 4, at 14 (noting that operations to repair damaged fallopian tubes are also performed in some situations, with a 30% success rate).

85 See SINGER & WELLS, supra note 4, 98–99 (noting that there are additional medical and nonmedical reasons why a woman might employ a surrogate); WARNOCK, supra note 39, at 42.

86 See Linda M. Whiteford, *Commercial Surrogacy: Social Issues Behind the Controversy*, in *NEW APPROACHES TO HUMAN REPRODUCTION: SOCIAL AND ETHICAL DIMENSIONS* 145, 146 (Linda M. Whiteford & Marilyn L. Poland eds., 1989) (quoting recent statistics that estimated that the cost of most surrogacy contracts are $20,000: $10,000 to the surrogate and $10,000 to the broker plus all expenses, including doctors' and hospital bills). See, e.g., *Anna J.*, 286 Cal. Rptr. at 372 (noting that, “Anna,” the surrogate mother for two gamete providers, was to be paid $10,000, have a $200,000 insurance policy on her life, and presumptively, all of her medical bills paid by the donor couple whose child she carried). See also Sandra Anderson Garcia, *The Baby M Case: A Class Struggle Over Undefined Rights, Unenforceable Responsibilities, and Inadequate Remedies*, in *NEW APPROACHES TO HUMAN REPRODUCTION: SOCIAL AND ETHICAL DIMENSIONS* 198, 207 (Linda M. Whiteford & Marilyn L. Poland eds., 1989) (citing the fact that Mary Beth Whitehead, the surrogate, would receive $10,000 for being artificially inseminated and carrying the baby.)

87 See SINGER & WELLS, supra note 4, at 95; WARNOCK, supra note 39, at 42; Whiteford, supra note 86, at 146.

88 See SINGER & WELLS, supra note 4, at 113. When a surrogate agrees to carry the embryo of the gamete providers but not contributing her own egg, it is “Full surrogacy.” See Sandra Anderson Garcia, *Surrogate Mothering in the Marketplace: Will Sales Law Act as Surrogate for Surrogacy Law?, in* *NEW APPROACHES TO HUMAN REPRODUCTION: SOCIAL AND ETHICAL DIMENSIONS* 170, 170 (Linda M. Whiteford & Marilyn L. Poland eds., 1989). The surrogate agrees that once the baby is born, she will relinquish parental rights and “allow the couple to adopt the baby.” *Id.*

89 See SINGER & WELLS, supra note 4, at 96, 113.
the donee mother’s partner could be performed. Ultimately, surrogate motherhood has the potential to result in even more confusion, heartbreak, and uncertainty as to legal parenthood than donor *in vitro* fertilization or artificial insemination. But, if all goes as planned, it could provide an infertile couple with the much sought-after opportunity to be parents. In addition, surrogacy could be used in combination with cryopreservation of an embryo, to allow a bereaved widower to father a child of his deceased wife.

G. *Cytoplasm Transfer*

Cytoplasm transfer is a new procedure to repair defective eggs, and is used in conjunction with *in vitro* fertilization. During a cytoplasm transfer, ooplasm, the liquid surrounding the nucleus of the egg, is taken from a donor egg and injected, along with the father’s sperm, into the mother’s egg. Then, the regular *in vitro* fertilization procedure is followed. The difference is in the genetic information. In an ordinary *in vitro* fertilization procedure where the mother’s eggs are defective, a donor egg is fertilized by the mother’s partner’s sperm and then inserted into her uterus. Cytoplasm transfer, on the other hand, uses the woman’s own egg with her genetic information, except that the ooplasm is substituted; thus, the child has the genetic makeup of the couple. As of 1997 this new technique had resulted in only two pregnancies; however, researchers believe it will become common in the future, particularly for women who have already tried other fertility techniques.

Once freezing eggs becomes a more widespread practice, women who have had difficulty conceiving because of structurally

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90 "Partial surrogacy" is the term for surrogate arrangements that involve artificial insemination. See Garcia, supra note 88, at 170.
91 See SINGER & WELLS, supra note 4, at 101 (noting the “horrendous legal tangles” surrogacy promotes and recounting distressing examples of failed surrogate contracts).
93 See id.
94 See WARNOCK, supra note 39, at 35 (explaining that in traditional egg donor situations, the donated egg is fertilized *in vitro* with the sperm of the infertile woman’s husband and then implanted in her uterus).
95 See Cytoplasm Transfer, supra note 92, at 126.
96 See id.
97 See id.
defective eggs may be able to have them preserved so that the eggs can later be repaired through cytoplasm transfer, transfer of the nucleus to a viable egg, or another procedure. The ability to repair eggs, combined with cryopreservation, will most likely create and prolong the period over which children of these women may be born. In addition, it may increase the already substantial market for donor eggs, particularly once freezing on a large scale allows for indefinite preservation. This prospect treads rather heavily into the highly controversial area of the commercialization of reproductive materials.

H. Cloning

Although not yet performed, human cloning has been suggested as another option available to infertile couples. The first reported successful “cloning,” which is the creation of an almost exact genetic replica of the “parent” or gene donor, was performed in Scotland in 1997 in the widely publicized story of the little lamb “Dolly.” Within a month and not to be outdone, American researchers announced their successful cloning of a

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98 See Pitrolo, supra note 76, at 155 (reporting that egg donors currently receive between $800 and $1,200 per retrieval cycle and acknowledging that a successful technique to freeze eggs will broaden the feasibility of using donor eggs); see generally Kluger, supra note 25, at 106.

99 See SURROGATE PARENTING, supra note 27, at 2 (“Pioneering techniques to freeze gametes and embryos may... radically alter the circumstances of human reproduction and present a new arena for commercial activity.”); Bonnie Steinbock, Sperm as Property, 6 STAN. L. & POL’Y REV. 57, 65–66 (1995). One result of this advance in technology is the recent trend toward soliciting donor eggs from Ivy League students, under the erroneous assumption that the resulting children will also be Ivy League material. See Joseph Berger, Yale Gene Pool Seen as Route to Better Baby, N.Y. TIMES, Jan. 10, 1999, at 1.

100 But see Panel Casts Doubt on Human Cloning Claim, N.Y. TIMES, Jan. 29, 1999, at A1 (reporting that in December scientists “had replaced the nucleus of a woman’s egg with the nucleus of one of her body cells” and then fertilized the egg and allowed it to divide into four cells, thus completing the “first step” towards human cloning).

101 See Cloning Erup, BUS. DAILY, Feb. 16, 1998, available in 1998 WL 5444194 (“Dr. Richard Seed... says that cloning is the answer to the prayers of sterile couples who want to have babies.”).

102 See Ronald Kotulak, First Mammal Is Cloned, CHI. TRIB., Feb. 23, 1997, at 1 (defining cloning a mammal as making a genetically identical copy from a single body cell); Chad Reed, Finding the Facts in Science Fiction, YORK DAILY REC., Mar. 7, 1997, available in 1997 WL 6090125 (defining cloning as the production of identical copies of animals).

103 See Kotulak, supra note 102; Reed, supra note 102.
Holstein bull months earlier.\textsuperscript{104} Research continues despite the extremely heated moral, ethical, and religious concerns surrounding this topic.\textsuperscript{105} In January 1998, Dr. Richard Seed announced his plan to pursue human cloning as an infertility treatment alternative.\textsuperscript{106} Using this method, the genetic information of one parent\textsuperscript{107} is inserted into an embryo that had its genetic information previously removed, and the child is then carried by the mother or a surrogate.\textsuperscript{108} This technique would provide infertile individuals or couples with a child that is virtually an "identical twin" to the donor parent, except for the intervening years.\textsuperscript{109} Critics assert, among other things,\textsuperscript{110} that clon-
ing procedures will not be restricted to infertile couples, but will be available to anyone who would prefer to have a replica of themselves rather than a child with its own unique genetic make-up, which, the experts strongly assert, is not the purpose of reproductive technology.¹¹¹

Despite its critics and political unpopularity,¹¹² it appears that the only real obstacle to the practice of human cloning is time.¹¹³ When human clones are finally created, the legal issues

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¹⁰⁹ See Cheshire, supra note 105 ("Differences in age and experience will separate them from us 'originals' and from themselves. In fact, . . . we will finally answer the question of whether factors such as environment and experience are more important than heredity in the development of the human organism."); Reed, supra note 102. The difference in age also raises the inevitable legal question: Is a clone an heir for inheritance purposes? See Cheshire, supra note 105. Also, there are the questions as to who will raise the clone and be responsible for him/her. The gene donor is a good candidate; the surrogate mother might claim guardianship; the state may assume protection as it would an orphaned child; or the researcher who produced the clone might take responsibility. See Reed, supra note 102.

¹¹⁰ See Banning Federal Funds for Human Cloning Research: Hearings Before the Subcomm. on Technology of the House Comm. on Science (1997), available in WL 11235877 (testimony of Dr. Hessel Bouma III) (stressing the religious and moral dangers of cloning).

¹¹¹ See id. (stating that in contrast to human person-cloning, animal, plant or microbial cloning are quite beneficial).

¹¹² Currently, the only state to have a law against cloning is California; which provides that human cloning will be punished with a $250,000 fine. See Cloning Erap, supra note 101. Republican and Democratic senators are battling not over whether cloning should be banned, but over which party's "clone banning" bill will be adopted. In the meantime, cloning is still legal since the Republican bill has been filibustered and the Democratic bill has not gotten off the ground yet. See Mara Bovsun, GOP Human Cloning Bill Bumped Off Fast Track By Senate Vote, BIOTECHNOLOGY NEWSWATCH, Feb. 16, 1998, at 1, available in 1998 WL 875052. Although the U.S. has not yet banned human cloning research like many of its European neighbors, "the U.S. government prohibits taxpayer dollars from being spent on human cloning research." Kotulak, supra note 102. In addition, the National Advisory Board on Ethics in Reproduction has studied human cloning and concluded that it provides no benefit to human society. See id. In Japan, the Education Ministry recently cited ethical problems for why it has decided, for the time being, not to allocate any government funds to human cloning research. Cloning experiments on mice and cattle, however, continue. See Ministry Decides Not to Fund R and D on Cloning Humans, JAPAN POLY & POL., Mar. 10, 1997, available in 1997 WL 8243335.

¹¹³ See Cheshire, supra note 105; Cloning knowledge 'close to completion,' SOUTH CHINA MORNING POST, Feb. 21, 1998, at 13 ("Dr. Richard Seed . . . said yesterday knowledge on human cloning might be complete within two months if current experiments on calves and monkeys showed positive results."); see also Cloning Erap, supra note 101 ("According to [Dr. Seed], he is almost near to perfecting his process that will enable him to produce as many as 200,000 human clones a year. The initial
will be sweeping and unprecedented. These issues, however, will be very similar to those surrounding the development of artificial insemination. In addition, cloning takes posthumous conception to the extreme. As well as being able to have yourself cloned more than once within your lifetime, you could be cloned once or repeatedly after death without the need to freeze sperm or embryos, thereby throwing the probate and social security laws into a tailspin. This situation will cause moral and ethical dilemmas, and confound our legal system. This Note does not attempt to present or resolve any of the complicated issues cloning raises, however, one possible preemptive measure is to begin answering somewhat related questions now, as they apply to artificially and posthumously conceived children, through legislative enactments.

II. PROPRIETARY/CUSTODY RIGHTS IN HUMAN REPRODUCTIVE MATERIALS

Courts have been struggling with issues related to reproductive technology since the 1940s with little or no legislative guidance. Beginning in the 1970s, and escalating into the 1990s, the number of legal problems has risen due to the widespread availability and use of advanced reproductive techniques. At the same time, according to some statistics, the fertility rate in America has steadily dropped, with recent studies revealing...
that there are at least 2.4 million American couples afflicted with fertility problems.\(^\text{117}\) Courts continue to face a seemingly endless stream of first impression cases involving the rights of mothers and (especially) fathers,\(^\text{118}\) surrogate mothers,\(^\text{119}\) egg donors,\(^\text{120}\) sperm donors,\(^\text{121}\) homosexual\(^\text{122}\) and heterosexual unmarried partners,\(^\text{123}\) husbands and wives,\(^\text{124}\) fertility clinics and sperm banks,\(^\text{125}\) potential relatives,\(^\text{126}\) children of artificial conception,\(^\text{127}\) and more. Courts have generally taken the view that the court in such situations sits in equity\(^\text{128}\) and they have merged what limited statutory guidance exists and somewhat related case law with legal principles and concepts of equity.\(^\text{129}\) This has resulted

(Machelle M. Seibel et al. eds., 1993) (stating that a national center for health statistics survey has found that infertility rates appear not to have changed).

\(^\text{117}\) See Seibel, supra note 3, at 11; see also Dickens, supra note 21, at 24 (commenting on the fact that "[t]he full extent of infertility is not known because many infertile people do not seek to conceive children.").

\(^\text{118}\) See, e.g., In re Adoption of Anonymous, 345 N.Y.S.2d 430 (Sur. Ct. 1973) (finding mother's ex-husband must consent to present husband's adoption of child born of AID during first marriage); Strnad v. Strnad, 78 N.Y.S.2d 390 (Sup. Ct. 1948).


\(^\text{120}\) This is such a new development in assisted reproductive technology that it has not yet caused notable legal battles. However, it almost certainly will. See Crockin, supra note 56, at 410 ("An even newer area of uncharted legal territory involves donor eggs.").


\(^\text{128}\) See, e.g., Davis, 842 S.W.2d at 591 ("[T]here can be no easy answer . . . . [W]e must weigh the interests of each party to the dispute, in terms of the facts and analysis set out below, in order to resolve [the] dispute in a fair and responsible manner."); see generally DOLGIN, supra note 20, at 178–82 (stating that courts have adopted an "intent" approach in an attempt to balance traditional concepts of family with the situations generated by the new technologies).
in a patchwork approach that provides few assurances to the substantial number of couples entering into these procedures, to the clinics and doctors who treat them, or to the children who are conceived through them.\textsuperscript{130}

Usually when a fertilization procedure is abandoned due to divorce,\textsuperscript{131} relocation,\textsuperscript{132} or other reason stemming from the participants, the issues begin (and in many cases end) with determining who should be allowed to take possession of and make decisions regarding the remaining vials of sperm or the individual embryos that have been cryogenically frozen. Many courts have recently faced this previously unknown dilemma, particularly in the area of frozen embryos.\textsuperscript{133}

A. Possession and Disposition of Embryos

Prior to the introduction of \textit{in vitro} fertilization, and more significantly cryopreservation, there was little question that an embryo belonged to the woman who was carrying it.\textsuperscript{134} If she was married, the law presumed that her husband was the father for inheritance and custody purposes, but generally did not grant him power of possession or disposition over the embryo.\textsuperscript{135} We

\textsuperscript{129} See DOLGIN, supra note 20, at 176–77 (noting that courts have either bypassed statutory law altogether because of its inapplicability or attempt to torture the statute into conforming to situations that were never imagined at the time of enactment); Crockin, supra note 56, at 407.

\textsuperscript{130} See Crockin, supra note 56, at 407.


\textsuperscript{133} See, e.g., York, 717 F. Supp. at 422; Kass, 663 N.Y.S.2d 581; Davis, 842 S.W.2d at 602 n.25; see generally Garcia, supra note 88, at 183 ("Fetuses and babies may become the focus of ongoing legal battles.").

\textsuperscript{134} See WARNOCK, supra note 39, at 56 (stating that the existence of embryos outside of the mother's uterus has initiated questions of "ownership" but that "ownership" of embryos should not be permitted, only a right of use and disposal in the donor couple (or the storage facility)); Anne Helum, Legal Regulation of New Reproductive Technologies: Continuity and Interconnectedness versus Freedom and Justice, in BIRTH LAW 109, 110 (Anne Helum ed., 1993).

\textsuperscript{135} See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (finding that husband's interest in the embryo did not rise to the level of allowing him to veto a woman's choice to have an abortion); see also Knoppers & LeBris, supra note 3, at 336 (noting that while the father's paternal interests have traditionally received some protection, that protection generally depended on a "live birth").
have entered a brave new world, however, in which fertility clinics and doctors have become third parties to the conception process and where we can now sustain an embryo outside of the mother. This has opened the door to new types of disputes surrounding the fate of embryos, such as control over embryos, custody of embryos, rights to initiate a pregnancy, abandonment issues, and intestate, inheritance, and succession issues. The concept of the embryo as property was explored in 1989, before Judge Clarke of the Eastern District of Virginia. Specifically, the issue was whether a fertility clinic was required to forward a cryopreserved embryo to another clinic at the request of the relocating parents. In York v. Jones, the court found that a bailment had been created and that, therefore, the clinic was required to follow the instructions of the embryo's "owners."

Dr. and Mrs. York had argued a cause of action in detinue, which required, inter alia, that the plaintiffs show "a property interest in the thing sought to be recovered,... [that] the property is capable of identification,... [and that] the property must be of some value." The court found these requirements

136 See ALDOUS HUXLEY, BRAVE NEW WORLD (1932) (describing an eerie future in which technology is all controlling, morality is turned on its head, and society is structured through genetic engineering).

137 See Crockin, supra note 56, at 407 ("For the first time, conception has been taken out of a woman's body .... Moreover, third parties are now actual participants and not merely assistants in procreation.").


139 See WARNOCK, supra note 39, at 56-57 (recommending that if the parties cannot agree on how to use the embryo, the storage facility gains the right to determine how to use or distribute the embryos). The Warnock Committee also recommended that at the end of ten years without use, the embryos pass automatically to the storage facility. See id. at 56. But see Andrews, supra note 4, at 404-05 (noting the psychological damage to progenitors that could occur if their embryos are given to another couple to use against their wishes).

140 See WARNOCK, supra note 39, at 56 (recommending that if one donor dies, the right to use or dispose of the gametes goes to the surviving spouse, and if both die, the right passes to the storage facility).


142 717 F. Supp. 421.

143 See id. at 425, 427.

144 Id. at 427.
had been satisfied and, in doing so, impliedly defined the embryo as "property."\textsuperscript{145}

The York decision has not inspired uniform adoption of its approach by other courts, and a split of authority has emerged.\textsuperscript{146} In the prominent case of Davis v. Davis\textsuperscript{147} the trial and intermediate courts treated the dispute over seven embryos as a battle for "custody."\textsuperscript{148} Davis was originally a divorce proceeding which had progressed without incident until the question of the embryos was raised.\textsuperscript{149} Mary Sue Davis, the wife, wanted to be allowed to keep the embryos and continue trying to become pregnant; Junior Lewis Davis, the husband, wanted them left in their frozen state until he decided whether he wanted to become a father in this manner.\textsuperscript{150} The trial court determined that the embryos were "human beings" and awarded custody to Mary Sue, along with a court directive that she be allowed to implant the embryos in an attempt to "bring these children to term."\textsuperscript{151} The Court of Appeals disagreed, finding that Junior had a constitutional right not to father children where no pregnancy has occurred.\textsuperscript{152} In addition, the Court of Appeals found that the parties had a joint interest in the fate of the embryos and therefore awarded joint custody.\textsuperscript{153}

By the time the case reached the Tennessee Supreme Court, Mary Sue and Junior had both remarried and their positions had changed; Mary Sue wanted to donate the embryos to a childless couple, and Junior wanted the embryos discarded.\textsuperscript{154} After noting the scarcity of guidance in this area, either from statute or case law, the court discussed the various approaches currently

\textsuperscript{145} See id.; see generally SINGER & WELLS, supra note 4, at 88 (stating that 90% of couples surveyed who have embryos frozen believed the embryo to be their "property").

\textsuperscript{146} Compare LA. REV. STAT. ANN. §§ 9:121 to 9:133 (West 1991) (granting embryos status as persons) with Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (stating that embryos are neither property nor persons).

\textsuperscript{147} 842 S.W.2d 588.

\textsuperscript{148} See id. at 589.

\textsuperscript{149} See id.

\textsuperscript{150} See id.

\textsuperscript{151} Id.

\textsuperscript{152} See id.

\textsuperscript{153} See id.

\textsuperscript{154} See id. at 590.
being advanced in legal journals\textsuperscript{155} and the opinions set forth by the American Fertility Society.\textsuperscript{156} The focus of the court's opinion was split between the legal status of an embryo\textsuperscript{157} and "[t]he [r]ight of [p]rocreational [a]utonomy."\textsuperscript{158} The court distinguished \textit{York v. Jones} and determined that the embryo holds a unique position somewhere between that of property and of a human being.\textsuperscript{159} The court also concluded that a desire not to father children from cryogenically-preserved embryos was protected under the constitutional right to privacy, which the United States Supreme Court has interpreted to include a right to choose whether or not to procreate.\textsuperscript{160} In the end, the court upheld Junior's right not to father children\textsuperscript{161} and directed the fertility clinic to dispose of the embryos in accordance with its normal procedure and the court's opinion.\textsuperscript{162}

The \textit{Davis} case highlights one of the fundamental arguments cryogenically-frozen embryos raise: Are these children? This, in turn, raises the always difficult questions: what is a human being and when is "life" created and when should it end?\textsuperscript{163} Unfortunately for the legal and scientific communities, as we race into the next millennium, we are moving at a dizzying rate toward the point where deftly avoiding these questions with superficial and malleable answers will no longer be an adequate solution.

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\begin{itemize}
\item \textsuperscript{155} See id.
\item \textsuperscript{156} See id. at 593.
\item \textsuperscript{157} See id. at 594–95 (expanding on the " 'Person' vs. 'Property' Dichotomy"); see \textit{generally SINGER \& WELLS supra} note 4, at 88–89 (suggesting that embryos could be treated as property and then discussing King Solomon's solution, splitting the child which would result in divorcing couples each having one set of identical twin embryos, or in the alternative, abandoning the property categorization and instead wage a custody battle).
\item \textsuperscript{158} See \textit{Davis}, 842 S.W.2d at 593.
\item \textsuperscript{159} See \textit{id.} at 596–97; see also \textit{WARNOCK, supra} note 39, at 56 (concluding that the right of a donor couple to use and dispose of embryos is limited but failing to establish how it is limited and instead simply urging donors to act responsibly).
\item \textsuperscript{160} See Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); see also \textit{Crockin, supra} note 56, at 408 ("The United States Supreme Court has long recognized that the right to procreate is one of a very few 'fundamental' rights and therefore deserving of the utmost protection and respect.").
\item \textsuperscript{161} See \textit{Davis}, 842 S.W.2d at 601–03.
\item \textsuperscript{162} See \textit{id.} at 604–05.
\item \textsuperscript{163} See \textit{generally Knoppers \& LeBris, supra} note 3 (arguing that embryos are always life, and as such need legal protection from commercialization and research).
\end{itemize}
The complexity and immediacy of this situation will escalate as increasingly more children are conceived after the death of a parent. Who has the right to determine the fate of an embryo whose parent is dead?

The ethical questions associated with the storage and destruction of embryos are apparent and have long been debated. For some, the destruction of these embryos is equivalent to abortion, while for others it is the prevention of a potential pregnancy which never occurred. In an unusual case, *Del Zio v. Columbia Presbyterian Medical Center*, a woman was awarded $50,000 in damages for emotional distress sustained when a doctor discarded the contents of a *petri* dish, which included the woman's egg and her husband's sperm, intended for later use in *in vitro* fertilization.

At present, neither the *York* court's property approach to embryos nor the "in-between" approach of the *Davis* court is the universally-accepted standard. In the first New York case on the subject, *Kass v. Kass*, a 3-2 majority of the Appellate Division reversed a lower court's finding that Mrs. Kass should be allowed to retain and use frozen embryos after her divorce. Mr. Kass wanted the embryos to be donated to the fertility clinic, as per the informed consent document that both had signed when joining the *in vitro* fertilization program. Under the informed consent document, the Kasses agreed that if the couple was unable to make a decision regarding the disposition of the embryos, the clinic would retain the embryos for research. Initially, Mrs. Kass had not objected, but, after filing for divorce, she changed her mind and requested that she be allowed to use the remaining embryos for future pregnancy attempts. The trial court found for Mrs. Kass, and made the strained analogy that "a husband's procreative rights in a situation involving in vitro fertilization were no greater than in the case of an in vivo fertiliza-

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165 See id. at *11.
166 See *Shah*, supra note 20, at 555 (asserting that most courts have taken the *Davis* interim approach).
168 See id.
169 See id. at 583.
170 See id. at 584.
tion, such that those rights essentially terminated at the moment of fertilization.”

On appeal, there was unanimous consensus that “[a] woman’s... control over her own body [was] not implicated in the IVF scenario until such time as implantation actually occurs.” The court split, however, on the interpretation of the consent documents that the Kasses had signed. A two-judge plurality concluded that the Kasses had demonstrated an intent to donate the embryos in the consent documents. In a concurring opinion, Justice Friedmann cited Davis and found that Mr. Kass’s desire to not be a parent was sufficient to trump Mrs. Kass’s desire to have children in this case, regardless of intent. The two dissenting justices did not find that Mrs. Kass had a conclusive right to the embryos; instead they felt that the consent documents were not dispositive of intent and would have remanded the case “to flesh out the record so that the parties’ respective interests and burdens may be evaluated and a factual determination may be rendered.”

The appellate court appears to have dodged the entire question of property versus person by resolving the issue based on contract interpretation. In addition, the opinion is carefully phrased in order to side-step the whole controversy by expressly avoiding words like “custody” or “ownership.” Thus, in New York, the questions as to whether a frozen embryo is considered property that can be controlled and distributed as such, or whether it is an entity over which custody must be granted, or possibly even whether it is a legal person with undeniable rights, remain unanswered.

\[\text{Id. at 585.}\]
\[\text{Id. at 586.}\]
\[\text{See id. at 595 (Miller, P.J., dissenting).}\]
\[\text{See id. at 597 (Miller, P.J., dissenting).}\]
\[\text{See id. at 592 (Friedmann, J., concurring).}\]
\[\text{Id. at 601. Like the court in Moore v. Regents of California, the dissenters in Kass felt that the embryos should be treated as sui generis where the achievement of policy goals should be the fundamental driving force. See Moore v. Regents of the Univ. of Ca., 793 P.2d 479, 495 (Cal. 1989).}\]
\[\text{The court uses the word “control.” E.g., Kass, 663 N.Y.S.2d at 586, “the woman who provides the eggs does not have the sole right to control the embryos’ fate” (emphasis added).}\]
\[\text{Id. at 592.}\]
\[\text{See Andrews, supra note 4, at 399. Louisiana has also banned the sale of}\]
The discussion of whether an embryo is a person, property, or something in-between, inevitably leads to related moral problems. The fate of frozen embryos raises questions that provoke legal, medical, scientific, philosophical, religious, moral, and ethical debate. While some religions refuse to authorize even artificial insemination as a permissible practice,\(^{180}\) even the most "progressive" religions have a difficult time condoning the destruction or complete de-humanization of frozen embryos.\(^{181}\)

From a moral and ethical perspective, it can be argued that maintaining embryos in a frozen state of suspended animation is equivalent to torture, and their destruction should be preferred to stockpiling unused and unwanted embryos for an indefinite period.\(^{182}\) On the other hand, there is a substantial moral and


\(^{180}\) According to the Vatican:

Contraception deliberately deprives the conjugal act of its openness to procreation and in this way brings about a voluntary dissociation of the ends of the marriage. Homologous artificial fertilisation, in seeking a procreation which is not the fruit of a specific act of conjugal union, objectively effects an analogous separation between the goods and the meanings of marriage.

MICHAEL J. COUGHLAN, THE VATICAN, THE LAW AND THE HUMAN EMBRYO 5–6 (1990) (quoting Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation published by the Vatican's Congregation for the Doctrine of Faith, ch. II, sect. 4, p. 27). In sum, under strict adherence to Catholicism, in vitro fertilization, artificial insemination donor, and most forms of artificial insemination husband are "morally illicit." Artificial insemination would be permissible "only if it serves to facilitate the conjugal act and is not a substitute therefor." COUGHLAN, supra, at 6.

\(^{181}\) While Hasidic Jews contend that in vitro fertilization is only permissible between a husband and wife, Reformed Jews believe that "Jewish law permits high-tech fertility methods, including the transfer of embryos." Marilyn Kalfus, Rabbis Wrestle With Issues Raised by In-vitro Methods (last updated Apr. 22, 1996) <rworld@link.freedom.com> (ORRegister) It appears, however, that the aim of both is to continue the Jewish heritage, and needless destruction of embryos would seem to be against the beliefs of either group.

\(^{182}\) See Edward Yoxen, Historical Perspectives on Human Embryo Research, in EXPERIMENTS ON EMBRYOS 27, 27 (Anthony Dyson & John Harris eds., 1990); Access Research Network, Origins Research Archives, What is in the Fridge? <http://www.arn.org/docs/orpages/or131/lejeune.htm> (Aug. 11, 1999) (transcript of Dr. Jerome Lejeune's testimony at the Davis v. Davis trial). Dr. Lejeune, an expert witness for Mrs. Davis, testified that in his carefully considered opinion, embryos are living beings and therefore, we do not have the option to destroy them. On the other hand, Dr. Lejeune argued, leaving embryos in a frozen state is equivalent to torture. He concluded that the only solution was to thaw and implant the embryos.
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ethical issue in discarding a potential life. In addition, assisted reproductive technology procedures are expensive and it is morally and ethically difficult to justify destruction of embryos, which might be able to provide a less affluent childless couple with the opportunity to be parents, simply because the donors no longer have a need for them.

From a medical perspective, this procedure is aimed at helping infertile couples, and while a doctor’s duty is to protect and enhance life, if forced to put the interests of an embryo on the same level as that of their parents, assisting infertile couples could become unduly burdensome. Because cryopreservation of embryos can improve the chances that an infertile couple will conceive a child, it is possible that this type of pressure on phy-
Physicians could ultimately prove detrimental to the couples seeking treatment.

Expanding possibilities and lack of regulation in reproductive technology have energized researchers and laboratories. Progressions in the field have been rapid. Placing responsibility for every embryo created, however, could quickly dampen if not drown this effort. While some may see a decline in the progression as a positive retreat from "playing God," infertile couples and others genuinely benefiting from the frenzy would likely see their hopes diminished.

Ultimately, the law must make a determination on the legal status of an embryo. Statutes will need to be enacted in every state that interpret and synthesize the various positions into a manageable, constitutionally-valid standard that reflects local public policy, and that can be applied and defended. As yet, very few statutes have been developed in this country or abroad in this area. Since an embryo is a potential life, this is a highly

Moghissi, supra note 23, at 124–25 (citing various studies which show that artificial insemination with frozen sperm has a 40 to 70 percent success rate).

187 See generally Richard Gold, Own ing Our Bodies: An Examination of Property Law and Biotechnology, 32 SAN DIEGO L. REV. 1167, 1210 (1995) (noting that both the majority and Justice Broussard's dissent in Moore agreed that maximizing functioning markets in bodily substances was their primary purpose).

188 See WARNOCK, supra note 39, at 9 ("[T]here is a body of opinion which holds that it is wrong to interfere with nature, or with what is perceived to be the will of God."). But see SINGER & WELLS, supra note 4, at 26 ("God's will cannot be discovered by simply assuming that it is in accordance with the way things have always been done since in that case every innovation in history would have to be dismissed as contrary to God's will."").

189 See Douglas J. Cusine, Experimentation: Some Legal Aspects, in EXPERIMENTS ON EMBRYOS 122–23 (Anthony Dyson & John Harris eds. 1990) (stating a long-held belief that legislative guidance is essential); Knoppers & LeBris, supra note 3, at 335–36 (asserting that protection of the embryo must be "specifically spelled out in law").

190 See GUNNING & ENGLISH, supra note 45, at 33 (noting that Australia was the first country to enact in vitro fertilization and embryo research statutes in, The Infertility (Medical Procedures) Act 1984); Crockin, supra note 56, at 407 (noting that Australia and Great Britain have established "national commissions to develop guidelines for the assisted reproductive technologies"). See generally INTERNATIONAL SURVEY OF LAWS ON ASSISTED PROCREATION (Jan Stepan ed. 1990); IN VITRO DIAGNOSTIC MEDICAL DEVICES: LAW AND PRACTICE IN FIVE EU MEMBER STATES: FRANCE, GERMANY, ITALY, SPAIN AND THE UNITED KINGDOM (Bernard Maassen & Robin Whaite eds. 1994); DEREK MORGAN & ROBERT G. LEE, BLACKSTONE'S GUIDE TO THE HUMAN FERTILISATION & EMBRYOLOGY ACT 1990: ABORTION & EMBRYO RESEARCH, THE NEW LAW (1991).
contentious topic. By using current technology a child could be born today that was created after one or both "parents" are dead. Therefore, decisions on the disposition and possession or custody of frozen embryos can have monumental and long-lasting effects.

B. Possession and Disposition of Sperm and Ova

There have not yet been as many cases regarding possession and disposition of the building blocks of the embryo, the sperm and ovum, as there have been about the embryo itself. This may be due in part to the fact that freezing human eggs, which increases their availability and subsequently their quantity, is still in the early stages of practicability. \(^{191}\) In addition, sperm does not carry the same momentous moral uncertainty that surrounds an embryo. \(^{192}\) In fact, most would assume that sperm belongs to the man from whose body it came. \(^{193}\) Gametes, however, are particularly unique and important human cells, and like other human materials, there is a legal reticence to categorize such items as "property," freely alienable and freely inheritable. \(^{194}\)

The controversial case of Moore v. Regents of the University of California \(^{195}\) reinforced the long held legal proposition that human body parts are not property, in the conventional sense. \(^{196}\) John Moore, a hairy-cell leukemia patient at the UCLA Medical Center had traveled from his home in Seattle to Los Angeles on many occasions, prior to and after having his spleen removed, to give "blood, blood serum, skin, bone marrow aspirate, and

\(^{191}\) See Kluger, supra note 25, at 106.

\(^{192}\) See SINGER & WELLS, supra note 4, at 74–75 (discussing "[t]he uniqueness of the embryo" as differentiated from the egg and sperm).

\(^{193}\) See Shapiro & Sonnenblick, supra note 11, at 229.

\(^{194}\) See Shah, supra note 20, at 558 ("Because courts have been reluctant to consider human body parts to be property, it is unlikely that courts would consider gametes and preembryos to be property.") (footnote omitted). See, e.g., 42 U.S.C. \(\S\) 274(e) (1994) (prohibiting the payment of fees for donating human tissue).

\(^{195}\) 793 P.2d 479 (Cal. 1990).

\(^{196}\) See id. at 489 ("T]he laws 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.") (footnotes omitted). See Hecht v. Kane, 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993); Note, Personalizing Personalty: Toward a Property Right in Human Bodies, 69 TEX. L. REV. 209, 220 (1990).
samples for the alleged purpose of monitoring his medical condition. After eight years of these visits, Moore discovered that the samples were not treatment-related but, instead, the samples, as well as his spleen, were used in extremely lucrative medical research because of their unique immunities. Moore sued the doctors involved and the medical center for, inter alia, conversion for their fraudulent removal, and for use of his bodily substances for the doctors' and medical center's own profit. The court, however, allowed Moore to go forward only against his treating physician in an action for failure to obtain informed consent. The court dismissed the other counts and held that Moore could not sue in conversion because he had no proprietary interest in his bodily substances, particularly his spleen, as it was in his best interest to have it removed. The California Supreme Court explained that allowing such a cause of action could, among other things, inhibit scientific research severely.

Gametes, on the other hand, have been treated somewhat differently than other bodily materials. Both sperm and eggs are currently salable and there is a growing likelihood that they are inheritable, or at least devisable if special provisions are made. Many legal scholars and the court in *Hecht v. Kane*,

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197 Moore, 793 P.2d. at 481 (internal quotations omitted).
198 See id.
199 See id. at 480–82.
201 See id. at 480–81.
202 See id. at 493, 497.
203 See id. at 491 n.32.
204 See id. at 493–97.
205 See generally SINGER & WELLS, supra note 4, at 65–68 (discussing the arguments for and against being permitted to sell gametes).
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 [the] Probate Code . . . .

*Id.* at 283.
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distinguish Moore and analogous cases that upheld genetic patents as against the specimen provider, from the rights a person may have in their gametes. Also distinguishable are the wrongful removal autopsy cases, generally finding no inheritable rights in a decedent's body parts and the laws prohibiting the sale of body parts for organ transfers. It appears that these distinctions are attributable to: 1) the body's ability to continue generating gametes, like blood, which can also be legally sold; and 2) the fact that gametes, unlike diseased organs, are usually not removed for a direct benefit of the individual, but instead are usually the result of a voluntary donation. It has been suggested that, like the Davis interim category for embryos, gametes also exist on a middle plane, exhibiting some of the characteristics of property, such as control over disposition, while not embodying the true and full meaning of "property."

Ordinarily humans have very limited property rights in most of their bodily substances and organs while alive, but it is routinely accepted that we may proscribe or prescribe what happens to those parts upon death. For example, we may donate our body to science; we may give a kidney to a relative; we may leave our liver to a research organization; we may prohibit the permanent removal of any body parts even if an autopsy is performed; we may request that our heirs or executor decide how to allocate our parts; and it appears we may even leave sperm or ova to a loved

207 20 Cal. Rptr. 2d at 281–82. Hecht is the leading United States case to address the issue of posthumously conceived children.

208 See, e.g., Moore, 793 P.2d 479. The leading Supreme Court case establishing the validity of patents on organic material is Diamond v. Chakrabarty, 447 U.S. 303 (1980).

209 See, e.g., Brotherton v. Cleveland, 923 F.2d 477, 482 (6th Cir. 1991).

210 See Steinbock, supra note 99, at 65; see also Scott, supra note 5, at 190.

The tissue most widely bought and sold in the United States is blood. Payment is also made as a routine matter for urine, skin, and other body fluids such as sweat, saliva, and semen. As long ago as 1970, the ongoing price for blood was $10 to $15 per pint, and for semen somewhere between $15 and $35 per ejaculation.

Id.

211 See Hecht, 20 Cal. Rptr. 2d at 280 n.4, 282; see also Steinbock, supra note 99, at 65 (acknowledging that “[s]perm, unlike blood, is not lifesaving, nor necessary for health”).

212 See Singer & Wells, supra note 4, at 87–88 (asserting that embryos and gametes are neither people nor inanimate objects and can not be “owned in the ordinary sense of that word.”)
one to conceive a child. An intention to leave any body part, however, especially gametes, should be unambiguously expressed, preferably in testamentary form, if it is to withstand judicial scrutiny.

There are currently very few cases dealing specifically with the issue of whether gametes can be bequeathed. The cases and the extensive legal commentary that they generate seem to suggest that, while gametes may be "property" to the extent they may be devised like other body parts, they are not innately inheritable. On the other hand, if they are not property, at least to the extent of being capable of being given as a gift or bequeathed, the question of posthumous conception, other than from an embryo, becomes moot. While no state has yet enacted statutes delineating a decedent's right to leave gametes for later procreation, current legal analysis and analogy to existing testamentary rights in other bodily substances seem to show that such a right does exist. Since these cases are becoming more common and since gametes have long been treated as a commodity, laws must be established that specify where all parties stand on the issue of possession and disposition of gametes, especially where the donor is deceased.

*Hecht v. Kane* is the only United States judicial decision to date that has dealt with property rights in frozen sperm and the possibility of posthumously conceived children by a non-spouse. Significantly, the California Court of Appeals concluded that gametes exist in a special category between property and person, in which there are sufficient property rights to permit devise. The court distinguished the present case from *Moore* because of the uniqueness of the issues raised by gametes. Mr. Moore had his diseased spleen removed and, at the time of most of the sample extractions, was afflicted with leukemia. Mr. Kane, how-

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214 See Collins, supra note 213, at 675 (citing the American Fertility Society's comments in the Ethical Statement on In Vitro Fertilization, which say that gametes and concepti are the property of the donors, as well as the fact that sperm is widely treated as property by medical professionals).


216 See id. at 283.

217 See id. at 280 n.4.

218 See id.
ever, had voluntarily made deposits in a sperm bank with which he had signed a "storage" agreement expressing his continued ownership right; he paid for the sperm's storage; and expected that he would get the sperm back if he paid a withdrawal fee.\textsuperscript{219} The court also cited statements by the American Fertility Society: "'It is understood that the gametes and concepti are the property of the donors'" and they have the right to dispose of the items as they choose, "'within medical and ethical guidelines'"\textsuperscript{220} provided there is no applicable legislation.

Whether gametes are property has generated polarized and passionate opinions.\textsuperscript{221} Some feel they should not be treated as property in any way under any circumstances, i.e., not salable and not devisable. These individuals feel it demeans human life and is oppressive for those in desperate financial situations.\textsuperscript{222} Under this view, gametes could never be sold or bequeathed. Others believe that all human body parts should be intrinsically the property of the individual, to do with as he or she desires, especially when driven by dire economic conditions. From this perspective, to be truly free human beings we must have complete dominion over our own bodies. Under this theory, gametes would be salable and devisable without limit. A third perspective takes the middle approach, asserting that gametes are never purely or wholly property, but under certain circumstances and if intent is clear, they may be both sold and devised. This approach contends that we must work backwards: First look to what the party wants done with the gametes, and then decide whether this meets policy standards. If it meets policy standards, it is property; otherwise, it is not.

The third approach, which is a variation of the Hecht decision, seems to be the most workable. It embraces the apparent legal preference, in such highly personal areas, for adopting a flexible middle-level approach.\textsuperscript{223} This method possesses the de-

\textsuperscript{219} See id. at 282.
\textsuperscript{220} Id. at 282, 283.
\textsuperscript{221} See Shah, supra note 20, at 558.
\textsuperscript{222} See id. (reporting that some feel that the sale of embryos and gametes is equivalent to "slavery and baby-selling").
\textsuperscript{223} See Brown, supra note 1, at 74 (noting that courts and legislatures have been reluctant to intrude into "private reproductive decisions" but have acknowledged that there are some state interests which could be valid); see also Planned Parent-
sirable combination of allowing gametes to be sold and bequeathed given the proper conditions and preventing uses that society finds offensive. As it stands, however, with no applicable statute, the third approach is far too dependent on the moral or subjective perspective of the individual judge or doctor. The first steps toward clarifying this hazy area of law are: clearly stating when and how a decedent may leave gametes for posthumous conception, when and how intent will be determined, when and how gametes may be sold or given \textit{inter vivos}, and when and how proprietary claims may be made for gametes.

III. ISSUES AND RELEVANT LAWS ARISING FROM AND AFFECTING POSTHUMOUSLY CONCEIVED CHILDREN

When a child is conceived posthumously, that is, when pregnancy begins after the death of one or both parents, that child's legal status is in doubt. As the law stands today, not only may that child's conception be contested through a battle over the distribution of a decedent's gametes or frozen embryos, but once the child is born, there is substantial doubt that child will be deemed a legal descendant of the decedent. Similar to the confusion of the early days of artificial insemination, there are no statutes to clarify the status of these children or their parents. Unfortunately, like illegitimate children and other children born with the assistance of unconventional scientific methods, these children may have to suffer through years if not decades of legislative inaction or oppression, stripping them of their birthrights, as a result of the acts of their parents.

\footnotesize{hood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976) (finding valid state interest sufficient to surpass woman's interest in reproductive freedom).

\textsuperscript{224} \textit{E.g.}, unrestricted experimentation on embryos. \textit{See} Cusine, \textit{supra} note 189, at 124--26 (exploring the arguments for and against allowing any experimentation on embryos and concluding that some ought to be allowed within legislative guidelines).

\textsuperscript{225} "Whether an embryo is seen as 'life' or 'property' apparently depends on where in the country, and before what judge or lawmaker, the disputing parties find themselves." Crockin, \textit{supra} note 56, at 409--10; \textit{see also} DOLGIN, \textit{supra} note 20, at 178--82 (explaining why the intent-based analysis of many courts is ineffective, inconsistent, and may lead to results at odds with the true intent of the parties because of its subjectiveness).

\textsuperscript{226} \textit{See} Brown, \textit{supra} note 1, at 79 (noting that the death of both parents ignites unique property considerations in relation to preserved embryos).}
Today there are more and more opportunities for, and thus an increasing number of, children being born posthumously. It appears, however, that most of these births have not been opposed and, therefore, no legal intervention occurred.\textsuperscript{227} As a result, issues regarding the legal status of the posthumously conceived child and his or her parents remain unanswered for now. Such issues include: the legitimacy status of the posthumously conceived child; the need for a clearly expressed intent to have a child posthumously for that child to be legally recognized; whether a posthumously conceived child can inherit,\textsuperscript{228} collect social security, military service, and other benefits from the deceased parent;\textsuperscript{228} whether the father’s estate can be held liable for support payments, whether a posthumously conceived child can

\textsuperscript{227} See, for example, the case of the Louisiana woman who asked for and was granted social security benefits for her posthumously conceived child. This case, in which the woman was impregnated three months after her husband’s death, never reached a courthouse. See Shah, supra note 20, at 561–62.

\textsuperscript{228} Inheritance issues surrounding posthumously conceived children abound. See WARNOCK, supra note 39, at 54 (“[T]he evidence presented to us drew attention to non-medical problems that may arise if frozen gametes or embryos are used after prolonged storage. Serious legal complications may well arise, for example in relation to inheritance ... .”). The Warnock Commission also noted that “posthumous fertilisation could cause real problems of inheritance and succession. Account would have to be taken of issue who might be born years after the death.” \textit{Id.} at 55.

The inheritance issues include: (1) whether a child conceived posthumously is an “heir” of the decedent, so that even if no financial provisions were made and there was no explicit intention on the part of the decedent to have a posthumous child, the child would take as a natural heir; (2) whether other children or heirs of the decedent can contest the birth or status of a posthumous child because it could tie-up distribution of the estate or diminish their portion; (3) whether being posthumously conceived cuts the child off from all inheritance rights from other members of the decedent’s family; see, e.g., Estate of Gordon, 501 N.Y.S.2d 969 (Sur. Ct. 1986) (holding that being born of AID does not preclude a child from inheriting from the “paternal” grandfather even without the husband’s written consent to the procedure and even when the mother and her husband are no longer married as long as consent was manifested at the time the procedure was performed); and (4) whether members of the decedent’s family inherit from the posthumously conceived child.

Moreover, there are the implications of both the common law Rule Against Perpetuities and the probate requirement that an heir survive the decedent by 120 hours; and whether an individual’s desire to reproduce posthumously is restricted under the United States Constitution.

\textsuperscript{229} See Shah, supra note 20, at 561–62 (citing case in which Louisiana mother of posthumous child was granted social security benefits for her daughter by the Social Security Commissioner, despite finding by Social Security Appeals Council that she was not entitled to the benefits because Louisiana law did not recognize posthumous children as heirs of the deceased parent).
sue for the wrongful death of the deceased parent; and whether a deceased person can be a "parent" with the affiliated rights and responsibilities.

A. Significant Developments in the Common Law

The first case to address the fate of posthumously conceived children was a 1984 French case, Parpalaix v. CECOS. Alain Parpalaix, age 26, was dying of testicular cancer when he made one deposit of sperm in CECOS, a government-run sperm bank. At the time he was living with Corinne, whom he later married, just two days before he died. After his death, Corinne requested the sperm deposit from CECOS, which denied her request, adhering to their policy not to release sperm to anyone but the donor and, absent express instructions, never to a widow for the purpose of posthumous conception. Alain had left no instructions. Corinne and Alain's parents took CECOS to court, claiming that as Alain's only living heirs they alone had the right to his sperm. CECOS responded, claiming that its only legal obligation was to Alain, that the deposit had been made solely for therapeutic purposes, and that sperm is not inheritable and only devisable when the decedent makes this intention expressly clear.

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230 See Scrivens v. Carrion, N.Y. L.J., Sept. 12, 1997, at 31 (noting that the posthumously born child of a woman not married to the decedent can possibly maintain an action for wrongful death, as long as the decedent's paternity is proven).
232 See id. at 229–30.
233 See id. at 230.
234 See id. at 229–31.
235 The Parpalaixs' argued that under French Civil Code Article 1939, the sperm was a "movable object" which had been placed in a bailment with the sperm bank, therefore it was inheritable and could be retrieved as long as all of the heirs were in agreement, which they were. Id. at 230.
236 See id. at 231. CECOS had three contentions: 1) CECOS was liable for the sperm only to the legal donor and under their normal deposit arrangement, it was not returnable to heirs; 2) That sperm is innately not inheritable since it is an indivisible part of the body, and because Alain had left no express instructions as to the fate of the sperm, Corinne could not merely claim it; and 3) That the sperm deposit had been used solely to aid Alain psychologically while he was battling testicular cancer, and that a birth from sperm obtained for treatment purposes only would be against public policy. See id.
The French court acknowledged that, under the current French Civil Code, any child born to Corinne from Alain's sperm would not be able to inherit from Alain because a "child born more than 300 days after the putative father's death is deemed illegitimate" and thus, can not inherit through the father. The court did not offer a solution to this "unfortunate result," but instead implied that these laws are outdated and inadequate in the face of today's myriad of reproductive assistance techniques. Like the court in the subsequent Hecht case, the Parpalaix court determined that sperm is neither simple inheritable property nor "an indivisible part of the body" because of its unique connection with the fundamental right of procreation. Ultimately, the court awarded the sperm to Corinne, not on a property theory, but on the theory that Alain's unequivocal intention for Corinne to be artificially inseminated with his sperm was proven by the testimony of his parents and widow.

The leading United States decision to date in the area of posthumously conceived children is Hecht v. Kane. Prior to his suicide, William Kane had made several deposits in a Los Angeles sperm bank with the apparent knowledge and encouragement of his girlfriend, Deborah Hecht. It was later contended by William's two grown children that Deborah, with whom William had been living for the preceding five years, was aware William was contemplating suicide, and may even have assisted him in making arrangements. Regardless, prior to his death on October 30, 1991, William had executed a will duly recorded and on file with the Los Angeles County Superior Court, which expressly

237 See id. at 231.
238 See id. at 231–32.
239 See id. at 232, 232 n.22 (quoting the court, "Must we . . . under these circumstances, revise our traditional ideas of conception?").
240 Id. at 232.
241 See id. The court "described sperm as 'the seed of life . . . tied to the fundamental liberty of a human being to conceive or not conceive.'" Id. (alteration in original). The court then refused to apply contract principles because "the fate of the sperm must be decided by the person from whom it is drawn. Therefore, the sole issue becomes that of intent." Id.
242 See id. at 232–33. Corinne was later inseminated, however, because of the small amount of sperm and its poor quality, she did not become pregnant. See id. at 233.
243 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
244 See id. at 276.
245 See id. at 276, 284.
stated that all rights and title he had in his "sperm stored with any sperm bank or similar facility" should pass to Deborah.246 Further, William expressed his intention that Deborah use his stored sperm, if she desired, to become pregnant.247

William had also included, in the agreement he signed with the sperm bank, his authorization of the release of his semen specimens to Deborah.248 Finally, augmenting the proof of his intentions, William wrote a letter to his two living children from a previous marriage explaining why he killed himself, and addressed it to his living children and to any children he hoped he would have with Deborah.249 To the latter he stated, "I have loved you in my dreams, even though I never got to see you born."250

William had named Deborah his executrix and had left her almost his entire estate.251 His two grown children from his prior marriage contested the will, which left them only a piece of land in Monterey, California, upon which the house he had left to Deborah stood.252 Ultimately, Deborah was not made executrix of William's estate and she entered into a settlement agreement under which she would instead receive 20% of sums in excess of $190,000 and some furniture, while each of the children would receive 40% and share the house.253 After settling, Deborah attempted to retrieve the sperm from the sperm bank, but the administrators at the sperm bank would not release it to her.254 Deborah argued that the sperm was not an asset of the estate, but instead, was a gift to her given in William's lifetime and, therefore, it was not subject to the settlement agreement.255 She claimed that by not releasing the sperm to her, the first settlement agreement had been breached.256 The children protested, defending the validity of the settlement agreement, but they also submitted a second settlement agreement declaring that the es-

246 Id. at 276.
247 See id. at 276–77.
248 See id. at 276.
249 See id. at 277.
250 Id.
251 See id. at 276–77.
252 See id. at 277.
253 See id.
254 See id. at 278.
255 See id.
256 See id.
tate would assign any interest it may have in the sperm to Debo-
rah if she would indemnify the estate against any future claims
brought by any of William's posthumously conceived children. Debo-
rah agreed.\textsuperscript{257}

At a hearing on the second settlement agreement, an estate
creditor protested and the children decided not to sign.\textsuperscript{258} There-
after, the children submitted a petition that the sperm be de-
stroyed or, alternatively, that 100\% or at least 80\% of the sperm
be given to them.\textsuperscript{259} Deborah again responded that, because the
sperm was an \textit{inter vivos} gift, it was not subject to division of the
estate, and even if it was part of the estate, the first settlement
was reached based on the agreement that she would receive all of
the sperm, as the will specifically directed.\textsuperscript{260} The trial court or-
dered the sperm destroyed and told Deborah's lawyer\textsuperscript{261} that this
case could now go up to the appellate level where it belonged for
the guidance that was desperately needed.\textsuperscript{262}

The court in \textit{Hecht} addressed several of the policy and con-
stitutional issues in dictum. The decision was limited to finding
a property interest in the sperm sufficient to devise it. The Court
of Appeals analyzed the interest William had in his stored sperm
and determined that he did, in fact, have a limited property in-
terest, similar to the one found in \textit{Davis v. Davis} for embryos.\textsuperscript{263}
The court distinguished \textit{Moore} because of the uniqueness of gam-
etes and determined that if it could be shown that William in-
tended to leave the sperm to Deborah, she could be entitled to it
since he had the power to bequeath it.\textsuperscript{264}

\textsuperscript{257} See id.
\textsuperscript{258} See id.
\textsuperscript{259} See id. at 278–79.
\textsuperscript{260} See id. at 279.
\textsuperscript{261} Ms. Hecht was represented by Marvin L. Rudnick and Michael J. Partos of
Los Angeles and J.R. Nerone of Reseda, California. See id. at 276. It is unclear from
the opinion's quote of the statements taken from the lower court's record which of
these attorneys the comments were addressed to. See id. at 279 n.3.
\textsuperscript{262} See id. at 279–80. Upon being asked by Hecht's attorney "for the legal basis
of the ruling, the court stated, 'It really does not matter, does it? If I am right, I am
right and if I am wrong, I am wrong .... This is something that is going to have to
be decided by the appellate courts. Let's get a decision.'" Id. at 279 n.3.
\textsuperscript{263} See id. at 282–83.
\textsuperscript{264} See id. at 283; see also Mika & Hurst, supra note 42, at 1013–14 ("[T]he
\textit{Hecht} court held that Kane was entitled to will the sperm to Hecht and, provided she
could establish his intent to do so, the sperm belonged to her.").
While the appellate court remanded the case for determination as to the validity of the first settlement agreement, the second settlement agreement, and the will as expressive of William’s intent, the court found there was a sufficient property interest in the sperm to make it part of the estate, and thereby validated the probate court’s jurisdiction. The court did not pass on whether a property interest in sperm was valid as applied to an *inter vivos* gift, and denied Deborah’s writ that the sperm be released to her, pending a decision on the decedent’s intent. The court reminded the decedent’s children that if the first agreement was valid, as they claimed, Deborah would be entitled to 20% of the sperm. The court also dismissed the children’s argument that Deborah should be denied the sperm on the basis of policy reasons against the artificial insemination of unmarried women, pointing out there is no pertinent authority in California denouncing the practice, and in fact, the court cited many cases permitting it. Finally, the court rejected the children’s argument that post-mortem artificial insemination should be void as against public policy because of a lack of authority to support the proposition and a reticence to restrict the decisional authority of gamete providers.

The *Hecht* court suggested, in dictum, as did the French court in *Parpalaix*, that under the local probate code, a posthumously conceived child would likely not be able to inherit from a deceased parent. Further, both the *Parpalaix* court and the *Hecht* court agreed that posthumously conceived children are not

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265 *See* *Hecht*, 20 Cal. Rptr. 2d at 283, 289 n.9.

266 *See* id. at 283 (declining to extend the holding of this case to gift or personal property law, or *causa mortis* gifts).

267 *See* id. at 284.

268 *See* id.

269 *See* id. at 287. The court refused to accept the children’s arguments that either California case law or state adoption statutes supports the proposition that unmarried women should not be artificially inseminated. *See* id. at 286–87. The court also noted that “New York’s high court also recently rejected the argument that the state has a sufficiently strong interest in providing two-parent families to discriminate against unwed fathers.” *Id.* at 286.

270 *See* id. at 288–91. “It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.” *Id.* at 290–91 (quoting Johnson v. Calvert, 851 P.2d 776 (Cal. 1990)).

271 *See* id. at 290.
per se against public policy. The decedent's grown children in *Hecht* made the argument that posthumously conceived children are against public policy and destructive to family integrity, and therefore, should not be sanctioned by law. The judge disagreed, citing the total lack of authority to support this proposition and relying extensively on the court's reasoning in *Davis* to uphold reproductive autonomy. The court also pointed to a California Supreme Court case which stated that restrictions on the uses of reproductive technology are solely a decision for the legislature because of the significant impact on such "fundamental . . . rights of procreation and privacy."

A relatively recent British Court of Appeals' decision addressed the issue of whether a woman should be given sperm taken from her dying husband to conceive their child posthumously. Stephen Blood was suffering from meningitis and had reportedly discussed the idea of posthumous conception with his wife and instructed her that he wanted her to have his child posthumously if he died. It appears uncontroverted that Stephen did not leave any written record of this intention because his worsening condition and his ultimate death came on rapidly and somewhat unexpectedly. While unconscious in the hospital, the physicians used an "electro-ejaculation" procedure to cause Stephen's sperm to travel into his bladder; they then ex-

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272 See id. at 288–89; Shapiro & Sonnenblick, supra note 11, at 231–33.
273 See *Hecht*, 20 Cal. Rptr. 2d at 287, 288–89.
274 See id.
275 Id. at 291 (quoting Johnson v. Calvert, 851 P.2d 776 (Cal. 1993)).
276 See *Ex parte Blood*, 2 W.L.R. 806 (C.A. 1997). This case has prompted discussion in the British press as to the moral and ethical implications of allowing such a practice. See Melanie Phillips, *In the Brave New World of Embryo High Technology, the Father Need Play No Role Other Than As a Gamete in a Test Tube*, OBSERVER, Jan. 26, 1997, at 2, available in 1997 WL 7809606 (arguing that not only is the practice of posthumous conception generally offensive, but that it is completely inappropriate under the circumstances of this case); Diane Blood, *Matters of Fact That Respect the Wishes of My Late Husband*, OBSERVER, Feb. 2, 1997, at 27, available in 1997 WL 7809901 (responding to Ms. Phillip's criticisms and defending her position by clarifying the facts of the case).
278 See *Blood*, 3 W.L.R. at 1178 (chronicling the sudden onset of meningitis symptoms and Stephan's being certified as clinically dead four days later); Phillips, supra note 276, at 2 ("[M]r. Blood had not provided [written consent] not surprisingly, since he had had no reason to imagine that he was going to die prematurely.").
tracted the sperm using a catheter and separated it from the urine.\textsuperscript{279}

The \textit{Blood} case illustrates how determining the intent of the decedent is the central focus of many of these cases. Intent on the part of the decedent must be shown. In this case, the combination of an absence of any written confirmation combined with the unusual way in which the sperm was collected raised sufficient doubt as to Stephen's intent, such that the Human Fertilisation and Embryology Authority refused to allow Mrs. Blood to be inseminated.\textsuperscript{280} The Court of Appeals confirmed that under British law written consent is required for the collection of sperm and the only possible exception is when the sperm is used immediately, i.e., not preserved.\textsuperscript{281}

1. Analogous Decisions: Artificial Insemination and In Vitro Fertilization

It is well established that whenever the law is faced with a novel area, as reproductive technology and posthumously conceived children certainly are, developed bodies of law are looked to for guidance and analogies are drawn. In the case of posthumously conceived children, the courts often look to the related areas of artificial insemination and \textit{in vitro} fertilization. For example, when Judge Lillie in \textit{Hecht} was faced with the first instance in the United States of a woman claiming the right to use her deceased lover's sperm to have his child posthumously, analogies were drawn, principally to developed case law on artificial insemination.\textsuperscript{282}

\textsuperscript{279} See \textit{Blood}, 2 W.L.R. at 809; \textit{Blood}, \textit{supra} note 276, at 27 (explaining that the procedure was completely painless for her comatose husband); \textit{Phillips}, \textit{supra} note 276, at 2 (describing graphically the procedure of electro-ejaculation); \textit{see also} Shah, \textit{supra} note 20, at 547 (recounting the 1994 request by Anthony Biaz's widow to the medical examiner to try to save her husband's sperm so that she could attempt to become pregnant).

\textsuperscript{280} See \textit{Blood}, 2 W.L.R. at 806 (citing the Human Fertilisation and Embryology Authority's denial to allow Mrs. Blood to either use her husband's sperm to conceive his child in Britain or to take the specimens abroad to have the procedure done).

\textsuperscript{281} See \textit{id.} at 806–07.

Historically, children born out-of-wedlock or conceived with one other than a spouse were illegitimate and legally "fatherless," and thus unable to inherit and without support rights. When artificial insemination became more common, courts deciding the fate of artificially-conceived children often deemed them "illegitimate" and denied any support or inheritance rights. In one of the earliest United States cases on the status of a child born of artificial insemination, *Strnad v. Strnad*, the New York court found that a child conceived by artificial insemination using donor sperm is similar to an adopted child, and, as such, the father would be considered at least a foster parent, if not a natural parent, with similar rights and obligations. The court did not broach the possibility that the child may be considered the actual legal offspring of the consenting father nor did it discuss any inheritance rights, but instead reasoned that since Mr. Strnad possessed at least the rights of a foster parent he should be allowed weekly visitation with the child.

In a later New York case, *Gursky v. Gursky*, the court distinguished *Strnad* as dealing only with visitation rights and dismissed any statements in *Strnad* that could be construed as asserting that children of artificial insemination are legitimate. The court ultimately found that Mr. Gursky did have an obligation to support the child based on contract estoppel theory. The decision expressly stated that artificial insemination using sperm other than the husband's "with or without the consent of the husband, constitutes adultery on the part of the mother, and that a child so conceived is ... illegitimate." The *Gursky* court cited the Illinois case of *Doornbos v. Doornbos* as persuasive. In *Doornbos*, Illinois adopted the Canadian reasoning of the time, that children of an Artificial Insemination Donor (AID) cannot be legitimate because it is the conception of a child with one other

283 78 N.Y.S.2d 390 (Sup. Ct. 1948).
284 See id. at 391–92.
285 See id. The court also noted that it was not passing judgment on the correctness of artificially-assisted procreation, leaving that discussion to the realms of "sociology, morality and religion." Id. at 392.
287 See id. at 410–11.
288 See id. at 411–12.
289 Id. at 411.
291 See Gursky, 242 N.Y.S.2d at 411.
than a legal spouse that adultery laws aim to discourage, not the act of extramarital sexual intercourse.\footnote{See Doornbos, 139 N.E.2d 844.}

This perspective on artificial insemination was entirely rejected by the California Supreme Court in \textit{People v. Sorensen}.\footnote{437 P.2d 495 (Cal. 1968) (in banc).} The court announced that when a husband consents to and/or participates in the physician-assisted AID of his wife, where the donor is completely anonymous, he cannot later renge on his responsibilities to that child.\footnote{See id. at 498. The California Supreme Court left no room for doubt, “[t]he law is that defendant is the lawful father of the child born to his wife, which child was conceived by artificial insemination to which he consented, and his conduct carries with it an obligation of support within the meaning of . . . the Penal Code.” Id. \footnote{Id. at 499.}} The court pointed out that without the active participation of the husband, the child would not exist.\footnote{See id. at 501-02. The court also discussed the related arguments for categorizing artificial insemination as adultery, and pointed out the “patently absurd” results this could effect, for example, the procedure may be performed by a female doctor or the sperm could be injected by the woman’s own husband. See id. at 501.} In dictum, the court conceded that whether these children will be considered “legitimate” or “illegitimate” was a decision for the legislature, but it criticized arguments that labeled these children illegitimate and explained the policy reasons that compelled legitimacy.\footnote{353 S.E.2d 877 (S.C. 1987). \footnote{Id. at 878.}}

Many cases have since clarified and expanded on the \textit{Sorensen} decision and subsequent artificial insemination-related statutes, many of which will find a woman’s husband the father of an AID baby when the husband gives written consent. In \textit{In re Baby Doe},\footnote{Id. at 878.} the South Carolina Supreme Court held that “a husband who consents for his wife to conceive a child through artificial insemination, with the understanding that the child will be treated as their own, is the legal father of the child . . . and will be charged with all the legal responsibilities of paternity, including support.”\footnote{See id. at 878-79. “Husband’s consent to his wife’s impregnation by artificial insemination may be express, or it may be implied from conduct which evidences knowledge of the procedure and failure to object.” Id. at 879.} The court resolved that although many state statutes require the husband’s written consent to declare him the legal father, equity demands that he be held responsible for support when his consent can be implied.\footnote{Id. at 879.}
In *In re Marriage of Adams*, the Supreme Court of Illinois applied Florida law in determining whether the husband had an obligation to support a child of AID because the insemination had been performed in Florida and the parties were living there at the time. The court noted, in dictum, that Florida's broader statute provided the child with a greater opportunity to obtain support, and that it did not want to hamper that possibility by adjudicating the case under the more restrictive Illinois statute. The court also observed that even under Illinois' statute (based on the Uniform Parentage Act), which required written consent of the husband, there was a possibility that absent such a writing, contract estoppel theory could still mandate child support.

Since the 1970s, courts have faced countless and increasingly unfamiliar scenarios arising from artificial insemination—such as they are now beginning to face with posthumously conceived children. In *C.M. v. C.C.*, C.C. testified that she told C.M., whom she had been dating, that she wanted to have a child by artificial insemination and asked C.M. to provide the sperm. C.M. agreed to do so, although C.C. refused to have sexual intercourse before they were married. The artificial insemination was performed by C.C. at home without a physician. C.M. claimed that he was under the impression he would be the baby's recognized father but C.C. vehemently objected. C.M. sued for and won visitation rights with the baby. The court opined that "natural father[s] [are] entitled to visitation rights with... [their] illegitimate children." Because C.M. was the baby's admitted natural father and not an anonymous donor, he was granted visitation privileges despite the artificial method of con-

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300 551 N.E.2d 635 (Ill. 1990).
301 See id. at 639.
302 See id.
303 See id. at 637, 638. "It may be the case that a support obligation will be found even in the absence of a parent-child relationship." Id. at 638.
305 See id.
306 See id.
307 See id. at 821–22.
308 See id. at 822.
309 See id. at 825.
310 Id. at 822.
The court cited policy reasons for its decision, principally, that a child have a father. Further, the court distinguished between an AID situation where the mother is married, and one in which the woman will be a single parent, because in the former, the woman’s husband is the child’s legally recognized father.

The court in Jhordan C. v. Mary K. took this analysis a step further, holding that under the Uniform Parentage Act, as enacted by state law, a mother could negate any claim of parental rights by the sperm donor through even limited involvement of a physician in the procedure, whether or not the donor was known to the mother. In this case, Mary and her partner Victoria had agreed that Mary would have a child through artificial insemination whom they would raise jointly. Jhordan, an acquaintance, agreed to provide the sperm and the insemination was performed at home by either Mary alone or Mary and Victoria. Jhordan was listed as the father on the birth certificate and after the child’s birth he made clear his intention to behave as the baby’s father and Mary protested. Jhordan later sued for and won visitation rights. He was also required, however, to reimburse the county for public assistance paid for the baby and to commence child support payments. The court found that the main requirement for a mother to claim protection under the California statute against unwanted intrusions by sperm donors, was that the sperm be “provided to a licensed physician.” Therefore, the court reasoned, had Jhordan given the sperm to a licensed physician, regardless of the fact that the procedure was

311 See id. at 824–25.
312 See id. at 824.
313 See id. at 823–24.
314 224 Cal. Rptr. 530 (Ct. App. 1986).
315 For a detailed discussion of the UPA, see infra Part III § B.
316 See Jhordan C., 224 Cal. Rptr. at 535.
317 See id. at 532.
318 See id.
319 See id. at 532–33.
320 See id. at 533, 538.
321 See id. at 533.
322 See id. (quoting CAL. CIV. CODE § 7005(b) (West 1975), amended by § 7613 (1994)).
performed at home and that Mary knew the donor’s identity, she could have prevented Jhordan from asserting parental rights.323

In Nancy S. v. Michele G.,324 Nancy sought a declaratory judgment that Michele, her lesbian partner, was not a parent to her two children born of AID.325 The court agreed, finding that Michele was not a “parent” within the meaning of the Uniform Parentage Act (“UPA”), which includes a presumption that a mother’s “husband” is a parent.326 In addition, the court found that Michele was neither a de facto parent, which has a very limited scope and is usually reserved for situations where the natural parent is unfit, nor did she stand in loco parentis.327 The court asserted that any extension of the classification “parent” is a legislative decision.328

In Karin T. v. Michael T.,329 Karin sued for support of her two children born of AID while she was “married” to Michael.330 Michael, it turns out, had been born Marlene and had been living as a man for many years. At the time of trial, his actual sex was unknown.331 The court, after sharing its surprise at being given the positive defense of womanhood in a paternity case for child support, cited the contract estoppel reasoning of Gursky, as well as public policy, in support of its holding that Michael was liable for child support.332

Today, children born of artificial insemination are almost always determined to be the legal child of the married couple, re-

323 See id. at 534.
325 See id. at 214.
326 See id. at 214, 215 n.3.
327 See id. at 216–17.
328 See id. at 219 (“[G]iven the ‘complex practical, social and constitutional ramifications’ of expanding the class of persons entitled to assert parental rights, the decision [is] better left to the Legislature.”) (quoting In re Marriage of Lewis & Goetz, 250 Cal. Rptr. 30 (Ct. App. 1988)).
330 See id. at 781.
331 See id. at 781–82. The court noted that regardless of whether or not Michael was indeed a transsexual, for purposes of this action the court found him to be female. See id. at 782.
332 See id. at 781 (“To this rather routine-appearing Petition, the respondent has filed an Answer which sets forth as an affirmative defense . . . . ‘That respondent is a female . . . .’”).
gardless of the sperm's origin. This conclusion is usually based on either state statutes (some modeled after the Uniform Parentage Act) or on an estoppel theory of contract, where the husband's consent forms the basis of the contract. The majority of parentage questions that continue to arise with respect to children of artificial insemination involve single mothers, lesbians, and, most recently, widows or lovers of deceased sperm donors.

Artificial insemination is not only the oldest and most common form of current reproductive assistance, but it is a procedure that is likely to be used in combination with cryopreservation to produce posthumously conceived children. Therefore, these decisions, and their underlying rationales, are persuasive when facing similar questions in relation to posthumously conceived children. The courts, through recent case law, clearly have declined to extend the definition of "parent" and generally reserve this right for the legislature. Therefore, if posthumously conceived children are to be deemed "children" of the deceased "parent," this decision will almost certainly have to come from the state legislatures.

Whereas artificial insemination is the preeminent process by which a deceased man can parent posthumously conceived children, in vitro fertilization can be used by either a man (with the assistance of a surrogate) or a woman for post-mortem parenthood. If embryos are cryogenically preserved, a woman may, after the death of her partner, attempt to become pregnant through in vitro fertilization. A man, on the other hand, can secure a surrogate to undergo in vitro fertilization of a frozen em-

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333 See SCOTT, supra note 5, at 205 (applauding the United States for the UPA and acknowledging that in most nations in the world, there is still a serious legal question as to whether a consenting husband will be deemed the "father" of a child of AID).


bryo that was created from his and his deceased partner's gametes. Therefore, the developing case law surrounding *in vitro* fertilization, and surrogacy in particular, is instructive on the issues and potential solutions associated with posthumous conception.

When an embryo is created during an *in vitro* fertilization procedure from the sperm and egg of a husband and wife, there can be little question as to who the genetic parents are. If a surrogate mother is used, however, the issue becomes who is the "natural" or "legal" mother. In *Anna J. v. Mark C.*, the surrogate mother threatened to keep the unborn child and the genetic parents sued for custody. The court found that, while giving birth to a child is one way for the natural mother to establish herself as the legal mother under the UPA, a surrogate with no genetic ties to the child cannot be the natural mother, even if she gives birth. This reasoning seems to suggest that, if an embryo were implanted in a surrogate after the death of the genetic mother, that surrogate would be unable to assert any parental rights over the resulting child. Thus, the child would solely belong to the sperm provider. The result may be different, however, if neither parent is alive at the time of the child's birth. For example, a California couple, who died in a plane crash,

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337 See *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 375–76 (Ct. App. 1991) (noting that blood tests are not infallible but explaining that in this case the results conclusively showed the surrogate was not the mother and she offered no evidence to show the tests were faulty).

338 Justice Sills lamented in *Anna J.*, 286 Cal. Rptr. at 371, that the modern legal system does not allow judges to use King Solomon's technique to determine who has more concern for the child:

> [And the King said, bring me a sword, and they brought a sword before the King. And the King said, divide the living child in two, and give half to one and half to the other. Then spake the woman whose the living child was unto the King . . ., and she said, O my Lord, give her the living child, and in no wise slay it. But the other said, Let it be neither mine nor thine, but divide it. Then the King answered and said, Give her the living child, and in no wise slay it: she is the mother thereof.]

*1 Kings* 3:16, 27.

339 286 Cal. Rptr. 369.

340 See id. at 372–73. In a letter that "Anna," the surrogate sent to the genetic parents, she told them, "[T]his situation can go two ways. One, you can pay me the entire sum early . . ., or two you can forget about helping me but, calling it a breach of contract and *not get the baby!*" Id. at 372 n.11.

341 See id. at 377.
two frozen embryos in Australia at the time of their death. If at least thirty couples expressed interest in the embryos as a result of the widespread publicity the event generated. If the embryos had been carried to term, would the resulting children have inherited from their wealthy gamete providers, who had only one other heir?

Cases such as Anna J. v. Mark C. and the turmoil an unsuccessful surrogate motherhood agreement produces have inspired legal scholars and motivated lawmakers. In fact, the bulk of the Uniform Status of Children of Assisted Conception Act ("USCACA") of 1988 deals with the formation and enforcement of surrogacy contracts. While undoubtedly legislation is needed, the USCACA does not provide sufficient guidance on post-mortem situations, including surrogacy, and what structure the Act does include is likely too restrictive to be upheld as con-

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343 See SINGER & WELLS, supra note 4, at 87 (noting that couples from various countries volunteered to carry the embryos); Saltarelli, supra note 342, at 1033.

344 See SINGER & WELLS, supra note 4, at 86–87 (recounting the controversy that arose surrounding the status and fate of these embryos and the argument made by Professor John Noonan from the University of California that under California law the embryos had rights in the decedents' estate).

345 See, e.g., In re Baby M., 525 A.2d 1128 (N.J. Super. Ct. 1987) (upholding the surrogacy contract and thereby granting custody to the sperm donor and his wife and terminating the surrogate mother's parental rights), aff'd in part, rev'd in part 537 A.2d 1227 (N.J. 1988) (holding the surrogacy contract unenforceable because it was equivalent to baby selling, awarding the surrogate mother visitation privileges, while leaving custody with the adoptive parents).

346 See, e.g., LORI ANDREWS, BETWEEN STRANGERS: SURROGATE MOTHERS, EXPECTANT FATHERS, & BRAVE NEW BABIES (1989); MARTHA A. FIELD, SURROGATE MOTHERHOOD: THE LEGAL AND HUMAN ISSUES (1988); PRETORIUS, supra note 66.

347 See Garcia, supra note 86, at 213; see, e.g., UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 184 (Supp. 1998); SURROGATE PARENTING, supra note 27, at 19 (1988).

348 See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §§ 5 (Surrogacy Agreement), 6 (Petition and Hearing for Approval of Surrogacy Agreement), 7 (Termination of Surrogacy Agreement), 8 (Parentage Under Approved Surrogacy Agreement), 9 (Surrogacy: Miscellaneous Provisions), 9B U.L.A. 184; c.f. id. at 185 (Prefatory Note) ("This Act has made only limited tangential use of so-called surrogacy components and then only to augment and clarify the rights of children born under the new technology as well as the rights of the parties to these arrangements.")
stitutional. It appears conclusive, however, that according to the USCACA and common law, privileges do not attach to a surrogate mother solely because she carried the baby when she is not a gamete provider.

B. The Uniform Acts

In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act ("UPA") as a guide for the courts in determining the status of children born outside of traditional boundaries. As of 1998, eighteen states have adopted this Act. The UPA addresses issues raised by parenthood in general and, specifically, in regard to artificial insemination, the legal status of sperm donors and the husband of the woman who has undergone AID. Section 5 of the UPA, titled Artificial Insemination, has been adopted in a number of states and provides in pertinent part:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the

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349 See UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287, 289 (1987) (acknowledging that the Act's main focus was to establish "substantive legal equality for all children regardless of the marital status of their parents"); Anna J. v. Mark C., 286 Cal. Rptr. 369, 373 (Ct. App. 1991) (citing the guidance provided by the UPA as assisting them to reach a decision); Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 533 (Ct. App. 1986) (stating that the California statute was adopted almost verbatim from the UPA).


351 See UNIF. PARENTAGE ACT § 5, 9B U.L.A. 301.
insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship.\textsuperscript{352}

The Prefatory Note to the UPA cross-references the Uniform Act on Paternity ("UAP"), which states in pertinent part, "[t]he father of a child which is or may be born out of wedlock is liable to the same extent as the father of a child born in wedlock... for the... necessary support... of the child,"\textsuperscript{353} and "[i]f paternity has been determined [or has been acknowledged according to the laws of this state], the liabilities of the father may be enforced... by the mother, child, or... public authority... and... by other persons including private agencies."\textsuperscript{354} Generally, the determination of paternity has not yet been addressed in other state statutes. Section 7, however, provides, "[t]he court... may... order... blood tests. If any party refuses... the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require."\textsuperscript{355} Section 11 of the UPA re-enforces section 7 of the UAP regarding when blood tests will be ordered, and section 12 of the UPA gives examples of evidence that may be used in determining paternity.\textsuperscript{356} While the question of paternity of a posthumously con-

\begin{itemize}
\item \textsuperscript{352} Id. (alteration in original).
\item \textsuperscript{353} UNIF. ACT ON PATERNITY § 1, 9B U.L.A. 350 (1987); see UNIF. PARENTAGE ACT Prefatory Note, 9B U.L.A. 287.
\item \textsuperscript{354} UNIF. ACT ON PATERNITY § 2, 9B U.L.A. 352 (second alteration in original).
\item \textsuperscript{355} Id. at § 7. The Comment to § 7 states that this section, and two others, are from the UNIF. ACT ON BLOOD TESTS TO DETERMINE PATERNITY.
\item \textsuperscript{356} See UNIF. PARENTAGE ACT § 11, 9B U.L.A. 316; id. at § 12, providing:
\begin{enumerate}
\item Evidence relating to paternity may include: (1) evidence of sexual intercourse between the mother and alleged father at any possible time of conception;
\item an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;
\item blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;
\item medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and
\item all other evidence relevant to the issue of paternity of the child.
\end{enumerate}
ceived child has not yet been raised in court, as these sections of the UAP and UPA demonstrate, it is well within a court's jurisdiction to order any testing necessary to conclusively determine that a child is the posthumously conceived child of the decedent. Finally, section 4 of the UAP, titled Limitations on Recovery from Father’s Estate, provides “[t]he obligation of the estate of the father for liabilities under this Act is limited to amounts accrued prior to his death [and such sums as may be payable for dependence under other laws].” This seems to imply that if a posthumously conceived child was found to be within the class called “children,” that child may be eligible to inherit from the deceased “parent” under other support and probate laws.

The Restatement Second of Property section 25.2 supports the presumption that a child whose paternity can be proven may be included in the category “children” for inheritance purposes, regardless of whether the child was born out of wedlock. The Restatement also declares that children “conceived by means other than sexual intercourse” are “children” for inheritance purposes, as long as the child is recognized as such by the decedent. In fact, the Restatement Second specifies in a comment to section 25.3 that a child of in vitro fertilization will be presumed to be included within the primary meaning of “children” and will inherit as such. Thus, an interpretation of the Uni-

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357 UNIF. ACT ON PATERNITY § 4, 9B U.L.A. 356 (second alteration in original).
358 See RESTATEMENT (SECOND) OF PROPERTY § 25.2 (1988). This section, titled Gifts to “Children”—Children Born Out of Wedlock, provides:
When the donor of property describes the beneficiaries thereof as the “children” of a designated person, the primary meaning of such class gift term includes a descendant in the first generation of such person who is born out of wedlock. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Id.
359 See RESTATEMENT (SECOND) OF PROPERTY § 25.3 (1988). This section, titled Gifts to “Children”—Child Conceived by Means Other Than Sexual Intercourse, provides:
When the donor of property describes the beneficiaries thereof as “children” of a designated person, the primary meaning of such class gift term includes a child conceived by means other than sexual intercourse who is recognized by the designated person as his or her child. It is assumed, in the absence of language or circumstances indicating a contrary intent, that the donor adopts such primary meaning.

Id.
360 See RESTATEMENT (SECOND) OF PROPERTY § 25.3 cmt. e (1988). This comment to § 25.3, titled, In vitro fertilization and the surrogate mother, provides:
form statutes in conjunction with the Restatement Second would suggest that if the paternity of the decedent is proven, the posthumously conceived child can, theoretically, inherit as a member of the class of "children."

Over time, the UPA's use of the term "husband" provoked questions as to whether the same presumption of paternity would apply to a long-term partner. In addition, litigation began to center on what was meant by specific provisions in the UPA (e.g., "under the supervision of a licensed physician," "wife" and "husband," and "husband's consent must be in writing"), what would give rise to the presumption, and further, what was sufficient to rebut that presumption. Unfortunately, the guidelines provided by the UPA were also somewhat limited. For example, the Act referred only to children conceived through artificial insemination, thereby neglecting to indicate the status of parties involved in in vitro fertilization, GIFT, and other procedures, and how cryopreservation or posthumous conception would complicate the outcome.

If the semen of a man is used to fertilize the egg of a woman outside the uterus with their mutual consent, and the fertilized egg is implanted in the woman who furnished the egg or in a surrogate mother who is to carry the child, it is reasonable to conclude that the child thus produced for the man and woman involved is to be recognized by them as their child. It is reasonable to conclude the donor would intend such child to be included in the primary meaning of a gift to the "children" of either one. In the absence of further evidence, it is reasonable to conclude that the donor of a gift to a surrogate mother's "children" would not intend to include in the primary meaning of the class gift term the child carried by the surrogate mother.

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361 See, e.g., Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991) (holding that lesbian partner is not a "husband" under the UPA); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986) (same).

362 See, e.g., Jhordan C., 224 Cal. Rptr. 530 (holding that "provided to licensed physician" was requisite under the statute to eliminate the sperm donor's parental rights); In re Marriage of Adams, 551 N.E.2d 635, 638 (Ill. 1990) (asserting that "husband's consent 'must be in writing'" was essential for the presumption of paternity to hold).

363 See UNIF. PARENTAGE ACT § 5, 9B U.L.A. 357 (1987). This section, titled, Artificial Insemination, is the only section of the Act that directly discusses the status of children born through assisted reproductive technology and it refers only to artificial insemination. See id.

364 In fact, the Comment section following § 5 acknowledges that this section is not even conclusive on all of the possible legal issues that artificial insemination, itself, may raise. See id. at 302.
In 1988, the Uniform Status of Children of Assisted Conception Act ("USCACA") was introduced to remedy the perceived deficiencies of the UPA. As of 1998, only two states have adopted it.³⁶⁵ The USCACA provides unambiguous definitions and rules which apply to all presently available methods of reproductive technology used to aid conception.³⁶⁶ The majority of the USCACA provisions are aimed at resolving issues that arise in surrogacy situations.³⁶⁷ Section 4, however, entitled Parental Status of Donors and Deceased Individuals, denies the legitimacy of posthumously conceived children in one fell swoop.

According to USCACA section 4, "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child."³⁶⁸ This eliminates any question as to whether a posthumously conceived child may inherit or receive benefits from the deceased parent. It is as if that parent never existed for that child, i.e., that the child falls under the old common law heading of "illegitimate." On the other hand, the text of the Act itself does not address a decedent’s making of express provisions for posthumous children.³⁶⁹ Therefore, in cases like Hecht v. Kane, where William expressly denoted his intent that Deborah conceive his child posthumously, William presumably could make provisions for such child.

³⁶⁶ See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT Prefatory Note, 9B U.L.A. 184 (1997). The Prefatory note asserts, "This Act was designed primarily to effect the security and well being of those children born and living in our midst as a result of assisted conception." Id. at 185 (emphasis added). It further explains:

The narrowness of the Act is designed to limit its applicability to what is best for children. The design of the limitation was also intended to strengthen the focus of this Act in the eyes of legislators and the public as prospective legislation which is needed immediately to provide order, direction, and design with dignity to the unsettled lives of our target children.

Id.
³⁶⁷ See infra note 380; see also UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT Prefatory Note, 9B U.L.A. 184, 185 (1997).
³⁶⁸ UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4, 9B U.L.A. 189; see also WARNOCK, supra note 39, at 55, 57 (using "in utero" as the defining time for inheritance purposes).
³⁶⁹ In fact, the Comment to section 4 specifically states, "Of course, those who want to explicitly provide for such children in their wills may do so." UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, § 4 comment, at 190.
Whether a testamentary gift to a posthumous child would be acceptable under the probate laws, however, remains unanswered.

The USCACA does not attempt to prevent posthumously conceived children on policy grounds or otherwise, but in attempting to draw some clear lines, it seems to have swung too far in the restrictive direction. The blanket statement that posthumously conceived children are not the legal children of the deceased parent could circumvent the implied, and on occasion the express, wishes of the decedent. It seems likely that these cases will usually involve a grieving spouse who had been trying to conquer infertility with his or her partner in life and whose last chance to parent a child with the decedent is artificial conception—not an opportunist trying to garner more of the estate through shady practices. Although insincerity, undue influence, and selfishness have been asserted in some of the existing cases, this could be handled on a case-by-case basis in the analysis of "intent." Therefore, flatly denying the right of posthumously conceived children to be considered the children of the deceased parent seems premature. It appears that the USCACA merely perpetuates laws similar to the French laws denounced as outdated by the Parpalaix court almost 15 years ago.

C. Probate Issues

Probate issues are intimately linked with the fate of posthumously conceived children. Whether the question is a living person’s right to be granted possession to use a decedent’s gametes or frozen embryos, or whether it is a posthumously conceived child’s legal status for inheritance and benefits purposes, it will usually arise in conjunction with the probating of the decedent’s estate.

Under common law, a child born after the writing of a will, even posthumously, could cause the will to be revoked, if no other provision had been made for that child, thus protecting the inter-

370 See id.
371 See Mika & Hurst, supra note 42, at 1017 (illuminating the disadvantages of the USCACA).
372 See, e.g., Hecht v. Kane, 20 Cal. Rptr. 2d 275 (Ct. App. 1993); Ex Parte Blood, 2 W.L.R. 806 (C.A. 1997) (addressing claims that the living partner unduly influenced or manipulated the decedent, thereby clouding his true intent).
estates of these children.\textsuperscript{373} Currently, however, most states have afterborn child and pretermitted heir statutes.\textsuperscript{374} The common law and these modern statutes, however, do not address a situation where the child is conceived after death.\textsuperscript{375}

If a posthumously conceived child is not recognized as the "child" of a decedent, then he or she will not be able to inherit intestate from the deceased parent. Historically, an illegitimate child could not take in intestacy from a deceased parent and was not included in a testamentary gift, unless the decedent had made an express bequest or had unequivocally implied that a gift to "children" included illegitimate children also.\textsuperscript{376} Later this "necessary implication" doctrine was expanded to include any indication of the decedent's intent to include illegitimate children.\textsuperscript{377} Today, most modern state probate codes, and the Uniform Probate Code, allow illegitimate children to inherit as

\textsuperscript{373} See 79 AM. JUR2D. Wills \textsection 632 (1975) stating:

The common-law rule . . . is that the marriage of a man and the birth to the union thus consummated of a child capable of inheriting from him, both events occurring subsequently to the execution of his will, revoke the will so as to permit the after-born child to take his share as an heir of the testator, in the absence of a provision for the benefit of the child . . . . The birth of a posthumous child is within the rule.

\textit{Id.} (footnotes omitted).

\textsuperscript{374} See MELVIN MADISON BIGELOW, THE LAW OF WILLS 115–16 (1996); \textit{see also} UNIF. PROBATE CODE \textsection 2-302, 8 U.L.A. 322 (1983) (Pretermitted Children) (providing that a child born or adopted after the execution of a will is entitled to that portion he or she would have received if the testator had died intestate, subject to limited exceptions).

\textsuperscript{375} See BIGELOW, supra note 374, at 171 ("[Children' means] legitimate offspring in the first generation, including those \textit{en ventre sa mere}"). (emphasis added); \textit{see also} UNIF. PROBATE CODE \textsection 2-108, 8 U.L.A. 87 (1983) ("An individual in gestation at a particular time is treated as living at the time if the individual lives 120 hours or more after birth."); Unif. Act on Intestacy, Wills, and Donative TRANSFERS \textsection 108, 8B U.L.A. 24 (1993) (Afterborn Heirs) (same); \textit{cf.} BIGELOW, supra note 374, at 296–98 (explaining that certain gifts to children "to be born" are acceptable as long the gift is immediate).

\textsuperscript{376} See BIGELOW, supra note 374, at 200–01 (noting the common law presumption that illegitimate children were excluded and explaining the "necessary implication" doctrine that required that a decedent make a necessary implication for illegitimate children to inherit as part of the class "children"); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 133 (1991) ("Historically, the common law labeled nonmarital children as "filius nullius"—the child of no one. These children formally lacked the right to inherit from or through either parent.").

\textsuperscript{377} See BIGELOW, supra note 374, at 202 ("Any reasonable evidence that the testator meant [to include] illegitimate children would now be considered.").
“children,” as long as paternity is proven. Under these modern statutes, as long as the paternity of a posthumously conceived child could be proven, out-of-wedlock status of the child would not necessarily preclude inheritance standing alone.

When a decedent bequeaths property to a posthumously conceived child, a further obstacle arises in the form of the common law Rule Against Perpetuities. The Rule Against Perpetuities was intended to prevent gifts that would not vest in a particular person until some remote time in the future. According to this rule, a gift must vest no later than the end of the life of “a person in being” plus twenty-one years. While this rule could pose problems for cloning, it would likely be transcended in the case of posthumously conceived children by using the life of the surviving spouse or designated surrogate mother as the “measuring life.” The Restatement Second agrees, and further allows an immediate or postponed gift to an as yet unconceived child as

378 See UNIF. PROBATE CODE § 2-114, 8 U.L.A. 91 (1998) (“[A] person . . . is the child of [its] parents, regardless of their marital status. The parent and child relationship may be established under the [Uniform Parentage Act].”). This section also provides an alternative subsection (2) provision, for states that have not adopted the Uniform Parentage Act, which allows the parent child relationship to be established either by a showing that the parents participated in a marriage ceremony, whether or not void, or if paternity is established through adjudication. See id.; see also WAGGONER, supra note 376, at 133 (“[T]he law has come full circle. The general principle of the 1990 Uniform Probate Code is that an individual inherits from and through her or his biological parents regardless of their marital status.”).

379 See BIGELOW, supra note 374, at 96–97 (detailing the history and reasoning behind the Rule Against Perpetuities); WAGGONER, supra note 376, at 984, (providing a colorful description).

380 See BIGELOW, supra note 374, at 96 (“[A] gift is in perpetuity, and hence invalid, when the interest given is so given that it might possibly not vest until after the expiration of a life or lives in being and twenty-one years and a fraction—the period of gestation.”) (footnote omitted); WAGGONER, supra note 376, at 986 (“The common-law perpetuity period is defined as a life in being plus 21 years. The period can be extended by one or more periods of gestation, but only when an actual pregnancy makes the extension necessary.”). For a statutory rule against perpetuities, see UNIF. ACT ON INTESTACY, WILLS, AND DONATIVE TRANSFERS § 901, 8B U.L.A. 138 (1993) (including an additional restriction that “the interest either vests or terminates within 90 years after its creation”).

381 The “measuring life” is the “life in being” that is tied to whether the testamentary distribution is valid. See WAGGONER, supra note 376, at 987–88. “For a life to be a ‘measuring life,’ the person must satisfy the requirement of initial certainty, which means that there must be a causal connection between the person’s death and the vesting or termination of the interest no later than 21 years thereafter.” Id. (footnote omitted).
long as there are no other members of the class "children" alive at the time of the gift.³⁸²

The 120-hour rule will also need to be addressed. According to the Uniform Probate Code, adopted in many states, if a proposed heir does not survive a decedent by at least 120 hours, the beneficiary is treated as having predeceased the decedent and is not an heir for purposes of intestate succession.³⁸³ This would mean that a posthumously conceived child could never take as an heir, but only as a devisee. Although this is a practical rule that helps in situations where a beneficiary's unforeseen death would otherwise frustrate a decedent's wishes,³⁸⁴ it was not designed to prevent unborn children from inheriting.³⁸⁵ This rule could prevent posthumously conceived children from inheriting from their deceased parent in situations where the parent died unexpectedly, without having made an express provision for the child. It could also arise when the parent simply did not contemplate that he or she must specifically bequeath property to that child, be-

³⁸² See Restatement (Second) of Property § 26.1 (1988), (Gift Immediate in Form to a Class—When Class Closes to After-Conceived and After-Adopted Persons) providing:

If a gift that is immediate in form is made in favor of a class described as "children," "grandchildren," "brothers," "sisters," "nephews," "nieces," "cousins," "issue," "descendants," "family," or by similar class gift terms, then, unless a contrary intent of the donor is found from additional language or circumstances,

(1) such disposition excludes a person within the primary meaning of the class gift term who is conceived or adopted after the effective date of the dispositive instrument, if on that date there is a class member, or a substitute for a class member, available to take under the gift; and

(2) if there is no class member, or no substitute for a class member, available to take under the gift on that date, such disposition does not exclude any person who is within the primary meaning of the class gift term on the ground that he or she was conceived or adopted too late.

Id.; see also Restatement (Second) of Property § 26.2 (1988), (Gift Postponed in Form to a Class—When Class Closes to After-Conceived and After-Adopted Persons) (emphasis added).


³⁸⁴ See Unif. Probate Code § 2-104 comment, 8 U.L.A. 84 (1983) (explaining that this provision is meant to avoid "multiple administrations and in some instances prevent[] the property from passing to persons not desired by the decedent," in cases of common disaster).

³⁸⁵ See id. (noting that this section is "a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of one another").
lieving that a gift to "children" will suffice, or in a situation like the one in Hecht, where the decedent clearly makes his intentions known but they are resolutely contested by his existing children. In addition, if a decedent made a gift specifically to a posthumously conceived child and the class "children," instead of dividing the gift, it could, theoretically, go to the posthumously conceived child for life with the class members being entitled to a remainder interest, thus possibly circumventing the decedent's wishes.386

The most often cited, and most practical and persuasive arguments against sanctioning the birth of posthumously conceived children, apart from the ethical dilemmas, are: that it will indefinitely tie-up estates, require excessive litigation in otherwise straight-forward probate cases, and freeze-up usable assets that would need to be set aside for the contingent child.387 While these are all valid concerns, state-sponsored administrative laws of convenience, which relate to procreation decisions, are ordinarily upheld only if they slightly infringe on fundamental rights and "further a compelling state interest in the least restrictive way."388 Facilitating less-complicated probate decisions will al-

386 See RESTATEMENT (SECOND) OF PROPERTY § 28.3 (Beneficiaries of Gift Described as Named Individual and Named Individual's "Children" or "Issue") providing:

If a gift is made to a named individual and a class described as the "children" or "issue" of the named individual, or by a similar class gift term, in the absence of additional language or circumstances that indicate otherwise,

(1) the named individual is entitled to a life interest in the subject matter of the gift; and

(2) the class members are entitled to a remainder interest in the subject matter of the gift.

Id.

387 See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 comment, 9B U.L.A. 197 (Supp. 1999) ("[This provision] is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent."); WARNOCK, supra note 39, at 55; Mika & Hurst, supra note 42, at 1018–19 (noting that these "fears" should stimulate timely legislation, not inhibit it); Shah, supra note 20, at 559, 571 (noting that few states have addressed these probate issues).

388 Andrews, supra note 4, at 401. Under this standard, a recent Louisiana law requiring physicians to register embryos would likely fail, even under the Planned Parenthood v. Danforth exception for limited record-keeping, because of "its burdensome nature and lack of a valid connection with a health purpose." Id.
most certainly fail as sufficient to violate the fundamental rights of privacy and procreation under the United States Constitution.

D. United States Supreme Court Decisions

The United States Supreme Court will not ordinarily involve itself in family, reproductive technology, and probate issues unless a state enacts and attempts to enforce a statute with questionable constitutional validity. Since state legislation in the area of children conceived through artificially assisted reproduction is somewhat limited and virtually nonexistent for posthumously conceived children, the Supreme Court has not passed judgment on these issues. Taken together, however, there exists some relevant precedent in related areas that could predict how the Supreme Court might come out.

In 1980, the Supreme Court announced in Diamond v. Chakrabarty, a 5-4 decision, that living organisms "manufactured" or "manipulated" by a researcher are property that can be patented. In the eighteen years since Chakrabarty was decided, cells of foreign tribesmen in rainforests have been patented, Mr. Moore's hairy-cell leukemia cells have been patented, and an American biotechnology company has been granted a patent that identifies a gene known to produce breast cancer. It is now being argued that simply "discovering" a human gene should be enough for a patent. All of this would seem to suggest that

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389 See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). Since these issues are not expressly delegated to the federal government, under the Erie doctrine, the federal courts must apply state law in deciding these issues, unless a federal question, such as constitutionality of the statute, is raised. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).


391 See id. at 309-10.


393 See Moore v. Regents of the Univ. of Ca., 793 P.2d 479, 482 (Cal. 1990) (in banc).


395 See id. (noting that the European Parliament has passed a directive that permits patents of genetic discoveries); cf. Chakrabarty, 447 U.S. 303 (finding that organisms not found in nature are patentable).
there are categories of living, human cells which can be deemed property, and even profitable. Even Justice Brennan in his dissent in *Chakrabarty* did not express concern about the possibility of treating a living organism as property in certain circumstances for certain purposes, but instead, focused on the damage that could ensue from the monopolization of living organisms to the exclusive profit of an individual or a company.  

*Chakrabarty*, interpreted in the context of state and federal laws prohibiting the sale or inheritance of certain human body parts, would appear to stand for the proposition that while selling a limb or an organ is not permissible, there are some types of human material that can carry with it at least limited property rights.

It would not be a stretch to surmise that the unique properties of gametes would lead the Supreme Court, like the lower courts that have addressed the issue, to decide that a property right exists because of the individual's significant interest in the fate of the gametes and the body's ability to regenerate them. Although an embryo raises more complicated moral questions, the Supreme Court, based on an analysis of prior decisions, would probably find that the gamete providers have the most significant right to "control" the fate of the embryos, even if the Court declines to include them in the category of "property." The re-

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396 See *Chakrabarty*, 447 U.S. at 318 (Brennan, J., dissenting) ("Patents on the processes by which he has produced and employed the new living organism are not contested. The only question we need decide is whether Congress . . . intended that he be able to secure a monopoly on the living organism itself, no matter how produced or how used."). Justice Brennan, joined by Justices White, Marshall, and Powell, then went on to discuss the role of patent law in helping to balance progress with monopolies. See id. at 319.

397 See UNIF. ANATOMICAL GIFT ACT § 10, 8A U.L.A. 58 (1993) (stating that selling body parts to be removed on death is a felony); c.f. id. at § 3 (intimating that there must be some inherited property right by allowing certain categories of relatives to make "an anatomical gift of all or a part of the decedent's body" as long as he did not make an unrevoked refusal to donate prior to death).

398 See, e.g., Hecht v. Kane, 20 Cal. Rptr. 2d 275 (Ct. App. 1993); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).


400 Property, as traditionally defined, is:

That which is peculiar or proper to any person; that which belongs exclusively to one. In the strict legal sense, an aggregate of rights which are guaranteed and protected by the government. The term is said to extend to
sult would be that removing embryos from a fertility clinic, leaving sperm to a loved one, or even selling gametes and possibly embryos, could be found permissible under Supreme Court precedent.

In the case of *Babbitt v. Youpee*, the Supreme Court struck down a federal statute that regulated how and when a Native American testator may bequeath his rights in property located on a reservation. As indicated above, the Supreme Court is seldom called upon to settle probate issues, but this case involved a federal statute that the Supreme Court deemed to be in violation of the Fifth Amendment’s Due Process Clause. The Court found that the Indian Land Consolidation Act (“ILCA”), which required that certain fractional interests in land escheat to the tribe upon the death of the current owner, effected a taking without just compensation because it limited the testator’s ability to transfer property at death. *Babbitt* came ten years after *Hodel v. Irving*, which had struck down the predecessor to the current ILCA, and reinforced the Supreme Court’s position that statutes prohibiting a testator’s ability to bequeath his property must walk a fine line not to be deemed a “taking.” Therefore, if posthumously conceived children can overcome the Rule Against

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*BLACK'S LAW DICTIONARY* 1216 (6th ed. 1990) (citation omitted). *See generally Mika & Hurst, supra note 42, at 1007 (asserting that “decisional authority” is in the gamete providers—at least to the extent of an effect on the reproductive autonomy).*

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402 See id. at 237.
403 See id.
404 See id. The Court further found that the statute “amounted to the ‘virtua[l] abrogation of the right [of a decedent] to pass on a certain type of property’ [to a devisee] . . . [and] could not be upheld.” *Id.* at 240 (quoting *Hodel v. Irving*, 481 U.S. 704, 716 (1987)). The Court also noted that the Ninth Circuit had found that the federal statute “‘continue[d] to completely abolish one of the sticks in the bundle of rights [constituting property].’” *Id.* at 242 (alterations in original). Finally, the Court denounced the current version of the statute because it “severely restricts the right of an individual to direct the descent of his property . . . [and] shrinks drastically the universe of possible successors.” *Id.* at 244–45.
406 See id. at 734.
407 See *Babbit*, 519 U.S. at 237, 240, 242, 244–45.
Perpetuities and the 120-hour probate code requirement, statutes that limit a decedent parent's ability to bequeath property to a posthumously conceived child, or possibly even statutes that exclude those children from being classified as "heirs," may fail a due process evaluation by the Supreme Court.

Finally, the right for consenting parties to have posthumously conceived children and the right to provide for those children presumably falls under the fundamental rights of privacy and procreation.\textsuperscript{408} Beginning with \textit{Skinner v. Oklahoma}\textsuperscript{409} and later in the landmark cases of \textit{Griswold v. Connecticut}\textsuperscript{410} and \textit{Roe v. Wade}\textsuperscript{411} and its progeny, the Supreme Court has continued to develop and define these fundamental constitutional rights of privacy and procreation.\textsuperscript{412} The parameters and standards for these rights were somewhat modified in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\textsuperscript{413} but ultimately, the prior

\begin{itemize}
\item \textsuperscript{408} See \textit{Roe v. Wade}, 410 U.S. 113 (1973).
\item The Constitution does not explicitly mention any right of privacy. . . . [But] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear . . . that the right has some extensions to activities relating to marriage . . . procreation . . . contraception . . . family relations . . . and child rearing and education.
\item \textit{Id.} at 152–53 (citations omitted) (emphasis added); \textit{Eisenstadt v. Baird}, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). \textit{But see} Dame Mary Donaldson, \textit{The Control of Reproductive Research}, in \textit{REPRODUCTIVE MEDICINE AND THE LAW} 157 (A. Allan Templeton & D. Cusine eds., 1990) ("I sometimes question whether it is every woman's inalienable right to have a child regardless of the means used to produce it and whether the future welfare of any baby is not paramount to this wish.").
\item \textsuperscript{409} 316 U.S. 527 (1942) (striking down an Oklahoma statute that allowed for the sterilization of convicts guilty of prior crimes of "moral turpitude," and in so doing, establishing marriage and procreation as fundamental rights protected under the Constitution).
\item \textsuperscript{410} 381 U.S. 479 (1965) (striking down a Connecticut statute prohibiting the sale of contraceptives even to married persons and establishing the "zone of privacy" that attaches to various guarantees in the Bill of Rights).
\item \textsuperscript{411} 410 U.S. 113 (striking down a Texas statute forbidding abortion and widening the privacy and procreation rights to include the right of a woman to have control over her body).
\end{itemize}
decisions were not disturbed.\textsuperscript{414} Even given the divided court in \textit{Casey}\textsuperscript{415} and the conservative leaning of the current Supreme Court, it is certainly arguable that any statute that attempts to notably limit the availability of reproductive assistance or to restrict when or how a child may be conceived or provided for, might be held to the strict scrutiny standard,\textsuperscript{416} a test few statutes pass.\textsuperscript{417} \textit{Casey} involved abortion, an issue that has splintered the Court in the past because of the underlying moral implications,\textsuperscript{418} whereas conception of a child with a loved one after

\begin{itemize}
\item\textsuperscript{413} 505 U.S. 833 (upholding the rights of privacy and procreation espoused in \textit{Roe} but altering the test in abortion cases that determines when the state's interest outweighs the woman's).
\item\textsuperscript{414} \textit{See} \textit{Casey}, 505 U.S. at 846.
\item\textsuperscript{415} The essential holding of \textit{Roe v. Wade} should be retained and once again reaffirmed. \ldots \textit{Roe} is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child \ldots \ Our cases since \textit{Roe} accord with \textit{Roe}'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.\textit{Id.} at 857.
\item\textsuperscript{416} Justice O'Connor wrote the Court's opinion, joined by Justices Kennedy and Souter. Justice Stevens concurred in part and dissented in part. Justice Blackmun concurred in part, concurred in the judgment, and dissented in part (dissenting on the alteration of the \textit{Roe} test for competing interests). Chief Justice Renquist, joined by Justices White, Scalia, and Thomas, concurred in the judgment in part and dissented in part (acknowledging that a woman has a right to have an abortion, but that the state may do everything in its power to dissuade her). Justice Scalia, joined by Chief Justice Renquist and Justice Thomas, concurred in the judgment in part and dissented in part (dissenting on the Court's decision not to overturn \textit{Roe}). \textit{See} \textit{Casey}, 505 U.S. 833.
\item\textsuperscript{417} \textit{See} \textit{Roe}, 410 U.S. at 155 ("[Where] certain 'fundamental rights' are involved, \ldots regulation limiting these rights may be justified only by a 'compelling state interest' and \ldots legislative enactments must be narrowly drawn to express only the legitimate state interest at stake."); \textit{Skinner}, 316 U.S. at 541-42; \textit{see also} \textit{Griswold}, 381 U.S. at 485-86.
\item\textsuperscript{418} \textit{See} Andrews, \textit{supra} note 4, at 400 (noting that Louisiana's law bestowing personhood on embryos would only be constitutional if it "furthered a compelling state interest in the least restrictive manner possible"); Mika & Hurst, \textit{supra} note 42, at 1005-06.
\end{itemize
an unfortunate or unexpected death usually does not raise similar dilemmas.\textsuperscript{419}

Cases involving assisted conception and posthumously conceived children are almost certain to eventually reach the Supreme Court since they deal with constitutional issues that are intrinsic, e.g., the fundamental rights of privacy and procreation and takings under the Fifth Amendment Due Process clause, which lower courts have not yet adequately addressed.

IV. DEVELOPING RELIABLE, MANAGEABLE, EQUITABLE STATUTES

Children who are conceived after one or both of their parents are deceased could face difficult personal and emotional challenges.\textsuperscript{420} The problem is compounded because the current state of law leaves their legal status uncertain.\textsuperscript{421} Also relevant is the reality that posthumously conceived children could be the final opportunity to conceive a child with a loved one, with whom conception had not been possible in life. Moreover, with so many Americans battling infertility, it is likely that legal issues associated with reproductive technology will only grow.

It is submitted that the common law developing around these issues, with an occasional ad hoc statute, is not sufficient to provide individuals and families with adequate guidance to comfortably plan for their future or to assert their rights upon the sudden death of a loved one.\textsuperscript{422} Therefore, comprehensive and flexible legislation is needed in every state to provide courts and individuals with notice of the rights and responsibilities arising for abortions, three dissenting, and one concurring in the holding but not the opinion).

\textsuperscript{419} See Andrews, \textit{supra} note 4, at 404 ("Unlike women undergoing abortions, the goal of the couples undertaking medically-assisted reproduction is to have a child.").

\textsuperscript{420} See Hecht v. Kane, 20 Cal. Rptr. 2d 275, 288 (Ct. App. 1993) (acknowledging that some "commentators" have argued that posthumously conceived children may have psychological difficulties dealing with the fact that they were conceived using the sperm of a dead man). \textit{See generally} \textit{SCOTT, supra} note 5, at 207–09 (discussing the reasoning advanced for not informing children of the assisted conception and raising arguments for disclosure).

\textsuperscript{421} See Mika & Hurst, \textit{supra} note 42, at 1019 ("Currently, the legal status of the posthumous child is as uncertain as the definitive circumstances in which a posthumous child is allowed to be born.").

\textsuperscript{422} See \textit{DOLGIN, supra} note 20, at 182 ("[The cases to date] illustrate the deep confusions and inconsistencies in the law's response at present to the possibilities that reproductive technology occasions.").
from assisted reproductive technology, particularly when the pro-
cedure produces a posthumously conceived child.

The UPA is a start, but it is too narrowly drawn and does not
address posthumously conceived children. The USCACA is well-
intentioned and arguably upholds the decedent's Roe right to re-
productive autonomy, however, it appears to run afoul of the
Supreme Court's reasoning in Babbitt, that due process can be
violated by state or federal restrictions that prevent the distribu-
tion of an estate in conformance with the decedent's wishes, and
the Restatement Second's definition of "heir." To resolve this
situation the USCACA could incorporate language similar to the
UPA, stating that all children can inherit as long as paternity
can be proven in conformance with the standards set out in the
Uniform Paternity Act. Alternatively, the rule could be narrowed
by including a requirement that the decedent's intent to parent a
posthumously conceived child be proven, either expressly or im-
pliedly. Although cases like Hecht raise questions about undue
influence, sound mind, and other suspect factors, the majority of
cases will probably be more like the heart-wrenching Parpalaix
case, in which, it should be remembered, no instructions for dis-
tribution of the sperm were left. These proposed statutes could
be worded so as to require clear evidence of intent and consent,
thereby preventing fraud and unwanted posthumous conceptions,
while protecting the rights of those survivors who genuinely want
these children.

In addition to these changes in family law, alterations to the
state probate codes will be necessary. The changes would need to
include posthumously conceived children as members within the
definition of "children" in situations where the decedent's intent
to parent such children is clear. An exception to the 120-hour re-
quirement would also be needed for children born under these
circumstances. Current probate code sections that set out when
and how a minor is to be represented at a probate hearing will
need to include specific provisions for posthumously conceived
children. Possibly, the surviving spouse or recipient of the

423 But see Mika & Hurst, supra note 42, at 1017–18 (arguing that the USCACA
infringes on gamete providers' constitutional protection over procreation decisions).
424 If both donors died but they had specified a "guardian" or if, for whatever
reason, the surviving partner cannot represent the posthumously conceived child's
interests, a conservator of the child's interest could be appointed.
gametes or embryos could represent the unborn child's interests at these hearings.

Finally, provisions will need to be formulated on how to probate the estate while protecting any posthumously conceived child's interest. This is the most difficult issue because in many situations it is not known how many, if any, posthumously conceived children will be born. This section of the statute could authorize retention of a certain percentage of the estate for a certain number of years in some form of a trust. A formula could be developed that would take into consideration the expected number of posthumously conceived children, based either on the decedent's wishes or the technological likelihood of conception given the circumstances (e.g., amount of reproductive material available and fertility of the living partner). This formula would also need to counterbalance the number of living children and the financial responsibilities of the decedent. It may be necessary to give the courts a certain amount of discretion to balance these interests. If no child is born within the specified period, that portion would revert back to the estate and could be distributed among the heirs in accordance with their position at the time of the original probating of the will.

Legislative guidance must also be provided for determining when and whether reproductive material is property, more than property, or when it might be deemed to have independent rights necessitating individual consideration. State legislatures must clarify who has rights to sperm, ova, and embryos and under what circumstances those rights shift. These clarifications could appear in the definition section of the state probate codes, defining gametes and embryos as "interim property," capable of being bequeathed; in state property laws that declare who owns gametes and embryos, under what circumstances, and how they can be transferred; and/or in the Uniform Anatomical Gift Act425 (as adopted by the states),426 explaining the circumstances and requirements that permit the transfer of gametes or embryos.

425 For example, a provision outlining when and how a decedent would be permitted to leave gametes or embryos could be added to UNIF. ANATOMICAL GIFT ACT § 6, 8A U.L.A. 53 (1993) ("Persons Who May Become Donees; Purposes for Which Anatomical Gifts may be Made").

426 See ARK. CODE ANN. §§ 20-17-601 to 20-17-617 (Michie 1991); CAL. HEALTH & SAFETY CODE §§ 7150 to 7157 (Deering 1975); CONN. GEN. STAT. ANN. §§ 19a-279a to 19a-280a (1988); HAW. REV. STAT. ANN. §§ 327-1 to 327-14 (Michie 1996);
Although it is likely that these issues will need to be covered in various sections of the state code, such as probate law, domestic relations law, and gift law that resolve the issues by referencing each other, a statute could be enacted which would encompass most aspects of these issues. Such a statute might approximate the following:

(a) All children who were conceived from the genetic material of an individual, living or deceased at the time of conception, will be the "children" of that individual, except:

When the decedent had made his or her intention not to beget children posthumously evident, provable either by sufficient witness testimony or by having signed a statement representing this intent was either witnessed or notarized;

When the decedent had made repeated attempts, prior to his or her death, to obtain possession of and destroy all reproductive material which was being stored;

When the decedent had relinquished all rights to the reproductive material he or she had stored, either by signing a contract so stating with a fertility clinic, research facility, sperm bank or any other organization which stores and/or uses reproductive material or by demanding anonymity of status as a donor;

When the decedent had entered into an agreement to provide reproductive material solely for the purpose of research;

When the decedent had entered into an agreement with private individuals, not falling under section 3 above, for the sole purpose of providing reproductive material to assist those individuals in their separate attempt to conceive a child;

When the genetic material or gamete was taken from the decedent after death or while unconscious without the decedent having previously made clear his or her intention that such a procedure be performed in such an event.

(b) The burden of proof, clear and convincing evidence, will be on those individuals who are attempting to establish parentage to show that none of the above exceptions existed, except in the case of probate, in which case the burden is on decedent's estate to prove one of the above exceptions existed.

All posthumously conceived children of a decedent, as determined by section (a) will be deemed children for all applicable probate codes provided they are born alive within 10 years of decedent's death. Any posthumously conceived child born after that 10-year period will be barred from asserting rights against any asset of decedent's estate not specifically bequeathed to him or her.

A "posthumously conceived child" means any child who is created from the gamete of the decedent and another after the decedent's death or an embryo which had been created using the decedent's gamete and the gamete of another but had not yet been implanted at the time of decedent's death or a child created from the genetic material of the decedent.

While a person is alive, he or she has preeminent right of control over his or her reproductive material, whether inside or outside of the body, unless the person has signed a contract relinquishing all rights to the material to either a private individual or organization.

Reproductive material, including embryos, is neither property in the traditional sense, nor a person, but shall be deemed to occupy an interim category allowing for some state regulation but not prohibition of sale, bequeathal or donation.

An individual may bequeath his or her stored gametes and when there has been attempts in the recent past, within the last 3 years absent an illness that could have precluded further attempts within those 3 years, a spouse or partner may claim the stored gametes. If a living spouse, not separated from the deceased prior to his or her death, requests that the gametes of the deceased spouse be removed for future attempts at conception the hospital will promptly remove and store either 10 eggs or 10 vials of sperm, at the expense of the living spouse. A court will
then determine whether it was in line with the deceased spouse's intent that posthumous children be conceived, either giving the living spouse the gametes or having them destroyed.

An embryo created but not yet implanted at the time of the death of one of the gamete providers falls under the complete control of the other living gamete provider unless that individual has relinquished control under sections (a) or (c), at which point, the embryo is controlled by the surviving spouse or partner of the deceased gamete provider or if none exists, then the fertility clinic, research facility or other organization storing the embryo at the time of decedent's death.

If there has been assisted reproduction attempts to conceive with the partner, any other family member, other than a spouse or partner, will not be given authority over gametes or embryos of their deceased family member unless the decedent expresses such a desire in a will or notarized statement and was of sound mind at the time the statement or will was made.

An individual may specify in a will to whom he or she wishes to give his or her gametes or embryos, if the other gamete provider is either deceased or has relinquished control.

The courts will retain their ability to sit in equity to fairly resolve situations that do not fit within this statute, so as to adjust for new and changing assisted reproduction techniques.

The courts have valiantly tackled these issues on a case-by-case basis. Some state legislatures have adopted the UPA and the USCACA and have added or amended their provisions to respond to these situations. The courts, however, will be forced to resolve a constant stream of first impression cases that tread dangerously close to constitutionally protected rights without real legislative guidance; the UPA is not nearly comprehensive enough, the USCACA forfeits some essential rights and requirements of parenthood in favor of consistency, and the other ad hoc statutes in existence are generally, either limited or collateral.

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427 See DOLGIN, supra note 20, at 176 (calling the courts the "laboratory" for the legislatures, providing them with results that may later be reviewed in creating the statutes which must ultimately come to pass).

428 See id. at 177 (remarking that state statutes dealing with custody and parentage were not helpful in cases of assisted reproduction because they were outdated).
If the state legislatures continue to hesitate in addressing these issues, the Congress will need to step in. Since reproductive technology is now a billion-dollar industry in America, Congress can almost certainly legislate on issues related to it through its Commerce Clause power. The threat of such legislation may be enough to spur the states into motion—goading them to enact laws on the status of reproductive material and the fate of posthumously conceived children.

CONCLUSION

Practical, comprehensive, flexible, and standard laws will need to be developed to provide the necessary guidelines to give parents, doctors, and fertility clinics/sperm banks a reasonable opportunity to provide for posthumously conceived children. While the federal government ordinarily leaves such issues to the states, if the states are not providing for such children or are denying them their due inheritance, federal intervention will be necessary to protect these children's rights. These statutes must, however, balance the interests of the parents and children with the administrative necessities of being able to probate a will in a reasonable amount of time, as well as all the other state administrative functions that require the state to be able to ascertain parentage.

In addition, the rights of a decedent to devise property freely, as well as the constitutional right to procreate or choose not to procreate, must be carefully considered and defended. The USCACA's attempt to provide a simple unconditional answer to

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429 See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT Prefatory Note, 9B U.L.A. 192 (Supp. 1999) ("An estimated one billion dollars was spent by Americans in the year of 1987 on medical care to combat infertility."); Peres, supra note 55, at 1 (estimating that presently, Americans spend $2 billion dollars per year on fertility treatments).

430 See U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States... "); see also Perez v. United States, 402 U.S. 146 (1971); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Houston, East & West Texas Ry. v. United States, 234 U.S. 342 (1914); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

431 The ABA has recognized the significance and need for prompt action in this area. Their committee on reproduction is presently drafting a model bill to deal with the spectrum of reproductive law issues that are currently unanswered or causing confusion in the courts and society. See Peres, supra note 55, at 1.
the issue of inheritance in these situations is commendable but appears to deny the decedent, the surviving parent, and the posthumously conceived child of their substantive due process protection. A more versatile standard should be developed, accompanied by well-developed guidelines to assist judges in making fair decisions and allowing parents to plan with confidence, knowing that their wishes will be carried out.

In a society that values the individual's rights of privacy and procreation so highly, where questions on abortion have caused severe internal strife, where single-parents abound, and where so many millions of Americans face trouble conceiving a child, it seems unthinkable that we would unilaterally restrict the rights a person has in his or her own reproductive material and in the freedom to decide when and how to have children. Instead of being scarred for life, these children could certainly grow-up better adjusted than "the kid next door," embraced by the love of a parent who went to great lengths to have them and the knowledge that they were unquestionably wanted.

Stacey Sutton