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What, in the Name of Conception? A Comparative Analysis of the Inheritance Rights of Posthumously Conceived Children in the United States and the United Kingdom

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I. Introduction to Reproductive Technologies and the Posthumously Conceived Child

A posthumous child is one who was conceived before and born after a parent's death.[270] It is in the posthumous child's best interest to be treated as in being from the time of conception rather than from the time of birth.[271] This ensures that the child will be treated as if it was born alive for the purposes of determining inheritance and property rights.[272] The Uniform Parentage Act ("UPA"), § 204 "establishes a rebuttable presumption that a child born to a woman within 300 [rather than 280] days after the death of her husband is a child of that husband."[273]

However, a posthumously conceived child has not been granted the same access to rights of inheritance and property of a deceased parent as those of a posthumous conceived child. The posthumously conceived child differs in respect to the posthumous child in that the former is both born and conceived after the death of one or both of the child's biological parents.[274] Posthumously conceived children have been considered

[270] Jesse Dukeminier et al., Wills, Trusts, and Estates 115 (8th ed. 2009).
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.* at 117; Unif. Parentage Act § 204 (2000, rev. 2002).

non-marital children even though their parents may have been married at the time prior to the child's conception.[275]

Though there have been cases identifying the rights to property and inheritance for posthumously conceived children, there has been no definitive federal statute addressing the standard of proof necessary to establish a successful claim to a deceased parent's intestate or testate property. The question arises as to whether there should be a time limitation of preserved semen or gamete storage that can be used for future conception.

The issue of property and inheritance rights has become more uncertain with the advent of assisted reproductive technologies. As women are now able to conceive children with embryos and/or sperm from living or deceased persons, the debate continues to what inheritance and property rights posthumously conceived children should be granted. Additional points to consider are what constitutes consent and if a child posthumously conceived should be given the same rights to inheritance and property as a posthumous or naturally conceived sibling. As technology has developed to the extent that sperm can be extracted from dead men, debate further centers on whether a child should have the possibility of receiving anything from a parent whose gametes or embryos were not retrieved with consent.[276]

This paper will focus on the legal and ethical issues surrounding the inheritance of those posthumously conceived children using the gametes or embryos from a deceased or dying person. It will offer a comparative analysis between the legislation and law reform

[275] *Id.*
[276] Lori B. Andrews, *The Sperminator*, N.Y. TIMES MAG., Mar. 28, 1999, at 62*; see supra* note 1 at 124.

in the United States and in the United Kingdom, and will conclude with a proposal that the United States should follow a rule similar to the United Kingdom's, Human Fertilisation and Embryology [Deceased Fathers] Act of 2008. The recommendation of the United States legislature to adopt a law like the United Kingdom's should alleviate some of the current burdens posed to the courts concerning the issue of the inheritance and property rights of posthumously conceived children.

II. Current Reproductive Technologies in the United States

Modern reproductive technologies have expanded so that physicians and scientists can intervene in procreation through numerous processes.[277] Initially, reproductive technology was a method of assisting couples dealing with infertility.[278] Though infertility is still the primary reason for use of this technology, it is also used by single women hoping to become mothers, same-sex couples who wish to have children, and men and women who want to prolong their reproductive lifespan.[279] Couples who find themselves busy with their careers have the option of freezing embryos for implantation and birth at a later time.[280] Artificial insemination and in vitro fertilization are just some of the existing technological procedures available for those who desire to conceive.[281]

Artificial insemination is the oldest and most common form of reproductive technology.[282] This process "consists of inserting sperm into the mother's uterus via a

[277] Michael Elliot, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child.* 39 Real Prop. Prob. & Tr. J. 47, 48 (2004).
[278] Stacey Sutton, Note, *The Real Sexual Revolution: Posthumously Conceived Children,* 73 St. John's L. Rev. 857, 861 (1999).
[279] *Id.* at 861-62.
[280] Elliot, *supra* note 8, at 48.
[281] Sutton, *supra* note 9 at 862-67.
[282] *Id.* at 862.

pipette while she is ovulating. It is a relatively simple procedure that does not require a physician's assistance but . . . 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."[283] Artificial insemination remains a popular treatment for males suffering from infertility, as it may be the sole option for conceiving a child.[284] For those who desire to conceive through artificial insemination, some states have adopted the UPA.[285] In accordance with the UPA, a consent form must be signed by both parties and the physician coordinating the procedure to establish the mother's husband as the child's legal father.[286]

In vitro fertilization ("IVF") commences with the removal of a woman's eggs that have been taken during her menstrual cycle or after using hormonal injections or oral medications.[287] Subsequently, the eggs are combined with the sperm of her husband or a donor in a culture dish simulating the fallopian tubes of the woman.[288] 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 . . . [and] . . . then introduced into the women's uterus by catheter with the hope it will implant and grow."[289] Although there is a sixty to eighty percent rate of successful implantation, many of those do not result in pregnancy.[290] Because of this, the success rates of conception for IVF are low.[291] With the lack of success, multiple implantations are common to increase the

[283] *Id.*
[284] Sutton, *supra* note 9, at 864.
[285] *Id.*
[286] *Id.* at 863.
[287] *Id.* at 865.
[288] *Id.*
[289] *Id.*
[290] *Id.* at 866.
[291] *Id.*

chance of actual pregnancy.[292] IVFs can result in multiple pregnancies, and stories from women having more than three children in one pregnancy have reached national headlines and even premiered in popular television shows.[293]

IVFs and artificial inseminations present multiple issues for the court in terms of property and inheritance rights. The possible parental combinations arising from donated egg and sperm raises questions of who the legal mother and father of the conceived child[ren] could be.[294] Could these embryos or sperm be the property of the egg donor, the clinic, or the sperm provider?[295] What are the rights to such embryos and sperm in terms of their utilization, storage, and their destruction?[296]

Scientific technology allows postmortem conception where a donor has voluntarily and purposefully given his sperm over to specific types of storage, such as cryopreservation or banking.[297] There are multiple reasons why someone may pursue this course. Sperm may have been preserved in a bank before a vasectomy so that the possibility of fatherhood is left open for the future.[298] A male can also choose to have his sperm preserved before undergoing sessions of chemotherapy and radiotherapy that could consequently leave him sterile or cause genetic

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[292] Stacey, *supra* note 9, at 866.
[293] *Id.* at 866.
[294] Stacey, *supra* note 9, at 866-67.
[295] *Id.* at 867.
[296] *Id.*
[297] Katheryn Katz, Note, *Parenthood From the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying,* U. Chi. Legal F. 289, 292 (2006).
[298] Katz, *supra* note 28, at 292.

damage to his sperm.[299] Some American soldiers deployed to the Middle East have deposited their sperm for later use in storage facilities, due to their concern of the potential exposure to chemical or biological weapons.[300] In "each of these instances, another motive may also be present: preserving their genetic potential in case the sperm bankers die from . . . disease, do not return from space, or are killed in war."[301]

The possibility of procreating long after death presents additional problems to the courts in the United States today. The advancement of reproductive technologies and its widespread use have developed at such a fast pace that the law has been unable to keep up with the rights over reproductive materials and the rights of children.[302] In the absence of specific instructions for what to do with preserved gametes after a period of time or in the event of death, these circumstances permit the courts and the legislature to exercise subjectivity in deciding the intention of the parties to procreate after death.[303] However, in some instances, there are consent forms for cryopreservation of gametes or pre-embryos carrying instructions for the handling of the gametes or the pre-embryos if their progenitors die leaving genetic material in storage.[304] The "very limited decisional law . . . establishes that public policy is not violated when the decedent has expressly stated that a named individual may be impregnated with the sperm."[305] Issues related to a posthumously conceived child's inheritance, survivor's benefits, and parentage are

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[299] *Id*.

[300] *Id.*
[301] *Id.*
[302] Elliot, *supra* note 8, at 49.
[303] Katz, *supra* note 28, at 292-93.
[304] *Id.* at 293.
[305] *Id.*

gradually being answered by legislatures and the courts.[306] However, courts have not adequately addressed these issues in light of the popularity of assisted reproductive techniques and their increased use.

III. Preservation of Genetic Material from the Deceased and Comatose

Technology has now made it possible to preserve the gametes or the embryos of one who is deceased, brain dead, comatose, or in a persistent vegetative state.[307] Sperm from a man in one of the aforementioned areas can be retrieved by "stimulated ejaculation, micro surgical epidymal sperm aspiration or testicular sperm extraction."[308] Though this increases the risk of birth defects in children, insemination is to use intra cytoplasmic sperm injection where an egg is fertilized using a single sperm.[309] Though a woman's reproductive tissue cannot be taken in the same capacity and effectiveness as those of a man; a woman, on the other hand, can have her ovaries removed and cryopreserved or have her tissue transplanted if she wanted to preserve her reproductive organs and/or ovarian tissue.[310]

IV. Direction of State Legislatures and Courts Today in Cases Dealing with Posthumously Conceived Children

With little legislative guidance, courts have been struggling with the idea of reproductive technologies and the escalating legal issues it has brought forth.[311] The rights of posthumously conceived children and control over reproductive materials have

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[306] Katz, *supra* note 28, at 293.

[307] *Id.* at 293.

[308] *Id.* (quoting The Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 Fertility and Sterility Supp. 1 (Sept 2004)).

[309] *Id.* at 293.

[310] *Id.* at 293-94.

[311] Sutton, *supra* note 9, at 876.

formed the basis of a developing area of litigation.[312] Cases of first impression are approaching the courts "involving the rights of mothers and fathers, surrogate mothers, egg donors, sperm donors, homosexual and heterosexual unmarried partners, husbands and wives, fertility clinics and sperm banks, potential relatives, children of artificial conception, and more."[313] This has "resulted in a patchwork approach that provides few assurances to the . . . number of couples entering into these procedures, to the clinics and doctors who treat them, or to the children who are conceived through them."[314]

Family scholars have recognized that the rights of posthumously conceived children are inundated with moral, religious, and cultural overtones and implications.[315] Because they involve issues of sexuality, reproduction, and family, courts seem reluctant to set definitive standards to what posthumously conceived children can inherit. Definitions of "family and procreation, both social and legal, serve primarily as limits; limits on what society, at any given point in time, will sanction both morally and legally."[316] Discussing and answering these questions are critical to the development of social policy, because of its potential on society and the reproductive choices of many individuals.[317] Though courts have little direction when it comes to posthumously conceived children, there have been several courts that have addressed their rights.

In *Woodward v. Commissioner of Social Security*, a widow conceived twin girls through artificial insemination of her husband's preserved semen two years after his

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[312] Elliott, *supra* note 8, at 49.

[313] Sutton, *supra* note 9, at 877.
[314] *Id.* at 877-78.
[315] Andrea Corvalan, Comment, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 Alb. L.J. Sci. & Tech. 335, 336 (1997).
[316] Corvalan , *supra* note 46, at 336.
[317] *Id.*

death.[318] She was denied Social Security benefits for her twins because of her inability to establish that the twins' were her deceased husband's children under Massachusetts intestacy and paternity laws.[319] The lower court held that the husband was not the children's legal father for the purposes of the distribution of his intestate property.[320] In determining whether posthumously conceived, genetic children may enjoy inheritance rights under the Massachusetts intestacy statutes, the court set a three-part test to see whether a posthumously conceived child could inherit from a deceased parent.[321] The three requirements were that: 1) a genetic relationship must have been in existence between the child and the decedent; 2) there must have been consent of the decedent; and 3) there must have been a time limit on the claim.[322] The Supreme Judicial Court of Massachusetts held that this test would be applicable in cases where the decedent died without a will or without accounting for the child in the will.[323] Further, the court held that the person who thought about the possibility of conceiving children in the future could always make provisions for the child in a will.[324]

Gillett-Netting v. Barnhart is another case that dealt with the rights of posthumously conceived children in the Arizona courts. The Arizona district court held that under Arizona intestacy statutes, a posthumously conceived child could not be considered an heir for probate and non-probate purposes.[325] However, the United States Court of Appeals reversed and remanded the case, and held that posthumously conceived

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[318] *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 260 (Mass. 2002).
[319] *Woodward,* 760 N.E.2d at 260.
[320] *Id.*
[321] *Id.* at 259.
[322] *Id.*
[323] *Woodward*, 760 N.E.2d at 259 & 272.
[324] *See generally Woodward v. Comm'r of Soc. Sec.,* 760 N.E.2d 257 (Mass. 2002).
[325] *See generally Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002).

children did not need to meet any additional requirements to be considered dependents under the Social Security Act.[326] It further held that the two posthumously conceived children were the biological, genetic children of the deceased and were therefore entitled to the benefits.[327]

From *Woodward* and *Gillett-Netting,* the implications from these cases concerning posthumously conceived children is that there is no set rule determinative of how to devise the property and inheritance interests of children. However, there are some things to consider when dealing with these types of cases. If there is a question to the genetic parentage of the child, then with proper DNA testing, proof of the genetic relationship between the mother and/or father and the posthumously conceived child is relatively easy.[328] DNA testing is 99-100% certain, and for most courts, this meets a clear and convincing standard of proof.[329] The only concern is that "the blood must be drawn under strictly controlled laboratory conditions and the chain of custody [be] meticulously documented."[330]

Though state court cases have dealt with the issues presented from rights of inheritance for posthumously conceived children, there have been no uniform federal guidelines for how the courts should handle this growing issue. The Uniform Probate Code states that "[. . .] an individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."[331] The UPA states that the deceased spouse will not be considered the parent of the resulting child unless the

[326] *Gillett-Netting v. Barnhart*, 371 F.3d 593, 597, 599 (9th Cir. 2004).
[327] *Id.* at 596.
[328] *In re Santos*, 768 N.Y.S.2d 272, 274 (Sur. Ct. Kings County 2003).
[329] *Id.* at 272.
[330] *Id.* at 275.
[331] Unif. Probate Code §2-108 (amended 2008).

deceased spouse consented to be the legal parent of the child in cases of conception after death.[332] The Restatement differs from the UPA in that it addresses the issue of whether or not the gametes or embryo are from a spouse. The Restatement states that the individual is the child of his or her genetic parents, regardless of whether their parents were married to each other.[333] The comment of this Restatement reads that the child produced from assisted reproduction must be born within a reasonable time after the deceased's death as long as the decedent approved of the child's right to inherit.[334] The Restatement provides far more flexibility in comparison to the UPA; where there is no requirement of a record, and is also flexible in terms of setting a reasonable time to conceive a child.[335] States have adopted varying policies in scope and degree in recognizing posthumously conceived children as rightful, legal heirs. Though some states have adopted the UPA, and others are considering doing the same; other states have set their own laws and statutes concerning inheritance and property rights.

Georgia revised its probate code in 1996 and accounts for children that were conceived through posthumous methods by limiting inheritance to children conceived prior and born after the decedent's death.[336] Similarly, in North Dakota, the parentage statutes codify that a person dying before a child's conception after providing genetic material will not be considered the child's parents.[337] The Ohio statutes seem uncertain to the subject of posthumously conceived children. The statute seems to preclude

[332] Unif. Parentage Act §701 (amended 2002).
[333] Restatement of Prop.: Wills & Other Donative Transfers §2.5 (1999).
[334] *Id.*
[335] *Id.*
[336] Susan Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to do about it Now.* 19 Prob. & Prop. 32, 34 (2005); Ga. Code Ann. §53-2-1 (West 2006).
[337] Gary, *supra* note 67 at 34; N.D. Cent. Code § 14-18-04 (2005).

inheritance, for it states descendants born after the deceased's life will inherit as if born in the lifetime of the intestate and surviving him.[338] However, Ohio enacted this statute in the 1950s, so it is unlikely that the legislature considered the issue of posthumously conceived children.[339]

Louisiana, Texas, California, and Florida have specific statutes dealing with the inheritance rights of posthumously conceived children.[340] Louisiana has set a time limit of when a posthumously conceived child can be conceived.[341] The posthumously conceived child will have the same right as those of a child born during the lifetime of the parent as long as there is written consent by the deceased parent that permits the surviving spouse to use his genetic material within a three year time period after the decedent's death.[342] California sets more regulations and requirements in comparison to Louisiana. The California Probate Code Section requires written consent of the decedent for the use of his or her genetic material and a person who is allowed to control the use of the genetic material.[343] Additionally, the posthumously conceived child must be conceived within two years after the parent's death and the person who is given control of the deceased's genetic material must give notice within four months of the parent's death to the one controlling the decedent's assets of the existence and potential future use of the deceased's genetic material.[344] In Texas, the Family Code Section states that as long as individuals, whether married or single, give their consent to have their genetic

[338] Gary, *supra* note 67 at 34-35; Ohio Rev. Code § 2105.15 (West 2005).
[339] *Id.*
[340] Gary, *supra* note 67, at 34.
[341] *Id.* at 34-35; La. Rev. Stat. Ann. § 9:391:1.
[342] Gary, *supra* note 67, at 34; La. Rev. Stat. Ann. § 9:391:1.
[343] Gary, *supra* note 67, at 34.
[344] *Id.*

material used in conception, then that child will be considered a child of the decedent.[345] In Florida, a posthumously conceived child can only inherit from a parent if the parent anticipated and provided for such child in his or her will.[346]

As shown from above, there are a variety of state statutes concerning posthumously conceived children and their rights to inheritance and property. By having individual states regulate this area rather than having a uniform national policy, states run the risk of confusion when it comes to inheritance rights in estate planning.[347] Some have suggested proposals in place of state policies, advocating a national policy. The Uniform Status of Children of Assisted Conception Act ("Uniform SCACA"), the American Bar Association ("ABA"), and the Joint Editorial Board for Uniform Trust and Estate Acts ("JEB") have their own recommendations
for what the United States legislatures and courts should do in response to posthumously conceived children.

The Uniform SCACA is one such proposal developed to provide some guidance in this area and a handful of states have adopted it.[348] The weakness of the Uniform SCACA is that it excludes a child posthumously conceived by a married couple if conceived through assisted reproductive techniques.[349] Furthermore, § 4(b) of the Act states that "an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is

[345] Tex. family Code Ann. §160.707 (2007).
[346] Fla. Stat. Ann. §742.17 (2010).
[347] Kristine Knaplund, *Postmortem Conception and a Father's Last Will.* 46 Ariz. L. Rev. 91, 103-04 (2004).
[348] Elliot, *supra* note 8, at 49.
[349] *Id.*

not a parent of the resulting child."[350] Consequently, any child conceived after a parent's death, is not considered the child of the genetic parents.[351] The Uniform SCACA is not an adequate standard of measure to gauge the inheritance rights of posthumously conceived children.[352]

The ABA's, Model Act Governing Assisted Reproductive Technology ("Act") defines key terms and concepts of the relevant definitions of what the ABA deems important, explicitly detailing words such as assisted reproduction, assisted reproductive technology, child, collaborative reproduction, and the meaning of an intended parent.[353] The Act's requirements for posthumous conceived children are that there be: 1) informed consent; 2) record authorization; 3) disclosures; and 4) that all parties must undergo a mental health evaluation.[354] In terms of time frame, the Act states that all the requirements will last for a period of five years or as another time agreed to by the parties involved.[355] Though the Act is specific to posthumous children, it indirectly addresses posthumously conceived children. This is shown by the note that the parent is not considered the biological parent of the posthumously conceived child unless there was consent that the deceased person would be the parent of the child if conception were to occur after death.[356]

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[350] *Id.* at 49-50.
[351] *Id.* at 50.
[352] *Id.*
[353] *See generally American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 Fam. L.Q.171 (2008).
[354] *Am. Bar Ass'n Model Act Governing Assisted Reproductive Tech.*, 42 Fam. L.Q., at 178-82.
[355] *Id. at 188.*
[356] *See generally Am. Bar Ass'n Model Act Governing Assisted Reproductive Tech.*, 42 Fam. L.Q.171 (2008).

The JEB has begun a project that has the potential to result in model statutory language and contains three requirements: 1) that the parent and child be biologically related; 2) that there be parental consent; and 3) that the conception occurred within a specified or reasonable period after the decedent's death.[357] Though these proposals may appear facially sound, there are several problems with this. For instance with the JEB, what constitutes a reasonable time period?; and for the ABA, what constitutes a level of sufficient mental health to be deemed able to conceive a child?

Some people, such as Ronald Chester ("Chester"), have addressed the weaknesses to the Restatement by suggesting alternative proposals.[358] Chester explicates an in-depth proposal that focuses on when the posthumously conceived child's paperwork can be filed in the court by specifying the importance of a three-year time frame to conceive the child.[359] Others, such as Michael Elliot ("Elliot"), stress that providing for the posthumously conceived children is an issue that society must face.[360] Elliot believes that the most logical solution to the problems facing posthumously conceived children is looking at the intent of the decedent.[361] If the decedent's intent is in question, then the court should look at a will or examine the facts and circumstances surrounding the individual's desire to procreate in the event of his or her death.[362] Elliot believes that because parents make the choice to conceive and bear children posthumously by reproductive assistance methods, children should be allowed the benefits that they would

[357] Gary, *supra* note 68, at 35.
[358] Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code,* 38 Real Prop. Prob. & Tr. J. 727 (2004).
[359] *Id.* at 735-36.
[360] Elliot, *supra* note 8, at 50.
[361] *Id.*
[362] *Id.*

be entitled to as heirs, and that "it should not be society's responsibility to support these children."[363] Though Elliot makes valid points, there are some weaknesses to his approach. One of them is that he fails to address the proper amount of time that an individual could use a deceased or comatose individual's reproductive material to conceive a child, especially because reproductive technology has allowed for gametes of individuals to be stored for a substantial period of time. However, his points of equity are sound and important in voicing the concerns of many individuals who are partaking in assisted reproductive techniques.

V. 1990 Human Fertilisation and Embryology Act

The Human Fertilisation and Embryology Act ("HFE Act") was mandated into law on November 1, 1990 in the United Kingdom.[364] The HFE Act created the Human Fertilisation and Embryology Authority ("HFEA") whose purpose is to license and monitor fertility clinics and all research involving human embryos.[365] Providing information to the public, the HFEA and the HFE Act mandated the creation, licensing, and monitoring of clinics that assisted with and performed assisted reproductive techniques such as IVF, artificial insemination, human embryo research, and the regulation of gametes.[366] However, the HFE Act does not exclude the existence of private clinics.[367]

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[363] *Id.*

[364] *Twenty Years since the Human Fertilisation and Embryology Act receives Royal Assent,* Human Fertilisation and Embryology Auth., http://www.hfea.gov.uk/6166.html, (last visited Nov. 1, 2010).

[365] *All about the HFEA: How we Regulate (treatment & research),* Human Fertilisation and Embryology Auth., http://www.hfea.gov.uk/25.html, (Last visited Jan. 1, 2011).

[366] *Twenty Years since the Human Fertilisation and Embryology Act receives Royal Assent*, Human Fertilisation and Embryology Auth., http://www.hfea.gov.uk/6166.html. (Last updated Nov. 1, 2010).

[367] *For Patients and their Supporters: Funding & payment issues: Private treatment*, Human Fertilisation and Embryology Auth., http://www.hfea.gov.uk/fertility.html. (Last visited Jan. 1, 2011).

The HFEA currently has 138 licensed centers and research establishments throughout the United Kingdom.[368] With the HFEA's assistance, more than 200,000 babies have been born as a result of IVF.[369] The HFEA's website provides information about infertility and to those who may be experiencing problems with infertility and want to conceive.[370] The website gives information about treatment options, storage options, and support networks to those who are thinking about or are undergoing assistance with reproductive technologies, and even provides funding options for women who qualify for it.[371]

In 2003, Diane Blood ("Blood") encouraged the movement towards amending the HFE Act when she won the legal battle to have her deceased husband recognized as the legal father of her posthumously conceived children.[372] Blood's husband died from bacterial meningitis after falling into a coma in 1995.[373] The couple had been trying to have a baby, and while he was in a coma, Blood convinced doctors to extract some of his sperm.[374] Blood experienced difficulty in storing the gametes of her deceased husband, for the HFE Act prevented Blood from holding the sperm in a storage facility in the United Kingdom because he had not given his written consent.[375] Blood sought to export the sperm to Belgium, where the law there would permit her to use her deceased

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368 *Twenty Years since the Human Fertilisation and Embryology Act receives Royal Assent*, Human Fertilisation and Embryology Auth., http://www.hfea.gov.uk/6166.html. (Last updated Nov. 1, 2010).
369 *Id.*
370 *For Patients and their Supporters*, Human Fertilisation & Embryology Auth., http://www.hfea.gov.uk/fertility.html (last visited Jan. 1, 2011).
371 *Funding & Payment Issues*, Human Fertilisation and Embryology Auth., http://www.hfea.gov.uk/fertility-treatment-cost.html (last visited Jan. 1, 2011).
372 Clare Dyer, *Diane Blood law victory gives her sons their "legal" father*. Guardian, Sept. 19, 2003, http://www.guardian.co.uk/science/2003/sep/19/genetics.uknews.
373 *Id.*
374 *Id.*
375 Katz, *supra* note 28, at 297.

husband's sperm.[376] The HFEA ruled that "Mrs. Blood was barred from taking the sperm abroad for use on the ground[s] that she should not be able to avoid the specific requirements of the Human Fertilisation and Embryology Act by exporting the sperm to a country to which she had no connection."[377]

After Blood sought judicial review of the HFEA's decision, the Court of Appeal upheld the HFEA on the issue of consent, but found that she won the right, under the European Community Treaty, for the freedom of movement for goods and medical services among member states.[378] She subsequently took the frozen sperm to Belgium and conceived her two sons at a Brussels clinic.[379]

Blood faced yet another legal obstacle when she was not permitted to put her deceased husband's name on her sons' birth certificates.[380] The HFEA previously held that any baby conceived after the father's death had no biological father for the purposes of succession and inheritance.[381] Because of this, her sons' births had to be recorded with a blank space on the certificate where her deceased husband's name would have been.[382] Arguing that this infringed on her rights to private and family life under the European Convention on human rights, she succeeded in getting the HFE Act amended to provide that children conceived postmortem would be recognized as the legal heirs of their deceased father.[383] Blood achieved the ultimate success when the House of Lords

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[376] *Id.*
[377] *Id.* at 297-98.
[378] Katz, *supra* note 28, at 297-98; Dyer, *supra* note 103.
[379] Katz, *supra* note 28, at 298; Dyer, *supra* note 103.
[380] Katz, *supra* note 28, at 298; Dyer, *supra* note 103.
[381] Katz, *supra* note 28, at 298.
[382] Dyer, *supra* note 103.
[383] Katz, *supra* note 28, at 298.

instituted a bill amending the HFE Act that eventually became law.[384] The bill amended the HFE Act of 1990 "under which a man is not considered a child's legal father if the child is conceived from frozen sperm or a frozen embryo after the man's death."[385] Recognizing the parents of posthumously conceived children even after their death, it was estimated that the bill's amendment immediately benefited up to fifty families with posthumously conceived children.[386]

VI. HFE Act 2008

The subsequent HFE Act 2008 was enacted in three parts.[387] The three parts are as follows: 1) amendments to the HFE Act of 1990; 2) parenthood; and 3) miscellaneous and general.[388] Though extensive, the main, new elements of the 2008 HFE Act are that it requires clinics take into account the welfare of the child when providing fertility treatment.[389] It also takes away the previous requirement that they take into account the child's need for a father.[390] It enables people in same-sex relationships and unmarried couples to be treated as parents of a child born through the use of a surrogate.[391]

There are those who believe that it would be difficult to imagine that individuals in the United States submit their reproductive decisions to government authority, especially because the right to procreate has never been one to submit to federal regulations or authority. It is thought that the legal resolution of the [Blood] case

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384 *Id.*
385 Dyer, *supra* note 103.
386 Dyer, *supra* note 103.
387 *The HFE Act (and other legislation),* Human Fertilisation and Embryology Act. (Jan. 2011), *available at* http://www.hfea.gov.uk/134.html.
388 *Id.*
389 *Id.*
390 *Id.*
391 *See Id.* § 121.

"however, is of little help in the United States, where the very idea of a central licensing authority for reproductive technology is [an] anathema to our belief in state, as opposed to federal, control of medical practice and parentage issues."[392]

The American Society for Reproductive Medicine ("ASRM") has noted that medical professionals are not required to honor a surviving spouse's request for postmortem gamete retrieval and unitization if the patient has not given consent or somehow made his wishes known.[393] The ASRM deems that these issues should be decided on a case by case basis and follow the applicable state laws.[394] There is some legislative and judicial direction for inheritance after posthumous conception, but nothing in particular addresses postmortem gamete retrieval and utilization.[395]

Unfortunately, in some of these cases of postmortem gamete retrieval and unitization, time is of the essence when it comes to requests to physicians and doctors.[396] Unlike "removing a respirator or discontinuing nutrition or hydration, where the status quo continues while decisions are made, with postmortem gamete retrieval and unitization, there is a very small window of opportunity to act."[397] Oftentimes, the situations in which these occur are tragic, and involves the sudden death of a loved one.[398] Absent statutory regulations, physicians often experience difficulty in resisting the pleas of a wife, parent, or lover who request postmortem gamete retrieval and unitization and physicians oftentimes do not object because they assume that there are no significant

[392] Katz, *supra* note 28, at 298.
[393] *Id.* at 299.
[394] *Id.*
[395] *Id.*
[396] *Id.*
[397] *Id.*
[398] *Id.*

legal objections.[399] Physicians' decisions may be a function of their impulses and the offering of help to those who are suffering.[400]

Because there is a lack of understanding and acknowledgement about what to do in cases of postmortem gamete retrieval and unitization, some medical institutions have developed their own plans on what to do when individuals request postmortem gamete retrieval and unitization.[401] At the first instance that there was a request for postmortem gamete retrieval and unitization, the New York Presbyterian Hospital composed a team of medical and legal professionals who created a set of guidelines for hospital staff despite the uncertainty of the legality of post-mortem gamete retrieval.[402]

VII. Procreative Liberty

Does the United States Constitution protect the rights of individuals to procreate after death? "Procreative liberty" is a broad term that, at a minimum, includes the freedom to reproduce and the freedom to avoid reproduction.[403] The idea of procreative liberty commences with the idea of protections as guaranteed by the Constitution that have been established by the courts.[404] The Supreme Court has never explicitly recognized a right to procreate, but has held that all individuals are guaranteed the constitutional protection accorded to a person's liberty interest relating to intimate relationships, the family, and whether to bear a child.[405]

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[399] Katz, *supra* note 28, at 299.
[400] *Id.*
[401] Katz, *supra* note 28, at 300.
[402] *Id.*
[403] Elliot, *supra* note 8, at 55.
[404] Elliot, *supra* note 8, at 55.
[405] *Id.* at 55-56.

With the constitutional protections afforded to an individual's liberty, the question when it comes to children who have been posthumously conceived is if an individual has a constitutional right to posthumously reproduce.[406] The Supreme Court has never addressed the rights of children conceived through posthumously conceived reproductive methods.[407] However "if the decision to bear a child is a constitutionally protected choice, then it is logical . . . that the manner in which a child is conceived, [either by sexual intercourse or utilizing reproductive assistance], it is also a constitutionally protected decision."[408] With the use of reproductive technologies becoming more common, posthumous reproduction and the children created thereby should be afforded the same constitutional protections that traditional reproductive methods and the children conceived therefrom receive.[409]

VIII. Concluding Remarks

Posthumously conceived children should be afforded the same measures of constitutional protections as those children who have been conceived through traditional methods. Though it would be difficult for the United States to have broad, expansive federal regulation of reproductive agencies and laws, in looking at the reproductive systems and relevant laws in both the United States and the United Kingdom, the United States should adopt a similar system to that such as the HFEA. In no way should the United States regulate the number of children a person should have, for that is a decision solely up to an individual's own choice and is a right guaranteed by the Constitution. But in looking at the limitations and inequities that posthumously conceived children face in

[406] Elliot, *supra* note 8, at 56.
[407] *Id.*
[408] *Id.*
[409] *Id.*

comparison to their naturally conceived siblings, it would be beneficial to have some type of federal regulation in place that addresses the inheritance and property rights of these children. Provided that the parents had the intent and consent to conceive posthumously, the interests of the posthumously conceived child should be placed on an equal footing as their siblings who were alive and conceived before their deceased parents' death. This ensures that these children are given and provided equal opportunities and afforded like constitutional protections.

The system would be similar to that of the United Kingdom's, HFEA. A federal system would be in place that all participating, reproductive facilities would abide by. Facilities would work together to ensure that patients or those thinking of undergoing any type of assisted reproductive technique would be adequately informed of the mental and physical risks associated with undergoing such a procedure. Additionally, if an individual decided to undergo the procedure, then there would be mandated written consent form of all the involved parties; specifically addressing such issues as the time period of storage, the desire for gamete destruction, and what to do in the event of one's death and whether the frozen gametes could be used for posthumously conceiving a child. With the combination of these types of rules, the courts could then use the relevant consent forms, wills, and testimony of the parties as a means of deciding what to do in determining the property and inheritance rights of posthumously conceived children.

The recommendation for these types of federal guidelines ensures that posthumously conceived children can be treated with as much equity in property and inheritance rights in comparison to their naturally conceived siblings. With these mandated, federal regulations, this should provide the courts some measure of aid in

making their decisions and ideally would provide cohesion in an area of law that is in need of direction.