Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons

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I. Introduction

In considering the application of the Social Security law to a posthumously conceived biological child of a deceased worker, the United States Court of Appeals for the Third Circuit observed in dicta that a case such as this, “presents a host of difficult legal and even moral questions.” 1 This paper focuses on the standards and policies that should be applied in addressing the multitude of legal and moral questions that arise from the desire to produce genetically related offspring by using the gametes of deceased or incompetent persons.

Contemporary medical procedures using assisted reproductive technology 2 have

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1 Capato v. Comm’r of Social Security, 631 F.3d 626, 627 (3d Cir. 2011) (children conceived posthumously by use of sperm of a deceased wage earner were entitled to social security benefits).

2 Assisted Reproductive Technology [hereinafter ART] means medical or scientific intervention “for the purpose of achieving a live birth that results from assisted conception.” AM. BAR ASS’N MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(2) (2008) [hereinafter MODEL ACT]. As used in this article, ART is distinguished from “collaborative reproduction,” which means assisted reproduction using gametes or embryos provided by third parties, and “surrogacy,” in which a third party carries a child to term for others. Id. § 102(5) (defining “collaborative reproduction”). In other words, while collaborative reproduction employs gamete donors or
made it possible for even infertile people\textsuperscript{3} to have genetically related children. Similarly, even dead people can have children genetically related to them by retrieving their gametes\textsuperscript{4} or producing embryos\textsuperscript{5} using their gametes to fertilize an egg by in vitro fertilization.\textsuperscript{6} These embryos can then be cryopreserved for possible future use to produce a child who is genetically related to the incompetent or deceased person.\textsuperscript{7} The potential legal issues may not be initially evident, but issues arising from consent standards for harvesting and using gametes and public policy concerns are real and troubling. While the Uniform Parentage Act\textsuperscript{8} addresses some of these matters in the context of parentage of children of Assisted Reproductive Technology ("ART"), and the Uniform Probate Code\textsuperscript{9} deals with issues relating to inheritance issues arising from ART, the American Bar Association Model Act Governing Assisted Reproductive

surrogate carriers to conceive or birth a child, this article focuses on cases in which a genetic child may be involved, and no third party is directly involved in the reproductive process.

\textsuperscript{3} The author uses the term “infertile” in a broad sense to mean anyone who intends to have a genetically related child now or in the future but who may not be able to do so without ART treatment for any reason, such as medical inability to produce a pregnancy by sexual intercourse, social reasons, or lack of a sexually opposite spouse.

\textsuperscript{4} MODEL ACT §102(30) (defining “posthumous conception” as the transfer of an embryo or gametes with the intent to produce a live birth after the gamete provider has died). A “gamete” means a sex cell, i.e. a female egg (ovum or oocyte) or male sperm (spermatozoa). See id. §102(13).

\textsuperscript{5} See id. § 102(10). An egg that has been fertilized by sperm is referred to in this article by the term “embryo,” which is commonly used in court decisions and literature to refer to a pre-embryo, zygote, or blastocyst. \textit{Id.} The definition of “embryo,” for purposes of assisted reproduction, is a

[C]ell or group of cells containing a diploid complement of chromosomes or group of such cells (not a gamete or gametes) that has the potential to develop into a live human being if transferred into the body of a woman under conditions in which gestation may reasonably expected to occur. \textit{Id.}

\textsuperscript{6} See id. § 102(20). In vitro fertilization ("IVF") is a procedure by which an egg is fertilized by use of sperm in a petri dish. MODEL ACT § 102(20). It is defined as “the formation of a human embryo outside the human body.” \textit{Id.}

\textsuperscript{7} See id. § 102(31). Cryopreservation is a freezing process by which gametes or embryos are preserved for possible future use. \textit{Id.} The Model Act uses the term “preservation” in reference to “maintaining organ, tissue or cellular utility” to leave open the possibility that some means other than cryopreservation may be developed in the future. \textit{Id.}


\textsuperscript{9} UNIF. PROBATE CODE §§ 2-120, 2-121 (amended 2008), 8 U.L.A 58-65 (West Supp. 2010) (discussing inheritance rights to and from children conceived posthumously by assisted reproduction or surrogacy arrangements).
Technology ("Model Act") is the only proposed law which attempts to regulate all aspects of ART. It is for that reason that this article uses the Model Act to address the various issues raised in the article. The seven factual examples used in this article illustrate the problems created by requests to harvest and use gametes retrieved from dead or incompetent persons and will be discussed in context in this article. Each of these examples is based at least in part on real-life situations that are discussed in court decisions, reported in the general media, or are known personally to the author.

II. Some Basic Applicable Concepts

A. Consent to Gamete Retrieval

The desire for a genetically related child is a strong human emotion, and it can sometimes prompt a decision to leave open the potential for a genetically related child even after the death, divorce, or incompetence of a gamete provider. It is a basic black-letter proposition that consent to sexual relations carries with it the consent for legal parenthood if a child is so conceived; however, in the context of assisted reproduction, the reality is different. This is because it is often unclear to what extent and in what circumstances a person has effectively given consent to retrieval of gametes and/or the transfer into a woman’s body with the intent to conceive a child.

12 “Retrieval” is defined in the Model Act, section 102(34), as the “procurement of eggs or sperm from a gamete provider.” Model Act § 102(34). This is also frequently referred to as “harvesting.” See, e.g., Alastair G. Sutcliffe, IVF Children: The First Generation 5 (Parthenon Publishing Group 2002). In ART, embryos are not retrieved but are produced by fertilization in vitro with an egg and sperm which have been retrieved. Id. at 5-7 (outlining the IVF cycle).
13 Model Act § 102(37). “Transfer” is defined in the Model Act as the “placement of an embryo or gametes into the body of a woman with the intent to achieve pregnancy and live birth.” Id. The author recognizes that if an embryo is being transferred some people may believe that conception has already taken place when the egg was fertilized, while others associate conception with implantation in the uterus. See Charles P. Kindregan, Jr. & Maureen McBrien, Embryo Donation: Unresolved Legal Issues in the Transfer of Cryopreserved Embryos, 49 VILL. L. REV. 169,
Consent from a person to retrieve gametes from his or her body stems from the doctrine of informed consent, which has evolved in the law of torts. The retrieval of gametes is the first step toward the possibility of parenthood, and once retrieved, the gametes are placed in the custody of others, such as physicians and clinics. Consent to retrieval is thus an important consideration. The Model Act requires that, “Informed consent must be provided by all participants prior to the commencement of assisted reproduction,” and it must be given in a record. Moreover, a woman from whom

185-86 (2004). However, from a legal point of view, such distinctions are irrelevant to consent issues because once transfer and placement of a fertilized egg (embryo) in the body of a woman takes place, the ability of a person who provides gametes or embryos with the intent to become a parent can no longer withdraw consent. Id. at 112-13 (discussing, specifically in the instance of divorce, the required consent by both parties and the ability of one party to avoid parenthood prior to conception). In contrast, MODEL ACT section 606(2) provides that the “consent of an individual assisted reproduction in a record may be withdrawn at any time before placement of eggs, sperm or embryos.” MODEL ACT § 606(2). It is important to note that this principle of ability to withdraw consent is irrelevant to a woman’s decision to terminate the subsequent pregnancy since that is a constitutionally unilaterally protected right, at least in the early stages of the pregnancy. See generally Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding power of Congress to prohibit intact dilation and evacuation (“D&E”) abortion procedure used in late term-pregnancy); Roe v. Wade, 410 U.S. 113 (1973) (holding women have constitutionally protected right to decide, in consultation with their physician, to terminate her pregnancy up to the stage of viability).

14 See generally CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE, 29-128 (Am. B. Ass’n 2d ed. 2010) (discussing various ways in which ART occurs, including intrauterine insemination, in vitro fertilization, and cryopreservation of embryos). The word conception is used here to mean a placement of gametes or embryos to produce a pregnancy. Id.

15 See Schloendorff v. Soc’y of N.Y. Hosp., 105 N.E. 92, 93-94 (N.Y. 1914). As early as 1914, Judge Cardozo ruled that the performance of un-consented surgery on a patient constituted a trespass (battery) in this landmark decision. Id. The doctrine of informed consent has since evolved as to constitute black letter law today, although its application has many difficulties in particular cases. See generally Emmanuel O. Iheukwumere, Doctor, Are You Experienced? The Relevance of Disclosure of Physician Experience to Valid Informed Consent, 18 J. CONTEMP. HEALTH L. & POL’Y 373 (2002) (discussing the creation and evolution of the informed consent doctrine). Although no court would likely justify the removal of eggs or sperm from a competent adult person’s body without his or her consent, there are certain instances in which a court may justify such a removal in the case of a minor. See infra Section III, Problem #4; See also KINDREGAN & MCBRIEN, supra note 14, at 265-66 (discussing the legal issues of informed consent as they pertain to assisted reproductive technology). In addition to potential liability based on failure of consent, other theories have been used in tort and contract claims arising from assisted reproduction. KINDREGAN & MCBRIEN, supra note 14, at 263-93.

eggs are to be retrieved must be first informed of the “health risks and adverse effects of ovarian stimulation and retrieval.” The Model Act also sets out detailed specific mental health and counseling requirements for ART participants.

The informed consent requirements would clearly require a person whose gametes are retrieved to give his or her informed consent. However, as the seven factual problems discussed later in this article illustrate, the application of these principles may present difficulties that are not necessarily easy to resolve when there is no applicable statutory law in a particular jurisdiction.

B. Transfer of Harvested Gametes

The fact that a dead or incompetent person has arranged to have their gametes cryopreserved does not of itself mean that others, such as spouses, lovers, parents, researchers, can legally retrieve them, fertilize them, or transfer them to produce a pregnancy. The prior consent of the deceased or incompetent person to use the preserved gametes is still needed, and the law should require proof of such consent. Further, that reason is why the law should require consent in a record, and in the absence of such a record, the law should allow use only when consent is unequivocally established by other clear and convincing evidence. To state this simply, a person should not become a parent by assisted reproduction even if dead or incompetent, except where consent of that person is clearly established. Critics of this principle may

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17 Id. A “record” is defined in the Model Act as “information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form.” Id. § 102(33).
18 Id. § 203(5) (enumerating required disclosures relating to health risks). This includes all relevant information regarding the ovarian stimulation and retrieval process, as well as the use and potential side effects of fertility drugs. See id.
19 See id. art. 3
21 See, e.g., Browne C. Lewis, Dead Men Reproducing: Responding to the Existence of Afterdeath Children, 16 GEO. MASON L. REV. 403 (2009) (discussing issues of consent with respect to posthumous reproduction); Elizabeth A. Trainor, Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances, 87 A.L.R.5th 253 (2001) (discussing spouse or other party’s right to use gametes for reproductive purposes after death, divorce, or other changes in circumstances that affect consent).
object that the requirement of certainty of consent may leave surviving family members without an opportunity to have a genetically related child by a deceased or incompetent loved one.22 However, applying the concept of substituted consent, which has been used in other medical contexts,23 will not work here because the substituted consent doctrine was developed to permit others to consent to medical procedures that will benefit an incompetent patient.24 In the case of consent to the use of gametes and embryos, the benefit of having a genetically related child is not for the deceased or incompetent person, but rather, for his surviving family or surviving partner.

It should be obvious that lawyers should advise a client who deposits gametes into storage to make clear his or her intent regarding use of the gametes in the contingency of his or her death or incompetence. That is why the consent or non-consent should rest with the person who has stored his or her gametes or embryos. In addition, it is for that exact reason that courts have refused to allow others to use gametes when the depositor has made clear his intent not to permit unconsented or posthumous reproduction, even when surviving family members claim he would have consented had he known that he would die or become incompetent.25

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22 See, e.g., Maya Sabatello, Who’s Got Parental Rights: The Intersection Between Infertility, Reproductive Technologies, and Disabilities Rights Law, 6 J. Health & Biomed. L. 227, 228, nn.6-8 (2010) (noting several examples of reported instances of surviving family members seeking to retrieve sperm from the bodies of recently deceased sons to preserve the potential to have a genetically related child in the future).

23 See generally In re Quinlan, 355 A.2d 647 (N.J. 1976) (parent-guardian authorized to discontinue extraordinary medical treatment for incompetent adult); John Parry, A Unified Theory of Substitute Consent: Incompetent Patients’ Right to Individual Health Care-Decision-Making, 11 MENTAL & PHYSICAL DISABILITY L. REP. 378 (1987). Substituted consent has been employed to make medical decisions for treatment of persons who are unable to decide for themselves because of their incompetence. In re Quinlan, 355 A.2d at 664. This can be by a guardian who is authorized by a court to make a substituted judgment regarding medical treatment for an incompetent patient. Id. It can also be a substituted judgment made by a person authorized in a living will or health care proxy document to give a substituted consent. See Guardianship of Kemp, 43 Cal. App. 3d 758 (Cal. Ct. App. 1974). The power to authorize substituted judgment is based on the historic equity power of a court to “care for all persons unable to care for themselves.” Id. at 761 (ruling that Chancery Court’s exercise of equitable authority was proper); see also Sell v. United States, 539 U.S. 166 (2003) (use of substituted judgment in medical treatment of incompetent criminals); Parry, supra, at 381.

24 See Shelley Shepherd, Living Wills: Why a Patient’s Last Wishes Are Not Always Respected, 34 Howard L.J. 229, 233 (1991) (discussing purpose of living wills). A living will or a health care proxy is a planning device, stating what preferences an individual has concerning what life saving treatments to apply to sustain life. Id.

C. Are Gametes or Embryos Property or Persons?

In the following discussion of a number of illustrative problems, a concept relating to the status of gametes and embryos as being a kind of property is bound to arise. This is in part because the legal issues presented in the forthcoming examples seem to treat the gametes and embryos as property, requesting their harvesting and/or use. We know that gametes such as eggs, sperm, and even embryos can be sold or donated just as property is sold or donated, and the income from such transactions can be taxed. Some decisional law, however, has suggested that while gametes may have some of the aspects of property, they are not technically property in the fullest sense of...
the word.  

There are very few court decisions that have used a property analysis to resolve disputes over embryos. For instance, in one case, a couple deposited cryopreserved embryos produced with their own gametes in a medical clinic that had been treating them for in vitro fertilization.  

When the couple moved to another state and asked the clinic to release the embryos for transfer to a clinic in the other state, the clinic refused their request.  

The couple sued, and a federal court ruled in their favor, treating the storage of the embryos as a bailment of property; so in accord with property law, the bailee had the obligation to return the property to the bailor.  

In another case, a couple sued a clinic that had failed to account for the five cryopreserved embryos and obtained a judgment based on the lost property, although the court rejected a claim for wrongful death because the lost embryos were not legally persons.  

Similarly, a Louisiana court considered cryopreserved sperm to be property under state law when the provider executed an Act of Donation conveying the sperm to his female friend.  

In contrast, a man who accused a woman, with whom he had oral sex, of converting his sperm and using it to impregnate herself, sued her for conversion of his property, but the Illinois court avoided the property issue by ruling that there was no conversion because he had

30 See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 277 (Cal. Ct. App. 1993), modified, 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996), certifying partial publication, 59 Cal. Rptr. 2d 222 (Cal. 1997) (explaining man gave girlfriend a deed of gift of his sperm and left it to her in his will); Davis v. Davis, 842 S.W.2d 588, 597-98 (Tenn. 1992) (ruling in divorce dispute over cryopreserved embryos that the embryos were not technically property, but that if they had a contract on who should have ownership the court would enforce it). Although it did not involve gametes or embryos, the much discussed decision in Moore v. Regents of Univ. of Cal., has some relevance in thinking about body parts as property. 793 P.2d 479 (Cal. 1990). The court in Moore did not rule that the plaintiff had a property right of ownership in his cancerous spleen, which the defendant physicians removed and then used for their economic advantage to create a cell line for medical use. Id. at 492-93. But, the Moore court ruled that the defendants breached a duty to inform the patient that they intended to use the spleen cells for their own profit. Id. at 497.


32 Id. at 424.

33 Id. at 426-27 (interfering from Cryopreservation Agreement that defendants must fully recognize plaintiffs’ property rights in pre-zygote).

34 See Jeter v. Mayo Clinic of Arizona, 121 P.3d 1256, 1261 (Ariz. Ct. App. 2005) (reversing dismissal of claims based on “negligent loss or destruction of the pre-embryos, breach of fiduciary duty, and breach of a bailment contract”). The court left the Arizona Legislature to decide whether “to include a three-day-old, cryopreserved pre-embryo within the statutory definition of ‘person’ under the wrongful death statutes.” Id.

35 Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348, 1351-52 (La. Ct. App. 1994) (ruling that the transfer of the cryopreserved sperm to his female friend was effective over objections of the sperm donor’s mother).
given her the sperm by placing it in her mouth. 36 Finally, several physicians in California were indicted on charges that they had misappropriated some embryos belonging to their patients, suggesting that embryos have the characteristics of property. 37 Nonetheless, the state of the law at this point in time is that while gametes and embryos have some of the characteristics of property, they are sui generis. Instead of being treated as legal property, gametes would be considered as tissue with the capacity to evolve into human life when the egg is fertilized and the resulting embryo is implanted into a human womb. 38 This aspect of the law remains to be more fully developed.

When male and female gametes are combined to produce an embryo, the law does not treat the conceptus as a legal person. 39 Embryos are not legally children, but

36 Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *6 (Ill. App. Ct. Feb. 22, 2005). The court declined to rule that a woman had converted a man’s sperm when, after oral sex, she used his sperm to impregnate herself without telling him. Id. However, the decision was based on the fact that he gave her his sperm in her mouth, so it was not technically a conversion of his property. Id.

37 In California, physicians were indicted for the crime of misappropriating gametes and embryos, suggesting that perhaps they are property at least for purposes of criminal law. See Charles P. Kindregan, Jr. & Maureen McBrien, supra note 13, at 199 (discussing misappropriation of embryos that occurred at the University of California at Irvine); see also Judith D. Fischer, Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View, 32 Loy. L. Rev. 381 (1999) (arguing that a claim for conversion in tort should be available when misappropriation of embryos occurs); Cyrene Grothaus-Day, Criminal Conception: Behind the White Coat, 39 Fam. L. Q. 707 (2005) (characterizing the infertility industry as one of widespread white-collar crime). After the scandal of the misappropriated embryos became public, California enacted a statute that made it a felony to misappropriate gametes and embryos. See CAL. PENAL CODE § 367g (West 2005).


39 In Davis, the trial judge had attempted to resolve the divorce dispute of the husband and wife over the disposition of the couple by applying principles of child custody, i.e. considering the embryos as persons. Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992). The appellate courts in Tennessee did not accept the concept, and subsequent decisions on such disputes in other states have not resorted to considering embryos as legal persons. Id. at 594-97; Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz. App. 2005) (holding that a pre-embryo was not a legal person for purposes of the wrongful death statute); In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003) (holding that the Iowa child custody statute did not apply to a dispute over embryos because the embryos were not “children” under the statute). Alabama specifically exempts commercial surrogacy arrangements from its criminal law provision that prohibits baby selling for purposes of adoption, thereby treating embryo transfer as not involving children. ALA. CODE § 26-10A-33 (2010). However, Louisiana law follows French law and treats embryos as juridical persons, prohibits their destruction, and permits their adoption. LA. REV. STAT. ANN. §§ 9:121, 9:129 (2010).
being human genetic tissue should be considered something more than mere property. Perhaps the best way of describing an embryo is that it is prenatal life with the potential to develop into a human “person.” The medical profession also takes the position that they should “not be viewed as persons,” although they are “accorded an elevated moral status compared with other human tissues.” In part, this view of medically trained persons in the ART field of the morally elevated status of an embryo is based on its potential to become a person, but an embryo cannot be considered a human child because “it has not yet developed the features of personhood, it is not yet established as developmentally individual, and it may never realize it biologic potential.”

III. Seven Illustrative Problems

A. Problem # 1: Widow Seeking Retrieval of Sperm from the Body of Her Dead Husband

A married man is brought to a hospital emergency room near death after an accident. Shortly after he dies, his wife appears in the hospital and demands that the medical staff retrieve his sperm so that she can give birth to their genetic child.

In Problem # 1, a spouse is seeking to retrieve the sperm of her husband who

40 In Roe v. Wade, the Supreme Court interpreted the word “person” as not including fetal life, ruling that a person within the meaning of the Constitution does not exist until birth. Roe v. Wade, 410 U.S. 113, 158 (1973). However, even if not yet a person, the state has “legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992). While these concepts were developed in the context of the constitutional disputes over abortion, they will also likely affect the views of courts that analyze the status of embryos in other contexts, since a fetus and an embryo both fall into the category of unborn entities.


43 But see MODEL ACT § 102(21) (2008) (approved by the A.B.A. Family Law Section in 2007 and the House of Delegates in 2008). The word “spouse” presumes the existence of a marriage, but it should be noted that under the Model Act, a legal spouse means “an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage.” Id. This definition allows persons living in a state which recognizes registered domestic partnerships or civil unions
has just died. Can this request be allowed when clearly the husband cannot then consent to the removal of his sperm? It is unlikely that the medical staff would assent to this without either a court order or at least a formal opinion by hospital counsel. Should then, a judge allow the retrieval without credible evidence that the husband consented to this before his death? To have a genetically related child, the survivor may seek judicial approval to have gametes removed in case of an accident or other unexpected death. However, unless the now deceased person’s consent to having such a child in the event of death or incompetence is clear, judicial placement of the gametes may not be forthcoming.

The distinction between a “retrieval” of gametes and a “placement” of the gametes after their retrieval is important in this respect. In Problem #1, the wife’s request for retrieval of her dead husband’s sperm will have to be acted on in a narrow period of time. At the very best, this is a window of up to thirty-six hours after death but may be considerably shorter. If not retrieved within this short period of time, the sperm will not be viable. This raises the issue of whether retrieval can be authorized in an emergency, i.e., where the pre-death consent of the husband is in doubt but failure to retrieve the gametes within the thirty-six hour window will prevent any subsequent useful inquiry on the issue of consent. The Model Act contains the following exception to the requirement that gametes not be retrieved from a dead body unless the deceased gave his consent prior to death or in a record:

In the event of an emergency where the required consent is alleged but is unavailable and where, in the opinion of the treating physician, loss of viability would occur as a result of delay, and where there is a

to be treated as a legal spouse for purposes of ART, even if not technically married. See id.

44 See Susan Crockin, New York Court Approves Sperm Retrieval from Dead Fiancé, AMERICAN SOCY FOR REPROD. MED. (Sept. 30, 2009), http://www.asrm.org/news/article.aspx?id=2276&terms =+(+%40Publish_To+Both+Sites+or+%40Publish_To+ASRM+Only+)+and+legally+speaking +susan+crockin+2009 (last visited Apr. 20, 2011) (reporting on a New York court that approved a dead man’s fiancé’s sperm retrieval request because her fiancé told her he wanted to have another child with her just a day before he died); see also Ike Flores, Newlywed Dies in Crash, But Hopes for Children Live in Extracted Sperm, L.A. TIMES, July 3, 1994, at A10 (reporting on sperm removed from dead body of newlywed husband for possible future use of widow); Maggie Gallagher, The Ultimate Deadbeat Dads, NEWSDAY, Feb. 1, 1995, at A28 (describing a scenario in which sperm was taken from body of deceased husband and cryopreserved at request of his widow).


46 Id.
A genuine question as to the existence of consent in a record, an exception is permissible.\textsuperscript{47}

This provision would leave the decision to the physician when the wife asserts that her husband had consented in writing to having his sperm harvested in case of his death, even if she could not produce the record at the time.\textsuperscript{48} However, in the absence of such a statute, it is likely that the physician would seek the advice of hospital counsel and that counsel would recommend seeking an emergency ruling from a court authorizing the harvesting of the gametes.\textsuperscript{49}

B. Problem # 2: Parent Seeking Retrieval of Eggs from a Brain-Injured Adult Daughter

A thirty-six year old woman with anoxic brain injury is brought to a hospital and is mechanically ventilated. She had been using oral contraceptives. Her husband and other family members appear in the hospital and state that the woman would, if she was competent, agree to the retrieval her eggs so that they could be used to produce a genetically related child. No written documentation of the woman’s intent exists.

The issue of consent is critical in the case of the hospitalized, brain-injured thirty-six year old woman whose family members claimed that if she were competent, she would consent to the harvesting of her eggs.\textsuperscript{50} In the actual situation on which


\textsuperscript{48} According to the Model Act, if embryos are retrieved, their transfer is expressly prohibited unless a court subsequently approves the transfer. See MODEL ACT § 205(3).

\textsuperscript{49} Depending on local procedure, a ruling could be sought under a statute that specifically provides for it, an action in equity, or a declaratory judgment. If the state has no procedure for such a proceeding, the Model Act section 205(2) leaves the judgment to the attending physician. MODEL ACT § 205(2).

\textsuperscript{50} This statement of facts is based on a reported panel discussion of the case. See David M. Greer et al., Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury, 363 NEW ENG. J. MED. 276, 276-83 (2010). At one time, the cryopreservation of unfertilized eggs was not especially successful. That seems to have changed and egg preservation success rates are increasing. See Briana Rudick et al., The Status of Oocyte Cryopreservation in the United States, 94 FERTILITY & STERILITY 2642, 2642-46 (2010) (reporting growing success with
Problem # 2 is based, the woman had a poor neurologic prognosis and did not meet the technical criteria for brain death. However, she was unable to give her consent, at the request of her family members, that her eggs be harvested so they could be used to conceive a genetically related child. The fact that the patient was using oral contraceptives at the time further complicated the case. Moreover, were the eggs to be harvested, it was estimated that about two weeks would be required to initiate exogenous gonadotropin therapy and ovarian hyper-stimulation before attempting the harvesting of the eggs. During the procedure, the patient would normally be placed in a supine position, but because of the patient’s physical brain injury, this position could result in brain herniation and death.

Focusing just on the issue of the patient’s consent, the Model Act would impose a strict standard prohibiting the collection of gametes from the body of an incompetent or dead person unless the person consented in a record before becoming incompetent or dying, or unless consent is given by the person’s authorized fiduciary, who has been granted express authority to provide such consent. In this case, as far as it could be determined, the incompetent woman did not consent in a record to the removal of her eggs, and no one claimed that such a record actually existed. The emergency situation discussed in Problem # 1 did not apply because no one made a representation that the woman had actually consented in any form to the harvesting of her eggs if she became incompetent or died. As such, the staff decided not to offer the procedure “for medical, as well as ethical and legal reasons,” and the patient died soon afterward.

If in this case the harvesting of the woman’s eggs had taken place, this does not mean that they could be used to conceive a child, even if the eggs were fertilized with donor sperm or the sperm of the husband after harvesting. The Model Act would still require court approval to transfer the resulting embryo, and the absence of a record

cryopreservation of eggs, which is now offered by more than half of the assisted reproduction clinics in the United States).

51 See Greer et al., supra note 50, at 280.
52 See Greer et al., supra note 50, at 280.
54 Greer et al., supra note 50, at 282. While family members stated that the incompetent woman would consent to the procedure if she could speak, this is obviously different from actually having consented when she was able to do so. In any case, no record of her consent was found, and the woman’s gynecologist had no record of a discussion with her about her pregnancy wishes. Id.
55 Greer et al., supra note 50, at 282.
showing consent would require overcoming a legal “presumption of non-consent.” 56
Furthermore, the need to authorize or employ a gestational carrier to birth the child
would add an additional complication, even in the unlikely situation in which the court
authorized the use of the eggs. 57

C. Problem # 3: Girlfriend Seeking Use of Deceased Soldier’s Sperm

A soldier about to be deployed to a war zone deposits his sperm in a
sperm bank for his girlfriend’s use in the event of his death in combat so that she
can become pregnant with a child genetically related to him.

Male military personnel who are assigned to duty in a combat zone sometimes
store their sperm before deployment. 58 This is to preserve their gametes in case of a
serious wound, which could harm their potential for having genetically related children,
or even to allow a surviving spouse or partner to use the sperm for the same purpose in
case of a death in combat. Problem #3 should be resolved based on the intent of the
soldier and his girlfriend, as long as that intent is clear and documented in a record. 59
Thus, before deployment and sperm storage, the soldier and his girlfriend should
consult and make a record of their intent, together with any restrictions they agree on.
This record should clearly spell out the circumstances under which the girlfriend will
have access to the sperm, whether access is limited to the death of the soldier or may
also include access in case of his incompetence, and any time limitations involved. In
this case, the record should spell out intent in clear and unequivocal language, and the
record should also express the soldier’s intent to be a parent and to provide support for
any child so conceived if he survives.

56 Model Act § 205(3).
57 See Kindregan & McBrien, supra note 14, at § 5.4. The status of surrogacy is complicated by
a wide array of laws governing that practice in the United States and is beyond the scope of this
article. Id. (summarizing and discussing state laws about surrogacy).
58 See Maria Doucettiperry, To be Continued: A Look at Posthumous Reproduction as it Relates to Today’s
/05-2008.pdf (noting issues created by sperm storage before combat deployment and relatives of
injured or dead soldiers requesting access to their sperm); see also Valerie Alvord, Some Troops
59 See, e.g., ALA CODE § 26-17-704 (2010); N.D. CENT. CODE § 14-20-62 (2011); UTAH CODE
to Uphold Paternity Agreements, 11 J.L. & FAM. STUD. 487, 488-94 (2009) (arguing that in
establishing the presence or absence of intent, courts should consider contractual agreements).
The record itself can take many forms. It can be a contract between the couple, a deed of gift to the girlfriend, a document authorizing a sperm bank to preserve his sperm, or even in a testamentary instrument. A couple should request affirmation of the sperm storage facility’s express willingness to abide by the couple’s wishes.\(^6^0\)

The leading decision on this issue is a California decision in which a man stored his sperm, deeded it to his girlfriend, left instructions with the storage facility to give the woman access to the sperm, and executed a will leaving it to her before he killed himself.\(^6^1\) However, even if all parties make their intent clearly known, scenarios like the ones in Problem #3 and the California decision raise a number of public policy issues for consideration, especially given the increasing popularity of these practices.

In this example, the parties are not married, so if the matter comes before a court, a judge may question if it is contrary to public policy for the judge to approve the transfer of sperm to a person who is not a spouse. It is true that many children are born out of marriage, but one may ask if the law should condone it by allowing an unmarried woman access to sperm to conceive a child posthumously. However, it is unlikely that a court today would focus on that since the right of unmarried persons to have children cannot be seriously contested in modern America.\(^6^2\) Certainly the Model Act, while recognizing the interests of legal spouses,\(^6^3\) does not place any limitation on unmarried

\(^6^0\) See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 282 (Cal. Ct. App. 1993) (discussing the importance of the donor’s consent in the use of sperm deposited at storage facilities). In Hecht, the court’s discussion of a widow’s rights in the sperm donated by her husband reflects the ambiguous status of property rights in sperm and other genetic material. Id. at 282-83. According to the court, the sperm bank would be bound to give a widow her deceased husband’s sperm only if the husband clearly expressed his intent in this regard. Id.\(^6^1\) Id., modified, 59 Cal. Rptr.2d 222, 223 (Cal. App. 1996), rev. denied, not to be officially published (Jan. 15, 1997) (involving a challenge to the girlfriend’s access to the stored sperm of her deceased boyfriend).\(^6^2\) Eisenstadt v. Baird, 405 U.S. 438, 440 (1972) (striking down a statute that prohibited the sale of contraceptives to unmarried persons because it violated the Equal Protection Clause). “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 beget a child.” Id. at 453. While the Supreme Court has not expressed directly whether there is a constitutional right to procreate, “a sensitive reading of the Court’s decision in relevant areas suggests that it has implicitly recognized such a right.” Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 HARV. L. REV. 669, 685 (1985).\(^6^3\) For example, the Model Act places some limitations on the right of a legal spouse to dispute parentage of a child born to his wife by assisted reproduction. MODEL ACT § 605 (2008) (approved by the A.B.A. Family Law Section in 2007 and the House of Delegates in 2008). However, under the Model Act, the right of an “individual” to use ART to become a parent is clearly recognized by the person’s consent in a record. Id. § 604(1). The Uniform Probate Code,
persons’ use of assisted reproduction.\textsuperscript{64}

Another policy issue Problem \# 3 raises is whether the law ought to authorize a judge to release gametes to a woman who will use the gametes to produce a child who will be conceived and born after the death of the father. This directly raises the legal status of posthumous conception, i.e., the parenthood of a man whose child is conceived after his death. The law long recognized that for purposes of inheritance, a child conceived sexually before the father’s death but born after it, was his legal child.\textsuperscript{65} But this situation is different from the harvesting issue Problem \# 3 introduces because it involves the potential post-mortem conception of a child.

\section*{D. Problem \# 4: Parent Seeking Harvesting of Child’s Sperm before Chemotherapy}

A thirteen year old boy is about to begin chemotherapy, which will likely have a negative impact on his fertility. Prior to his treatment, however, his mother gives permission for his sperm to be cryopreserved so that she may, at some future date, have a genetically related grandchild. The mother may also want to preserve the sperm in case the boy decides to have a genetically related child after he reaches adulthood. The boy objects when the physician explains the procedure to retrieve the sperm, accomplished by either aspiration or ejaculation.

The issue here is whether a boy, who is legally incompetent due to his minority status, can decide for himself whether to assent or to veto his mother’s request for the retrieval of his sperm.\textsuperscript{66} The American Society for Reproductive Medicine (“ASRM”) on the other hand, provides that for purposes of inheritance an individual is the legal child of its natural parents regardless of their marital status. \textsc{Unif. Probate Code} § 2-117 (amended 2008), 8 U.L.A 58-65 (West Supp. 2010).

\textsuperscript{64} \textit{See} \textsc{Model Act} § 102(19) (defining “intended parent” as “a person, \textit{married or unmarried}, who manifests the intent . . . to be legally bound as the parent of a child resulting from assisted or collaborative reproduction”) (emphasis added); \textit{see also} Maria C. Gonzáles, \textit{Frozen Embryos, Divorce, and Needed Legislation: On the Horizon or Has it Arrived?}, 83 \textsc{Fla. B.J.} 39, 40 n.18 (2009) (citing to the Model Act and its definition of “intended parents”).

\textsuperscript{65} \textsc{Restatement (Third) of Prop.: Wills & Other Donative Transfers} § 2.1 cmt. d (1999) (child conceived by sexual intercourse is legal heir of the father who dies before birth); \textsc{Mass. Gen. Laws} ch. 190, § 8 (2010) (treating posthumous children as living at the death of their parent).

\textsuperscript{66} The statement of facts in Problem \# 4 is based on an actual incident, but the facts are somewhat modified for purposes of this article. The modifications of the actual incident are based on the author’s personal knowledge.
requires that gametes harvested from a minor serve his or her best interests.\textsuperscript{67} The procedure to be employed in sperm retrieval is also relevant. If the thirteen year old boy is post-pubertal, he should be capable of ejaculation with medical assistance, which will not require substantially intrusive procedures, but this could be disturbing to a thirteen year old, so the options should be explained to him in detail outside the presence of his parent(s).\textsuperscript{68}

Because a thirteen year old is a minor and as such, is disqualified in most instances from consenting to medical procedures, the consent of his parent is normally required, except in an emergency or when allowed by statute. The application of consent principles here, however, is further complicated by the fact that sperm retrieval yields no immediate medical benefit to the child, and the parent's request to proceed may be influenced by her conflict of interest, i.e., her personal desire to have a genetically related grandchild in the future. The mother may have in mind that this is the only possible chance for her to have a genetically related grandchild, which focuses on her interests, rather than those of her son. This would be especially true if she intends to seek a surrogate to conceive a child using the sperm or perhaps even to conceive and birth her own genetically related offspring.\textsuperscript{69} On the other hand, the mother may have a sincere desire to preserve her son's fertility so that he can make the choice to become a father when he reaches adulthood if he overcomes the cancer and survives.


\textsuperscript{68} \textit{Id.} at 1625. If the male child is not post-pubertal, an epididymal sperm aspiration and extraction can be done, but this is clearly more intrusive than ejaculation. \textit{Id.} In the case of a post-pubertal minor female, the retrieval of eggs would be more complicated than male ejaculation because of the need for a stimulation cycle and the intrusive nature of the procedure. \textit{Id.}

\textsuperscript{69} The idea of a woman seeking to become pregnant using the sperm of her son may seem unlikely, unethical, or even illegal to some; however, in a matter unrelated to the facts in problem \# 4, another physician described such a request from the mother of a recently deceased adult child in a conversation with the author of this paper. See generally In Re Estate of Evans, No. C-1-PB-09-000304, 2009 WL 7729455 (Tex. Prob. Ct. 2009). In a trial order, the probate court granted an injunction in favor of the deceased's mother to preserve the body for the purpose of harvesting the deceased's sperm. \textit{Id.;} Mike CeliZic, \textit{Mother Defends Harvesting Dead Son's Sperm,} MSNBC Today, (Apr. 9, 2009), http://today.msnbc.msn.com/id/30133582/ns/today-today_health/ (last visited Apr. 20, 2011).
The proper basis of a decision in such a case seems to this author to be based on the maturity of the boy. When the physician describes the sperm removal procedure to the boy and the reasons for it, if he appears to be sufficiently mature to understand and consent to it, the author believes his decision to proceed or not proceed should control. While a procedure such as ejaculation may involve no physical danger to the teenage boy, it is also not intended to give him any immediate medical benefit. Surgical removal of sperm is obviously more intrusive than ejaculation, and in addition to being more complicated, it also does not confer any immediate medical benefit on the boy. However, retrieving the boy’s sperm may produce long-term benefits to the boy, such as preserving his fertility and giving him some hope that he may be able to conceive a genetically related child when he becomes an adult.

Whatever the decision to retrieve the sperm may be, the author thinks the sperm must be cryopreserved and not used until the boy gives his explicit consent to becoming a parent, if and when he becomes an adult. He may be mature enough to consent to retrieval of his sperm at age thirteen, but the author does not believe he can legally consent to the present use of the sperm to conceive a child by assisted reproduction at age thirteen.

E. Problem # 5: Former Girlfriend Seeks to Use Embryos Produced with Her Gametes and Those of Her Former Boyfriend Even Though He No Longer Wants to Be a Parent

A woman is about to undergo cancer treatment involving the surgical removal of her ovaries. She and her cohabiting boyfriend agree to have her eggs retrieved and fertilized in vitro with his sperm and to cryopreserve the resulting embryos so they can have a genetically related child in the future when she finishes her cancer treatment. But, after the relationship ends, the man objects to the woman implanting the embryos to become pregnant, saying he has withdrawn his consent.

Problem # 5 is based on a decision of the European Court of Human Rights in

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70 Even though the boy is a minor, the law recognizes that some children in the teen years may be sufficiently mature to make a decision regarding medical treatment. Bellotti v. Baird, 443 U.S. 622, 643 (1979). In Bellotti, the Supreme Court upheld the Massachusetts judicial by-pass system, which would allow a minor to seek an abortion without parental consent if a judge found that the child was either sufficiently mature to decide the matter for herself, notwithstanding her minority, or if the judge found the abortion to be in her best interests. Id. at 647-48.
the *Evans* Case. A *Evans*, an unmarried couple learned that the woman had precancerous tumors in both of her ovaries and that the ovaries would have to be removed in the course of her treatment. The English clinic informed them that her eggs could be harvested prior to surgery, fertilized in vitro by his sperm, and cryopreserved for future use. As part of this procedure, the clinic also told the couple that they had to execute a consent form under the United Kingdom Human Fertilization and Embryology Act of 1990, which by judicial interpretation conferred the right to revoke consent to in vitro fertilization prior to the transfer of any resulting embryos. The

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71 Evans v. United Kingdom, 43 Eur. Ct. H.R. 21 (2006). The choice of a woman with cancer to attempt to preserve her fertility for use in this case by embryo cryopreservation has potential for success. Embryos can be cryopreserved, and there is some evidence that when this is done to preserve the fertility of a female cancer patient who is going to undergo chemotherapy that embryo yield has a good potential for success. *See* Audra D. Robertson, Stacey A. Missmer & Elizabeth S. Ginsburg, *Embryo Yield After In Vitro Fertilization in Women Undergoing Embryo Banking in Fertility Preservation Before Chemotherapy*, 95 FERTILITY & STERILITY 588, 588-99 (2001) (showing that there is gender equivalent success in embryo yield in use of cryopreservation and this should encourage women cancer patients to consider this course of action).

72 The author does not think such a case would be decided based on marriage of the genetic gamete providers. Even if the couple were married, the right of either party to withdraw consent to the placement of the embryos is recognized by the Model Act in that it states: “The consent of a person to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm or embryos.” MODEL ACT § 606(2) (2008) (approved by the A.B.A. Family Law Section in 2007 and the House of Delegates in 2008). In any case, in *Evans*, the gamete providers were not married. *Evans*, 43 Eur. Ct. H.R. at 411. However, the Israeli court ruled otherwise in *Nachmani v. Nachmani*, in which the gamete providers were married. CFH 2401/95 Nachmani v. Nachmani 50(4) PD 661 [1996] (Isr.). The former husband attempted to withdraw his consent to his former wife’s use of cryopreserved embryos, which had been produced by agreement of the parties that his sperm and the wife’s eggs were to be carried by an American surrogate carrier. *Id.* The Supreme Court of Israel provided an analogy to a child conceived by sexual intercourse and ruled once fertilization took place, the husband could not withdraw his consent. *Id.* A major consideration in this decision was that the wife could not have a genetically related child except by placement of the embryos produced with use of her eggs. *Id.* There appears to be nothing in American law to support such an analogy.

73 A recent study showed no differences in embryos mothered by female cancer patients and those fathered by males using cryopreserved embryos for post-chemotherapy reproduction. *See* Robertson, Missmer & Ginsburg, *supra* note 71, at 588-91.

74 *Evans*, 43 Eur. Ct. H.R. at 411 (detailing process by which couple’s consent was sought to comply with United Kingdom Human Fertilization and Embryology Act of 1990). The consent form that the couple signed read as follows:

[D]o not sign this form unless you have received information about these matters and have been offered counselling [sic]. You may vary the terms of this consent at any time except in relation to sperm or embryos which have already been used. Please insert numbers or tick boxes as appropriate.
parties subsequently separated, and the man then wrote to the clinic informing it that he was withdrawing his consent to use the embryos. When the clinic then notified the woman that it was required to destroy the embryos, she brought suit against both the clinic and the man, seeking equitable relief to prevent the destruction of the embryos, as well as a declaration stating that the man could not withdraw his consent. After losing in the High Court of Justice, the woman then sought review of the applicable United Kingdom law in relation to the judgment rendered in the European Court of Justice, which in the end upheld the ruling of the national court.

The Model Act states that, “The consent of an individual to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this Section is not a parent of the resulting child.” Under this test, the man has the right to withdraw his consent before the embryos are implanted in the body of his former girlfriend if he withdrew consent after notice in a record, such as letters to the woman and the clinic preserving the embryos.

An argument might be made on the woman’s behalf that the embryos should be treated differently than gametes since fertilization has already occurred in vitro with the consent of both parties. That argument might be strengthened by the consideration that the woman’s ovaries have been removed after the man consented and provided sperm to fertilize her eggs, and the use of the embryos is the absolute last chance she has to have a genetically related child.

Id. at 412 (emphasis added). See also id. at 417-19 (quoting consent provisions of United Kingdom Human Fertilization and Embryology Act of 1990).

Id. at 412. The clinic notified the woman that they were legally obligated to destroy the embryo pursuant to section 8(2) of Schedule 3 to the United Kingdom Human Fertilization and Embryology Act of 1990. Id.


Such notice was given in writing in Evans. See Evans, 43 Eur. Ct. H.R. at 412. In a Massachusetts case, a jury verdict in a breach of contract case awarded a money judgment against a clinic to a husband whose wife used cryopreserved embryos to conceive a child without his consent, even though he did not formally withdraw his consent in writing. See $108 Verdict, NEW ENG. JURY VERDICT REVIEW & ANALYSIS, April 2004, at 7, 7-8 (discussing Gladu v. Boston IVF, Inc., an unreported, unavailable case decided by the Middlesex Superior Court).
F. Problem # 6: Widow Seeking to Use Late Husband’s Sperm for Posthumous Reproduction

A man who is dying has his sperm cryopreserved and directs the clinic to provide it to his wife if she wants to have their genetically related child after his death. Two years after his death, the wife uses the sperm and becomes pregnant by intrauterine insemination; she gives birth to a child nine months later. The wife then applies for Social Security benefits as the surviving child of a Social Security beneficiary.

Problem # 6 raises issues that go beyond the private interests of potential parents because it implicates the public interest in the Social Security fund. The law recognizes that a child that is in gestation at time of its father’s death is his legal heir. At this point in time, there is no legal bar to prevent a dying husband from providing his wife with his sperm to produce their posthumously-related genetic child. For example, the Model Act recognizes the possible posthumous conception of a child by providing that if the individual has:

[C]onsented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased person would be a parent of the child.


82 Model Act § 607. A legislative note that precedes the article provides that if there is a conflict between this provision in the A.B.A. Model Act and the enacting state’s probate code, then the probate code should control. See Model Act art. 6. With the exception of the provision relating to the probate code, this is also the position of the Uniform Parentage Act. See Unif. Parentage Act § 707 (amended 2002). For purposes of inheritance, the Uniform Probate Code (“U.P.C.”) permits a person to consent in a record to reproduction using his gametes or embryos after his death. See Unif. Probate Code § 2-120(h)(1). This is true even if there is no such record to approve of posthumous reproduction if there was clear and convincing evidence of such intent. See id. § 2-120(h)(2). The marriage of the birth mother to the decedent makes a strong case for treating the posthumous child as that of the husband if no divorce proceeding was pending at the time of death. See id. § 2-120(h). Finally, the posthumous child must be in gestation within thirty-six months after the father’s death or be born within forty-five months of his death. See id. § 2-120(k). The U.P.C. also provides for recognition of a
The policy question arises when the wife makes the choice after her husband’s death to conceive a child and then applies for Social Security benefits based on the child’s status as the heir of the father. This issue has arisen in a number of cases, and the results have been widely inconsistent. This inconsistency is based on the fact that for purposes of Social Security, state law determines heirship, not federal law. The Social Security Act provides that a surviving child of a deceased, fully covered beneficiary is entitled to benefits if the child is unmarried, under the age of eighteen, and was dependent on the deceased parent at the time of his or her death. The Social Security Administration has routinely rejected claims such those arising from the facts of Problem # 6, and because state law varies on the status of such posthumously conceived children, the court decisions are not consistent.

In one much cited decision, after the Social Security Administration denied a claim of twin children conceived after the death of the father when his widow used his sperm, the First Circuit sent certified questions regarding the status of the children under Massachusetts law to the supreme court of that state. The Massachusetts Supreme Judicial Court answered that the children were the dead man’s heirs under state law if they were his genetic children, if he had clearly consented to his sperm being used by his wife to conceive their children posthumously, if he intended to support any children produced by use of his sperm, and if a reasonable time elapsed between his posthumously conceived child in well-defined circumstances when birthed by a surrogate carrier, even if the posthumous child is not genetically related to the deceased father. See id. §§ 2-121(a)(3), 2-121(a)(4), 2-121(c).

83 Compare Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 961, 966-67 (D. Ariz. 2002) (affirming decision to deny benefits to children conceived by in vitro fertilization after father’s death because children could not inherit from the father under Arizona intestacy laws as they could not demonstrate actual dependency at the time of the father’s death), and Khabbaz v. Comm’r of Soc. Sec., 930 A.2d 1180 (N.H. 2007) (holding that child was not a “surviving issue” of father under New Hampshire intestacy statutes and thus not eligible for coverage), with In re Estate of Kloacy, 753 A.2d 1257 (N.J Super. Ct. App. Div. 2000) (holding that that twin children born eighteen months after their father deceased were entitled to inherit under the state’s intestacy law in circumstances where decedent left no estate and an adjudication of parentage did not cause “serious problems” with the orderly administration of estates), and Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002) (holding that children could inherit if wife established their genetic relationship with decedent and that decedent consented both to posthumous reproduction and support to the child).

84 See Who is the insured’s natural child?, 20 C.F.R. § 404.355 (2011).


86 Woodward, 760 N.E.2d at 257 (defining the terms under which posthumously conceived children would be classified as the heir of a deceased genetic father for social security purposes when they were conceived using his sperm to inseminate his widow about sixteen months after his death).
death and the conception of the children. Having met these qualifications, the children appeared to be eligible to receive Social Security benefits. The Ninth Circuit reached a similar result, noting that as genetic children of married parents, they were dependent children of an insured wage earner. However, other courts, interpreting different state law, have denied Social Security benefits to posthumously conceived children. The result is the rather odd situation where federal benefits are granted or denied based on different state laws. Thus, when a widow applies for Social Security benefits for the child, as in Problem # 6, the results will vary depending on the applicable state law.

G. Problem # 7: Divorced Woman Seeking to Use Embryos Produced During Marriage

A married couple underwent in vitro fertilization using their own gametes, and after the procedure, there were five excess cryopreserved embryos. When the parties divorced, neither of them notified the clinic; a year later, the former wife seeks to use the embryos without notifying the ex-husband.

Normally, the in vitro fertilization process produces a number of “excess” cryopreserved embryos, i.e., embryos not implanted immediately but stored for possible future use. Because of this result, hundreds of thousands of embryos are in storage in the United States. Many of these embryos are placed in storage by married couples who later divorce. The parties to the marriage consented to the cryopreservation in the hope of later conceiving children, but once the marriage ends, there is obvious potential for disagreement over what to do with the embryos.

Clinics usually provide their in vitro fertilization patients with a form suggesting

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87 See id. at 269-70.
88 Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004) (dependent genetic children of deceased wage-earner are entitled to social security benefits even if they were conceived about ten months after his death). Accord Capato v. Comm’r of Soc. Sec., 631 F.3d 626 (3d Cir. 2011) (citing Gillett-Netting with approval).
90 Charles P. Kindregan, Jr. & Maureen McBrien, supra note 13, at 170 n.2 (discussing the large number of cryopreserved embryos in the United States).
that they agree before the procedure to provide in advance as to disposal of embryos in the event that they later divorce.\textsuperscript{92} Disposal choices could include giving one of the spouses the choice of what to do with them, donating the embryos to research, transferring the embryos to a woman experiencing an infertility problem, or ordering the clinic to destroy them. However, it is unclear that courts will enforce such an agreement. In the leading decision, the Supreme Court of Tennessee stated in dictum that a contract between the husband and wife regarding the disposition of their excess embryos would be enforced if they could not agree during the divorce proceedings.\textsuperscript{93} Still, in that case, there was no prior agreement; thus, the court suggested that in such cases, the court should favor the party who wishes to avoid parenthood by assisted reproduction, although it might rule conversely if the destruction of the embryos would preclude the wife from ever having a genetically related child.\textsuperscript{94} Alternatively, a Massachusetts decision found that a contract would be an improper basis for imposing fatherhood on a divorcing husband, even if he previously agreed that in the event of divorce, the wife should decide how to dispose of the embryos.\textsuperscript{95} A New Jersey court suggested the middle ground in a case where the husband wanted the embryos preserved, while the wife wanted them destroyed.\textsuperscript{96} The New Jersey court held that when a party has changed a position from the disposition previously agreed to, the current position of both parties should be evaluated, and the choice of a party to avoid parenthood should ordinarily prevail.\textsuperscript{97}

The American Society for Reproductive Medicine favors the use of contracts in such cases as evidenced by the statement that, “Persons whose gametes, embryos, or tissue are stored to preserve fertility or their legal guardians should give directions for disposition of that tissue in the future.”\textsuperscript{98} However, the change in circumstances, which


\textsuperscript{93} See generally Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (discussing the court’s enforcement of an earlier contract to donate their embryos to research); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (discussing an ex-wife’s desire to use the embryos versus her ex-husband’s desire to destroy them).

\textsuperscript{94} See Davis, 842 S.W.2d at 604.

\textsuperscript{95} A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000). The court ruled that a contract made years before, when the marriage was still intact, should not be the basis for forcing a husband to become a parent by use of assisted reproduction against his will when the parties are divorcing. Id. at 1058-59.


\textsuperscript{97} Id. at 719 (stating wife’s decision to destroy the embryos should control).

\textsuperscript{98} See Ethics Comm. of the Am. Soc’y for Reprod. Med., Fertility Preservation and Reproduction in
arises between the time when a couple jointly cooperated to achieve parenthood and the situation that exists when they are divorcing, creates serious problems for enforcement of a prior contractual agreement. 99

A peculiar consent issue affecting embryos, as distinguished from the consent to the use of gametes, is that the consent of both of the progenitors should be required. It also follows that if at the time of the divorce they cannot agree, then the court must decide based not on a contract but on the standard of assisted reproductive law that a person should not be forced into parenthood against his or her will. This is the standard the Model Act adopted, that notwithstanding a prior agreement:

In the event of a subsequent disagreement between the intended parents, wherein one intended parent no longer wishes to use stored embryos as previously agreed, after receipt of notice in a record by the other intended parent and by the clinic or storage facility of that individual’s intent to avoid conception, an intended parent may not transfer the embryos into the body of any woman with the intent to create a child. No prior agreement to the contrary will be enforceable. 100

In Problem # 7, the divorce has occurred but neither party notified the clinic or storage facility. This sometimes happens because people forget that embryos were stored a number of years before. 101 The idea of notification set out in the Model Act

Cancer Patients, supra note 67, at 1625.

99 See generally MODEL ACT § 501(3) (2008) (approved by the A.B.A. Family Law Section in 2007 and the House of Delegates in 2008) (describing what must be included in an embryo agreement). The requirements of what must be included in an embryo agreement include, “whether an intended parent may use the embryos in the event of divorce,” “which intended parent may control the embryos in the event of divorce,” and what should happen to the embryo in the event of a disagreement between intended parents. Id. § 501(3)(a)–(c). These requirements allude to the fact that divorce between intended parents creates problems with the embryo agreements. See id. By requiring intended parents to include these provisions in an embryo agreement, it is implied that disagreements arising between divorced intended parents would be resolved through the embryo agreement. See id.

100 See MODEL ACT § 501(3). Generally, section 501 deals with the parental rights and obligations when an embryo agreement is in place. Id. § 501. Section 501 allows for flexibility, in that the embryo agreement may be amended at any time before the transfer of the embryo or the death of a parent. Id. However, section 501 does specify the need for certain provisions in an embryo agreement, such as what happens in the case of a disagreement or divorce between the parents. Id. § 501(3)(b)–(e).

101 See Charles P. Kindregan & Maureen McBrien, supra note 13, at 171–72 (describing the effects
would work in an ideal world, but the world is not always ideal. Therefore, the failure of
the husband to notify the clinic of the divorce, and the subsequent failure of the wife to
notify the husband of her request to have the embryos implanted, will have to be
addressed outside of the Model Act standard. The clinic runs a risk of liability in the
event that it allows the transfer of the embryos to the wife without first giving notice to
the ex-husband, who could then give notice of his objection, thus invoking the Model
Act standard. In the event that the clinic allowed transfer to the former wife after it
received notice, then in addition to its potential liability, the husband would “not be the
parent of a resulting child.” But if the husband does not take action to give notice of
his objection to the use of the embryos around the time of the divorce, he could be and
indeed should be treated as the parent of any resulting child.

IV. Conclusion

The problems discussed in this article are just a few of the legal issues that
developments in medical assisted reproduction raise. Numerous other legal issues have
already been raised and are likely to come to the fore in future years. These include, for
example, parentage issues growing out of international surrogacy arrangements, the
enforcement of domestic surrogacy contracts, the use of ART by same-sex partners or
single persons, attempts to identify anonymous gamete donors, the legal status of known
gamete providers, the use of pre-implantation genetic diagnosis, the use of pre-birth
parentage orders, efforts to require insurance coverage for assisted reproduction,
interpretation of estate planning as to children of assisted reproduction, inheritance
rights of posthumously conceived children, and the coming use of human reproductive
cloning, to name just a few. In the absence of the unlikely national consensus on how
these problems should be addressed, and especially in the absence of uniform or model

of a surplus of embryos); Carl T. Hall, The Forgotten Embryo: Fertility Clinics Must Store or Destroy the
08-20/news/17614928_1_human-embryos-cell-controversy-cell-research (last visited Apr. 20,
2011) (describing what happens to embryos when they are forgotten). The author has been
informed by medical personal specializing in IVF procedures that patients do sometimes forget
about the stored embryos, lose interest in them, stop paying storage fees, or move away from the
area without leaving directions or information about a divorce with the clinic or storage facility.
This is a major problem for the medical facilities involved, and it is understandable that the fear
of a malpractice suit will create caution about disposing of the embryos, even if the patients had
previously signed a form agreement stating that the clinic could dispose of the embryos after the
passage of a specific period of time.

102 MODEL ACT § 501(3)(c). Section 501(3)(c) specifically states that if the transfer of an embryo
occurs after a parent gives notice of their intent to avoid gestation, then that parent who had
made their intent known, will not be the parent of the child. Id.
laws, much of the burden of developing common law solutions will fall on thoughtful and creative lawyers and judges. The author has relied on the American Bar Association Model Act Governing Assisted Reproduction in addressing the problems which are discussed, not because it is a panacea, but rather because it is a good starting point to assist the law in developing a body of law, which can create at least some certainty and solutions for some lawyers and their clients in addressing the ever-evolving science of medical reproduction. The treatment of gametes and embryos as a form of property and the application of traditional parentage doctrines will simply not work in the context of assisted reproduction. Until the law provides a uniform framework for resolution of issues growing out of the use of assisted reproduction, an unacceptable void in the principles governing procreation will continue to exist.