en ventre sa frigidaire[1]

Zygotes as children

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In a world first a Tasmanian Court has held that a zygote may inherit under intestacy legislation.

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The courts have typically two responses to new technology. They may either absorb the new technology within existing legal categories which may have to be manipulated to accommodate it; or they may decide that the policy issues raised are so controversial or difficult that the matter is best left to the legislature to make new statutes. Both responses have been common in the past 15 years as various Australian jurisdictions have wrestled with the legal problems posed by the new medical technologies, especially the innovations in artificial conception.

The first response was exhibited recently by a judge in Tasmania who was asked by the Public Trustee whether, for the purposes of an intestate estate, the word 'children' in the legislation[2] included two zygotes: one at a two-cell stage of differentiation the other at a four-cell stage left by the deceased father (Estate of K A,16/1996, 22 April 1996, Tas. Supreme Court, Slicer J). The case arose because the Public Trustee applied to the court for a determination of the issue since it was the responsibility of his office to deal with the estates of people who die without leaving a will. Two precise questions were posed to the court:

- were the embryos,[3] as they were called, actually living at the date of decease? and
- do they become children on being born alive?

The father and mother had, in fact, entered the in vitro fertilisation program at Hobart hospital and five embryos were produced, three of which were implanted. This led to the live birth of a son. It had been the parents' intention to use the two remaining embryos but the father died before this could happen.

Were the embryos *issue* at the time of death?

The answer given to the first question was no, and the judge added that the same answer would have been given had the embryos been implanted in the mother at the time of the death of the father. The judge arrived at this conclusion by considering the existing law on the status of a human embryo prior to birth. This subject is sometimes considered by reference to the french expression *en ventre sa mere:* in the belly of the mother.

Legal recognition of a child *en ventre sa mere* in the law of wills came late to the common law and was, as with many legal contrivances, based on a fiction. In the 16th century the doctrine did not exist for the purpose of wills where the testator had left his property to his children.[4] At that time this phrase did not refer to children who were 'on the way', so to speak but by 1634 first recognition to children *en ventre sa mere* was accorded.[5] Thereafter, it was not uncommon for the drafters of wills to avoid doubt in the matter by explicitly stating in the will that the class 'children' included children *en ventre sa mere.*[6] If they did not, the courts adopted the rule of construction that a reference to children in wills included a child *en ventre sa mere.*[7] The central point

to grasp here is that it was always necessary for the child *en ventre sa mere* at the time of the death of the testator to be subsequently born alive[8] and to survive until any age at which they were to take the property under the terms of the will. The rule was later extended to recognise the right of children *en ventre sa mere* at the time of the death of the testator to challenge the distribution made under the will under testator family maintenance legislation.[9]

The doctrine was always based on a fiction namely that a child *en ventre sa mere* is a person in being, not in a literal sense since the law does not recognise a person until it is born alive and is outside the body of the mother,[10] but in the sense that the potential existence of the child places it within the reason or motive of the gift.[11] Thus the term 'children living at the time of the death of the testator' came to mean children procreated.[12] The one exception to this construction was if the terms of the will clearly indicated otherwise in which case the fiction could not be relied on and a narrower construction of 'child' was adopted.[13] This would arise, for example, if the will referred to the children by name and not to children as a class. In such a case the courts have held that a child *en ventre sa mere* is not one of the named children and cannot take under the will.[14]

The problem that faced Slicer J was that there were no previous cases on the precise point he had to consider nor did State legislation help.[15] Accordingly, the Court proceeded to examine the *en ventre sa mere* cases generally. This review noted that such rights as the unborn may have do not exist prior to birth, but are conferred at birth when the child is born alive and has a separate existence from its mother. Thus the rights of the unborn, especially in an abortion context, do not, strictly speaking, exist and the courts have denied their existence.[16] The principle that a child *en ventre sa mere* may take legal action when it is born alive has now been extended to a great variety of activities. Such a child may bring legal proceedings for injuries suffered in utero,[17] even against its own mother if she is responsible.[18] The rule that a right to sue only comes into being when the child is born alive is a strict one and should the child die in utero or be stillborn the day before it was due no right to sue accrues in such a case.[19] It would seem that there are only two ways by which this rule may be extended:

by the legislature to extend the ambit of relevant legislation, or

the courts interpret the term child to include viable children as has happened in several American States.[20]

Although the State of Louisiana has allowed a human embryo at the one-cell stage legal recognition to sue and be sued, even this law does not extend to allowing it to inherit until it is actually born.[21]

Similarly, criminal injuries sustained while in the womb may be a crime against the unborn child provided that it is born alive. This would include manslaughter if the child was injured before birth, was born and subsequently died.[22] On the other hand, if the child is killed whilst in utero this cannot be murder, manslaughter or infanticide since this may only apply to a human who is in being, that is, born alive,[23] though in some jurisdictions a separate offence exists to cover such a contingency.[24] Recognition of the unborn has also been extended to the registration of the stillborn for the purposes of the births, deaths and marriages legislation.[25]

At the end of this tour d'horizon, Slicer J concluded that a foetus is not recognised by the law in a full legal sense, but that it has rights contingent on being born alive. A child *en ventre sa mere* is not a human being and to acquire this status it must have quitted its mother in a living state. A child so born is treated as a child in being at an earlier point in time and is treated as capable of receiving a benefit as if it had been actually born at that earlier time.[26]

Interestingly, the issue had arisen previously though it was not resolved in the manner chosen by Slicer J. In 1981 two wealthy Americans named Rios went to Melbourne and entered an in vitro fertilisation program that resulted in three embryos. After one unsuccessful implantation the other two were cryopreserved. The couple died in a plane crash in Chile in 1983 but left no instructions as to what to do with the embryos. In the end they were implanted in an Australian woman. Meanwhile, in California a probate court decided that under the State intestacy law 50% of the deceaseds' estate went to Mr Rios's son by a former marriage and 50% to Mrs Rios's mother.[27] At the time, legal figures in Australia had expressed the opinion that any claims by the embryos against the Rios estate were fanciful.[28] It seems that when considering whether the embryos might inherit under the California intestacy statute the probate court decided that only children born or in utero at the time of the parental death could inherit.[29]

Do the embryos become children of the deceased on being born alive?

The answer to this question was yes. Before answering this question the Court concluded that the embryos in this case were not living at the death of the intestate father. But in respect of the question whether once born these embryos would be cloaked with the fiction and deemed to have been born at the date of death the court arrived at a clear answer. The judge held that there should be no difference in principle between a child *en ventre sa mere* and a sibling that was at the time a frozen embryo. Support for this conclusion was derived from several law reform commission reports that recommended that children in embryo should be able to inherit and the Court noted that a New South Wales Law Reform Commission report[30] had also recommended that embryos be accorded the capacity to inherit under a will. It was but a small incremental step from this line of reasoning to conclude that the same position should obtain in the case of an intestate estate.

The Court discounted practical objections such as how long a period might be involved. After all if the embryos were stored for a long period of time, though just how long this may be done is medically unclear, and then implanted in the widow at say age 60, as happened in one case in Italy, to which should be added the period of gestation plus 18 years, this might be decades hence.[31] In the meantime the executor would have to allocate a portion of the estate for the potential children in case this scenario should eventuate. If it did not, and this might be known very early if the widow died before implantation, or the embryos were implanted and no live birth resulted, or the widow decided not to use them at all, the other children[32] would inherit the residue assuming they survived until age 18 years and such other period that lapsed until the fate of the embryos was definitively known.

Policy considerations

While these were only obliquely adverted to by the Court it seems that the judge held that there was no justice in saying that if there were two children — one born after in vitro

fertilisation but actually born alive before the death of the father, the other born by the same technique, but neither implanted at death nor born at the death of the father — only the former could receive property. The difficulty in these cases is that the old rule that a person could only rely on rights if they were born alive might work real injustice. In the personal injuries cases it has been argued that '. . . if the trauma is severe enough to kill the child, then there will be no recovery; but if less serious, allowing the child to survive, there might be recovery. Again, if the fatality was immediate, the suit could not prevail, but if the death was protracted by a few hours, even minutes, beyond birth, the claim would succeed. Practically, it would mean that the graver the harm the better the chance of immunity.'[33]

In the inheritance cases, a similar argument might be mounted, that is, if there had been an implant on the day the father died there would have been a child *en ventre sa mere* and the rule in existence since the 17th century would operate. But if the implantation had been made minutes after his death that argument could not be relied on. The problem that the decision in this case opens up is that legal recognition has now been given, in a qualified manner, to life just after conception. In this case, one of the zygotes had reached the stage of two cells, that is, 24-36 hours after fertilisation. It is hard to imagine that this recognition could be pushed back any further, though, of course, if medical science is able to identify with precision the exact time of fertilisation, that is, when the ovum and sperm mingle to become an undifferentiated zygote, this argument would have to be revised.

The scope of this decision if followed elsewhere may be greater than it might seem for between 1978, when the first in vitro fertilised child was born in England, and 1991 16,000 such children had been born world wide.[34] Prior to in vitro fertilisation the *en ventre sa mere* rule would have embraced a limited group since the wife or partner would have to be pregnant at the time of death. Normally in such cases this would involve only one child *en ventre sa mere* unless it was a case of a multiple birth.

A nice question might arise if the intestate father had not donated the sperm. Would the child in such a case be his child for the purposes of his estate? Fortunately, other Australian jurisdictions have dealt with this question in their reproductive technology statutes which hold that the donor of sperm, if other than the husband or partner of the birth mother, has no legal rights or obligations vis a vis the child.[35] On the other hand, the husband or de facto partner of the birth mother may only have such obligations and rights in the event that he approved of the in vitro fertilisation. If no such approval was forthcoming it would seem that resultant children would not have a father in a legal sense. None of these issues arose in the *Estate of K* since the decedent father S was the donor in this case.[36]

References

1. Derived from an unnamed female law student see: Barton Leach, W., 'Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent', (1962) 48 *ABAJ* 942, 943, fn 3; see also Sappideen, Carolyn, 'Life After Death: Sperm Banks, Wills and Perpetuities', (1979) 53 *ALJ* 311, 312.
2. *Administration and Probate Act 1936* (Tas.) s.46(1) which provided that where the residuary estate is directed to be held on trust for the issues of an intestate person, such shall be held '(a) In trust, in equal shares if more than one, for all or any of the children of the intestate, living at the death of the intestate, who attain the age of 18 years or marry under that age . . .'
3. Strictly speaking a fertilised human embryo is regarded as a zygote, i.e. when a sperm and ovum mingle and become a single cell, and until it reaches the 8-cell stage it is a pre-embryo.
4. *Anon* (1585) 3 Dyer 303b, 303a ; 73 ER 682, 683 (KB).
5. *Marsh v Kirby* (1634) 1 Rep Ch 76; 21 ER 512.(Ch).
6. *Re Davis* (1906) 7 SR (NSW) 71.(SC).
7. For an early Australian example see: *Trustees Executors and Agency Co Ltd v Sleeman* (1899) 25 VLR 187, 192 (SC) per A'Beckett J. For a Tasmanian example relied on in *Estate of K* at 3 see *In re Bruce* [1979] Tas SR 110, 123 (SC).
8. *Permanent Trustees Co of NSW Ltd v Ralfe* (1940) 57 WN (NSW) 183 (SC).
9. *V v G* [1980] 2 NSWLR 366, 368 D-E (SC); *Re Lawrence* [1973] Qd R 201 (SC).
10. For the citation of early common law classics on this point see: Barry, J.V., 'The Child *En Ventre sa Mere*', (1941) 14 *ALJ* 351-57 at 353.
11. Winfield, P.H., 'The Unborn Child', (1944) 8 *Cambridge LJ* 76-91 at 77. As one judge put it 'From the beginning this construction was acknowledged by the courts to be in some sense a straining of language . . . ' per Lord Loreburn LC in *Villar v Gilbey* [1907] AC 139, 145 (HL(E)).
12. *In re Brown (Deceased), Brown v Brown* [1933] NZLR 114, 117 (FC).
13. *McGrath v Hughes* No. 2345 of 1992 (24 July 1991) NSW Equity Div, per Bryson J at 17.
14. *Bull v Sloan* [1938] 3 DLR 79, 81 (BC CA).
15. In *Estate of K* at 5 he noted that the *Status of Children Act 1974* (Tas.) s.10A(2) provided that nothing in Part III, which dealt with fertilisation procedures and their consequences, altered the law as it existed before commencement of this Act.
16. *Estate of K* at 2 citing *Attorney General for Queensland (Ex rel Kerr) v T* (1983) 57 ALJR 285 (HCA). See also p.3 where Slicer J refers to the cases that have denied a right in either a father or other persons to seek an injunction to prevent an abortion on this ground. Cf *Re Simms and H* (1980) 106 DLR (3d) 435 (NS Family Ct) where the Court appointed a guardian *ad litem* for an unborn child in a case where a father sought an injunction to prevent the mother having a therapeutic abortion.
17. The classic case is *Watt v Rama* [1972] VR 353 (FC). See also *X and Y (By her Tutor X) v Pal* (1991) 23 NSWLR 26 (CA) (negligence suit against failure of doctor to carry out a syphilis test); *Manns v Carlon* [1940] VLR 280 where the action was stayed until the birth of the child. That is, the Court denied that a child in utero could sue before its birth. See further: Cane, Peter, 'Injuries to Unborn Children', (1977) 51 *ALJ* 704-720; Pace, P.J., 'Civil Liability for Pre-Natal Injuries', (1977) 40 *MLR* 141-158.
17. *Lynch v Lynch* (1992) 25 NSWLR 411 (CA).
19. *Davey v Victoria General Hospital* [1996] 3 WWR 347 (Man QB) (a child stillborn one day before the expected delivery date was not a person for the purposes of the *Fatal Accidents Act).* A child that is stillborn was not regarded at common law as a true child: *Re Millar* [1938] 2 DLR 164, 172 (Ont SC) citing *R v De Brouquens* (1811) 14 East 277, 279; 104 ER 607, 608 (KB).
20. *Stidam v Ashmore* 167 NE2d 106 (Ohio CA, 1959); *Mone v Greyhound Lines* 331 NE2d 916, 920 (Mass SJC, 1975) (child died in utero but at 8.5 months gestation was deemed to be viable); *Commonwealth v Cass* 467 NE2d 1324 (Mass, SJC, 1984). For discussion see: Whitfield, A., 'Common Law Duties to Unborn Children', (1993) 1 *Med L Rev* 28-52.
21. La Rev Stat. Ann section 133(West 1991) cited in Feliciano, Tanya, 'Davis v Davis: What About Future Disputes', (1993) 26 *Conn L Rev* 305, 311, fn 51.
22. *Estate of K* at 2 referring to *R v Martin* WA SC, unreported, 8 December 1995. See also *R v Kwok Chak Ming (No 2)* [1963] HKLR 349, 354-355 (FC).
23. *R v Hutty* [1953] VLR 338, 340(SC); *R v Tait* [1989] 3 All ER 682 (CA).
24. *Crimes Act 1961* (NZ) s.182; *R v Henderson* [1990] 3 NZLR 174 (CA).
25. *Births, Deaths and Marriages Registration Act 1995* (SA) (passed 23 March 1996) s.4 (to be at least of 20 weeks gestation or at least 400 grams at birth), s.12(2)(b).
26. *Estate of K* at 4.
27 Smith II, George P., 'Australia's Frozen Orphan Embryos: A Medical, Legal and Ethical Dilemma', (1985-86) 24 *J of Family Law* 27, 28.
28. Smith II, George P., above, at 37 citing Deputy Chairman of New South Wales Law Reform Commission and the Waller Committee set up to decide what to do about the remaining embryos.

Continued on p.172

selves become meaningless, because they 'talk past' the very kernel of what affirmative action is about; namely, taking account of the multiple levels of individuals' situatedness.

Nevertheless, as affirmative action programs falter under the USA's Gingrich-led backlash and its 'relaxed and comfortable' Australian equivalents, the task of developing a philosophical justification for affirmative action is as urgent as it has ever been. To succeed, any justification has to be able, while preserving liberal gains, to take account of the specificities of lived experience, including bodily difference, which affirmative action law has begun to recognise.

References

1. If the traditional reason given for discriminating against married women in employment was that they might become pregnant at any time (backed up by the ideology of the man as breadwinner), then the sections of the Act which forbid discrimination on the basis of marital status should also be interpreted as also being part of the prohibition of discrimination on the basis of potential pregnancy.
2. This is distinct from USA law, in which affirmative action includes ethnicity as well as sex; and North American philosophical analysis tends to concentrate on ethnicity rather than sex. The author discussed in this paper, Richard Wasserstrom, is an exception in this regard.
3. For example, Rosenfeld, Michael, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry,* Yale UP, 1991; 'Affirmative Action and the Myth of Merit' in Iris Marion Young (ed.) *Justice and the Politics of Difference,* Princeton UP, 1990, pp.192-225.
4. Wasserstrom, Richard, 'Racism and Sexism' and 'Preferential Treatment', both in *Philosophy and Social Issues,* Notre Dame UP, 1980.
5. 'Racism and Sexism', p.47, n 25.
6. This is an analogy which does not completely exclude difference — eye colour, after all is not a totally neutral phenomenon in the culture we have now. The association of green eyes with jealousy and quick temper, brown eyes with peaceful disposition, blue eyes with merriment ('twinkling blue eyes') and grey eyes with thoughtfulness is a common literary device. Wasserstrom could plausibly claim that he is not arguing for the eradication of all cultural ascriptions of difference. However, these literary associations probably do not have great impact on the actual lives of green-eyed, blue-eyed, grey-eyed or brown-eyed people; Wasserstrom is arguing for a much lower level of recognised difference based on bodily experience than is now the case.
7. 'Preferential Treatment', p.56.
8. 'Racism and Sexism', p.12.
9. 'Racism and Sexism', p.11.
10. For example, Wolf, Eric, *Europe and the People Without History,* Berkeley: University of California Press, 1982. Wolf attributes his development of the model to 'the intellectual reassessments that marked the late 1960s' (p.x). The movement involving studies 'from below' owes much to the Frankfurt-inspired South American-based theorists such as Freire, Illich and Gutierrez, who formulated their approaches during this period.
11. For a survey and analysis of this tradition of feminist scholarship see, for example, Harding, Sandra, *The Science Question in Feminism,* Cornell UP, 1986; Duran, Jane, *Toward a Feminist Epistemology,* Savage, Rowman & Littlefield, Maryland, c1991.
12. See Gatens, Moira, 'A Critique of the Sex/Gender Distinction', in Judith Allen and Paul Patton (eds), *Beyond Marxism: Interventions after Marx,* Intervention, Sydney, 1988.
13. On the possibilities and dangers of the incorporation of difference into the liberal academy, see Champagne, John, *The Ethics of Marginality: A New Approach To Gay Studies,* University of Minnesota Press, Minneapolis, 1995; also the critical foreword to Champagne's book, by Donald E. Pease. See also related arguments in Poiner, Gretchen and Wills, Sue, *The Gifthorse: A Critical Look at Equal Employment Opportunity in Australia,* Allen and Unwin Sydney, 1991, p.98.
14. 'Preferential Treatment', p.60.
15. 'Preferential Treatment', p.57.
16. 'Preferential Treatment', note 22, p.81.

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18. Koranyi, E.K., *Transsexuality in the Male: The Spectrum of Gender Dysphoria,* Charles C. Thomas Publishers, 1980, p.31.
19. Bolin, A., above, ref. 17, p.63.
20. Koranyi, E.K., above, ref. 18, p.89.
21. Bolin, A., above, ref. 17, p.63.
22. Lewins, F., *Transsexualism in Society: A Sociology of Male-to-Female Transsexuals,* Macmillan, 1995, p.95.
23. Lewins, F., above, p.94.
24. Bolin, A., above, ref. 17, p.63.
25. King, D., above, ref. 7, p.185.
26. West, C. and Zimmerman, D.H., 'Doing Gender' in J. Lorber and S.A. Farrell (eds), *The Social Construction of Gender,* Sage Publications, 1991, pp.13-37.
27. Kessler, S.J. and McKenna, W., *Gender: An Ethnomethodological Approach,* John Wiley & Sons, NY, 1978.
28. Foucault, M., 'The Confession of the Flesh' in C. Gordon (ed.), *Power/Knowledge: Selected Interviews and other Writings, 1972-1977,* Harvester Wheatsheaf, 1980, pp.194-228 at 215-6.
29. See Koranyi, E.K., above, ref. 3, pp.27, 84; Billings, D.B. and Urban, T., 'The Socio-Medical Construction of Transsexualism: An Interpretation and Critique', (1982) 29 *Social Problems* 266-82 at 275; Bolin, A., above, ref. 22, pp.107-8; King, D., above, ref. 9, p.85; Lewins, F., above, ref. 27, p.103, 116. However, what counts as feminine may be indicative of a middle-class as well as a male medical gaze. For as Tyler points out 'it is only from a middle-class point of view that Dolly Parton looks like a female impersonator; from a working-class point of view she could be the epitome of genuine womanliness' (Tyler, C.A., 'Boys Will be Girls: The Politics of Gay Drag' in D. Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories,* pp.32-70, Routledge, 1991). Indeed, it may be that a successful gender performance and the degree of that success implicates multiple relations.
30. King, D., above, ref. 7, p.85.
31. Foucault, M., *The Archaeology of Knowledge,* Tavistock, London,1972, pp.51-2.
32. Butler, J., above, ref. 3.

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29. Leiber, James, 'A Piece of Yourself in the World', (1989) *Atlantic Monthly,* June, p.76.
30. NSWLRC, *In Vitro Fertilization,* Report No. 58, 1988, Recommendation No. 39.
31. The report in *Estate of K* does not state the age of the wife.
32. i.e. the sole child of the relationship plus three children of the father from a previous marriage.
33. *Todd v Sandridge Construction Company* 341 F2d 75, 77 (4th Cir, 1964) per Bryan J.
34. Feliciano, Tanya, 'Davis v Davis: What About Future Disputes', (1993) 26 *Conn L Rev* 305 fn 6.
35. See *Artificial Conception Act 1984* (NSW) ss.5-6; *Artificial Conception Act 1985* (ACT) ss.5-7; *Artificial Conception Act 1985* (WA) ss.6-7; *Status of Children Act 1979* (NT) ss.5A-5F; *Status of Children Act 1978* (Qld) ss.15-18; *Family Relationships Act 1975* (SA) ss.10c-10e.
36. Nor have Australian courts been faced with disputes about whether embryos are property or may be left in a will, or may be the subject of a custody dispute as have several American courts: *Davis v Davis* 842 SW2d 588 (Tenn SC, 1982) *Hect v Superior Court* 20 Cal Rptr 2d 275 (Cal App 2 Dist, 1993).