

ARTICLES

The Ethics and Legality of Posthumous Conception

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Posthumous conception, where a child is conceived after the death of one or both of the parents, has been possible since the 1950s. Although the first reported case occurred in 1977, it was not until 1995, when Diane Blood requested sperm be extracted from her comatose husband, that this matter came to public attention. Recently, a Queensland Court denied Simone Baker permission to extract sperm from her deceased fiancée. Who should decide such matters? Is this a role for the courts? Is there a better way?

Introduction

Today, sperm, ova and pre-embryos can be successfully cryopreserved for future use. The extraction of sperm from a male is a relatively straightforward process and, if the donor is alive, generally requires no medical intervention. However, after death or while in a persistent vegetative state (PVS), it is necessary for sperm to be extracted by a medical professional.

Extracting eggs from a female is a more complicated process because the female needs to take hormones for a period prior to the extraction. Although ovarian tissue can also be extracted, research still continues in this area and it is not yet known whether ovarian tissue grafts will allow natural conception and pregnancy in humans.¹

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¹ Monash IVF 2003, "Fact sheet: Long-term frozen storage of ovarian tissue" Monash IVF <www.monashivf.edu.au/library/factsheets/frozen_sperm.html> (3 April 2003).

Posthumous conception came to public attention in 1995, when Diane Blood² fought a lengthy, public battle to use her dead husband's sperm extracted while he was in a coma. In Australia, there is renewed interest following the refusal by a Queensland Court to allow Simone Baker³ to extract sperm from her deceased fiancée.

This article provides a brief history of assisted reproductive technology, discusses the ethical and legal issues associated with posthumous conception, and considers whether posthumous reproduction should be regulated.

A brief history

The first recorded case of artificial insemination was in 1790,⁴ the first successful donor insemination in 1890,⁵ and the first IVF baby, Louise Brown, was born in 1978.⁶ Cryopreservation, or 'freezing' as it is widely known, has been a viable method of storing sperm since the 1950s, thereby providing the means for posthumous conception to occur. It was not until 1977 in Cambridgeshire, United Kingdom that frozen sperm was used to conceive a child, Milo Casali, the youngest son of "Love is ..." creator Kim and her husband Roberto, who had died in 1976.⁷ Milo was conceived nine months after Roberto's death using sperm frozen prior to his commencing treatment for cancer. Since 1977 there have been numerous reported cases of children being conceived posthumously⁸ from frozen sperm stored prior to their

² *R v Human Fertilisation and Embryology Authority; Ex parte Blood* [1997] 2 All ER 687.

³ *Baker v State of Queensland* [2003] QSC 2 (unreported, No 39 of 2003, 6 January 2003)

⁴ Baker HWG, "Problems with Regulation of Assisted Reproductive Technology: A Clinician's Perspective" (2002) 9 *Journal of Law and Medicine* 468.

⁵ Baker, note 4.

⁶ Baker, note 4.

⁷ Andrews LB, "The Sperminator", *New York Times*, 28 March 1999.

⁸ *Baker v State of Queensland*, note 3; *Woodward ex rel. Estate of Woodward v Cmr of Social Sec*, 435 Mass 536 NE 2d 2002 WL 4289 (Mass, 2002); *AZ v BZ* 431 Mass 150 (2000); *In the matter of Gray* [2000] QSC 390; *MAW v Western Sydney Area Health Services* [2000] NSWSC 358; "The Sperminator", *New York Times*, 28 March 1999; Ramsay S, "Parents want access to dead son's frozen sperm" (1 Jan 2000) 355 (9197) *The Lancet* (UK) 50; Ruth, "A joy that is conceived in the midst of tragic illness", *The Independent* (London), 12 July 1999; Velloff, "Babies in limbo: Laws Outpaced by fertility advances", *Washington Post*, 8 February

father's death. In the majority of cases, the father was facing a terminal illness.

In 1980, the year Australia had its first IVF baby, the first reported case of sperm extracted after death occurred.⁹ In 1997, 20 years after the birth of Milo Casali, there was the first reported case of a child conceived posthumously using sperm extracted after death.¹⁰ The following year Liam Blood, the son of Diane Blood, who came to public attention after requesting sperm be taken from her comatose husband in 1995, and subsequently fought a number of legal battles to use the sperm, was born.¹¹ In the same year, Australia had its first court case where a wife requested sperm be retrieved from her deceased husband.¹²

Ethical Issues

[P]osthumous reproduction nicely illustrates how the importance of autonomy in resolving conflicts about new technology must be demonstrated and earned anew with each

1998; Dwyer L, "Dead daddies: Issues in Postmortem Reproduction", (Spring 2000) 52 *Rutgers Law Review* 881; *AB v Attorney-General Supreme Court of Victoria*, (Unreported No 6553 of 1998); *Blood (UK)*, *R v HFEA; ex parte Blood* [1997] 2 All ER 687; Rios (Tasmania), *The Weekend Australian*, 27 April 1996; Orange County Reg (Cal.), 5 June 1995; Kolcay: Morley et al "Development in Law and Policy: Emerging Issues in Family Law" (Winter 2003) 21 *Yale Law & Policy Review* 169; Zeifrani, 5 May 1994, *The Jerusalem Report*; *Hall v Fertility Institute of New Orleans* 642 So 2d 1348 (La App 4 Cir 1994); Marcesca: Kerr S, "Post-mortem sperm procurement: is it legal?" (Fall 1999) 3 *DePaul J Health Care Law* 39; *Hecht v Superior Court*, 20 Cal Rptr 2d, 275, pp287-88 (Ct App 1993); Hart – *Christian Science monitor* Jan 7, 2002 (Texas); *Davis v Davis* 842 S.W.2d 588, pp 589-90 (Tenn 1992); *Parplaix v CECOS tribunal de Grande Instance de Ceteil* (1 Ch cir) 1 August 1884

9 McLean SA, "Post-mortem Human Reproduction: Legal and Other Regulatory Issues" (2002) 9 *Journal of Law and Medicine* 435.

10 McLean, note 9.

11 Diane Blood won a court battle to export the sperm to Belgium where she underwent treatment. See *R v Human Fertilisation and Embryology Authority; Ex parte Blood*, note 2. Liam's birth certificate lists his father as 'unknown'. Ms Blood is continuing a fight to have Liam's father's name listed on his birth certificate. *BBC News*, 8 February 2002
<<http://news.bbc.co.uk/1/hi/england/1809296.stm>> (3 March 2003).

12 *AB v Attorney-General* (unreported, SC (Vic), No 6553 of 1998).

application and should not automatically control simply because an individual has expressed a wish.¹³

All discussions as to whether posthumous reproduction should be allowed will ultimately return to the same argument: autonomy versus the greater good. Is the individual's right to self-determination more important than the potential impact on others: spouse, child, family, and the wider community?

In all cases to date, the central theme has been the requirement for explicit informed consent. The deceased must not only have expressed a desire to have a child with his spouse, but also have expressed a wish that his spouse have such a child even after his death. This is a clear acknowledgement by society that the deceased has a right to self-determination. The courts have considered the wishes of the surviving spouse. However, without evidence of explicit informed consent by the deceased spouse the courts have not, except in a few exceptional cases, upheld the surviving spouse's wishes.

Searle¹⁴ discusses the idea of collective intentions, where two parties have the same intentions, interests, and desires. For example: "We are building a house, we are moving in together, we are married, we want to have a child." These are all statements of collective intentions. Clearly, parenthood, which requires two parties, is an example of a collective intention.

Although the death of one spouse ends a marriage, in the surviving spouse's mind the couple still have collective intentions. The progress from collective to individual intentions is part of the grieving process. Many surviving spouses never completely lose these collective intentions.

Why should a court be able to refuse to honour the wishes of a surviving spouse who is clearly in a better position to know the collective intentions of the couple, and also the individual views of the deceased? In many other facets of life, such as sexual preferences, number of children, pre-agreed divorce or custody arrangements, a

¹³ Robertson JA, "Symposium: Emerging Paradigms in Bioethics: Posthumous Reproduction" (1994) 69 *Indiana Law Journal* 1027.

¹⁴ See Parker M, "Response to Orr and Siegler – Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception", unpublished paper, 2003.

court will either respect the choices made by the couple or refuse to interfere. Why is this situation any different? Is it because the surviving spouse may be prejudiced in deciding what the deceased's wishes were? If the couple had been married this would clearly indicate they had willingly chosen each other as partners, if unmarried there could be evidence of the length and nature of their relationship. For most surviving spouses, any prejudice would lean towards making the couples' collective intentions a reality. There may be some surviving spouses who would favour their own interests, such as those wishing to bear offspring in order to obtain financial support from the deceased spouse's estate. However, an examination of the nature of the relationship, together with evidence from family and friends, should be sufficient to objectively determine the couples' collective intentions. At present, however, the courts hide behind the 'grief' of the surviving spouse and their own ideas as to the acceptability of posthumous conception.

Articles written in the United States on posthumous conception often discuss whether there is a right to reproduce. In *Davis v Davis*,¹⁵ a case involving a custody dispute over embryos created during the marriage, which the recently divorced husband did not want to be used, the court held there was a right to procreational autonomy under the fourteenth amendment.¹⁶ The United States Supreme Court has yet to determine whether this fundamental right to make decisions relating to procreation includes procreation by artificial means, although at least one district court has determined that it does.¹⁷ However, this does not mean that the surviving spouse has the choice, it simply upholds the commonly held view that the individual has the right to decide, leading us back to the original requirement for explicit informed consent.

A better question to ask is: Why is assisted reproductive technology (ART) subjected to a higher level of rigour and control than non-ART? Is a woman's use of her deceased spouse's sperm posthumously any different to a woman deliberately becoming pregnant to her spouse

¹⁵ *Davis v Davis* 842 S.W.2d 588, 589-90 (Tenn 1992).

¹⁶ Edwards BE, "Posthumous reproduction: perspectives on the ASRM guidelines" (2000) *Contemporary OB/GYN*, <www.findarticles.com/cf_0/m0BGG/10_45/69756908/print.jhtml> (25 February 2003).

¹⁷ *Lifchez v Hartigan* 735 F. Supp. 1361 (N.D. Ill 1990) cited in Antall KL, "Who is my mother? Why states should ban posthumous reproduction by women" (Winter 1999) 9 *Health Matrix Clevel.* 203, p 224.

without his consent? This practice is not regulated. Why should posthumous conception be regulated? Is it simply because society has yet to accept the alternatives science now offers?

In *MAW v Western Sydney Area Health Service*, where the court was asked to allow extraction of sperm from a comatose husband, O’Keefe J said:¹⁸

Such a child would never have the prospect of knowing its father. Such a child would come to recognise that he or she was not sought to be procreated during the life of the father. ... Furthermore, should the circumstances of the child’s conception come to be known there would be people in the community who would tend to regard the child as different – not a happy situation, especially for a child. In the circumstances of the present case I cannot conclude that such a child’s best interests would be served by being brought into existence in the manner, at the time and in the circumstances contemplated as possible by the plaintiff.

Justice O’Keefe’s comments were a very negative view of posthumous conception. He failed to consider that the child would indeed be wanted, something not all children can claim. True, the child’s birth would be different from the norm, but so was the birth of the first IVF baby in 1978, a procedure now accepted by society. Reading this passage it is difficult not to ask whether O’Keefe J was aware that 19.6% of children under 15 live in lone-parent households.¹⁹

Justice O’Keefe seemed unable to provide an answer to the question: why would a person want to bring a child into the world and raise her/him alone with no possible support, financial or emotional, from a partner? The answer may be simply; because the person wants to have the child. That is precisely what many Australians are doing.

In *In the matter of Gray*,²⁰ Chesterman J also struggled with the question of whether “the interests of such a child would be advanced by inevitable fatherlessness.” His Honour stated:

¹⁸ *MAW v Western Sydney Area Health Service* [2000] NSWSC 358 at [43]-[44].

¹⁹ ABS, 2002, *Australian Social Trends*.

²⁰ *In the matter of Gray* [2000] QSC 390.

The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significant, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in [the child's] best interests.

Despite Chesterman J's acknowledgment of the impossibility of courts knowing what is in a child's best interests, they continue to decide child custody cases, determining what is in the best interests of the child. Why is posthumous conception any different? Is it because the courts see themselves as providing the means of creating a life? Do the courts fear a rush of similar applications? If there were such a rush, wouldn't that indicate the community attitude towards posthumous conception was changing, just as it did towards IVF?

Legal Issues

The legal issues surrounding posthumous conception are the extraction of reproductive material after death, the use of reproductive material, succession, and the potential for litigation by the child. The last-mentioned includes an action for the wrongful death of a parent or parents killed in an accident, or for wrongful life (deliberate birth with only one parent), or for negligence (where the only surviving parent dies).

The extraction of reproductive material after death

There are three scenarios when extraction can occur: during life, while in a PVS, or after death. Sperm needs to be extracted and cryopreserved within 48 hours of death. If it is, the live birth rates from IVF lead to a greater than 70% chance of a woman under 35 having a child.²¹

During a person's life, provided informed consent has been given, there are no legal or ethical impediments to extracting reproductive material. However, while a person is in a PVS or after a person's death, the issue of consent is related to the person's right to self-

²¹ Woolcott R, "Birth after death deserves debate", *Newcastle Herald*, 10 January 2003, p 9.

determination. As Cardozo J stated in *Schloendorff v Society of New York Hospital*:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault.²²

This principle was confirmed by the High Court of Australia in 1992,²³ leaving no doubt that appropriately obtained consent is required for any medical procedure on a patient, dead or alive. Without such consent the extraction of reproductive material is illegal.

In the case of posthumous retrieval of reproductive material the absence of consent is largely due to the novelty of the procedure. By contrast, consent for the surviving spouse to use already stored reproductive tissue is often obtained by the IVF clinic at the time of donation.²⁴

There are two types of consent, informed or reasonably inferred. Informed consent requires the patient to have decision-making capacity (sufficient age and sound mind), to have been provided with adequate information, and to have given her/his consent voluntarily.²⁵ The actual discussion between the patient and the medical professional regarding the procedure may be considered as constituting the process of informing the patient of the risks and benefits of procedures, and the patient's acquiescence to proceeding may be viewed as consent.²⁶ However, in most cases written acknowledgement and consent will be obtained. During the discussion the medical professional must explain the procedure in an understandable fashion, with particular emphasis on those aspects thought to be of serious concern to the patient, including the nature of the procedure/treatment, the risks and possible complications, the expected benefits, and alternative treatments or

²² *Schloendorff v Society of New York Hospital* (1914) 105 NE 92 at 93.

²³ *Secretary, Department of Health and Community Services v J.W.G. and S.M.B. (Marion's Case)* (1992) 175 CLR 218 at 234 and 310.

²⁴ Woolcott, note 21.

²⁵ Orr RD and Siegler M, "Is posthumous sperm retrieval ethically permissible?" (2002) 28 (5) *Journal of Medical Ethics* 299.

²⁶ Vukadinovich DM, "Assisted Reproductive Law" (2000) 21(1) *The Journal of Legal Medicine* 67.

procedures and their risks and benefits.²⁷ A good example of informed consent is an advance directive. This could be in the form of an advance health directive, a previously signed consent form, or a directive included in a will.

Reasonably inferred consent is used where the patient, because of her/his death or mental incompetence, is unable to give consent. The question is asked: “Is it reasonable to infer that the patient would have approved of the procedure in question when alive [or competent] if somehow the patient had been given the opportunity to do so?”²⁸

At this point the cases fuse two issues: the extraction of reproductive material, and the use of it posthumously to produce a child. As to the first issue, the extraction of reproductive material, the question is whether in the circumstances the patient would have approved of the removal of reproductive material?

Consider the following scenarios:

Scenario 1: Couple undergoing IVF

If the couple had been undergoing IVF and the treatment required the donation of sperm, could consent to the extraction of reproductive material be reasonably inferred? The answer would surely be: “Yes, there was previous consent to the partner’s use of the sperm.” The case would be even stronger if the IVF treatment had required the extraction of sperm.

Scenario 2: Couple trying to have children, but not undergoing IVF

If there was evidence of a strong ‘we-desire’ to have children, is it far-fetched to argue that the partner would have wanted the reproductive material to be extracted? Considering the couple had been trying to conceive, and reproductive material had previously been ‘given’, the answer would surely be: “No, it is not far-fetched.”

²⁷ Vukadinovich, note 26.

²⁸ White GB, “Commentary: Legal and Ethical Aspects of Sperm Retrieval” (1999) 27(4) *Journal of Law, Medicine and Ethics* 359.

Scenario 3: Couple having decided to wait before having children, one partner dies unexpectedly

The 'we-desire' to have children at a later time most likely represents a desire to bring children into the world when the couple's financial situation has improved. Unexpectedly, one partner dies. In such dramatic circumstances, the surviving partner may feel regret at not having had children, particularly if he/she had pushed for this decision. This situation is less clear than the previous one, but the author would argue that if a 'we-desire' can be shown the extraction of reproductive material should be allowed. However, an examination would need to be made of why their current situation had been undesirable for having children.

Scenario 4: Couple never having discussed having children, one partner dies unexpectedly

Where the couple had never discussed the idea of having children, it would be difficult to argue they had formed a 'we-desire' to have children. The answer to the question of whether in the circumstances the patient would have approved of the removal of reproductive material would have to be 'no'.

Scenario 5: An individual, not currently in a relationship, dies unexpectedly

It would be impossible to argue the existence of a 'we-desire'. It may be possible to show the individual had desired to have children, but there is the unanswerable question: "Who with?"

The organ donation analogy

In deciding whether consent can be reasonably inferred the example of organ donation is often cited. If the deceased had indicated a desire to donate her/his organs, wouldn't this be a clear indication of a desire to donate reproductive material? Kerr argues that the procedure has the same hallmarks as organ procurement or an autopsy: the reproductive material needs to be obtained by a medical professional, and there is little or no visible evidence of the procedure having occurred.²⁹ Thus, next-of-kin consent should be sufficient.

²⁹ Kerr S, note 8.

The difficulty with the organ donation analogy is that donated organs perform a life-continuing function by sustaining another person's life, whereas the donation of reproductive material is life-creating.³⁰ The outcome of the donation of reproductive material is not for the greater good but for the benefit of the individual and/or her/his next-of-kin.

Even if it was accepted that consenting to be an organ donor includes agreeing to donate reproductive material, the current method of obtaining and observing consent would not overcome the problems faced in those cases where no explicit consent had been given. Consent with respect to organ donation rests with the donor.³¹ If the deceased had indicated that he/she wished to donate, in practice, the next-of-kin has a right of veto. However, the reverse is not true. If the deceased had indicated that he/she did not wish to donate, the next-of-kin does not have the right to veto and allow donation. Similarly, if the deceased had expressed no desire either orally or in writing, her/his wishes will be observed regardless of the next-of-kin's wishes. Further, in Queensland, s 8 of the *Transplantation and Anatomy Act 1979* (Qld) specifically excludes the donation of foetal tissue, spermatozoa and ova.

Whenever consent is to be reasonably inferred there will always be an element of bias. Those providing information may have conflicting interests: concern for the deceased, concern for the surviving partner, and their own moral values are but a few of these. For this reason, medical institutes generally have a detailed policy governing how forms of consent, usually specific to the type of procedure, will be addressed within their facility.³²

Parens patriae

In addition to informed and reasonably inferred consent there is a doctrine, *parens patriae*, whereby a court can give consent in relation to certain matters on behalf of people who are incapable of giving the

30 Schiff AR, "Arising from the Dead: Challenges of Posthumous Procreation" (1997) 75 *North Carolina Law Review* 901.

31 Orr & Siegler, note 25.

32 For an example of such a policy, see Lahey Clinic, "Sperm Retrieval from Dead or Irreversibly Comatose Patients", <www.lahey.org/ethics/policies.asp> (21 February 2003).

requisite consent themselves.³³ The doctrine is a protective one, aimed at ensuring that the person receives the care required to preserve their health and welfare.³⁴

In *MAW v Western Sydney Area Health Service*,³⁵ the court held that *parens patriae* did not extend to authorising a non-therapeutic surgical procedure, such as extracting sperm, as it was not required to preserve the life of the individual. However, in some circumstances a court may interfere even if it is a non-therapeutic surgical procedure. For example, if a pregnant woman is in a coma and the termination of the pregnancy will increase her chances of survival.

What if the pregnant woman is in a PVS? Who decides whether to keep her alive to increase the chances of a healthy child? Any advance directive given by the mother must be considered. However, current interests (spouse, family) will trump her wishes.³⁶ The court will intervene to allow her body to be used to create life (the birth of a child), even if she had specifically indicated that this should not occur.

Indecent dealing and assault

If the patient was deceased at the time of the procedure, a failure to obtain consent would result in the medical practitioner and anyone else participating in the procedure being liable for indecent dealing. They could not be charged with assault because the patient was no longer alive. The key question is whether the retrieval of reproductive material constitutes indecent dealing. It is difficult to argue that it does, as in fact the intent of the procedure is to respect the patient, allowing her/his 'line' to continue. However, if the patient was comatose at the time of the procedure a charge of assault would be possible even if he/she subsequently died.

³³ Wynne A, "Consent, the comatose patient and the taking of sperm for posthumous use" (2001) 9(4) *Australian Health Law Bulletin* 37.

³⁴ Wynne, note 33.

³⁵ *MAW v Western Sydney Area Health Service*, note 18, at [43].

³⁶ Robertson, note 13.

The use of reproductive material

Critics argue that even where the couple have planned or actively tried to conceive a child it is difficult to assume consent to posthumous conception.³⁷ However, unless prohibited by legislation, clinics worldwide usually allow previously stored material (commonly sperm) to be used after the death of the donor despite an absence of explicit consent.³⁸

Previously stored

The National Health and Medical Research Council (NHMRC) *Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* recommend that extraction of reproductive material from a deceased should not be facilitated unless the donee has witnessed the direction and counselling is provided.³⁹ If gametes have already been stored and the donor has died, the gametes may be used by the donor's spouse or partner. The spouse or partner must request their use and the clinic is to provide an adequate time for the grieving process before they can be used.⁴⁰ This is consistent with the *Infertility Treatment Act 1995* (Vic) which allows embryos to be created using gametes from a person who has since died, and recognises that embryos unlike gametes are the product of gametes from two parties and once formed cannot be divided.

Consent by bequest

Overseas stored gametes have been willed as part of the estate of the donor to either a specific person or the trustee. In *Parplaix* the clinic, CECOS, argued that sperm was an indivisible part of the body and could not be heritable property. The court did not address the issue of

³⁷ Bennett B, "Posthumous Reproduction and the Meanings of Autonomy" (1999) 23(2) *Melbourne University Law Review* 286.

³⁸ *Woodward ex rel. Estate of Woodward v Cmr of Social Sec*, note 8; Ramsay S, note 8; (UK); Ruth, note 8; Veloff, note 8; Morley et al, note 8; Zeifrani, note 8; *Hall v Fertility Institute of New Orleans*, note 8; Kerr S, note 8; Hart – Christian Science monitor, Jan 7, 2002 (Texas); *Parplaix v CECOS tribunal de Grande Instance de Ceteil* (1 Ch cir) 1 August 1884.

³⁹ NHMRC, "Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research" (2004) *NHMRC* 6.15.

⁴⁰ NHMRC, note 39 at 6.16.

property, it held that the intentions of the donee were clear, stating: “[sperm is] the seed of life ... tied to the fundamental liberty of a human being to conceive or not to conceive.”⁴¹

In *Hecht v Superior Court*⁴² the court used the definition of property in s 62 of the *California Probate Code*, “anything that may be subject of ownership [including] both real and personal property and any interest therein”, to uphold the donor’s decision to bequeath sperm to his girlfriend. The court did so despite the objections of his children from a previous marriage.

In *Hall v Fertility Institute of New Orleans*⁴³ the court required no legislation to uphold the gift, stating that a gift of frozen sperm to a donee for the purpose of being artificially inseminated, either during the donor’s life or posthumously, was not against public policy. There have been other similar cases in the United States and France, but none as yet in Australia.

Many clinics worldwide now require couples at the time of signing on to indicate their wishes with respect to the storage of embryos should they or one partner die, or should they divorce. This is consistent with the NHMRC guidelines.⁴⁴

Succession

The most commonly cited argument against allowing posthumous conception is the potential for difficulties with settling estates.⁴⁵ The

41 *Parplaix v CECOS (tribunal de Grande Instance de Creteil* (1 Ch cir), 1 August 1984, in McLean, note 9.

42 *Hecht v Superior Court* 20 Cal Rptr 2d, 275 (Ct App 1993).

43 *Hall v Fertility Institute of New Orleans*, note 8.

44 NHMRC, note 39.

45 Waugh P, “New Rights for Babies Conceived ‘After Death’”, *The Independent*, 25 August 2000 p 3; Shapo HS, “Matters of Life and Death: Inheritance Consequences of Reproductive Technologies” Hofstra University <www.hofstra.edu/FORMS/FORMS_printPage.cfm?thepage=law_lawrev_shapo2> (19 February 2003); NSWLRC “Report on Human Artificial Insemination: No 49”: (1986) <www.lawlink.nsw.gov.au/lrf.nsf/pages/R49CHP12> (12 February 2003); Shah M, “Legal Issues Concerning Cryopreservation and Posthumous Conception” (1996) 15 *Journal of Legal Medicine* 547; Sutton S, “The Real Sexual Revolution: Posthumously Conceived Children” (1999) 173 *St John’s Law Review* 857; Kerr, note 8.

ability to have new offspring born after death raises the concern that the rule against perpetuities may be breached.⁴⁶

If there was no specific provision for the child born subsequent to the death of the testator, in any claim against the estate paternity would need to be proved. Unlike a child conceived during a marriage, a posthumous child is conceived after the marriage has been dissolved by the death of one of the parties. Hence, there is no automatic assumption that the child is a child of the surviving spouse and deceased spouse. By contrast, there is such an assumption where a child is conceived using ART when both parents are alive.

The facts of *In the Matter of Estate of the late K and In the Matter of the Administration and Probate Act 1935: Ex parte The Public Trustee*⁴⁷ were that the couple commenced living together in April 1991. They wished to have children and in August 1993, experiencing difficulty with conception, they entered into an in-vitro fertilisation program. The procedure was successful, three of the five embryos produced were implanted, and in May 1994 a son was born. In March 1995 the couple married, but in the following month the husband died. The couples' intention was to have another child by way of the implantation of the two remaining embryos, and the widow intended to proceed with the implantation. If the procedure was successful, a child would be born in December 1996. The court was asked to determine:

- (1) Were the two embryos, the product of the ova of the widow of the deceased and semen of the deceased, 'issue' pursuant to the *Administration and Probate Act 1935* (Tas) and, if so, were they 'living' at the date of the deceased's death.
- (2) Alternatively, would the embryos become 'children of the deceased' upon their being born alive.

Justice Slicer, after hearing expert medical advice on the status of embryos and reviewing the common law, summarised the status and rights of a foetus as follows:

⁴⁶ *In the Matter of Estate of the Late K and in the Matter of the Administration and Probate Act 1935: Ex parte: The Public Trustee* (unreported, SC (Tas), Slicer J, No M25/1996, 22 April 1996).

⁴⁷ *In the Matter of Estate of the Late K and in the Matter of the Administration and Probate Act 1935: Ex parte: The Public Trustee*, note 46.

- A foetus is not recognised, by the law, as a person in the full legal sense.
- The law has long recognised foetal rights contingent upon a legal personality being acquired upon its subsequent birth alive.
- A child, en ventre sa mere, is not a human being. To be human a child must have quitted its mother in a living state.
- A child so born is by a legal fiction treated as having been living at an earlier point of time if by being so treated the child would receive a benefit to which it would have been entitled if actually born at that earlier time.⁴⁸

In light of this summary, Slicer J concluded: “[T]he answer to the first question asked, namely, whether the embryos are issue, is no.”

Turning attention to the second question, whether the embryos become children of the deceased upon their being born alive, Slicer J stated:

[My conclusion is that] a child, being the product of his father’s semen and mother’s ovum, implanted in the mother’s womb subsequent to the death of his father is, upon birth, entitled to a right of inheritance afforded by law.⁴⁹

Thus, a right of inheritance afforded by law extended to a posthumously conceived child of the deceased and his widow upon such child being born alive. In other words, once born a posthumously conceived child should be treated the same as any other child. Justice Slicer’s view that the embryos were not ‘issue’ of the deceased has been echoed in other court decisions, which have treated frozen embryos as occupying a legal status somewhere between a thing and a person.⁵⁰

However, this is only the first hurdle in relation to the rule against perpetuities. The fact that reproductive material can now be preserved

48 *In the Matter of Estate of the Late K and in the Matter of the Administration and Probate Act 1935: Ex parte: The Public Trustee*, note 46, at [20].

49 *In the Matter of Estate of the Late K and in the Matter of the Administration and Probate Act 1935: Ex parte: The Public Trustee*, note 46, at [31].

50 Morgan D, “Rights and legal status of embryos” (1996) 4(7) *Australian Health Law Bulletin* 62.

indefinitely raises the prospect of children being born from the same father over many decades or even centuries. In reality, the time period over which posthumously conceived children may be born will be limited by the person(s) with an interest in continuing the line: the spouse or immediate family. For a female spouse this will typically cease, at the latest, on her reaching menopause.

The New South Wales Law Reform Commission recommended against posthumously conceived children being able to inherit from their parents' estates.⁵¹ However, there are viable alternatives that would allow such children to inherit without violating the rule against perpetuities. Limits may need to be placed, such as that only children of the surviving spouse born during the reproductive years of the surviving spouse can inherit from their deceased parent's estate. This would have two benefits. First, it would limit the children who could inherit to those children conceived by the surviving spouse, which would accord with the deceased spouse's wishes. Second, it would ensure that the right to inherit would only extend to those children born while at least one parent is alive, which accords with the concept of a 'we-desire'. If both parties are deceased the 'we-desire' to reproduce no longer exists and the child is not an issue of the couple.

The potential for litigation by the child

Another argument sometimes cited is the possibility of wrongful death suits where one parent has died as the result of an accident or medical negligence, or a wrongful life suit where the child objects to having been deliberately conceived with only one live parent. To date there have been no such reported cases with respect to children conceived posthumously.

Regulate or not?

Baker states: “[ART] in Australia is highly specialised and is already subject to professional regulation to an extent not seen in other areas of medicine.”⁵² NHMRC guidelines,⁵³ ethical standards, allowable private health insurance, and Medicare rebates combine to form a

51 NSWLRC, note 39.

52 Baker, note 4.

53 NHMRC, note 39.

complex system of self-regulation. However, Victoria, South Australia and Western Australia have also enacted legislation that has led to inconsistencies in regulating ART. Baker argues that ideally these states should repeal their legislation and revert to the self-regulation model.⁵⁴ At a minimum Baker suggests that any legislative prohibitions or restrictions on ART should have a sunset clause.⁵⁵

Baker is not alone in supporting self-regulation: the New South Wales Law Reform Commission recommended that direct legislative regulation of the practice of human artificial insemination is not required. The commission also recommended that no action should be taken to enact legislation to directly or indirectly regulate human artificial insemination where a widow wishes to use that procedure to become pregnant by her late husband's stored sperm.⁵⁶

It is clear from the cases that courts are reluctant to interfere where no explicit consent has been given. The obvious solution is to remove the necessity for the surviving spouse to obtain curial permission to extract reproductive material. A self-regulatory model would remove that necessity, and also respond quickly to changing societal views. The self-regulatory model must allow for regular review of all its rules, and provide an appeal process for those wishing to do something currently not permitted by the rules. It must also be visible to the wider-community, and when determining the rules the wider community must be consulted. Some complementary legislative changes would be required to ensure that allowable activities under the self-regulatory model are not illegal, and to ensure that posthumously conceived children receive adequate financial support.

Should ART be regulated at all? Our society does nothing to prevent people who have a history of domestic violence, sex offences or paedophilia, or who could not financially or emotionally support a child, from having children. The courts have conceded that it is impossible to know what is in the "best interests" of a child. Yet, simply because an individual cannot conceive 'naturally' our society believes it has the right to interfere. Why?

54 Baker, note 4.

55 Baker, note 4.

56 NSWLRC, note 39.