From Cradle to Tomb: Estate Planning Considerations of the New Procreation

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I. INTRODUCTION

"Do I have a Daddy?" the child cried.
"No," the State said, "you were conceived after he died!"1

Twelve years ago this law review published an article suggesting that the proliferation of new reproductive techniques necessitated a re-examination of existing legislation.2 That article discussed the dearth of regulatory legislation regarding reproductive procedures such as artificial insemination, surrogate motherhood, and in vitro fertilization.3 Since that time, more children have been born via these alternative means of reproduction.4 In response, some additional legislation has been adopted to deal with the issues presented by these techniques.5 However, many areas have received little, if any, serious deliberation by lawmakers. Meanwhile, the medical procedures continue and children

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3. The only reference in the Louisiana Civil Code or ancillaries to these procedures was a portion of Louisiana Civil Code article 188, which remains the same today and states in pertinent part: "[t]he husband also cannot disavow paternity of a child born as the result of artificial insemination of the mother to which he consented." La. Civ. Code art. 188.
4. According to a report on assisted reproductive technology, there were reported initiations of 41,209 cycles of assisted reproductive technology treatment, excluding frozen embryo and donor oocyte cycles, in 1993 alone. Assisted Reproductive Technology in the United States and Canada: 1993 Results Generated from the American Society for Reproductive Medicine/Society for Assisted Reproductive Technology Registry, 64 Fertility and Sterility 13 (1995).
5. The society now lists four facilities in Louisiana which offer in vitro fertilization and other assisted reproductive technologies: Fertility & Laser Center, Metairie; The Center for Fertility & Advanced Reproductive Care, Metairie; Fertility Institute of New Orleans, New Orleans; and the Center for Fertility and Reproductive Health, Shreveport.
are born as a result, often raising unresolved questions affecting the rights of potential and existing children. The approach

One possible reason for the lack of legislation in this area may be that the issues involved pose questions that are not easily answered. These questions challenge traditional notions of family, defy established religious and moral beliefs, and make life and legislating generally more complicated. The approach

8. The Catechism of the Catholic Church, §§ 2375-2377, states:

Research aimed at reducing human sterility is to be encouraged, on condition that it is placed “at the service of the human person, of his inalienable rights, and his true and integral good according to the design and will of God.”

Techniques that entail the dissociation of husband and wife, by the intrusion of a person other than the couple (donation of sperm or ovum, surrogate uterus), are gravely immoral. These techniques (heterologous artificial insemination and fertilization) infringe the child’s right to be born of a father and mother known to him and bound to each other by marriage. They betray the spouses’ “right to become a father and a mother only through each other.”

Techniques involving only the married couple (homologous artificial insemination and fertilization) are perhaps less reprehensible, yet remain morally unacceptable. They dissociate the sexual act from the procreative act. The act which brings the child into existence is no longer an act by which two persons give themselves to one another, but one that “entrusts the life and identity of the embryo into the power of doctors and biologists and establishes the domination of technology over the origin and destiny of the human person. Such a relationship of domination is in itself contrary to the dignity and equality that must be common to parents and children.” “Under the moral aspect procreation is deprived of its proper perfection when it is not willed as the fruit of the conjugal act, that is to say, of the specific act of the spouses’ union. . . . Only respect for the link between the meanings of the conjugal act and respect for the unity of the human being made possible procreation in conformity with the dignity of the person.”

Catechism of the Catholic Church, 1994 (citations omitted). In contrast, Roman Catholic theologian Charles E. Curran concluded that in vitro fertilization may be acceptable under some circumstances. Charles E. Curran, In Vitro Fertilization and Embryo Transfer: From a Perspective of Moral Theology, Ethics Advisory Board, Department of Health, Education, and Welfare, Appendix: HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer § 4, at 7 (1979) [hereinafter EAB]. Offering a Protestant viewpoint, Stanley Hauerwas found no “direct connection between theological beliefs and the question of the permissibility or impermissibility of in vitro fertilization,” but neither encouraged nor prohibited it. Stanley Hauerwas, Theological Reflections on In Vitro Fertilization, EAB § 5, at 3, 18. Islamic scholar Ehtishamul Haque Thanva called the procedure “a defiance of the laws of nature.” Kathryn Venturatos Lorio, In Vitro Fertilization & Embryo Transfer: Fertile Areas for Litigation, 35 Sw. L.J. 973, 980 (1982) (quoting West, Associated Press Release (International), July 22, 1979, London). Rabbi Seymour Siegel, professor of ethics at Manhattan’s Jewish Theological Seminary, compared efforts to have children by whatever means to obeying God’s commandment to have children. Lorio, supra, at 980 n.59. “When nature does not permit conception, it is desirable to try to outwit nature. The Talmud teaches that God desires man’s cooperation.” Id. See also Orthodox theologian Stanley S. Harakas’ article in which the author stated:

Not only does the issue of “test tube babies” have important moral dimensions for the Orthodox, but a whole literature exists regarding this practice of general religious as well as non-religious interest. . . . At every stage of this process there are moral issues. Is it right
of ignoring the techniques and hoping that the related issues will go away is not only unrealistic, but callous to the interests of the innocent children born as a result. Another possible approach is to legislatively prohibit or severely restrict the use of the new methods, thus hoping to alleviate some of the more challenging issues raised. Some difficulties, however, may arise as a result of this approach. Deciding what and how to prohibit or restrict such intimate activity is particularly problematic in our heterogeneous culture. Additionally, the effectiveness of legislating on such private issues, which depends in large part on the compliance of individuals, may be idealistic at best. Even assuming an agreement to restrictive legislation, however, does not disspell the possible constitutional ramifications of regulating procreation which may preclude this type of legislation altogether.

Finally, even with restrictive legislation, people will continue to avail themselves of the new procedures and some innocent children will undoubtedly be born into a legal limbo.

Inheritance issues offer an additional dimension to the dilemma. This article will focus on three areas of particular significance to the distribution of estates: filiation of children of assisted conception, rights regarding authority over gametes and embryos, and capacity of inheritance by posthumously conceived or implanted children. Setting some legal boundaries regarding these matters will not only make life easier for those who avail themselves of the new techniques as they plan their estates, but will also define expectations for other heirs whose portions may be affected and for third parties who have interests in the stability of land titles.

in the first place to intervene in a mechanical fashion in this most human of experiences, the conception of a child, in effect divorcing the sexual union of parents-to-be from "baby making?"


9. As noted in the Prefatory Note of the Uniform Status of Children of Assisted Conception Act, "Once out, the genie will never return to the bottle." Unif. Status of Children of Assisted Conception Act, 9B U.L.A. 186 (Supp. 1996) [hereinafter USCCA].

10. An analogy may be drawn to the rights of illegitimate children. Although many may regard procreation outside of marriage as morally reprehensible, denying rights to the resulting children may be equally objectionable. When Louisiana laws regarding illegitimates were among the most restrictive in the nation, its illegitimacy rates were among the highest. See Kathryn Venturatos Lorio, Succession Rights of Illegitimates in Louisiana, 24 Loy. L. Rev. 1, 2 n.13 (1978). Additionally, laws denying rights to illegitimate children have not been shown to deter the actions of the parents.


12. In countries which are more homologous, sharing culture, religion, and tradition, a consensus is often easier to achieve. However, in our "melting pot" society, such agreement is often harder to reach. See Knoppers & LeBriz, supra note 11, at 333.

II. FILIATION

A. Artificial Insemination

Artificial insemination is one of the oldest\(^4\) and most common\(^5\) forms of alternative reproduction. This procedure involves the introduction of semen, without sexual intercourse, into the woman’s reproductive tract for the purpose of procreation.\(^6\)

When a married woman is inseminated with her husband’s sperm, the process is referred to as artificial insemination husband or A.I.H.\(^7\) Usually, because the husband’s sperm is used to inseminate his own wife with hopes of creating a child of the marriage, this procedure raises no problems of filiation.

Problems of filiation may arise, however, if artificial insemination donor or A.I.D. is used.\(^8\) This procedure involves the donation of semen by a donor, rather than by the husband of the mother. Different problems may be presented depending on whether or not the woman is married at the time, and whether or not her husband has consented to the procedure. Other than an obvious intent to create a child, it is not always clear whether the child is intended by one or both gamete providers to be a child of the marriage. Additionally, in the case of an unmarried woman, it may be unclear what the sperm donor’s role is contemplated to be.


15. One estimate is that 170,000 women in the United States are artificially inseminated with donated sperm each year, and that as many as 65,000 children a year are born as a result. Press Conference Statement of Kathryn Kolbert, Vice President, The Center for Reproductive Law and Policy, New Orleans, La. (Dec. 12, 1994) (on file with the Louisiana Law Review).


17. This process is used when the husband is either unable to have sexual intercourse, or has a very low sperm count. Semen samples may be collected, frozen, and aggregated to enlarge the count. Alternatively, the sperm may be inserted closer to the egg, reducing the distance necessary for traveling to the egg. Lorio, supra note 2, at 1643-44.

18. Another process, also raising legal issues of filiation, uses a mixture of the sperm of the woman’s husband and the sperm of a donor. This method is used when the husband has a low sperm count, or has slow sperm or otherwise inferior sperm, but there is a possibility that one of his sperm could result in a pregnancy. By mixing the husband’s sperm with that of a donor, the possibilities of achieving a pregnancy are enhanced. Lorio, supra note 2, at 1643-44 n.20.
The Louisiana Civil Code deals with artificial insemination in a limited way through its provision dealing with disavowal. Article 188 states in pertinent part that "the husband . . . cannot disavow a child born as the result of artificial insemination of the mother to which he consented." Thus, there is an expressed legislative intent to regard the mother's husband as the father of any child resulting from donor insemination consented to by the husband. The policy is in the child's best interest, insuring a right to demand support during the life of the husband, an intestate portion after the death of the husband, and possibly even a forced portion of the husband's estate at death.

The problem is that Article 188 does not go far enough. Although stated in the negative, precluding disavowal, it imposes a positive relationship between the husband and the child. However, this article is incomplete in at least two respects. First, it does not elaborate on what is necessary to constitute consent and therein lies the potential for litigation. Of the states having laws regarding artificial insemination, some require written consent of the husband and wife as does the Uniform Parentage Act. Others require the written consent of the husband only. However, even where consent is required in writing, courts have not imposed the requirement where to do so would deny the

22. This will accommodate most cases of artificial insemination since 92% of the requests for that procedure are from married women. Emily McAllister, *Defining the Parent-Child Relationship in An Age of Reproductive Technology: Implications for Inheritance*, 29 Real Property, Probate & Trust Journal 55 (1994).
23. With regard to inheritance, the possibility of litigation increases as the number of potential decedent fathers increases. Since the use of this procedure became common in the fifties with the discovery that adding a small amount of glycerol before freezing sperm resulted in enhancing the chances of sperm survival, the time is "ripe" for litigation as the involved husbands approach the end of life. See Lori B. Andrews, *The Stork Market: The Law of New Reproduction Technologies*, 70 A.B.A. J. 50, 53 (Aug. 1984); Shapiro & Sonnenblick, *supra* note 14, at 234; Heard, *supra* note 14, at 929-30.
25. The Uniform Parentage Act of 1973, § 5(a) provides:

The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown. Unif. Parentage Act § 5(a), 9B U.L.A. 301 (1996) [hereinafter UPA]. The Uniform Parentage Act has been adopted by the following states: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, Wyoming. *Id.*
child a father.\textsuperscript{27} Thus, where it was needed to strike a balance between precise proof of consent and the best interest of the child, the courts have consistently favored the latter. One way to achieve this balance may be to adopt the approach of the Uniform Act for Children of Assisted Conception, which presumes consent of the husband of the child's gestational mother.\textsuperscript{28} Presuming consent by the husband of the mother places responsibility for rebutting the presumption with the husband, rather than placing that burden on the child. The responsibility of the husband to affirmatively deny his consent to artificial insemination is analogous to the first part of Article 188 which provides that a man who marries a pregnant woman knowing she is pregnant cannot disavow paternity of a child, absent a showing of bad faith on the part of the mother.

In a state which recognizes the possibility of dual paternity,\textsuperscript{29} providing that the husband of the mother is the father of the child is insufficient to fully protect the child's estate from potential claims of inheritance by the sperm donor, or vice versa. Louisiana should also provide an affirmative statement that when the mother of a child born as a result of artificial insemination is married and her husband has consented to the insemination, the sperm donor is not the legal father of the child and is released from any rights or obligations regarding the child. Going further than the release provided to natural parents that relinquish rights when placing their children for adoption, the artificial insemination statute should clearly sever any ties of inheritance by, or from, the sperm donor.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{27} See R.S. v. R.S., 670 P.2d 923 (Kan. Ct. App. 1983) (finding husband consented orally to heterologous insemination); K.B. v. N.B., 811 S.W. 2d 634 (Tex. Ct. App. 1991), cert. denied, 112 S. Ct. 1963 (1992) (finding that although no written consent as required by statute, husband had ratified procedure by his acts and statements); In re Marriage of Adams, 528 N.E.2d 1075 (III. App. 3d 1988), rev'd, 551 N.E.2d 635 (Ill. 1990) (finding summary judgment not appropriate to deny child support where genuine issue of material fact existed beyond lack of husband's written consent). McAllister cited these cases and concluded that requiring written consent is too harsh in many cases. McAllister, supra note 22, at 69, 74-76.
\item \textsuperscript{28} USCACA § 3 provides that except in the case of surrogate motherhood:
\begin{quote}
The husband of a woman who bears a child through assisted conception is the father of the child, notwithstanding a declaration of invalidity or annulment of the marriage obtained after the assisted conception, unless within two years after learning of the child's birth he commences an action in which the mother and child are parties and in which it is determined that he did not consent to the assisted conception.
\end{quote}

The reference to the "woman who bears a child," as opposed to simply referring to her as the "mother" is necessary in order to distinguish the gestational mother from the genetic mother in instances where the two are separate. See discussion of gestational surrogacy infra text accompanying notes 36-48.
\item \textsuperscript{29} Such is the case in Louisiana. See Christopher L. Blakesley, Louisiana Family Law § 12.33.1 (1996) and Katherine S. Spah, Family Law in Louisiana § 13.15 (1995).
\item \textsuperscript{30} La. Civ. Code art. 214 provides in part:
\begin{quote}
[U]pon adoption: the blood parent or parents and all other blood relatives of the adopted person, . . . are relieved of all their legal duties and divested of all of their legal rights with regard to the adopted person, including the right of inheritance from the adopted person, and his lawful descendants; and the adopted person and his lawful descendants are relieved of all of their legal duties and divested of all of their legal rights with regard
\end{quote}
\end{itemize}
A different situation may exist when the recipient of the sperm is an unmarried woman. Since there is no husband of the mother, relieving the donor of responsibility to the child may not be in the child's best interest. One of the reasons for releasing the donor of responsibilities is to encourage donation. However, in instances where the child would not have two parents, perhaps that incentive should not be available.

Another question is raised in instances in which two women intend to serve as parents of the child. Some would argue that in such a case, the child would be provided a two-parent home and thus the sperm donor should be relieved of any responsibilities. Others would object to that arrangement as not comporting with traditional notions of parenthood. Louisiana should seriously consider public policy concerns, potential constitutional challenges, and the controversial nature of this issue.

Most artificial inseminations are performed by physicians and many statutes dealing with the process require a physician's participation in order for the statutes to apply. Yet, the procedure is not complicated and may easily be performed without medical assistance. When the procedure is performed directly, without a doctor's intervention, the donor is generally known to the recipient and the rationale for releasing the donor of responsibility again may not exist.

32. The Uniform Parentage Act provision, stating that the semen donor is not the father of the child born as a result of artificial insemination, applies only when a licensed physician performs the insemination. UPA § 5.
33. Compare Jhordan C. v. Mary K, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986) (the California statute in which a donor was not considered the natural father of the child was found inapplicable where the sperm had not been provided to a licensed physician) with McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App.), cert. denied, 495 U.S. 905, 110 S. Ct. 1924 (1989) (Oregon statute which did not recognize sperm donor as father applicable, despite lack of physician intervention unless donor could establish agreement with mother, upon which he relied, to the contrary).
B. Egg Donation

Relatively new on the horizon of new reproductive techniques, egg donation poses some of the most difficult legal questions in the arena of medically assisted reproductive procedures. This procedure involves the surgical removal of an egg from one woman and the transfer of the egg to another. The egg may be fertilized in vitro, outside of the recipient’s body. Subsequently, the resulting embryo is transferred either into the carrier’s uterus (in vitro fertilization) or into her fallopian tube (Zygote intrafallopian transfer, ZIFT). Alternatively, the egg may be retrieved from the donor and then transferred into the fallopian tube of the recipient where it is fertilized in vivo (gamete intrafallopian transfer, GIFT). A much less frequently used procedure involves fertilization within the egg donor’s body and subsequent “lavage,” or washing out of the embryo, followed by transfer to the carrier.

Egg donation is not as frequent an occurrence as sperm donation. This is partially due to the fact that the removal of the eggs is more intrusive than the collection of sperm, as well as the fact that eggs, in contrast to sperm, are not consistently replenished. Each woman is born with a limited supply of eggs. Absent hormonal treatment, only one egg generally matures each month. Thus, eggs are a much rarer commodity than sperm. Not surprisingly, only a few states have any laws dealing with egg donation.

Louisiana’s treatment of the subject is limited to a prohibition against the sale of human ova which appears in the “human embryos” provisions. Also, the revised statute stating that surrogate motherhood contracts are null is limited to situations where the alleged surrogate is both ovum donor and carrier of the resulting child. Thus, the surrogate is the biological mother in the complete sense.


35. Schiff, supra note 34, at 270. The lavage method is seldom used due to the risk that the egg will not be retrieved, resulting in the unwanted pregnancy of the donor. Id.


37. La. R.S. 9:122 (1991). It is interesting to note that there is no prohibition against the sale of human sperm. Such a prohibition would likely result in deterring the contribution of sperm as a recent survey of sperm donors in the U.S. found that 71% were primarily motivated to donate by the financial compensation. L.R. Schover et al., The Personality & Motivation of Semen Donors: A Comparison with Oocyte Donors, 7 Human Reproduction 575 (1992).

38. La. R.S. 9:2713 (1991) provides:

A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.

B. “Contract for surrogate motherhood” means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be
Obviously, sperm donation and egg donation are not analogous. Whereas in the case of sperm donation, the donor contributes the gamete only, in egg donation, the genetic contribution is only part of the equation. The severability of the genetic and gestational components of motherhood jar traditional notions of this revered institution. The common law presumption that the woman who gives birth is the legal mother arose at a time long before bifurcated motherhood was ever contemplated.

Because the process is so new, inheritance disputes have not yet become an issue. However, the potential for litigation remains a haunting reality and thus a clear determination of the child’s filiation is essential. Either a determination that the woman who gives birth or, on the other hand, that the woman whose gamete is used, should be considered the legal mother may be equally arbitrary depending on the circumstances. Because each woman makes a major contribution to the child’s ultimate existence, a viable claim of motherhood by each is plausible.

There are a number of different approaches a state could use in legislating maternity. One is that the law could recognize both women as mothers of the child. This would certainly meet the expectation of two lesbians who contemplate joint motherhood with the intention of raising the resulting child together. None of the states currently having legislation dealing with the subject of egg donation have used the approach of recognizing dual maternity.

Another way to deal with this issue is to start with the traditional presumption that the woman who gives birth to the child is the child’s mother. For example, if a married woman received a donor’s egg, carried the resulting child to term, and gave birth to the child with the intention of the parties being that the child would be raised as a child of the marriage, then the notion that the woman who gives birth is the mother works well. In that case, it is reasonable to

inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.

39. See Larry Palmer, Who Are the Parents of Biotechnological Children?, 35 Jurimetrics J. 17, 26 (1994). The author suggests this as a possible way to deal with non-inheritance legal disputes. In some ways, the logic of dual maternity is more compelling than that of dual paternity since both women have a biological connection to the child.

40. Cf. McAllister, supra note 22, at 76. Potential claims from the sperm donor could also exist and would need to be analyzed in terms of the paternity considerations discussed above.


42. See USCACA § 2 which provides that the birth mother is the legal mother and UPA § 3 which defines the natural mother as the woman who can prove she gave birth to the child. See also N.H. Rev. Stat. Ann. § 168-B: 2 (1994).

43. This was the legal approach used to determine custody in a divorce action where the child was the product of an agreement whereby the husband’s sperm joined with a donor’s egg to create
sever legal ties to the egg donor, as is the result under a number of existing state statutes. 44

However, the traditional assumption that the birth mother should be considered the legal mother is unwarranted in the case where a married woman is unable to carry a child, but is able to provide an egg for fertilization by her husband's sperm. In this scenario, the genetic mother may seek out a gestational mother to carry the child to term with the intent that the child be raised as a child of the marriage. In such a case, the law could indicate that the presumption that the gestational mother is the legal mother could be refuted with strong evidence, perhaps in writing, that the intention of the parties at the time of conception was to the contrary. Another way to reach the same result is to require the genetic mother to take the initiative and formally adopt the child. Of course, the latter solution would only be feasible if the gestational mother adhered to her agreement to surrender that child as originally contemplated. 45

Another possible approach is to start with the presumption that in bifurcated maternity the genetic mother is the legal mother of the child. 46 To refute the presumption, proof, again possibly required in writing, could be submitted to show a contrary intention of the parties.

In all of these instances involving egg donation, the child is not an accident, but a well-planned aspiration. Parties who go to such lengths can hardly complain if the responsibility of committing their intentions to writing is required of them. In such cases, the intention of the parties as expressed in the written document should control provided it is in the best interest of the resulting child. 47 In the absence of such expression, the traditional presumption that the birth mother is the legal mother could be controlling. 48

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45. In the case of Johnson v. Calvert, a married couple had entered into an agreement with a woman who was to carry the embryo, created by the union of the sperm of the husband and the egg of the wife, to term and give birth to the child who it was contemplated would be raised by the married couple. When the surrogate changed her mind about surrendering the child and claimed to be the child's mother, the California Supreme Court held that the genetic mother was the legal mother since the intent was that the married couple was to raise the child. 851 P.2d 776 (Cal.), cert. denied, 114 S. Ct. 206, cert. denied, 114 S. Ct. 374 (1993). Compare the case Belsito v. Clark, in which the wife's egg was joined with her husband's sperm in vitro and the resulting embryo was carried to term by the wife's sister. 644 N.E.2d 760 (Ohio C.T. C.P. 1994). When the married couple brought suit to clarify their status as legal parents, the County Court of Common Pleas declared the wife to be the natural mother.

46. This was the approach with regard to inheritance issues taken by Professor Palmer in his proposal to the New York State Bar Association. Palmer, supra note 39, at 26-27.

47. The state may or may not wish to subject all of the considerations to a standard based on the "best interest of the child." Although the consideration of the "best interest of the child" controls in custody disputes, the same conditions are not necessarily operative in an inheritance case.

48. Issues of dual maternity, particularly involving lesbian mothers, might also be considered, since the state allows for dual paternity. See McAllister, supra note 22, at 76-77.
As early as 1866, an Italian scientist, Montegazza, who discovered that sperm could be frozen, suggested that women whose husbands might be killed at war might want to avail themselves of that discovery. Thus, the idea of posthumous conception is not new, although the frequency of its use may have increased.

The legal question raised by this process is whether the law should recognize the donation of gametes to be used after the death of the donor for conception of a child whom the donor intends to be considered as the donor's child. To date, the issue has only arisen with regard to sperm donation since sperm can be easily frozen for use in later conception. Although the freezing of eggs is possible, the practice is not perfected and is not yet widely practiced.

The query as to whether this procedure should be legally sanctioned is often posed in terms of questioning the propriety of one transferring his gametes by selling or donating them. Thus, discussions concerning the nature of gametes as a form of property have arisen. Many have argued that gametes are entities subject to disposition and that the donors or persons from whose bodies the gametes are taken have some dispositional authority over these entities. Public policy, tempered by cultural and moral considerations, however, may limit the ultimate form of disposition. For example, the state may have an interest in restricting the use of such gametes to procreation, as opposed to experimentation. However, within the confines of the boundaries set by society as to proper use, the donor is the individual with the greatest interest in, and right to, dispose of the sperm.

Cases dealing with defining those boundaries for acceptable use of gametes are now confronting the legal system. The first of such cases arose in France, Parpalaix c. CECOS, decided by the French Tribunal de Grand Instance in 1984.

49. Shapiro & Sonnenblick, supra note 14, at 234.
50. Healthy children have been born using sperm that has been frozen for over ten years. Shapiro & Sonnenblick, supra note 14, at 234.
51. The first freezing of an egg was done in mid-1994. Schiff, supra note 34, at 271 n.30.
52. The operative word here is yet. Since medical advances outpace the legal response, anticipation of the use of frozen eggs is not unrealistic.
53. See Bonnie Steinbock, Sperm as Property, 6 Stan. L & Pol'y Rev. 57 (1995). Ms. Steinbock argues that this is fundamentally a moral question.
54. See Ethical Statement on In Vitro Fertilization of the American Fertility Society which states: "[The] concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items." American Fertility Society, Ethical Statement on In Vitro Fertilization, 41 Fertility & Sterility 2 (1984), cited in Barbara Gregoratos, Note, Tempest in the Laboratory: Medical Research on Spare Embryos from In Vitro Fertilization, 37 Hastings L.J. 977, 991 (1986). See also John A. Robertson, Posthumous Reproduction, in which Professor Robertson states that "[t]he term 'property' merely designates the locus of dispositional control over the object or matter in question. The scope of that control is a separate issue and will depend upon what bundle of dispositional rights exist with regard to that object." 69 Ind. L.J. 1027, 1038 (1994).
dealt with the issue of artificial insemination after the death of the sperm donor. When twenty-four year old Alain Parpalaix was undergoing treatment for testicular cancer, he was advised that the chemotherapy would render him sterile. Thereafter, he made a deposit of sperm with the Centre d'Etude et de Conservation du Sperm (CECOS) without leaving any specific instructions for the use of the sperm. At the time of the deposit, Alain was living with Corinne Richard. Alain’s health grew progressively worse. He died on Christmas day, 1984, two days after he and Corinne had married. When Corinne asked CECOS for Alain’s sperm deposit, she was told that the facility had no procedure for returning the deposit to one other than the depositor and that Corinne could appeal the denial to the Ministry of Health. When the Ministry postponed reaching a decision on the matter, Corinne and her in-laws jointly brought the matter to court.

The plaintiffs based their argument on Article 1939 of the French Civil Code which provided that on the death of the bailor, his heirs had the right to have the object of the bailment returned to them. Thus, their position centered on regarding the sperm as property which could be inherited. CECOS contended that the obligation to return the deposit was only to the donor, not to his heirs. Arguing that sperm was part of the donor’s body, CECOS took the position that sperm was not movable property and thus could not be released to anyone but the depositor, absent specific instructions from the donor. Additionally, the defendant argued that the clear intent of the depositor was not manifest because Alain was not married at the time he made the deposit. Finally, the argument was raised that the deposit was made only for therapeutic purposes and further use would lead to possible abuse.

Ultimately resolving the question in favor of Corinne, the court rejected the property argument refusing to label sperm as movable property subject to inheritance, thus finding the French Civil Code articles not controlling. Rather,
the Tribunal chose to characterize the human sperm as "the seed of life... tied to the fundamental liberty of a human being to conceive or not to conceive." Since the disposition of the sperm should be within the donor's domain, the resolution of the dispute rested in determining the intent of the donor. Analyzing the facts of the situation and the unified front of the widow and her in-laws, the court ruled that the sperm be delivered to Corinne's doctor for her use.

It was not long before a similar case, Hecht v. Kane, arose in the United States. Prior to his death by suicide on October 30, 1991, William Kane deposited fifteen vials of sperm at California Cryobank in Los Angeles. In conjunction with this deposit, Kane signed a "Specimen Storage Agreement" providing that, in the event of his death, the sperm bank was to store or release the specimens at the discretion of the executor of his estate. He also authorized the release of his semen specimens to Deborah Hecht in an "Authorization to Release Specimens" form. Finally, Kane executed a will naming Hecht as executor and bequeathed to her the sperm specimen. When a dispute arose between Kane's children and Hecht with regard to the disposition of the sperm, the California court found it appropriate for the probate court to have jurisdiction over the matter since the
decedent, at the time of his death, had "an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm," even if not governed by the general law of "personal property." Speaking to the issue of intent of the parties as to post-mortem insemination, the appellate court reviewed the Paraplaix case and concluded that "assuming that both Hecht and decedent desired to conceive a child using decedent's sperm, real parties fail to establish a state interest sufficient to justify interference with that decision."

A Louisiana court had the opportunity to deal with a similar dispute in the case of Hall v. Fertility Institute of New Orleans when the testamentary executrix of Barry Hall's succession sought a declaration that frozen semen of the decedent, deposited with the Fertility Institute, constituted succession property. Christine St. John intervened alleging ownership pursuant to a formal donation intervivos executed by the decedent. Similar to Alain Parpalaix, Barry Hall was advised prior to undergoing chemotherapy that he might wish to preserve his sperm for use at a later time. Eight months after he made the last sperm deposit, Hall executed a formal act of donation, purporting to transfer his interest in his frozen semen to St. John. The Fourth Circuit refused to set the donation aside based on any public policy issue that such posthumous insemination was contra bonos mores. Rather, the court focused on whether Hall was fully competent and operating on his own volition when he executed the act of donation. The court seemed to recognize Hall's dispositional authority over his semen, stating: "If it is shown at trial that decedent was competent and not under undue influence at the time the act was passed, the frozen semen is St. John's property, and she has full rights to its disposition."

In its Amicus brief to the court, the New Orleans Association for Women Attorneys argued that the issue before the court was not whether or not the frozen sperm was property under Louisiana law, but rather whether or not the decedent had a sufficient interest in the sperm to permit donation for the purpose of reproduction. Indeed, the question of donation of sperm seems to have been impliedly answered by the recognition of artificial insemination in the

68. *Id.* at 283. The trial court dismissed the argument, finding that Kane had no ownership interest in the sperm once out of his body. The court analogized Kane's deposit of sperm to the removed spleen of the plaintiff in Moore v. Regents of Univ. of Cal., 793 P.2d 479 (1990). Unbeknownst to Moore, tissues from his spleen were used to create a drug for the treatment for leukemia. When his cells were cultured and later sold by the researchers, Moore sued for conversion, claiming ownership of the cells. The Supreme Court of California rejected his claim finding that Moore had no expectation of retaining possession of his cells.

69. *Hecht*, 20 Cal. Rptr. 2d at 283.

70. *Id.*

71. 647 So. 2d 1348 (La. App. 4th Cir. 1994).

72. *Id.* at 1350.

73. *Id.* at 1351.

74. Amicus Curiae Brief by the New Orleans Association for Women Attorneys in Support of Defendant-Appellant at 5, *Hall*, 647 So. 2d at 1348. See Steinbock, *supra* note 53, at 59. The author suggests the *Hecht* court would have been better served if it had approached the issue in that manner.
disavowal section of the Civil Code.\textsuperscript{75} By referring to the “contributor of the sperm” in declaring surrogate motherhood contracts unenforceable, the Louisiana Civil Code ancillary provision also suggests an awareness that sperm is transferred for purposes of artificial insemination. Similarly, all states which have laws regarding artificial insemination have already recognized the practice of transferring sperm.

Thus, the real issue in these cases is not whether or not sperm is property, nor is it whether or not artificial insemination is an acceptable practice. In all three cases—Parpalai, Hecht, and Hall, what is really disturbing to those challenging the process is that conception of a child will take place after the death of the father. Policy issues concerning the support of a child without a father and the potential estate and title disputes that might ensue are the real dilemmas.

Just as sperm may be the object of donation, so too may ova. Although Louisiana has spoken legislatively to prohibit the sale of ova,\textsuperscript{76} there is no existing prohibition of a donation without compensation for ova. Despite the fact that the freezing of eggs for later use is not perfected, the possibility of controversy involving post-mortem conception by use of donated eggs looms in the not too distant future. In some ways, the policy issues will differ when post-mortem motherhood is involved, because at least until an artificial womb for gestation is created,\textsuperscript{77} a birth mother would presumably still be contemplated. Although the likelihood that a woman would consider having her egg be used to create a child after her death with the anticipation of retaining a legal relationship with the child seems remote, such a case has already been reported.\textsuperscript{78} Indeed, the possibilities are endless and what was implausible only a few years ago has become ordinary today.

Another twist to this issue is the possibility of implanting frozen embryos of predeceased gamete donors. The death of two Americans, Mario and Elsa Rios, in a plane crash in 1983 raised legal questions involving the rights of and to two frozen embryos created and stored at the Queen Victoria Medical Center in Australia.\textsuperscript{79} The embryos had been conceived using Mrs. Rios’s eggs and the sperm of an unknown donor.\textsuperscript{80} The Rios estate, totaling approximately

\textsuperscript{75} By barring a consenting husband from disavowing a child born as a result of artificial insemination of his wife, the Code impliedly recognizes that there has been a transfer of semen.

\textsuperscript{76} La. R.S. 9:122 (1991) states in pertinent part: “The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.”

\textsuperscript{77} See McAllister, supra note 22, at 112. McAllister states that some researchers think that medical science is less than ten years away from growing babies outside of a woman’s womb. See Ruth F. Chadwick, Ethics, Reproduction and Genetic Control 46 (1992). Chadwick discusses “ectogenesis,” development outside of the womb.

\textsuperscript{78} See Abraham J. Heller’s article which speaks of a case in which a widower wanted his deceased wife’s egg to be implanted in his sister in order that a child be born. See Heller, supra note 1.


\textsuperscript{80} Heard, supra note 14, at 928.
eight million dollars, brought added attention to the case and may have prompted the ninety women who volunteered to be impregnated with the embryos. Because Mr. and Mrs. Rios left no will and no agreement as to the disposition of the embryos in the event of their deaths, the query was raised as to who had dispositional authority over the embryos. Additionally, if the embryos were implanted and born alive, were they heirs to the Rios fortune? In 1984, a special committee commissioned in Australia and known as the Waller Committee, which had been considering policy relating to the new reproductive techniques, issued its report. One of the Committee’s recommendations was that embryos such as those belonging to Mr. and Mrs. Rios be destroyed, rather than implanted. The government of Victoria, however, ordered that the embryos remain frozen and after the settlement of the Rios estate in California, it sanctioned implantation. The Rios case is credited with prompting the state of Victoria to enact its Infertility (Medical Procedures) Act in 1984 which provided guidelines for future dilemmas.

Two years later, Louisiana passed a law dealing with human embryos. Granting the pre-implanted embryos the status of juridical persons, the law prohibits the sale of human embryos. Specifically stating that the embryo is not the property of the physician, nor of the gamete donors, the relationship

82. Heard, supra note 14, at 928.
83. Fabricant, supra note 11, at 183.
85. Id. §§ 2.14-2.19. The Committee compared the removal of embryos from storage to the removal of life support from a terminally ill person. Id.
86. Fabricant, supra note 11, at 183.
91. La. R.S. 9:126 (1991) provides that if the gamete donors do not “express their identity,” the physician shall be deemed “temporary guardian” of the embryo until adoptive implantation can occur.
92. La. R.S. 9:126 (1991) states:
An in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum. If the in vitro fertilization patients express their identity, then their rights as parents as provided under the Louisiana Civil Code will be preserved. If the in vitro fertilization patients fail to express their identity, then the
between the donors who have "expressed their identity" and the embryo is defined as one of parents and child.\textsuperscript{93}

There is an attempt in the Louisiana statute to deal with some inheritance issues that might arise.\textsuperscript{94} However, a number of questions remain unanswered. The statute provides that viable embryos may not be intentionally destroyed.\textsuperscript{95} There is a provision, however, allowing renunciation of "parental rights for in utero implantation" by the gamete donors.\textsuperscript{96} In such a case, the embryo would become "available for adoptive implantation."\textsuperscript{97} In the case of such an "adoption," any child born would have inheritance rights to the adoptive parents, while losing inheritance rights to the gamete donors.\textsuperscript{98}

It is unclear, however, how the Rios case would have been resolved under the Louisiana statute since no specific provision is made for the possibility of gamete donors dying without having renounced their rights for implantation. Presumably, since viable embryos may not be destroyed under the statute, adoptive implantation would take place. Apparently, the right to arrange such an adoption would be left to the physician as temporary guardian.

Yet, if the gamete providers have "expressed their identity," thus preserving their rights as parents under the Civil Code,\textsuperscript{99} and if they "fail to renounce their

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physician shall be deemed to be temporary guardian of the in vitro fertilized human ovum until adoptive implantation can occur. A court in the parish where the in vitro fertilized ovum is located may appoint a curator, upon motion of the in vitro fertilization patients, their heirs, or physicians who caused in vitro fertilization to be performed, to protect the in vitro fertilized human ovum's rights.

Compare the case of York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), in which the Jones Institute refused the request of Mr. and Mrs. York to transfer their frozen embryo to another facility. Analyzing the case in terms of a bailment, the court characterized the embryo as property. A different resolution was reached by the supreme court of Tennessee in \textit{Davis v. Davis}, a divorce case in which the custody of preembryos was at issue. 842 S.W.2d 588 (Tenn. 1992). Using a theory that the preembryos should not be considered persons, as implied by the trial court in referring to them as "children in vitro," and the reasoning suggested by the appellate court that they were not property, the Supreme Court of Tennessee concluded that the preembryos "occup[y]ed an interim category that entitle[d] them to special respect because of their potential for human life." \textit{Id.} at 597.

\textsuperscript{93} \textit{Id.} at 598.
\textsuperscript{97} \textit{Id.} One author notes the inconsistency in this statute with the Louisiana adoption procedures. \textit{See Ahnen, supra note 11, at 1339-1340, pointing out that the procedure for adoption in Louisiana requires a determination of the "moral and financial fitness" of prospective adoptive parents whereas no provision for investigating prenatal adoptive parents appears in the human embryo statute. The language Ahnen refers to appeared in former La. R.S. 9:427. That specific language is omitted from the current parallel provision in the Children's Code but there is still an implied fitness to be adoptive parents. La. Ch.C. arts. 1171-1175.
\textsuperscript{98} This is also inconsistent with the Louisiana laws on adoption which allow the children of adoption to inherit both from the adoptive parents and from the blood parents. La. Civ. Code art. 214. \textit{See supra} note 30 and accompanying text.
parental rights,” but in fact affirmatively express an intention to become parents post-mortem, there is nothing prohibiting such behavior. Theoretically, the gamete providers could specify that a gestational surrogate be found to carry the embryo to birth.100

Ultimately, the state may wish to articulate a public policy regarding posthumous conception.101 Although the right to procreate has been deemed “fundamental to the very existence and survival of the race,”102 that right may not extend to having one’s genetic material used after death.103 As Professor John Robertson notes:

Posthumous reproduction, however, will share only a few features of what is valued about reproductive experiences. The individual will not gestate. She will not rear. While alive, she will not even know she has reproduced genetically. At most, the person has the present satisfaction of knowing that genetic reproduction might occur after she has died. This is an extremely attenuated version of the experiences that usually make reproduction valuable and important. Indeed, it is so attenuated that one could argue it is not an important reproductive experience at all, and should not receive the high respect ordinarily granted core reproductive experiences when they collide with the interests of others.104

If the state chose to prohibit posthumous reproduction, and assuming such prohibition was constitutionally permitted,105 the task would not be an easy one. First, the desire for such a policy suggests itself only when the gamete providers wish to retain the relationship of parent with the resulting child. If an anonymous sperm donor were to die prior to the use of his sperm for impregnating, the reasons for prohibition of the posthumous birth are not operative since

100. If they intended the resulting child to inherit from them, capacity issues arise. Practically, this scenario could be avoided by physicians requiring as a prerequisite to proceeding with the treatment that gamete donors agree to the renunciation of parental rights in the event of the death of the donors. See infra Part IV.

101. In Hall v. Fertility Institute, 647 So. 2d 1348, 1351 (La. 4th Cir. 1994), the Fourth Circuit made the following statement, suggesting it has no public policy objection to the proposed posthumous insemination:

We find no merit in the Executrix’ arguments that the authentic act of donation should be set aside for reasons of public policy, and reject the notion that St. John’s proposed artificial insemination would be contra bonos mores in this State.

However, in the next sentence, the court seems to be cautioning that its previous statement is dicta: Similarly, we are not called upon to address the constitutional propriety of artificial insemination in vitro or in utero, of the question of posthumous reproduction set out with great erudition in the amicus curiae brief filed herein.

Id.


103. Robertson, supra note 54, at 1031.

104. Id. at 1032.

105. See Robertson, supra note 54, for a thorough analysis of the issues involved.
the birth of such a child would not result in any loss of inheritance by the
donor’s other children. Therefore, because there is no expectation of a legal
relationship to the child, the non-existence of the donor is not relevant. In
addition, the death of gamete donors who wished to renounce the rights of
implantation of an embryo would present no greater legal problems than if the
same donors were to survive the implantation.

Thus, the prohibition would have to focus on the intent of the donor to
preserve a legal relationship to the resulting child and would merely prohibit the
practice of posthumous reproduction in the very cases where such a relationship
was contemplated by the donors. If both gamete donors are deceased, such a
state policy of prohibition may be more easily rationalized. However, in
instances in which a widow, who would otherwise have had legal access to the
decedent’s sperm is denied her “partner of choice,” the state may have a more
difficult time showing a compelling reason for restricting her procreative
liberty.

IV. CAPACITY OF POSTHUMOUSLY REPRODUCED CHILDREN TO INHERIT

Regardless of the state’s articulated position on posthumous reproduction,
the rights of any resulting child must be considered. For even if the state were
to prohibit posthumous conception or posthumous implantation of the embryos,
some children may still be born as a result of the techniques. Denying these
children legal rights of inheritance based on the theory that such denial would
deter people from posthumously reproducing is the moral equivalent of denying
illegitimate children inheritance rights in order to deter people from having
children out of wedlock.

The case of Hart v. Shalala illustrates the roadblock to inheritance that
currently exists for posthumously conceived children in Louisiana. The issue was
raised as an ancillary question in the determination of whether or nor Judith Hart,

106. Thus, the child would not be deprived of any anticipated financial or emotional support
from the donor.
107. Robertson, supra note 54, at 1045.
108. This has been deemed to be an unconstitutional deprivation of equal protection. See
Trimble v. Gordon, 430 U.S. 762, 772, 97 S. Ct. 1459, 1466 (1977), in which the Supreme Court
balanced concerns over proving paternity against the child’s “total statutory disinheritance.” See also
Frederick W. Swaim, Jr. & Kathryn Venturatos Lorio, Successions and Donations, Ch. 3 in Louisiana
Civil Law Treatise (1995). Of course, in the context of posthumous conception, one may argue, in
a “Catch-22” manner, that capacity to inherit must be determined at the time of the parent’s death
and since that is before personhood has occurred, no equal protection argument would lie. However,
in the case of embryos where conception, though not implantation, has occurred prior to the death,
La. R.S. 9:121 recognizes these embryos as juridical persons. Thus, when a gamete provider of these
conceived but not yet implanted embryos dies, the embryos would be juridical persons, arguably due
equal protection.
Garside, Comment, Posthumous Progeny: A Proposed Resolution to the Dilemma of the
born to Nancy Hart, widow of Edward Hart, and conceived by gamete intrafallopian transfer with the sperm of Edward Hart after Edward's death, should be able to receive Social Security survivors' benefits as Edward's "natural child."

Four years after Edward and Nancy Hart were married, Edward was diagnosed with non-Hodgkin's lymphoma of the esophagus and chemotherapy treatments were prescribed. After learning that the treatments might render him sterile, Edward decided to deposit his sperm with a sperm bank. In a form provided by the Fertility Institute where the storage was to be made, Edward directed the physicians to freeze his sperm for later use, assigning all ownership interest to his wife for her use or disposal as she saw fit. After the chemotherapy, Edward went to Houston for surgery to remove his cancerous tumor. On the way to Houston, Hart reminded his wife to go forward with the plan to have a child, even if he died. On June 14, 1990, ten days after that discussion, Edward Hart died.

Three months after Edward Hart's death and pursuant to his wishes, his widow underwent the GIFT process. She became pregnant, giving birth to Judith Hart on June 4, 1991. All medical and birth records were consistent in naming Edward Hart as the child's father. Judith was acknowledged as such by friends and relatives, including Edward's two grown children of a previous marriage.

On December 23, 1993, more than two years after filing a claim on Judith's behalf for Social Security survivors' benefits, Mrs. Hart was informed by the Social Security Administration that her request was denied on the basis that Judith was not the "natural child" of Edward Hart. To be eligible for such benefits, a child must be a minor and prove dependency on the decedent at the time of his death. Dependency is presumed in the case of a legitimate child or in the case of a child who would be entitled to inherit personal property from the insured parent's estate under the intestacy law of the insured's state of domicile. A presumption of dependency also exists if the decedent acknowledged the child in writing, if a court decree recognized the decedent as the parent of the child, or if the decedent had been ordered to pay child support to the child. Otherwise a showing must be made that the applicant is the

111. The exact language in the form, signed by Edward Hart and witnessed on April 9, 1990, was in pertinent part:
In the event I become incapacitated or die, I assign ownership of all vials of frozen sperm to Nancy Young Hart to either use or dispose of as she/he sees fit.
115. 42 U.S.C. § 416 (h)(2)(A) (1988). "Applicants who according to such [state] law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such." Id.
child of the decedent and was "living with or contributing to the support of the applicant at the time such applicant's application was filed."\textsuperscript{117}

Because Judith was not conceived at the time of Edward's death, she could not prove dependency at that time. Since she was born more than three hundred days after the dissolution by death of the marriage of Edward and Nancy Hart, she was not presumed to be Edward's legitimate child under Louisiana Civil Code article 185.\textsuperscript{118} Not having been conceived prior to Edward's death, Judith had not been acknowledged by Edward in writing, nor had any court required him to support her. Due to the fact that a year had passed since Edward's death, it was too late for a filiation action to be brought to attempt to get a decree by a court that Judith was Edward's child.\textsuperscript{119}

The final possibility was to prove that Judith would have been able to inherit from Edward under the Louisiana laws of intestacy. The problem here was Louisiana Civil Code article 953 which requires an heir to "exist at the moment the succession becomes open."\textsuperscript{120} A child in its mother's womb "is considered as born" and "takes all successions opened in its favor since conception," provided it be born alive.\textsuperscript{121} Article 957 states two prerequisites to inheriting: "one, that the child be conceived at the moment of the opening of the succession; the other, that the child be born alive."\textsuperscript{122} Since Judith was not conceived at the time of Edwards death, she lacked capacity to inherit form him under the Louisiana law of intestacy and thus her dependency was not presumed under the

\textsuperscript{118} La. Civ. Code art. 185 provides:
A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage. A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband.
\textsuperscript{119} La. Civ. Code art. 209 provides:
A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.
B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article.
C. The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages.
D. The right to bring this proceeding is heritable.
\textsuperscript{120} La. Civ. Code art. 953. Opening of the succession is either by death or by presumption of death caused by long absence. La. Civ. Code art. 934.
\textsuperscript{121} La. Civ. Code art. 954.
\textsuperscript{122} La. Civ. Code art. 957.
Social Security law. Absent that presumption, she would have had to show actual dependency at the time of Edward’s death, something which was impossible due to the fact that she was not yet conceived.

Although some of the coverage of this story in the media criticized Louisiana’s legal system as “antiquated,” suggesting that its unique civilian sources may have been the reason for this perceived injustice, the basic principles are not very different from those in most other jurisdictions. Both the common law and the Uniform Probate Code require that a child be conceived at the time of his father’s death in order to be capable of inheriting.

However, there has been some attempt to protect the rights of posthumously-conceived children in other proposed or adopted legislation. In 1988 the National Conference of Commissioners on Uniform State Laws adopted the Uniform Act of Children of Assisted Conception and, prompted by the Rios case, included a specific provision to the effect that “an individual who dies before implantation of any embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.” Although the provision was “designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material could lead to the deceased being termed a parent,” the accompanying comment to the Act states that “[o]f course, those who want to explicitly provide for such children in their will may do so.”

Of the two states that have adopted the USCACA, North Dakota and Virginia, Virginia has recognized a deceased person to be a parent of a posthumously-born child if the process of conception involves the consensual union of

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126. Uniform Probate Code § 2-108 provides:
   An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.
Section 2-104 provides:
   A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent’s heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the state under Section 2-105.
127. See Comment to § 4 of USCACA.
128. USCACA § 4(b).
129. Comment to § 4 of USCACA. The Uniform Act was designed “primarily to effect the security and well being of those children born and living in our midst as a result of assisted conception.” USCACA Prefatory Note.
a wife's ovum with the sperm of her husband and the child is born within ten months of the death of either spouse (presumably regardless of the time of actual conception).\textsuperscript{131} Death of a gamete contributor before in utero implantation will also not preclude parenthood, whether or not the gamete contributors are married to each other if "(i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation."\textsuperscript{132}

Louisiana has not followed this trend of legislation aimed at recognition of children born of new reproductive techniques. In fact, Louisiana is actually proposing legislation which is more restrictive in its approach with regard to posthumously born children. Senate Bill Number 1379 of the Regular Session of 1995 included the standard provision that "[a] successor must exist at the death of the decedent."\textsuperscript{133} It also proposed the passage of a new Article 940 which would provide that "[a]n unborn child in utero at the death of the decedent and thereafter born alive shall be considered to exist at the death of the decedent."\textsuperscript{134} The comment to the proposed article states that it reproduces the substance of Article 954 of the Louisiana Code of 1870 and "does not change the law."\textsuperscript{135} If the article is meant only to ensure that implanted children who are subsequently born alive may inherit, the statement presents no problem. However, if it is meant to absolutely preclude inheritance by conceived, but not yet implanted children, the article may be altering the law. The difficulty is that in its abbreviation of previous Chapter 5 of Book II, Title I, the proposed revision has omitted articles which would support the possibility of inheritance by a child conceived before a parent's death, although not yet implanted in a uterus. Article 957 of the Louisiana Code of 1870 provides simply that in order to inherit, a child need only show that he was conceived at the time of his parent's death, and that he was later born alive.\textsuperscript{136} Nothing is mentioned about implantation. Perhaps this is because the redactors,

\begin{enumerate}
\item\textsuperscript{131} Va. Code Ann. § 20-158B provides:
\textbf{B. Death of spouse.—}Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died. However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.
\item\textsuperscript{132} Va. Code Ann. § 20-158 B (Michie 1995).
\item\textsuperscript{133} S. 1379, 1995 Session art. 939. See Appendix to this Symposium at 57 La. L. Rev. 201.
\item\textsuperscript{134} Id. at art. 940.
\item\textsuperscript{135} Comment to proposed Article 940. Article 954 of the Louisiana Code of 1870 states in pertinent part:
\textbf{The child in its mother's womb is considered as born for all purposes of its own interest; It takes all successions opened in its favor since its conception, provided it be capable of succeeding at the moment of its birth.}
\item\textsuperscript{136} La. Civ. Code art. 957.
\end{enumerate}
writing the Code before new reproductive techniques were common, did not make any distinction between fertilization and implantation. Indeed, at that time such distinctions were not necessary. Today, however, the distinctions are pivotal. For example, a child conceived, but not implanted in his mother’s uterus before the death of his father, could argue that he was in fact conceived and was later born alive. Thus, the child could inherit under Article 957. Arguably, the reference to being in the mother’s womb in Article 954 does not preclude a conceived, but not yet implanted child from inheriting. Rather, Article 957 merely gives the child in the womb at the time of the father’s death an advantage because that child is already “considered as born for all purposes of its own interest . . . provided it be capable of succeeding at the moment of its birth.” In contrast, the child that has not yet been implanted does not enjoy that same presumption of capacity, but must in fact present further proof of timely conception. When the Code was written, the redactors contemplated proof such as that provided in the section on filiation. However, with today’s new techniques, other proof, such as medical records indicating dates of insemination could also be used to prove conception.

Additionally, to require that a child be in utero in order to be capable of inheriting or of receiving a donation eliminates the possibility of inheritance, not only of posthumously born children, but also of children born as the result of abdominal pregnancies. Although rare, it is possible for a child to be conceived, never be implanted in the mother’s uterus, but rather in her abdomen and then born alive. Thus, if the revision was meant to eliminate the possibility of posthumously implanted children inheriting, but not meant to disqualify children born of abdominal pregnancies, requiring a child to be “in vivo” rather than “in utero” would have been more appropriate.

Even assuming, however, that an argument could be made under the Code of 1870 for inheritance by children conceived before their father’s death, although implanted after, there is still a problem with regard to children

137. There are differing definitions of conception: “[T]he onset of pregnancy, marked by implantation of the blastocyst in the endometrium; the formation of a visible zygote.” Dorland’s Illustrated Medical Dictionary (28th ed. 1994); and, “The beginning of pregnancy. As to human beings, the fecundation of the female ovum by the male spermatozoon resulting in human life capable of survival and maturation under normal conditions.” Black’s Law Dictionary 289 (6th ed. 1990).
139. Louisiana Civil Code article 958 specifically refers to the filiation provisions.
140. Such a provision was passed in 1991 as part of the package dealing with capacity to take, including articles dealing with mental incapacity ad undue influence. 1991 La. Acts No. 363. Article 1474 provides:
   To be capable of receiving by donation inter vivos, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation mortis causa, an unborn child must be in utero at the time of the death of the testator. In either case, the donation, has effect only if the child is born alive.
See discussion of this provision in Swaim & Lorio, supra note 108, § 10.2.
conceived after the father’s death. Some may argue that this distinction is deliberative and that it would be contra bones mores to open the doors of inheritance to such children. This author submits, however, that the exact opposite is the case. If the state is truly concerned about the support of children, allowing these children to inherit the estate of the person responsible for their existence seems eminently reasonable. Rather than excluding these children from receiving property that could be used to ensure they not become wards of the state, the law should sanction such inheritance. Under this reasoning a biological parent should certainly not be precluded from leaving property by testament to these children.

However, allowing such posthumously conceived children to inherit raises a number of other issues such as actual proof of relationship, intent of the gamete provider to retain a relationship to the resulting child, and the myriad of questions regarding the stability of land titles. Any provision proposing recognition of inheritance rights by these children should accommodate for these three concerns. Requiring that the persons responsible for the creation of these children take the initiative to plan for their protection does not seem unduly burdensome. Most persons contemplating extraordinary methods of conception have generally given considerable thought to the process. Arguably, they would welcome a legal mechanism to ensure the security of any resulting children.

The following suggestions are submitted as reasonable measures to protect the rights of these children. First, the problem of proving the biological relationship between the gamete provider and the posthumously conceived child could be alleviated by requiring the parent, at the time of depositing genetic material, to undergo deoxyribonucleic (DNA) testing so the results could be compared to that of any posthumously born child to establish filiation. Second, to ensure that the parent desired to retain a legal relationship to the resulting child, specific written indication of intent should be made at the time of deposit. Third, a time period after the prospective parent’s death and within which birth of the child must take place would protect the interests of other heirs and third parties as well.

Although it may be argued that all rights of ownership to an estate should vest at the time of the decedent’s death, there is already precedent to the contrary in Louisiana. Louisiana Civil Code article 1521 specifically accommodates for

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142. See Lisa M. Burkdall, Note, A Dead Man’s Tale: Regulating the Right to Bequeath Sperm in California, 46 Hastings L.J. 875, 904 (1995), where the author suggests that a sperm donor specifically provide that his testamentary disposition of property be subject to an obligation to support any posthumously conceived children.


144. It is submitted that one of the reasons such provisions by prospective parents are not made is that there is no legal framework to guide them in the process.

145. Heller, supra note 1, at 21.

146. For such recommendations, see Garside, supra note 109, and Burkdall, supra note 142, at 905.
the possibility of suspending the vesting of ownership for ninety days following the death of the decedent in order to ensure that an heir lives long enough to enjoy an inheritance. Why not provide for a similar time frame within which a child could be conceived? Donations could be made by the prospective gamete donor to the subsequently born child, contingent on the birth of the child within the specified permissible period after the donor’s death. Just as in the case of Milne’s Heirs v. Milne’s Executors, in which a donation mortis causa to a corporation which had not come into existence at the time of the donor’s death was rationalized as “conditional” in nature, the birth of a planned child could be conditional. In Milne, realizing the “manifest public utility” of creating institutions to receive the sizable donation of the testator, the Louisiana legislature incorporated the entities after the donor’s death and deemed the condition fulfilled. Likewise, in order to carry out the clear intention of the decedent and to provide necessary support for the innocent child, the law could

147. La. Civ. Code art. 1521 provides in pertinent part:
The disposition, by which a third person is called to take a gift, the inheritance or the legacy, in case the donee, the heir, or the legatee does not take it, shall not be considered a substitution and shall be valid, provided: . . . (2) That, with regard to the taking of a disposition by any heir, legatee, or trust beneficiary, including the legitime of a forced heir, a testator may impose as a valid suspensive condition that the donee, heir, legatee, or trust beneficiary must survive the testator for a stipulated period, which period shall not exceed ninety days after the testator’s death, in default of which a third person is called to take the gift, the inheritance, or the legacy; in such a case the right of the donee, heir, legatee, or trust beneficiary is in suspense until the survivorship vel non as required is determined. If the donee, heir, legatee, or trust beneficiary survives as required, he is considered as having succeeded to the deceased from the moment of his death, and if he does not survive as required, he is considered as never having received it, and the third person who is called to take the bequest in default of his survival is considered as having succeeded to the deceased from the moment of his death. A survivorship condition as to the legitime of a forced heir shall only be valid if the forced heir dies without descendants, or if he dies with descendants and neither the forced heir nor the descendants survive the stipulated time.

See also Baten v. Taylor, 386 So. 2d 333 (La. 1979), in which ownership of a legacy was deemed suspensively conditioned on the legatee’s survival for a period of thirty days from the testator’s death. As noted by the court, “[t]he survivorship clause . . . does not suspend seizin of the succession, but is a valid disposition of ownership subject to suspensive conditions. . . .” Id. Compare Max Nathan, Common Disasters and Common Sense in Louisiana, in which the author recommends a similar resolution, although seemingly positing his argument in terms of the suspension of seizin. 41 Tul. L. Rev. 33, 52 (1968).

148. 17 La. at 46 (1841).

149. The Milne court stated:
Dispositions of this kind are conditional in their nature and the condition fulfilled by the creation of the capacities to receive; thus in this case, it was intended, we think, that the legacies should be delivered to these institutions upon their becoming incorporated; the implied condition was that they should be rendered capable of receiving and that condition was fulfilled by the subsequent acts of incorporation.

Milne, 17 La. at 55.

150. Milne, 17 La. at 56.
deem the condition of birth as fulfillment of the suspensive condition in the case of posthumously conceived children.\footnote{151}

V. Conclusion

As the first “test-tube” baby has come of age,\footnote{152} our legal system has yet to adequately address the issues raised by the new reproductive technology. Although posing difficult constitutional and moral dilemmas which challenge our basic views of humanity, these procedures cannot be ignored and the legal ramifications need to be addressed. As time passes, the problems become magnified as gamete donors die and inheritance issues arise.

A first step is a recognition of the need for action. Then, educated concerning the legal, medical, and ethical ramifications of the processes involved, lawmakers may formulate policies involving acceptable boundaries and legal procedures to follow in order to fully protect the interests of the resulting children of the new procreative technology.

\footnote{151} The words of the Milne case become particularly poignant when analyzing the difficulties faced by Judith Hart:

After the strong and positive declaration of Milne with respect to the disposition of his property, shall a technical objection drawn from provisions of law, not perhaps applicable to cases of this kind, defeat his purpose?

\textit{Id.} at 56-57.
