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# Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval

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## Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval

“[T]here is no voice advocating the complete dismissal of the wishes of the dead . . . . [T]he importance of the decision to reproduce is of such moment and has such a deeply personal nature that procreative autonomy survives death.”<sup>1</sup>

### I. INTRODUCTION

All great medical phenomena begin as a rarity, taking years to increase in numbers and success stories—if in fact they ever do. These medical marvels initially shock the mind of an average citizen if he or she is even aware the marvel exists and is medically possible. Such is the case with postmortem sperm retrieval (PMSR). PMSR involves extracting sperm—or gametic material—from a recently deceased male for the purpose of impregnating a woman, presumably his surviving wife, and conceiving a child with her after his death.<sup>2</sup> Most often, the extracted sperm is frozen for future use.<sup>3</sup>

PMSR, however, is not a new concept; its origin dates back to 1980.<sup>4</sup> Nor is it strictly confined to the United States.<sup>5</sup> Although PMSR is a

1. Katheryn D. Katz, *Parenthood From the Grave: Protocols for Retrieving and Utilizing Gametes From the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 300–01 (2006) (citing Belinda Bennett, *Posthumous Reproduction and the Meaning of Autonomy*, 23 MELB. U. L. REV. 286, 286 (1999)).

2. Mary F. Radford, *Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 33, 35–36 (2009) (describing the techniques used to accomplish PMSR); see also Katz, *supra* note 1, at 308 (discussing the same phenomenon but using the term “postmortem gamete retrieval” instead of PMSR).

3. See Radford, *supra* note 2, at 36; Philip Cohen & Michael Day, *Never Say Die*, NEW SCIENTIST, Mar. 24, 1999, at 2179, 2179 (reporting on the first PMSR procedure to result in a live birth); Bryce Weber, Ron Kodama, & Keith Jarvi, *Postmortem Sperm Retrieval: The Canadian Perspective*, 30 J. ANDROLOGY 407, 407 (2009), available at <http://www.andrologyjournal.org/cgi/reprint/30/4/407.pdf>.

4. See Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 244 (2000) (citing Cappy Miles Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 FERTILITY AND

worldwide, death-defying occurrence, it lacks a legal backbone.<sup>6</sup> For this reason, hospitals have been forced to draft their own rules regarding the procedure.<sup>7</sup> While the medical community has done well with promulgating guidelines for facing this unusual occurrence on its own, this Comment suggests the need for legislation on the topic in order to protect all parties involved.<sup>8</sup> Furthermore, legislation is needed to resolve what happens to a child conceived and born from postmortem sperm retrieval as it relates to probate, class gifts, social security, and legal status in general.<sup>9</sup>

Part I of this Comment lays a historical foundation of the gradual development of case law dealing with reproductive rights as they relate to postmortem conception and discusses uniform laws that have partially addressed the issue of PMSR. Part II explains more specifically the difficulties facing the legal community due to the lack of precedent on the topic and lack of legislation; it also delves into the problems of construing postmortem intent and how that uncertainty affects PMSR from the outset.

The first three subparts of Part III discuss the public policy arguments against PMSR, while the fourth subpart takes a look into how society views it. The final two subparts of Part III present arguments for why PMSR should not be banned and suggest the implementation of a “Statute of Formalities” to address the problems surrounding PMSR.

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STERILITY 512 (1980)) (discussing the first case of extracting sperm from a man’s body following death in 1980.).

5. Since 1980, numerous requests for PMSR have been made throughout the world. See generally R. Landau, *Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychosocial Critique*, 19 HUM. REPROD. 1952 (2004), available at <http://humrep.oxfordjournals.org/content/19/9/1952.full.pdf+html> (discussing PMSR in Israel); Weber et al., *supra* note 3 (discussing PMSR in Canada); J. Dostal et al., *Post-Mortem Sperm Retrieval in New European Union Countries: Case Report*, 20 HUM. REPROD. 2359 (2005), available at <http://humrep.oxfordjournals.org/content/20/8/2359.full.pdf#page=1&view=FitH> (discussing PMSR in Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia); Rebecca Collins, *Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma*, 30 J. MED. & PHIL. 431 (2005), available at <http://jmp.oxfordjournals.org/content/30/4/431.full.pdf#page=1&view=FitH> (discussing posthumous reproduction in Australia and New Zealand).

6. See *infra* Part II.A–C.

7. See, e.g., *New York Hospital Guidelines for Consideration of Requests for Postmortem Sperm Retrieval*, CORNELLUROLOGY.COM, <http://www.cornellurology.com/guidelines.shtml> (last visited Nov. 6, 2011) [hereinafter *New York Hospital Guidelines*].

8. See Katz, *supra* note 1, at 315–16 (raising in her conclusion the question of whether legislative intervention is needed or whether PMSR procedures should remain solely a question of medical ethics).

9. See *id.* at 316 (suggesting briefly in her conclusion that legislation is needed to “clarify the status of children born as the result of [PMSR]”); *infra* Part II.A–C.

## II. THE GRADUAL DEVELOPMENT OF POSTHUMOUS CONCEPTION LAW

To say the law surrounding postmortem conception—and more specifically, PMSR—is limited would be an understatement. Over the past twenty years, case law on artificial reproduction has developed slowly,<sup>10</sup> leaving many questions surrounding the topic unexamined and unanswered. Particularly within the area of PMSR, the only regulations—and this term is used loosely—directly on point are developed by hospitals as guidelines for granting or denying requests for PMSR.<sup>11</sup> Only a few states have addressed the legal problems of postmortem conception,<sup>12</sup> and even fewer have specifically addressed the controversial issue of PMSR.<sup>13</sup>

### A. *The Seminal Case for Posthumous Conception: Hecht v. Superior Court*

On October 30, 1991, William E. Kane committed suicide, leaving behind the most bizarre devise for his live-in girlfriend, Deborah E. Hecht: fifteen vials of his sperm.<sup>14</sup> Kane made a deposit at a sperm bank in October of 1991.<sup>15</sup> Prior to depositing his specimens at the sperm bank, Kane signed an “Authorization to Release Specimens” form, which specifically provided for the sperm bank to release his vials to Hecht or Hecht’s physician.<sup>16</sup> In addition to the release form, Kane also executed a will on September 27, 1991, in which he stated all of his stored specimens were to go

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10. Artificial reproduction is a broad topic encompassing, among other procedures, postmortem sperm retrieval, artificial insemination, and cryogenically preserving sperm and eggs. Although the law on artificial reproduction as a general field has progressed, the legal community has largely failed to address the problems created by more narrow subsets of artificial reproduction, such as PMSR. It is for this reason that this Comment suggests the need for legislation.

11. See, e.g., *New York Hospital Guidelines*, *supra* note 7.

12. The states that have addressed postmortem conception have addressed it through uniform laws such as the Uniform Probate Code, the Uniform Parentage Act, and the Uniform Anatomical Gift Act.

13. See *infra* Part II.A–C.

14. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276 (Cal. Ct. App. 1993).

15. *Id.* Although Kane’s making a deposit at a sperm bank and killing himself all in the same month raises suspicions about his true intent or state of mind, it does not seem to factor into the court’s analysis. Maybe the proximity of the two acts could further solidify Kane’s true intent to conceive a child posthumously with Hecht. In a footnote, however, the court references a suit filed by Kane’s children against Hecht for wrongful death and intentional infliction of emotional distress, alleging, among other things, that Hecht had unduly influenced Kane into bequeathing his sperm and property to her. *Id.* at 279 n.2.

16. *Id.*

to Hecht.<sup>17</sup> Kane's will provided that it was Kane's intention and wish for Hecht to become "impregnated with [his] sperm, before or after [his] death," and the will thereafter referenced "our future child or children."<sup>18</sup> Kane had also written a letter to his future, not yet conceived, children, where he again specifically stated his intention for Hecht to conceive a child from his sperm after his death.<sup>19</sup>

Kane's two children from a previous marriage contested the will, arguing that (1) a posthumously born child would disrupt their existing family balance, (2) the posthumously born child would be harmed because he or she would not be raised in a traditional family home, and (3) it would violate public policy for Hecht to become impregnated by Kane's sperm because Kane and Hecht were never married.<sup>20</sup> On these three grounds, Kane's children sought to have the sperm destroyed.<sup>21</sup>

The trial court in *Hecht* relied on *Moore v. Regents of University of California* in finding that Kane did not have a possessory interest in his sperm once it left his body.<sup>22</sup> Beginning its analysis with California probate laws, the California Court of Appeals rejected the trial court's decision

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17. *Id.*

18. *Id.* at 276–77.

19. *Id.* at 277. Portions of the letter read as follows:

I address this to my children, because, although I have only two . . . it may be that Deborah will decide—as I hope she will—to have a child by me after my death. I've been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born . . . I wanted to leave you with something more than a dead enigma that was your father.

*Id.*

20. *Id.* at 279, 284.

21. *Id.* at 279. Interestingly, courts have found testamentary orders for the destruction of property to be against public policy. *See, e.g., Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975) (holding it was against public policy to destroy the decedent's house, despite decedent's express language in her will to do so, because it would harm neighbors and adjacent land value). California, however, had not ruled that sperm or bodily fluid was property; in fact, it had done just the opposite. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990) (rejecting plaintiff's claim that he had a property ownership right in his bodily fluids and should be entitled to a conversion cause of action against the hospital for using his bodily fluids without paying him or obtaining his informed consent.). Perhaps this explains why the lower court in *Hecht* accepted the children's argument that the sperm should be destroyed.

22. *See Moore*, 793 P.2d at 136–37; *Hecht*, 20 Cal. Rptr. 2d at 281 (discussing both the trial court's decision and *Moore*).

and its reliance on *Moore*.<sup>23</sup> The court distinguished *Moore* from the issue in *Hecht* by stating that the court in *Moore* had not fully resolved the debate over what, if any, property interest an individual has over his or her body.<sup>24</sup> The court in *Hecht* concluded that Kane had both an ownership interest in his sperm and the “decision making authority” over how it was to be used for reproduction.<sup>25</sup> By making this determination, the court held that Kane’s sperm was property within the meaning of the probate code, and therefore, the court had jurisdiction over the vials of sperm.<sup>26</sup>

The *Hecht* court ultimately concluded that (1) it was not against public policy for Hecht, as an unmarried woman, to be inseminated with Kane’s sperm, and (2) postmortem conception was not against public policy.<sup>27</sup> The court refused to consider whether a child brought into the world without ever knowing his father would be adversely affected or whether a posthumously born child would disrupt the family dynamic and be a burden on society.<sup>28</sup> These public policy arguments have been the subject of an endless debate on PMSR.<sup>29</sup>

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23. *Hecht*, 20 Cal. Rptr. 2d at 280–81. The *Hecht* court stated that it was “self-defeating for [the] parties to argue, under the rationale of *Moore*, that decedent had no ownership or possessory interest in his sperm once it left his body, because the sperm then would not constitute part of Kane’s estate and the probate court would not have jurisdiction over its disposition.” *Id.*

24. *Id.* at 281.

25. *Id.* at 283 (discussing Kane’s interest in his sperm at the time of his death). The court found that, because Kane’s intention was to have his frozen sperm impregnate Hecht, the stored sperm was “unlike other human tissue because it [was] ‘gametic material’ that [could] be used for reproduction.” *Id.* at 283 (citing *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992)). The court also stated “the value of sperm lies in its potential to create a child.” *Id.*; see also *infra* Part.III.E.

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

27. *Id.* at 287, 290–91. After the court handed down its decisions, the case went back to the probate court. *Kane v. Superior Court*, 44 Cal. Rptr. 2d 578, 580 (Cal. Ct. App. 1995). The probate court decided to distribute the sperm in the same percentage as the estate had been settled, with Hecht receiving 20% and the children each receiving 40%. *Id.* Hecht tried to conceive a child using the sperm, but was never able to conceive, partly due to the decreased quantity of sperm. See Andrea Corvalan, Comment, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 350 (1997).

28. *Hecht*, 20 Cal. Rptr. 2d at 291 (quoting *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993)) (“[I]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.”)

29. See *infra* Part IV.A–C.

### B. Case Law After Hecht

There have been several cases addressing *Hecht* and the sperm-property theory it espoused. Before addressing the cases that have come after *Hecht*, it is important to be familiar with the holding in *Davis v. Davis*.<sup>30</sup> *Davis* involved a dispute between a recently divorced husband and wife over the ownership of their cryopreserved pre-embryos.<sup>31</sup> The ex-wife wanted to use the pre-embryos to conceive a child, while the husband was “vehemently opposed to fathering a child that would not live with both parents.”<sup>32</sup> The Supreme Court of Tennessee held that when there is a dispute over the disposition of pre-embryos, the party opposing procreation should prevail and should not be forced to be a parent against his or her will.<sup>33</sup> This holding is in conformity with the argument that PMSR should not occur when the man did not explicitly agree to his sperm being extracted from his body for the purpose of conceiving a child long after his death.<sup>34</sup>

Other cases are worth noting briefly for their holdings. In *Woodward v. Commissioner of Social Security*,<sup>35</sup> Lauren Woodward applied for social security benefits for herself and her twin daughters.<sup>36</sup> Woodward’s twin daughters were conceived with her husband’s cryopreserved sperm, and born almost exactly two years after Mr. Woodward had passed away.<sup>37</sup> The Social Security Administration (SSA) denied Mrs. Woodward’s claim, and she appealed.<sup>38</sup> The Supreme Judicial Court of Massachusetts held that the posthumously conceived twins could inherit from their deceased genetic father if Mrs. Woodward could prove the following: (1) the genetic relationship between Mr. Woodward and the twins, (2) that Mr. Woodward had consented before his death to Mrs. Woodward using his stored sperm to reproduce posthumously, and (3) that Mr. Woodward had consented before

30. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992). The *Hecht* court relied on *Davis* in holding that sperm occupies the same “interim” property position that embryos occupy due to the potential for life. *Hecht*, 20 Cal. Rptr. 2d at 283.

31. *Davis*, 842 S.W.2d at 589. The court used the term “pre-embryo” to refer to the stage of development within fourteen days of egg fertilization. *Id.* at 593.

32. *Id.* at 604.

33. *Id.* The court also stated that this would be the rule when the party in favor of procreation has other means of reproducing or simply wishes to donate the pre-embryos to someone else. *Id.* When there are no viable alternatives for one of the parties to reproduce, the argument in favor of procreation using the pre-embryos would have more weight. *Id.*

34. See *infra* Parts III.A, IV.C.

35. *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

36. *Id.* at 260.

37. *Id.*

38. *Id.* The SSA denied Mrs. Woodward’s claim due to her failure to prove the twins were Mr. Woodward’s “children” under the terms of the intestacy statute. *Id.*

his death to support any posthumously born children.<sup>39</sup> The court, however, suggested that even if these conditions were satisfied, a time limit might preclude qualifying for inheritance rights.<sup>40</sup>

An interesting case dealing directly with PMSR involved a posthumously conceived child born nearly four years after her father's death.<sup>41</sup> In *Vernoff v. Astrue*, the court basically adopted a test analogous to the one adopted in *Woodward*.<sup>42</sup> In order for Brandalynn to inherit under state law and receive Social Security benefits, Mrs. Vernoff had to establish that Brandalynn was the natural child of Mr. Vernoff, as defined by the statute, or a dependent of Mr. Vernoff when he died.<sup>43</sup>

First, because Brandalynn was not even conceived when Mr. Vernoff died, much less born, she could not establish herself as being actually dependent upon Mr. Vernoff at his death.<sup>44</sup> Second, because there was no evidence of Mr. Vernoff's intent to father and support a posthumously born child, Brandalynn could not establish that Mr. Vernoff was her "parent" under California law.<sup>45</sup> Third, Brandalynn could not establish her right to

39. *Id.* at 269. The court required the deceased's pre-mortem consent to posthumous reproduction to be "clear[] and unequivocal[]," stating that silence or "equivocal indications of a desire to parent posthumously, 'ought not to be construed as consent.'" *Id.* (quoting Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. Rev. 901, 951 (1997)).

40. *Id.* at 272.

41. *Vernoff v. Astrue*, 568 F.3d 1102, 1105 (9th Cir. 2009). This case involves Brandalynn Vernoff, arguably the first person born through the use of PMSR. See Radford, *supra* note 2, at 34–35; Cohen & Day, *supra* note 3. But see *Baby from Dead Husband's Sperm*, BBC NEWS ONLINE (Mar. 27, 1999), <http://news.bbc.co.uk/2/hi/science/nature/305302.stm> (discussing the Vernoff baby as the first PMSR birth in the U.S., but stating that a woman in France holds the record as having the first PMSR birth two years prior).

42. See *Vernoff*, 568 F.3d at 1107–08.

43. *Id.* at 1106–10. The court laid out three methods of establishing dependency, which would entitle Brandalynn to Social Security benefits. *Id.* at 1106–07. The three methods were: "(1) show[ing] actual dependency at the time of the insured's death; (2) . . . establishing that the insured is her 'parent' under California law provisions . . . ; or (3) . . . establishing that she may inherit from the insured under the intestacy laws of California." *Id.* Under the second and third tests, Mrs. Vernoff had to establish, as in *Woodward*, that Mr. Vernoff had both consented to father a posthumously conceived child and to support the child posthumously. *Id.* at 1107.

44. *Id.* at 1106–07.

45. *Vernoff*, 568 F.3d at 1109–10 (stating that the "basis for establishing natural parenthood" was "the decedent's consent to the posthumous conception"). The court drew heavily from *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004), which held that the "natural child" requirement had been established when the mother was married to the deceased father, the posthumously conceived child was the biological child of the deceased father, and the deceased father had expressly consented to his sperm being used postmortem for the purpose of conceiving.



inherit from Mr. Vernoff under California intestacy law.<sup>46</sup> Not only was there no evidence of Mr. Vernoff's written consent to father a child posthumously, Brandalynn was born nearly four years after her father's death, which precluded her from meeting the two-year time restriction.<sup>47</sup> Therefore, the Ninth Circuit held that Brandalynn could not inherit from her father's estate and could not qualify for Social Security benefits.<sup>48</sup>

These cases all lead to the same conclusion: the deceased's consent regarding PMSR and posthumous conception are essential to determining the child's legal status under intestacy and probate laws.

### C. *The Uniform Probate Code on Posthumous Conception*

There are still many questions surrounding the rights of children born posthumously that *Hecht*, *Davis*, *Woodward*, and *Vernoff* fail to answer. Furthermore, there are many states that have not been presented with the issues that the Massachusetts and California courts have been forced to answer. Another question is whether the two-year time limit in the California probate law is reasonable, or if more time should be added to provide for a posthumously conceived child if the father's written consent provides for it.<sup>49</sup>

The Uniform Probate Code (the Code) has created several presumptions that affect the parentage and rights of posthumously born children. Section 2-120 of the Uniform Probate Code outlines how a legal parent-child relationship can be established in situations where the child is born through assisted reproduction.<sup>50</sup> Section 2-120(f) provides:

[A] parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent to assisted reproduction by the birth mother with in-

46. *Id.* at 1110. In order to inherit under California intestacy law, Brandalynn had to prove

by clear and convincing evidence that . . . the decedent, in writing, specific[e]d that his or her genetic material shall be used for the posthumous conception of a child of the decedent . . . [and] the child was in utero using the decedent's genetic material . . . within two years of the date of . . . decedent's death.

CAL. PROBATE CODE § 249.5 (West 2009).

47. *Id.* at 1111–12.

48. *Id.*

49. *See Radford*, *supra* note 2, at 60–61 (suggesting it is in the government's interest to construe the Social Security Act "somewhat more narrowly" to limit some posthumously born children's rights to benefits based on the number of years between the father's death and the child's birth).

50. UNIF. PROBATE CODE § 2-120 (amended 2008).

tent to be treated as the other parent of the child is established if the individual . . . signed a record that . . . evidences the individual's consent; or . . . intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence.<sup>51</sup>

In addition, the Code provides that, “[i]f the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceeding was pending, in the absence of clear and convincing evidence to the contrary” it is presumed that the deceased spouse had the necessary intent.<sup>52</sup> Taken together, these two provisions create a strong presumption in favor of finding a parent-child relationship between the posthumously conceived child and the deceased father in most cases.

Compared to the written consent requirements set out in *Vernoff*, the Code has a more lenient standard on proving consent to father a child posthumously.<sup>53</sup> In addition to making paternity easier to establish, the Code (in most circumstances) would allow the child to inherit from his or her father as the result of a legal fiction that the child was alive at the time of the father's death.<sup>54</sup> By treating the posthumously conceived child as “in gestation” during the father's life if the mother is pregnant with the child within three years of the father's death—or if the child is born within forty-five months after the father's death—the Code would recognize no legal difference between posthumously and naturally-conceived children.<sup>55</sup> The thirty-six month period between the decedent's death and conception “allow[s] a surviving spouse . . . a period of grieving, time to make up his or her

51. *Id.* § 2-120(f).

52. *Id.* § 2-120(h)(2).

53. Consent to father a posthumous child can now be established by clear and convincing evidence that the deceased husband, by virtue of being married to the child's mother, intended to father the child. *See id.* § 2-120(f). There is no requirement that there be a written record. *See id.* § 2-120(f)(2)(C).

54. *Compare id.* § 2-104(a)(2) (“An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth.”), *with id.* § 2-120(k) (treating a posthumously conceived child as being “in gestation at the [father's] death . . . if the child is: (1) in utero not later than 36 months after the individual's death; or (2) born not later than 45 months after the individual's death.”)

55. Section 2-120 of the Code has answered the question posed by many scholars over the survivorship requirement. *See, e.g.,* Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 115 (2004) (“[T]he requirement that heirs must survive the decedent is ‘indicative that they must be in existence at the time of the decedent's death.’”) (quoting *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 966 (D. Ariz. 2002), *rev'd*, 371 F.3d 593 (9th Cir. 2004)).

mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy.”<sup>56</sup>

Although the Uniform Probate Code has not been adopted by every state, it provides a good foundation for addressing the inheritance rights of children conceived posthumously from PMSR. The three-year time limit between the decedent’s death and the conception of the child provides an adequate time frame within which to conceive, while still allowing for a narrow, yet acceptable, construction of inheritance rights and Social Security benefits to support the child. The Uniform Probate Code, however, only addresses the rights of the posthumously conceived child after birth. It fails to address the initial question of when a request for PMSR should be granted and the essential question of the deceased’s consent on posthumous conception.

### III. HOW MUCH WEIGHT SHOULD THE LAW GIVE THE SELF-SERVING EVIDENCE OF A MAN’S POSTMORTEM INTENT?<sup>57</sup>

*Hecht* was the easy case: the decedent had clearly expressed, through multiple written statements, his intent that his girlfriend should take possession of his stored sperm for the purpose of postmortem artificial insemination.<sup>58</sup> *Hecht*’s analysis did not turn on the issue of consent, but on public policy, probate laws, and property laws.<sup>59</sup> In using “the *Hecht* theory” as a foundation for developing law on PMSR, the key will be in upholding the suggestion that when “the issue is postmortem reproduction using gamete material from a deceased donor, the decedent’s intent as to such use should control.”<sup>60</sup>

But what happens when there is not explicit consent through written letters or a will? What happens when a man dies without mentioning any intent to conceive posthumously? Or even more puzzling, can intent be implied when there is evidence a man wanted to have children with his wife but died before his wife became pregnant?<sup>61</sup> If the presence of con-

56. UNIF. PROBATE CODE § 2-120(k) cmt. (k); see also *infra* Part III.B (discussing the time periods involved with PMSR).

57. This section of the Comment addresses consent issues as they relate to granting or denying PMSR requests, rather than whether a child will inherit from the father or receive Social Security benefits.

58. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276–77, 279 (Cal. Ct. App. 1993).

59. *Id.* at 280–83; see also *supra* notes 14–29 and accompanying text.

60. *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 316 (Cal. Ct. App. 2008) (discussing *Hecht*, 20 Cal. Rptr. 2d at 283).

61. See L. Cannold, *Who Owns a Dead Man’s Sperm?: A Sad Outcome, But the Right One*, 30 J. MED. ETHICS 386, 386 (2004), available at <http://www.ncbi.nlm.nih.gov/pmc/>

sent between a husband and a wife is debatable, how could consent ever be implied for an unmarried couple?<sup>62</sup>

#### A. *The Problem of Consent*

The ambiguity of unwritten consent poses the biggest problem on the threshold of PMSR—granting the initial request to extract sperm from the husband. Because the law has been mute on whether it is legal and ethical to extract sperm from a corpse,<sup>63</sup> hospitals have had to depend upon their own guidelines in making that decision.<sup>64</sup>

One particular sperm retrieval guideline from the New York Hospital provides that a deceased's consent to postmortem sperm retrieval can be "reasonably inferred" in the absence of express consent.<sup>65</sup> The guideline continues by stating "only men undergoing fertility treatment, actively attempting conception or who had specifically expressed their plans to attempt conception in the immediate future would be suitable candidates for retrieval."<sup>66</sup> Although these actions during a man's life would create a reasonable inference that he did in fact want to conceive a child with his spouse,<sup>67</sup> can pre-mortem intent to raise a child with his wife really transfer

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articles/PMC1733912/pdf/v030p00386.pdf. Cannold writes:

[A] legitimate decision to grant a sperm seeker access to a dead man's sperm needs to be grounded in a belief that the seeker's access and use of the sperm would not contravene the dead man's autonomy but—through doing what "he would have wanted"—extend it. Such a decision would also need to be based on a clear conviction that in attempting to gain access to the dead man's sperm, the seeker is not using the dead man as a means to their own ends, but both expressing her love for him and attempting, by enabling the birth of his genetic offspring, to pay tribute to him.

*Id.*

62. Although *Hecht* involved an unmarried couple, the decedent had expressed—continuously and explicitly—his intent to conceive posthumously with his girlfriend, and therefore, that case has no effect on the answer to this rhetorical question. *Hecht*, 20 Cal. Rptr. at 276–77.

63. This particular issue (the propriety of extracting sperm postmortem) has never been litigated and there is no specific legislation on its legality. *See supra* Part II.A–C.

64. *See infra* Part V (suggesting a solution for when hospitals grant or deny PMSR requests based upon their own guidelines).

65. *New York Hospital Guidelines*, *supra* note 7; *see also* Katz, *supra* note 1, at 308 (discussing *New York Hospital Guidelines* as it concerns consent and the right to request retrieval).

66. *New York Hospital Guidelines*, *supra* note 7.

67. In this day and age, these actions could be taken with a girlfriend or a same-sex partner with the intent to conceive a child; however, for the purposes of analyzing the con-

to postmortem intent to have his wife conceive, bear, and raise his biological child after he is dead? While there may be an argument that intent can be implied in this situation, “it is significantly different for a man to intend to consent to [the] use of his sperm to create a child while he is alive . . . than to consent to hav[ing] his sperm extracted from his dead body . . . and later used to create a pregnancy.”<sup>68</sup>

Due to the sensitive (and controversial) nature of PMSR, it is easier for people to accept PMSR when the decedent was married to the requesting party.<sup>69</sup> Although this Comment assumes that marriage alone cannot establish intent to conceive and father a child posthumously, it is much easier to prove the requisite consent when the couple was married.<sup>70</sup> By placing greater weight on the husband–wife relationship with regard to posthumous conception, a presumption against PMSR surfaces when the couple is not married.<sup>71</sup>

Other problems with interpreting consent arise due to the biased nature of the evidence provided by the requesting party. Sometimes the only evidence of the deceased husband’s intent is the wife’s interpretations of her husband’s actions and words. Clearly, the wife requesting PMSR is not impartial. As will be discussed in more detail in the following subpart, grief alone can cloud a woman’s judgment when requesting PMSR.<sup>72</sup> If the wife is the one requesting PMSR, she may have the motive to lie about her husband’s intent in order to get what she wants: his sperm. For these reasons, the wife’s one-sided testimony about her husband’s intent regarding PMSR is unreliable. Despite this unreliability, the wife is in the best position to know what the husband wanted.<sup>73</sup>

### B. *The Time Crunch*

*The absence of explicit donor consent, the intense grief experienced by surviving partners who request the procedure in the hours following an untimely death, and the short timeframe for executing the request prior to deterioration of the reproductive material all intensify the ethical and legal*

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sent guidelines hospitals have developed, this particular argument put forth will assume only the relationship of deceased husband and surviving wife.

68. See Cannold, *supra* note 61, at 386.

69. See *infra* Parts IV.A, IV.D.

70. See UNIF. PROBATE CODE § 2-120(f) (amended 2008).

71. This is more of a public policy argument than established law, as it is clear couples are allowed to procreate without regard to marriage.

72. See *infra* Part IV.A–D.

73. See Corvalan, *supra* note 27, at 353 (discussing a court’s reliance on the wife as being the party “in the best position to determine [the deceased husband’s] intent.”).

*questions that surround the more general practice of posthumous assisted reproduction.*<sup>74</sup>

Another unique problem facing hospitals in making the decision to grant or deny a request to extract sperm from a dead man's corpse is the fleeting time period during which the sperm can be extracted, frozen, and remain viable.<sup>75</sup> Usually, the procedure must occur within twenty-four hours after death.<sup>76</sup> With the grief and pain a widow feels during these hours, it is natural to want the quick fix,<sup>77</sup> but it is seemingly impossible to decipher the deceased's true, "legal" intent regarding PMSR within the limited time frame for successful sperm extraction.<sup>78</sup>

Experiencing the loss of a loved one can make it difficult for a grieving widow to fully understand whether PMSR is what her deceased husband truly wanted.<sup>79</sup> Due to the limited time frame within which a doctor can successfully extract viable sperm, the widow's statements that her deceased husband would have wanted PMSR are both self-serving and clouded by grief.<sup>80</sup> For that reason, some believe the widow cannot be trusted automatically.<sup>81</sup>

Under their guidelines, hospitals have shown that they are capable of making the quick decision regarding whether consent exists.<sup>82</sup> However, this consent determination has no relationship with the legal intent required for the child to inherit posthumously. If the legislature were to take over and regulate the granting and denying of PMSR requests, the hospitals may not be equipped to make both a quick consent determination and the legal consent investigation.<sup>83</sup> It is necessary, therefore, to strike a balance be-

74. Jason D. Hans, *Attitudes Toward Posthumous Harvesting And Reproduction*, 32 DEATH STUDIES 837, 838 (2008).

75. *See id.* at 841 (stating that the most successful procedures are done within twenty-four hours after death); *supra* note 3 and accompanying text.

76. *See supra* note 3 and accompanying text.

77. *See Cannold, supra* note 61, at 386 (discussing how the loss of a loved one can create a desire to continue his legacy and life through other forms, specifically PMSR).

78. This is assuming there is no written, explicit consent. "Legal intent" is used here to refer to the consent that is required for the child to be eligible to receive under intestate succession.

79. *See Cannold, supra* note 61, at 386 (acknowledging that grief can lead one to ask for PMSR without being able to articulate—much less fully understand—that PMSR is what the deceased would have wanted).

80. *Id.* (stating that the widows are in their first stage of grief when making the request for PMSR).

81. *Id.*

82. *See generally New York Hospital Guidelines, supra* note 7.

83. *See infra* Part V.

tween regulating PMSR at the request stage and regulating the rights of the children conceived posthumously through PMSR.

A compromise to the problem is to require the wife to meet a heightened consent requirement at a later stage when the wife intends to impregnate herself with the extracted sperm. The hospital, using its own guidelines, would continue to grant and deny PMSR requests, but in order for a widow to actually use and become impregnated with the decedent's sperm, she would have to come forward with more compelling evidence of the deceased's intentions to conceive posthumously. This second-layer requirement of intent would eliminate the problems associated with the twenty-four hour limitation on sperm extraction, e.g., grief, poor judgment, and selfishness.

#### IV. PUBLIC POLICY ARGUMENTS FOR AND AGAINST PMSR

As with any controversial issue, there have been numerous public policy arguments against legitimatizing PMSR. The first three subparts of Part III will address the public policy arguments against hospitals granting requests to perform PMSR procedures, as well as provide the opposing positions on those issues. The remaining two subparts will address society's sentiments on the issue and provide plausible reasons why women request for their deceased husband's sperm to be extracted.

##### A. *The Single-Parent Hypothesis*

One of the most-cited arguments against postmortem conception using PMSR is that a child born posthumously without a living father and raised by only one parent will be adversely affected.<sup>84</sup> Kane's children in *Hecht* used this very argument to persuade the court that giving the sperm to Hecht would violate public policy because of the harm a child conceived in that manner would suffer.<sup>85</sup> The court refused to fully address those public policy arguments,<sup>86</sup> and so the single-parent hypothesis continues as a

84. See, e.g., Sorin Hostiuc & Cristian George Curca, *Informed Consent in Posthumous Sperm Procurement*, 282 ARCHIVES OF GYNECOLOGY & OBSTETRICS 433, 436 (2010).

85. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 279 (Cal. Ct. App. 1993). Specifically, Kane's children argued that a posthumously born child would never know his father and "never even have the slightest hope of being raised in a traditional family." *Id.* They also contended that a posthumously born child would (1) "disrupt[] existing families," and (2) cause "emotional, psychological and financial stress on those family members already in existence." *Id.*

86. The *Hecht* court addressed other public policy arguments put forth by the Kane children, specifically whether it violated public policy for Hecht, as an unmarried woman, to become impregnated with the sperm. *Id.* at 287 (holding that it did not violate public poli-

strong argument against allowing PMSR to occur. The gist of the single-parent hypothesis is this: “Children who spend their entire childhood living with their married, biological parents experience, on average, fewer academic, behavioral and social problems during both childhood and adulthood than those who spend time in other family types.”<sup>87</sup>

Many studies have been done to prove the harmful effects suffered by a child raised in a single-parent home.<sup>88</sup> The studies have shown, however, that a child is more likely to suffer harmful effects of a single-parent home when the home is inadequately financed.<sup>89</sup> One study showed that “[a] child of a single parent living in poverty is from 11% to 26% more likely to be behind in school than a child of the same sex and ethnicity who resides in a husband–wife family with income above the poverty level.”<sup>90</sup>

Arguably, however, the adverse effects of growing up in a low-income, single-parent home will be much less likely to occur with children born through postmortem sperm retrieval.<sup>91</sup> The PMSR procedure alone is moderately expensive to perform.<sup>92</sup> If these costs are correct, then low-income mothers will likely be unable to pay for the procedure. This alone, however, does not negate the monetary argument:

First, on average, two-biological-parent families have higher household incomes and more assets than other family types. Low incomes constrain parents’ ability to purchase goods and services for their children, thus reducing the quality of children’s home and out-of-home environments. Economic hardship may also increase parents’ psychological distress and

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cy). In ruling on that public policy argument, the court failed to consider the other public policy arguments raised by the Kane children, specifically the harmful effects of bringing a child into the world posthumously. *See id.* at 290–91 (stating that Kane’s children had failed to establish any legal or factual basis for their argument of adverse effects).

87. Katherine Magnuson & Lawrence M. Berger, *Family Structure States and Transitions: Associations with Children’s Wellbeing During Middle Childhood*, 71 J. MARRIAGE & FAM. 575, 575 (2009).

88. *See, e.g., id.*

89. *See, e.g., id.*

90. Doris R. Entwisle & Karl L. Alexander, *Family Type and Children’s Growth in Reading and Math Over the Primary Grades*, 58 J. MARRIAGE & FAM. 341, 342 (1996), available at <http://www.jstor.org/stable/353500?origin=crossref&>.

91. *See* Lynne A. Hall et al., *Psychosocial Predictors of Maternal Depressive Symptoms, Parenting Attitudes, and Child Behavior in Single-Parent Families*, 40 NURSING RESEARCH 214, 218 (1991), available at [http://journals.lww.com/nursingresearchonline/Abstract/1991/07000/Psychosocial\\_Predictors\\_of\\_Maternal\\_Depressive.6.aspx](http://journals.lww.com/nursingresearchonline/Abstract/1991/07000/Psychosocial_Predictors_of_Maternal_Depressive.6.aspx).

92. *See* Katz, *supra* note 1, at 311 (stating that PMSR would cost “several thousand dollars”).



reduce sensitive caregiving. As a result, low family incomes may adversely influence children's cognitive development and behavior.<sup>93</sup>

Other factors may place strain on a child of a single-parent home. Social and psychological problems may result from the decreased amount of attention a single parent is able to provide.<sup>94</sup> Single parents must juggle more responsibility than their counterparts in husband-wife families.<sup>95</sup> Additionally, single parents struggle to break away from and overcome society's expectations of parenting.<sup>96</sup> These additional burdens have the potential to adversely affect the child due to less effective parenting.<sup>97</sup>

Despite this evidence, many children in single-parent homes have thrived from the increased stress and abnormal family dynamic.<sup>98</sup> Furthermore, the struggle may actually help a child's social development.<sup>99</sup> Although the single-parent hypothesis has been around for many years, it does not appear to have much truth value in today's society.<sup>100</sup> Single parenting has become a norm in today's times. In fact, nearly half of all children under the age of eighteen will spend time in a single-parent home.<sup>101</sup> At this rate, the single-parent hypothesis may become moot.

#### B. *The Marriage Restriction*<sup>102</sup>

Another argument put forth by opponents of PMSR is that PMSR should be granted only if the woman requesting the sperm extraction was married to the deceased donor at the time of his death. This is a much stronger argument than the single-parent hypothesis because it goes straight to a critical issue: consent. The Uniform Probate Code provides a presumption in favor of consent when the decedent and the woman requesting his sperm were married at the time of the decedent's death with no divorce proceedings pending.<sup>103</sup>

93. Magnuson & Berger, *supra* note 87, at 576 (citations omitted).

94. *See id.* at 575 (discussing the decreased parental time, attention, supervision, and monitoring that children of single-parent homes receive as compared to children of two-biological-parent homes).

95. *Id.* at 576.

96. *Id.*

97. *Id.*

98. *Id.* at 577.

99. *Id.*

100. *See* Katz, *supra* note 1, at 313–14 (discussing single parenthood and questioning whether there is any weight to the argument against single parenting).

101. Magnuson & Berger, *supra* note 87, at 575.

102. *See infra* Part IV.D.

103. UNIF. PROBATE CODE § 2-120(h) (amended 2008).

Despite this presumption in favor of marriage, it can hardly be argued that unmarried couples cannot procreate. One scholar, however, went so far as to state, “the non-married person has no legal right to the decedent’s sperm. Everyone agrees to that.”<sup>104</sup> This statement, however, carries no weight in light of *Hecht*, where the court held it was not against public policy for an unmarried woman to impregnate herself with the decedent’s sperm.<sup>105</sup> If it were not against public policy for an unmarried woman to impregnate herself with a deceased’s sperm, would it be violative of public policy if PMSR requests were only granted to the wife of the deceased?

### C. *The Sanctity of the Dead*

Our society has a lot of respect for the sanctity of a dead body.<sup>106</sup> While some oppose PMSR because it allows posthumously conceived children to be born to single mothers,<sup>107</sup> others suggest that PMSR “represent[s] a mutilation of the dead” attributable to a “lack of respect.”<sup>108</sup> This is especially true when the requesting party is seeking the sperm without having a solid conviction that she will in fact use it to conceive a child.<sup>109</sup> As previously suggested, early stages of mourning can cloud a widow’s judgment about whether her husband would have truly wanted his sperm extracted so that she could conceive a child.<sup>110</sup>

In moments of unbelievable grief, the widow may think that PMSR is a great idea because she *may* be able to conceive a child with her deceased husband several years down the road. She may later decide not to conceive a child with her deceased husband’s sperm. If the widow decides not to use the sperm to conceive a child, her dead husband’s corpse would have been violated for no other reason than to give her reproductive peace of mind for a couple of years. That is when society must ask: was it worth it to invade the deceased’s body?

104. Norman Bauman, *Law Provides Little Guidance for Postmortem Sperm Retrieval*, UROLOGY TIMES, Oct. 1998, at 21, 22.

105. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 287 (Cal. Ct. App. 1993); *see also supra* Part II.A.

106. *See Cannold, supra* note 61, at 386.

107. *See supra* Part IV.A.

108. Katz, *supra* note 1, at 296 (quoting *New York Hospital Guidelines*)

109. *See id.* at 311–12. In the alternative, a woman might decide to have numerous children using the deceased’s sperm, to the point that it exceeds his consent to conceive posthumously. Arguably, this violates the dead by encroaching on his reproductive autonomy.

110. *See supra* Part III.B.

Although this Comment suggests that hospitals should engage in a two-part consent inquiry,<sup>111</sup> this Comment does not propose that PMSR should be granted with such leniency that it becomes standard protocol for every autopsy. The initial request for extraction should *only* be granted when the wife has shown her sincere intention to use the sperm to conceive at a later point in time. While this does not resolve the debate over whether PMSR is a mutilation of a corpse,<sup>112</sup> it does limit the number of pointless bodily invasions that might otherwise occur.

#### D. *A Study of Society's Sentiments*

In 2008, a quantitative study was conducted to test society's sentiments on PMSR.<sup>113</sup> Jason Hans interviewed over 400 people, ages eighteen to eighty-eight.<sup>114</sup> The survey asked whether hospitals should grant a request for PMSR under various circumstances.<sup>115</sup> The variables that changed included: the marital status of the couple; the length of the couple's relationship; the gender of the survivor; whether the deceased died unexpectedly; the parental status of the couple; whether the couple had plans for childbearing; the intentions of the deceased and whether he had expressed his intentions; and lastly, whether the deceased's parents were supportive of the idea.<sup>116</sup>

The results of the study show overwhelmingly that the marital status of the couple played a significant role in the interviewee's response.<sup>117</sup> When the couple was married, the interviewee was twice as likely to support PMSR than if the couple only lived together.<sup>118</sup> Whether the couple had discussed PMSR also played a role in the interviewee's decision on whether PMSR should be permitted.<sup>119</sup>

In cases where PMSR had never been discussed by the deceased spouse but the couple was married and the deceased's parents were supportive, 61.8 percent of the interviewees said PMSR should be allowed.<sup>120</sup>

111. *See supra* Part III.B.

112. *See Hostiuc & Curca, supra* note 84, at 434–35 (analogizing the rape of a woman to the breach of a man's reproductive autonomy when he becomes a father after his death and without his consent).

113. Hans, *supra* note 74, at 843.

114. *Id.* at 844.

115. *Id.* at 845–49.

116. *Id.* at 846–49.

117. *Id.* at 855; *see supra* Part IV.B.

118. Hans, *supra* note 74, at 852.

119. *Id.*

120. *Id.* at 856.

By contrast, in cases where PMSR had not been discussed, the couple was unmarried, and the parents were unresponsive, only 17.2 percent of the interviewees favored PMSR.<sup>121</sup> Even in cases where the deceased left written directions indicating his intent that a PMSR be performed, the approval rate of PMSR dropped more than ten percent if the couple was unmarried and the parents did not approve.<sup>122</sup> Based on this evidence, it appears that society places greater emphasis on the marital status of the couple and the deceased's parents' feelings on the issue of PMSR than it does on the deceased's express wishes.

*E. Additional Reasons in Support of PMSR*

There are endless reasons why a woman might use PMSR to conceive a child. For example, a woman may believe that using her deceased husband's sperm would be a way to pay tribute to him.<sup>123</sup> A woman may believe that conceiving posthumously may help her cope with the loss of her husband because he would live on through the child. In addition, a woman who wanted to bear a child might have religious reasons for wanting to use only her husband's sperm.<sup>124</sup> In particular, the woman might view artificial insemination using donor sperm as "an adulterous act."<sup>125</sup> Another important reason for choosing PMSR is that a woman might "desire to know the genetic origins of [her] child."<sup>126</sup> Using her husband's sperm, the woman will presumably know much more about the child's family and genetic history than she would if she used donor sperm or adopted a child.<sup>127</sup> The posthumously conceived child would have a "genetic connection" with his father's family and would have a secure place within the family tree.<sup>128</sup> Due to this genetic connection, the child may have more peace of mind in knowing that he or she was conceived from a loving relationship rather than from an unknown sperm donor.

121. *Id.*

122. *Id.* (finding an 83.3 percent approval rate for a married couple with parental support and a 73.1 percent approval rate for an unmarried couple without parental support).

123. *See* Knaplund, *supra* note 55, at 398.

124. *Id.*

125. *Id.* (stating that the "Eastern Orthodox Church 'opposes gamete donation, especially AID [Artificial Insemination by Donor], on the basis that it is an adulterous act.'").

126. *Id.*

127. *Id.*

128. *Id.* at 398–99.

V. WHO SHOULD HAVE THE FINAL WORD AND WHAT SHOULD THAT FINAL WORD BE?

There is a clear need for states to address the issues surrounding the harvesting of sperm from a dead man's body and the status of children conceived and born posthumously through PMSR. But the real question is: *who* should have the responsibility of regulating PMSR and clarifying the status of the children born through PMSR? Should it be left to the medical community? Should it be left to the courts to blindly decide on a case-by-case basis?<sup>129</sup> Should it be left to the elected legislature? Should lawyers be responsible for asking the right questions of their clients when drafting wills?<sup>130</sup>

This Comment recommends that an analogue to the Statute of Wills be created for PMSR. The proposed statute would have two purposes: (1) to establish rules for requesting the sperm extraction and (2) to clarify the legal rights of children conceived and born posthumously through PMSR.<sup>131</sup> Creating this Statute of Formalities for PMSR will solve many of the legal and ethical problems that currently arise after the death of the donor. If the formalities are met, a PMSR could be conducted and a posthumously conceived child would legally be treated as a legitimate child of the deceased donor.

There may be problems, however, with this proposal. For example, can the legislature limit the PMSR right to the wife of the decedent? Many scholars have suggested that the deceased's wishes to procreate in a particular manner "should be honored in the same way that testamentary provisions receive deference."<sup>132</sup> Therefore, if the decedent left clear instructions that he wanted his sperm extracted to conceive a child with a particular woman, those instructions should be respected, regardless of whether the woman is his wife.<sup>133</sup> Another potential problem is whether the legislature may limit the *woman's* right to reproduce by denying her ac-

129. See *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993) ("It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.").

130. This is a good practice for lawyers, but it alone does not solve the problems surrounding PMSR and posthumously conceived children.

131. For purposes of this Comment, the statute will be referred to as Statute of Formalities of PMSR, which would include written consent (or its equivalent, proven by clear and convincing evidence) that the decedent intended to father a child posthumously through PMSR.

132. Katz, *supra* note 1, at 312.

133. If the instructions violate public policy, however, then the instructions might be disregarded in the same manner that a will provision would be disregarded.

cess to the decedent's sperm. However, as suggested earlier in this Comment,<sup>134</sup> silence on the part of the deceased should not be construed as consent. Accordingly, it seems that the reproductive autonomy of the woman seeking PMSR can be limited to the extent that it would infringe upon the decedent's reproductive autonomy.<sup>135</sup>

Although the medical community has done well in setting guidelines for the difficult decision presented when a PMSR request is received, the only entities protected by the medical guidelines are the medical institutions. The guidelines ignore the interests of other parties involved in the PMSR,<sup>136</sup> not because of a failure to consider the matter, but because it is not the hospitals' responsibility to develop the law of PMSR. For these reasons, this Comment suggests the two-layered consent requirement: one at the initial PMSR request stage, and the second when the wife attempts to conceive with the extracted sperm.<sup>137</sup>

First, hospitals should continue to set their own guidelines for the initial request to perform PMSR, but should be required by law to provide notice and obtain informed consent from the woman requesting PMSR.<sup>138</sup> Continuing to allow hospitals to set their own guidelines for granting and denying requests for PMSR allows the hospitals to avoid the responsibility (and potential legal liability) of deciphering the deceased husband's true intent regarding the use of his sperm after his death. Hospitals may not be as equipped as the legal community in making these legal determinations, especially in light of the typical twenty-four hour timeframe involved.<sup>139</sup> The required notice would inform the requesting woman that the child conceived from PMSR might not be legally entitled to inherit or receive any benefits from the deceased father. Furthermore, the notice would inform the woman that satisfying the hospital's guidelines for consent should not be interpreted as meeting the Statute of Formalities, which would still be

134. *See supra* Parts II.B, III.A.

135. Due to the special nature of procreation, reproductive autonomy survives death. *See Katz, supra* note 1, at 311 ("The dead are not usually thought of as having rights that survive death, but . . . procreative rights are exceptional.").

136. *See Bauman, supra* note 104, at 21, 22.

137. *See id.*

138. This allows PMSR requests to be granted based upon the consent required as set forth in that particular hospital's guidelines, which presumably allows less strenuous evidence of consent to enable the hospital to perform the extraction. It further allows women to think twice about conceiving a child with the extracted sperm if they are aware their posthumously conceived child may not inherit from the father without the required consent as set forth by the Statute of Formalities for PMSR. This also helps alleviate the hospital's need to meet the time crunch as described *supra* Part III.B.

139. *See supra* Part III.A-B.

required for her posthumously conceived child to legally inherit or receive benefits from the father.

After the first layer of consent is established—meeting the hospital’s “reasonably inferred” consent requirement for initial extraction<sup>140</sup> and the notice requirements—the Statute of Formalities would then place the burden on the wife to establish her deceased husband’s intent to conceive and father a child posthumously. The second layer of the Statute of Formalities would be triggered after the PMSR, only if the wife attempted to use the extracted sperm for conception. In order to impregnate herself with the extracted sperm, the wife would need to either (1) meet the Statute of Formalities, ensuring that her child would be legally recognized as a child of the deceased, or (2) sign a waiver acknowledging that she abandons her right to challenge her child’s inability to receive benefits by virtue of his or her biological father.

Like the Statute of Wills,<sup>141</sup> the Statute of Formalities would have three formal requirements. First, the Statute of Formalities would require a written document that unequivocally demonstrates the deceased’s intent that (1) his sperm be extracted postmortem for his wife’s use,<sup>142</sup> (2) the extracted sperm be used to conceive his child posthumously, and (3) he support the posthumously conceived child.<sup>143</sup> Merely stating that the wife is entitled to use the deceased’s sperm will not suffice. Secondly, the document would need to contain the deceased’s signature. Lastly, the deceased’s signing of the document would need to be witnessed by two disinterested persons. Practically speaking, anyone other than the wife or other PMSR recipient could qualify as a disinterested witness.

When the deceased’s intent is unclear or unascertainable, the Statute of Formalities would not be met, and therefore, any child born from PMSR will not receive any benefits from his deceased biological father.<sup>144</sup> How-

140. See *supra* Part III.B; *supra* notes 65–68 and accompanying text.

141. See, e.g., N.C. GEN. STAT. § 31-3.3 (2009) (mandating that a decedent’s will be in writing, signed by the testator, and witnessed by at least two competent persons.)

142. While the Uniform Probate Code places a presumption in favor of finding the requisite intent for posthumous conception when the couple is married, it is not necessary that the couple be married if the elements of the Statute of Formalities are met. See *supra* notes 53–55 and accompanying text; *supra* Part II.A (discussing the relationship status in *Hecht*).

143. See *supra* Part II.A. In *Hecht*, Kane’s intent for his girlfriend to have and use his stored sperm to conceive a child after his death was clear. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276–77 (Cal Ct. App 1993). This would easily satisfy the intent prong of the Statute of Formalities.

144. But see UNIF. PROBATE CODE § 2-120(f)(2)(C) (requiring clear and convincing evidence of intent to parent a posthumously conceived child, but not mandating that it be in writing); UNIF. PROBATE CODE § 2-120(h)(2) (providing a presumption, in the absence of clear and convincing evidence, of when the couple was married).

ever, assuming the wife could meet the hospital's reasonably inferred consent requirement, the Statute of Formalities would not prevent the wife from extracting the deceased's sperm, nor would it prevent her from actually conceiving a child with the extracted sperm. This alternative balances the wife's freedom to conceive against the state's interest in protecting probate and Social Security laws.

## VI. CONCLUSION

With each passing year, medical and reproductive technologies may advance far beyond our wildest dreams.<sup>145</sup> There is no doubt that PMSR will one day seem ancient and out of date in the medical and legal communities. As PMSR fades from the headlines, a new controversial procedure will be on the horizon to take its place. As medical reproductive technology continues to advance, so too should our legal standards and regulations. It is inevitable that medicine will always be a step ahead of the law, but the least the legal community can do is attempt to keep up with modern advances in technology.<sup>146</sup>

It is not enough to adopt the mindset of the trial judge in *Hecht* who stated, "we are forging new frontiers because science has run ahead of common law[,] [a]nd we have got to have some sort of appellate decision telling us what rights are in these uncharted territories."<sup>147</sup> It is not up to the courts to blindly shape the law of PMSR. Well-drafted legislation needs to be established to protect the posthumously born child, the decedent's estate, and all other individuals involved. Without meeting the Statute of Formalities for PMSR, a child would not be able to inherit from his or her genetic father in the same way a child conceived from an anonymous sperm donor cannot inherit from the donor.<sup>148</sup> While it is possible to leave the decision of granting or denying PMSR requests to the hospital, a Statute of Formalities for PMSR should be developed to aid hospitals in making such decisions and to resolve the uncertain legal status of posthumously conceived children.

145. See Knaplund, *supra* note 55, at 397 (suggesting that women's eggs and ovaries will soon be eligible for PMSR); Michael K. Elliott, *Tales of Parenthood From the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 68 (2004) ("As reproductive technology and biotechnology develop, science fiction can turn into reality . . . . 'As quickly as courts [can] deal with one [new] issue of new reproductive technology, a new technology is developed that creates even more complicated issues.'").

146. See Knaplund, *supra* note 55, at 414–15.

147. *Hecht*, 20 Cal. Rptr. 2d at 280 n.3.

148. UNIF. PROBATE CODE § 2-120(b).



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