

2014

Posthumously Conceived Children: An International and Human Rights Perspective

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Recommended Citation

Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 J.L. & Health 29 (2014)
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POSTHUMOUSLY CONCEIVED CHILDREN: AN INTERNATIONAL AND HUMAN RIGHTS PERSPECTIVE

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In 1997, Diane Blood famously won a court case allowing her to export the sperm of her dead husband from England to Belgium with the goal of conceiving a child with the assistance of medical technology.¹ The pictures of a smiling Ms. Blood exiting the British Court after her initial victorious ruling, and later on, her pictures with her first, and then second, son have captured much international attention. Since then, more and more children have been posthumously conceived, and the phenomenon has received growing attention. Not only does posthumous conception capture the social imagination in its construction of parenthood and families, but it also raises new legal quandaries. Questions about the scope of reproductive freedom, the limits of consent, and the value of genetic material as property are all pertinent. As adults make reproductive choices, physicians provide the needed medical services, and courts adjudicate related dilemmas, debates over posthumous conception have centered on the rights and interests of the adults at stake.

* I want to thank Cleveland-Marshall College of Law for organizing and hosting the symposium, especially Professor Browne C. Lewis, Sasha M. Swoveland (Senior Editor) and Trent Stechschulte (Editor-in-Chief) as well as the Publication Editors, Ami Imbrogno and Katharine Green, for their assistance with this publication.

¹ R. v Human Fertilisation & Embryology Authority, *ex parte* Blood, [1997] EWCA (Civ) 4003, [70], [1997] 2 WLR 806 (Q.B.D.) (Eng.). In this case, a first sample of sperm was extracted by electro-ejaculation when the husband was in coma; a second sample was extracted shortly before the husband was certified clinically death. The samples were kept by the Infertility Research Trust; however, it refused to release the sperm to Ms. Blood. The Human Fertilisation and Embryology Authority did not approve the release on the grounds that the requirements of “written and effective consent of a man” were not met. *Id.* at [2]–[3], [5].

Significantly less attention has been given to the resulting children. Certainly, this neglect may be at least partially attributed to the focus on the moral and legal status of embryos or even pre-embryonic entities. But as children are the end goal of the procedure, attention to their interests and rights is cardinal. Are posthumously conceived children harmed by being born? What rights do posthumously conceived children have—or should they have? How can their interests be protected? And importantly, how do children conceptualize the related rights and interests for themselves?

This essay considers posthumous conception from an international and child-centered approach. After a sketch in Part I of the phenomenon of posthumous conception and the complexities it evokes, Part II examines the types of issues arising in court cases concerning posthumous conception. Part III considers how courts in their rulings have addressed the welfare and best interests of posthumously conceived children and analyzes the scope and meaning of relevant decisions. Part IV looks into children's rights or interests raised in those judicial decisions: parental acknowledgement, family structures, identity harm, and inheritance and social benefits. This part draws on the Convention on the Rights of the Child (CRC),² a prime instrument to advance children's rights on the international level, incorporating as much as possible the perspectives of children. I argue that the discourse must include concern for the rights and interests of posthumously conceived children and that a new special category of children who are "outcast" cannot stand the test of equality and non-discrimination, nor of the entrenched principles of child welfare and best interests. Moreover, I suggest that attending to children's perspectives may illuminate the gaps in the current discourse and what needs to be addressed. Finally, Part V draws some conclusions and calls for a more relational approach to ensure that posthumously conceived children do not pay the price of their parents' decisions and that their welfare and best interests are upheld.

I. THE PHENOMENON OF POSTHUMOUS CONCEPTION

Although in most societies procreation holds a central place in one's community and one's own social fabric, no other medical development has raised as many opposing voices as assisted reproductive technologies. The phenomenon of posthumous conception is no different; on the contrary, it both revisits and extends controversies about the scope of reproductive freedom, the family, and medical technologies. In explaining the excitement—and criticism—that arose, this Part highlights why this phenomenon has captured national and international attention and pinpoints the ethical and legal dilemmas that ensue.

The first reason for the growing interest in posthumous conception is the sensational nature of the issue. While examples of children born after the death of their fathers ("posthumous birth") can be found in earliest history,³ the phenomenon of posthumous conception, in which medical technologies are used to achieve a pregnancy, is relatively new. Although sperm freezing became possible in 1949,

² Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, Supp. No. 49, U.N. Doc. A/44/49, at 167, (Sept. 2, 1990).

³ Michael R. Soules, *Commentary: Posthumous Harvesting of Gametes – A Physician's Perspective*, 27 J.L. MED. & ETHICS 362, 362 (1999).

reports suggest that the first posthumous conception occurred in 1977,⁴ the first posthumous sperm retrieval was in 1980,⁵ and the first child born after posthumous sperm retrieval was Ljam, the Blood's child, in 1998.⁶ Egg retrieval and preservation is even more recent.⁷ Because egg harvesting from a live woman is significantly more medically complicated than retrieving sperm (even from a dead man),⁸ it became possible only in the late 1970s with the development of *in-vitro-fertilization* (IVF): the first reported case of birth after egg freeze was in 1986.⁹ Further, although harvesting of female ova or tissue is now possible, using eggs that were extracted posthumously or from a dying woman (without her full cooperation) is ever more complex. Gestation requires a surrogate mother. Yet this is fraught with social and ethical disagreements, and legally, many countries prohibit the practice of surrogacy.¹⁰ Consequently,¹¹ there are no published reports of children born as a result of these recent techniques,¹¹ and the court only approved—for the first and possibly only time—a family's request to extract eggs from a woman who was declared brain

⁴ Alberta Law Reform Inst., *Succession and Posthumously Conceived Children: Report for Discussion*, ALRI PUBLICATIONS, 1, 3, 5 (Jan. 2012), <http://www.law.ualberta.ca/alri/docs/rfd023.pdf>.

⁵ Cappy M. Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 FERTILITY & STERILITY 512, 512 (1980).

⁶ Jason Pobjoy, *Medically Mediated Reproduction: Posthumous Conception and the Best Interests of the Child*, 15 J.L. & MED. 450, 452 (2007).

⁷ See Jason D. Hans, *Attitudes Toward Posthumous Harvesting and Reproduction*, 32 DEATH STUD. 837, 838–39 (2008).

⁸ Egg retrieval requires one-to-two weeks of hormonal ovarian stimulation before harvesting of eggs can take place. *Id.* at 838.

⁹ Christopher Chen, *Pregnancy After Human Oocyte Cryopreservation*, 327 THE LANCET 884, 884–86 (1986). The second reported case of birth after egg freeze was in 1987. J.F.H.M. Van Uem et al., *Birth After Cryopreservation of Unfertilized Oocytes*, 329 LANCET 752, 752–53 (1987).

¹⁰ Italy, for instance, prohibits both altruistic and commercial surrogacy. Germany, France, various states in the U.S., Switzerland, Greece, Spain, Norway, New Zealand, and several Australian states prohibit commercial surrogacy as well, though New Zealand allows altruistic surrogacy if an ethics committee approves the procedure in advance. John A. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1693 (2004); Usha R. Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 24–26 (2008). In Israel, because of various religious limitations, only full surrogacy is allowed (i.e., the surrogate is not genetically linked to the child), and the regulations also require that the surrogate and the intended mother belong to the same religion. A new law regulating ova donations in Israel entered into force in March 2011 allowing Israeli women between the ages of twenty and thirty-five to donate ova in exchange for some payment. Dan Even, *Knesset Approves Revolutionary Law Allowing Domestic Ova Donations*, HAARETZ (Isr.), June 9, 2010, <http://www.haaretz.com/print-edition/news/knesset-approves-revolutionary-law-allowing-domestic-ova-donations-1.295004>. The egg donation must be anonymous and to ensure the maternal religious lineage the donor's and the recipient's religion must be matched. *Id.* Also, a baby born to a Jewish family from a non-Jewish donor will have to undergo conversion. *Id.*

¹¹ Hans, *supra* note 7, at 839.

dead as recently as 2011.¹² Thus, posthumous conception using gametes extracted during life for reproduction after the man or woman died—or following the retrieval of sperm or especially egg from the dead—represents the most recent form of the “new family.”

Second, posthumous conception marks another shift in the social construction of kinship. Certainly, the scientific revolution in fertility treatments had already shattered the traditional conceptualization of the family as a union between a man and a woman. New technologies like hormone treatment, IVF, and gamete donation gave a couple the chance of overcoming infertility. They also enabled single women, gay couples, and transgender individuals to become biological parents. Indeed, such non-traditional families turned into visible consumers in the market for assisted reproductive technologies.¹³ Nonetheless, the phenomenon of posthumous conception is unique among those new technologies. It does suggest some sort of continuation of the traditional family structure of a husband and wife (and increasingly, also of other unmarried heterosexual couples) even if one party to the relationship is no longer alive.¹⁴ But, while the law commonly treats children born within a certain accepted time period after the father’s death (generally, around three hundred days from the father’s death) as any other child who is born “into the marriage,”¹⁵ posthumous conception can extend the timeframe for a “marital child” for a longer period, and potentially, indefinitely.¹⁶

¹² David Regev, *Woman’s Dream to Have a Child Fulfilled After Death*, YNETNEWS.COM (June 14, 2011), <http://www.ynetnews.com/articles/0,7340,L-4081456,00.html>; Mikaela Conley, *Harvesting Dead Girl’s Eggs Raises Ethical Issues*, CBS NEWS (August 11, 2011), http://www.cbsnews.com/8301-504763_162-20091343-10391704.html. Whether an adolescent can consent to parent a child after his or her death (and if so, from what age) is another interesting question concerning children’s rights. However, it is beyond the scope of this article.

¹³ Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 31–33 (2008); June Carbone, *If I Say “Yes” to Regulation Today, Will You Still Respect Me in the Morning?*, 76 GEO. WASH. L. REV. 1747, 1763–64 (2008); Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 293–94 (2006); Paul Lauritzen, *What Price Parenthood?*, 20 HASTINGS CENTER REP. 38 (1990). Some scholars made a distinction between medical infertility and so-called “social infertility.” The latter refers especially to single mothers or same-sex couples who cannot achieve pregnancy due to a lack of a partner or of interest in having a sexual relationship with another person from the opposite sex. Daar, *supra* at 31–32. See also Julien S. Murphy, *Should Lesbians Count as Infertile Couples? Antilebian Discrimination in Assisted Reproduction*, in EMBODYING BIOETHICS: RECENT FEMINIST ADVANCES 103, 103 (Anne Donchin & Laura M. Purdy eds., 1999).

¹⁴ Bob Simpson, *Making ‘Bad’ Deaths ‘Good’: the Kinship Consequences of Posthumous Conception*, 7 ROYAL ANTHROPOLOGICAL INST. 1, 3 (2001).

¹⁵ BROWNE C. LEWIS, PAPA’S BABY: PATERNITY AND ARTIFICIAL INSEMINATION 113–14 (2012).

¹⁶ Sperm Cryopreservation allows for sperms to remain viable for a long period of time. While the maximum period of time for such preservation is unknown, estimates range from twelve years to centuries. Joshua Greenfield, *Dad Was Born A Thousand Years Ago? Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN. J. L. SCI. & TECH. 277, 280–81 (2006). Embryo freezing is another

Simultaneously, posthumous conception opens the door for significantly more complex familial relationships. So far, the most common scenario is that the life partner of the deceased, generally his widow or girlfriend, seeks to use his frozen gametes herself, intending to fertilize the egg and carry the pregnancy to term. Increasingly, however, other scenarios are arising.¹⁷ For instance, a surviving husband who has possession of frozen embryos he had created with his now deceased wife can contract with a surrogate mother to carry the pregnancy to term (this happened recently in Israel¹⁸); he might just as well decide to remarry and request that the new wife be implanted with the embryos created with the previous wife. Parents of a deceased or dying person can request that doctors harvest the gametes of their loved ones for donation¹⁹ or to be used along with gamete donation or surrogacy to create a grandchild.²⁰ Third parties may further gain possession of gametes or frozen embryos when either one, or both, genetic parents die, and these new owners could either carry the pregnancy or contract with a surrogate to undergo a pregnancy. In cases of gamete donation, a third party might purchase gametes if fertility clinics do not discard them after the donor's death. Moreover, given the rise in legal recognition of same-sex couples as family units, the surviving partner of a same-sex couple may soon turn to posthumous conception as well.²¹ For a gay man, that would mean using the sperm of the deceased partner and would require a

common practice that allows extending viability of gamete for long periods. Given that it requires a male partner, it is limited in its support for single women who want to extend their reproductive period. Cryopreservation is increasingly used also for eggs and ovarian tissues. Only limited data exists regarding the effect of duration of egg and ovarian preservation on the rates of viability and pregnancy; one study showed that, in terms of survival, fertilization, embryo quality, etc., the results after forty-eight months storage are comparable to shorter periods of storage. *Am. Soc'y for Reprod. Med., Mature Oocyte Cryopreservation: A Guideline*, 99 FERTILITY & STERILITY 37, 40 (2013). Note that contrary to some states in the United States (such as New York), where the laws or professional guidelines do not prescribe maximum storage time on gamete and embryo cryopreservation, some countries require that such storage does not exceed certain time periods as provided by law (in the United Kingdom, for instance, it stands on ten years). As technologies further develop, however, the time limitation is likely to increase. Surrogacy can further extend the period of reproduction: it removes the barrier of women's infertility due to age.

¹⁷ Gary S. Nakhuda, *Posthumous Assisted Reproduction*, 28 SEMINARS IN REPROD. MED. 329, 329–31 (2010).

¹⁸ Dan Even, *Israeli Woman Becomes Mother Two Years After Dying of Cancer*, HAARETZ (Isr.), June 14, 2011, <http://www.haaretz.com/print-edition/news/israeli-woman-becomes-mother-two-years-after-dying-of-cancer-1.367523>.

¹⁹ This was one of the intentions of the parents of the deceased 17-year-old girl in the case of Chen Ayash. Nitzi Yakov, *Court Permits Harvest of Dead Girl's Eggs, Father Decides He Does Not Want to Use Them*, ISRAELHAYOM.COM (August 8, 2011), http://www.israelhayom.com/site/newsletter_article.php?id=632. However, according to media reports the deceased father ultimately was uncomfortable with the possibility of donating her eggs to an infertile woman and the family decided to destroy the eggs. *Id.*

²⁰ Michael Leidig, *Russian Woman May Lose Grandson Conceived from Dead Son's Frozen Sperm*, 332 BMJ 627, 627 (2006).

²¹ Such an option is also explicitly endorsed by some laws (e.g. in Victoria, Australia and in the United Kingdom). See *infra* note 51; *infra* Part II.

surrogate and an egg donor to bear a child who is not genetically related to him. In the case of a lesbian woman, she may seek to take an embryo from her deceased partner's eggs and a sperm donor (whether created while she was alive or after her death) and have it transferred to her own uterus, to that of a surrogate, or to that of a new partner. In each of these cases, it is unclear who should be registered as the father or mother on the child's birth certificate or acknowledged as the child's parent. In short, medical advances in posthumous conception mean that questions about kinship, familial relationships, and parentage have become more complicated, and are likely to become even more so.

Finally, posthumous conception creates a new front in reproductive choice. While parental reproductive freedom is often viewed as a basic right,²² its entanglement with medical technologies that enable people to materialize this right beyond the "natural" has raised acrimonious debates.²³ Supporters of reproductive freedom have argued that (considering the financial, social, emotional, and other burdens associated with raising a child) parental decisions about the sort of commitment they want and can undertake should be respected.²⁴ Accordingly, the right to reproductive freedom should include the choice of how to procreate and under what circumstances to do so.²⁵ Critics, conversely, have suggested that

²² International human rights treaties include reference to the right to found a family. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at 16 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/6316, at 23 (Dec. 16, 1966); Convention on the Rights of Persons with Disabilities, G.A. Res. 67 B, U.N. Doc. A/RES/61/106, at 23 (Jan. 24, 2007); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/46, at 23 (Dec. 18, 1979). Notwithstanding the internationally recognized right to found a family, both the right to reproduce and the right not to reproduce are fraught with controversies. Scholarly work has highlighted racial, ethnic, cultural, and economic discrimination; other controversies include the imposed sterilization throughout history of women deemed unsuitable for parenthood (because of their skin color, disability, etc.) and the impact of lack of access to other social and health benefits on the ability to exercise the right to found a family. *See, e.g.*, Naomi Cahn & June Carbone, *Deep Purple: Religious Shades of Family Law*, 110 W. VA. L. REV. 459, 459–500 (2007–2008); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 209–73 (1995); Hawley Fogg-Davis, *Navigating Race in the Market for Human Gametes*, 31 HASTINGS CENTER REP. 13, 13–21 (2001); *see also*, Maya Sabatello, *Who's Got Parental Rights? The Intersection Between Infertility, Reproductive Technologies, and Disability Rights Law*, 6 J. HEALTH & BIOMEDICAL L. 227, 227–59 (2010).

²³ The right "[t]o enjoy the benefits of scientific progress and its applications" may further strengthen an argument for reproductive freedom through assisted reproductive technologies. This right is stipulated in Article 15(1)(b) of the International Covenant on Economic, Social & Cultural Rights. G.A. Res. 2200 (XXI) A, 21 U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (Jan. 3, 1976). *See also*, Maya Sabatello, *Advancing Transgender's Family Rights through Science – A Proposal for An Alternative Framework*, 33 HUM. RTS. Q. 43, 43–75 (2011).

²⁴ John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B. U. L. REV. 421, 421–82 (1996); Richard J. Hull, *Cheap Listening?—Reflections on the Concept of Wrongful Disability*, 20 BIOETHICS 55, 55–63 (2006).

²⁵ John A. Robertson et al., *Conception to Obtain Hematopoietic Stem Cells*, 32 HASTINGS CENTER REP. 34, 34–40 (2002); John A. Robertson, *Assisting Reproduction, Choosing Genes, and the Scope of Reproductive Freedom*, 76 GEO. WASH. L. REV. 1490, 1490–1513 (2007–2008).

procreation through the use of assisted reproductive technologies, especially by untraditional families—single mothers and same sex couples—are a form of child abuse.²⁶ They have emphasized that preserving the institution of parenthood “the way we know it” is the only way to meet each child’s “need” for a mother and a father.²⁷ Opponents of posthumous conception in particular contend that a resulting child may be a “substitute” for the lost spouse, and that the grieving process of the surviving spouse constitutes a psychological instability that would impair the child’s future welfare.²⁸ They are therefore opposed to the extension of the fundamental right to procreate after death.²⁹

As I discuss elsewhere, these latter arguments may be based on religious—rather than scientific—grounds.³⁰ The extent to which they are relevant is consequently dependent on one’s religious views and, generally, national policies in liberal states should not be determined on such religious basis. Nonetheless, posthumous conception undoubtedly further complicates parental reproductive choice. It expands the concept of reproductive freedom beyond the lifetime of the individual. It also raises significant questions about the limits of reproductive choice. The suggestion that people might use the genetic material of their deceased children—and the increasing number of requests to do this—exemplifies this issue. Can an individual claim a *right* to become a grandparent? And what are the limits of consent in such scenarios? A situation where future grandparents donate the genetic material of their deceased child so that another man or a woman becomes a parent is relatively uncomplicated.³¹ In such instances, the recipient parent holds the primary responsibilities for the child, and the grandparents may or may not have a relationship with the resulting child. But can the deceased request that his or her mother (and future grandparent) carry the pregnancy? Can the future grandmother consent to such a request or choose it on her own? Should fertility clinics accept such requests or consent? These questions, combined with the fact that the implications of all these possibilities on the resulting child are unclear, shift posthumous conception from a mere matter of privacy to one that may have significant implications for the public interest.³²

²⁶ Eric Blyth, *To Be or Not to Be? A Critical Appraisal of the Welfare of Children Conceived through New Reproductive Technologies*, 16 INT’L J. CHILDREN’S RIGHTS 505, 506 (2008).

²⁷ ELIZABETH MARQUARDT, INST. FOR AM. VALUES, *THE REVOLUTION IN PARENTHOOD: THE EMERGING GLOBAL CLASH BETWEEN ADULT RIGHTS AND CHILDREN’S NEEDS* 15–16 (2006), available at <http://familyscholars.org/2006/01/01/the-revolution-in-parenthood/>.

²⁸ J.A.M. Hunfeld, et al. *Protect the Child from Being Born: Arguments Against IVF from Heads of the 13 Licensed Dutch Fertility Centres, Ethical and Legal Perspectives*, 22 J. REPROD. & INFANT PSYCHOLOGY 279, 284 (2004); Katz, *supra* note 13, at 309–10.

²⁹ Kristin L. Antall, *Who is My Mother?: Why States Should Ban Posthumous Reproduction by Women*, 9 HEALTH MATRIX 203, 227–29 (1999).

³⁰ Maya Sabatello, *Are the Kids All Right? A Child-Centered Approach to Assisted Reproductive Technologies*, 31 NETH. Q. HUM. RTS. 74, 82–84 (2013).

³¹ See *infra* Part III.

³² Simpson, *supra* note 14, at 2.

As a matter of policy, it is possible to regulate this field so as to prohibit any or all such scenarios of posthumously conceived children. Indeed, this is the position endorsed in France, Germany, and Sweden, for instance.³³ However, it is unlikely to be universally endorsed. In the United States, assisted reproductive technology is a highly lucrative business, primarily in private hands.³⁴ There is consequently little incentive to curb it and great difficulty in doing so. Moreover, some countries explicitly allow posthumous conception when certain conditions are met. For instance, in the state of Victoria, Australia, the Assisted Reproductive Treatment Act of 2008 permits posthumous conception when the recipient was married to the deceased partner, the deceased provided written consent for the procedure, the recipient received counseling prior to the treatment about the grieving process and the possible impact on the child to be born as a result of the treatment, and the Patient Review Panel approved the use of gametes or embryos.³⁵ The United Kingdom's Human Fertilisation and Embryology Act of 2008 similarly allows for posthumous conception when the deceased provided sperm and consented in writing both for the use of his sperm by a specific woman after his death and for being treated for the purpose of parentage registration in the birth certificate as the father of any resulting child.³⁶ This law also makes arrangements for situations where an embryo was created during a marriage or a civil partnership using the sperm of a donor (rather than of the deceased) with the consent of the deceased.³⁷ The recipient woman is additionally required to acknowledge in writing, within forty-two days of the child's birth, the deceased's parentage.³⁸ And while the New Zealand Human Assisted Reproductive Technology Act of 2004 does not dedicate a separate section to posthumous conception, it allows such conceptions when the condition of informed consent for the collection of gametes, embryos, or both, is met.³⁹

Finally, the rise of "rights talk" combined with new medical practices plays an important role in the endorsement of posthumous conception as a legitimate form of reproduction. Doctors encourage patients who undergo medical treatment that may

³³ Hans, *supra* note 7, at 893.

³⁴ *See Daar, supra* note 13, at 36.

³⁵ *Assisted Reproductive Treatment Act 2008* (Vic) ss 46, 91(c), 96(c) (Austl.); *see also Assisted Reproductive Treatment Regulations 2009* (Vic) s 11 (Austl.). There are no comprehensive national regulations of assisted reproductive technologies in Australia, and the individual states are free to adopt relevant arrangements. However, the Australian government issued ethical standards guiding the practice in 2007. These regulations allow for posthumous conception if the deceased or the near dying person has left a clearly expressed and witnessed direction consenting to the use of his or her gametes, the prospective parent received counseling about the consequences of such use, and an appropriate period of time for the grieving process was taken before assisting in conception attempts. *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2004*, (Cth) ss 6.15–16 (Austl.).

³⁶ Human Fertilisation & Embryology Act, 2008, c. 22, § 39 (Eng.). This amendment to the Act is the result of the 2003 legal struggle of Diane Blood to have her dead husband registered as the father of her posthumously conceived children.

³⁷ *Id.* §§ 40(1), 40(2), 42 (Eng.).

³⁸ *Id.* §§ 39(d), 40(f) (Eng.).

³⁹ Human Assisted Reproductive Technology Act 2004 (N.Z.).

negatively affect their reproduction (such as cancer patients undergoing chemotherapy) to preserve sperm or eggs beforehand, and such harvesting is part of routine medical practice today.⁴⁰ As some may eventually succumb to the disease, their stored gametes may be available for use. Beyond that, because reproduction is viewed as a fundamental right, individuals and governments are increasingly invested in protecting it. In the United Kingdom, for instance, the Ministry of Defense provides “all military personnel with pre-deployment advice on fertility preservation,” and although pre-deployment preservation is not funded by the government, it is reported that a “government-recognized program will allow British soldiers to continue their bloodline even if mortally wounded in battle.”⁴¹ In the United States, while pre-deployment fertility preservation by soldiers is privately organized and funded, it is reported as a growing (and accepted) trend among soldiers deployed to Iraq, Afghanistan, and the Middle East.⁴² And in Israel, although there are no comprehensive national regulations of assisted reproductive technologies, posthumous conception is increasingly viewed as a right on its own—and is extended to future grandparents.⁴³ Young adults entering the army and other individuals are encouraged to sign a so-called “biological will” to specify what should be done with genetic material in case of death.⁴⁴ More than six hundred such wills were already signed and they are deposited in the first and only bank for biological wills in the world.⁴⁵

Prohibiting posthumous conception is further difficult given globalization and the so-called phenomenon of fertility tourism, in which individuals and couples travel outside of their home country to receive fertility treatment and other services such as surrogacy and gamete donation.⁴⁶ The reality is that those who want the opportunity

⁴⁰ Sara E. Barton et al., *Population-Based Study of Attitudes Toward Posthumous Reproduction*, 98 FERTILITY & STERILITY 735, 735–36 (2012).

⁴¹ Jim Kouri, *Brit Soldiers in Afghanistan Freezing Sperm*, TELEGRAPH, Feb. 20, 2011, <http://www.examiner.com/article/brit-soldiers-afghanistan-freezing-sperm>; *Sperm Freezing Should be Funded by MoD: Injured Soldier*, BBC NEWS (June 9, 2011), <http://www.bbc.co.uk/news/uk-england-lancashire-13709751?print=true>.

⁴² Valerie Alvord, *Troops Start Trend with Sperm Banks*, USA TODAY, Jan. 26, 2003, http://usatoday30.usatoday.com/news/nation/2003-01-26-sperm-inside_x.htm#.

⁴³ *Grandparents Rights*, NEW FAMILY, <http://www.newfamily.org.il/en/grandparents-rights/> (last visited Nov. 19, 2013).

⁴⁴ Ronny Linder-Ganz, *Reservists Ask for Their Sperm to Be Frozen if They Die*, HAARETZ (Isr.), Sept. 26, 2013, <http://www.haaretz.com/news/diplomacy-defense/reservists-ask-for-their-sperm-to-be-frozen-if-they-die.premium-1.479114>.

⁴⁵ The Bank for biological wills was established by the New Family Organization, a leading family rights non-governmental organization that promoted the issue. Both the concept of biological will and the bank are protected under patent laws. For further information see, www.newfamily.org.il.

⁴⁶ Smerdon, *supra* note 10, at 24–26; Richard F. Storrow, *Family Tales: The Handmaid's Tale of Fertility Tourism: Passports and Third Parties in the Religious Regulation of Assisted Conception*, 12 TEXAS WESLEYAN L. REV. 189, 202–03 (2005–2006).

to have a child with their deceased loved ones will find a way to do so.⁴⁷ The practice of posthumous conception is, thus, unlikely to disappear anytime soon.

Assuming that children should not pay the price of parental decisions, it is important to consider how to uphold the interests and rights of children that are born from posthumous conception. Yet, to what extent have courts deciding on cases involving posthumously conceived children done so?

II. POSTHUMOUS CONCEPTION IN COURTS

Since the victorious ruling in the Blood case that enabled Diane to procreate through the use of her dead husband's sperm in 1997, many cases pertaining to posthumous conception have arrived in courts. Specifically, four types of cases can be observed.

In the first kind of case, a person requests permission to harvest gametes from a recently-deceased or dying patient. Such cases are especially prevalent in Australia.⁴⁸ They are rather urgent given the time limits on extracting viable sperm or eggs,⁴⁹ and commonly in such cases, an additional court decision is required in order to get permission to use the harvested gametes.⁵⁰ This is also an instance of the second type of case. A surviving partner or parent might ask for permission to use the gametes that the deceased had frozen before going onto a medical treatment (such as chemotherapy) or had asked to have harvested shortly before or after death. Both Australian and Israeli courts have delivered opinions in this regard.⁵¹ In the

⁴⁷ In *ex parte Blood*, the British Court ruled that although the harvesting of sperm from Ms. Blood's dying husband should not have taken place given the lack of clear and written consent, once it was done Ms. Blood had the right, under the law of the European Community, to export the sperm for the purpose of received medical treatment in other EU members. *R. v Human Fertilisation and Embryology Authority, ex parte Blood*, [1997] EWCA (Civ) 4003, [70], [1997] 2 WLR 806 (Q.B.D.) (Eng.). Subsequently, Ms. Blood conceived her two children in fertility clinics in Belgium. Lucie Morris, *Second Baby for Diane Blood*, DAILY MAIL (Sept. 26, 2013) <http://www.dailymail.co.uk/health/article-128719/Second-baby-Diane-Blood.html>; see also Derek Morgan & Robert G. Lee, *In the Name of the Father? Ex Parte Blood: Dealing with Novelty and Anomaly*, 60 MOD. L. REV. 840 (1997) (discussing the European standards regarding free movement and services); Benjamin Kroon et al., *Post-mortem Sperm Retrieval in Australia*, 52 AUSTL. & N.Z. J. OBSTETRICS & GYNECOLOGY 487, 488 (2012) (discussing the law in Victoria, Australia that allows exportation of retrieved sperm to a State or a Territory that allows use without written consent of the deceased).

⁴⁸ *In the matter of Gray* [2000] QSC 390 (Austl.); *MAW v W. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 231 (Austl.); *S v Minister for Health (WA)* [2008] WASC 262 (Austl.); *Re Floyd* [2011] QSC 218 (Austl.); *Re H, AE* [2012] SASC 146 (Austl.).

⁴⁹ The medical recommendation for posthumous harvesting and preservation of sperm is that extraction take place within twenty-four hours after death, although the sperm may remain viable longer (up to forty-eight hours) if the body has been cooled. Katrina Bills, *The Ethics and Legality of Posthumous Conception*, 9 S. CROSS U. L. REV. 1, 7 (2005); Bryce Weber, Ron Kodama, and Keith Jarvi, *Postmortem Sperm Retrieval: The Canadian Perspective*, 30 J. ANDROLOGY 407, 407 (2009).

⁵⁰ See *In the matter of Gray* [2000] QSC at ¶ 4; see also *S v Minister for Health*, [2008] WASC at ¶¶ 17, 25; *Re H, AE*, [2012] SASC at ¶¶ 12, 49.

⁵¹ Vallance & Marco [2012] FamCA 653 (Austl.); *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478 (Austl.); *Re H, AE (No 2)* [2012] SASC 177 (Austl.); *AB v Attorney-General of Victoria* [2005] VSC 180 (Austl.); 13530/08 Family Court (Krayot),

third type of case, a posthumously conceived child has already been born and the surviving parent (generally, the widow) submits a request for recognition of the deceased's parentage. Diane Blood, for instance, had filed such a request in the United Kingdom after the birth of her first son.⁵² These requests are especially prevalent in Japan where all legal cases of posthumous conception focus on the issue of parentage acknowledgment and registration in the child's birth certificate.⁵³ Finally, in the fourth type of case, the courts were called upon to determine whether a posthumously conceived child should have inheritance rights and/or receive social security benefits as the dependent of the deceased—a request that is especially prevalent in the United States.⁵⁴

The reasons for the national differences in judicial requests may be grounded in the disparate legal regulations of assisted reproductive technologies in these countries, as well as in their very different cultural understandings of procreation. In the United States, where assisted reproductive technologies are lightly regulated, decisions about harvesting gametes are often in the hands of medical ethics committees. Once the request is approved, the decision of using these gametes for the purpose of creating a child is further in the hands of private fertility clinics that independently provide such services. Thus, for the most part, when courts are called to respond to cases of posthumous conception the child already exists and the issue at stake is mainly the relationship between the state and the child—especially the privileges the child will receive. Similarly, in Japan, there is no regulatory

New Family Org. v. Rambam Med. Ctr. (2009) (Isr.) [hereinafter NFO]; Katy Sinclair, *Israeli Court Allows Use of Dead Soldier's Sperm*, BIONEWS (Jan.20, 2007), http://www.bionews.org.uk/page_12974.asp; Andrew Vorzimer, *Court Rules that Widow Can Use Dead Husband's Sperm*, THE SPIN DOCTOR (May 24, 2011), <http://www.eggdonor.com/blog/2011/05/24/court-rules-widow-dead-husbands-sperm/>; see also, Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993) (providing a U.S. decision); *Ex parte Blood*, [1997] EWCA (Civ) 4003 (providing a U.K. decision).

⁵² *Blood Claims IVF Paternity Victory*, BBC NEWS, <http://news.bbc.co.uk/2/hi/health/2807707.stm> (last updated Feb. 28, 2003); Neil Connor, *Campaigner is Confident of Paternity Declaration*, THE BIRMINGHAM POST (Eng.), Mar. 1, 2003, http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=98239278.

⁵³ Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7 (Japan); Noriyuki Ueda et al., *Study of Views on Posthumous Reproduction, Focusing on Its Relation with Views on Family and Religion in Modern Japan*, 62 ACTA MED. OKAYAMA 285, 286. A few cases in Russia concern the registration of posthumously conceived children when the grandmother requests registration. See *From Sorrow to Surrogacy: Grandmother Fights for Late Son's Kids*, RT NEWS (Russ.), June 7, 2011, <http://rt.com/news/frozen-sperm-surrogacy-maternity/>; Irina Pulya, *Posthumous Grandchildren*, RUSSIA BEYOND THE HEADLINES (Russ.), June 16, 2011, http://rbth.ru/articles/2011/06/16/posthumous_grandchildren_13047.html.

⁵⁴ *In re Estate of Kolacy*, 753 A.2d 1257, 1259-60 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm'r Soc. Sec.*, 760 N.E.2d 257, 260 (Mass. 2002); *Khabbaz v. Comm'r, Soc. Sec. Admin.* 930 A.2d 1180, 1182 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849, 850 (Ark. 2008); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 598 (9th Cir. 2004); *Stephen v. Comm'r Soc. Sec.*, 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005); *In Re Martin B.*, 841 N.Y.S.2d 207, 208 (Sur. Ct. 2007); *Vernoff v. Astrue* 568 F.3d 1102, 1105 (9th Cir. 2009); *Astrue v. Capato*, 132 S. Ct. 2021, 2025-26 (2012).

framework of law or guidelines concerning assisted reproductive technologies, and the actual procedure is in private hands.⁵⁵ Judicial resolutions are therefore called for only when the child exists. The focus on parentage acknowledgement and registration further reflects the importance of the blood-line and family continuation in Japanese culture.⁵⁶

The situation is different in countries which regulate assisted reproductive technologies and allow posthumous conception. For instance, in Victoria, Australia parental acknowledgement in the child's birth certificate is part of the established system,⁵⁷ as it is in British Columbia, Canada, when the deceased was married or in a marriage-like relationship and consented to the use of his or her gametes after death.⁵⁸ Following another suit by Diane Blood, in which it was accepted at the High Court in London that the lack of such acknowledgment violated her children's rights to privacy and family life,⁵⁹ the Parliament in the United Kingdom also revised the regulation of parental registration.⁶⁰ It subsequently adopted an amendment to the Fertilisation and Embryology Act of 1990, in 2003 (now formally included in the Fertilisation and Embryology Act of 2008) so that birth certificates for posthumously conceived children would register the deceased as the father rather than leave the line for the father's name blank.⁶¹ The Act of 2008 further allows a woman who is in a relationship with another woman to register as the other parent of a child.⁶² Thus, in such countries, people seeking to harvest and subsequently use gametes must approach the judiciary when there is a question of whether they have met the threshold conditions, especially the consent of the deceased. Finally, the legal framework in Israel also reflects the dilemmas being presented to courts. Although there are no comprehensive national regulations about assisted reproductive technologies, the national healthcare system offers fertility treatments.⁶³ Moreover,

⁵⁵ Mayumi Mayeda, *Present State of Reproductive Medicine in Japan—Ethical Issues with a Focus on Those Seen in Court Cases*, 7 BMC MEDICAL ETHICS 2, 15 (2006).

⁵⁶ Ueda, *supra* note 53, at 294.

⁵⁷ *Assisted Reproductive Treatment Act 2008* (Vic) pt 5 (Austl.) (recognizing and registering the deceased—whether a man or a woman in a heterosexual relationship, or a woman in a same-sex relationship—as a parent of the posthumously conceived child).

⁵⁸ Alberta Law Reform Inst., *supra* note 4, at 8–9.

⁵⁹ *Blood Claims IVF Paternity Victory*, BBC NEWS (Feb. 28, 2003), <http://news.bbc.co.uk/2/hi/health/2807707.stm>.

⁶⁰ Clare Dyer, *Diane Blood Law Victory Gives Her Sons Their 'Legal' Father*, GUARDIAN, Sep. 18, 2003, <http://www.theguardian.com/science/2003/sep/19/genetics.uknews>.

⁶¹ Human Fertilization and Embryology (Deceased Fathers) Bill, 2003, H.L. Bill [78] cl. 1 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200203/ldbills/078/03078.1-4.html>. For the Parliamentary discussion on this amendment to the Act see 25 Apr. 2001, PARL. DEB., H.C. Standing Committee G (2001) (U.K.), available at <http://www.publications.parliament.uk/pa/cm200001/cmstand/g/st010425/am/10425s01.htm>; see also Fertilisation and Embryology Act, 2008, c. 22, § 48 (U.K.).

⁶² Fertilisation and Embryology Act of 2008, c. 22, § 48 (U.K.).

⁶³ Arich Raziell et al., *Nationwide Use of Postmortem Retrieved Sperm in Israel: a Follow-up Report*, 95 AM. SOC'Y FOR REPROD. MED., 2693, 2693–95 (2011) (reporting that most of the harvested gametes are ultimately not used however).

the country's cultural emphasis on procreation and "continuation of the family line," along with its mandatory military service, has created a greater acceptance of posthumous conceptions.⁶⁴ Consequently, in practice, requests for the harvesting or use of sperm or eggs may often be resolved by turning to the state attorney; only a handful of more controversial cases come to court.⁶⁵

The next Part considers the legal discourse on posthumously conceived children. It observes the extent to which courts have addressed the welfare and best interests of posthumously conceived children in their rulings, and analyzes the scope and meaning of relevant decisions.

III. THE LEGAL DISCOURSE ON POSTHUMOUSLY CONCEIVED CHILDREN

Regardless of the type of case that reaches court, it is pertinent to explore the place posthumously conceived children occupy in judicial decisions. After all, the goal of requests for harvesting gametes, or for the use of frozen ones, is to achieve a pregnancy that will result in the birth of a child. In some cases, calculations of a child's welfare and best interests inherently fall into abstract thinking,⁶⁶ but when a fertility treatment has succeeded, and a child already exists, a case is necessarily concrete. It would therefore be reasonable to expect that considerations of the welfare and best interest of the posthumously conceived children will be part of the discussion, just as in other cases concerning children in the family sphere.

This expectation is especially pertinent given the CRC's requirement that states attend to children's interests and best interests. This international treaty, which entered into force in 1991 and has been almost universally ratified (the exceptions are the United States and Somalia),⁶⁷ aimed to create a children's rights revolution.⁶⁸ Recognizing children as subjects and as bearers of rights, its provisions are aimed at protecting the equal rights of all children up to the age of 18, regardless of their race, religion, nationality, and importantly, also birth or other status.⁶⁹ Moreover, among its core provisions is the explicit requirement that, "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."⁷⁰ Article 3(2) further requires states "to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end,

⁶⁴ *Id.* at 2694.

⁶⁵ Telephone Interview with New Family Organization (Feb. 2013).

⁶⁶ Pobjoy, *supra* note 6, at 459.

⁶⁷ Convention on the Rights of the Child, G.A. Res. 44/25, ¶ 1577, Art. 2, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), available at <http://www.un.org/documents/ga/res/44/a44r025.htm>.

⁶⁸ MAYA SABATELLO, CHILDREN'S BIOETHICS: THE INTERNATIONAL BIOPOLITICAL DISCOURSE ON HARMFUL TRADITIONAL PRACTICES AND THE RIGHT OF THE CHILD TO CULTURAL IDENTITY 27–33 (2009) (describing the revolutionary and innovative provisions of the Convention on the Rights of the Child).

⁶⁹ See Convention on the Rights of the Child, *supra* note 67.

⁷⁰ See Convention on the Rights of the Child, *supra* note 67, at Article 3(1).

shall take all appropriate legislative and administrative measures.”⁷¹ Thus, although the CRC does not explicitly stipulate posthumously conceived children—indeed, it is doubtful that at the time of its adoption, the drafters could possibly envision such children—there can be no doubt that posthumously conceived children fall within the CRC’s scope of protection.

Disturbingly, however, this is often not the case. An examination of judicial decisions and media reports from various countries, including the United States, United Kingdom, Australia, New Zealand, Japan, Russia, and Israel shows that courts are overwhelmingly focused on the question of consent and the reproductive freedom of the adults involved,⁷² on the property-like characteristics of gametes,⁷³ and on states’ interests in the orderly administration of estates and their intestate law, as relevant for inheritance and social security benefits.⁷⁴ In some instances, the judicial neglect of children is more blatant. A decision by the Russian Civil Registry Office is a vivid example.⁷⁵ In this case, a woman who used the sperm of her dead son to fertilize an egg from an anonymous donor and hired a surrogate to bear the grandchild requested that the authorities issue a birth certificate.⁷⁶ The authorities refused, stating that the child was born two years after the death of the deceased; they added that “because the egg donor was anonymous, the baby also does not have a mother.”⁷⁷ Consequently, the Civil Registry Office decided that “the baby has no legal parents, does not officially exist, and cannot have a birth certificate.”⁷⁸ Further,

⁷¹ See Convention on the Rights of the Child, *supra* note 67, at Article 3(2).

⁷² *MAW v W. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 23, ¶ 43 (Austl.); *In the matter of Gray* [2000] QSC 390, ¶ 23(a) (Austl.); *R. v Human Fertilisation and Embryology Authority, ex parte Blood*, [1997] EWCA (Civ) 4003, [3]–[28], [1997] 2 WLR 806 (Q.B.D.) (Eng.); 13530/08 Family Court (Krayot), *New Family Org. v. Rambam Med. Ctr.* (2009) ¶ 5.1 (Isr.).

⁷³ *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993); *In the matter of Gray* [2000] QSC at ¶¶ 11–22; *Re H, AE (No 2)* [2012] SASC 177, ¶¶ 46–58 (Austl.); *Jocelyn Edwards*; *Re the estate of the late mark Edwards* [2011] NSWSC 478, ¶¶ 41–78 (Austl.); *New Family Org.*, 13530/08 Family Court (Krayot) at ¶ 6.

⁷⁴ *Gillett-Netting v. Barnhart*, 371 F.3d 593, 597–99 (9th Cir. 2004); *Vernoff v. Astrue* 568 F.3d 1102, 1110–12 (9th Cir. 2009); *Finley v. Astrue*, 270 S.W.3d 849, 852–54 (Ark. 2008); *Woodward v. Comm’r Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002); *In re Certified Question from the U.S. District Court, W.D. of Michigan*, 825 N.W.2d 566, 570 (Mich. 2012); *Khabbaz v. Comm’r, Soc. Sec. Admin.* 930 A.2d 1180, 1182–84 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849, 852–54 (Ark. 2008).

⁷⁵ A similar response is reported from a case delivered by the District Court in Russia. In this case, a divorcee grandmother requested to be registered as the guardian of two pairs of twins. See *From Sorrow to Surrogacy*, *supra* note 53; see also Pulya, *supra* note 53. The children were conceived from her deceased son’s sperm and donated eggs and born through two surrogates. See *From Sorrow to Surrogacy*, *supra* note 53; see also Pulya, *supra* note 53. In denying her request, the court stated that, because under Russian law only married couples can use surrogates “the four children five months old at the time have no legal mother and father. . . .” See *From Sorrow to Surrogacy*, *supra* note 53; see also Pulya, *supra* note 53.

⁷⁶ Leidig, *supra* note 20, at 627.

⁷⁷ Leidig, *supra* note 20, at 627.

⁷⁸ Leidig, *supra* note 20, at 627.

according to the media report of the case, the Civil Registry Office suggested that the grandmother “has no claim on the boy, and as she is too old to adopt him it wants to take him away from her and place him in an orphanage.”⁷⁹

Clearly, such a response is astonishing. The child’s *existence* is not dependent on any formal recognition of his or her parents. A child’s birth is an objective fact that, under international law, states are required to document by issuing a birth certificate.⁸⁰ Further, even if a state may legitimately set an age limitation on prospective parents who want to adopt a child, it is most likely that placing the child in an orphanage will be a far worse option. In the particular instance of this case, while it is unclear whether the fifty-five-year-old grandmother in fact requested to adopt the child (as might be implied by the response of the Civil Registry Office), there is no doubt that the child was very much wanted and taken care of, thus undermining the rationales for placing the child in an orphanage—an option that is, and must be, a last resort. And in any case, the child’s birth registration should always be separate from the question of adoption. Simply stated, the position of the Civil Registry Office could only have been made by entirely ignoring the child’s interests.

Still, some exceptions merit attention. Specifically, nine judicial decisions have raised the issue of child welfare and best interest in a substantive manner as a consideration in decision-making. The first two cases addressed requests for the harvesting of sperm. In *MAW v. Western Sydney Area Health Services*,⁸¹ heard by the Supreme Court of New South Wales, Australia, the couple in question was married for seven years when the husband was struck by a heavy vehicle.⁸² He was subsequently admitted to the hospital where he was diagnosed as near brain dead and put on life support.⁸³ At the time that his wife filed the request with the court, his life expectancy was estimated at approximately forty-eight hours.⁸⁴ He was twenty-five

⁷⁹ Leidig, *supra* note 20, at 627.

⁸⁰ Article 7 of the CRC states:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Convention on the Rights of the Child, *supra* note 67, at Art. 7; *see also* Convention on the Rights of the Child, *supra* note 67, at Art. 8 (requiring states “to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.” Sub-Article (2) further stipulates that “[w]here a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity).

⁸¹ *MAW v W. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 231, ¶¶ 1, 9, 11 (Austl.).

⁸² *Id.* at ¶ 2.

⁸³ *Id.* at ¶ 1.

⁸⁴ *Id.* at ¶¶ 1, 2.

years old, the applicant was twenty-eight, and they did not yet have any children.⁸⁵ According to the records, the couple had originally decided to postpone parenthood “until they got on their feet financially.”⁸⁶ They further discussed having children from time to time but put off the decision. A few months before the accident, the husband discussed with his wife, in what was described as “a jocose way,” the possibility of him having a vasectomy after making a semen donation.⁸⁷ Although the couple never pursued any course of action, these discussions were critical in the court’s decision to dismiss her request;⁸⁸ indeed, the applicant’s testimony that her husband indicated “that if they were to have a child, he wanted the child to carry on the W name”⁸⁹ failed to persuade the court otherwise.

*In the matter of Gray*⁹⁰ (heard by the Supreme Court of Queensland, Australia), the couple had been married for six years, and had a one-year-old child, when the thirty-seven-year-old husband died unexpectedly in his sleep. The applicant, who was forty-two years old, submitted the request to harvest his sperm for the purpose of procreation. She testified that they had discussed having another child and that “their intentions [were] to do so in the near future.”⁹¹ As in the previous case, the parents of the deceased supported the spouse’s request.⁹²

Although both cases were dismissed, essentially, on the grounds of lack of the deceased’s consent to harvest his sperm,⁹³ the courts raised the welfare and best interests of prospective posthumously conceived children as well, as stated in the *MAW* case, as “another factor militating against the recognition of such a new special category.”⁹⁴ In the case of *MAW*, the court explained that,

Such a child will never have the prospect of knowing his father. Such a child would come to recognise that he or she was not sought to be procreated during the life of the father. Such a child would not have rights of succession. . . . Furthermore, should the circumstances of the child’s conception come to be known there would be people in the community

⁸⁵ *Id.*

⁸⁶ *Id.* at ¶ 12.

⁸⁷ *Id.* at ¶ 14.

⁸⁸ *Id.* at ¶ 14.

⁸⁹ *Id.* at ¶ 15.

⁹⁰ *In the matter of Gray* [2000] QSC 390, ¶ 1 (Austl.).

⁹¹ *Id.* at ¶ 1, 2.

⁹² *Id.* at ¶ 6.

⁹³ *MAW*, [2000] NSWSC at ¶¶ 5, 7, 17-21, 24, 27-50, 51-62; see also *In the matter of Gray*, [2000] QSC at ¶ 23(a) (resolving that in the lack of legislation, the court has no jurisdiction). In both cases, the court also resolved that in the lack of legislation it has no jurisdiction. *MAW*, [2000] NSWSC at ¶¶ 27-50, as well as ¶¶ 51-62; *In the matter of Gray*, [2000] QSC at ¶¶ 5, 7, 24.

⁹⁴ *MAW*, [2000] NSWSC at ¶ 43.

who would tend to regard the child as different –not a happy situation, especially for the child.⁹⁵

The court subsequently stated that “I cannot conclude that such a child’s best interests would be served by being brought into existence in the manner, at the time and in the circumstances contemplated as possible by the plaintiff.”⁹⁶

Similarly, *In the matter of Gray* the court opined, in regard to the harvesting request, that,

I cannot see how it can be said that the interests of such a child will be advanced by inevitable fatherlessness. The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up. More significantly, because the court can never know in what circumstances the child may be born and brought up, it is impossible to know what is in its best interests.⁹⁷

Subsequently, the court concluded that this case did not raise legal “challenges for which there may be no adequate precedent,” that “good sense and ordinary concepts of morality should be a sufficient guide for many of the problems that will arise [with the expansion of medical technology],” and that if these are insufficient, it should be left to the legislator to provide another legal response.⁹⁸

The third case was heard by the High Court of Japan in 2004.⁹⁹ This case involved the request of a widow that her dead husband be acknowledged as the father of her posthumously conceived child, born eighteen months after the father’s death.¹⁰⁰ In this case, the husband had preserved sperm while going through cancer treatment, and the couple was in the process of getting an approval for IVF when he died.¹⁰¹ The deceased’s consent was not contested, and his parents were also fully involved and supported the widow’s decision to continue the IVF treatment after he died.¹⁰²

However, reversing the decision of the lower court, the Japanese High Court dismissed the request.¹⁰³ While it did so presumably on the ground of lack of legislation,¹⁰⁴ it highlighted considerations relating to the child as well. The court ruled that it is impossible to establish a parent-child relationship in such scenario

⁹⁵ *MAW*, [2000] NSWSC at ¶ 43.

⁹⁶ *MAW*, [2000] NSWSC at ¶ 44.

⁹⁷ *In the matter of Gray*, [2000] QSC at ¶ 23(c).

⁹⁸ *In the matter of Gray*, [2000] QSC at ¶ 24.

⁹⁹ Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7, ¶ 1, 2 (Japan).

¹⁰⁰ *Id.* at ¶ 1.

¹⁰¹ *Id.* at ¶¶ 1, 2.

¹⁰² *Id.* at ¶ 1.

¹⁰³ *Id.* at ¶ 3.

¹⁰⁴ *Id.* at ¶ 4.

because there is no possibility for the father to have parental authority over the child; nor is it possible for the child to enjoy the father's custody, care, or support; nor could the child become the father's heir.¹⁰⁵ In concurring opinions, other justices provided additional justifications. They emphasized that the existence of a "blood relationship" cannot necessarily be a reason to legally recognize parent-child relations, stating that, in general, a child is born with both father and mother being alive who provide him or her the environment in which they mentally or materially bless him or her.¹⁰⁶ Moreover, while Justice Imai Isao pointed out that the court should consider the existing child, and that "there should be no objection to giving priority to the welfare of the child," he nonetheless found the benefits of registration insignificant¹⁰⁷—even though it was explicitly acknowledged that leaving a blank in the section for father in the family register causes considerable social disadvantages to the child,¹⁰⁸ and despite the indisputable benefit of registration in that it would enable the child to claim kinship with the father's relatives, including possible rights and obligations of support between them.¹⁰⁹

In three other cases concerning inheritance and the social benefit rights of posthumously conceived children, all heard by courts in the United States, the judges considered the welfare and best interests of the child. In the case of *Lauren Woodward v. Commissioner of Social Security*,¹¹⁰ a widow asked the Supreme Judicial Court of Massachusetts to rule on whether twin girls born following her use of her deceased husband's sperm were eligible for inheritance and social security benefits under Massachusetts' intestacy law. The husband had deposited sperm just before entering medical treatment for leukemia; the twins were born two years after his death.¹¹¹ While the Court generally accepted that interpretation of Massachusetts law allows posthumously conceived children to inherit and receive social security benefits, it did not decide the particular case, remanding it to the Probate and Family Court for further evidence concerning the deceased's explicit consent to both the use of his sperm after his death and to support the resulting child.¹¹² Its opinion on posthumously conceived children is yet important.

In its decision, the Court stipulated state interests that need to be balanced: the child's best interests, the state's interest in the orderly administration of estates, and the reproductive rights of the genetic parent.¹¹³ Importantly, the Court emphasized

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at ¶ 2.

¹⁰⁷ *Id.* at ¶¶ 4–5.

¹⁰⁸ *Id.* at ¶ 3 (explicitly acknowledging that "the family register in Japan is an important system that has no equivalent in other countries, and a blank in section of father in the family register causes considerable social disadvantages to the child.").

¹⁰⁹ *Id.* at ¶ 5.

¹¹⁰ *Woodward v. Comm'r Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

¹¹¹ *Id.* at 260.

¹¹² *Id.* at 272. The Court stipulated a two-fold consent requirement from the deceased: consent that his gamete is used for procreation after his death (a genetic-biological connection) and consent to the support of any resulting child. *Id.* The Court was not persuaded that the latter existed. *Id.*

¹¹³ *Id.* at 265.

the overriding legislative concern to protect minor children, “most especially those who may be stigmatized by their ‘illegitimate’ status,”¹¹⁴ including posthumously conceived children within the scope of this protection. The Court highlighted that the legislature encouraged assisted reproductive technologies¹¹⁵ and that it would therefore be inconsistent and irrational to suggest that children resulting from such technologies have fewer rights and protections than other children.¹¹⁶ The Court further stated unequivocally that “posthumously conceived children may not come into the world the way the majority children do, but they are children nonetheless.”¹¹⁷ The Court thus concluded that, generally, they are “entitled, in so far as possible, to the same rights and protections of law” as children conceived before death.¹¹⁸

In *Gillett-Netting v. Barnhart*,¹¹⁹ the United States Ninth Appellate Circuit accepted the plaintiff-appellant’s assertion that her minor children, conceived after the death of her husband, were entitled to insurance benefits under Arizona law. In this case, the deceased deposited sperm before undergoing chemotherapy for cancer, and there was no dispute as to his wish that his widow have their child after his death.¹²⁰ In reaching its conclusion, the court took a broad interpretive approach to the criteria of the Social Security Act. It stated that once the parentage question is undisputed, as in the present case, the requirement of proving dependency should be automatically interpreted as inherently inclusive of all legitimate children.¹²¹ As the court emphasized,

It has long been the policy of the state to protect innocent children from the omissions of their parents by abolishing legal distinctions based on legitimacy . . . Although Arizona law does not deal specifically with posthumously conceived children, every child in Arizona, which necessarily includes Juliet and Piers [the children of the deceased], is the legitimate child of her or his natural parents.¹²²

A similar conclusion was reached by the Surrogate’s Court of New York. In *In the Matter of the Construction of Agreements among Martin B., as Grantor, and Martin B. et al, as Trustees*,¹²³ the court resolved that two infants conceived by the widow after the deceased’s death were “issue” of “descendants” protected under the

¹¹⁴ *Id.*

¹¹⁵ Massachusetts provides universal healthcare and insurance coverage for infertility treatment. *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 266.

¹¹⁸ *Id.*

¹¹⁹ *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

¹²⁰ *Id.* at 594–95.

¹²¹ *Id.* at 597–98.

¹²² *Id.* at 598–99.

¹²³ *In Re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007).

trust fund. While the court acknowledged that “certainty and finality are critical to the public interests in the orderly administration of estates,” it also highlighted that “the human desire to have children, albeit by biotechnology, deserves respect, as do the rights of the children born as a result of such scientific advances.”¹²⁴ Further, it emphasized that “if an individual considers a child to be his or her own, society through its laws should do so as well,” leading to its conclusion that the two posthumously conceived children should be treated as part of their father’s family for all purposes.¹²⁵ As the court stipulated, “where a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights “for all purposes as those of a natural child.”¹²⁶

A seventh relevant case, *New Family Organization et al v. Rambam Medical Center et al*¹²⁷ was delivered by the Family Court Hakrayot in 2009. In this case, a forty-year-old single woman requested the court’s permission to use the sperm of a man who died at twenty-two after preserving his sperm when he received treatment for cancer.¹²⁸ According to his parents, he expressed a desire for them to have his grandchildren with his sperm.¹²⁹ Although the woman never knew the man or his family, the family fully supported her request to be impregnated with their son’s sperm.¹³⁰ The parents of the deceased and the woman also signed an agreement to regulate their relationships.¹³¹

In approving the request, the court gave the most comprehensive examination to date of the welfare and best interests of the child. The court acknowledged some general concerns about the unique family structure and its possible financial impact given that the child will be raised in a single-parent household.¹³² It also noted the possibility of the child experiencing some identity issues.¹³³ However, it ultimately emphasized that the decision has to take into account the specific facts of the case.¹³⁴ Accordingly, it observed that a single-mother is not uncommon, while simultaneously pointing out that, in the present case, the family will already have an untraditional structure.¹³⁵ The court noted that in the particular case, the applicant’s only alternative to posthumous conception from this known deceased would be conception through the use of sperm from an unknown donor.¹³⁶ Given these

¹²⁴ *Id.* at 211.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 13530/08 Family Court (Krayot), *New Family Org. v. Rambam Med. Ctr.* (2009) (Isr.).

¹²⁸ *Id.* at ¶ 1.

¹²⁹ *Id.* at ¶¶ 1, 5.1–5.2.

¹³⁰ *Id.* at introduction to the court’s decision and ¶ 1.

¹³¹ *Id.* at ¶ 1.

¹³² *Id.* at ¶ 5.2.

¹³³ *Id.*

¹³⁴ *Id.* at ¶¶ 5, 5.2.

¹³⁵ *Id.* at ¶¶ 5.2–5.3.

¹³⁶ Note: non-anonymous sperm donation is prohibited in Israel.

circumstances, the court raised the medical, psychological, and religious benefits of the child knowing his genetic origins and emphasized the right of the child to enjoy extended family relations of both parents as rationales for its decision.¹³⁷

Finally, two additional cases from Australia considered the issues of child welfare and the child's best interests in a substantial way: the *Jocelyn Edwards case*¹³⁸ from the Supreme Court in New South Wales (May 2011) and *Re H, AE (No 2)*¹³⁹ from the Supreme Court of South Australia (October 2012). Both cases addressed whether a widow is entitled to possession of sperm that had been extracted from the widow's dead husband. The extended families in both cases were also involved and supportive of the possibility of having a posthumously conceived grandchild. In the *Edwards case*, the couple had been married for five years, both individuals had children from previous relationships, and they were going through fertility treatment when the husband was fatally injured in a workplace accident.¹⁴⁰ The applicant, forty years old at the time of her husband's death, further testified that when her husband had earlier experienced severe back pain and was being diagnosed for his condition, he explicitly said that,

If something happens to me I would want a part of me to be here with you. Our baby will be a part of us—our legacy even after we are both gone. She will be the bond that unites our families. The bond between [their two children]. If we find out I have cancer I want to make sure we have our baby before I am unable to have one, before I do any chemo. Please promise me you will still have our baby.¹⁴¹

In *Re H, AE (No 2)* case, the husband died as a result of a motor vehicle accident.¹⁴² The couple had been married at the time for just over a year, although they had also been domestic partners for five years prior to that.¹⁴³ They were attempting to start a family. The deceased left a will making the applicant the residuary beneficiary of his estate.¹⁴⁴ Shortly after his death, the applicant, twenty years old at the time, filed a request that doctors harvest the husband's sperm.¹⁴⁵ The court approved the request due to the urgency of the situation, with the condition that the sperm will not be used for any purpose without another order of the court.¹⁴⁶

¹³⁷ 13530/08 Family Court (Krayot), *New Family Org. v. Rambam Med. Ctr.* (2009) (Isr.).

¹³⁸ *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478 (Austl.).

¹³⁹ *Re H, AE (No 2)* [2012] SASC 177 (Austl.).

¹⁴⁰ *Id.* at ¶¶ 1–40.

¹⁴¹ *Edwards*, [2011] NSWSC at ¶ 108.

¹⁴² *Re H, AE (No 2)*, [2012] SASC at ¶ 2. For the facts of the case, see ¶ 25–35.

¹⁴³ *Id.* at ¶ 2.

¹⁴⁴ *Id.* at ¶ 26.

¹⁴⁵ *Id.* at ¶¶ 2–3.

¹⁴⁶ *Id.* at ¶ 2.

Five months later, the widow sought a declaration that she was entitled to possession of the sperm and an order for its release to her.¹⁴⁷

In contrast to the *MAW* and *Gray cases*, the *Edwards and the Re H, AE (No. 2)* courts approved the requests. In considering the child's welfare and best interests, the courts emphasized the characteristics of the wife and the wider family support that would further ensure the child would be provided with the needed material support.¹⁴⁸ The *Edwards* court, beyond finding that the child would be born to a loving mother and a supportive extended family, ultimately stated that "it would be inappropriate to engage in speculation about a variety of indeterminable matters",¹⁴⁹ such as the wife's future health, her employment and financial situation, or whether she would remarry.¹⁵⁰

There are various reasons why courts granted the question of the welfare and best interests of posthumously conceived children greater attention in these recent cases. Changes in the family and family structures, especially but not only due to the availability of assisted reproductive technologies, have meant that the single-parent household is not abnormal in many societies as it was historically perceived to be.¹⁵¹ The scope of the phenomenon of posthumously conceived children may further explain this shift. Certainly, it is not as common as other reproductive procedures such as IVF, surrogacy, or gamete donation. However, the number of requests for posthumous conception has significantly increased in the past decade,¹⁵² leading

¹⁴⁷ *Id.*

¹⁴⁸ *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478 (Austl.).

¹⁴⁹ *Id.* at ¶ 144.

¹⁵⁰ *Id.* at ¶ 143. See in this regard also *Re H, AE* [2012] SASC 146, ¶ 37 (Austl.) (discussing various possible scenarios for a child to be born when the father is not present and changes in family structure, concluding that "[i]t cannot be thought that because the child will only have one living parent that will necessarily not be in its best interests, particularly when the alternative is for the child not to exist at all.").

¹⁵¹ Joanna L. Grossman, *A Growing Debate Over the Rights of Posthumously Conceived Children: Part One in a Two-Part Series of Columns*, VERDICT (Sept. 6, 2011), <http://verdict.justia.com/2011/09/06/a-growing-debate-over-the-rights-of-posthumously-conceived-children> (stating that, according to reports, forty-one percent of all American children were born to unmarried parents in 2011, and twenty-five percent of same-sex couple households included children).

¹⁵² There is no accurate data as to how many posthumously conceived children have been born. However, there is no doubt that the number is rising. Laura Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881, 910 (2000) (stating that according to a study by the University of Pennsylvania, in the years from 1980 to 1995, eighty-two requests were made at infertility clinics for post-mortem gamete retrieval and unitization); Kimberly E. Naguit, *The Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children*, 74 MO. L. REV. 889, 889 n.5 (2009) (stating that in the United States, it was estimated as of 2003 that there are hundreds of thousands of cryopreserved embryos that exist not least because of the number of American soldiers who are active in war); See also Katz, *supra* note 13, at 294 (stating that "the fact is that requests [for post-mortem gamete retrieval and unitization] are numerous, they appear on a worldwide basis, and their number is expected to grow"); *Blood Claims IVF Paternity Victory*, BBC NEWS, <http://news.bbc.co.uk/2/hi/health/2807707.stm> (last updated Feb. 28, 2003) (in the UK, it was estimated that in 2003 the number of posthumously conceived children was between forty and fifty).

also to a shift in the societal acceptance of such children. Indeed, recent studies of public opinion on this issue in both the United States and Japan show significant support (about 50–78% and 60%, respectively).¹⁵³ Finally, the rise of the children’s rights agenda, especially in the past decade, has played a role in this acceptance. As states are gradually internalizing their responsibilities under the CRC,¹⁵⁴ courts all around the world are increasingly considering how their decisions affect the welfare and best interests of the child at stake. Moreover, the simultaneous rise of internet communication and globalization has created an additional international pressure.¹⁵⁵ They make injustices towards such children public and call for remedial measures.

Notwithstanding these discussions, the scope of these judicial decisions is limited, and a few observations are in place. First, these rulings are local and commonly not comprehensive. The rights granted to a posthumously conceived child are dependent on the child’s place of birth—be it Japan, Australia, or Israel—or even, in light of the *Capato* case in the United States, on the particular state.¹⁵⁶ Moreover, even if courts are willing to acknowledge the familial surroundings of posthumously conceived children (as in the *NFO*, *Edwards*, and *Re H, AE* cases), they commonly deny those children inheritance and social benefit rights. The United States Supreme Court decision in *Capato* is illustrative in this regard. Whereas the Court refrained from any explicit and particular discussion about the twins’ welfare and best interests, its determination that the aim of the Social Security Act “was not to create a program ‘generally benefiting needy persons’ . . . [but] to ‘provide . . . dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings,’” led it to conclude that inheritance rights are to be determined by states’ intestacy laws.¹⁵⁷ And while the United States Supreme Court acknowledged that states adopt different intestacy laws with regard to posthumously conceived children, it rejected the argument that

¹⁵³ Sara E. Barton et al., *Population-based Study of Attitudes Toward Posthumous Reproduction*, 98 FERTILITY & STERILITY 735, 735–40 (2012); Gary S. Nakhuda et al., *Posthumous Assisted Reproduction: A Survey of Attitudes of Couples Seeking Fertility Treatment and the Degree of Agreement Between Intimate Partners*, 96 FERTILITY AND STERILITY 1463, 1465 (2011); Ueda, *supra* note 53, at 285. *But see* Arich Raziel et al., *Nationwide Use of Postmortem Retrieved Sperm in Israel: A Follow-up Report*, 95 FERTILITY & STERILITY 2693, 2693 (2011) (stating that the actual use of extracted sperm may be low); *see also* Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 198–99 (2011) (stating that public support for posthumous conception may be dependent on factors such as marital status of the couple and the support of the deceased’s family—regardless of the deceased’s consent).

¹⁵⁴ *See* Convention on the Rights of the Child, *supra* note 67, at Art. 3.

¹⁵⁵ Michael Freeman, *The Future of Children’s Rights*, 14 CHILD. & SOC’Y 277, 278–81 (2000).

¹⁵⁶ *Astrue v. Capato*, 132 S. Ct. 2021, 2029–34 (2012); Cynthia E. Frutchman, *Tales From the Crib: Posthumous Reproduction and ART*, 33 WHITTIER L. REV. 311, 318–20 (2011–12) (stating that currently, only fourteen states in the US have statutes addressing posthumous conception: Alabama, California, Colorado, Delaware, Florida, Louisiana, New Mexico, New York, North Dakota, Texas, Utah, Virginia, Washington, and Wyoming. Others may have only case law).

¹⁵⁷ *Capato*, 132 S. Ct. at 2030–33.

heightened scrutiny is appropriate in the case, stating that “no showing has been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents.”¹⁵⁸

Concurrently, the lessons that can be learnt from court cases where inheritance and social benefits for posthumously conceived children were granted are equally limited. While in *In the Matter of Martin B.*, the court upheld the interests of the posthumously conceived children, the application in front of it merely required its confirmation of what was agreed upon by all parties rather than a resolution of a dispute.¹⁵⁹ Conversely, in the *Woodward* case, the Court’s two-fold expectation that a deceased parent should explicitly consent to both the use of his sperm after his death and to support the resulting child¹⁶⁰ may be too demanding given that it was not previously required. Despite the judicial statements of protecting the interests and rights of posthumously conceived children, then, the Court, in effect, erected a barrier that, in the present case, may be impossible to overcome. Further, it may be punishing posthumously conceived children for the failure of their parents’ to plan appropriately for an unknown possible future¹⁶¹—an undesirable result.

Certainly, the lack of clear legislative statement about the rights of posthumously conceived children may reflect the common phenomenon that the legal system is not yet up to date with the developments of medical technologies. This problem is especially pertinent in the case of assisted reproductive technologies, not least because ensuing disagreements often lead to a legislative block.¹⁶² Yet while courts may be reluctant to interfere in the enactment of laws as a matter of separation of powers (indeed, this was also the formal justification for the decision of the Japanese Supreme Court),¹⁶³ it is disturbing that the only victims of this lack of regulations are the children.

A second observation is that judicial determination in each of these cases coupled the question of the child’s welfare and best interests with the courts’ perception—and judgmental view—of the wife/future mother. In the *MAW* case, where the request was for the harvesting of sperm, the court interpreted the wife’s admission that she is emotional and that she would wait a few months before she makes a final decision about whether to proceed with using the sperm to mean that she blames

¹⁵⁸ *Capato*, 132 S. Ct. at 2030–33.

¹⁵⁹ *In Re Martin B.*, 841 N.Y.S.2d 207, 208 (Sur. Ct. 2007).

¹⁶⁰ *Woodward v. Comm’r Soc. Sec.*, 760 N.E.2d 257, 269 (Mass. 2002).

¹⁶¹ Jenna M. F. Suppon, *Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children*, 48 FAM. CT. REV. 228, 235 (2010).

¹⁶² Efforts to set up a legally binding universal framework that would sort out the possibilities and limits of ART have failed, and the international community has ultimately opted for a declaration. The Universal Declaration on Bioethics and Human Rights, promulgated in 2005, references in general terms new scientific and technological developments; however, it does not explicitly address ART. See *Universal Declaration on Bioethics and Human Rights*, U.N. EDUC. SCI. & CULTURAL ORG., <http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/bioethics-and-human-rights/> (last visited July 10, 2013) (giving background information about the Declaration).

¹⁶³ The opinions of all Justices in this case emphasized this point. See Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7 (Japan).

herself for not having a child while her husband was well¹⁶⁴ and that she should not make decisions at all.¹⁶⁵ Moreover, it interpreted her admission that bearing and caring for a child is time consuming and demanding as a sign that once the emotional crisis subsides “she is quite likely to change her mind about having a child.”¹⁶⁶ Similarly, *In the matter of Gray*, the Court stipulated that given the wife’s grief and shock from the unexpected death of her husband “[it] could have no confidence that the applicant’s desire is a result of careful or rational deliberation.”¹⁶⁷ And in the Japanese case, the traditional conceptualization of the family as an institution that is associated directly with being a husband and wife seemingly led to judicial disdain of a single-mother household.¹⁶⁸ Thus, although that court was correct that in general a child is born with both father and mother being alive, its refusal to do justice with a “different” family sends the practical message that maternal authority is not enough—even when supported by the extended family.¹⁶⁹

These judicial conclusions are logically peculiar. In *MAW*, it would have been wrong if the applicant *was not* emotional after losing her life partner, there is no doubt that child rearing is indeed demanding, and beyond anything else, her admission that she would wait before proceeding with using the sperm shows maternal responsibility (and certainly not guilt). Further, it is not at all clear why one’s (reasonably) emotional state should undermine rational thinking, as suggested by both the *MAW* and the *Gray* courts. Even if the women’s *current* state is emotional, it is further unclear why that justifies denying these women the opportunity for *future* careful and rational deliberation. The decisions are thus overly paternalistic. Similarly, in the Japanese case, although the child was already born, Justice Shigeo highlights that “it is still necessary to fully consider whether or not it is appropriate at all to give birth to such a child based on the sperm donor’s living consent”¹⁷⁰—implying that the mother’s decision to do so was simply wrong. As the courts are dismissive of the wives as competent decision-makers and as future good mothers, they deny the requests as though the decisions are grounded in the child’s best interests.

Moreover, the decisions come across as merely reflecting the Justices’ personal opposing view rather than being grounded in law. Although the Japanese Court admits that the Civil Code that regulates parental acknowledgement was enacted in

¹⁶⁴ *MAW v W. Sydney Area Health Serv.* [2000] NSW 358; 49 NSWLR 231, ¶ 22 (Austl.).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at ¶ 70.

¹⁶⁷ *In the matter of Gray* [2000] QSC 390, ¶ 23(b) (Austl.).

¹⁶⁸ *See supra* Part III.

¹⁶⁹ *See Takamatsu Kōtō Saibansho* [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7, ¶ 5 (Japan); *see also* Rachel Brehm King, *Redefining Motherhood: Discrimination in Legal Parenthood in Japan*, 18 PAC. RIM L. & POL’Y J. 189, 189 (2011) (discussing discrimination against Japanese women in the context of assisted reproductive technologies).

¹⁷⁰ *Takamatsu Kōtō Saibansho* [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7, ¶ 2 (Japan).

the pre-assisted reproductive technologies era and that it should be extended beyond natural reproduction, Justice Shigeo views posthumously conceived children as “contrary to the providence of nature”¹⁷¹ which justifies, in his mind, the rejection of the application. The judicial disdain is most vivid in the *MAW* case: Justice O’Keefe went as far as to compare the cases of posthumously conceived children with the highly controversial question of the abortion of fetuses conceived by persons with developmental and mental disability or communicable diseases.¹⁷² Thus, not only did the Court strip away any agency that these women had as human beings, but it also implied that this “special new category”¹⁷³ of posthumously conceived children is akin to a communicable disease and polluting of the social fabric.

In contrast, in the more recent cases from Australia and Israel (the *NFO*, *Edwards*, and *Re H, AE cases*)¹⁷⁴ the courts’ perception of the future mothers as loving, caring, and responsible¹⁷⁴ set the tone for its subsequent observation that the support of their extended families is instrumental to the child’s development and sense of security. Certainly, the time at which the various rulings were delivered may account for at least some of the difference. Single parent household today are significantly more prevalent and socially accepted than they were a decade ago,¹⁷⁵ and it is possible that those judicial decisions simply mirror the societal shift. It may also be the case that the characteristics of the individual applicants in the various cases are what mobilized each court’s ruling. While this is not obvious from the facts of the cases, it is reasonable to suspect that the women in the *Edwards* and *Re H, AE (No 2) cases* were indeed less visibly emotional given the time that had passed since the deaths of their husbands (and the subsequent extraction of their sperm) and the time at which they requested to receive possession of the gamete.¹⁷⁶ It is worth noting that the courts’ initial denial of the wives’ requests to extract sperm in the *MAW* and *Gray* cases also denied those wives the opportunity to overcome their initial grief.

The third observation is that, generally, the courts upheld traditional family structure comprised of a man and a woman who are alive—a position that implicitly undermines, rather than endorses, the new families in which these children are raised. The judicial comments in this regard were most obvious in the *MAW* and

¹⁷¹ *Id.* at ¶ 1.

¹⁷² *MAW v W. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 231, ¶ 75 (Austl.).

¹⁷³ *Id.* at ¶ 79.

¹⁷⁴ *See supra* Part III.

¹⁷⁵ Grossman, *supra* note 151 (stating that, according to reports, forty-one percent of all American children were born to unmarried parents in 2011 and twenty-five percent of same-sex couple households included children).

¹⁷⁶ Indeed, interestingly, the emotional state of the applicant in the original request to extract sperm from her dead husband was not discussed at all, notwithstanding the fact that this request was made an hour within the death. *Re H, AE* [2012] SASC 146 (Austl.). There is no mentioning of Jocelyn Edwards emotional state as well. *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478 (Austl.); *see also Re Floyd* [2011] QSC 218 (Austl.) (the Court approves the request of a life partner of the deceased to extract his sperm although “the applicant was unable to appear in person because she is, unsurprisingly, in a state of extreme distress . . .”).

Gray cases, as well as in the Japanese case, where the courts explicitly emphasized the traditional marital relationship of a father and a mother at the time of conception as a central point.¹⁷⁷ But, a similar result can be observed in the cases that approved the requests (even if unintentionally). In the *NFO* case, the explicit comparison with the known sperm donor¹⁷⁸ reinforces the traditional conceptualization of the family unit and the importance attributed to the genetic—rather than social—tie. This emphasis implicitly undermines many of the new families that were created through the use of gamete donation. Further, the courts in all three cases—the *New Family Organization*, *Edwards* and *Re H, AE (No. 2)*—note that a single-mother household is an untraditional family structure and pay great importance to the material and other support that the parents of both the widow and the deceased will provide.¹⁷⁹ This too reflects the expectation of a traditional extended family.

To be sure, there is nothing inherently wrong in bringing the extended family into consideration. Indeed, from a child-centered perspective there is little doubt that such relationships are important. The concern is, however, that the more that the courts ground the welfare and best interests of posthumously conceived children in the extension of the traditional family of one mother and one father, the harder it will be for posthumously conceived children who are born in the other scenarios sketched earlier—especially, families of more than two parents (as in the instance of the husband and frozen embryo from first wife) or of same-sex couples—to have their needs properly addressed and endorsed.¹⁸⁰ And again, in so far that children should not pay the price of decisions made by their parents, it is important that in the future judicial rationales are sufficiently inclusive to cover these other scenarios as well.

Finally, the courts' use of terminology of welfare and best interests of the child does not necessarily mean that the judicial decision was in fact mobilized by any objective criteria of what the child's welfare and best interests actually are. As the discussion of the judicial decisions shows, the courts have used the terminology of child welfare and best interests both to dismiss and to accept the requests made of it.¹⁸¹ The (bizarre) comment by the *Gray* Court in justifying its rejection of the request (that "it is impossible to know what is in [the child's] best interests"¹⁸²) especially reflects this manipulation of the concept of the child's best interests. It shows, not only that determination of the child's best interest is a regular, common, and indeed, expected part of the court's decision, but also, this is in fact exactly what the court did in arriving at its decision. Furthermore, with the exception of the Israeli Court in the *NFO* case,¹⁸³ none of the other Justices referred to any empirical studies

¹⁷⁷ See *supra* Part III.

¹⁷⁸ 13530/08 Family Court (Krayot), *New Family Org. v. Rambam Med. Ctr.* (2009) ¶ 5.2 (Isr.).

¹⁷⁹ See *supra* Part III.

¹⁸⁰ See *supra* Part I.

¹⁸¹ Interestingly, although the *Gillett-Netting* court was especially supportive of protecting the rights and interests of posthumously conceived children, the decision does not include an explicit mention of the child welfare and best interests. See *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

¹⁸² *In the matter of Gray* [2000] QSC 390, ¶ 23(c) (Austl.).

¹⁸³ *New Family Org.*, 13530/08 Family Court (Krayot) at ¶ 5.2.

in support of their opinion. Quite the contrary, in the Japanese case, when a child already existed and the justices were aware of the considerable negative impact the lack of paternity registration would have on the child given the unique importance attributed to the family registry in Japan, they nonetheless opted to reject the registration request.¹⁸⁴

The vagueness of the concepts of child welfare and best interests may partially explain why courts can use these concepts to support whichever position each is inclined to adopt. This criticism is not new. Scholars have long charged that these concepts are too elastic, too open for abuse; and, to an extent, it is certainly true.¹⁸⁵ But as other alternative standards do not yet exist, the focus should be on how the flawed implementation of this measure can be improved.¹⁸⁶ One such way, I suggest, is to consider whether the arguments raised correspond with children's own views of their needs. Put differently, by listening to children's experiences—as also required under the CRC¹⁸⁷—the court can enrich the debate and inform the legal policies to be adopted. The next part considers the rights at stake of posthumously conceived children as judicial decisions have raised them and considers children's perspectives thereof.

IV. POSTHUMOUSLY CONCEIVED CHILDREN

Judicial decisions concerning posthumous conception and scholarly work in their arena raise four main interests and rights of the resulting children: parentage acknowledgment, family structure, identity harm, and finally, inheritance and social benefits. Each of these is discussed separately below.

A. Parentage Acknowledgement

Should parentage acknowledgement of the deceased parent be established in the case of posthumously conceived children? In discussing this issue, courts have generally regarded biology, that is, whether there is a genetic or “blood” connection between the posthumously conceived children and the deceased, as a precondition for registration of parenthood.¹⁸⁸ Additional requirements revolve around consent of the deceased (United States, Australia) or valid marriage (some states in the United States, Japan).¹⁸⁹

¹⁸⁴ See Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7, ¶ 3 (Japan).

¹⁸⁵ SABATELLO, *supra* note 68, at 120–27, 199. See Pobjoy, *supra* note 6, at 459; Kimberly M. Mutcherson, *In Defense of Future Children: A Response to Cohen's Beyond Best Interests*, 96 MINN. L. REV. HEADNOTES 46, 57–64 (2012).

¹⁸⁶ See Mutcherson, *supra* note 185, at 61.

¹⁸⁷ See Convention on the Rights of the Child, *supra* note 67, at Art. 12.

¹⁸⁸ *Case to Seek Acknowledgement*, 60 MINSHŪ 7 at ¶ 3; *In re Estate of Kolacy*, 753 A.2d 1257, 1258–59 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm'r Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002); *Gillett-Netting v. Barnhart*, 371 F.3d 593, 598–99 (9th Cir.).

¹⁸⁹ *Contra Gillett-Netting*, 371 F.3d at 598 (ruling that posthumously conceived children are legitimate children of the deceased as under Arizona law “every child is the legitimate child of its natural parents and is entitled to support . . . as if born in lawful wedlock.” Here

These conditions require further consideration. On the one hand, unwed genetic fathers who were tricked into having a child cannot prevent their parentage acknowledgement.¹⁹⁰ This suggests that genetics, rather than consent or marriage, is the paramount aspect for parentage.¹⁹¹ On the other hand, familial relations often trump genetics. Indeed, in Western legal structure, including the United States, the bond between biological parenthood (particularly fatherhood) and parental-child acknowledgement was never a “natural given” but a social construct.¹⁹² One glaring example is the so-called *presumption of paternity*, a legal construct whereby it is assumed that the husband is the father of a child born into the marriage—although the number of children who are unknowingly raised by non-genetically related fathers is not marginal. In the United States, this number is estimated at one out of ten children born to a marriage; this number increases to one out of seven in the United Kingdom.¹⁹³

Children’s perspectives support the approach of social parenthood. Studies show that for children, especially in families that became possible with the developments of assisted reproductive technologies, genetics is not paramount; children determine parentage by the way in which they were raised, and especially, the fact that they were planned and wanted all along.¹⁹⁴ These criteria can hardly be contested in the

too there was evidence, however, for the deceased husband’s consent for the posthumously conceived children.)

¹⁹⁰ *Paternity Fraud Rampant in the US*, WND.COM (Feb. 18, 2006), <http://www.wnd.com/2006/02/34861> (Media reports and organizations dedicated to revealing “paternity fraud” estimate the rate at from fourteen percent to as high as thirty percent); *See also* PATERNITYFRAUD.COM, www.paternityfraud.com (last visited Jan. 4, 2014).

¹⁹¹ *See* Ruth Zafran, *Dying to Be A Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL’Y 47, 71–74 (2007) (discussing the “genetic model”).

¹⁹² Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 253–57 (1995); *see also* Simpson, *supra* note 14, at 9.

¹⁹³ Jane Alfred, *Flagging Non-Paternity*, 3 NATURE REV. GENETICS 161, 161 (2002). It is difficult to know whether this rate is accurate. The American Association of Blood Banks, the only organization in the US to collect information about relationship genetic testing from approved laboratories, suggests in its 2010 annual report (the latest available) that the average exclusion rate of paternal relationships is 20.44% with a standard deviation of 6.62. RELATIONSHIP TESTING PROGRAM UNIT, AABB, ANNUAL REPORT SUMMARY FOR TESTING IN 2010 3 (2010), *available at* <http://www.aabb.org/sa/facilities/Documents/rtannrpt10.pdf>. However, this percentage includes testing following a mother’s request to determine who among a few possible men is the father; it also includes testing after the recognized man raises a question of infidelity, after which a few other possible men are tested, leading the organization to conclude that “[t]here is no evidence that a large number of the men excluded in the testing were misled into believing they are the biological father of a given child.” *Id.* at 4; *See also* Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Paternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 515 (2006); S. Macintyre & A. Sooman, *Non-Paternity and Prenatal Genetic Screening*, 338 LANCET 869, 869–70 (1991).

¹⁹⁴ José Gabilondo, *Heterosexuality as a Prenatal Social Problem: Why Parents and Courts Have a Taste for Heterosexuality*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 118, 124, 129 n.43 (Michele B. Goodwin ed., 2010); Susan Golombok, et al., *Families Created by the New Reproductive Technologies: Quality of Parenting and*

case of posthumously conceived children, especially when the deceased has clearly provided consent. Thus, from a child's perspective, judicial decisions denying parentage acknowledgement is the worst of all worlds. Such decisions lean on genetics, which is not as relevant for children and which would exclude posthumously conceived children born to non-traditional family structures from having an established parentage. Simultaneously, they do not take seriously children's emphasis on the importance of their parentage relationships, which children construe as a matter of being planned and wanted.

A more responsive approach would be to enable acknowledgment of the parental status of deceased spouses—even if such registration would not change the ensuing inheritance rights.¹⁹⁵ Such acknowledgement is especially appropriate given that such children are likely to know their story of conception and to inquire, and hear about, their genetic parents.¹⁹⁶ Indeed, studies on the process of grief and mourning suggest that in reality the dead continue to occupy a significant social and domestic space; in both traditional and Western societies, “the living continue to be in dialogical contact with the dead.”¹⁹⁷ Parentage acknowledgement would also correspond better with states' international obligations under international law. Articles 7 and 8 of the CRC explicitly require that regardless of status, a child is “registered immediately after birth, along with a right to a name and the right to preserve his or her identity, including name and family relations.”¹⁹⁸ Moreover, as the High Court in London declared in its judicial resolution of Ms. Blood's second suit requesting parental registration, registering children born posthumously to a woman from the sperm of her deceased husband as fatherless, was contrary to the right to privacy and family life, as well as the right to found a family under Articles 8 and 12 of the European Convention on Human Rights and Fundamental Freedoms.¹⁹⁹ Parental acknowledgement and registration will at least narrow the child's familial dissonance.

B. Family Structures

Another domain of legal argument over posthumously conceived children is family structure. Specifically, scholars and judicial opinions have argued that because a widow inherently acts out of sorrow and grief, she will not be able to

Social and Emotional Development of the Children, 66 CHILD DEV. 285, 297 (1995); Dena Moyal & Carolyn Shelly, *Future Child's Rights in New Reproductive Technology: Thinking Outside the Tube and Maintaining the Connections*, 48 FAM. CT. REV. 431, 433 (2010); Zaira Papaligoura & Colwyn Trevarthen, *Mother-Infant Communication Can be Enhanced after Conception by In-Vitro Fertilization*, 22 INFANT MENTAL HEALTH J. 591, 591 (2001).

¹⁹⁵ See discussion *infra* Part IV(d). Yet, as argued below, I suggest that posthumously conceived children should be eligible also for the inheritance and social benefits. See discussion *infra* Part IV(d).

¹⁹⁶ Pobjoy, *supra* note 6, at 462–63.

¹⁹⁷ Simpson, *supra* note 14, at 12; see also Ueda et al., *supra* note 53, at 294–95 (discussing the support for posthumous conception among Japanese students because of “intimacy across the border between life and death” and the Japanese views on afterlife).

¹⁹⁸ Convention on the Rights of the Child, *supra* note 67, at Art. 7–8.

¹⁹⁹ See 25 Apr. 2001, PARL. DEB., H.C. Standing Committee G (2001) (U.K.), available at <http://www.publications.parliament.uk/pa/cm200001/cmstand/g/st010425/am/10425s01.htm>.

provide a child with a stable and loving environment.²⁰⁰ They have also suggested that growing up with both parents is preferable to growing up in a single-parent household,²⁰¹ not least because of possible financial hardship and the effects of poverty on the child's development.²⁰² Others have further stressed the negative psychological impact that such a non-traditional conception story might have on a child (as has been documented with children who were orphaned before knowing their parent) and charge that it is simply wrong to bring into the world a parent-less child.²⁰³

Although these arguments seemingly aim to advance children's interests, caution is needed. First, from a legal standpoint, the presumption of a universal, ultimate family structure for the child cannot hold. While the CRC pays great attention to the importance of the familial environment to the child, it does not limit the definition of the family to the traditional structure of a mother and a father.²⁰⁴ Rather, it allows for pluralism in family relations, requiring states to "respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community . . ."²⁰⁵ Second, worry over possible financial hardship cannot justify an automatic dismissal of requests for posthumous conception. At least some single parents can certainly provide a comfortable economic environment for the child,²⁰⁶ and the practice of relying on assistance (financial and other) from extended family varies across cultures. In contrast to American and German individualist cultures,

²⁰⁰ Sorin Hostiuc & Christian George Curca, *Informed Consent in Posthumous Sperm Procurement*, 282 ARCHIVES GYNECOLOGY & OBSTETRICS 433, 436 (2010); Hunfeld et al., *supra* note 28, at 284; Katz, *supra* note 13, at 309–10; *see also* *MAW v W. Sydney Area Health Serv.* [2000] NSW 358; 49 NSWLR 231 (Austl.); *In the matter of Gray* [2000] QSC 390, ¶ 23 (Austl.); *supra* Part III.

²⁰¹ *See* Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7 (Japan).

²⁰² Fiona MacCallum & Susan Golombok, *Children Raised in Fatherless Families from Infancy: A Follow-up of Children of Lesbian and Single Heterosexual Mothers at Early Adolescence*, 48 J. CHILD PSYCHOL. & PSYCHIATRY 1407, 1407 (2004); Williams, *supra* note 153, at 195.

²⁰³ Ruth Landau, *Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and Psychological Critique*, 19 HUM. REPROD. 1952, 1953 (2004); Hostiuc & Curca, *supra* note 200, at 436; Antall, *supra* note 29, at 220–21. *See also* *Case to Seek Acknowledgement*, 60 MINSHŪ 7.

²⁰⁴ Convention on the Rights of the Child, *supra* note 67, at pmb., Arts. 2–3, 5, 7–10, 14, 16, 18, 20–23; Sabatello, *supra* note 30, at 82; *see also* *Astrue v. Capato*, 132 S. Ct. 2021, 2030 (2012); Pobjoy, *supra* note 6, at 464 (making a similar point).

²⁰⁵ *See* Convention on the Rights of the Child, *supra* note 67, at Art. 5.

²⁰⁶ Given the expenses associated with assisted reproductive technologies in the US and Japan (unlike some other countries where such services are provided by the national healthcare system), it is also likely that low-income women will not have access to such procedures. Mayeda, *supra* note 55, at 15; Williams, *supra* note 153, at 195; *see also* *From Sorrow to Surrogacy*, *supra* note 53; Pulya, *supra* note 53. The children born to the grandmother who used her son's sperm through two surrogates were cared for by the grandmother, her sister and a nanny. Pulya, *supra* note 53.

Israeli society, for instance, sees none of the family members as truly independent. The child and the future child are seen as part of a collective whole, characterized by mutual dependence and with duties and responsibilities towards one another.²⁰⁷ Similarly, in cases where a child's father dies young, Iran's civil law transfers the responsibility for the child to the grandfather or uncle,²⁰⁸ suggesting that the extended family is invested in each child. Moreover, familial circumstances and subsequent financial improvement or hardship may occur in all kinds of families. For instance, divorcing parents (especially mothers) often experience a drop in financial stability and resources.²⁰⁹ By the same token, a surviving parent may well develop a new, more profitable, career path, or find another life partner—scenarios that are likely to improve the financial situation of the family unit. Discerning beforehand what the economic environment will be is thus often mere guesswork. Besides, as Justice Alon stated in *NFO*, many children are born into difficult conditions even when they have a traditional family structure, and the resolution of such instances²¹⁰ should be to provide assistance and support rather than prohibit procreation.

Finally, and again, courts must bear in mind that children have valid perspectives on family structures. Studies with children consistently show that the child's development is not negatively affected by a particular family structure—whether it is traditional, single parent, or same-sex household.²¹¹ Simultaneously, children of divorcing or separated parents show poorer psychological adjustment and higher incidents of behavioral problems and coping with transition to adulthood than children whose fathers have died.²¹² Children further do not view their family structure as wronging them in any way,²¹³ and in fact, children have shown to be quite creative in their approach to kinship. Unlike adults who often frame familial structures as right or wrong, good or bad, children are particularly adept at developing strategies to comprehend complex family relationships.²¹⁴ Moreover, children's creativity has the potential to open up adult understanding of family forms

²⁰⁷ Yael Hashiloni-Dolev & Shiri Shkedi, *On New Reproductive Technologies and Family Ethics: Pre-implantation Genetic Diagnosis for Sibling Donor in Israel and Germany*, 65 SOC. SCI. & MED. 2081, 2087 (2007) (discussing differences between Israeli and German societies); see also Daphna Birenbaum-Carmeli, *The Politics of 'The Natural Family' in Israel: State Policy and Kinship Ideologies*, 69 SOC. SCI. & MED. 1018, 1019 (2009).

²⁰⁸ Reza Omani Samani et al., *Posthumous Assisted Reproduction from Islamic Perspective*, 2 INT'L J. FERTILITY & STERILITY 96, 98 (2008). Whether an embryo or a pre-implantation embryo is considered a child is beyond the scope of this essay.

²⁰⁹ MacCallum & Golombok, *supra* note 202, at 1407.

²¹⁰ 13530/08 Family Court (Krayot), *New Family Org. v. Rambam Med. Ctr.* (2009) ¶ 5.2 (Isr.).

²¹¹ Sozos J. Fasouliotis & Joseph G. Schenker, *Social Aspects in Assisted Reproduction*, 5 HUM. REPROD. UPDATE 26, 28 (1999).

²¹² MacCallum & Golombok, *supra* note 202, at 1047; see also Pobjoy, *supra* note 6, at 465, 467 (discussing whether two parents are better than one).

²¹³ Moyal & Shelley, *supra* note 194, at 436.

²¹⁴ Jennifer Mason & Becky Tipper, *Being Related: How Children Define and Create Kinship*, 15 CHILDHOOD 441, 441 (2008).

where existing kinship vocabulary is inadequate.²¹⁵ Thus, if we are concerned about the welfare and best interests of posthumously conceived children, further emphasis should be on what is most important for them—as it is for all other children—that is, that they enjoy loving and caring familial relationships.

C. Identity Harm

A third argument commonly raised in court cases on posthumously conceived children concerns identity. Notwithstanding provisions in the CRC requiring states to preserve the identity of a child (Article 8), some courts have suggested that a posthumously conceived child is likely to experience identity dilemmas due to the expectation that he or she take the place of the deceased parent and serve as the deceased's "memorial candle."²¹⁶

Certainly, there is something to this argument. In the *MAW* case, Justice O'Keefe expressed deep concern over the applicant's statement in her affidavit that "I feel that I can't live without my husband and this [harvesting his sperm] is giving me the opportunity to have at least part of him still with me."²¹⁷ This concern is especially valid when parents of the deceased are the ones to pursue the harvesting of gametes and their use. The mother of a man, who died in military service and who requested the posthumous harvesting of his sperm for the purpose of having a grandchild, expressed to an interviewer her sense of tragedy upon his death that he would be buried and nothing of him would be left to her.²¹⁸ She was quoted stating,

Just as I am my parents' roots, he [the deceased] is mine. With all his beauty—both externally and internally—and with all his good genes . . . [and given that I have his sperm], people expect that I destroy the potential of having a grandchild from my son? Sperm is life, it gives life, it is the origin for a whole person.²¹⁹

Similarly, the Russian grandmother whose grandchild the authorities requested sending to an orphanage said, "Gosha [the grandchild] is a perfect copy of my [dead] son. Now I face losing it all again."²²⁰

But, whether this arguable harm justifies a prohibition is questionable. Procreation is often regarded as a natural desire to "continue the family line" and a desire to leave a piece of oneself behind. As Rebecca Collins points out, reproduction provides "philosophical or even spiritual comfort to them to know that a part of them will continue to live on, that somehow they will be able to 'beat'

²¹⁵ *Id.*

²¹⁶ Ruth Landau, *Planned Orphanhood*, 49 SOC. SCI. & MED. 185, 188 (1999).

²¹⁷ *MAW v W. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 231, ¶¶ 20, 22 (Austl.).

²¹⁸ Eti Abramov, *I Will Fight Until I have a Grandchild from my Dead Son*, YEDIOT AHARONOT, February 8, 2013 (translated from Hebrew).

²¹⁹ *Id.*

²²⁰ Leidig, *supra* note 20, at 627.

death.”²²¹ Parental expectation that a child will internalize and reflect pieces of oneself is therefore not in and of itself unique to posthumous conception. Moreover, while identity is increasingly recognized in legal discourses,²²² a suggestion that certain kinds of procreation should be prohibited on the basis of “identity harm” raise the question: which identities should be protected—or avoided?

Arguments about the harm to one’s identity have been raised in discussing other assisted reproductive technologies. These include genetic selection against or for disability, sex selection (commonly on the basis of son preference), and savior sibling scenario in which doctors attempt to select for implantation in the woman’s womb a pre-embryo whose genetic tissue composition matches the one of an existing sick sibling for the purpose of being a cell donor. The common thread among these scenarios is the suggestion that by so selecting, a parent or doctor imposes an identity on a child—whether it is a disability-related identity, a fixated gender-identity, or a donor-identity which is arguably characterized by anxiety, lesser sense of worth, and living in the shadow of the ill sibling, regardless of his or her other characteristics and interests.²²³ Scholars and courts have also considered concerns about the harm to children’s identity in gamete donation, where the identity of the donor is unknown.²²⁴ In this regard, scholars have drawn on accounts of the experiences of identity bewilderment among adopted children separated from their

²²¹ Rebecca Collins, *Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma*, 30 J. MED. & PHIL. 431, 435 (2005).

²²² See, e.g., the set of conventions on human rights and biomedicine adopted at the European level that explicitly link, for the first time in an international human rights instrument, biomedicine, human rights, and identity. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine art. 1, *opened for signature* Apr. 4, 1997, E.T.S. No. 164 (entered into force Dec. 1, 1999), <http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm> [hereinafter Oviedo Convention]; Additional Protocol to the Convention on Human Rights and Biomedicine Concerning Transplantation of Organs and Tissues of Human Origin art. 1, *opened for signature* Jan. 24, 2002, E.T.S. No. 186 (entered into force May 1, 2006), <http://conventions.coe.int/Treaty/EN/Reports/Html/186.htm>; Additional Protocol to the Convention on Human Rights and Biomedicine, Concerning Biomedical Research art. 1, *opened for signature* Jan. 25, 2005, C.E.T.S. No. 195 (entered into force Sept. 1, 2007), <http://www.conventions.coe.int/Treaty/EN/Treaties/Html/195.htm>.

²²³ Mark P. Aulisio et al., *Procreation for Donation: the Moral and Political Permissibility of “Having a Child to Save a Child,”* 10 CAMBRIDGE Q. HEALTHCARE ETHICS 408, 413–17 (2001); Michele Goodwin, *My Sister’s Keeper: Law, Children, and Compelled Donation*, 29 W. NEW ENG. L. REV. 357, 364, 371 (2007); Mianna Lotz, *Procreative Reasons-Relevance: On the Moral Significance of Why We Have Children*, 23 BIOETHICS 291, 296 (2009).

²²⁴ See 13530/08 Family Court (Krayot), *New Family Org. v. Rambam Med. Ctr.* (2009) (Isr.); see also *X, Y and Z v. United Kingdom*, App. No. 21830/93, 24 Eur. Ct. H.R. 143 (1997). The ECHR denied the joint request of a social family comprised of a biological mother, a female-to-male transgender father, and an anonymous donor-IVF child that the (new) man be registered as the father of the child *inter alia* on the basis of the lack of consensus among EU members concerning the right of donor-conceived child to know the donor’s identity. *Id.* at ¶ 44.

biological parents, concluding that donor-conceived children will have similar experiences.²²⁵

These are important concerns and they should be taken seriously, especially with respect to adopted children where there is mounting evidence as to their sense of loss. However, a few points should be highlighted. The first one is that all identities are complex and evolving. They are also not fixed. Multiple factors—family relations, peers, one’s socio-cultural milieu as well as general environment—play an even greater role than genetics in the formation of a child’s (and adult’s) identity.²²⁶ Studies with children further show that, they have fluid and plural identities, and regardless of family structure—traditional, single parent or same-sex families—their process of identity formation is similar.²²⁷ Conversely, children’s identity construction is significantly influenced by an exclusionary social attitude which sets them apart. That is, societal attitudes that children with disabilities, girls, adopted children, or father-absent families are different—not genetics—would influence them the most.²²⁸ Thus, if we are concerned about the identity of posthumously conceived children, the focus should be on how to create an inclusive society, where such children enjoy equal rights, rather than singling them out as a “new special category” of children or dismissing them as parentless or without identity at all.²²⁹

D. Inheritance and Social Benefits

A final argument over posthumously conceived children is whether they should be eligible for inheritance and social benefits. As mentioned earlier, this concern has been debated especially in the United States²³⁰—an unsurprising result of the fact

²²⁵ Olga van den Akker, *A Review of Family Donor Constructs: Current Research and Future Directions*, 12 HUM. REPROD. UPDATE, 91, 96 (2006); Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 16–17 (2008); A. McWhinnie, *Gamete Donation and Anonymity: Should Offspring from Donated Gametes Continue to Be Denied Knowledge of Their Origins and Antecedents?*, 16 HUM. REPROD. 807, 814 (2001).

²²⁶ Yoon-Mi Hur & Thomas J. Bouchard, Jr., *Genetic Influences on Perceptions of Childhood Family Environment: A Reared Apart Twin Study*, 66 CHILD DEV. 330, 341 (1995); Ingmar Persson, *Genetic Therapy, Identity and the Person-Regarding Reasons*, 9 BIOETHICS 16, 22 (1995).

²²⁷ Fasouliotis & Schenker, *supra* note 211, at 28.

²²⁸ Mark Deal, *Disabled People’s Attitudes Toward Other Impairment Groups: A Hierarchy of Impairments*, 18 DISABILITY & SOC’Y 897, 899 (2003); MacCallum & Golombok, *supra* note 202, at 1415; *see also* Zoebia Ali, et al., *Disability, Ethnicity and Childhood: A Critical Review of Research*, 16 DISABILITY & SOC’Y 961 (2001).

²²⁹ *MAW v W. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 231, ¶ 43 (Austl.); Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7 (Japan); Leidig, *supra* note 20, at 627; *see also* Pobjoy, *supra* note 6, at 466-67 (making a similar point).

²³⁰ For some of the scholarly work on this issue, *see*: Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579 (2005); David Shayne & Christine Quigley, *Defining ‘Descendants’: Science Outpaces Traditional Heirship*, 38 EST. PLAN. J. 14 (2011); John Doroghazi, Note, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597

that all cases concerning posthumous conception in the country, including the decision of the Supreme Court in the *Capato case*, revolved around these issues. A comprehensive discussion about them is beyond the scope of this essay. However, three brief points are salient.

First, as courts commonly note, the state has a legitimate interest in the orderly administration of estates. This interest is further increasingly complex given that many parties may be legitimate beneficiaries of the estate, not least because of the changes in family structures including, as the *Woodward* Court points out, “serial marriages, serial families, and blended families.”²³¹ Yet, an automatic exclusion of posthumously conceived children from inheritance cannot hold, and it is possible to create a more inclusive scheme for the distribution of such assets. As the Manitoba Law Reform Commission in Canada correctly expressed with respect to inheritance rights of posthumously conceived children, the values of inclusion outweigh the value of “administrative convenience, simplicity and efficiency.”²³² Given that it is recommended that a recently widowed individual wait to proceed with fertility treatment until a certain grieving period has passed,²³³ it should be possible to extend the time period for inheritance rights beyond the traditional three hundred day period.²³⁴ The time extension should also take into account that pregnancy may not

(2005); Greenfield, *supra* note 16; Alycia Kennedy, Note, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C. L. REV. 821 (2013); Amy L. Komoroski, Comment, *After Woodward v. Commissioner of Social Services: Where Do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297 (2002); Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001 (2002); Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963 (2003); Susan C. Stevenson-Popp, Comment, *“I Have Loved You in My Dreams”: Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U. L. REV. 727 (2003); Suppon, *supra* note 161.

²³¹ *Woodward v. Comm’r Soc. Sec.*, 760 N.E.2d 257, 266 (Mass. 2002). This was also an issue in the case of *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 26777 (Cal. Ct. App. 1993): although the deceased (who committed suicide) left a will where he requested that his girlfriend be granted his sperm for the purpose of procreation, his children from a previous marriage opposed her request to use the gamete.

²³² *Posthumously Conceived Children: Intestate Succession and Dependents Relief*, MANITOBA L. REFORM COMMISSION 16 (Nov. 2008), http://www.manitobalawreform.ca/pubs/pdf/118-full_report.pdf.

²³³ In Victoria (Australia) and the United Kingdom, the laws regulating posthumous conception require that fertility treatments are not provided immediately after the death and that counseling is provided before the medical procedure takes place. See discussion *supra* Part I.

²³⁴ LEWIS, *supra* note 15, at 113–14. See in this regard recent legal developments in Province of British Columbia Wills, Estates and Succession Amendment Act, S.B.C. 2011, pt. 2, sec. 8.1 (Can.) (entering into force Mar. 31, 2014), available at <http://www.ag.gov.bc.ca/legislation/wills-estates-succession-act/pdf/WESAExplanation.pdf>, which will enable posthumously conceived children to inherit as other children within a certain time limitation. ALBERTA LAW REFORM INST., *supra* note 4, at 17–28. See also the recommendations of the MANITOBA LAW REFORM COMMISSION, *supra* note 232, at 31–32 (recommending the

immediately be achieved.²³⁵ Indeed, as the *Woodward* court points out, “the one-year limitations period . . . may pose significant burdens on the surviving parent, and consequently on the child.”²³⁶ Thus, while such a scheme may be a more complex process—and may require a case-by-case determination rather than a universal standard—it will be more responsive to the interests of all involved.

Second, in discussing whether a posthumously conceived child is entitled to social security benefits, courts have commonly examined whether the child falls within the scope of a “child” for the purpose of the Social Security Act and whether the child is a “dependent” on the deceased.²³⁷ Both criteria have often been answered negatively: the first, because the biological tie was necessary but insufficient for the determination of parent-child relationship and as death ends the marital status as well as the presumption of a “marital child”;²³⁸ the second, because the posthumously conceived child could not, practically, enjoy the benefits of his deceased parent’s support during the lifetime of the parent.²³⁹ In practice, however, as both the *Woodward* and *Gillett-Netting* courts emphasized, neither of these criteria are set in stone. The marital requirement is not essential when recognizing parentage,²⁴⁰ and all children are dependent.²⁴¹ Moreover, given that the deceased’s

amendment of laws pertaining to inheritance and dependant benefits to include posthumously conceived children when certain criteria are met).

²³⁵ Success rates for IVF treatment vary depending on the age of the woman, her general health, and other factors. Further, the likelihood of conception following ART is estimated to be about thirty–thirty-five percent per cycle for women under the age of thirty-five; most women need more than one cycle to conceive. The likelihood decreases with age—women older than forty-four who use their own eggs have only a one percent live birth rate. Daar, *supra* note 13, at 18, nn. 54 & 56. See also *In Vitro Fertilization: IVF*, AM. PREGNANCY ASS’N, <http://www.americanpregnancy.org/infertility/ivf.html> (last updated May 2007). Additionally, the cost of a single cycle of IVF in the US is \$10,000 on average, though it can be twice as much depending on the clinic. Daar, *supra* note 13, at 20. Medications and any other procedures, such as screening for disability, PGD, etc., add other expenses. See *Selecting Your Assisted Reproductive Technology Program*, AM. PREGNANCY ASS’N, <http://americanpregnancy.org/infertility/selectingartprogram.html> (last updated April 2012).

²³⁶ *Woodward v. Comm’r Soc. Sec.*, 760 N.E.2d 257, 268 (Mass. 2002).

²³⁷ See cases cited, *supra* note 54.

²³⁸ See discussion, *supra* Part I.

²³⁹ Takamatsu Kōtō Saibansho [Takamatsu High Court] July 16, 2004, Case to Seek Acknowledgement, 2004 (Ju) No. 1748, 60 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 7, ¶4 (Japan) (Takii Shigeo, J., ¶2) (Imai Isao, J., ¶3); *MAW v. Sydney Area Health Serv.* [2000] NSWSC 358; 49 NSWLR 231, ¶43 (Austl.); *Stephen v. Comm’r Soc. Sec.* 386 F. Supp. 2d 1257, 1258 (2005); *Astrue v. Capato*, 132 S. Ct. 2021, 2029–30 (2012) (tying between the expiration of marriage at death and who is considered a “marital” child); *In re Certified Question from the U.S. District Court, W.D. of Michigan*, 825 N.W.2d 566, 570 (Mich. 2012); *Khabbaz v. Comm’r, Soc. Sec. Admin.* 930 A.2d 1180, 1182–84 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849, 852–54 (Ark. 2008); *Vernoff v. Astrue* 568 F.3d 1102, 1110–12 (9th Cir. 2009).

²⁴⁰ See *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596–97 (9th Cir. 2004); *Woodward*, 760 N.E.2d at 266–67.

²⁴¹ *Gillett-Netting*, 371 F.3d at 598.

consent for posthumous conception is required (whether by law²⁴² or medical practice)²⁴³ and that child's social security benefits are based on the deceased's earnings during his or her lifetime, the primary beneficiary of excluding posthumously conceived children is the governmental insurance fund responsible for the distribution of payments.²⁴⁴ This cannot be an acceptable—and is certainly not the only possible—solution.

Finally, in most instances, both inheritance and social security benefits are unlikely to be unbearably complex or burdensome. With respect to inheritance, the life-partner of the deceased or his or her parents are those who commonly inherit from the deceased. And especially when the extended family supports the posthumous conception, they clearly also express their interest that the resulting child continues the 'family line' including by inheritance. The legal acceptance of such arrangements should thus not stand in the way of the child. Similarly, with respect to social security benefits, although the number of requests for posthumous conception has increased,²⁴⁵ the number of children born as a result is overall very low.²⁴⁶ It is also unlikely to become a prevalent or preferable way for procreation. There is therefore no risk that extending it to all posthumously conceived children will deplete external sources. Indeed, generosity would be the just response.

V. CONCLUSION

Although the issue of posthumously conceived children has received much media and popular attention in the past few years, a conversation about the welfare and best interests of posthumously conceived children has been suspiciously missing from the discourse. As I have shown, this neglect has extended to judicial decisions on this issue. However, given that the phenomenon of posthumously conceived children is not likely to disappear anytime soon—indeed, it is likely to increase—it is important that we recapture the conversation. Including children's perspectives either through research with posthumously conceived children themselves if they are already sufficiently old or from studies with children in seemingly comparable cases is essential. Ultimately, posthumously conceived children place the utmost importance on the relationships around them, both real and abstract; the adults helping to resolve their dilemmas should take a more relational approach to their welfare and best

²⁴² See discussion, *supra* Part I.

²⁴³ Fertility clinics in the US require it. See also recommendations by the ASRM: *Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion*, ETHICS COMM., AM. SOC'Y FOR REPROD. MED. 2 (2013), http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/posthumous.pdf.

²⁴⁴ Note that the argument of children born to the deceased from a previous marriage/relationship, who object to the recognition of posthumously conceived children as additional dependents, is weak. The deceased is the one who earned the benefit, and once s/he consents to the posthumous conception, his or her wish should be respected. Put differently, also with inheritance—existing children have no right to inherit more than what they are owed.

²⁴⁵ See sources cited, *supra* note 152 and accompanying text.

²⁴⁶ Razieli, *supra* note 63, at 2693–95 (reporting that most of the harvested gametes are ultimately not used); see also *supra* text accompanying note 156.

interests. This is also the only way that all children, including posthumously conceived children, will have a fair and equal chance in life.