

INHERITANCE AND THE POSTHUMOUSLY CONCEIVED CHILD

Posthumously Conceived Children; Inheritance; Maintenance; Wills; Intestacy

Preliminary

A child may be born after the death of its natural father. That has always been the case. Modern advances in technology now create a new possibility and a child may be both conceived and born after the death of its father. This creates many legal complexities and uncertainties, one of which relates to the posthumously conceived child's capacity to inherit from the deceased father's estate. This article examines the novel legal questions that arise in relation to such children and succession. In particular, the extent to which sperm is inheritable, the obstacles faced by posthumously conceived children in inheriting from the natural father and the circumstances when a duty to provide for the child from the estate will arise.

Posthumous Reproduction

As noted, advances in biotechnology and cryopreservation have made it possible for a man to father a child some time after he has died.¹ Such children may be conceived utilising Artificial Reproductive Technology (hereinafter referred to as ART) with frozen ejaculate sperm harvested before the father's death, or with sperm obtained by posthumous sperm retrieval from the corpse soon after the death. Posthumous conception is ethically controversial and has been banned by some countries (France, Germany, Sweden and Canada), and allowed in others, such as the UK, if there is explicit pre-mortem consent to the procedure.² Less restrictive regimes exist and it is possible to utilise the procedure in Belgium and the United States without the

¹ See G. Bahadur, "Death and conception" [2002] 17 *Human Reproduction* 2769; B.M. Star, "A Matter of Life and Death: Posthumous Conception" [2003] 64 *La. L. Rev.* 613; C.A. Scharman, "Not Without My Father: The Legal Status of the Posthumously Conceived Child" [2002] 55 *Vand. L. Rev.* 1001.

² K. Tremellen and J. Savulescu, "A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception" [2015] 30 *Reproductive Biomedicine Online* 6, at 7.

deceased's prior written consent, while Israel has the most liberal regime freely allowing posthumous sperm retrieval and the transfer of pre-embryos at the widow's request.³

Opponents of posthumous conception contend that it is undesirable to conceive children who have no possibility of a social relationship to their genetic father and argue that deliberately creating a single parent household is harmful to the child.⁴ Pre-conception legal controversies focus on the extent to which sperm can be considered 'property' for the purposes of succession law (and thus who could inherit them after death),⁵ and on the nature of the consent necessary for posthumous sperm retrieval and use in a subsequent ART procedure. Post-conception disputes concern filiation (can the deceased genetic parent be the legal parent?) and inheritance rights against the deceased father's estate. These two questions overlap, but they are not identical. It is possible to be the legal parent of a child, and yet that child may have no entitlement to inheritance as against that parent.

Sperm as Inheritable Property?

The question as to whether sperm is capable of passing by succession has been the subject of some notable litigation.⁶ Typically, a widow or surviving partner of the deceased seeks control of his frozen sperm samples with a view to using them for the purposes of conception.⁷ Notwithstanding doubts as to whether sperm is appropriately an object of property,⁸ such claims have generally been successful. The finding that sperm may be inheritable property has been based alternatively on the fact that the donor exerted control over it after it left his body

³ Tremellen and Savulescu, "Presumed Consent" [2015], p. 7.

⁴ Bahadur, "Death and Conception" [2002], p. 2772. Although, as Robertson points out, this is hardly persuasive as the alternative is for the child not to exist (since the acts that are stated to be harmful to the child are those that bring it into existence): J.A. Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, USA: Princeton University Press, 1994), pp. 120-122; J.A. Robertson, "Posthumous Reproduction" [1993] 69 *Indiana Law Journal* 1027.

⁵ *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 289 (Cal. Ct. App. 2d 1993); G.A. Katz, "Parpalaix c. CECOS: Protecting Intent in Reproductive Technology" [1997] 11 *Harvard Journal of Law & Technology* 683.

⁶ *Hecht v. Superior Courts of Los Angeles County* (1993) is the most famous case but there is an earlier French case on the issue *Paraplaix v. CECO* discussed by J.A. Robertson, "Posthumous Reproduction" (1994), pp. 1038-1039. See also: D.A. Rameden, "Frozen Semen as Property in *Hecht v. Superior Court*: One Step Forward: Two Steps Backward" [1993] 62 *UmKc Law Review* 377.

⁷ See also the Australian cases of *Bazley v. Wesley Monash IVF Pty Ltd* [2010] Q.S.C. 118; *Estate of the Late Mark Edwards* [2011] N.S.W.S.C. 478; *Re H, AE (No 2)* [2012] S.A.S.C. 177; *Re H, AE (No 3)* [2013] S.A.S.C. 116.

⁸ J. Wall, 'The Trespasses of Property Law' [2013] *J. Med Ethics* 1.

and prior to his death,⁹ or that the sample had been extracted by the ‘work and skill’ of a physician acting as the agent of the widow.¹⁰

These cases do not establish that sperm samples are property for all purposes. It seems likely that any inheritable interest that exists in a frozen sperm sample is a more limited form of property. Thus, its owner cannot exercise all of the standard incidents set down in Honoré’s famous conception of ownership.¹¹ For instance, transmissibility allows an owner to transmit his interest in property without fetter.¹² To admit that one has ‘full-blooded ownership’ of the sperm received via succession (i.e. its owner can enjoy all of the standard incidents of ownership) would be to admit that a widow could make *any* use she wished of the samples. She would be free to sell or gift them to anyone she wished, irrespective of the wishes of the deceased.

For example, in the leading case of *Hecht v Superior Court*, the deceased had left express written instructions that the samples be used by his partner. Nonetheless, the probate court ordered the samples to be deposited as residual assets of the estate pursuant to a scheme of arrangement between the deceased’s girlfriend and surviving children in a 20:40:40 division. The appeal court, perhaps realising the mischief that might arise, changed its view and held the samples to be the property of the deceased’s girlfriend for the purposes of procreation.¹³

In light of this, it is of note that Honoré expressly contemplates a right of transmissibility limited to the ‘first, second or third generation of transmitters’, although he does not elaborate the circumstances where it would be appropriate to impose this restriction.¹⁴ Perhaps the right to any sperm sample received by succession should be limited to transmission to one specified person only (e.g. the widow) for limited purposes (use or destruction), not unlike the quasi-property rights next-of-kin enjoy over dead bodies to ensure their prompt burial.¹⁵

⁹ *Hecht v. Superior Court* (1993); *Bazley v. Wesley Monash IVF Pty Ltd* [2010].

¹⁰ *Estate of the Late Mark Edwards* [2011]; N. Maddox, ‘Property, Control and Separated Human Biomaterials’ [2016] 23 *European Journal of Health Law* 1, at 16-21. The leading authority for recognising property in body parts where they have been altered by the work/skill of the claimant is the Australian case of *Dodeward v. Spence* (1908) 6 C.L.R. 406.

¹¹ A.M. Honoré, ‘Ownership’ in: A.G. Guest, *Oxford Essays in Jurisprudence: a Collaborative Work* (London: OUP, 1961), pp. 107-147.

¹² Honoré, ‘Ownership’ (1961), pp. 120-121.

¹³ For discussion see Maddox, ‘Property, Control and Separated Human Biomaterials’ [2016], pp. 19-21.

¹⁴ Honoré, ‘Ownership’ [1961], at 120-121.

¹⁵ W. Boulier, ‘Sperm, Spleens and Other Valuables: The Need to Recognize Property Rights in Human Body Parts’ (1994) 23 *Hofstra Law Review* 693, at 700.

Obstacles to Inheritance Faced by Posthumously Conceived Children

Express Provision and the Rule Against Perpetuities

Children conceived posthumously face particular obstacles to inheritance from their deceased father's estate. Such children will usually be born into single parent homes, and in many cases it is not fanciful to assume economically disadvantaged as a result.¹⁶ Of course, a parent may expressly provide for such a child in his will, but this is less likely to happen where the death was sudden and unexpected. Furthermore, the parent cannot bequeath insurance or social welfare benefits to a posthumous child. Given that most people who resort to posthumous conception are at an earlier stage of their lives, these may be the only significant assets that they have.¹⁷

There is also the perpetuities problem. Previously, there would be little difficulty with a bequest by a testator such as "to Simon's children who reach twenty-one." Implicit in recognising such a gift as valid is the assumption that all of Simon's children will reach that age within twenty-one years of Simon's death, plus any period of gestation. Given the availability of modern reproductive technology, this is no longer a safe assumption and it is possible for Simon's children to be conceived and born many years after his death. A number of possibilities arise as to the validity of the gift.¹⁸

If Simon dies without fathering any children, but leaves a deposit of frozen sperm, the gift could arguably be struck down under the 'classical' common law rule as there is a possibility it may vest outside the perpetuity period.¹⁹ Alternatively, the gift could be upheld as valid and the possibilities and contingencies created by the new technologies ignored. Given the existence of a "wait and see" jurisdiction, such an approach would save all gifts that vested within twenty-one years from the testator's death, or within the new 125 year period created

¹⁶ H.S. Shapo, "Matters of Life and Death: Inheritance Consequences of Reproductive Technologies" [1997] 25 *Hofstra Law Review* 1091, at 1158. Social Innovation Lab for Kent, *Just Coping: A New Perspective on Low Income Families* (Maidstone, Kent County Council, 2008), p. 12. Although, the considerable expense of such procedures may suggest otherwise: 'I Would Have Given Anything To Have a Baby But What Does IVF Really Cost?' *The Guardian* 29 November 2016 <https://www.theguardian.com/commentisfree/2016/nov/29/given-anything-to-have-baby-ivf-cost> <date accessed 6th December 2016>.

¹⁷ C.A. Sharman, "Not Without My Father: The Legal Status of the Posthumously Conceived Child" [2002] 55 *Vanderbilt Law Review* 1024, at 1026.

¹⁸ R.C. Brashier, "Children and Inheritance in the Nontraditional Family" [1996] *Utah Law Review* 93, pp. 214-218.

¹⁹ C. Harpum, S. Bridge, M. Dixon, *Megarry and Wade: The Law of Real Property*, 8th ed., [London: Sweet and Maxwell, 2012], pp. 317-382.

by the Perpetuities and Accumulations Act 2009.²⁰ The validity of gifts which vest outside the time period is less clear-cut. The new time period of 125 years specified in the 2009 Act commences once the instrument creating it becomes effective, thus will run from the death of the testator if the gift is in a will.²¹ For dispositions prior to 2009 to which the old rule applies, one possibility is that the definition of “lives in being” could be extended for as long a period as the deceased’s frozen sperm remained viable to take account of modern procreative options.²² Such gifts may also be saved by modern “cy pres” jurisdiction.²³ Where provision for prospective children is made by way of trust, either testamentary or *inter vivos*, a stronger argument can be made for the trust’s validity if some other person who is a beneficiary is already born.²⁴

Intestacy, Parentage and What Constitutes Sufficient Express Provision

Intestacy also presents many obstacles to inheritance for the posthumously conceived child. The majority of people die intestate.²⁵ Thus, inheritance rights are dependent on the deceased being recognised as the legal parent of the posthumously conceived child. Normally, the dead are not classed as legal parents, but there is an exception. At common law, a child is presumed to be the legitimate offspring of the deceased if it is born within the normal period of gestation measured from the date of the parent’s death.²⁶ This presumption was developed to ensure that children conceived before the death but born after it could inherit as if they had been born in the lifetime of the deceased.²⁷

In any event, it is unlikely that a posthumously conceived child will be born within this period given the circumstances; namely, the potential mother has just been widowed and the likely legal delays. This was the case with Diane Blood who was involved in some notable litigation to enable her to have her deceased husband’s frozen sperm samples transferred to a clinic in

²⁰ S. 3(1) of the Perpetuities and Accumulations Act 1964.

²¹ S. 6.

²² W.B. Leach, “Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent” [1962] 48 *American Bar Association Journal* 942, at 944.

²³ R. Chester, “Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance” [1996] 33 *Hous. L. Rev.* 967.

²⁴ Chester, “Freezing The Heir Apparent” [1996], p. 983.

²⁵ ‘30m UK Adults Have Not Made A Will’ *The Guardian* 23 October 2010 <https://www.theguardian.com/money/2010/oct/23/making-will-dying-intestate> <date accessed 8 December 2016>. R.J. Kerekes, “My Child ... But Not My Heir: Technology, the Law and Post-Mortem Conception” [1996] 31 *Real Property Probate and Trusts Journal* 213, at 225.

²⁶ William Blackstone, *Commentaries on the Laws of England*, vol. 1, (Oxford, Clarendon Press, 1765), p. 445.

²⁷ Kerekes, ‘My Child ... But Not My Heir’, [1996], p. 214.

Belgium where she could lawfully undergo an IVF procedure with them.²⁸ For the reasons noted, her deceased husband was not their legal father under UK law. This resulted in follow up litigation whereby she contended—successfully—that the law (s.28(6)(b) of the Human Fertilisation and Embryology Act 1990) that allowed the state to refuse to enter the deceased father’s name on the child’s birth certificate was incompatible with Article 8 of the ECHR, the provision which protects private and family life.²⁹ This resulted in the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 whereby children born in such circumstances will have their deceased father’s name entered on their birth certificate as a matter of statutory right.³⁰

Nevertheless, this legal change is merely symbolic and has little substance beyond that.³¹ There are no rights that the child has vis-é-vis the father beyond the entry of the name on the birth certificate. The deceased is not regarded as the legal parent of the child who is thus excluded from claims in intestacy and under the Inheritance (Provision for Family and Dependents) Act 1975. There is good reason for this. In the parliamentary debates on the passage of the 2003 Act, it was expressly acknowledged that the 1990 Act was framed so as to prevent difficulties in winding up estates; Baroness Pitkeathley noted that: “Because sperm can be stored for up to 39 years—although the statutory period is only ten years—there is no doubt that if rights of inheritance or succession were to arise, this could be a substantial problem.”³² Indeed, Baroness Warnock strongly supported the bill notwithstanding the fact that she previously chaired a Committee of Inquiry that had come out strongly against posthumous conception.³³ One of the reasons for this change of mind was the idea that posthumous children would be “lying in wait to be born” and it would be impossible to finalise succession or title if paternity were recognised.³⁴ They had not considered separating the registration of the biological father from legal paternity.³⁵

Implicit in this discussion is the fact that any posthumously conceived children will have no claim against their deceased fathers’ estate in an intestacy, as he will not be deemed their legal

²⁸ *Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 W.L.R. 806.

²⁹ <http://www.independent.co.uk/news/uk/crime/at-last-diane-blood-can-put-the-name-of-her-husband-on-sons-birth-certificate-710510.html> <date accessed 17 January 2017>.

³⁰ Sperm donors are excluded from the acts provisions. s. 1(1).

³¹ S. Sheldon, “Fragmenting Fatherhood: The Regulation of Reproductive Technologies” [2005] 68(4) *Modern Law Review* 523, at 539-540.

³² HL Debates Vol 650 Col 1149 (4th July 2003).

³³ *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) (Cmnd 9314).

³⁴ HL Debates, Vol 650 Col 1151 (4th July 2003).

³⁵ HL Debates, Vol 650 Col 1151 (4th July 2003).

parent. Indeed, outside of the succession issues and the matters covered in the 2003 Act, it is difficult to conceive of the relevance of recognising the deceased's parenthood since he cannot take on any of the responsibilities of fatherhood and be an active participant in his child's life by virtue of his death.³⁶ Some jurisdictions explicitly exclude posthumously conceived children from intestate inheritance, and the child can only inherit if expressly provided for in the father's will.³⁷ However, it is unclear if the testator must make explicit reference to the child's posthumous status in the will for them to inherit, or whether a gift to 'my children'³⁸ would suffice. The cardinal rule of construction is that effect be given to the intention of the testator, the words in the will being given their natural meaning.³⁹ There was a well settled rule, since repealed, that "children" bore the natural meaning "legitimate children".⁴⁰ If an analogous interpretation were favoured by the courts, it would exclude a posthumously conceived child benefiting from any gift the testator makes simply to his "children." If this interpretation were adopted, a testator would have to expressly identify posthumous children as being the intended recipients of the gift for it to pass.

Certain jurisdictions recognise the person who has provided genetic material as the legal parent if that person consented in writing to use of his genetic materials.⁴¹ Such a requirement may specify that consent to the *posthumous* use of the material be obtained,⁴² while others only require consent to the use of the material for reproduction (normally by the surviving spouse).⁴³ A time limit is also imposed whereby the child must be born or be in utero within a specific period after the father's death in order for him to be the legal parent.⁴⁴ Such time limits will likely solve any difficulties with estate administration, but clearly any child born too late would lose any claim against the natural father's estate.

³⁶ R.C. Brashier, "Children and Inheritance in the Non-Traditional Family" [1996], at 213-214.

³⁷ In the United States: Florida, North Dakota and Georgia expressly preclude intestate succession by a child conceived after the father's death, while the effect of Ohio's statutes, although not expressly precluding intestate succession in such circumstances, is likely the same: S.N. Gary, "Posthumously Conceived Heirs: Where the Law Stands and What To Do About It Now" [2005] 19 Probate and Property 32, at 34.

³⁸ Gary, "Posthumously Conceived Heirs" [2005] at 34.

³⁹ Dixon *et al*, *Megarry and Wade* [2012] para 14.070-14.099.

⁴⁰ Dixon *et al*, *Megarry and Wade*, [2012] para.14.070-14.099.

⁴¹ In the U.S., the Uniform Parentage Act 2002 contains such a provision and has been adopted by ten States: Uniform Law Commission, *Parentage Act* <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act> <date accessed 7th December 2016>. Gary, "Posthumously Conceived Heirs" [2005] p. 34.

⁴² UPA Act 2002.

⁴³ Such as in Louisiana: Gary, 'Posthumously Conceived Heirs', [2005], p. 34.

⁴⁴ In California, for example, the child must be in utero within two years of the father's death, whereas Louisiana states that the child must be born within three years of the death: Gary, "Posthumously Conceived Heirs" [2005] p. 34.

A Duty to Provide For Posthumously Conceived Children by Will?

Blackstone's 'Voluntary Creation of Need'

It is unlikely that a child has a broad legal 'right' to inherit from a parent.⁴⁵ Blackstone believed it to be a civil right rather than a natural right.⁴⁶ Nevertheless, if one concedes that such a moral claim exists, it rests surely on the idea of not allowing one's dependents become destitute: "that stock picture of anguish, the starving widow and her brood of orphans" as one commentator describes it.⁴⁷ Mill argued that the only justifiable claim a child has against his parents is for education and training to prepare for a successful life.⁴⁸ As human beings, we bear moral responsibility for our voluntary acts that impact upon the lives of others.⁴⁹ This is clearly evident in the moral duty that parents owe to the children they have brought into the world. Of this, Blackstone noted:

The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature itself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed will be supported and preserved. Thus, the children will have the perfect right of maintenance against their parents.⁵⁰

Although Blackstone viewed such an obligation of maintenance as a moral one, and thus not legally enforceable, the 'voluntary creation of need' is now the most accepted theory as to genitors liability for child support.⁵¹ This moral duty is now seen as a generally enforceable

⁴⁵ W.J. Ashley (ed.), *J.S. Mill: Principles of Political Economy* (London: Longmans and Green and Co., 1909), Book 2, Chapter 2 Sections 6 and 13; D.J. Kornstein, "Inheritance: A Constitutional Right?" (1983-1984) 36 Rutgers Law Review 741.

⁴⁶ W. Blackstone, *Commentaries on the Laws of England*, vol. 1, (1765), p. 435; R. Chester, "Inheritance in American Legal Thought" Chester, Ronald. "Inheritance in American Legal Thought." *Inheritance and Wealth in America*. (Springer US, 1998) pp. 23-43.

⁴⁷ J. Gold, J.L. Robson, O. Kahn-Freund, and W. Breslauer, "Freedom of Testation" (1938) 1 Modern Law Review 296.

⁴⁸ Ashley (ed.), *J.S. Mill: Principles of Political Economy*, Book 2, Chapter 2 Sections 6 and 13.

⁴⁹ D. Callahan, 'Bioethics and Fatherhood'[1992], at 737.

⁵⁰ W. Blackstone, 1 *Commentaries on the Laws of England* (1765), p. 435.

⁵¹ S. Sheldon, "Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations" [2003] 66 Modern Law Review 175, at 177; E.M. Joung, "Threshold Issues Associated With the Parental Obligation of

legal duty of maintenance.⁵² Although utilising the ‘voluntary creation of need’ as the basis for child support obligations has been criticised,⁵³ obliging both parents to contribute child-support, whether married or not, lowers the financial burden on society to such an extent that there is little incentive for the state to revisit it.⁵⁴

Nonetheless, the legal recognition of the moral duty of a parent to provide for his or her dependents, and not to burden the state with their maintenance, is far less extensive after their death; as one commentator notes: “[t]he considerable obligation this side of the grave contrasts sharply with the absence of a comparable obligation after death.”⁵⁵ This is rooted in the fact that there is a conflict between the freedom of a parent to dispose of property by will and the duty of that parent to maintain his dependent children.⁵⁶ The concern to protect testamentary freedom is most strongly evident in the United States where, subject to one exception, a testator is free to disinherit needy, dependant children.⁵⁷ It is thought by some that to interfere with this freedom is to interfere with the testator’s right to do what he wishes with his property; thus it threatens his authority over his family.⁵⁸ Notwithstanding this concern, substantial statutory protection exists for disinherited spouses.⁵⁹ This lacuna has been criticised with proposals that the parental child support obligation that exists during the life of the parent be extended beyond death,⁶⁰ for at least a testator’s needy and dependent children,⁶¹ through either a forced share (similar to civil law legitime),⁶² or by determination of a court.⁶³

Child Support” in: Judith Cassetty (ed.), *The Parental-Child Support Obligation: Research, Practice and Social Policy* (Lexington Books, 1983).

⁵² J. Kent, *Commentaries On American Law* 191 (3rd ed., 1827), discussed by Donna Schuele, “Origins and Development of the Law of Parental Child Support” (1988) 27 *Journal of Family Law* 807. In contrast to Blackstone, Chancellor Kent believed the obligation to be legally enforceable.

⁵³ Sheldon, ‘Unwilling Fathers and Abortion’, pp. 177-194.

⁵⁴ Joung, ‘Threshold Issues’ [1983], p. 61.

⁵⁵ P.G. Haskell, “The Power of Disinheritance: Proposal for Reform” [1963] 52 *Georgetown Law Journal* 499, at 500.

⁵⁶ H.D. Laube, “The Right of a Testator To Pauperize His Helpless Dependents” [1928] 13 *Cornell Law Review* 599.

⁵⁷ R.C. Brashier, “Disinheritance and the Modern Family” [1994] 45 *Case Western Law Review* 83. Louisiana is the only state with direct protection for the child from disinheritance utilising the civil law mechanism of legitime: R.C. Brashier, ‘Protecting the Child From Disinheritance: Must Louisiana Stand Alone?’ [1996] 57 *Louisiana Law Review* 1.

⁵⁸ Laube ‘The Right of a Testator to Pauperize his Helpless Dependents’ [1928], p. 560.

⁵⁹ Brashier, “Disinheritance and the Modern Family” [1994], p. 85.

⁶⁰ H.D. Krause and K.A. Turner, “Child support in America: The Legal Perspective” [1981] 32 *Juvenile and Family Court Journal* 61; Brashier, ‘Disinheritance and the Modern Family’ [1994], pp. 84-183.

⁶¹ Haskell, “The Power of Disinheritance: Proposal for Reform” [1963], pp. 519-520.

⁶² D.A. Batts, “‘I Didn’t Ask To Be Born’: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance” [1990] *Hastings Law Journal* 1197, pp. 1253-1269.

⁶³ E.N. Cahn, “Restraints on Disinheritance” [1936] 85 *University of Pennsylvania Law Review* 139, at 147.

Legislative Restrictions on Freedom of Testation

In civil law countries, the decedent's survivors are protected by both community property and the legitime (granting forced heirship dependent on status);⁶⁴ unlike common law countries where there was little restriction on testator freedom extending from the fourteenth century until the twentieth.⁶⁵ It is Mill's narrow claim as to a parent's support obligations that is reflected in legislative restrictions on freedom of testation in England and New Zealand, where claims by children of the testator are limited to minors and those offspring unable to make a living due to incapacity.⁶⁶ Such restrictions are commonly referred to as 'testator's family maintenance', named after the original statutory scheme in New Zealand,⁶⁷ which served as the basis for restrictions on freedom of testation in Australia, Canada and England.⁶⁸ The English provisions are typical of such schemes and contained in the Inheritance (Provision for Family and Dependents) Act 1975. The Act allows a decedent's spouse (or cohabitant) and children file a claim if they have not been afforded 'reasonable financial provision' by the will (or by the operation of the law of intestacy).⁶⁹

Indeed, the definition of 'child' for the purposes of the Act is so broad as to encompass any person who was treated as a child by the decedent during his marriage(s), or anyone maintained in whole or in part by the decedent immediately prior to his death.⁷⁰ Notwithstanding the expansion of this category, it is of note that posthumously conceived children would still be excluded from a claim under the Act. The deceased would not be their legal parent for the reasons already mentioned, and could obviously not have maintained them or treated them as his child prior to his death, thus precluding any claim.

In any event, the broadening of the category of people who may claim as a 'child' under the 1975 Act suggests a policy change from allowing claims based solely on status (i.e. is the decedent the legal parent of the child?) to need, i.e. a decedent's estate may face a claim from a child if he was acting *in loco parentis* to it during his lifetime.⁷¹ Perhaps this recognises that

⁶⁴ Brashier, "Disinheritance and the Modern Family", p. 121.

⁶⁵ Dixon *et al*, *Megarry and Wade: The Law of Real Property*, 8th ed., para. 14.003.

⁶⁶ In the UK, the Inheritance (Provision for Family and Dependents) Act 1975 repealed and replacing earlier maintenance acts. In New Zealand it is governed by the Family Protection Acts 1900-1955.

⁶⁷ Brashier, 'Disinheritance and the Modern Family' [1994] p. 122. Testators Family Maintenance Act 1900, NZ Stat., No. 20, 1900.

⁶⁸ J. Dainow, "Restricted Testation in New Zealand, Australia and Canada" [1938] 36 *Michigan Law Review* 1107.

⁶⁹ S. 1.

⁷⁰ S. (1)(1)(d) and s. 1(1)(1)(e).

⁷¹ Sidney Ross, *Inheritance Act Claims* 3rd ed., (London: Sweet and Maxwell, 2011), pp 48-60.

minor children are particularly vulnerable to disinheritance. Unlike the spouse, the minor child has no opportunity to protect itself from disinheritance or to mitigate its effects, and is bound to a family not of its choice or making.⁷² Thus, the posthumously conceived child is a member of a class that is vulnerable to disinheritance, but unlike other such minor children, has no statutory remedy to mitigate his or her position.

Voluntary Creation of Need and Parental Intent

The question arises as to whether posthumously conceived children have at least an ethical claim against the deceased father's estate; thus a case can be made for legal recognition of such a claim. If one accepts the 'voluntary creation of need', as the basis for the child-support obligation, the validity of such a claim would surely depend on the circumstances surrounding the freezing of the decedent's sperm sample. In a country such as the UK where express written consent to the use of the sample after death is required,⁷³ it can be strongly contended that the deceased father 'voluntarily' created the need by granting his explicit written consent to the use of his sperm for conception after death. In circumstances where the father's consent extends to taking the sample for use in an ART procedure, but does not mention what is to be done with it in the event of his death, the position is less clear. Israel, for instance, does not require such explicit consent and the widow's view that her husband would have supported such posthumous use of the sperm is sufficient.⁷⁴

In cases of posthumous sperm procurement, it is difficult to characterise posthumous conception as the 'voluntary creation of need' by the deceased. There are a number of reasons for this. Generally, healthy young men do not consider death as imminent and something to be planned for.⁷⁵ One survey of men of reproductive age found that just 4% of them had discussed posthumous conception with their partners, and an even smaller number had recorded their wishes in an advanced written directive.⁷⁶ Furthermore, posthumous sperm retrieval is

⁷² Brashier, 'Disinheritance and the Modern Family'[1994], pp. 169-170.

⁷³ S. 28 Human Fertilisation and Embryology Act 1990.

⁷⁴ K. Tremellen and J. Savulescu, "A Discussion Supporting Presumed Consent For Posthumous Sperm Procurement and Conception" [2015] 30 *Reproductive Biomedicine Online* 6. This also happened in the Australian case of *Bazley v. Wesley Monash IVF Pty Ltd* [2010] Q.S.C. 118 where a sperm sample had been frozen and stored before the death of the donor, who had not provided any written consent governing what was to be done with the sperm after death.

⁷⁵ K. Tremellen and J. Savulescu, "Presumed Consent for Posthumous Sperm Procurement"[2015], p. 7.

⁷⁶ S.E Barton, K.F. Correia, S. Shalev, S.A. Missmer, L.S. Lehmann, D.K. Shah, and E.S. Ginsburg, "Population-based Study of Attitudes Towards Posthumous Reproduction" [2012] 98 *Fertility and Sterility* 735.

generally sought in cases where a young man's death is sudden and unexpected, thus allowing no time to obtain any express authorisations to such a procedure.⁷⁷ Decisions about the permissibility of posthumous sperm retrieval often take place in an evidentiary vacuum where there is little or no evidence of what the deceased's attitudes towards the procedure were; indeed he may never have considered it.

Current ethical debate concerning the permissibility of both posthumous sperm retrieval and posthumous conception focuses on the quality of the consent—express, implied, or presumed—necessary to authorise these procedures.⁷⁸ The 'restrictive view' whereby posthumous sperm retrieval and conception is limited to cases where the deceased has provided explicit consent to the procedure is the one that dominates.⁷⁹ Where consent has been obtained before death, the European Society of Human Reproduction and Embryology and the Ethics Committee of the American Society for Reproductive Medicine, the two major reproductive professional societies, support posthumous conception and there is evidence that the public holds similar sentiments.⁸⁰

There are, however, ethicists who advocate less restrictive regimes: allowing insemination and conception in all cases unless the procedure has been explicitly refused, or where there is no reasonable evidence that the deceased person desired children (described as the 'permissible view'),⁸¹ or even less restrictive again: where the deceased has not expressly opted out of the procedure.⁸² Sperm retrieved under such legal regimes, where there is no other evidence of procreative intent on behalf of the deceased, could hardly be described as the 'voluntary creation of need' by him. The position is not always clear-cut, however. Where, for example a testator deposits sperm prior to his death but leaves no instructions as to its posthumous use, one could argue that the fact of its deposit alone says something as to his wishes, and creates a duty to maintain any child subsequently born of an IVF procedure, but this is clearly contestable.⁸³

⁷⁷ *Estate of the Late Mark Edwards* [2011] N.S.W.S.C. 478; *Re H, AE (No 2)* [2012] S.A.S.C. 177; *Re H, AE (No 3)* [2013] S.A.S.C. 116; B. Spielman, 'Pushing the Dead Into the Next Reproductive Frontier: Post Mortem Gamete Retrieval under the Uniform Anatomical Gift Act' [2009] 37 *The Journal of Law Medicine & Ethics* 331.

⁷⁸ R.D. Orr and M Siegler, "Is Posthumous Sperm Retrieval Ethically Permissible" [2002] 28 *Journal of Medical Ethics* 299; M. Parker, "Response to Orr and Siegler—Collective Intentionality and Procreative Desires: the Permissible View on Consent to Posthumous Conception" [2004] 30 *Journal of Medical Ethics* 389.

⁷⁹ Parker, 'Response to Orr and Siegler' [2004], p. 389.

⁸⁰ Tremellen and Savulescu, "Presumed Consent" [2015], p. 6.

⁸¹ Parker, 'Response to Orr and Siegler', p. 389-392.

⁸² Tremellen and Savulescu, 'Presumed Consent' [2015], pp. 6-13.

⁸³ Chester, 'Postmortem Conception' [1996], n.80.

Conclusion

A posthumously conceived child suffers the immediate disadvantage of never knowing his or her natural father. Unless the mother remarries, there is also the potential economic disadvantage of being born into a single-parent household combined, for the reasons outlined, with the possibility of having no claim against the deceased father's estate. Posthumously created children face unique obstacles to inheriting from their natural father's estate. If one accepts the 'voluntary creation of need' as the basis for a child support obligation, any testamentary duty to provide for a posthumously conceived child is then dependent on the (varied) circumstances in which the sperm sample used in the ART procedure was retrieved. It also seems that such samples can pass by succession, although arguably their use and transmission must be restricted.