CONSENT AND THE REGULATION OF POSTHUMOUS CONCEPTION

1. Introduction

Children being born after the death of their genetic father is certainly not a new phenomenon. Accident, disease and disaster can always bring death after the act of conception and before the birth of a child. The common law recognises this fact by extending the presumption that the child is the 'legitimate' offspring of the deceased if it is born within the normal period of gestation.[1] Rapid advances in artificial reproductive technology (ART) in the second half of the twentieth century now mean it is possible for a child to be both conceived and born after the death of its biological father or mother (or indeed after the death of both). This has led to novel and complicated legal and ethical debates concerning the permissibility of the procedure itself as well as the welfare and status of the posthumously conceived child.[2] In the absence of regulation, there is a danger that the posthumous child will be left with only one legal parent, [3] affecting both its capacity to inherit from its deceased parent's estate, as well as presenting

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

[2] G. Bahadur, "Death and Conception" (2002) 17 *Human Reproduction* 2769; J.A. Robertson, "Posthumous Reproduction" (1993) 69 *Indiana Law Journal* 1027; C.P. Kindregan and Maureen McBrien, "Posthumous Reproduction" (2005) 39 *Family Law Quarterly* 579; B. Bennett, "Posthumous Reproduction and the Meanings of Autonomy" (1999) 23 *Melbourne University Law Review* 286; N. Maddox, "Inheritance and the Posthumously Conceived Child" (2017) 81 *Conveyancing and Property Lawyer* 405.

[3] D. Madden, "The Quest for Legal Parenthood in Assisted Human Reproduction" (1999) 21 *Dublin University Law Journal* 1.

issues as to filiation and identity.[4] Although the posthumous collection of gametes from both men and women is theoretically possible, I focus predominantly on posthumous sperm retrieval in this article for the simple reason that posthumous collection of eggs is a rarer and more complicated procedure than posthumous removal of sperm.[5]

In addition, consent requirements present difficulties in two different but related ways. First, the type of consent necessary for posthumous sperm retrieval is controversial. Some commentators take the approach that a surviving partner's or parents' request for sperm retrieval should not be honoured unless there is strong evidence that the deceased would have wished this; while others advocate for much more permissive regimes.[6] Consent as to the posthumous use of sperm and ovum is also problematic with some commentators questioning whether consent to the use of gametes in ART pre-mortem is the same as consent to its use post-mortem in the absence of express consent to that specific use.[7] There is also a distinction between applications for the posthumous retrieval of sperm and applications as to its subsequent use. Applications for retrieval invariably take place under extreme time pressure given the narrow window in which motile sperm can be retrieved from a dead man. In contrast, as gametes can be frozen and stored for many years the subsequent application to use the

[4] *Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 WLR 806.

[5] Peart, 'Life Beyond Death', n. 6 above, at 727.

[6] C. Strong, J.R. Gingrich and W.H. Kutteh, "Ethics of Postmortem Sperm Retrieval" (2000) 15 *Human Reproduction* 739; R.D. Orr and M. Siegler, "Is Posthumous Semen Retrieval Ethically Permissible?" (2002) 28 *J. Med. Ethics* 299; K. Tremellen and J. Savulescu, "A Discussion Supporting Presumed Consent for Posthumous Sperm Retrieval and Conception" (2015) 30 *Reproductive Biomedicine Online* 6; R. Collins, "Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma" (2005) 30 *Journal of Medicine and Philosophy* 431.

[7] N. Peart, "Life Beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 *VUWLR* 725.

samples for posthumous reproduction need not be dealt with so urgently. Furthermore, posthumous retrieval of gametes implicates different interests than their subsequent use. In light of these differences, I contend that retrieval and use should be dealt with differently by the law.

No clear consensus has developed as to the desirability of states' facilitating posthumous conception through the use of sperm or ova harvested from the deceased. It has been banned in France, Germany, Sweden and Canada.[8] It is permitted in the UK if there is specific pre-mortem consent to the procedure.[9] Similar requirements have been recently proposed in Ireland that would impose exacting requirements as to consent in that jurisdiction. [10]

Less restrictive regimes than the UK or that proposed in Ireland do exist, however, where the wishes of the deceased can be inferred by other less formal means. In Belgium and certain states of the United States, it is possible to avail of the procedure without prior written consent, while Israel has by far the most liberal regime allowing sperm retrieval and use at the widow's request.[11]

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[8] Tremellen and Savulescu, "Presumed Consent for Posthumous Sperm Procurement", n. 5 above, at 7.

[9] *Human Fertilisation and Embryology Act 1990*; *Q* (*IM and MM) v Human Fertilisation and Embryology Authority* [2015] EWHC 1706.

[10] *General Scheme of the Assisted Human Reproduction Bill 2017*.

[11] R. Landau, "Posthumous Sperm Retrieval for the Purposes of Later Insemination or IVF in Israel: an Ethical and Psychosocial critique" (2004) 19 *Human Reproduction* 1952. The export of gametes from jurisdictions with restrictive regimes to those with more permissive regulation is a frequent occurrence in the law reports *R. v. HFEA, ex parte Blood* [1997] 2 WLR 806 (where Mrs Blood successfully sought export of her husband's sperm to Belgium); *Q* (*IM and MM) v Human Fertilisation and Embryology Authority* [2015] EWHC 1706 (where the applicants sought export of the deceased's eggs to a clinic in New York); *L v. Human Fertilisation and*

This article critiques differing approaches to the regulation of posthumous conception in light of the interests of the deceased in both the posthumous treatment of their body and in reproduction after death. Strict requirements for advanced written directives tend to exclude the category of people most likely to benefit from the procedure. They weigh perhaps too highly the deceased's interests in not having his body interfered with after death, to the detriment of his potential interest in posthumous reproduction. Permissive regimes, in minimising the importance of consent, risk intrumentalizing the dead and using them solely as a means to serve the interests of the living. Advocates of advanced written directives, in requiring evidence of express statements of the deceased that he would have consented to posthumous conception, protect the deceased's self-determination at the expense of his authenticity, when it is the latter value which justifies the former, and not vice versa.

I contend that a system whereby consent or authorisation can be implied best protects the interests of the deceased after death. I propose a two stage system of consent to posthumous sperm retrieval and then its subsequent use. I argue that the primary focus of the decision-maker should be in arriving at a decision that accords with the deceased's beliefs and values. Previously expressed wishes are evidence of these beliefs and values, but should not be determinative of the decision that the deceased would have made in the changed circumstances of the present. Nor should the absence of any statements as to the posthumous use of his gametes justify a refusal of use if such posthumous use would have accorded with the values and character of the deceased. Given the narrow window after death in which motile sperm can be gathered by posthumous sperm retrieval, I contend that the surviving partner is best placed to consent on behalf of the deceased. The authorisation for use, however, should be

Embryology Authority [2008] EWHC 2149; *Re H, AE (No 3)* [2013] *SASC* 196 (where the applicant sought export of her late husband's sperm from South Australia to the Australian Capital Territory).

determined by a quasi-judicial committee charged with vindicating the reproductive autonomy of the deceased.

2. Posthumous Gamete Retrieval and Use

(a) Gametes Stored Prior to Death

Given the increasing use of IVF technologies, there is an increasing likelihood that deceased persons will have frozen their sperm or ova prior to death. This may or may not have been in contemplation of dying. Indeed, in one famous case, the deceased had frozen and stored his sperm prior to his suicide in the hope that it would be used by his surviving partner after his death.[12] In other cases, however, it may not be clear if the samples were left with the intention that they be used after death, or to preserve fertility and utilised by the person when they return from a hazardous occupation or recover from a serious illness. Examples of this include soldiers going to war, or when cancer patients are about to undergo treatment that will likely render them infertile.[13] In a regulated jurisdiction, the reality is that IVF clinics will seek written consents for a variety of matters including what is to be done with the material in the event of the death of its source.[14] In jurisdictions where there are strict requirements for written consent, such as the UK, there is always the danger and the fear that due to human error or oversight, one of a large number of forms will have been lost, or filled out incorrectly.[15] A grieving partner

[12] *Hecht v. Superior Court* (1993) 20 Cal. Rptr 2d 275.

[13] *Yearworth v. North Bristol NHS Trust* [2010] 1 QB 1; *Evans v. UK* (2008) 46 EHRR 34.

[14] *Y v. A Healthcare NHS Trust* [2018] EWCOP 18, per Knowles J at [6].

[15] *Y v. A Healthcare NHS Trust* [2018] EWCOP 18, per Knowles J at [6] and [10].

is then left in the anomalous position of being allowed to use donor gametes for reproduction, but not the gametes of their deceased partner.

(b) Patients in a Permanent Vegetative State (PVS)

The question as to whether there can be gamete retrieval from a person in a permanent vegetative state is often considered with the issue of posthumous gamete retrieval. As the patient derives no personal or medical benefit from the procedure, it is difficult to characterise it as being in their best interests and medical professionals are understandably loath to carry out such a procedure on an incompetent person. One could argue that the procedure is in the patient's best interests if their previously expressed wishes and values were in favour of posthumous reproduction, but this is a sufficiently novel and speculative contention as to be unlikely to convince a doctor exercising caution when treating a seriously ill patient, particularly as viable sperm can be collected after death.[16]

In the recent UK case of *Y v A Healthcare NHS Trust & Ors*,[17] Y had suffered a catastrophic brain injury and medical testing revealed he would never recover brain function or consciousness. He was married and had a son, but he and his wife had been trying for another child and, after struggling in this regard, had attended consultations with an IVF clinic.[18] While they had discussed the matter of posthumous conception at the fertility clinic his widow was concerned that there may have been an error in the paperwork regarding consent and she would be thus barred from using his frozen sperm under the Human Fertilisation and Embryology Act 1990 (hereinafter HFEA 1990). She sought and was granted an emergency order in the court of protection under the Mental Capacity Act 2005. The court considered the retrieval in the

[16] Peart, 'Life Beyond Death', n. 6 above, at 734. *R v. Edwards* [2011] NSWSC 478.

[17] [2018] EWCOP 18.

[18] [2018] EWCOP 18, Knowles J. at [5]-[10].

best interests of the patient given his past wishes and feelings as well as his beliefs and values, both factors that could be considered under the legislation.[19] Sections 27(h) and 27(i) of that act also prohibit anyone giving consent under the HFE Acts 1990-2008 on behalf of a person lacking capacity to consent. Nonetheless, the court used its powers under the 2005 Act to order the necessary consents to storage and use be executed on Y's behalf. If there was a distinction between the consents ordered by the court to be executed on behalf of Y, and that prohibited by s. 27 it is not at all clear what this is, and, indeed s. 27 is not mentioned or discussed in the judgment.While the court's desire to give effect to the wishes of the incapacitated man is laudable, one must question whether there was in fact a legislative basis for doing so.

(c) Posthumous Retrieval of Ovum

As noted, the posthumous collection of eggs is a rarer and more complex procedure than posthumous removal of sperm.[20] In order to successfully retrieve eggs, medical staff must administer hormone treatment for a number of days or weeks so as to mature the eggs prior to collection.[21] One study estimated that a brain dead patient would have to be kept alive artificially for approximately two weeks for ovarian hyper-stimulation and the permissibility of doing this presents serious medical and ethical questions.[22] Thus, it is not fanciful to assume that such requests for posthumous retrieval of ova will be even rarer than those for posthumous

[19] Mental Capacity Act 2005, s. 4(3); [2018] EWCOP 18, Knowles J. at [15].

[20] Peart, 'Life Beyond Death', n. 6 above, at 727.

[21] D.M. Greer, A.K. Styer, T.L. Toth, C.P. Kindregan and J.M. Romero, "Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury" (2010) 3 *New England Journal of Medicine* 276.

[22] Ibid, at 282; *PP v. Health Service Executive* [2014] IEHC 622.

sperm retrieval, and even where a valid consent to retrieval is in existence it may be impossible to retrieve eggs for medical reasons. Indeed, there does not appear to be any documented case of a successful attempt.[23] There is also the added complication that any embryo that is created *in vitro* will have to be implanted into a surrogate to gestate. There have also been instances where an immediate family member has sought implantation of the fertilised eggs.[24]

(d) Posthumous Sperm Retrieval

The first report of posthumous sperm retrieval was in 1980, in a case involving a 30 year old man who became brain dead after a road traffic accident and whose family sought sperm preservation.[25] The first reported pregnancy arising from posthumous conception was in 1998.[26] There are a number of methods for retrieving sperm after death including excision of

[23] In a recent reported case the deceased's family secured a court order permitting the harvesting of their deceased daughter's eggs but did not ultimately go through with the procedure: 'Family Given Permission to Extract Eggs from Ovaries of Dead Daughter in World First' *The Telegraph* 8 Aug 2011; Jacqueline Clarke, "Dying to Be a Mommy: Using Intentional Parenthood as a Proxy for Consent in Posthumous Egg Retrieval Cases" (2012) *Michigan State Law Review* 1331, at 1342.

[24] *R. (on the application of M) v. Human Fertilisation and Embryology Authority* [2015] EWHC 1706 (Admin) [2015] Fam Law 1048 where the mother of the deceased sought implantation of an embryo created using her deceased daughter's eggs and was refused as there was insufficient consent under the Human Fertilisation and Embryology Act 1990. 'Grieving Mum Who Wanted to be Inseminated with Dead Son's Sperm Meets his Twins" www.news.com.au 19 February 2018 <date accessed 17 June 2018>.

[25] C.M. Rothman, "A Method for Obtaining Viable Sperm in the Postmortem State" (1980) 34 *Fertility and Sterility* 12.

[26] C. Strong, J.R. Gingrich and W.H. Kutteh, "Ethics of Posthumous Sperm Retrieval" (2000) 15 *Human Reproduction* 739, at 739.

testicular tissue and rectal probe ejaculation.[27] It is generally advised that viable sperm can be collected within thirty-six hours of the death, but in the academic literature there are reports that motile sperm can be collected up to forty-eight hours after death.[28] Thus, when applications for posthumous sperm retrieval come before a judge they tend to be on an emergency basis, and the refusal of the application would usually lead to the loss of any chance of procuring viable sperm from the dead man for use in a future ART procedure.[29]

Healthy young men do not typically regard death as imminent, or something to be planned for.[30] In one survey of men of reproductive age, under five per cent had discussed the possibility of posthumous conception with their partners and a much smaller number had recorded their wishes in writing.[31] As such, sperm retrieval is generally sought in cases where the deceased has died suddenly, unexpectedly, and tragically leaving no written instructions as to the posthumous use of his sperm.[32] While such requests for posthumous sperm retrieval are relatively rare,[33] they are invariably tragic, often involving a shocked and grieving widow or

[27] Ibid.

[28] A.M. Jequier and M. Zhang, "Practical Problems in the Posthumous Retrieval of Sperm" (2014) 29 *Human Reproduction* 2615.

[29] *R. v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 WLR 806.

[30] Tremellen and Savulescu, "Presumed Consent for Posthumous Sperm Procurement", n. 5 above, at 7.

[31] S.E. Barton and 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.

[32] *Re Lee (Deceased) and Long (Applicant)* [2017] NZHC 3263; *R. v. Human Fertilisation and Embryology Authority, ex parte Blood* [1997] 2 WLR 806; *Estate of the Late Mark Edwards* [2011] NSWSC 478; *Re H, AE (No. 2)* [2012] SASC 177; *Re H, AE (No 3)* [2013] SASC 116. Maddox, "Inheritance and the Posthumously Conceived Child", n. 2 above.

[33] Orr and Siegler, "Is Posthumous Semen Retrieval Ethically Permissible?", n. 5 above, at 299.

partner with an intense desire for her recently deceased husband's or partner's offspring. Nonetheless, if one accepts that the dead can have interests, or alternatively, that the still-living have an interest in the treatment of the dead, then the surviving partner's desire for posthumous conception cannot be determinative of any application for posthumous sperm retrieval. Such applications raise issues about respectful treatment of the dead, and also as to the level of consent which is necessary to adequately respect the procreative wishes of the deceased.

3. Interests Affected by Posthumous Reproduction

(a) The Deceased's Interests After Death: Critical, Not Experiential

The undignified treatment of the dead may harm the interests of society as a whole, as well as the private harm to the interests of the family and friends of the deceased. There is also another potential harm: to the interests of the deceased himself, either while living or after death.[34] Dworkin posts that we are guided in our lives by two kinds of interests: experiential and critical.[35] Experiential interests are our interest in doing things for the experience of doing them. Clearly, the dead no longer have experiential interests. However, critical interests are the

[34] H. Young, "The Right to Posthumous Bodily Integrity and Implications of Whose Right it Is" (2013) 14 *Marq. Elder's Advisor* 197.

[35] R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Alfred A. Knopf, 1993), pp. 201-202.

hopes and aims we seek to satisfy, as they lend meaning and a coherent narrative structure to our lives.[36]

We need not be aware that our critical interests have been satisfied or thwarted,[37] and we can thus still have a critical interest in future events that we will never be aware of in two possible ways.[38] First, we can have a present interest in post-mortem events, including what happens to our bodies after death. On this view, our critical interests are not affected after our death, for example if our corpse was used in a way contrary to our wishes, but the critical interests of the still-living, seeing that their wishes would not be honoured posthumously, would be. More controversially there are claims that the dead themselves can have interests in the treatment of their bodies.[39] Thus, a failure to respect their wishes regarding the posthumous interests of their corpse would affect the dead's critical interests and not just the critical interests of the still-living.[40] Of course, there is the counter-argument that the dead have no interests, and are thus incapable of being harmed.[41] Or, as John Harris claims that any interests that persist after death are relatively weak when compared with the interests of living persons and should be respected,

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[36] Ibid.

[37] This adopts an objective approach to harm: J. Feinberg, "Harm and Self Interest" in P.M.S. Hacker & J. Raz (eds) *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977), pp. 285-308.

[38] Buchanan and Brock adopt a similar division of interests between experiential interests and surviving interests, the latter being those critical interests that relate to events in the future: A. Buchanan and D. Brock, *The Ethics of Surrogate Decisionmaking* (Cambridge: Cambridge University Press, 1989), at 164.

[39] See H. Young, "The Right to Posthumous Bodily Integrity and Implications of Whose Right it is." (2012) 14 *Marq. Elder's Adviser* 197, at 214-220.

[40] J. Feinberg, "The Rights of Animals and Unborn Generations" in R. Shafer-Landau, *Ethical Theory: An Anthology* (2nd ed, Wylie and Sons, 2013), p. 372; J. Feinberg, "Harm and Self Interest" in P.M.S Hacker and J. Raz, *Law, Morality and Society: Essays in Honour of HLA Hart* (Oxford, Clarendon Press, OUP, 1977), p. 284.

[41] E. Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91 *Ethics* 243

but subject to the reasonable demands of the public interest.[42] Some even go so far as to adopt the utilitarian notion that the right of control over the cadaver should be vested in the state as representative of those who may benefit from organ donation.[43] Even if one accepts such views, attendant as they are with all of the dangers of instrumentalization discussed more fully below, it is still true that dead bodies have significant value to individuals and families who claim the right to consent to their posthumous use. The taking of the body may impinge upon religious and personal beliefs and social conventions.[44] Respecting the express "wishes of the dead" allows the majority of living persons great comfort in knowing that their remains will not be treated in a manner that does not accord with these beliefs and conventions.[45]

Interests in reproducing or not reproducing, are by their nature, associated with liberal ideas of self-rule, freedom and self-determination.[46] The dominant view is that we should protect this freedom by honouring a competent person's autonomous choices in most circumstances. This can be justified by the claim that people usually know better than anyone else what best serves their interests and their choices are thus the best evidence we have of decisions that would best protect these interests.[47] The desire to protect autonomous choice is evident in jurisdictions that require advance directives justifying sperm retrieval and use of sperm, such as in the UK and Victoria. Choosing is not everything, however, and Brundy posits that another value—

[42] J. Harris, "Organ Procurement: Dead Interests, Living Needs" (2003) 29 *J. Med. Ethics* 130.

[43] HE Emson, "Is it Immoral to Require Consent for Cadaver Organ Donation" (2003) 29 *J. Med. Ethics* 125

[44] D. Nelkin and L. Andrews, "Do the Dead Have Interests—Policy Issues for Research after Life" (1998) 24 *American Journal of Law and Medicine* 261, at 277.

[45]J.C. Callahan, "On Harming the Dead" (1987) 97 *Ethics* 341.

[46] J. Savulescu, "Death, Us and our Bodies" (2003) 29 *J. Med. Ethics* 127.

[47] Dworkin refers to this as the evidentiary view of autonomy: Rebecca Dresser, 'Dworkin on Dementia: Elegant Theory, Questionable Policy' (1995) 25 *Hastings Centre Report* 32, at 33.

authenticity—is at play when bioethicists invoke patient autonomy.[48] Authenticity recognises that beyond choosing, persons also have the capacity to be a particular distinctive self. While a capacity for self-determination is not the same as authenticity, they are often evidence for the existence of one another; for example a patient's decision regarding treatment that is inauthentic, i.e. widely divergent from previously held beliefs and values, is evidence that their decision-making capacity is impaired.[49] And, of course we also have interests that may or may not be satisfied—i.e. we have best interests.[50]

Authenticity underpins the moral force of clinicians honouring questions as to what the patient would choose.[51] Dworkin presents a similar justification for honouring a patient's prior directive when it conflicts with their present best interests. He describes this as the 'integrity' view of autonomy whereby we wish to allow people to "lead their lives out of a distinctive sense of their own character, a sense of what is important to them".[52] Choices are thus not honoured simply for their own sake, but also because they are thought to best reflect the values of our authentic selves. As Dworkin noted we do not wish to live a life that is out of character.[53]

(b) Interests in Posthumous Reproduction

Interests in Reproduction after Death

[48] D. Brundy, 'Choosing for Another: Beyond Autonomy and Best Interests' (2009) *Hastings Centre Report* 31.

[49] Ibid, at 32.

[50] Ibid.

[51] Ibid.

[52] Dworkin, *Life's Dominion*, n. 40 above, p. 224.

[53] Ibid.

If one accepts that we can have critical interests in events after we die, be they the current interests of the still-living or posthumous interests, these can clearly extend beyond the treatment of our corpses. There are new interests concerning reproduction that now exist as a consequence of the development of ART technology. While living, a person has two such interests broadly categorised under the umbrella of 'procreative liberty': the right to engage in reproduction and the right to avoid reproduction. Robertson describes both of these interests as of equal importance and notes that "[d]enial of either imposes great burdens on individuals and affects their identity, their dignity, and the shape of their lives in ways that they alone can best appreciate".[54] This inherent subjectivity involved in identifying interests in procreative liberty explains the importance of protecting an individual's autonomy with regard to procreative decisions. This normally means respecting their self-determination, i.e. right to choose to reproduce, or not. Courts have strongly protected the individual's decisional authority in this regard; most notably with regards to abortion,[55] where gestational and genetic parentage are in issue, and also in disputes regarding the use of frozen embryos where one of the parties no longer wishes to become, even at the very least, a genetic parent.[56]

Clearly, the individual is the person best placed to know which decisions about having children or not, and if so in what circumstances, will best serve their interests in procreation and their choices as to whether to reproduce or not are thus strongly protected by the law. After death or permanent incapacity, however, the issue is complicated in two ways. First, the question as to whether the character of reproductive interests after death is the same as it was before, or a

[54] J.A. Robertson, "Posthumous Reproduction" (1994) 69 *Indiana Law Journal* 1027.

[55] LJ Wharton, S. Frietsche and K. Kolbert, "Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey (2006) 18 *Yale Journal of Law and Feminism* 317.

[56] *Evans v. Amicus Healthcare* [2003] EWHC 2161.

much diminished interest deserving of less protection. Secondly, the dead or incapacitated man no longer has the capacity for self-determination.[57] If we accept the centrality of consent, the weight that must be attached to prior written directives concerning reproduction if they exist, and the admissibility of the evidence of a surviving spouse and relatives about the deceased's character and his reproductive wishes both before and after death become central issues to resolve as to how to best vindicate those wishes.

An Attenuated Right?

Robertson argues that posthumous reproduction can only be controlled in the same way as reproductive autonomy if posthumous reproduction implicates the same interests, values and concerns that reproduction ordinarily entails.[58] As the posthumous reproduction shares only a few features of what is valued about reproductive experience he characterises it as an extremely attenuated form of the experience that is arguably not an important reproductive interest at all and should not receive the high respect granted ordinary "living" reproductive experience when clashing with the interests of others. In particular, he notes that the deceased parent will not gestate or rear the child, and will never know that he or she has reproduced.[59] Steinbock goes even further and rejects the view that mere genetic reproduction can ground any right to reproduction, as this would create a *de facto* right to create children with no attendant responsibility to bring them up. The central foundation to any right to reproduce is in her view

[57] Brundy, 'Beyond Autonomy and Best Interests', n.46 above, p. 34.

[58]Robertson, 'Posthumous Reproduction', n. 51 above, pp. 1031.

[59]Robertson, 'Posthumous Reproduction', n. 51 above, pp. 1030-1031.

an intention to rear.[60] The implications of this view for any purported right to posthumous reproduction are clear.

The difficulty with such a minimal view of the importance of any interest in posthumous reproduction is that it places almost the entire value of the reproductive experience in experiential interests: the interest in rearing and gestating a child and knowing that the child will live on after your death. It ignores the fact that there may be significant critical interests of the deceased that can be fulfilled or frustrated after death. For example, the continuation of a joint parental project where parents always wished their first child to have a sibling,[61] or the transmission of traditional cultural values of the deceased which mandated continuing his bloodline and having grandchildren for his parents.[62] Furthermore, the diminution of any interest in reproducing posthumously on the basis that the deceased will have no responsibility for the rearing of the child is greatly mitigated in circumstances where his parents have indicated a willingness to be supportive of the mother should she go ahead with the procedure.[63] Characterising the deceased's interest in posthumous reproduction as an interest in mere genetic continuity is misleading in circumstances where his extended family intend to provide a supportive and loving environment in which the child can be nurtured, and in which the family's traditional values can be instilled in the child.[64] A parent could clearly have a

[60] Arguably, Steninbock's contention here could be adapted to justify there being no right not to reproduce posthumously: B. Steinbock, "A Philosopher Looks at Assisted Reproduction" (1995) *J. Assist. Reprod. Genet* 543, at 549. An analyses of the difference between Robertson's and Steinbock's approaches is at: M. Quigley, "A Right to Reproduce" (2010) 24 *Bioethics* 403, at 404-405.

[61] *Re Lee (Long)* [2017] NZHC 3263, at [5].

[62] Ibid, at [6].

[63] *Re H, AE (No 2)* [2012] SASC 177, at [37]; *Re Lee (Long)*, n. 59 above, at [6].

[64] *Re Lee (Long)*, n. 59 above, at [6].

persisting or critical interest in having their child raised in accordance with his or her family's cultural, religious, and household values: even after that parent's death.

Furthermore, the interest in genetic continuity is a natural form of what one author describes as 'self-extension', whereby something of us can live on after our death and "using the deceased's gametes is a tangible way for people to leave 'pieces ' of 'themselves' alive in the world.[65] The passing on of one's genes to future generations can also constitute an expression of personal identity and family heritage.[66] Dying individuals have been known to express some comfort that part of them will 'live on' through posthumous reproduction, and both Steinbock and Robertson's reservations concerning the strength of any interest in reproducing after death will have to be reevaluated as the procedure becomes more commonplace and more people are informed of its viability.[67]

The Interest in Not Reproducing After Death

The other aspect of procreative liberty is, of course, the right not to reproduce and to become a parent and Robertson values this right equally with the right to reproduce.[68] There are different types of parents, however: genetic, gestational, legal and social— but posthumous reproduction only involves the first of these. All of the experiences of parenthood and as a result all of its responsibilities are simply not an issue for the deceased parent who will not have to deal with the consequences of having an unwanted child. As to the right not to be a genetic parent, Cohen describes a possible harm to the parent as something he characterises as 'attributional

[65] S. Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible without the Deceased's Prior Consent?' (2018) *Journal of Law and the Biosciences* 329, at 343.

[66] Ibid.

[67] Ibid, p. 344.

[68] Robertson, 'Posthumous Reproduction', n. 52 above, pp. 28-29.

parenthood'. Here, society, the child and indeed the genetic parent himself may attribute parentage to the unwilling father irrespective of the fact that legal or social parentage lies elsewhere, creating a kind of harm by forcing the unwilling father into a social category, relationships and obligations that he did not choose.[69] Whatever we make of this type of harm, it is clearly one which is experiential and would not trouble the dead whose interests in what happens after death are critical and not experiential.

One may also have critical interests in not reproducing after death, however. Although the deceased may have wished for a child during life, one may wish not to reproduce posthumously on the basis that it would not be possible to have a relationship with the child and the only way it could know its father would be through pictures and the recollections of others.[70] Furthermore, the deceased may have held certain moral positions or religious beliefs a natural consequence of which would be to be opposed to the procedure, even if his views on posthumous conception had never been canvassed.[71] He may have objected to intentionally creating a child that would be reared in a single parent home. Additionally, the deceased may have had no particular objection to posthumous conception, but would not wish to reproduce with the person requesting it, normally the surviving partner. If the quality of the relationship was poor or had broken down at the time of the deceased's death; if there had been desertion, discord and estrangement the deceased's critical interests would be better served by

[69] G. Cohen, "The Right Not to Be a Genetic Parent?" (2007) 81 *S. Cal. L. Rev.*1134-1145.

[70] Peart, 'Life beyond Death', n. 6 above, p. 734.

[71] Hans characterises those who opposed the procedure in all circumstances as 'persistent dissenters' and they comprised about 17% of his sample: Hans, 'Attitudes towards Posthumous Harvesting and Reproduction', (2008) 32 *Death Studies* 837, at 863.

disallowing the procedure.[72] The same may hold based on the surviving partner's behaviour after the death; for example if she has taken up with an enemy of the deceased or someone who has done him harm.[73] If, after taking up with her husband's murderer and usurper, Gertrude had sought to posthumously conceive her husband's child, his ghost would surely have objected.

(c) Other Interests Implicated by Posthumous Reproduction: Parents, Grandparents, Siblings, Children

The deceased, his partner, parents, siblings and indeed grandparents may have an interest in utilising the deceased's gametes for reproduction. The deceased's partner's interest is in conceiving and becoming a parent after the death of her partner. The deceased's parents may share such an interest in realising their dead child's interest in genetic continuity, as a memorial of their child, the continuation of the family line and of course the experience of grandparenting.[74] As regards the deceased's siblings, they may have similar interests in the continuation of the family line and the experience of being an aunt or uncle,[75] but depending on the circumstances the interest may be in the procedure not going ahead as the surviving partner may not be their genetic parent, and the creation of a posthumous child may interfere with matters of family identity and inheritance in unwanted ways.[76]

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[72] S. Jones and G. Gillet, "Posthumous Reproduction: Consent and its Limitations" (2008) 16 *Journal of Law and Medicine* 279, at 280.

[73] Ibid.

[74] Simana, 'Creating Life after Death', n. 63 above, p. 350.

[75] *Re Lee (Deceased)* [2017] NZHC 3263; *Re H, AE (No 2)* [2012] SASC 177.

[76] *Hecht v. Superior Court* (1986), n. 13 above.

The deceased's parents too may have an interest in the procedure not going ahead where, for instance, they believe that the deceased would have been opposed to it for any of the reasons already discussed. And, of course any consideration of the interests of the resulting child is ultimately unhelpful as a hypothetical child has no current interests, and because of the 'non-identity' problem, we must assume that the child's best interest would be in being born, except perhaps in the most extreme cases of disability.[77] Nonetheless, there may be a social interest in not allowing children to be born in disadvantaged and dependent circumstances.

(d) Interests in the Body

When sperm retrieval is sought after death, the immediate question is whether carrying out the procedure is consistent with respectful treatment of the dead. While the legal heirs are entitled at common law to possession of the corpse of their loved one, this is merely to facilitate burial and is not in the nature of a property right.[78] Traditionally, of course, the law recognised no property in a corpse,[79] and although limited exceptions have been carved out from this rule in relation to sperm, none of these justify the initial removal of sperm from a dead body.[80] Granting such limited custodial rights over the corpse to the legal heirs serves society's interest

[77] G.I. Cohen, "Intentional Diminishment, the Non-Identity Problem, and Legal Liability" (2008) 60 *Hastings L.J.* 347.

[78] *Haynes' Case* (1614) 12 Co Rep 113; *R v Lynn* (1788) 2 T R 394, 2 Term Rep 733; *R v Sharpe* (1857) 21 JP 86, 169 ER 959; *R v Price* (1884) 12 QBD 247; *Williams v Williams* (1881–85) All ER 80 (Ch); H. Conway, "Dead, but not Buried: Bodies, Burial and Family Conflict" (2003) 23 *Legal Studies* 423, 426-427.

[79] *Haynes' Case* (1614) 12 Co Rep 113.

[80] For example, in *Hecht v. Superior Court* (1993) 793 P 2d 479 where sperm samples frozen and stored prior to the decedent's suicide were held to be property for the purposes of California succession law and could thus pass by devise. See also *Bazley v. Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37; *Roche v. Douglas* [2000] WASC 146; *Re Edwards* [2011] NSWSC 478.

in the prompt disposal of the dead, as well as the family's interest in ensuring their loved one's body is disposed of in a manner that honours the fact that they are the last vestiges of the living person. This latter consideration, the need to treat human remains with dignity is protected by the civil and criminal law; in particular statutes that criminalise misconduct in relation to the dead.[81]

In addition, religious and cultural norms may dictate that the body be treated in a particular manner after death and what is done with the body after death is believed to affect the individual in the afterlife. [82] Medical and research interest in parts of the body can conflict with religious values about bodily integrity, and the fact that theological understandings view the organic totality of the body as sacred, of inherent value, and to be respected even after death.[83] Prohibitions against mutilation of the corpse can only be overridden in limited circumstances, such as for example, if there is immediate practical benefit to another,[84] or if there is a legal requirement, such as in the case of autopsy.[85] These commitments to bodily integrity after death protect more than abstract values as the deep anguish caused to families by the events constituting the Alder Hey organ retention scandal in the UK illustrate.[86]

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[81] See the comments of Heath J. in relation to s. 150 of the New Zealand Crimes Act 1961 in *Re JSB (A Child)* [2010] NZLR 236 (HC), at [59].

[82] K.V. Iserson, "Postmortem Procedures in the Emergency Department: Using the Recently Dead Practice and Teach" (1993) 19 *J. Med. Ethics* 92, at 93.

[83] C.S. Campbell, "Religion and the Body in Medical Research" (1998) 8 *Kennedy Institute of Ethics Journal* 275, at 277.

[84] As proposed by certain Orthodox Jewish Rabbis, Ibid, p. 291.

[85] Ibi, pp. 294-295.

[86] M. Redfern, J. Keeling, and E. Powell, *The Royal Liverpool Children's Inquiry Report* (London: The Stationery Office, 2001).

There is also authority to suggest that the right to possession for burial is a right to receive the cadaver in the same condition as when the death occurred.[87] On this view, only those dealings with a corpse that are to effect burial are legitimate, unless they are pursuant to legal authority. For example, the coroner promotes the public interest by investigating sudden and unexplained deaths so as to prevent such deaths in the future, and promote justice. Taking custody of a body is the first step in this investigative process. Nonetheless, the coroner's powers with regard to the body are limited to pursuing this investigative function.[88]

4. Regulating Posthumous Conception

There is little consistency in the manner in which different jurisdictions currently regulate posthumous conception. Some countries have opted for outright bans, while others have extremely permissive regimes allowing sperm retrieval and use on the request of the widow.[89] In between these extremes, some states have introduced requirements that the deceased must leave advance written directives authorising both posthumous sperm retrieval and use. In jurisdictions where there has not yet been legislation to deal with the matter, retrieval or use or both have been justified on the basis of human tissue legislation and as being within the court's inherent or *parens patriae* jurisdiction. Some commentators believe that the welfare of the living, and not the autonomy of the deceased person should be the primary ethical focus, and

[87] Per Chesterman J. in *Re Gray* [2000] QSC 390, at [18]-[21].

[88] This was illustrated in a recent New Zealand case of *Re Lee (deceased)*, n. 72 above, where the coroner declined to authorise posthumous sperm retrieval when requested to do so, citing lack of jurisdiction under the Corners Act 2006, ibid., at [13].

[89] G. Bahadur, "Death and Conception", n. 2 above.

argue for an 'opt out' system of presumed consent.[90] Each of these is an imperfect mechanism for the vindication of the critical interests of the deceased in reproducing or not reproducing after death.

Advanced Written Directives

In the UK there are requirements that there be consent in writing to each of posthumous sperm retrieval, its subsequent storage, and of course its use in any reproductive procedure.[91] The Australian State of Victoria requires written consent as to the use of the dead man's sperm for reproduction.[92] There is unlikely to be much difficulty with such requirements where the gametes have been frozen prior to their donor dying or becoming permanently incapacitated, as they will be required to specify what is done with them in the event of such death or incapacity.[93] The difficulty with such requirements is in cases where the death was sudden and unexpected and the deceased has not had the opportunity to consider the matter and leave an advance directive if he wishes to allow his widow or surviving partner to reproduce after his death. As the great bulk of the case-law reveals, this is almost always the reason that posthumous sperm retrieval is sought.[94] The adoption of such strict formal requirements with regard to consent thus likely excludes the very class of people who may wish to engage in the procedure.

[90] K. Tremellen and J. Savulescu, 'A Discussion Supporting Presumed Consent for Posthumous Conception' (2015) 30 *Reproductive Biomedicine Online* 6.

[91] *Rv. HFEA ex parte Blood* [1997] 2 WLR 806.

[92] Assisted Reproductive Treatment Act 2008 (Vic).

[93] *Y. v. A Healthcare NHS Trust,* n. 15 above.

[94] See the cases referred to at nn. 107-119 below.

It is also of note in this regard that consent may not be verbal, or inferred from the previous conduct of the deceased, thus excluding utilising the procedure even in circumstances where it is clear he would have wished for it. By adopting autonomy, which is generally protected by informed consent, the legal position is characterised by a presumption against consent with the onus on the person requesting the procedure to prove otherwise.[95] This is anomalous in that the widow or surviving partner will usually be permitted to conceive with anonymous donor sperm, but not with her deceased husband's thereby depriving her, and any already born children, of the most natural or fitting parent for the potential child.[96] The deceased is also deprived of a possibility that he may have desired after his death, even in circumstances where there is evidence that he had favourably considered the possibility of posthumous conception.[97]

Furthermore, the existence of an advanced written directive as to posthumous conception is regarded as determinative of what the deceased would have wanted after his death. Yet, as Robertson notes with regard to living wills, the basis of the prior directive is that the patient's interests and values remain the same so that those interests are best served by following the prior directive.[98] This is a big assumption and the attitude embodied in the advanced directive may be entirely reversed by subsequent events. This is evident from a portion of the disputes

[95]R. Collins, "Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma" (2005) 30 *Journal of Medicine and Philosophy* 431, at 432.

[96] S. Jones and G. Gillet, "Posthumous Reproduction: Consent and its Limitations" (2008) 16 *Journal of Law and Medicine* 279, at 280.

[97] S. McLean, *Consent and the law: Review of the Current Provisions of the Human Fertilisation and Embryology Act 1990 for the UK Health Ministers* (Department of Health, 1997) 1, at 2.

[98] J.A. Robertson, "Some Thoughts on Living Wills" (1991) 21 *Hastings Centre Report* 6, at 7.

between progenitors of embryos where one party wishes to withdraw consent to their use because of the breakdown of the relationship in the intervening period.[99]

The difficulty with advanced directives is that they fix our preferences in stone, when in fact they are always changing and evolving.[100] By their nature such directives are general and immune to context. A man who, at a time when he is healthy and has no reason to fear imminent death, is opposed to his wife engaging in posthumous conception may feel differently if he could have foresight of the circumstances of his death. If, for instance he knew at the time that his widow would request the procedure after his sudden and unexpected death to ameliorate her and the wider family's grief, to memorialize him, and to some extent to make some good from the tragedy of his death.[101] Conversely, a man who has left an advanced directive authorising the procedure would likely not have done so if he could have foreseen the subsequent and acrimonious breakdown of the relationship before the material would be sought for utilisation. Advance directives can, of course, be withdrawn or rewritten but fate may intervene and a person may die suddenly,[102] or they may not be aware of the circumstances that would lead them to change their mind, e.g. in the case of an illicit affair. That the deceased may have ticked a box consenting to posthumous use of sperm some years previously would not it seems adequately vindicate his reproductive autonomy in changed or unforeseen circumstances. Adopting a regime where the widow can use the deceased's sperm once the

[99] *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992); *Evans v. Amicus Healthcare Ltd*, [2003] EWHC 2161 (Fam), 2

[100] A. Fagerlin and CE Schneider, "Enough: The Failure of the Living Will" (2004) *Hastings Centre Report* 30.

[101] B. Simpson, "Making Bad Deaths 'Good': The Kinship Consequences of Posthumous Conception" (2001) 7 *J. Royal Anthropological Institute* 1.

[102] In *Re Edwards* [2011] NSWSC. 478, the deceased, who was terminally ill, died in a workplace accident the day before he had an appointment at an IVF clinic to leave sperm samples for posthumous use by his wife.

necessary consent requirements have been fulfilled does not necessarily vindicate his reproductive wishes in every case.

Advance directives seek to extend a person's autonomy beyond their period of competence, and indeed, their lives. Nonetheless, they only serve one form of autonomy: decisional autonomy. The basis for decisional autonomy, as we have seen, is evidential, in that we assume that the person is best placed to know which choices are authentic for them and will vindicate their preferences and be authentic to their character. This justification is greatly weakened in the case of advanced directives as the person is unable to know precisely the circumstances that will prevail at the time of their death or incapacity.[103] Changing circumstances may mean that honouring the instructions in the advanced directive may constitute and inauthentic decision by the deceased, i.e. a decision that is 'out of character' and at odds with their values. His critical interests are thus frustrated.

Comparative Perspective: Inconsistent Case-Law

In jurisdictions where posthumous conception has not been specifically legislated for, the case law is inconsistent. Some judges have taken the view that sperm removal can be authorised by the court within its inherent jurisdiction. This is justified as enabling the sperm to be preserved pending an application for its use, a lawful process that would otherwise be frustrated.[104] While others have held that the inherent jurisdiction and the *parens patriae* in particular could not be exercisable in relation to a dead body: being limited to questions of custody, guardianship and the welfare of children as well as the protection of property in a charitable trust.[105]Indeed, it has been held that procedures that are not necessary to preserve the life and mental and physical

[103] Robertson, 'Second Thoughts on Living Wills', n. 95 above, p. 7.

[104] *Re Lee* [2017], n. 72 above, at [100]. *Re H, AE (No 2)* [2012]

[105] Per Chesterman J. in *Re Gray* [2000], n 84, above, at [10].

wellbeing of a comatose man should not be authorised by the court under *parens patriae*.[106] A finding that the extracted semen is property (as work and skill has been applied to it in the extraction and preservation[107]) has been used to justify the vesting of the deceased's sperm in the widow,[108] and also dismissed as unhelpful and incongruous view of the law,[109] and a paradigm that 'bears little resemblance to the desire to create a human being and to nurture the person in a particular relationship'.[110] In two recent similar cases consent to the extraction of sperm pursuant to legislation governing the mentally incapacitated was deemed inappropriate by an Australian court,[111] but permitted by a UK court.[112]

In some jurisdictions, removal of semen has been authorised by the courts pursuant to their human tissue legislation,[113] while others spurn such an approach and use the fact that their

[106] Per O'Keefe J.in *MAW v. Western Sydney Area Health Service* [2000] NSWSC 358. See also the comments of Fagan J. in *Chapman v. South Eastern Sydney Local Health District* [2018] NSWSC 1231, at [21].

[107] *Doodeward v. Spence* [1908] 6 CLR 40.

[108] *Re Edwards* (2011) , n. 36 above; *Chapman*, n. 103 above; *Bazley v. Monash IVF* [2010] QSC 118; *Hecht*, n. 13 above.

[109] *Re Lee* [2017], n. 72 above, at [84]

[110] per Muir J. in *Baker v. Queensland* [2003] QSC 2.

[111] *Chapman v. South Eastern Sydney Local Health District* [2018] NSWSC 1231. The application was pursuant to the Guardianship Act 1987.

[112] *Y v. A Healthcare NHS Trust* [2018] EWCOP 18. The application was made under the UK Mental Capacity Act 2005.

[113] *S v. Minister for Health* [2008] WASC 262, applying the Human Tissue and Transplant Act 1982 (WA); See also *AB v. Attorney General for the State of Victoria* [2005] VSC 180 and *Y v. Austin Health* [2005] VSC 427.

human tissue acts predate ART to justify a finding that posthumous gamete retrieval is beyond the scope of those provisions.[114]

Invariably, these cases consider the quality of the deceased's relationship with the requesting partner as well as any reproductive plans that they may have had prior to date. It is perhaps in weighing the relevance of these factors that the true inconsistency, and the need for clear policymaking, lies. Evidence that the couple intended to have children together during the life of the deceased, including the desire for a sibling for an existing child and engagement with an IVF clinic has been deemed sufficient to justify authorising the procedure in a number of cases.[115] In two cases where posthumous sperm retrieval was refused, the fact that the deceased had not averred to the possibility of having children after death was *inter alia* a reason for refusing the request for posthumous sperm retrieval, even in circumstances where there was evidence that the deceased had wanted a sibling for an existing child.[116] The best interests of the child to be born have been used to justify granting the order,[117] and also its refusal.[118] The interests of the extended family have also been considered in these cases, including any objections to the procedure and any cultural barriers for or against posthumous conception,[119]

[114] *Chapman v. South Eastern Sydney Local Health District* [2018] NSWSC 1231, at [19].

[115] *Re H, AE (No 2)* [2012], n. 36 above, at [25]-[35], *S v. Minister for Health (WA)* [2008], n. 110 above, at [21], *Re Lee* [2017], n. 72 above, at [3] –[6]; *Re Denman* (2004) QSC 70, at [3].

[116]Chesterman J in *Re Gray* [2000] QSC 390 at [6] at [23]; per Muir J. in *Baker v. Queensland* [2003], n. 107 above. See also the comments of Professor Peart on the material difference between the two choices: Peart, 'Life beyond Death', n. 6 above, p. 734.

[117] *Re Denman* (2004), n. 112 above, at [20]-[21],.

[118] Chesterman J in *Re Gray* [2000] QSC 390 at [23][c]; per Muir J. in *Baker v. Queensland* [2003], n. 112 above.

[119] *Re Lee* [2017], n. 72 above, at [6] at [10].

as has possible detrimental effects having the child would have on the wife's ability to process grief and move on with her life.[120]

In all of this case-law it is impossible to divine any consistent approach as to the relative importance that should be attached to each of the parties' interests. Are we seeking to imply the consent of the deceased, or are we balancing all of the affected interests, namely, of the deceased, the surviving partner, extended family and resulting child? If, as is my contention, we should be seeking to vindicate the critical interests of the deceased in reproducing or not reproducing, there is a danger that this purpose will be lost in the uncertainty until the law is clarified. Indeed, there is a danger that his critical interests will be disregarded altogether. In the recent case of *Chapman v. SESLHD*[121] Fagan J. held that an unconscious patient who would never recover consciousness could not benefit from the sperm removal procedure as he would never experience the physical and emotional aspects of parenthood. Thus, the procedure could only be for his widow's benefit and was thus unlawful.[122] This definition of the deceased's interests in purely experiential terms was in circumstances where the court acknowledged that the relationship between the spouses was strong and the unconscious man would likely have consented had he ever recovered.[123] It had the effect of frustrating the critical interests of the dead man, as well as the secondary interests of the spouse in engaging in the procedure.

Presumed Consent and Instrumentalization

[120] Per Muir J. in *Baker v. Queensland* [2003], n 112 above.

[121] n. 111 above.

[122] *Chapman*, n. 111 above, at [37]

[123] Ibid.

Tremellen and Savulescu view the extraction, and by implication, the subsequent use, of sperm without explicit prior consent as ethically justifiable for three reasons; first, many countries already allow organ donation in the absence of such explicit consent, by the family giving their proxy consent or sometimes, under 'opt-out' systems, their consent is presumed. In their view, such organ donation does not benefit the dead, and the practice of sperm retrieval is much less invasive than organ donation which is already an ethically acceptable practice.[124] Indeed, in some Australian jurisdictions, human tissue legislation has been used to justify posthumous sperm retrieval. They further argue that the procedure can benefit the deceased in allowing him to continue his bloodline and in helping his widow and family indirectly benefits his legacy after death.[125]

Nonetheless, these justifications ignore the material differences between organ donation and posthumous sperm retrieval. For organ donation, the critical interests of the deceased potentially affected only concern his interest in the treatment of his body after death alone. Posthumous sperm retrieval also affects these interests, and even if we accept the view that the interference is of a lesser nature than for organ donation, we cannot ignore the crucial distinction between organs and human gametes in that the latter contain the deceased's genetic material in readily utilisable form.[126] As Carson Strong notes, the freedom to make procreative decisions is significant because of the significant meaning that procreation has for persons, bearing on concerns that are deeply personal and at the core of self-identity.[127] Reproductive

[124]Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent, n. 87 above, p. 8.

[125] Ibid, p. 8.

[126] R.P. Jansen, "Sperm and Ova as Property" (1985) 11 *J. Med Eth.* 123.

[127] C. Strong, "Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State" (2000) 14 *J. Law & Health* 243.

autonomy is of such a personal nature, and has such serious a consequences for a deceased's family legacy that it has even been argued that it survives death.[128]

The decision to retrieve sperm may constitute a much less invasive interference with the body after death than organ donation, but implications of posthumous gamete retrieval are of a much greater magnitude, being generational. The creation of new life through posthumous reproduction has consequences for the existing family members affecting matters such as identity and inheritance, as well as for any child born as a result of the procedure. The argument for presumed consent also ignores the other crucial feature of procreative liberty aside from the right to procreate: the right not to procreate. In particular, with regard to posthumous reproduction we are talking about the right not to be a genetic parent after death. Although, the deceased will never experience any adverse consequences from the use of his gametes for posthumous conception, the importance that we place on the individual making their own reproductive decisions and the importance of these decisions to that individual mean that overlooking the need for the explicit or inferred consent of the deceased would be disrespectful.[129]

There are those of the view that the dead have no interests, in avoiding posthumous reproduction or anything else, and that treatment of the dead can only harm the critical interests of the still living.[130] This view of interest has been used to argue for a system of presumed consent to posthumous sperm retrieval and use. Young adopts a 'balancing of interests'

[128] KD Katz, "Utilising Gametes from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying" (2006) *University of Chicago Legal Forum* 289, at 300-301.

[129] C. Strong, 'Consent to Sperm Retrieval and Insemination after Sperm Retrieval or PVS' (2000) 14 *J. L. & Health* 243, at 260.

[130] H. Young, 'Presuming Consent to Posthumous Reproduction' (2014) 27 *Journal of Law and Health* 68, at 75.

approach and the only interests which can counter the desire for a surviving partner to engage in posthumous reproduction with her partner's sperm are the critical interests of the still living. As any system of presumed consent would not go against the prior recorded wishes of the deceased, the greatest interest which the still-living could claim to balance against the wishes of the widow would be the protection of a person's right not to have to make a decision about posthumous reproduction during their life.[131] In her view, the strong reproductive interests of the surviving spouse will prevail in most circumstances. A further justification for a presumed consent regime comes from the limited empirical studies that have been published on men's attitudes towards the possibility of posthumous conception, which have found that attitudes and beliefs are primarily in favour of allowing the procedure.[132] Adoption of an 'opt-out' system would thus 'nudge' men into more desirable actions in line with current policy-making in other areas such as organ-donation.[133]

The primary difficulty with such arguments where the interests of the deceased man, if any, are merely treated as one factor to be weighed against many others are that it instrumentalizes the dead, i.e. it treats the retained reproductive potential of the deceased man as a means to secure the interests of others.[134] The most that could be said of any 'opt-out' regime is that it would approximate the wishes of the majority of men, thereby ignoring a sizeable minority who were opposed to the procedure.[135] Proponents of this type of system believe that the best way to respect the wishes of the dead is to adopt the policy that results in the 'fewest

[131] Ibid, at 87-88.

[132] Tremellen and Savulescu, 'A Discussion Supporting Presumed Consent', n. 87 above, pp. 8-9.

[133] JD Hans, 'Attitudes towards Posthumous Harvesting and Reproduction' (2007) 32 *Death Studies* 837.

[134] Strong, 'Consent to Sperm Retrieval', n 126 above, p. 260.

[135] Persistent dissenters comprised 17% in one study and opposed the procedure in every context and circumstance that was suggested to them: Hans, 'Posthumous Harvesting and Reproduction', n. 130 above, p. 862.

mistakes'.[136] With regard to organ donation they draw moral equivalence between mistaken non-removals of organs with mistaken removals of organs.[137] At stake, is bodily interference in order to save the life of another living person, most often a stranger. While posthumous sperm retrieval also involves bodily interference, its goal is not life-saving but life-creating. The potential life has no interests and thus nothing to match against the compelling public health goals of systems of organ donation and the surviving partner's interest in posthumous reproduction would be similarly disadvantaged in such a comparison. Furthermore, the consequences of posthumous reproduction are permanent and generational.

By adopting such an objective and general standard under presumed consent the subjectivity of these men is erased, not just their preferences, but their character, beliefs, attitudes and hopes for their legacy are ignored in allowing posthumous reproduction. An objection to presumed consent to posthumous sperm retrieval and reproduction on the basis that it would conflict with the beliefs of the deceased can be challenged by the fact that such individuals can simply opt out. However, the reality is that cases involving posthumous sperm retrieval invariably involve the tragic and unexpected death of a young man.[138] And, of course, healthy young men are generally not pre-occupied with the possibility of their imminent death and even less concerned to leave detailed advanced directives governing reproduction thereafter.[139]

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[136] MB Gill, 'Presumed Consent, Autonomy, and Organ Donation' (2004) 29 *Journal of Medicine and Philosophy* 37, at 45.

[137] Gill, 'Presumed Consent', n. 133 above, p. 43.

[138] For example, *Estate of the Late Mark Edwards* [2011] NSWSC 478; *Re H, AE (No 2)* [2012] SASC 177; *Re H, AE* (No 3) [2013] SASC 116.

[139] 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.

The reality of any system of presumed consent is that the vast majority of men would be caught by the presumption, whether or not they would have wished this had they turned their minds to it. Furthermore, circumstances may develop after death, although the deceased will never be aware of, that to allow posthumous conception would be a decision entirely at odds with the deceased's character and the manner in which he had lived his life, in essence an inauthentic decision. Such a system can hardly be said to 'respect the wishes' of the deceased. Critics of presumed consent systems for organ donation rightly criticise using the language of consent in relation to such systems when they are more readily characterised as permitting organ retrieval without consent. They are in effect routine salvaging laws whereby the state can harvest organs without any concern as to whether the deceased would have consented or not.[140] The adoption of such a system for posthumous sperm retrieval would be particularly troubling given the highly personalised nature of reproduction and its intimate connection with the person's dignity and identity.[141]

Implied Consent by the Surviving Partner

Strong is one of the few commentators to argue for such an implied or inferred consent approach, albeit cautiously, noting the difficulty with conflicts of interest of close family members and that the surviving partner and family members could falsely claim that the man would want the retrieval.[142] He notes the difficulty here is that those providing an account of

[140] R.M. Veatch and J.B. Pitt, "The Myth of Presumed Consent: Ethical Problems in New Organ Procurement Strategies", in S. Holland (ed), *Arguing About Bioethics* (Routledge: London and New York, 2012), p. 264.

[141] N. Priaulx, "Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters", (2008) 16 *Medical Law Review* 169.

[142] C. Strong, 'Ethical and Legal Aspects of Sperm Retrieval after Death or Persistent Vegetative State' (1999) 27 *Journal of Law, Medicine and Ethics* 347. The others are M. Spriggs, 'Woman Wants Dead Fiancé's Baby:

the man's wishes have a conflict of interest, for instance the wife's claim that her husband would want the child may be based on her own desire to have the child, and the other family members may be biased by their own interests and concerns for the interests of the wife.[143] There may also be financial or legal gains such as death benefit or inheritance that might prompt a request for posthumous sperm retrieval.[144] A further objection to such a consent requirement is that it allows hearsay evidence of the deceased's wishes from those who have a vested interest in the outcome, and that there is no method for resolving conflict between family members as to what the deceased would have wanted.[145] To resolve these difficulties, Strong suggests some independent verification exist; in particular a previous explicit statement, either written or verbal by the man concerning posthumous sperm retrieval be required before a reasonable inference could be made that he would approve, otherwise attempts to infer his wishes would be defeated by the problem of bias.[146]

In other contexts, common practice is to appoint a close family member as surrogate decision-maker.[147] There is an evidential reason for this as there is a presumption that a close-family

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Who Owns s Dead Man's Sperm' (2004) *J. Med. Ethics* 384-388 and R. Collins, 'Posthumous Reproduction and the Presumption against Consent in Cases of Death Caused by Sudden Trauma' (2005) *J. Med. Philos.* 30.

[143]Strong, 'Ethical and Legal Aspects of Sperm Retrieval after Death or Persistent Vegetative State', n. 139 above, p. 351.

[144] F.R. Batzar, J.M. Hurwitz and A. Caplan, "Posthumous Parenthood and the Need For a Protocol with Posthumous Sperm Procurement" (2003) 79 *Fertility and Sterility* 1263, at 1265.

[145] Tremellen and Savulescu, 'Presumed Consent', n. 87 above, p. 9.

[146] Strong, 'Ethical and Legal Aspects of Sperm Retrieval after Death or Persistent Vegetative State', n. 139 above, p. 351.

[147] D.W. Brock, "Good Decision-making for Incompetent Patients" (1994) 24 *Hastings Centre Report* S8, at S9; In the UK, a 'Deputy' can be appointed by the court to make decisions on an incompetent's behalf: section 16 of the Mental Capacity Act 2005. Although the Act does not adopt a substituted judgment doctrine and prefers a

member who knows the incompetent well, is best placed to decide what he would have wanted or wished for, although this presumption is of course rebuttable.[148] This evidential justification is particularly strongly in favour of appointing a widow or surviving partner as surrogate where the issue is knowing the deceased or incompetent's reproductive wishes. Providing the relationship is still intimate and conjugal, they would clearly be best placed to make this assessment. A surrogate decision maker who is a family member of the incapacitated person may have interests that are affected by a decision to pursue expensive medical treatment or place the person in a long-term care facility.[149] Indeed, it would be surprising if a close family member did not have interests that were affected by the decision. The existence of interests of their own that might be implicated need not necessarily be a reason to discount their evidence, although this does not address the conflict of interest.[150]

Substituted Consent by an Independent Quasi-Judicial Committee

Generally, the difficulties highlighted by these authors are evidentiary in nature in that they are inadequacies in the availability and quality of evidence of what the deceased would have chosen. Implicit in this is seeking to vindicate the deceased's autonomy by honouring his likely choices. There are two elements at play here: the deceased's self-determination, or choice, and his authenticity. As noted, honouring the deceased's choices is not an independent value; rather

'best interests' formula, it allows an assessment of what decision a person would have made as one of the factors relevant to assessing best interests: J. Herring, *Medical Law and Ethics*, 6th ed., (OUP, Oxford, 2016), p. 191.

[148] Brock, Good Decision-making for Incompetent Patients', n 144 above, at S9.

[149] DW Brock, What is the Moral Authority of Family Members to Act as Surrogates for Incompetent Patients' (1996) 74 *The Milbank Quarterly* 599, at 608.

[150] Ibid, p. 608.

it is given its moral force by being generally the best means of ensuring that actions are authentic and in accordance with his character and distinctive sense of self.[151] And, as we have seen in relation the requirements of advanced written directives, honouring a prior decision is not always the best way of serving autonomy where the individual is not currently capable of making choices and recourse must be had to previously expressed wishes insensitive to the current context or any changes in circumstances that may have affected that choosing.[152]

With regard to posthumous gamete retrieval, the adoption of a 'non-interference model' whereby a person's body is not interfered with in the absence of prior specific instructions is not consistent with a 'respect for wishes' model of autonomy which would allow for the fulfilment of a person's wishes when he is no longer capable of carrying them out.[153] The person best placed to provide evidence of these wishes will, in the vast majority of cases, be the deceased's conjugal partner for reasons already outlined. The main difficulty with the systems of consent outlined above is not the surviving partner has a potential conflict of interest; rather it is that the partner will be the decision-maker and will not be in a position to independently assess the weight to be given to the evidence of the deceased's reproductive intentions.

Such an independent assessment has at times been made by the courts and an examination of the case law in relation to posthumous sperm retrieval,[154] reveals an attempt by courts to infer what the deceased would have wanted in the circumstances.[155] Much of the inconsistency in

[151] Brundy, 'Choosing for Another', n. 45 above, pp. 32-33.

[152] Robertson, 'Second Thoughts on Living Wills', n. 95 above, p. 7.

[153] Simana, 'Creating Life After Death', n. 63 above, p. 345

[154] Caselaw and discussion at nn. 107-119 above.

[155] Ibid.

the outcomes can be accounted for by inconsistency in the weight to be attached to differing types of evidence regarding the deceased's reproductive wishes which is a result of an absence of policy guidance from lawmakers. Of course, recourse to the courts is an imperfect solution to the problem of consent in these cases as the necessity of obtaining court-orders is time-consuming, cumbersome formal and expensive.[156] Nonetheless, the courts do have expertise in weighing evidence from divergent parties and resolving conflicts and gaps in such evidence. They are therefore able to protect individual rights by making decisions that would best approximate those of the incompetent patient.[157]

For example, the courts are well accustomed to dealing with hearsay evidence and the law is sufficiently attuned to admit it in certain circumstances; indeed, the hearsay rule has well recognised exceptions where the deceased has made declarations in contemplation of death,[158] and where past statements of the deceased are admitted to interpret a will so as to properly give effect to their intentions after death.[159] Indeed, at times the courts have given legal effect to mere verbal statements as to how a deceased intended his property to devolve after death.[160] In succession law, the courts are willing to be flexible about allowing such statements as evidence (in view of the fact that the deceased is clearly no longer available as a witness) as the best

[156] C.J. Sundram and P.F. Stavis, "Obtaining Informed Consent for Treatment of Mentally Incompetent Patients" (1999) 22 *International Journal of Law and Psychiatry* 107.

[157] P.B. Solnick, "Proxy Consent for Incompetent Non-Terminally Ill Adult Patients" (1985) *Journal of Legal Medicine* 1, at 25.

[158] As occurred in *Hecht v. Superior Court*, n 13 above.

[159] C. Harpum (ed.), *Megarry & Wade: The Law of Real Property* (6th ed., Sweet & Maxwell Ltd, London, 1999), [11-064]-[11-065].

[160] In the case of *Donatio Mortis Causa* and proprietary estoppel; Harpum, *Megarry and Wade*, ibid, at [11-083]-[11-086] and [13-001] –[13.037].

means of giving effect to the deceased's true intentions as to what should happen to their property after death.[161]

One solution to the issue of consent is to vest decision-making power as to whether posthumous use can be made of gametes in a committee acting judicially, with a representative being appointed to advocate on behalf of the interests of the deceased.[162] This would allow a range of factors to be considered properly before a decision is made; namely, the wishes and values of the deceased, the motivations of the potential mother and her capacity to raise the resultant child, as well as any cultural norms that would militate either for or against posthumous reproduction,[163] as well as any other factors in the individual case that would bear on the decision. The statutory scheme in New Zealand, by way of example, has established an advisory committee to develop policy in relation to ART, and an ethics committee which can approve non-standard applications for ART on a case-by-case basis.[164] Evidence could thus be weighed appropriately by an independent body and conflicts of evidence, for example as between the surviving partner and family,[165] could also be resolved. Empowering such a quasi-judicial decision-making committee would have the advantages of being a quicker, less formal

[161]Ibid, at [11-064]-[11-065].

[162]Jones and Gillett, 'Posthumous Reproduction', n. 93 above, at 285-286.

[163]Many non-western cultures value family and group decision-making over individualism and personal autonomy. There may be cultural norms in favour of continuing the blood-line: *Re Lee (Long)*, n. 72 above.

[164]Human Assisted Reproductive Technology Act 2004 (NZ). Section 4 of this act lists broad principles— such as the welfare of resultant children, human health, and cultural sensitivity— which all of those people and bodies performing functions under the legislation must have regard to. This provides clear principles and policies in which the advisory committee can develop guidelines for use by the ethics committee. See also Peart, "Life beyond Death", n. 6 above, at 729-731.

[165] As occurred in *Hecht v. Superior Court*, n 13 above.

and less expensive procedure than recourse to the courts. It would also enable the appointment of legal and medical experts so that the hearing would retain the benefits of a judicial process.

There is of course a distinction between applications to authorise posthumous sperm retrieval and applications as to its subsequent use. Once human gametes have been retrieved and frozen sperm can remain viable for decades.[166] There would thus be sufficient time for any such hearing to decide whether to authorise use to take place. Applications for posthumous sperm retrieval are different and as discussed invariably take place in 'emergency' circumstances where a judge must decide the application under extreme time constraints without the best opportunity to fully consider all of the evidence or the legal implications. These factors arguably justify a much less onerous requirement than decisions on use, such as allowing the surviving partner to provide consent to posthumous sperm retrieval, as the best means of vindicating the autonomy of the deceased.

Nonetheless, granting power to authorise the use of such retrieved sperm to an independent committee would relieve physicians faced with a request for posthumous sperm retrieval from the responsibility of facilitating its posthumous use, and the serious and ongoing consequences of this for the legacy of the deceased, his existing family, the potential child and society in general. This would allow medical bodies and policymakers to focus on the narrower issue of delimiting the circumstances when posthumous sperm retrieval is permissible, a far less serious issue, and one which could arguably be accommodated by less onerous requirements than the prior written and informed consent of the deceased.

[166]There is a record of one case of a successful birth that utilised cryopreserved sperm that had been frozen 21 years before: AK Nangia, SA Krieg, and SS Kim. "Clinical Guidelines for Sperm Cryopreservation in Cancer Patients" (2013) 100 *Fertility and Sterility* 1203, at 1206.

5. Conclusion

Posthumous reproduction raises novel and difficult issues of ethics and law. It affects a myriad of different interests both in families and society, and for the living, the dead, and the not yet alive. It is impossible to judge the harm such procedures might engender, given their newness and relative rareness. It is entirely understandable that many jurisdictions exercise caution when seeking to regulate this area, with some outlawing it altogether. That said, in the absence of clear evidence of harm resulting from allowing posthumous conception, a case can be made that it should be facilitated and that a private and social good may come from alleviating the grief of a partner and family that invariably follows when a young man dies tragically.

Adopting requirements for prior explicit informed consent to both posthumous sperm retrieval and use in practice serves to exclude the very class of people most likely to benefit from the procedure: the surviving partner and family of a young man who has died suddenly and unexpectedly. These strict consent requirements serve to vindicate only one aspect of the deceased's autonomy: his capacity for self-determination. The effect of such strict requirements, however, is to exclude posthumous conception in many cases where the deceased would have wished it.

On the other extreme, presumed consent to posthumous sperm retrieval is really no consent at all and instrumentalizes the dead. One cannot simply adapt the arguments justifying presumed consent regimes for organ donation to posthumous conception as they are materially different procedures in their effects and implications. Adopting a system of presumed consent would detach the decision to reproduce posthumously from the deceased's autonomy.

A system of implied or inferred consent offers the best opportunity to vindicate the critical interests of the deceased in reproducing or not reproducing after death. Concerns about the weight that should be given to evidence of these wishes by the next-of-kin given the potential

conflict of interest can be addressed by empowering a quasi-judicial committee to decide on use after considering a range of interests and circumstances, on a case-by-case basis. While respect for the dead requires the authorization of posthumous sperm retrieval to be put on a clear legal footing, this is a much less serious matter than authorising the posthumous use of sperm, and a regulatory regime should effectively separate these issues. Given the emergency nature of the procedure and its necessity to preserve the possibility of making a subsequent application for the authorisation of use of the material, a less onerous form of consent can be justified such as allowing the surviving partner to consent to posthumous sperm retrieval on behalf of the dead or dying man. In such a two stage regulatory system, medical professionals would be relieved of the responsibility of enabling the use of the materials for posthumous reproduction by facilitating sperm retrieval for the recently deceased man.