REPRODUCTIVE TECHNOLOGY

PLANNING FOR LIFE AFTER DEATH: LAWS OF SUCCESSION vs. THE NEW BIOLOGY

Southeast Fellows Institute ("SEFI")
of the American College of Trust and Estate Counsel
May 3, 2024 – Omni Richmond Hotel – Richmond, Virginia

Joshua S. Rubenstein
Katten Muchin Rosenman
50 Rockfeller Plaza
New York, New York 10020-1605
Phone: (212) 940-7150
Fax: (212) 940-8545
joshua.rubenstein@katten.com

REPRODUCTIVE TECHNOLOGY - *Index*

I. Control Over Disposition of Remains

A. History of Property Rights in Corpses

1. Historically there was no recognized property interest in the body. It was often described as a "quasi-property" interest, with next-of-kin acting as a type of trustee to see to the details of burial or other disposal. *See* Michelle Bourianoff Bray, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 227 (1990) (arguing that "individuals' interests in their bodies should be protected as property interests because the body is central to the individuals' sense of identity" 239-240).

2. Under English common law, there was no property interest in corpses, which were deemed to belong to the public. Lord Edward Coke wrote in his 1644 treatise regarding the burial of cadavers that they are "*nullius in bonis*" or "goods of no one" and belong to ecclesiastical authorities—a statement that became the basis for non-recognition of human body parts as property. *See* R. Alta Charo, *Skin and Bones: Post-Mortem Markets in Human Tissue,* 26 NOVA L. REV., 421, 426 (2002) (quoting 3 Edwardo Coke, Institutes of the Laws of England 203 (1644).

3. English law evolved from judicial efforts to prevent unauthorized disinterments and to avoid second-guessing family burial decisions after the fact. *See Regina v. Sharpe* (son was convicted for disinterring his mother without congregation permission and reburying her in a consecrated graveyard, holding that he had no right to his mother's corpse), Dears. & Bell 159, 169 Eng. Rep. 959 (Q.B. 1857); *Foster v. Dodd* (defendants were found guilty of improperly and indecently disinterring a corpse), 3. Q.B. 67 (1867); *Regina v. Price* (father was not convicted for burning, instead of burying, his daughter, holding that there were no property interests in a corpse, but that a parent had a duty to dispose of a child's body in any legal manner), 12 Q.B.D. 247 (1884). *See also* Bray at 225-226 and Anne Reichman Schiff, *Arising From the Dead: Challenges of Posthumous Procreation,* 75 N.C. L. Rev. 901, 923-925 (1997).

4. American common law established a quasi-property right, vested in the next-of-kin, for the limited purpose of burial or other disposal. There was no commercial property interest in corpses, in part because it was believed that remains of a human body are not inherently valuable. *Shults vs. United States*, 995 F.Supp. 1270, 1276 (D. Kan. 1998). Whether a change in market demand would alter this reasoning remains to be seen. *See* Charo at 429 and FN 26.

5. Therefore, the only redress for wrongful handling of a corpse lay in tort, *e.g.*, intentional infliction of emotional distress i.e., due to mishandling of the corpse. *See* Bray at 227-228. *See also* RESTATEMENT (SECOND) OF TORTS § 868 (1977).

   a) Funeral homes may not assert a lien for nonpayment against a corpse. *See Morgan v. Richmond*, 336 So. 2d 342 (La. App. 1st Cir. 1976).

b) Several high-profile scandals involving funeral homes have been the subject of class-action litigation for improper handling of a corpse. *See* Charo, *supra*, at FN27. These included the following:

(1) 1984-- $31 million dollar settlement paid by more than 30 funeral homes stemming from a class-action law suit brought by relatives of decedents whose ashes were dumped on land by the funeral home instead of at sea. Duane D. Stanford, ATLANTA JOURNAL-CONSTITUTION, March 3, 2002 at A1.

(2) 1991-- $25 million dollar settlement involving more than 100 funeral homes stemming from a class-action law suit brought by relatives of decedents whose cadavers were first harvested for their body parts and sold to medical research facilities and then illegally cremated multiple bodies at once. *Id*.

(3) 2002 -- a funeral home proprietor was accused of improper disposal of human remains at a Georgia crematorium by failing to cremate corpses, leaving them to decay without proper disposal. *State v. Marsh*, 2002 WL 537033 (Ga. Super. Mar. 7, 2002). The funeral home later settled a civil suit by family members of the deceased. R. Robin McDonald, *$80 Million Crematory Settlement Is 'Monopoly Money,' Says Attorney*, Fulton County Daily Report, August 27, 2004, *available at* http://www.law.com/jsp/article.jsp?id=1090180430607. The operator of the funeral home is also serving a 12-year prison sentence after pleading guilty to criminal charges.

c) *See also* Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999) (discussing the historical reasons for the American quasi-property right theory, individual versus familial-centered approaches to death and changing attitudes toward death and the definition of the family).

d) Australian law has crafted an interesting exception for corpses not awaiting burial. *See Doodeward v. Spence* (physician was permitted to sell preserved, stillborn Siamese twins he had kept as a curiosity), 6 CLR 406 (1908).

6. Cases involving lifetime dispositions of body parts involve policy considerations militating against finding property interests in them, which policy considerations have prevented a finding of such rights in corpses.

a) *See Mokry v. University of Texas Health Science Center* (damages in tort only for plaintiff's surgically removed eyeball's being negligently washed down drain), 529 S.W.2d 802 (Tex. Civ. App. 1975), *writ ref'd n.r.e.* (Feb. 11, 1976).

b) *Venner v. State* (no property rights in excrement containing marijuana-filled balloons), 354 A.2d 483 (Md. Ct. Spec. App., 1976), *aff'd*, 367 A.2d 949 (Md. 1977).

c) *United States v. Garber* (without opining whether blood donation was property or a service, the court allowed the government to subject the $80,000 a year defendant received for three years from donating her plasma to income tax, but reversed her conviction for willful tax evasion), 607 F.2d 92 (5th Cir. 1979); *Green v. Commissioner* (Green earned a living from repeatedly selling her rare, type AB-negative blood. The court held that proceeds of such sale were taxable gross income, allowing a deduction for certain ordinary and necessary business expenses [including transportation to and from the lab]. Although for tax purposes her blood was considered sale of a *tangible product*, the court denied her claim for a deduction for health insurance premiums reasoning that insuring against the taxpayer's health is primarily a personal rather than a business concern.) 74 T.C. 1229 (U.S. Tax Ct., 1980); *Lary v. United States* (denying charitable deduction for blood donation) 608 F.Supp. 258 (N.D. Ala. 1985), *aff'd*, 787 F.2d 1538 (11th Cir. 1986).

d) A deeply-divided California Court held that there was not a general property right in one's excised cells, finding this area better suited to legislative reform and that policy considerations of protecting patient rights are best served through fiduciary-duty and informed-consent. *Moore v. Regents of Univ. Of Cal.* (doctors used genetically unique spleen of a man who suffered from hairy cell leukemia to develop and patent a commercial T-cell line valued at more than $3 billion), 793 P.2d 479 (Cal. 1990).

e) In *Washington University v. Catalona*, 490 F.3d 667 (8th Cir. 2007), *cert. denied*, 128 S. Ct. 1122 (2008), the Eighth Circuit Court of Appeals applied a property-rights analysis to a dispute over the ownership of biological materials donated to a hospital by surgery patients for later cancer research. The court found that the donations constituted valid inter vivos gifts under Missouri law; thus, the patients could not later direct the hospital to transfer the biological materials to a doctor at another hospital. Lyria Bennett Moses, *The Applicability of Property Law in New Contexts: From Cells to Cyberspace*, 30 SYDNEY L. REV. 639, 644 (2008).

f) For commentary on controversial legal debates over property rights in organs and other body parts used for medical research and the absence of proper acknowledgment of the medical profession's entrepreneurial interest in its subjects, *See*, Melissa M. Perry, *Fragmented Bodies, Legal Privilege, and Commodification in Science and Medicine*, 51 ME. L. REV. 169 (1999).

7. For general background information on the treatment of dead bodies, *See* Percival E. Jackson, *The Law of Cadavers* (1950).

8. For an analysis of historical controversies involving anatomy and dissection, interpretation of interests and social values involved when corpses become the focus of competing claims and policy considerations for dealing with research on the dead, *See* Dorothy Nelkin & Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J. L. & MED. 261 (1998).

9. For a discussion of the legal complexities involved in determining the proper disposition of a partner's body upon death in same-sex couples, *See* Jennifer E. Horan, *"When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. GENDER RACE & JUST., 423 (1999) (arguing that courts should give the power to control disposition to the person closest to the decedent and ensure that same-sex partners are included in the definition of spouse).

10. Brian L. Josias, *Burying The Hatchet in Burial Disputes: Applying Alternative Dispute Resolution to Disputes Concerning the Interment of Bodies*, 79 NOTRE DAME L. REV. 1141 (2004) (examining the efficacy of conventional methods of dispute with respect to disputes over burial and organ donation and suggesting that, in certain situations, the use of ADR to resolve such disputes would be a viable alternative to the traditional adjudicative model).

11. For a discussion of the holding and use of human remains by museums, *see Human Remains: Transparency, Perspective and Balance*, Hetty Gleave et. al, Vol. IX Issue 2, ART ANTIQUITY AND LAW, 202 (2004).

B. Cases

1. A Decedent cannot control his or her own burial. Essentially such direction is usually guided by (a) the decedent's wishes, (b) rights of family members and (c) state statutes that prioritize decision-making authority—each state regulates this area differently. See *infra* Part C.

2. *Bruning. v. Eckman Funeral Home* (noting that a decedent's wishes are not absolute, but that a court should defer to them whenever possible), 693 A.2d 164 (N.J. Super. Ct. App. Div. 1997) (dispute over burial between decedent's spouse and girlfriend). *See also Sherman v. Sherman*, 750 A.2d 229 (N.J. Super. Ct. App. Div. 1999) (noting N.J.S.A. 8A:5-18 which prioritizes those persons who possess an interest in controlling the disposition of the dead. This right to control goes first to the surviving spouse and then to the majority of the surviving children unless other directions have been given by the decedent. The court stated that in delineating the rights of family members, the statute clearly places the decedent first and such preference can be determined by both testamentary and non-testamentary statements.)

3. *Estate of Moyer v. Moyer* (holding that testamentary powers exist only within the limits of "reason and decency as related to the accepted customs of mankind"), 577 P.2d 108 (Utah 1978) (family buried decedent, in spite of testamentary direction to cremate).

4. *Estate of Fischer v. Fischer* (holding that the surviving spouse and not the next-of-kin has the right to the possession of the body and to the control of burial . . . in the absence of a different provision by the deceased), 117 N.E.2d 855, 858 (Ill. App. Ct. 1954).

5. *Yome v. Gorman* (finding that the decedent's behavior during life that indicated a desire to be buried in a Catholic cemetery outweighed the wishes of the surviving spouse to change cemeteries), 152 N.E. 126, 128 (N.Y. 1926).

6. *Cohen v. Guardianship of Cohen* (holding that the testamentary disposition of a body is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that the decedent intended another disposition for his body), 896 So. 2d 950 (Fla. Dist. Ct. App. 4th Dist. 2005), *review denied*, 911 So. 2d 792 (Fla. 2005).

7. *Crocker v. Pleasant*, 778 So.2d 978 (Fla. 2001) – the Florida Supreme Court held on appeal that Florida recognizes a legitimate claim of entitlement by the next of kin to possession of the remains of a decedent for burial or other lawful disposition and thus the next of kin may bring a §1983 action arising from alleged deprivation of procedural due process.

8. A case in Virginia held that any persons within the "next-of-kin" class have coequal rights to possess, preserve or bury a dead body and that these rights do not follow a sequential hierarchy of relatives analogous to those for distribution of an estate. Thus, even though the decedent's adult children preceded the surviving parent and siblings in the estate distribution hierarchy, the parent and siblings had equal standing to bring claims related to the disposition of the corpse. *Siver v. Rockingham Memorial Hospital*, 48 F. Supp. 2d 608 (W.D. Va. 1999).

9. The director of the UCLA medical school's *Willed Body Program* was arrested and charged with *selling human body parts* from corpses donated to the medical school. An alleged middleman, who purportedly received the corpses from the director, was also charged with *receiving known stolen property with a value of more than four hundred dollars*. In connection with these arrests, donors' families filed suit, seeking class action status, against UCLA for its involvement these sales. It is interesting to note that the alleged middleman was charged with receiving stolen *property*, a concept not normally attributable to human remains. Chris T. Nguyen, Law Suit Alleges UCLA Sold Body Parts, ASSOCIATED PRESS ONLINE, March 9, 2004, *available at* http://news.google.com/newspapers?nid=1876&dat=20040309&id=4T8fAAAAIBAJ&sjid=SdAEAAAAIBAJ&pg=5269,3176480.
In *Bennett v. The Regents of the University of California*, 133 Cal.App.4th 347 (2005), the court denied class certification for the mishandling of human remains. The California Supreme Court *denied review*, 2006 Cal. LEXIS 101.

10. *Spates v. Dameron Hosp. Assn.*, 7 Cal.Rptr.3d 597 (Cal. App. Ct. 2003): In a California action brought by decedent's daughter for negligent infliction of emotional distress, conversion, and breach of fiduciary duty against a hospital after it disposed of her deceased mother's remains by cremation following unsuccessful attempts to notify daughter, the Court of Appeals held that the hospital did not owe daughter a duty of care under a California statute governing interment or disposition of remains by coroner.

11. In *Caseres v. Ferrer*, 6 A.D.3d 433 (N.Y.A.D. 2 Dept. 2004) a New York court held that there is only a personal and not a proprietary right in [a] decedent's body, and thus, although the appellant (decedent's ex-wife) received letters of administration of the decedent's estate, she had no standing to seek custody of the decedent's remains, reasoning that absent evidence that the decedent left instructions with respect to the disposition

of his remains, his surviving next of kin are the only people who have standing to seek possession of such remains for burial.

C. Statutes

1. Public Health Laws

a) Burial – regulate method and location.

(1) CBS Chicago, February 17, 2011, "Bodies Stacked 8 Deep at Cemetery."

b) Cremation – regulate storage and scattering.

c) Examples

(1) NEW YORK PUBLIC HEALTH LAW §4201, enacted in 2006, provides a form separate from the will that allows for the decedent to control the disposition of his remains. It also details a list of persons who may control the disposition of the decedent's remains. The proposed New York Senate Bill No. 171 offers additional guidelines pertaining to the written instrument required in this process.

(2) In Illinois, 755 ILCS 65/1 et seq. lists, in order of priority, those persons who have the right to control the disposition of the decedent's remains unless the decedent has left directions for the disposition. It also provides a form for the appointment of an agent to control the disposition of remains. A person may provide written directions for the disposition of the person's remains in a will, a prepaid funeral, burial, or cremation contract, a written instrument signed by the person and notarized, or in a power of attorney that contains a power to direct the disposition of remains.

(3) TEXAS HEALTH AND SAFETY CODE § 711.002 allows decedent to direct disposition. Direction must be by will, a prepaid funeral contract, or written instrument signed and acknowledged. In Texas, a designated agent can carry out the wishes of the deceased. Lynn Asinof, WALL STREET JOURNAL, July 11, 2002 at D2.

(4) VA. CODE ANN. § 54.1-2825 – individuals can designate a person to make arrangements for burial or cremation. The designation must be by a signed and notarized writing, and must be accepted by designee.

(5) Ala. Code 1975 § 43-2-831 (West 2014) states that the duties and powers of a personal representative commence upon appointment. Prior to appointment, a person named as personal representative in a will may carry out written instructions of the decedent relating to the decedent's body, funeral, and burial arrangements. *See also* AS 13.16.340.

(6) ARIZ. REV. STAT. ANN. §32-1365.01 (West 2013 and Supp. 1998) allows a legally competent adult to prepare a written statement directing the cremation or other lawful disposition of the legally competent adult's own remains. The written statement may but need not be part of the legally competent adult's will.

(7) ARK. CODE ANN. §20-17-102 (2009) allows an individual to execute a binding declaration governing the final disposition of bodily remains. A 2003 amendment added a provision that "[n]o additional consent of any other person is required if the declaration" is valid under the statute. In addition, the amendment created a shield from liability for crematory operators and funeral home directors acting in accordance with the terms of the declaration. Next of kin can no longer override the declaration with regard to cremation, however, in the absence of a declaration of final disposition, the person having lawful possession of the decedent's remains can dispose of the remains in any manner that is consistent with existing laws.

(8) CAL. HEALTH & SAFETY CODE §7100 & §7105 (West 2013 and Supp. 1999) clarifies that if decedent fails to provide internment instructions, the right to control the disposition of bodily remains devolves to a statutory list of family members. A 2004 amendment adds a competent adult sibling of the deceased to the list of persons who may control the disposition of the decedent's remains. Additionally, if the person who controls the disposition of the decedent's remains fails to act or cannot be found within 7 days of the death (or within 10 days for a spouse), the right to control the disposition shall succeed to the next person in accordance with the statute.

(9) S.D. CODIFIED LAWS §34-26-1 (Michie 1997) asserting that every person has the right to direct the disposition of his or her bodily remains and body parts.

(10) In Louisiana, the Decedent's burial wishes prevail when notarized, LA. REV. STAT. ANN. §8:655.

(11) New Hampshire requires compliance with the decedent's wishes if there are sufficient funds to do so, N.H. REV. STAT. ANN. §290:20.

(12) In New Jersey if a person appoints a person to control his remains in his will, that person maintains control. N.J. Stat. § 45:27-22. Proposed legislation will allow individuals greater discretion to update who is authorized to control his remains, provided at least two witnesses are present when a new writing is signed. 2018 NJ S.B. 1753 (NS).

(13) In 2004 the Florida legislature passed a bill to amend F.S. Ch. 470 and 497, governing the funeral and cemetery

industries. Under the new law, a "legally authorized person," as defined in the statute, may instruct funeral directors on the disposition of dead bodies. The prioritized list of "authorized persons" begins with the decedent, who is able to direct the disposition of his remains by a written inter vivos authorization or direction. 2004 Fla. Laws ch. 301. *See* James W. Martin, *Is the Law of the Body a Body of Law?*, The Florida Bar News, June 1, 2004.

(14) CONN. GEN. STAT. § 45a-318 – A person may execute a written document directing the disposition of that person's remains, designating an individual to act as an agent in carrying out those directions, or, in the absence of such directions, designating an individual to have custody and control of the disposition of the person's remains. The document must be signed by two witnesses. The statute also lists, in order of priority, those individuals who shall have the right to custody and control of the disposition of the person's remains in the event that there is no designated agent.

d) For a proposal for the creation of a Uniform Disposition of Bodily Remains Act, *See* Tracie M. Kester, Note, *Can the Dead Hand Control the Dead Body? The Case for a Uniform Bodily Remains Law*, 29 W. NEW ENG. L. REV. 571 (2007).

2. Cemetery Laws

a) Not-For-Profit – regulate location, timing and succession.

b) For-Profit – regulate location, timing and succession.

3. Autopsy Laws – public interest in the case of accidental, criminal or suspicious deaths outweighs certain wishes of the decedent and/or his or her family.

D. Summary

While there seems to be a preference to accommodate a decedent's wishes regarding the disposal of his or her remains, this is nowhere an absolute right. Authority over the body rests with the surviving family members. Even the interests and desires of surviving family members can be outweighed by societal norms or public health concerns. This area requires statutory and perhaps Constitutional reform in order to protect and enforce a decedent's wishes. The weight of modern commentary seems to be in favor of finding:

1. A property right – but a commercially inalienable one – in one's body;

2. Continuation of personal rights with decedent represented by the executor; or

3. Intellectual Property rights, such as those currently covering covers athletes, models and other public figures.

II. Control Over Disposition of Body Parts

A. History of Property Rights in Body Parts

1. *See* the discussion at I.A., *supra.*

2. For a complete discussion of the topic, See Erik S. Jaffe, *She's Got Bette Davis[']s] Eyes: Assessing The Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528 (1990).

3. A Texas death row inmate was denied the opportunity to take advantage of the Texas Department of Criminal Justice's organ donation policy. Under the policy, the state covers the cost of guarding and transporting the prisoner to Galveston for the surgery. A department spokesperson said that the policy does not apply to condemned inmates. *An Organ Donation Offer On Death Row is Refused*, THE NEW YORK TIMES, Sept. 9, 1998, at A23. *See also Lee v. Quarterman*, 2008 WL 3926118 (S.D. Tex. August 21, 2008) (holding that a Texas inmate does not have a constitutional right to donate an organ and an inmates right to donate an organ is a matter of prison administration that a prospective inmate donor must pursue through the channels established by the Texas Department of Criminal Justice).

4. In one case, the only suitable donor could not be compelled in equity to donate his unique bone marrow to save his cousin's life, the court there citing the established common law doctrine of 'no duty to rescue another.' *McFall v. Shrimp*, 10 Pa. D. & C.3d 90 (Pa Ct. Com. Pl. 1978). However, as one commentator noted, there may come a time when society will focus less on 'best interests of the individual' and "more on an objective evaluation that [an] individual's property interest in his body part, which is being sought by another" should be used for the greater good of society even at the expense of the individual. Charles M. Jordan, Jr. & Casey J. Price, *First Moore, then Hecht: Isn't it Time We Recognize a Property Interest in Tissues, Cells and Gametes*?, 37 REAL PROP. PROB. & TR. J. 151,165 (2002).

5. In 1994, Pennsylvania passed legislation establishing the Governor Robert P. Casey Memorial Organ Donation Awareness Trust Fund (20 PA. CONS. STAT. § 8622 (1999)). The Department of Transportation, the Department of Revenue and the Department of Health receive contributions when Pennsylvanians make a voluntary one-dollar contribution through drivers' license renewals, vehicle registrations or state income tax returns. The law states that ten percent of the fund may be spent each year by the Pennsylvania Department of Health for reasonable medical expenses, paid to the funeral home or hospital, but not to the donor's family or estate. While the Act stipulates a maximum of $3000 per family, Pennsylvania's Organ Donor Advisory Committee has decided the payments should approximate $300 per family.

6. In NY, bills have been introduced in the past few years to amend the tax law to provide a credit against estate tax for organ donors. An estate tax credit of $1000 would be allowed for those individuals who give an anatomical gift of all or part of his or her body. The bill has not yet been passed. (2009 NY S.B. 1224). This bill is still pending.

7. NY Senate Bill No. S01475 (2017), aims to expand the existing tax deduction of $10,000 for human organ donations to make it easier for persons to donate organs without worrying about expenses related to the transplant. The bill would allow the spouse of a human organ donor to claim a deduction related to transportation expenses, lost wages, and lodging expenses related to the donor's transplant. An expanded tax credit would also include child care costs within the $10,000 deduction when such costs are incurred by the organ donor and spouse in relation to a transplant procedure. The bill has not been signed into law as of yet. It was passed in the Senate on May 2, 2017, but died in the Assembly on Jan. 3, 2018. It has been returned to the Senate.

8. Michigan enacted a law that prohibits family members from overruling an organ donor's wishes after death. The law gives legal standing to retrieve organs and provides an opportunity to make the public more aware of the organ crisis. MICH. COMP. LAWS § 333.10102(a) (2003). This law was repealed effective May 1, 2008, by P.A.2008, No. 39, § 3.

9. The availability of donated organs varies widely from country to country. In some countries, such as Austria and Belgium, everyone is presumed to be a potential donor unless they specifically refuse. In most others, including the United States, donors or their families must give permission before an organ is removed. *See* Jennifer M. Krueger, *Life Coming Bravely Out of Death: Organ Donation Legislation Across European Countries*, 18 WIS. INT'L L.J. 321 (2000) (discussing organ donation, the European Union and the need for a comprehensive and coordinated organ donation system).

10. Professor Hardiman vigorously argues for a "right of commerciality" augmenting any existing quasi-property rights one has in one's body parts, analogizing such right to the pecuniary value of one's name and personal likeness. He further argues that while such right would not give one an absolute right to the individual's tissue or body part, it would prevent others from enriching themselves from such a misappropriation. Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV., 207, 215 (1986). If this theory on the "right of commerciality" published in 1986 had been respected, it undoubtedly would have made the plaintiffs argument for conversion of his T-cells stronger in *Moore v. Regents of California*, *supra*.

11. Estimates indicate that of the approximately 20,000 Americans who die each year under circumstances that make their organs suitable for transplant, only about 3,000 agree to donate them. The current waiting list for organ transplants in the United States has surpassed 90,000. The list has grown steadily (from 20,481 in 1990) as techniques improved, more hospitals began programs and doctors recommended transplants for their patients. In 2005, nearly 6,500 people died waiting for transplants and there were approximately 28,000 organ transplants. As of March 2020, 112,000 patients were on the national transplant waiting list and 20 people die each die awaiting transplant. In addition, every ten minutes another person is added to the transplant waiting list, but only 3 in 1,000 people die in a way that allows for organ donation. *See* HEALTH RESOURCES AND

SERVICES ADMINISTRATION, ORGAN DONATION STATISTICS, https://www.organdonor.gov/statistics-stories/statistics.html (2020).

12. Recent developments now allow traditionally 'untransplantable' body parts to be transplanted.

a) Hand and limb transplants --

(1) The first hand transplant, performed in Ecuador in 1964, lasted for less than two weeks.

(2) In September 1998, in France, the hand and lower forearm of a dead man was transplanted onto Clint Hallam, an accident victim. The same team of surgeons, led by Drs. Jean-Michel Dubernard, Nadey Hakim and Earl Owen, transplanted two new arms onto a patient in January 2000, the first operation of its kind. *In First Such Operation, Man Receives Two Arm Transplants*, THE NEW YORK TIMES ON THE WEB, Jan. 14, 2000.

(3) On January 24, 1999, in the first hand transplant in the United States, surgeons, led by Dr. Warren C. Breidenbach, reattached the left hand of an unidentified donor onto Matthew David Scott. At the time of the surgery, Dr. Breidenbach estimated that there was a fifty- percent chance the hand would last a year, but that long-term prognoses were unknown. After the surgery Scott was able to use the transplanted hand to open doors and tie his shoes. However, some doctors maintain that the risks posed by the drugs Scott must take for the rest of his life to prevent his body from rejecting the new hand outweigh the benefits. *Hand Transplant Man Can Use Fingers*, THE NEW YORK TIMES ON THE WEB, Nov. 29, 1999.

(4) Some experts and associations, including the American Society for Surgery of the Hand, are skeptical that anti-rejection drugs have advanced enough to make this operation a success. They also question whether the risk-to-benefit ratio has been "convincingly established."

b) Other Transplants

(1) The first cadaveric kidney transplant was performed in the Soviet Union in 1936. Elizabeth J. Church, ORGAN DONATION AND TRANSPLANTATION, July 1, 2002. Kidney transplants are the most successful of all organ transplants. *Id*.

(2) Doctors are now able to use artificial corneas in transplants. *Cornea implant moves to second stage with success*, ASSOCIATED PRESS STATE & LOCAL WIRE, October 17, 2005.

(3) Doctors in Sweden reported the first successful lung transplant from a donor declared dead after the heart stopped beating. Doctors injected coolant into the lungs just after the donor's heart stopped. Because organs begin to deteriorate the minute the heart stops, the main source of organ donations has previously been those of brain-dead individuals on life support. Ethical issues surround the new procedure because the lung must be removed almost immediately after the heart has stopped beating and permission to remove the lung is asked before the patient dies, raising fears that not enough will be done to keep the patient alive. This procedure expands the size of the potential donor pool but also raises concerns regarding donor protection. *New Method Could Aid Lung Donation*, ASSOCIATED PRESS, March 15, 2001.

(4) Surgeons have marked a new medical milestone with the first face transplant. In November 2005, doctors in France took tissues, muscles, arteries and veins from a brain dead donor and attached them to the patient's lower face. *Face Transplant Patient Getting Back to Normal Life*, ABC NEWS (May 25, 2006), http://abcnews.go.com/Primetime/Health/story?id=2001410&page=1.

(5) On March 27, 2010, the first successful full face transplant was performed at the University Hospital Vall d'Hebron in Barcelona, Spain. The harvest and subsequent implant took approximately 24 hours. *See* Juan P Barret et al., *Full Face Transplant: The First Case Report*, 254 ANNALS OF SURGERY 252 (2011).

(6) Doctors in Saudi Arabia have reportedly performed a uterus transplant on a woman, although it had to be removed due to blood-clotting problems, and researchers in Sweden successfully transplanted uterine in mice, which were then able to give birth. The ability to perform uterine transplants, if successful, would offer an alternative to surrogacy. Jacqueline Stenson, *The Future of Babymaking*, MSNBC NEWS (July 22, 2003), http://msnbc.com/news/940553.asp?0dm=C226H.

(7) In July of 2003, the first-ever tongue transplant was performed during a 14-hour operation. The patient is able to speak clearly and swallow. Martin Gnedt, *Human Tongue Transplant Patient Leaves the Hospital*, USA TODAY ONLINE (Aug. 21, 2003 12:03 PM), http://www.usatoday.com/news/health/2003-08-21-austria-tongue_x.htm.

(8) Other transplantable body parts include liver, pancreas, intestine, bone, cartilage, skin, heart valves, and saphenous vein.

c) Cell and Genetic Research

(1) Doctors have found that hematopoietic stem cells collected from umbilical cord blood at birth can be used to treat various life-threatening diseases of the blood and immune systems. Biotechnology companies use these advances to a commercial advantage and offer parents the opportunity to harvest and cryogenically preserve their newborn's stem cells as "insurance" against future diseases. This technology raises issues of ownership and control over stored body parts. Sheila R. Kirschenbaum, *Banking on Discord: Property Conflicts in the Transplantation of Umbilical Cord Stem Cells*, 39 ARIZ. L. REV. 1391 (1997). Some commentators argue for limited property rights in umbilical cord blood due to its unique nature as neither body part nor body waste and the absence of risk to the mother or the newborn during harvesting. Establishing and protecting property rights in cord blood is seen as a way to maximize the potential use of such a valuable medical resource. Stephen R. Munzer, *The Special Case of Property Rights in Umbilical Cord Blood for Transplantation*, 51 RUTGERS L. REV. 493, 568 (1999).

(2) An article published by the Philadelphia Children's Hospital stated that prenatal stem cell transplants could open the door to organ transplants by making the patient's immune system tolerant of the donated organ. John Ascenzi, Children's Hospital of Philadelphia, *Pre-Natal Stem Cell Transplants May Open Door to Organ Transplants, Treating Genetic Diseases* (Nov. 6, 2002), http://www.eurekalert.org/pub_releases/2002-11/chop-psc110602.php.

(3) Sheryl Gay Stolberg, *Some See New Route to Adoption in Clinics Full of Frozen Embryos*, THE NEW YORK TIMES, February 25, 2001 (discussing couples who have chosen to put unused embryos up for adoption and the dilemma faced by fertility centers holding frozen embryos for couples who have not given direction for disposition or paid storage fees for their embryos).

(4) Some conservative groups are pushing for the term "embryo adoption" as opposed to "embryo donation," and want the area to be considered under adoption law rather than contract law. *From Stem Cell Opponents, an Embryo Crusade*, THE NEW YORK TIMES (June 2, 2005), http://www.nytimes.com/2005/06/02/national/02embryo.html?ex=1275451200&en=fef71389a1bef584&ei=5088&partner=rssnyt&emc=rss.

(5) In 2000, parents in Colorado became the first to use genetic tests to have a baby with the exact traits needed to provide a cell transplant to a sibling. Stem cells from the newborn's umbilical cord and placenta were given to the

sibling who has a rare blood disorder. Although genetic testing had already been used in cases to help parents who carry disease-causing genes to select healthy embryos, this was the first instance of parents using the tests to select an embryo as a tissue donor. Denise Grady, *Son Conceived To Provide Blood Cells For Daughter*, THE NEW YORK TIMES, October 4, 2000, at A24.

(6) Margaret Talbot, *The Cloning Mission: The Desire to Duplicate*, THE NEW YORK TIMES, February 4, 2001, at Section 6, Page 40, Column 1 (discussing cloning of human beings). A number of states, including California, Louisiana, Michigan, North Dakota, Iowa, Rhode Island, and Virginia have passed laws against cloning for reproductive purposes. Bioethicists have embraced cloning as a reproductive right to assist the infertile. The ethics committee of the American Society for Reproductive Medicine (ASRM) (www.asrm.org) issued a report stating that cloning as a treatment for infertility did not currently meet "standards of ethical acceptability."

(7) In the past few years there have been numerous unproven claims of success in human cloning, inducing even middle of the road lawmakers to support an outright ban. This trend was reinforced by President Bush's indication that he would support a ban on human cloning. Greg Wright, *Human Clone Claim Prompting Congress to Ban Practice in United States*, GANNETT NEWS SERVICE, Dec. 27, 2002. *See also* Nell Boyce, *The Clone is Out of the Bottle*, U.S. News & World Rep., Feb. 23, 2004.

(8) A number of bills have been introduced in Congress attempting to prohibit human cloning and the expenditure of funds to conduct or support research on cloning. H.R. 110 and H.R. 1050, both entitled the "Human Cloning Prohibition Act of 2009", were introduced in the 111th Congress and referred to the House Judiciary Committee. Both bills did not receive a vote and died in Congress.

(9) The dramatically expanding field of genetic research, including the creation of DNA data banks, has led some commentators to call for greater privacy protections. *See* Michael J. Markett, *Genetic Diaries: An Analysis of Privacy Protection in DNA Data Banks*, 30 SUFFOLK U. L. REV. 185 (1996). Others recommend the creation of a federal property right in genetic material, arguing that a federal Genetic Privacy Act would "provide optimum protection for individuals while concurrently furthering social goals by resolving the current legal uncertainty." *See* Michael M.J. Lin, *Conferring a Federal Property Right in Genetic Material: Stepping into the Future with the Genetic Privacy Act*, 22 AM. J.L. & MED. 109, 111 (1996); *see also* Donna M. Gitter, Article, *Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research*

Participants' Property Rights in Their Biological Material, 61 WASH. & LEE L. REV. 257 (2004).

(10) Scientists working with mice have successfully transplanted stem cells that eventually develop into sperm cells carrying the traits of the donor male. Scientists hope these procedures will eventually be used to replenish cells damaged in boys who must undergo cancer treatments damaging their reproductive potential. *Sperm Stem Cells Transferred in Mice*, THE NEW YORK TIMES ON THE WEB, December 29, 1999, *available at* http://www.nytimes.com/1999/12/29/us/sperm-stem-cells-transferred-in-mice.html.

(11) Australian researchers have discovered a way to fertilize an egg with cells from any part of the body, rather than with sperm. Thus far, researchers have been able to fertilize mice eggs with cells derived from non-reproductive parts of the mice. *Australian Research Fertilizes Eggs Without Sperm*, REUTERS ON THE WEB, July 10, 2001.

(12) Another study showed that female eggs may not necessarily be required to create offspring. Scientists from the University of Bath in the UK have developed a technique that involves using sperm to fertilize embryos instead of eggs, and the method has resulted in the birth of healthy mice. *See* Honor Whiteman, *Ferilization Without an Egg: New Technique Produces Healthy Baby Mice*, MEDICAL NEWS TODAY (September 14, 2016), https://www.medicalnewstoday.com/articles/312904.

B. Cases

1. At least three states have upheld the constitutionality of their limited presumed consent laws in the case of removal of specific body parts at autopsy. *State v. Powell*, 497 So. 2d 1188 (Fla. 1986) (holding the state's interest in providing sight to the blind supersedes any rights to familial notice before removing cornea from cadaver); *Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127 (Ga. 1985) (holding there is no constitutionally protected interest in a decedent's body and that the interest of public welfare dictates that corneal tissue could be utilized without consent); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275 (Mich. App. Ct. 1984) (holding that the common-law right of a parent to bury her child without mutilation is not included in the constitutional right to privacy).

a) The above cases all acknowledge a quasi-property right relative to the body, but find no property or liberty right in the constitutional sense under the Fifth (Takings) or Fourth and Fourteenth (Due Process) Amendments.

b) *But see Newman v. Sathyavaglswaran*, 287 F.3d 786 (9th Cir. 2002) (holding the exclusive right of the parents to take possession of their children's deceased bodies created a property interest significant enough entitling it to due process protection before removal of their corneas without consent of the parents notwithstanding the then California statutory provision to the contrary), *cert. denied*, 537 US 1029 (2002).

c) In *Beaky v. County of Bucks*, 2009 WL 2390224 (E.D. Pa. August 3, 2009), while the court acknowledged that there was some constitutionally-protected property interest in a decedent's body (citing *Newman*), it held that the scope of due process owed has not been established. Accordingly, it ruled against Plaintiff's because the coroner's office attempted to reach next of kin before cremating the decedent. *See also Chaudhry v. City of Los Angeles*, 573 Fed.Appx. 628 (9th Cir. 2014) (holding that parents and siblings of individual who was shot and killed by police officer were not deprived of any constitutionally protected interest in possession, control, and disposition of individual's remains, as would support their substantive due process claim against officer, city, and others; although California law created a right to possession of a body for burial, it did not create a right to burial on whatever terms the family desires, and individual's family had no right to stop coroner from performing autopsy, removing organs, or even from handling the body in a disrespectful or undignified manner).

2. The *Moore* case, *supra* (holding a patient cannot recover in conversion for his doctor's commercial use of his spleen cells without consent), does not by its terms apply to posthumous organ donations.

3. *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43 (2006), a case brought by an intended donee against the NYODN for conversion (among other claims) after the organization used an incompatible kidney intended for him for someone else, the Court of Appeals for New York ruled against the plaintiff's cause of action for conversion, holding that no such right exists for the specified donee of an incompatible kidney. Leaving open the possibility that a specified donee of a compatible organ may have such a right.

4. *Carey v. New England Organ Bank*, 17 Mass. L. Rptr. 582 (Mass. Super. 2004) (holding that determining whether organs are qualified for transplant prior to recovering them from decedent's body is not required under UAGA). In this case, the post-recovery discovery that decedent's organs and tissue could not be transplanted gave rise to an action by his parents against the organ bank for negligence, misrepresentation and emotional distress. Although plaintiffs consented to the donation, they claimed that defendants acted negligently and not in good faith when soliciting their consent and harvesting decedent's tissue and organs (which were later found unsuitable for human transplantation.) The court held that the organ bank did not violate good faith immunity under UAGA by failing to take appropriate measures to determine that such organs were not qualified for transplant. The Supreme Court of Massachusetts affirmed

the judgment in *Carey v. New England Organ Bank*, 843 N.E.2d 1070 (Mass. S. Ct. 2006).

5. In *Schembre v. Mid-America Transplant Ass'n*, 135 S.W.3d 527 (Mo. Ct. App. 2004), a Missouri court held that a medical transplant services company did not go beyond the consent it was granted and thus acted without negligence, for purposes of the Uniform Anatomical Gift Act (UAGA), when its employees harvested leg bones, tissue, and corneas from patient, where the company obtained a medical consent form from patient's wife, followed its standard protocols during removal, and patient's family did not contact the company to limit or revoke the gift.

6. *Amaker v. King County*, 479 F. Supp.2d 1162 (W.D. Wash. 2007), (holding that Washington's UAGA was not enacted to benefit the Plaintiff, rather it was enacted to encourage the process of organ donation. Thus, Plaintiff was not within the class for whose "especial" benefit the UAGA was enacted and therefore no implied cause of action existed). In the case, the decedent's brain, tissue, and blood were donated to a medical research institute bereft of consent from the next of kin (decedent's father). After the father's death, the decedent's sister attempted to bring an action under the Washington UAGA for lack of written or verbal consent, to no avail. The Washington Supreme Court adopted the reasoning used in *Amaker* in *Adams v. King County*, 164 Wash.2d 640 (2008), a case in which a research institution procured a man's entire brain after only receiving permission to extract brain tissue. In holding that decedent's mother had no implied cause of action through Washington's UAGA, the Court stressed that the primary purpose of the UAGA was to encourage organ donation and not to offer decedents' families causes of action.

7. In *Geary v. Stanley Medical Research Institute*, 939 A.2d 86 (Me. 2008), the Supreme Judicial Court of Maine ruled that the good faith clause of the Maine UAGA did not provide immunity, as a matter of law, to an organ donation trust and its agent who allegedly procured "donations" of decedents' brains without proper authorization from their respective spouses, as a basis for an interlocutory appeal of partial summary judgment.

8. Courts have liberally construed the good faith immunity provision, presumably in furtherance of the UAGA's chief goal (to encourage organ donation). *See e.g.*, the *Carey* case, *supra*; *Cooper v. Louisiana Organ* Procurement, 146 So.3d 908 (La. App. 2 Cir. 2014), *writ* denied, 157 So.3d 1109 (La. 2015) (holding that evidence was insufficient to support finding that organ procurement agency and its employee failed to act in good faith when it removed donor's organs following her death, and thus the Anatomical Gift Act barred donor's family from recovering damages related to the removal, despite evidence that donor's most recent identification card did not have an organ donor symbol on it and that donor verbally requested that she did not want to be a donor when she obtained the card; evidence indicated that donor was listed on the statewide donor registry, and that donor's family consented to the donations despite initial misgivings; *Kennedy-McInnis v. Biomedical Tissue Services, Ltd.*, 178 F. Supp.3d 97 (W.D.N.Y. 2016) (ruling in favor

of tissue bank that received decedent's unauthorized tissue through a human-tissue recovery firm with a checkered past, because there was not enough evidence to show that it acted other than in good faith); *Scarbrough v. Transplant Resource Center of Maryland*, 242 Md. App. 453 (2019) (good faith provision confers immunity on organ procurement organizations for negligently packaging, preserving, and transporting a donated organ).

C. Statutes

1. Uniform Anatomical Gift Act (UAGA) (deals with anatomical gifts by decedents)

a) All 50 states, the District of Columbia, Guam, and the Virgin Islands have enacted either the 1968, 1987, or 2006 version of the UAGA. As of today, the 2006 revised version of the UAGA has been adopted by Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York (New York's adoption happened fairly recently when Senate Bill S6000A was signed into law on December 26, 2019), North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania (adopted a version of the 2006 UAGA (See https://gkh.com/news/2018/11/pennsylvania-expands-anatomical-gift-law/)), Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, as well as the US Virgin Islands, and the District of Columbia. Florida, through Senate Bill 766 (which went into effect July 1, 2009), revised its anatomical gift law to incorporate a variety of issues addressed in the 2006 version of the UAGA (See https://www.florida-probate-lawyer.com/probate/florida-anatomical-gifts-act/).

b) UAGA standardizes the process of organ donation. Additionally, the 1987 version prohibits their sale. It includes "organs, tissues, eyes, bones, arteries, blood, other fluids and any other portions of a human body" in the term "part." It gives preference to the wishes of the decedent, but sets forth a prioritized list of family members authorized to make donations when the decedent's wishes are unknown.

c) Donations may be made to any hospital, school, bank or specified individual. The most significant difference between the 1968 and the 1987 versions is that the 1987 version permits implied consent in the case of corneas and pituitary glands when corpses are in the hands of coroners or medical examiners after making reasonable efforts to locate the decedent's medical records and/or family.

d) The UAGA was revised in 2006. The revised UAGA retains the basic policy of the 1968 and 1987 versions, though it calls for their

repeal. The revised version strengthens the system honoring an individual's choice to be or not to be a donor. It also adds to the list of persons who can make an anatomical gift for another individual during that individual's lifetime, and to list of people who can make a gift of a deceased individual's body or parts. REV. UNIF. ANATOMICAL GIFT ACT (2006), 8A U.L.A. 3 (Prefatory Note) (Supp. 2007).

e) It is unclear under all versions of UAGA whether the inclusion of "a stillborn infant or fetus" in the definition of "decedent" covers fetuses resulting from abortions.

2. National Organ Transplant Act (NOTA), 42 U.S.C. §§ 273-274 (1984). NOTA is the only federal law that attempts to regulate the procurement and transplantation of human organs. It prohibits the transfer of a body part for "valuable consideration" and provides grants to organ procurement agencies and a national organ-sharing system. 42 U.S.C. Section 274 was amended by PL 113-51, November 21, 2013, 127 Stat. 579. The amendment focused on giving OPTN the option to acquire organs that are infected with HIV/AIDS, so long as those organs are transplanted in individuals who share the same illness, or are participating in approved clinical research.

NOTA was amended in part by the Organ Donation and Recovery Improvement Act, PL 108-216, April 5, 2004, 118 Stat 584 – which was passed to promote organ donation. The law authorizes $25 million in new resources for efforts to increase organ donation, including providing (1) grants for reimbursement of travel and subsistence expenses and incidental non-medical expenses incurred by individuals toward making living organ donations; (2) peer reviewed grants for studies and demonstration projects to increase organ donation and recovery rates; (3) grants to states for organ donor awareness, public education and outreach activities, and programs designed to increase the number of organ donors within the state; and (4) matching grants to qualified organ procurement organizations and hospitals to establish programs coordinating organ donation activities to increase the rate of organ donations for such hospitals.

a) It is important to note that in contrast to contract law, "valuable consideration" in a transplant context excludes "reasonable payments" in connection with the donation of the organ such as removal, transportation, lost wages of the donor and medical costs. 42 U.S.C. §274e(c)(2).

b) A bill before the 111th Congress would amend the federal tax code to provide for a nonrefundable personal tax credit to living donors of qualified life-saving organs. The bill would also amend NOTA to provide that such a tax credit shall not be deemed "valuable consideration." Living Organ Donor Tax Credit Act of 2009, H.R. 218, 111th Cong. (2009-2010). For a discussion of the benefits of tax credits, *See* Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits*, 17 ANN. HEALTH L. 67 (2008). This bill was referred to the Subcommittee on Health on January 14, 2009, and has not made any progress since.

c) Laurel R. Siegel, Comment, *Re-engineering the Laws of Organ Transplantation*, 49 EMORY L.J. 917 (2000) (1) proposes that Congress amend NOTA to include pilot programs, administered by the Department of Health and Human Services, similar to Pennsylvania's incentive program through which the family of a deceased organ donor will receive funeral expenses; (2) argues that adopting an incentive system provides a bridge between the current altruistic system and a full-fledged market.

d) A bill (H.R. 6458) was introduced by Rep. Tom Rice (R-SC) in the House on July, 19, 2018, which sought to make several changes to the organization and goals of the Organ Procurement and Transplantation Network, including expanding the scope to specifically address certain populations (e.g., minorities, children, and individuals in rural areas). It was referred to the House Committee on Energy and Commerce but has not progressed.

e) Phillips Ducor, *The Legal Status of Human Materials*, 44 DRAKE L. REV. 195 (1996)

(1) NOTA superseded cases upholding sales of organs (at 243).

(2) Claiming that blood and sperm (at 254) are not covered under NOTA – but are included in UAGA.

(a) Blood is the only transplantable body part not included in NOTA (Ducor at 247).

(b) Similarly, sperm and ova are not included within NOTA's definition of "organ" and can legally be sold to donees in amounts that do not pose a health risk to the donor. 42 U.S.C. 274e(c)(1).

(c) NOTA restricts sale of organs "for use in human transplantation," 42 U.S.C. § 274e(a). Ducor interprets this as prohibiting the sale of organs only where their purpose is transplantation, not where they will merely be used in a transplant.

(d) The 1987 version of UAGA similarly prohibits sales or purchases after death, that involve body parts "for transplantation or therapy," UNIFORM ANATOMICAL GIFT ACT § 10(a), 8A U.L.A. 58 (1993).

(e) Non-transplantable organs (e.g. diseased) could presumably be sold (at 249).

(3) Possible justification for the different treatment of blood and sperm

(a) Replenishable.

(b) Less painful and dangerous to "donate."

(c) It is interesting to note that these distinctions do not appear to apply to ova.

(4) While it is possible that sale restrictions do not apply to blood, sperm, and ova, payment is typically for "services" rendered, not the actual donated body parts themselves. The American Society for Reproductive Medicine specifies that donors be paid for the "inconvenience, time, discomfort, and for the risk undertaken" as opposed to being paid for the eggs donated. *But see* Jay A. Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919 (1999) (arguing that infertility clinics compensate donors not for their services but for their eggs and, as a gain on property, donors should receive preferential tax `treatment under the "capital asset" definition). In addition, some commentators have argued for recognition of the tort of conversion in the context of misappropriation of eggs and embryos in human reproduction. *See* Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 LOY. L.A. L. REV. 381 (1999).

f) Christine A. Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 359 n.195 (1994) (citing Society for Assisted Reproductive Technologies ("SART") survey reporting that 90% of sperm donors were compensated).

3. UNIFORM DETERMINATION OF DEATH ACT (UDODA), 12A U.L.A. 593 (1996) – adopted by 38 States, the U.S. Virgin Islands, the District of Columbia and Puerto Rico, adopting a whole brain definition of death. (New York and North Carolina have provisions that are substantially similar to UDODA and are not included in above total).

4. There have been recent calls to revise UDODA to clarify and harmonize procedures related to the determination of death by neurologic criteria. Proposed revisions would identify the standards for determining death by neurologic criteria and address the question of whether consent is required to make this determination. *See* Erik Greb, *Experts Call to Revise the Uniform Determination of Death Act*, MD EDGE (January 3, 2020), https://www.mdedge.com/emergencymedicine/article/214955/traumatic-brain-injury/experts-call-revise-uniform-determination.

5. Autopsy Laws – apply whenever death is accidental, criminal or under suspicious circumstances. Almost all such state laws permit the removal of corneas and pituitary glands in the absence of known lack of consent.

D. Summary

While the law regarding organ donation is fairly settled by UAGA, UAGA has failed to accomplish its stated task of promoting organ donations. As a practical matter, the affirmative donation model does not work. The limited exception in the 1987 UAGA and

in most autopsy laws is ineffective, as most bodies are not autopsied, and there is a decreasing need for pituitary glands now that human growth hormone can be synthetically manufactured, and for corneas now that they can be grown in the lab. Even in the case of affirmative donations made pursuant to UAGA, in practice, they fail in the face of family objections, in order for doctors and hospitals to avoid litigation over "harvesting" organs. *See* Bray, *supra,* at 224.

Again, affirmative legislation seems called for to attempt to balance the conflict between respect for the sanctity of corpses, on the one hand, and the severe shortage of body parts needed to reduce death and suffering, on the other hand. Two alternative models have been proposed:

1. Mandatory Donation Model – *See* Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act,* 68 B.U.L. REV. 681 (1988).

    a) Proposes mandatory organ donation, with an exemption only for religious objections.

    b) Suggests that the state interest in organ availability would outweigh any potential privacy right issue (at 717).

    c) Compares mandated organ donation with the military draft and compulsory gifts to the poor through welfare – no real obstacle in overcoming the "right" to free will (at 719).

    d) Discusses tradition of nonfeasance and Americans' continued reluctance to require good service – *but see* Minnesota's "Good Samaritan Law," Minn. Stat. Ann. §604A.01(1988), and Vermont's "Emergency Medical Care" statute, VT. STAT. ANN., tit. 12, § 519.

2. Presumed Consent Model – This model would expand the presumed consent currently available for corneas and pituitary glands in the case of accidental, criminal and suspicious deaths to all body parts in the case of all deaths, in the absence of objections that are either known or readily ascertainable given the useful life of the body part. Apparently, some variant of this model is the law in at least 28 countries including: Argentina, Austria, Belgium, Bulgaria, Chile, Cyprus, Czech Republic, Denmark, Finland, France, Hungary, Greece, Israel, Italy, Japan, Latvia, Luxembourg, Norway, Poland, Portugal, Singapore, Slovenia, Spain, Sweden, Switzerland and Tunisia. The British Medical Association's proposed adoption of a similar system was rejected by the government. *See* Fred H. Cate, *Human Organ Transplantation: The Role of Law,* 20 J. CORP. L. 69, 83 n.113 (1994); Sean Arthurs, *No More Circumventing the Dead: The Least-Cost Model Congress Should Adopt to Address the Abject Failure of our National Organ Donation Regime,* 73 U. CIN. L. REV. 1101, 1117 (2005); Emily Denham Morris, *The Organ Trail: Express Versus Presumed Consent as Paths to Blaze in Solving a Critical Shortage,* 90 KY. L.J. 1125,1135-36 (2001-2002); Kieran Healy, *The Supply and Demand of Body Parts: Do Presumed-Consent Laws Raise Organ Procurement Rates?,* 55 DEPAUL L. REV. 1017 (2006).

a) French Model- Under the Caillavet Law of 1976 as amended, with some exceptions, all decedents are presumed to consent to organ donation unless they opt out to such approach. Doctors must exercise reasonable efforts to determine if the decedent opted out of this scheme. Morris, *supra*, at 1135-36 (2001-2002).

b) Austrian Model- "Austria has the only system of 'pure' presumed consent." Elizabeth J. Church, *Organ Donation and Transplantation*, RADIOLOGIC TECHNOLOGY (July1, 2002). An Austrian citizen must formally opt out of being an organ donor and the doctor need not even make reasonable inquiry to determine if the decedent in fact opted out. Even if the family makes a written request, the doctor is free to ignore it. *Id.* at 1136-1137.

c) For a general discussion on the doctrine of presumed consent and the ethical issues raised by it, see Marie-Andrée Jacob, *On Silencing And Slicing: Presumed Consent To Post-Mortem Organ "Donation" In Diversified Societies*, 11 TULSA J. COMP. & INT'L L. 239 (2003).

d) There are a number of U.S. states that have some version of a presumed consent law, though few are actively used. See Richards, *supra*, at 392.

3. Traci J. Hoffman, *Organ Donor Laws in the U.S. and the U.K.: The Need for Reform and the Promise of Xenotransplantation*, 10 IND. INT'L & COMP. L. REV. 339 (2000) (discussing the failure of current organ procurement laws; express and presumed consent as alternate systems of organ procurement; and the alternative of xenotransplantation, its history and the ethical considerations involved in transplanting animal tissues and organs into humans).

4. Congress recently passed the Organ Donation and Recovery Improvement Act (108 P.L. 216) that will provide money for travel and other expenses incurred by organ donors. The legislation authorizes $5 million per year for grants to states and organ banks to reimburse travel and expenses for certain living donors. It also allows $15 million for grants that would help states develop programs for those wishing to donate and for public education about donation.

5. New York enacted a system (the "New York State Gift of Life Medal of Honor") to honor and give public recognition for those individuals whose life-saving contribution of an organ, tissue, or bone marrow to a needy recipient. Such individuals will be given a life medal of honor recognizing their contribution. N.Y. STAT ANN. §4368 (West 2014).

Constitutional amendments may be required as well.

III. Control Over Posthumous Reproduction

A. Technology

1. Definitions:

a) Gametes (eggs and sperm) are reproductive cells. They may be successfully cryogenically stored and later thawed. Gametes, by themselves, are not capable of developing into human beings.

(1) The oldest frozen sperm sample used for a live birth had been frozen for 27 years and 195 days. *See* Guiness World Records, *Oldest Sperm Used in Successful IVF Treatment*, GUINESS WORLD RECORDS (November 29, 2015), https://www.guinnessworldrecords.com/world-records/oldest-sperm-used-in-successful-ivf-treatment. In 2019, scientists in Australia successfully impregnated dozens of sheep using sperm that was frozen for over 50 years. Even more astounding, the birth rate was as high as using sperm that was frozen for less than a year. Jack Guy, *Lambs born from world's oldest stored semen*, CNN MARCH 18, 2019. https://www.cnn.com/2019/03/18/australia/oldest-sperm-ewes-scli-scn-intl/index.html

b) Zygotes are single-cell, fertilized eggs.

c) A pre-embryo (4-to-8 cell zygote) is an embryo during the first 14 days of creation. It may be successfully cryogenically stored and later thawed.

d) Embryos exist at the stage at which cell differentiation develops.

e) Cloning is a process whereby a living creature can be duplicated from other than reproductive cells.

f) In vitro fertilization is accomplished in a petri dish.

g) In vivo fertilization is accomplished inside the uterus.

h) ART is assisted reproductive technologies.

i) AID is artificial insemination by an anonymous donor.

j) AIH is artificial insemination by the husband.

k) Posthumous Gamete Harvesting

(1) Male

(a) Maggie Gallagher, *The Ultimate Deadbeat Dads*, NEWSDAY, February 1, 1995 at A28. Anthony Baez died in police custody. Sperm was taken (at the request of his widow) within 24 hours.

(b) Ike Flores, *Newlywed Dies in Crash, but Hopes for Children Live in Extracted Sperm*, L.A. TIMES, July 3, 1994, at A10. Emanuele Maresca, 22 years old, was killed in a car accident 16 days after his

wedding. His sperm was harvested for future fertilization of his widow.

(c) *Sperm Taken from Another Dead Man*, SAN FRANCISCO CHRONICLE, January 25, 1995, at A5. Sperm was removed almost 24 hours after the death of a 34-year-old man. His wife of five months requested the procedure for potential future use.

(d) *Medical Ethics 'Posthumous Reproduction': Baby Born of Dead Man's Sperm*, American Political Network, American Health Line, Volume 6, No. 9, Mar. 30, 1999. A Los Angeles woman gave birth to a child who was conceived with sperm from her deceased husband. The sperm was retrieved 30 hours after his death and frozen for 15 months before doctors used it to impregnate his widow. This is the first publicly acknowledged case of a birth under such circumstances in the United States.

(e) Jamie Talan, *After Death, A New Life*, NEWSDAY, December 26, 2004. Two years after husband's death, woman gives birth to a boy from sperm harvested at husband's death.

(f) The American Society for Reproductive Medicine's (ASRM) position is that without prior consent by "donor," requests for post-mortem sperm harvesting should be denied. It would seem that the ASRM's position on the topic of post-mortem sperm harvesting has evolved over the years. In a published ASRM Ethics Committee Opinion, the Committee stated: "[p]osthumous gamete retrieval or use for reproductive purposes is ethically justifiable if written documentation from the deceased authorizing the procedure is available . . . *[i]n the absence of written documentation from the decedent, programs open to considering requests for posthumous use of embryos or gametes should only do so when such requests are initiated by the surviving spouse or partner*." Ethics Committee of the ASRM, *Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion,* ASRM PAGES (June 11, 2018).While the position of the ASRM is that when there is written documentation that the deceased was interested in sperm retrieval - then it is ethically justifiable to do so, that is not to the exclusion of where there is no written documentation. Many times, especially in the case of younger people, they never wrote anything down on paper regarding posthumous reproduction, as they weren't expecting their demise. The main point of the ASRM is that the retrieval must have "comported with the decedents

wishes." That is satisfied with written documentation or other clear and convincing evidence, such as discussions with one's spouse. https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/posthumous_retrieval_and_use_of_gametes_or_embryos.pdf

(g) A federal law in Canada, enacted in 2007, prohibits the removal of human reproductive material from a deceased person's body absent prior written consent from that person. Assisted Human Reproduction Act, S.C., 2004, c.2 (Can.). *But see K.L.W. v. Genesis Fertility Centre*, 2016 BCSC 1621 (August 31, 2016). In the case, the decedent did not provide written consent for his spouse to use his frozen sperm post-mortem as required under the AHRA. However, the Supreme Court of British Columbia granted its use to his surviving spouse because the decedent was never informed of the requirement to provide written consent and the decedent had discussed the possibility of his spouse using his sperm after his death with his social worker, a nurse involved in his care, his family doctor, and the clinic. The court pointed to the fact that the deceased had his sperm preserved and stored during his lifetime which demonstrated that he was serious about fathering a child/children with his sperm. In *L.T. v. D.T. Estate (Re)*, 2019 BCSC 2130 the plaintiff cited *K.L.W. v. Genesis Fertility Centre* as support that she should be able to use sperm of her deceased husband, but the court rejected the comparison because unlike the deceased in K.L.W who in his lifetime had sperm stored, the deceased in L.T. never had sperm stored in his lifetime, so the law stands that there needs to be prior written consent of which the plaintiff was unable to provide. (As an interesting side note, being that there was a 36 hour deadline from the time of death for the sperm to be retrieved, the judge permitted the retrieval of sperm and for it be stored in a fertility center pending a full hearing on the facts of the case. Ultimately, the plaintiff was unable to use the sperm as the court ruled that she could not use the sperm as there was no prior written consent. *See* Bernise Carolino, *Sperm can't be removed without spouse's consent after death: B.C. Supreme Court*, CANADIAN LAWYER (December 19, 2019) *https://www.canadianlawyermag.com/practice-areas/litigation/sperm-cant-be-removed-without-spouses-consent-after-death-b.c.-supreme-court/324356*

(h) S. 669, Sess. 2001-2002 (NY) (originally introduced February 17, 1998 by Roy Goodman) - took the position that post-mortem sperm harvesting should be banned unless there is prior written consent by the deceased, and the request is made by the deceased's partner or spouse. The bill died in committee.

(i) Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39 (1999). Kerr argues that it is legally permissible for the surviving spouse or next-of-kin to consent to and to have the sperm of a deceased spouse or next-of-kin removed; inferred right to procreate. Suggests amending section 6(a) of UAGA to include removal of sperm posthumously for purposes of procreation. *See also* Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. & POL'Y 401 (1999).

(j) Katheryn D. Katz, *The Clonal Child: Procreative Liberty & Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1 (1997).

(i) Study within U.S. & Canada – between 1980 and 1995, post-mortem sperm removal occurred at 14 centers in 11 states (at 37).

(ii) Examines judicial protection of right not to procreate - even suggests that this right is more protected than the right to reproduce (at 39).

(k) *See generally*, Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U. L.J. 451 (2000) (discussing non-statutory methods of addressing uncontested sperm harvesting).

(l) The question as to whether post-mortem sperm harvesting should be legally and/or ethically permissible has been complicated by parents' wishes to preserve the sperm of their deceased sons. *See* Susan Donaldson James, *Sperm Retrieval: Mother Creates Life After Death*, ABC News (February 22, 2010), https://abcnews.go.com/Health/Wellness/mother-murdered-son-hopes-create-grandchild-post-mortem/story?id=9913939. *See also*, Andrew Joseph, '*They don't want his story to end': Efforts to save the sperm of the deceased come with heartache and tough questions*, Stat News (March 13, 2019)

https://www.statnews.com/2019/03/13/postmortem-sperm-retrieval/

See also, "Allow Dead Men to be Sperm Donors, Ethicists say" WEBMD (January 22, 2020) quoting two British doctors who are of the opinion that sperm donation should be similar to the organ donation process, where one can choose in his lifetime (by marking on the back of his license) that his sperm should be harvested. https://www.webmd.com/infertility-and-reproduction/news/20200122/allow-dead-men-to-be-sperm-donors-medical-ethicists-say

See also, "Posthumous Sperm Retrieval" IMPACT ETHICS (October 22, 2018), which addresses a Mormon woman whose husband was pronounced brain dead following a car accident. She wanted to retrieve his sperm so she could have his baby. There was no written advance directive from the deceased authorizing the procedure. The woman argued that that according to the teachings of The Church of Jesus Christ of Latter-day Saints, she is only allowed one husband in her lifetime and that having children is necessary for her entry to the highest degree of heaven. This situation is similar to Supreme Court cases like Masterpiece Cakeshop where the court has sided with religious freedom. Courts have generally claimed that women have other options to have a child, whether it is with another person or through artificial insemination. But the Mormon Church frowns upon both of those options so maybe the courts would agree that she should be able to retrieve her husband's sperm. https://impactethics.ca/2018/10/22/posthumous-sperm-retrieval/

(2) Female

(a) Eugene Robinson, *Furor Over Fertility Options,* THE WASHINGTON POST, January 11, 1994, at Z06. Commenting on proposals to transplant ovarian tissue from aborted fetuses.

(b) *Donor Cards Expanded to Human Eggs,* ST. PETERSBURG TIMES, July 7, 1994, at A1. Reporting on the controversy following approval of a plan to allow British women (as young as 12) to sign cards to donate ova. The use of eggs from aborted fetuses was banned.

(c) Julie Garber – a 28-year-old leukemia patient had eggs harvested, fertilized by an anonymous sperm donor, and frozen. Ms. Garber subsequently died, but her parents arranged for the embryos to be implanted in a surrogate. The last of the embryos was rejected by the surrogate's body only a few weeks into the pregnancy. Had this attempt been successful, it would have resulted in the first known post-mortem motherhood. *See* Evelyne Shuster, *Dead Parents Cannot Parent* , THE CHI. TRIBUNE, December 15, 1997 at 21; Rick Weiss, *The Many Bumps on the Way to Babyville,* L.A. TIMES, March 23, 1998 at S2.

(d) Gina Kolata, *Monkey is Created by Embryo Splitting*, THE NEW YORK TIMES ON THE WEB, January 14, 2000, *available at* http://www.nytimes.com/2000/01/14/us/monkey-is-created-by-embryo-splitting.html. Scientists in Oregon divided an eight-cell monkey embryo into quarters, creating identical quadruplet embryos. One of the embryos survived and resulted in the birth of a baby monkey. This is reported as the first time primate embryos have been deliberately subdivided, resulting in the birth of live offspring.

(e) There has been a dramatic increase in the market for eggs harvested from young women who match specific physical and intellectual criteria. Fees paid to donors range from $2,500 to $100,000 and matches between donors and recipients are arranged through agencies, clinics and advertisements posted by would-be parents on university campuses. The Internet offers a way for hopeful recipients to examine photographs, health histories and educational backgrounds of would-be donors. *See* Rebecca Mead, *Eggs for Sale*, THE NEW YORKER, Aug. 9, 1999, 56-65. The ethical implications of commercial traffic in eggs have become more acute as prices continue to rise. In addition, the long-term health risks involved in donation are not entirely clear (ovarian scarring and ovarian cancer have been cited as two possible risks associated with egg donation). Additionally, donors must take reproductive hormones for weeks before donating eggs. While such hormones have proven to be safe over time, for the most part, the women who have taken the hormones were experiencing infertility and lacking some of these hormones. There is no telling what effect the hormones might have on a woman who is not lacking such hormones in the first place. *See*, Tasha McAbee, *Egg Donation Risk and Reward*, PUBLIC HEALTH POST, Oct. 9, 2020

**Though not universally followed, the ASRM released an Ethics Committee Report in 2007 that attempted to establish a limit on payments to egg donors of $5,000 (and $10,000 under special circumstances*See* Ethics Committee of the American Society for Reproductive Medicine, *Financial Compensation of Oocyte Donors*, ASRM PAGES (August 2007), https://www.fertstert.org/action/showPdf?pii=S0015-0282%2807%2900235-X. The Report cited the discounting of health and fertility risks as reasons to curtail the compensatory amount. However, in

Kamakahi v. ASRM, 2013 WL 1768706 (N.D. Cal. March 29, 2013), egg donors challenged the compensatory cap. After four years of litigation, in early 2016, the parties reached a settlement that included the removal of the limit. *See* Indiana Family Lawyer Blog, *Kamakahi v. ASRM Update*, HARDEN JACKSON LLC (March 18, 2016), https://www.indianafamilylawyerblog.com/kamakahi-v-asrm-update/.

(f) In his article on the market for human ovum, Dr. Jeffrey P. Kahn notes that because fertility treatment costs are largely borne by the patient and not the health insurance industry, it creates a market for services instead of a regulated system by which to allocate a scarce resource. He argues that society should not be paying donors to overlook the risks of donating by increasing the sale price of human eggs. Rather, there should be a regulated standard and a monetary incentive consistent with encouraging altruism. Dr. Jeffrey P. Kahn, Director of the Center for Bioethics at the University of Minnesota, *Is there a Difference Between Selling Eggs and Kidneys?, available at* http://www.bioethics.umn.edu/publications/em-archive/1998.05%20selling%20eggs%20kdney.html / (last visited May 31, 2006).

(g) Compensation for sale of human eggs typically ranges from $3,500 to $12,000 (plus expenses) depending on many variables. Egg Donations, Inc., http://www.eggdonor.com (last visited June 13, 2006). More "desirable" egg donors, specifically targeted at young Ivy-League students with superior athletic abilities and physical attractiveness have a price tag ranging from $25,000- $50,000 often times for a mere one-time egg donation. Kari L. Karsjens, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 64-65 (2002); Andrew W. Vorizmer, *The Egg Donor and Surrogacy Controversy: Legal Issues Surrounding Representation of Parties to an Egg Donor and Surroagcy Contract*, 21 WHITTIER L. REV. 415, 417-19 (1999).*See alsoFertility companies are paying egg donors high fees that often exceed guidelines*, NBC NEWS, Mar. 26, 2010).Such high payments of $50,000 or more have been offered in print and Internet advertisements placed by couples or entrepreneurs seeking eggs from women with specific physical, cultural, and intellectual or other abilities. *See* Ethics Committee of the American Society for Reproductive

Medicine, *Financial Compensation of Oocyte Donors: An Ethics Committee Opinion*, ASRM PAGES (December 2016), https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/financial_compensation_of_oocyte_donors.pdf.

(h) The American Society for Reproductive Medicine officially opposes the sale of human eggs but states that donors may be compensated for inconvenience and time. It would seem from the aforementioned ASRM Reports that the organization's stance on the sale of human eggs has softened. In the December 2016 Ethics Committee Opinion, supra, the organization acknowledged that "[d]uring the last two decades, oocyte donation increasingly has been accepted as a method of assisting women without healthy oocytes to have children."

(i) Other technological advances include the proliferation of gender selection before fertilization, particularly with couples having children of a single gender. For an additional cost above the usual fee for IVF or artificial insemination, the Genetics & IVF Institute will sort the sperm separating the X chromosomes (which produce girls) from the Y chromosomes (which produce boys). When individuals are able to conceive, the Institute claims a 75% success rate for those seeking boys and an even more impressive 90% success rate for those seeking girls. (Another methodboasts an even higher success rate but is even more controversial, as doctors examine the embryos after fertilization, discarding those embryos conceived ofthe undesired sex). As evidence suggests a significant preference for male children over females, continued use of such gender selection techniques will likely cause the world population to slowly become more male as time and technology progress. David Leonhardt, *It's a Girl! (Will the Economy Suffer?*), N.Y. TIMES ON THE WEB, October 26, 2003. *But see*, Mara Silverman as told to Gillian Silverman, *Surprise Delivery*, N.Y. TIMES MAGAZINE, Nov. 2, 2003 (unsuccessful attempt at female gender selection).

(3) History of Property Rights in Reproductive or Reproducible Cells

(a) There is no history of property rights in reproductive or reproducible cells, apart from that described at I.A., *supra*.

B. Statutes

1. In the absence of a prior written agreement, there is scant state-enacted legislation specifically addressing custody of pre-embryos where the couple divorces or simply cannot agree on a course of action for the pre-embryos. Helene S. Shapiro, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L. L., 75, 82 (2002). *But see*, Florida's position on custody of pre-embryos below.

2. Florida- Florida's approach to custody disputes, discussed below, provides the best solution to decision-making disputes by encouraging advance directive of gamete/pre-embryo disposition or, alternatively, in the absence of such direction, by giving gamete providers predictability in many disputes over gamete/pre-embryo decision-making authority. Other States should follow Florida's lead in this regard and enact similar legislation to address advances in 21st Century reproductive technology.

3. In relevant part, Florida's statute requires that a commissioning couple and their doctor enter into a written contract providing for disposition of the couple's gametes and pre-embryos in the event of death, divorce or another unforeseen circumstance. The law provides that without such agreement in place, gametes are under the control of the individual respective provider. Decision-making regarding pre-embryos resides jointly with the couple unless one member of the couple dies, in which case control vests with survivor of such couple. (Therein lies the major flaw with Florida's statute. In the absence of a written agreement, a divorcing couple may not reach compromise at a time where emotions are running high and deciding the disposition is exceptionally difficult. Consequently, pre-embryos may remain in limbo while divorcing couples attempt to reach consensus). Furthermore, a child conceived from the gamete of such person(s) who died prior to transfer of such gamete or pre-embryo to a woman's body is ineligible to claim against the decedent's estate unless the child was so provided for by the decedent's will. FLA. STAT. ANN. § 742.17 (West 2014). Other states requiring written consent for embryo disposition include California (CAL. HEALTH & SAFETY CODE §125315 (West 2014)), Connecticut (CONN. GEN. STAT. § 32-41jj (West 2015)), Maryland (MD. CODE ANN., ECON. DEV. § 10-438 (WEST 2014))(The statute was amended by 2020 Maryland Laws Ch. 580 (S.B. 747). However, those amendments were only in style. Nothing substantive was changed), Massachusetts (MASS. GEN. LAWS ch. 111L, § 4 (West 2014)), New Jersey (N.J. STAT. ANN. § 26:2Z-2 (West 2014))(A bill was introduced in the New Jersey State Assembly (NJ A.B. 2978) that would require that the patient to whom the timely, relevant, and appropriate information is given, provide written acknowledgement that the information was provided, and that the written acknowledgement be included in the patient's medical record), and New York (N.Y. COMP. CODES R. & REGS. tit. 10, § 52-8.8 (West 2014)). For a thoughtful discussion of the various statutory approaches on this topic, as well as a proposal for a model statute, *see* Mary Joy Dingler, *Family Law's Coldest War: The Battle for Frozen Embryos and the Need for a Statutory White Flag*, 43 SEATTLE UNIV. L. REV. 293 (2019).

4. Louisiana- In contrast, Louisiana's unique perspective on fertilized human ova is the antithesis of Florida's more progressive statute. Louisiana

prohibits the destruction of fertilized human ova regardless of any advanced written directives. Furthermore, Louisiana considers a fertilized human ovum to be a juridical person that can itself sue or be sued.

5. Specifically, Louisiana's statute states, in relevant part, that a fertilized human ovum is not considered property, even of the biological parents, although the parents will preserve their rights as parents under Louisiana law if they express their identity. Additionally, although Louisiana prohibits the intentional destruction of a viable in vitro fertilized human ovum, paradoxically, abortions after such a fertilized pre-embryo was implanted in a woman are legal. Moreover, in disputes arising between any parties regarding the fertilized ovum, the standard to resolve such disputes is the "best interest of the fertilized ovum". *See generally,* LA. REV. STAT. ANN §§ 9:124-133. New Mexico enacted similar legislation that protects pre-embryos but does not consider them a juridical person. N.M. STAT. ANN. § 24-9A-[1]-[7].

6. North Dakota also enacted a statute on point. Under N.D. CENT. CODE § 14-20-64, if a marriage is dissolved before implantation of eggs, sperm, or embryos, an ex-spouse is not a parent of the resulting child unless said spouse consented in a record that if assisted reproduction were to occur after a divorce, he or she would be a parent of the child. The statute also allows for an individual to withdraw his or her consent to assisted reproduction in a record prior to implantation of eggs, sperm, or embryo.

7. In late 2008, the Victorian Parliament passed a law on assisted reproductive treatment. The law allows the posthumous use of gametes or embryos in assisted reproductive treatment if the treatment procedure is carried out on the deceased person's partner, the deceased person provided written consent for the use of the person's gametes or embryos in such treatment, a "patient review panel" has approved the use of the gametes or embryo, and the person who is to undergo the treatment has received counseling as provided for in the statute. *Assisted Reproductive Treatment Act* 2008, 76 Vict. Acts 2008.

8. In April 2018, the Arizona Governor signed into law a bill directing the courts, in a proceeding for dissolution of marriage involving the disposition of in vitro human embryos, to award the embryos to the spouse who intends to allow the embryos to develop to birth. The courts are directed to resolve any dispute on the disposition in a manner that provides for the best chance for the embryo to develop to birth (ARIZ. REV. STAT. ANN. § 25-318.03(A)(2). The issue with this provision is that the courts (instead of the parents who have a more prominent right in the disposition) will have the sole power to decide which parent offers the best chance for the embryo to develop to birth. Inevitably, the application of this rule will lead to a subjective balancing test/best interest test—not ideal). ARIZ. REV. STAT. § 25-318.03. Arizona Senate Bill No. 1393, Arizona Fifty-Third Legislature – Second Regular Session. Under (ARIZ. REV. STAT. ANN. § 25-318.03(C) the spouse that is not awarded the embryos has no parental responsibilities or obligations with respect to any child resulting from the disputed embryo unless the parent consents in writing to be a parent to any resulting child.

9. *See* Appendix.

C. Cases

Most of the cases arise in the matrimonial context. The first four cases deal with pre-embryo disputes where United States courts awarded the pre-embryos to the party opposing implantation.

1. *Davis v. Davis* (in a divorce, the trial court awarded the pre-embryos to the wife; the court of appeals reversed, and the Tennessee Supreme Court affirmed the reversal; after receiving custody, but before the Supreme Court appeal, the wife's circumstances changed – she no longer wanted to use the embryos herself, but wanted to donate them to a childless couple, whereas the husband wanted them destroyed; the court held that (i) pre-embryos are neither persons nor property, but a special category because of potential life; (ii) the wishes of the donors should prevail; (iii) if there is a conflict, or if wishes are unknown, the prior agreement is binding unless it is modified by mutual agreement; (iv) in the absence of agreement, the relative interests in using or not using the pre-embryos must be balanced, with the party wishing to avoid procreation generally prevailing if the other party has reasonable alternatives; and (v) if no reasonable alternatives exist, the argument favoring use by the donor (not further donation) should be considered), 842 S.W.2d 588 (Tenn. 1992). This was the first U.S. State court to decide the fate of frozen embryos.

2. *Kass v. Kass* (in a divorce proceeding, the trial court determined that a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process; the Appellate Division reversed, and the Court of Appeals affirmed the reversal, finding that the IVF agreement, which unambiguously called for the donation of the pre-zygotes for research if the couple ever failed to agree as to their disposition, controlled), 696 N.E.2d 174 (N.Y. 1998). This court based its decision relying substantially on the contract with the in vitro fertilization clinic. *See* Shapo, *supra*, at 83.

3. *In re Marriage of Nash*, 2009 WL 1514842 (June 1, 2009)—(in a case where a divorcing couple had signed a cryopreservation agreement that gave sole authority to the wife to decide disposition of pre-embryos, but later signed a divorce settlement that gave decisional authority to a judge who would decide who had dispositional authority, the court ruled against the wife because the cryopreservation agreement included the language "if not addressed in the divorce settlement." The court distinguished Kass on the basis that the consent forms in Kass were clear and the spouses signed an uncontested divorce agreement indicating that their pre-embryos "should be disposed of in the manner pursuant to the consent forms").

4. *A.Z. v. B.Z* -- In a recent Massachusetts case a couple conceived twins by IVF and additional vials of frozen embryos were stored. When the wife attempted to use the additional embryos against the wishes of her husband following divorce, the Supreme Judicial Court of Massachusetts affirmed the trial court's grant of a permanent injunction against the wife's use of the embryos. The court based its decision on the circumstances surrounding the consent form, which was signed in blank by the husband and later filled in by the wife to provide that on separation the embryos were to be given to the wife for implantation. *A.Z. v. B.Z.*, 725 N.E.2d

1051 (Mass. 2000). Perhaps more importantly, the court opined in dictum, that "even had the husband and the wife entered into an unambiguous agreement that would compel one donor to become a parent against his or her will, the court would rule it is unenforceable as it violates public policy." This is in contrast to how the court in *Kass* ruled.

5. *J.B. v. M.B.* (in post-divorce proceedings concerning disposition of the parties' cryopreserved pre-embryos, the New Jersey Supreme Court held that the former wife's fundamental right not to procreate would be irrevocably extinguished if a surrogate mother bore the former wife's child through the implantation of the pre-embryos; the Court also held that an agreement regarding disposition of pre-embryos entered into at the time of IVF is enforceable, subject to the right of either party to change his or her mind regarding disposition up to point of use or destruction of any stored pre-embryos), 783 A.2d 707 (N.J. 2001).

    a) Motivated by this case, New Jersey Assemblyman Neil M. Cohen introduced bills in the 209th, 210th and 211th Leg., (supplementing Title 26 of the Revised Statutes) that would require couples seeking IVF treatments to create binding agreements that dictate the fate of the frozen gametes or embryos in the event of changed circumstances (such as death or divorce). 2000 NJ A.B. 1116, 2002 NJ A.B. 496, and 2004 NJ A.B. 2226. The bills died in committee and have not been reintroduced.

6. *Litowitz v. Litowitz*—(*Donor can convey custodial rights in a fertilized egg to a third-party-non-gamete-donor by a mere contract with the non-donor*) In this divorce action, Husband and Wife each sought custody of two cryopreserved pre-embryos that were formed after Husband's sperm fertilized a donor's egg, not the Wife, that was to be implanted into a surrogate mother. The Supreme Court of Washington held, in a case of first impression, that pursuant to the cryopreservation contract, (1) the Husband and Wife had to petition the court for assistance where mutual decision as to disposition of the pre-embryos could not be reached and, (2) even though the Husband has a greater biological connection to the eggs than does the Wife, as an intended mother of this potential child, the Wife had equal rights to the eggs under the contract. The Court determined that per the cryopreservation contract, Husband and Wife had to petition court for instructions when they were unable to reach mutual decision regarding disposition of pre-embryos upon dissolution of their marriage. 48 P.3d 261 (Wash. 2002), *amended by*, 53 P.3d 516 (order changing concurring opinion) (Wash. 2002), *and cert. denied,* 123 S. Ct. 1271 (2003).

7. *Nachmani v. Nachmani* (Israeli court granted mother custody substantially relying on mother's inability to otherwise procreate). In a 7-4 opinion, the Israeli Supreme court in *Nachmani v. Nachmani*, awarded eggs fertilized by her and her now estranged husband to the mother largely because she could no longer have genetic children of her own. In *Nachmani*, the couple agreed to proceed with in vitro fertilization utilizing a surrogate mother as a host. There was a contract signed with the surrogate mother but no contract was signed with the clinic regarding the eggs use upon disagreement. The court there decided that the harm to the mother in denying her opportunity to have a genetic child of her own

outweighed the harm to the father of becoming an unwanted father. Shapo, *supra,* at 77-80 (quoting *Nachmani v. Nachmani*, 50(4) P.D. 661 (1996) [Isr.]). The husband then appealed the judgment to the Israeli Supreme Court who overturned the verdict and said that "although a spouse's right to parent is a basic right, this right does not impose a duty on the other spouse to help realize this right." The court then did something very rare and granted Mrs. Nachmani's request for an additional hearing before an expanded panel of judges and they ruled that a "woman"s right to be a parent prevails over the husbands right not to be a parent." *See*. "*Israeli Court gives Wife the Right to Her Embryos*" N.Y. TIMES (SEPT. 13, 1996) https://www.nytimes.com/1996/09/13/world/israeli-court-gives-wife-the-right-to-her-embryos.html

8. In February 2013, the Israeli Supreme Court denied a woman's petition to overrule a Ministry of Health decision, barring her from conceiving another child from a specific donor's sperm (that same donor was the biological father of her daughter, also conceived by artificial insemination) after he had asked to withdraw his donation. Unlike the *Nachmani* case, here the woman was able to have other genetic children. The court reasoned that the right to avoid parenting is stronger than the right to choose a specific partner, and that in any case, the latter right is contingent on the agreement of the partner. *See HCJ* 4077/12 *Anonymous v. Ministry of Health* (2013) [Isr.].

9. As one commentator noted regarding the above cases, the Israeli court awarded custody of the embryos so she could have a genetic child of her own but failed to consider that Ms. Nachmani could adopt. In contrast, in *Davis, A.Z., and J.B.*, the courts awarded the pre-embryos to the destroying party so as not to force them into unwanted parenthood, despite the fact that in *A.Z.* and *J.B.*, the parent opposing destruction of the pre-embryo was not childless. The *Davis* and *J.B.* courts indicated they may not have ordered the destruction of the embryos had the custody-requesting party sought to raise the children themselves and this was their only genetic chance to do so. *See* Shapo, *supra*, at 77-80.

10. *York v. Jones (Spirit of contract controls inter-institutional transfer of Couple's Zygote)* -- Husband and wife brought an action against a medical college to obtain possession of their cryopreserved human pre-zygotes for inter-institutional transfer; the college moved for dismissal on the ground that only research, donation or thawing were permissible options under their contract, which controlled, and that in any event the college enjoyed Eleventh Amendment Immunity; the court denied the motion, finding a bailment relationship, and holding that the contract did control, but that inter-institutional transfer, although not specifically covered by the contract, was not inconsistent with the permissible options. 717 F.Supp. 421 (E.D. Va. 1989).

11. *Buzzanca v. Buzzanca* (husband and wife divorced after having agreed to have an embryo, genetically unrelated to either of them, implanted in a surrogate who, under a surrogate contract, carried and gave birth to a child; the Court of Appeals held that both of them, under the artificial insemination statute, were the child's natural parents and that the husband was obligated to support the child, notwithstanding the fact that the wife had allegedly promised to assume such responsibility and the surrogate

contract had not been signed at the time of conception). 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

12. *Robert B. v. Susan B.*, 135 Cal. Rptr.2d 785 (2003) (husband and wife contracted with an anonymous ovum donor to obtain the donor's eggs for fertilization with husband's sperm. Another woman went to the same fertility clinic with the intent of purchasing an embryo from two donors who would contractually sign away their parental rights. Husband and wife had a baby, and woman had a baby when clinic made a mistake implanting her with husband and wife's remaining embryos. The Court denied the wife's attempt to establish maternity over the woman's child and distinguished *Buzzanca* from the case at bar, holding that the woman did not agree to be a surrogate under contract with the wife, and was, in fact, declared the mother of the child. The Court declined to extend *Buzzanca* to a situation in which: a woman has no genetic or gestational relationship to the child, has no status comparable to that of a presumed father, and another woman asserts a legally recognized claim).

13. *(Post-divorce paternity rights granted to father of child born from frozen embryo)*-- While not a case of posthumous gamete rights, the 1st Court of Appeals in Houston, Texas decided a case involving custody of a child created from a frozen embryo. In *In the Interest of Olivia Grace McGill*, a married couple created an embryo through IVF. The frozen embryo was implanted only after the couple divorced. In spite of the fact that the father was listed on the birth certificate, the mother argued that the divorce, absent any decision regarding the future of the embryo, terminated any rights of the father. The court disagreed and granted paternity rights to the biological father of the child, stating that to do otherwise "would bastardize [Olivia]." *See* TEXAS LAWYER, April 19, 1999.

14. *Parpalaix v. CECOS* (*holding that donated sperm is not movable property subject to inheritance but should be disposed of according to the donor's intent*). The French Tribunal de Grand Instance recognized a "quasi-property" interest in an individual's gametes, the court held that a just-married surviving spouse was entitled to possession of sperm deposited by her deceased husband/donor. Because the deceased husband failed to leave any instructions for the disposition of his sperm deposited with CECOS before his marriage, the court used several factors to determine the husband's intent regarding his intended disposition. After finding that sperm is "the genetic expression of a person's fundamental right to create life…", the court refused to allow the sperm to be destroyed and returned the sperm to the surviving spouse for implantation after finding such a step to have been the deceased husband's "unequivocal" intent. T.G.I., Creteil, 1^{e} ch., Aug. 1, 1984, J.C.P. 1984, II, 20321; *see also* Gail Goldfarb, *Posthumous Conception and Inheritance Rights*, NYSBA (Trusts and Estates Law Section Newsletter), Summer 2003, at 43.

15. *Hecht v. Superior Court (Intent of Decedent created limited license to Decedent's frozen sperm)*-- (holding, in a will contest with decedent's adult children, that where Testator's intent is clear, failure to respect the Testator's intent regarding the intended donee of several vials of decedent's cryopreserved sperm violates Testator's fundamental right to procreate). Accordingly, based largely on Decedent's intent, donee was

merely granted an option to use the sperm for her own use but could not sell or donate the decedent's sperm as it was not an asset of the estate subject to division in a settlement agreement. Ordered not published January 15, 1997, California Supreme Court. Previously published as 59 Cal. Rptr. 2d 222 (Cal. Ct. App. 1996).

16. *Prato-Morrison v. Doe (Best interest of the child supercedes claims of Biological Parenthood)*-- A California Appeals court denied custody/ visitation rights to a couple who used the services of a fertility clinic accused of misappropriating their reproductive materials to Respondent who successfully bore twins from such materials. The court reasoned that even if the Petitioner "presented proof of a genetic link sufficient to establish standing to pursue a parentage action… it would not be in the best interests of the twins" to have petitioner intrude into the children's lives after fourteen years. *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 511 (Cal. Ct. App. 2002). See also Erie Cty. Dep't of Soc. Servs. On behalf of J.F. v. R.P 68 Misc. 3d 520, 126 N.Y.S. 3d 303 (N.Y. Fam. Ct. 2020) where the court prevented a sperm donor who was absent the first 2 years of his childs life, from meeting his son as it would disturb the child who was living happily with a set of parents. The court stated that "it must weigh the child's right to know his biological father against any psychological harm or trauma caused by a disruption of the already established relationship."

17. *Perry-Rogers v. Fasano* (*Gestational parent estopped from asserting best interest of the child to gain visitation where any psychological bond was caused by their delay*)-- In facts similar to *Prato* above, a fertility clinic mistakenly implanted Ms. Fasano with genetic material entirely from Rogers in addition to the genetic material of Mr. Fasano, her husband. Ms. Fasano later gave birth to two children of different races. Subsequent DNA tests confirmed that the black child was the Rogers' biological child while the white child was the Fasano's. Fasano relinquished custody of the black child to the Rogers' on execution of a written visitation agreement giving Fasano visitation rights to the child. The court held that (1) notwithstanding the purported visitation agreement, in this case, Fasano lacked standing to seek visitation pursuant to applicable New York Statutory law which requires the movant in a visitation proceeding to be a parent, grandparent or sibling of the child, and (2) a best interest of the child hearing was not required under the circumstances of this case as any psychological bond that existed between the child and the gestational mother was the direct result of the Fasano's failure to take timely action upon learning of the fertility clinic error. Accordingly, Fasano was denied custody and visitation of the child. *Perry-Rogers v. Fasano*, 276 A.D.2d 67 (N.Y. App. Div. 2000).

18. Couple fertilized 15 eggs in 1989 and implanted four, resulting in the birth of a son. The couple would like to donate the remaining embryos with the only restriction being that they go to "good people and Christians." Although embryos, if frozen and stored properly, remain viable, many physicians encourage their patients to use recently fertilized eggs. The fertility clinic where the embryos are currently stored will begin charging $600 a year for storage and the couple must decide whether to destroy the embryos if a recipient cannot be found. *Couple Faces Destroying Frozen Embryos*, BOCA RATON NEWS, Jan. 9, 2000, at A1.

19. ***In re Marriage of Witten,*** 672 N.W.2d 768 (Iowa 2003). Wife appealed dissolution decree of the District Court enjoining parties from unilaterally using the couple's frozen human embryos stored at medical facility. Husband cross-appealed. The supreme court held that: (1) Iowa's statute governing child custody did not apply to frozen human embryos; (2) it would violate public policy to enforce a prior agreement regarding use or disposition of embryos when a party has changed his or her mind; (3) agreements entered into before the time in vitro fertilization is commenced are enforceable and binding, subject to the right of either party to change his or her mind regarding disposition of embryos; and (4) if donors cannot reach a mutual decision on disposition, then no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors.

20. In *Ferguson v. McKiernan*, the Supreme Court of Pennsylvania held that an oral agreement between a donee-mother and sperm-donor father, in which the father agreed to donate his sperm in exchange for being released from any obligation for any child conceived, was enforceable. 940 A.2d 1236 (Pa. 2007). The court noted that in the context of institutional sperm donation, "there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor." *Id.* at 1246. That the sperm-donor father in this case was not anonymous but had previously had a romantic relationship with the mother did not necessitate a different analysis.

    This case was recently distinguished by *N.A.H. v. J.S.*, 2018 WL 1354356 *1 (Pa. Super. 2018) where the Supreme Court of Pennsylvania held that there had been no enforceable agreement between the parties regarding a sperm donation. The Court affirmed the lower court's order to grant the father's petition for a paternity and genetic test. In this case, two friends of the opposite sex, both gay, decided to use a home insemination kit to create what they called "the new modern family." *Id.* at *1. The putative father filed a complaint to establish paternity and request genetic testing as to his alleged child. The mother appealed. This case does not seem to change the direction of the law, but provides guidance as to how a court in Pennsylvania might evaluate oral agreements made between parties, especially in the case of sperm donation.

21. In *re C. K. G., C. A. G., and C. L. G.*, 173 S.W. 3d 714 (Tenn. S. Ct. 2005). An unmarried heterosexual couple had three children by obtaining eggs donated from an anonymous donor, fertilizing the eggs in vitro with the man's sperm and implanting the woman, who carried the children and gave birth to them. When the couple's relationship deteriorated, the woman filed parentage action seeking full custody and child support. In response, the man claimed that the woman had no standing as a parent because, lacking genetic connection to the children, she failed to qualify as a "mother" under the statutes and was merely a gestational surrogate; he filed for the sole custody. The Court ruled that the woman was children's legal mother because (a) prior to the children's birth, both the woman as gestator and the man as the genetic father intended and agreed that the woman would be the children's legal mother; (b) she became pregnant, carried to term and gave birth to the children as her own; and (c) there was no controversy in the case between a gestator and the female genetic donor or gestational surrogate and genetically-unrelated mother. The Court

called for legislative action and stated that the present Parentage Statutes did not apply to this narrow case where genetic father and genetically-unrelated gestator mother were not married. The dissent agreed that the above outcome was reasonable, but focused on the language in Tenn. Code Ann. §§ 36-2-302(4), 36-1-102(10) where it defines "mother" and "parent" as "one who has biological ties to the children."

22. *K.M. v. E.G.*, 13 Cal.Rptr.3d 136 (Cal. App. 1 Dist. 2004). In this case, a woman donated her eggs to her lesbian partner, who bore twins, and then filed a petition to establish a parental relationship with her then ex-partner's twin children after couple's relationship ended. The lower court held that sufficient evidence supported the finding that the woman waived her parental rights on the ovum donor consent form. The California Supreme Court reversed the judgment, finding that both were the mothers of the child and the donor's waiver did not affect the determination of parentage, because" parents cannot, by agreement, limit or abrogate a child's right to support" *K.M. v. E.G.*, 33 Cal. Rptr. 3d 61 (Cal. 2005).

23. *Elisa B. v. Superior Court*, 37 Cal. 4th 108 (Cal. 2005). California Court of Appeals held that a former same-sex partner was not a parent within the meaning of the UPA as she did not have genetic consanguinity with children and did not give birth to them. Thus, she was not obligated to pay child support, despite her intent both during the relationship and at the time of conception to participate in the raising of such children. The Supreme Court of California reversed and held that a woman who agreed to raise children with her lesbian partner, supported her partner's artificial insemination, and received the resulting twin children as her own, is the children's parent under the UPA and has obligations to support them.

24. *In re Parentage of L.B.*, 122 P. 3d 161 (Wash. 2005) *cert. denied* 2006 U.S. Lexis 3701, 74 U.S.L.W. (U.S. 2006). In a Washington case, a woman sought to establish her co-parentage of a minor child who was conceived through artificial insemination during such individual's 12-year domestic relationship with the biological mother. The Supreme Court of Washington affirmed the decision of the Appellate Court and held that, in a matter of first impression, the common-law claim of "de facto" or psychological parentage existed, such that the woman could petition for shared parentage or visitation. See also *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (holding that lesbian partner was a de facto parent to mother's child and was entitled to be considered for an award of parental rights and responsibilities). *See also S.A.S. v E.M.A.*, 2004 Del. Fam. Ct. LEXIS 188, where the "de facto" parent rights were recognized by the Delaware Family Court in an action by a lesbian partner to seek parentage rights where partners entered into Covenant of Commitment and each gave birth to children through a sperm donation. The Court held that the partner was a "de facto" parent to the children born to the other mother and that factors other than biology determine parentage in today's day and age. *See L.H. v. Div. of Family Servs.*, Nos. CN04-10895, 04-37168, CN00-07072, 04-08999, 2005 Del. Fam. Ct. Lexis 72 (Fam. Ct. May 16, 2005) where "de facto" parent rights were not given to relatives who initially had custody of the child due to the drug use of the mother. Court stated that such rights won't be given "unless the de facto parent had been in a committed personal relationship with the child's biological parent at the time the child was conceived and subsequently born."

25. *Roman v Roman*, 193 S.W.3d 40 (Tex. App. 2006), *review denied*, 2007 Tex. LEXIS 724 (Tex. 2007), *cert. denied*, 128 S.Ct. 1662 (2008). Husband and wife signed an embryo agreement that in the event of divorce their frozen embryos would be discarded. The court found that the agreement was valid after reviewing case law from other states, in which a majority allowed written embryo agreements. The agreement was clear, even though the wife argued that she believed the embryo agreement to apply only to remaining embryos after initial implantation. To follow her interpretation, the court would have to imply language to the contract and disregard the current language.

26. *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008) (holding that the intent of the donor controls; a widow could not demand distribution of her late husband's frozen sperm where her late husband had signed an agreement with the company storing the sperm providing that the sperm was to be discarded upon his death).

27. *Robertson v. Saadat*, 262 Cal. Rptr. 3d 215 (2020), *reh'g denied* (June 4, 2020), *review filed* (June 8, 2020) (agreeing with *Kievernagel* that the donor's intent controls the disposition of gametic material upon the donor's death and that a spouse that has not provided that gametic material has no interest nor any decisionmaking authority as to the use of that material. The court also declined to apply a balancing test (such as that invoked in *Davis*, *supra*) in a case such as this where only one spouse donated the gametes at issue. Consequently, the court ruled against decedent's spouse, finding that her status as decedent's spouse did not entitle her to conceive with his sperm).

28. In 2008, a federal judge in Georgia granted a widow a temporary restraining order to prevent the embalming of her late-husband's body before samples of his sperm were extracted so that she could bear his child. Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children,* 16 GEO. MASON L. REV. 403 (2009); *See also* The Associated Press, *Ga. Soldier's Widow has Sperm Extracted,* USA TODAY (Apr. 7, 2008, 9:00 PM), *available at* http://www.usatoday.com/news/nation/2008-04-07-ga-soldier-sperm_N.htm.

29. In 2009, a Texas probate judge granted a mother's request to posthumously harvest sperm from the body of her 21-year-old son. The mother intended to have a surrogate carry her late son's baby, and to raise the grandchild herself. Mike Celizic, *Mother Defends Harvesting Dead Son's Sperm,* MSNBC.COM (Apr. 9, 2009, 9:23 AM), *available at* http://www.msnbc.msn.com/id/30133582. An Israeli court in 2007 granted the parents of a dead soldier the right to have their son's sperm used to impregnate a surrogate who would bear their grandchild. The soldier's sperm had been collected after his death. Lewis, *supra*.

30. In *Evans v. United Kingdom*, the European Court of Human Rights held that a British man could demand the destruction of frozen pre-embryos created from his sperm even though his partner's ovaries had been removed after the extraction of her eggs and therefore she would be unable to have a genetic child. 2007 Eur. Ct. H.R. 264 (2007). Under the UK's Human Fertilization and Embryology Act of 1990, donors may withdraw

their consent to use gametes or embryos created from them at any time before the embryos are implanted in a donee's uterus. *Id.*

31. In *In re Mullen*, the court denied child custody to a former domestic partner who had no genetic or birth relationship to the child. The two women in a domestic partnership decided to have a child by in vitro fertilization. A friend was asked to donate sperm and to be listed on the birth certificate as the child's father but to relinquish his parental and custody rights. After the women's relationship deteriorated, the non-biological mother sued for custody. The court denied custody to the non-biological mother. It upheld the juvenile court's decision that the biological mother did not relinquish full custody of the child for shared custody with the non-biological mother. 953 N.E.2d 302 (Ohio 2011).

32. In *In re G.R.-Z.*, 99 N.E.3d 1067 (Ohio Ct. App. 2017), the court denied child custody to a former domestic partner who had no genetic or birth relationship to the child. The two women in a domestic partnership decided to have a child by in vitro fertilization. A friend was asked to donate sperm but relinquished his parental and custody rights. Mother and domestic partner entered into a written agreement in the interest of "raising the children in a stable and loving environment," but the agreement did not include anything that could have been construed as the mother giving up full custody. After the women's relationship deteriorated, the non-biological mother sued for custody. The court denied custody to the non-biological mother, holding that *In re Mullen* prescribes that if there is no contract evidencing the intent for the parent and non-parent to share custody, a trial court need not consider the "best interests" test.

33. In *T.M.H. v. D.M.T.*, a lesbian couple had a child using in vitro fertilization. One woman was the birth mother, and the other was the biological mother. The birth mother moved away from the biological mother with the child once the relationship terminated. The biological mother sued for parental rights. The court held that any statute severing the biological mother's parental relationship was an unconstitutional denial of her fundamental parenthood rights as a genetic parent. Because the biological mother had formed and maintained a parental relationship with the child and was an equal partner with the birth mother, she was the child's mother. The court stated that a choice between two mothers was not necessary. 79 So.3d 787 (Fla. Dist. Ct. App. 2011). The Supreme Court of Florida, disagreeing with the Appeals Court on the applicability of a statute, remanded the case to the trial court to determine, based on the best interests of the child, issues such as parental time-sharing and child support. It also stressed that an all-or-nothing choice between the two parents was not necessary. *D.M.T. v. T.M.H.*, 129 So.3d 320 (Fla. 2013).

34. In *Reber v. Reiss*, the Pennsylvania Superior Court awarded frozen pre-embryos made from the wife's egg and the husband's sperm to a wife who had undergone chemotherapy for breast cancer. The couple had divorced, and the husband wished to avoid procreation. The court held that the couple never had an IVF agreement, and the frozen pre-embryos were the wife's best chance at achieving not only biological parenthood, but achieving parenthood at all. 42 A.3d 1131 (Pa. Super. Ct. 2012).

35. In *Szafranksi v. Dunston*, an ex-couple entered into an agreement to undergo in vitro fertilization (IVF) together for the purpose of creating pre-embryos, after the girlfriend had been diagnosed with lymphoma and was expected to suffer ovarian failure and infertility. During the IVF process, the ex-couple agreed to fertilize all of the eggs that were retrieved and three viable pre-embryos were created and frozen. After the relationship ended, the boyfriend sued to enjoin the girlfriend from using the embryos to which the girlfriend countersued seeking sole custody and control over them. The Appellate Court of Illinois held that the ex-couple was bound by an oral contract to create the pre-embryos and that the parties did not modify such contract when they signed a medical informed consent which required permission from both parties before a release of the embryos. 2015 IL App (1st) 122975 (Ill. App. Ct. 1st Dist. 2015).

36. In *Loeb v. Vergara*, actress Sophia Vergara and her partner entered into an agreement to undergo IVF. The procedure resulted in two viable embryos. After the relationship ended, Loeb created a Louisiana Trust to benefit the two embryos—"Emma" and "Isabella." Loeb filed suit in Louisiana state court on behalf of himself and the two embryos, seeking an order allowing him to bring the embyros to term without Vergara's consent. Loeb invoked the Uniform Child Custody Jurisdiction and Enforcement Act, seeking full custody of the embryos, which are deemed persons in Lousiana. Vergara removed the case to federal court, however the Eastern District of Lousiana remanded the cases back to state court due to lack of subject-matter jurisdiction. The court reasoned that because Loeb invoked the UCCJEA, the case was a domestic relations matter and purely a state law claim. The UCCJEA allowed Loeb to skirt personal jurisdiction claims that Vergara raised. 326 F.Supp. 3d 295 (E.D. La. 2018).

37. In *Matter of Zhu* a New York state court ruled that parents of a deceased cadet could harvest and freeze his procreative fluids for possible use with a surrogate mother. The decedent had no will or any express direction with respect to the posthumous disposition or use of his genetic material. The court looked to evidence of the decedent's intentions, including his past statements, actions, and statements from his parents and officers. The court determined that the decedent would have intended for his parents to make decisions with respect to the preservation and disposition of the procreative fluids at issue, and that Peter intended to start a family to carry on his legacy. No. 53327/2019, 2019 WL 2181157 (N.Y. Sup. Ct. May 16, 2019).

38. In *Rye v. Women's Care Ctr. Of Memphis, MPLLC* the Tennessee Supreme Court declined to extend *Davis* to confer an independent right of action against a non-governmental third-party. Though this case did not involve IVF, the court interpreted the "disruption of family planning" element of the *Davis* decision. Here, the plaintiff couple argued that under *Davis* disruption of family planning should be an independent cause of action or an element of damages for other negligence-based claims related

their medical malpractice suit (Rye underwent a procedure that created severe risks for future pregnancies). The court disagreed with the plaintiff couple. 477 S.W.3d 235 (Tenn. 2015).

39. In *McQueen v. Gadberry* the court found two frozen pre-embryos, created from a husband's frozen semen and a wife's eggs via IVF, to be marital property of special character, and awarded the frozen pre-embryos to the husband and wife jointly. The couple mutually signed a "Directive" contract that said that the embryos would got the wife upon divorce. However, the court ruled that the contract was invalid and unenforceable because the husband did not sign with the intent that the wife be awarded the embryos upon divorce. The wife, an attorney, filled in virtually all of the information on the Directive documents, including her husband's name in some places, and simply instructed her husband where to sign. The court ruled that, as marital property jointly owned, the embryos were to remain in their status quo of cryogenic preservation until the parties both agree in writing as to another disposition. This case is consistent with the contemporaneous mutual consent approach articulated in *Witten*. 507 S.W. 3d 127 (Mo. Ct. App. 2016).

40. In *Findley v. Lee* the California Supreme Court for the first time squarely addressed a dispute over the disposition of frozen embryos upon divorce. The court adopted the contract and balancing approaches, consistent with New York, New Jersey, and Tennessee. It ruled that an enforceable contract should govern the disposition of embryos upon divorce and if there is not an enforceable contract, the court should balance the interests of the party seeking to procreate against the interests of the party seeking to avoid procreation. The court held that the contract was enforceable. Further, the court held that if it were to apply a balancing test, Findley's right not to be a parent with Lee outweighed Lee's right to have a biologically related child. Pursuant to the contract, the court ordered the embryos to be thawed and discarded. The court also declined to adopt the contemporaneous mutual consent approach. No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Jan. 11, 2016).

41. In *In re Matter of Terrell v. Torres* the Court of Appeals of Arizona reversed a trial decision awarding embryos to a divorced husband to be destroyed. The court adopted the contract approach and interpreted the contract to direct the court to decide the embryo disposition by balancing test (the contract stated that upon divorce, a court decree will be presented to the clinic directing disposition). The court administered the balancing test in favor of the wife seeking to procreate. The court noted that the wife, who had undergone chemotherapy and could no longer get pregnant, had given up the opportunity to use another donor, therefore she was likely unable to become a parent (biological or otherwise) through other means. No. 1 CA-CV 17-0617 FC, 2019 WL 237069 (Ariz. Ct. App. June 6, 2019). In response to this case's underlying divorce proceeding, the Arizona Senate passed a bill that orders the courts to award the contested

embryos to the spouse who intends to allow the embryos to develop to birth. ARIZ. REV. STAT. § 25-318.03. *See,* Ariana Eunjung Cha, "Who gets the embryos? Whoever wants to make them into babies, new law says."Washington Post (July 17, 2019) for the reactions of different groups to the law that the embryos should be given to the spouse who intends to help them "develop to birth." In *Terrell v. Torres*, 248 Ariz. 47 (2020), *as amended* (February 21, 2020), the Supreme Court of Arizona overturned the Court of Appeals ruling, holding in favor of the divorced husband. The Court stressed that where a valid cryopreservation agreement exists, it should be given full effect and the Court of Appeals erred in its interpretation of the operant contract clause which led to a balancing of the interests approach which should not have been reached. Likewise, although the Supreme Court of Arizona reached the same result as the trial court, it held that the trial court erred in its application of the balancing test instead of simply enforcing the agreement.

**- In light of the new Arizona Statute, it is interesting to think about whether the outcome of this case would be different if brought in front of the courts now. The statute orders the courts to "award the contested embryos to the spouse who intends to allow the embryos to develop to birth." In this case, the Supreme Court ruled in favor of the father who was not destroying the embryos, but rather donating them, while the mother was going to use them for her own purposes. Would a court applying this statute find that the father (although donating the embryos) was not a spouse developing the embryos to birth and rule in favor of the mother whose use was direct and more apt for personal development?

42. In *In re Marriage of Rooks* the Supreme Court of Colorado, as a matter of first impression, ruled that in resolving disagreements over a couple's cryogenically preserved pre-embryos when that couple divorces, a court should look first to any existing agreement expressing the spouses' intent regarding disposition of the remaining pre-embryos in the event of divorce and, in absence of such agreement, a court should seek to balance the parties' respective interests. The lower courts applied the contract and balancing approach, ruling in favor of the spouse seeking to avoid procreation. The Supreme Court reversed and remanded the decision, holding that the lower courts considered inappropriate factors in administering the balancing test. The Supreme Court stated that when courts apply the balancing test, courts should consider the "intended use of the party seeking to preserve the pre-embryos; a party's demonstrated ability, or inability, to become a genetic parent through means other than use of the disputed pre-embryos; the parties' reason for undertaking IVF in the first place; the emotional, financial, or logistical hardship for the person seeking to avoid becoming a genetic parent; any demonstrated bad faith or attempt to use the pre-embryos as unfair leverage in the divorce process; and other considerations relevant to the parties' specific situation." The Supreme Court stated that courts should *not* consider whether the party seeking to become a genetic parent using the pre-embryos can afford a child; the number of a party's existing children, standing alone; whether the party seeking to become a genetic parent could instead adopt a child or otherwise parent non-biological children. 429 P.3d 579 (Colo. 2018), *cert. denied sub nom. Rooks v. Rooks*, 139 S. Ct. 1147 (2019) Following the *Rooks* case, a Colorado Court of Appeals reversed and remanded a trial court ruling that awarded pre-embryos to an

ex-wife who sought to donate them to an infertile couple. The Court of Appeals ruled that the trial court considered inappropriate factors in administering the balancing test. In *In re Marriage of Fabos & Olsen*, 2019 COA 80, 2019 WL 2219696 (Colo. App. May 23, 2019).

In *Bilbao v. Goodwin*, 217 A.3d 977 (Conn. 2019), the Supreme Court of Connecticut adopted the contractual approach as the appropriate first step in determining the disposition of pre-embryos upon divorce. Factors that the Court mentioned in support of this approach were: progenitors being the primary decision makers as opposed to the courts, benefits in making dispositional decisions in advance, consistency with Connecticut's public policy of calling for pre-planning documentation, and the contractual approach being consistent with the current practices of most state courts that have confronted the issue. However, the Court narrowed the scope of the holding by calling for its application only in a case of a contract application that will not result in procreation. The Court also declined to adopt a standard in the absence of an enforceable agreement.

possible cases to look at:
* Dahl v. Angle (holding that contractual right to dispose of frozen embryos created during marriage was personal property that was subject to a just and proper disposition in dissolution proceeding; ordering that frozen embryos be destroyed, as preferred by wife, constituted a just and proper distribution of that property; and courts should give effect to a valid agreement evincing the parties' intent regarding disposition of frozen embryos.
In re Marriage of Dahl & Angle, 222 Or. App. 572 (Or. Ct. App. 2008), 194 P.3d 834.
*Karmasu v. Karmasu (holding that custody of parties' frozen embryos following their divorce was controlled by contract between them and fertility clinic.) *Karmasu v. Karmasu*, 2009-Ohio-5252 (Ohio Ct. App. 2009).

* Cwik v. Cwik (holding that trial court did not abuse its discretion in awarding former spouses' frozen embryos to former wife as part of the distribution of property in their divorce proceeding, as contract between former spouses and fertility clinic gave sole ownership of parties' frozen embryos to former wife in event of divorce) *Cwik v. Cwik* 128 Ohio St. 3d 1515 (Ohio 2011), 948 N.E.2d 451.

* (British Columbia Supreme Court) – J.C.M v. A.N.A: A lesbian couple purchased sperm from a US sperm bank. Using this sperm, they conceived two children at Genesis Fertility Centre. The couple later broke up and divided up the assets of their relationship, but inadvertently failed to come to an agreement about the remaining sperm. The applicant, J.C.M., later met a new partner and wanted to use the remaining frozen sperm to conceive a child who was biologically related to her previous children. A.N.A. refused to allow the use and instead asked that the cryopreserved sperm be destroyed. J.C.M. brought the application seeking a declaration that the sperm was her sole property. Justice Russell declared that the sperm straws are property and ordered that the 13 remaining sperm straws be divided between the parties. J.C.M. v. A.N.A. 2012, 2012 BCSC 584 (Can. B.C. B.C.S.C.), *available at* http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc584/2012bcsc584.pdf.

D. Proposed Legislation

1. A bill proposed March 14, 2002 in the Connecticut General Assembly stated that where a husband and wife consented to assisted reproductive methods but dissolved their marriage before any transfer took place, the husband is not the father of the resulting child unless he consents to such arrangement in the record where the assisted reproduction occurs after such dissolution. Similarly, if an individual who consented to assisted reproduction then dies before such procedure took place the individual is not the resultant child's legal parent unless that parent consented in advance should such assisted reproduction occur after their death. 2002 C.T. H.B. 5762 (SN). The bill died in committee and has not been reintroduced.

2. New Jersey and New York have proposed legislation requiring an advanced written directive for the transfer, use and disposition of gametes or embryos cryopreserved in the course of a program of assisted reproductive technology. 2004 NJ A.B. 2226 (AS) died in committee and has not been reintroduced. 2009 NY A.B. 2761 passed the Assembly in March, 2009; 2009 NY S.B. 4531 was referred to the Judiciary Committee in April, 2009. 2011 NY S.B. 388 was referred to the Senate Committee on Rules in March, 2012. 2013 NY S.B. 1474 was referred to the Judiciary Committee in January, 2014. 2015 NY S.B. 2708 died in the committee in January, 2015.

3. New Jersey has proposed legislation that leaves a carve-out allowing parents to request genetic testing information for purposes of determining health conditions related to the parents and fetus. 2018 NJ A.B. 2248. (The bill had a 25% progression, but died in committee).

4. Similar legislation was proposed in Illinois, 2011 IL H.B. 5622, Minnesota, 2003 MN S.F. 813 (SN), and West Virginia, 2002 W.V. H.B. 2522 (SN). These bills died in committee.

5. A number of states have sought to pass bills assigning personhood to fetuses and, as a result, give them legal rights. These laws could potentially have a major effect on IVF in general. "The assignment of personhood to embryos will mean that IVF clinics will no longer be able to create, freeze, or dispose of them." Angela Lawson, *New Personhood Pushes Renew Threats to IVF*, REWIRE NEWS (May 27, 2018), https://rewire.news/article/2018/03/27/new-personhood-threats-ivf/. *See, e.g.*, Georgia Living Infants Fairness Equality (LIFE) Act (HB 481) (signed into law in May 2019 and defining "natural person" to mean "any human being including an unborn child"); *see also*, Personhood Act of South Carolina (H 3289) (introduced to Committee in January 2019 and defining "personhood" as beginning at the moment of fertilization). Similarly, fetal burial laws related to personhood laws would require patients to pay for burials for unused nonviable embryos and the embryos would require a government-issued death certificate. The bill also has major ramifications relating to abortion, as fetuses are considered persons from the moment of conception and have the constitutional protection to the right of life

E. Summary

Generally, these cases seem to indicate that body parts are not to be considered property except to the extent that a person has an interest in control over decision making. Frozen embryos seem to be something between persons and property.

The consensus seems to be that the disposition of frozen genetic material is governed by the contract governing the procedure. In the absence of a governing contract, it would appear that gametes belong to the surviving spouse, and may even be devisable "quasi-property." The right not to procreate seems to prevail in the absence of an agreement. For extended discussions of the subject, *see:*

1. Commentary

a) Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J. 897 (2000). (Summarizes cases decided under the presumption that prior agreements regarding disposition of frozen embryos should be enforced. The author contends that when courts have determined that dispositional agreements are valid and enforceable, they have been unconcerned with the location and manner in which these agreements are signed. The author points out that many of these agreements are embedded in informed consent documents provided by fertility clinics as a precursor to obtaining treatment and that despite evidence that patients often sign such documents with little or no appreciation of their content, judicial inquiry into the validity of these agreements has been limited. The author concludes that the court's allowance of a waiver of rights in the embryo disposition context represents an inappropriate divergence from the courts' and legislatures' normally protective stance toward procreative liberty [e.g., in adoption and surrogacy contracts]).

b) Ellen Waldman, *The Parent Trap: Uncovering the Myth of "Coerced Parenthood" in Frozen Embryo Disputes*, 53 AM. U.L. Rev. 1021 (2004). (Summarizes cases regarding frozen embryo disputes which err on the side of the right to avoid procreation. Instead, the author advocates that in this sensitive and fact specific area, courts at least equally weigh the right to procreate and the personal and psychological investments by the procreation-seeking party). Also discusses how adoption for "single older women is an expensive process fraught with the potential for protracted delay and ultimate disappointment." The court in *Reber v. Reiss* 42 A.3d 1131 (Pa. Super. Ct. 2012), quoted this to help support its ruling that frozen embryos should go to the mother, and the husband has no claim that the mother could "just adopt."

c) Arthur Caplan, *Due Consideration: Controversy in the Age of Medical Miracles* (1998) (including an interesting discussion on cloning).

d) David A. Rameden, *Frozen Semen as Property in Hecht v. Superior Court: One Step Forward, Two Steps Backward*, 62 UMKC L. REV. 377, 384 n.51 (1993) (noting that the American

Fertility Society states that gametes and embryos are the property of the donors.

e) John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027 (1994).

(1) Arguing that there is no constitutional right of posthumous reproduction. *Id.* at 1041-42.

(2) Posthumous interests in avoiding reproduction are attenuated and do not appear to implicate the core interests involved in most situations of avoiding reproduction, and arguably should not be valued to the same extent that interest is valued for living persons. *Id.* at 1032 – quoted in Schiff at 942-943.

f) Alise R. Panitch, *The Davis Dilemma: How to Prevent Battles over Frozen Preembryos*, 41 CASE W. L. REV. 543, 574 (1991) – Arguing that between a Double Consent Rule (allowing veto power for each parent), and an Implantation Rule (IVF participation waives objections – although legal ties can later be severed), the latter is better:

(1) increases fairness to the parties.

(2) reduces harm to losing party.

g) Rameden – Arguing that frozen semen exhibits all of the basic attributes of property (right to control and use, exclusivity and alienability) and should be held as such (at 395-96).

h) Bonnie Steinbock, *Sperm as Property*, STAN. L. & POL'Y REV., Issue 2, 1995, at 57.

i) Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, STAN. L. & POL'Y REV., Issue 2, 1995, at 73.

j) *See also – Italy Lacks Laws on Reproduction*, THE NATIONAL LAW JOURNAL, Feb. 1, 1999 at A10 (reporting on an Italian judge allowing the implantation of an embryo in the wife of a man who has been dead for six months).

k) Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55 (1999) – Arguing that widespread support for a contractual solution to questions regarding the disposition of frozen embryos is misguided. Coleman states that binding decisions regarding future disposition undermines procreative freedom and societal values about families, reproduction, and the strength of genetic ties. Instead, individuals should make contemporaneous decisions about how one's reproductive capacity will be used and previous agreements should not be used if either partner objects. Coleman argues for the right

to control the disposition of one's frozen embryos as an inalienable right that can not be relinquished irrevocably until disposition is carried out.

l) *See also* Donna M. Sheinbach, *Examining Disputes Over Ownership Rights to Frozen Embryos: Will Prior Consent Documents Survive if Challenged by State Law and/or Constitutional Principles?*, 48 CATH. U. L. REV. 989 (1999); Kermit Roosevelt, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, (1998) (arguing for property rights in the human body and human reproductive materials); Gail A. Katz, *Parpalaix c. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J. L. & TECH. 683, (1998); Weldon E. Havins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern that Technology*, 48 DEPAUL L. REV. 825 (1999).

m) David L. Theyssen, *Balancing Interests in Frozen Embryo Disputes: Is Adoption Really a Reasonable Alternative?*, 74 IND. L. J. 711, 712 (1999). "In light of the special concerns and difficulties relevant to adoption, it should not be forced upon the parent wishing to implant the embryos as an equal alternative to child birth if no other genetic options are available."

n) Jill Madden Melchoir, *Cryogenically Preserved Embryos in Dispositional Disputes and the Supreme Court: Breaking Impossible Ties*, 68 U. CIN. L. REV. 921 (2000) (discusses the dilemma of what to do with ever increasing numbers of frozen embryos and argues that a lack of regulation of clinics and an almost inevitable circuit split may lead to a Supreme Court ruling on the legal status of the frozen embryo as an entity separate from its mother. Melchoir also discusses problematic aspects of application of contract principals with respect to the disposition of frozen embryos).

o) Howard Fink & June Carbone, *Between Private Ordering and Public Fiat: A New Paradigm for Family Law Decision-Making*, 5 J.L. & FAM. STUD. 1 (2003) (discussing the important role of contract in the pre-determination of disputes involving frozen embryos, prenuptial property agreements and surrogate mother agreements).

(1) The authors propose using three procedural devices, declaratory judgments, mediation, and judicial or administrative approval, to assist the parties in settling their disputes.

p) Erik W. Johnson, Note, *Frozen Embryos: Determining Disposition Through Contract*, 55 RUTGERS L. REV. 793 (2003) (suggesting that pre-embryos should be protected more than normal cells and that parties should be required to sign consent forms before undergoing the in vitro fertilization procedure. The author also

suggests that legislation should be enacted to guide the courts where a consent form is absent or invalid).

q) *Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052 (2003) (discussing legislative initiatives and judicial efforts initiated to give non-traditional parents traditional parental rights, as well as the legal response to advances in reproductive technology that are challenging the traditional notion of the nuclear family).

r) For a discussion of the legal implications of "embryo adoption" (the adoption of surplus embryos by infertile couples), *see* Charles P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues In The Transfer Of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169 (2004).

s) Katheryn D. Katz, *Parenthood From the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying,* 2006 Chicago Legal F. 289 (2006). The author discusses the various protocols on postmortem gamete harvesting developed by medical institutions to guide physicians given the lack of legislative guidance in the area. She institutional approaches as either permissive, restrictive, or hybrid approaches, and points out the need for clarity and certainty in such protocols.

2. Proposals

a) AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (2008).

(1) The Committee on Reproductive and Genetic Technology in the ABA Section of Family Law issued a model act to address issues related to reproductive technology. The Model Act was approved by the ABA in February 2008 (final version available at http://www.abanet.org/family/committees/artmodelact.pdf) (last visited June 23, 2009).

(2) The Model Act calls for informed consent on the risks and benefits of ART, mandatory mental health consultation of both donor and donee, and binding agreements to be executed by intended parents as to the use and disposition of embryos.

(3) Gametes or embryos shall not be collected from deceased individuals or from preserved tissues, absent prior consent from the individual while alive or from an authorized fiduciary who has the express authorization to give such consent. ABA MODEL ACT, supra, §205(1). Where delay in removal of gametes would result in loss of viability, an emergency provision would allow the removal of gametes; however, court approval is required before such gametes can be used. §205(2-3).

(4) For a discussion of the history and provisions of the act, *See* Charles P. Kindregan, Jr. and Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203 (2008).

** The American Bar Association ratified an updated ART Model Act in early 2019. The newly ratified Model Act adds newly defined terms and updated language throughout to make the act neutral as to gender and sexual orientation. It establishes baseline best practice standards and eligibility requirements for all types of surrogacy for the safety of all participants in assisted reproduction. The new act updates parental establishment provisions for gestational surrogacy to reflect current practice and, for the first time, addresses traditional / genetic surrogacy, which was not addressed at all in 2008 Model Act, including parental establishment provisions for traditional / genetic surrogacy as well. The newly ratified 2019 Model Act stands as the prime example of best practices and requirements for the safety of all the participants in an assisted reproduction arrangement. It addresses gestational and genetic (formerly referred to as traditional) surrogacy in ways that mirror those best practices, and creates predictability for the participants and the attorneys that assist them. The act echoes the modern realities of current ART parentage practices while also protecting the integrity of the intended parent doctrine.

b) Schiff

(1) gamete donation does not equal intent for the purposes of consent – mere general intent (at 950).

(2) particular distinctions of female gamete procedures (higher investment in time, pain, etc.) (at 950).

(3) prefers clear and convincing evidence to be required to show intent to use stored gametes (at 953).

(4) arguing that a distinction should be made between in vivo and in vitro reproduction for purposes of inferring intent to proceed with reproduction (at 961).

(5) "where no agreement exists and the deceased's objections to the use of the embryos are known, posthumous procreation using those embryos should not be permitted" (at 962).

(6) "a person's interest in avoiding biological parenthood should not be viewed as significantly diminished after death" (at 962 and notes 248-84 and accompanying text).

(7) with gametes, decision should be with gamete donor (regardless of who is decedent) (at 963).

(8) with embryos, "balance seems to tip in favor of allowing posthumous procreation" (at 964).

(9) discussing quasi-property rights over corpses – trust situation (at 925).

c) Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521 (1993).

(1) AID is now called therapeutic donor insemination ("TDI") to avoid confusion with the AIDS virus (527 n.32).

(2) Noting that any societal (and statutory) restrictions on unmarried women having children directly affect post-mortem insemination because a widow is by definition not married (535 n.65).

(3) Discussing differing procedures for treatment of sperm after death by different sperm banks (548-49 n.139).

(a) some release sperm only with decedent's prior authorization (sperm not seen as property).

(b) some do view sperm as property.

(i) if married – sperm goes to widow or legal heirs.

(ii) if unmarried and left directive, it is followed.

(iii) if unmarried and left no instructions, sperm bank requires court order before releasing sperm to someone requesting it.

(c) some only release sperm to widow – if unmarried, sperm is destroyed, regardless of an express instruction to the contrary.

(4) Arguing that in some cases, a woman's right to procreate, combined with the unique nature of sperm, should outweigh a decedent's interest in destroying the sperm. (550).

d) ASRM

(1) Society has advised clinics that they may destroy embryos if they have diligently tried to contact the patients for five years.

(2) Growing field of cryopreservation of ova – would still need surrogate uterus

(3) Encourage use of agreements for embryo disposition after death, divorce, or time lapse

e) James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743 (1998) (examining the legal/technological disparity in the field, and arguing for the judicial recognition of gametes, zygotes, pre-embryos, and embryos as property).

f) Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter?*, 11 BYU J. PUB. L. 1 (1997) (proposing that posthumous conception doctrine shift away from a focus on personal autonomy, allows for greater state intervention and regulation, and re-emphasizes the interests of the child).

g) Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, (2000) (in depth overview and analysis with proposed model for analyzing legal issues arising from technological conception).

h) Charles P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, *supra* (advocating for an intent-based model of legal parenthood to assisted conception scenarios).

i) Melissa B. Vegter, Note, *The "Art" of Inheritance: A Proposal For Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit From a Deceased Parent's Estate*, 38 VAL. U. L. REV. 267 (2003). The author here suggests two issues that should be considered in determining whether a posthumously conceived child is a child of the deceased parent for purposes of inheritance: (1) intent - whether the father knowingly agreed to conceive a child with his sperm after his death, and (2) time - whether a period of limitations for filing a claim against the estate should be imposed on the child; and proposing that amending the UPC could solve the controversy.

j) I. Glenn Cohen, *The Right Not to be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008). The author advocates the recognition of a right not to be a genetic parent, as distinct from the right not to be a legal parent, and proposes that absent a contract, the default rule in pre-embryo disposition cases should be non-use.

k) Bridget M. Fuselier, *The Trouble With Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-Embryos*, 14 TEX. J. ON C.L. & C.R. 143 (2009). The author proposes the application of a property-rights approach to disputes over pre-embryos, in which pre-embryos would be treated as "property with special dignity."

IV. Control Over Inheritance by Posthumously Reproduced Individuals

A. History of Inheritance Rights by Posthumously Reproduced Individuals

Most States developed a statutory and/or maintain a common-law scheme to deal with situations of children born posthumously to their parent's death although conceived prior to death. However, it is not until recently that a few jurisdictions have addressed such births when conception occurred after the biological father's death (i.e. cryopreserved sperm implanted into mother after biological father died). *See* FLA. STAT. § 742.17 (West 2014); N.D. CENT. CODE ANN. § 30.1-04-19 (West); VA. CODE ANN. § 20-156-165 (Michie Supp. 1997); LA REV. STAT. ANN §§ 9:124-133 (West 2014); Renee H. Sekino, *Posthumous Conception: The Birth of a New Class of Social Security*, 8 B.U. J. SCI. & TECH. L., 362 (2002). *See also* Julie Goodwin, *Not all Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children,* 4 CONN. PUB. INT. L.J. 234 (2005).

Common law requires conception and proof of paternity before a father's death for inheritance. *See* Djalleta at 365; Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation,* 57 LA. L. REV. 27, 48 (1996); Ronald R. Volkmer, *After-Born Heirs and Reproductive Technology*, 28 EST. PLAN. 39 (2001).

B. Statutes

1. UNIFORM PARENTAGE ACT (UPA) (1973), 9B U.L.A. 287 (1987)[1].

[1] UPA was last amended in 2017. The 2017 UPA updates the Act to address three primary issues.

First, the 2017 UPA seeks to ensure the equal treatment of children born to same-sex couples. The 2002 UPA is written in gendered terms, and its provisions presume that couples consist of one man and one woman. For example, Section 703 of the 2002 UPA provides that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."

In its 2015 decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), the United States Supreme Court held that laws barring marriage between two people of the same sex are unconstitutional. After Obergefell, some parentage laws that treat same-sex couples differently than different-sex couples may be unconstitutional. The 2017 UPA updates the Act to address this potential constitutional infirmity by amending the provisions so that they address and apply equally to same-sex couples.

Second, the 2017 UPA updates the surrogacy provisions to reflect developments in that area.

Finally, the 2017 UPA includes a new article – Article 9 – that addresses the right of children born through assisted reproductive technology to access medical and identifying information regarding any gamete providers. Article 9 does not require disclosure of the identity of gamete

a) The UPA has been adopted at least in part by Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, Texas, Utah, Washington and Wyoming. In 2002, West Virginia introduced legislation on this Act without further action.

b) The UPA establishes the ability of the husband of the sperm receiver to be deemed the resulting child's father.

c) Where the sperm donee's husband is established as the father, the biological father's ties are severed.

d) Creates a presumption that a child born within 300 days of the decedent's death is the decedent's issue. This Act extends the common-law presumption of 280 days.

e) On August 3, 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL) unanimously approved the revised Uniform Parentage Act (UPA). The revisions reflect changes in genetic testing technology and include a Registry of Paternity section. The revised UPA also incorporates provisions of the Uniform Putative and Unknown Fathers Act (1988) and the Uniform Status of Children of Assisted Conception Act (1988) (see below). The Committee recommended that the Uniform Putative and Unknown Fathers Act and the Uniform Status of Children of Assisted Conception Act be merged into the revised UPA.

f) In 2002, the UPA (2000) was amended to modernize the law for determining the parents of children and to facilitate modern methods of testing for parentage. The revisions reflect the rising incidence of children born to unmarried parents and the necessity of improving parentage determinations for the enforcement of child support.

(1) The UPA, as amended in 2002, is now the official recommendation of the National Conference of Commissioners on Uniform State Laws (the NCCUSL) on the subject of parentage. As amended, the UPA relegates to history all of the earlier uniform acts dealing with parentage, to wit, UPA (1973), UPUFA (1988), and USCACA (1988).

---

providers, but it does require gamete banks and fertility clinics to ask donors if they want to have their identifying information disclosed when the resulting child turns 18.

See https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=238dfcf5-eb39-47d0-bfb7-d0ea50c52c63&forceDialog=0.

(2) The amended UPA has been adopted by Alabama, Delaware, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming. In 2003, Minnesota and New Jersey introduced legislation on this Act without further action. California, Vermont, and Washington have adopted the 2017 Parentage Act. In 2019, Connecticut, Pennsylvania, Massachusetts, and Rhode Island introduced legislature to adopt the 2017 Parentage Act. All states share one commonality: The surviving parent must provide proof of the deceased's intent for the posthumous child to inherit.

g) California's Uniform Parentage Act was amended in 2005 to allow posthumously conceived children to be eligible for inheritance or death benefits, where the child is conceived within two years of and consistent with the wishes of the deceased parent. Cal. Prob. Code § 249.5 (Deering 2009).

2. Uniform Status of Children of Assisted Conception Act (USCACA), 9B U.L.A. 184 (Supp. 1998).

a) Purpose is to insure a certainty of legal parentage in cases where assisted conception is used.

b) Anyone who dies before implantation of an embryo or conception with gamete is not the resulting child's parent, unless specific provisions are made for posthumous children by will.

c) Presumes consent of paternity by the gestational mother's husband in all cases of assisted conception. The presumption can be overcome if within two years of birth, the husband *commences* an action in which it is determined that he did not consent to the conception.

d) North Dakota adopted Alternative B of the Act, simply declaring contracts with surrogate mothers void. N.D. Cent. Code § 14-18-05 (2009). Virginia adopted the Act but with some important differences, including that a decedent dying before implantation of the embryo of his or her respective reproductive material, whether or not the other gamete is that of the other spouse, is not the parent of that child unless the person consented to be a parent in writing. Va. Code Ann. §§ 20-158 (2009).

e) Florida and Louisiana, while not adopting the USCACA, each enacted legislation that each address children of posthumous conception.

(1) Florida-- A child conceived after Testator's death is ineligible to take from the decedent's estate (through intestacy) unless that child is otherwise provided for by Decedent's will, thus essentially eliminating any inheritance rights of posthumously conceived children. FLA. STAT. ANN. § 742.17; Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security*

Survivor Benefits for Posthumously Conceived Children, 32 LOY. L.A. L. REV., 251, 292 (1999).

(2) Louisiana-- La. Rev. Stat. Ann. § 9:391.1 states that a child conceived after the death of a decedent who specifically authorized in writing the use of his gametes, is the legitimate child of such decedent and has rights of inheritance, provided the child was born within three years of the death of the decedent. While Louisiana Civil Code Article 939 requires the heir to exist "at the death of the decedent," (LA CIV. CODE ANN. ART. 939), this statute specifically grants this exception.

Further, a child born through in vitro fertilization or in vitro ovum donation to another couple does not retain its inheritance rights from the gamete donor(s). LA REV STAT. ANN. § 9:133 (West 2014).

f) **NOTE:** The USCACA was incorporated into the amended version of the Uniform Parentage Act (UPA) in 2002. Article 7 of the UPA (Child of Assisted Reproduction), recodifies USCACA (1988), but applies its provisions to non-marital as well as marital children born as a result of assisted reproductive technologies.

With regard to gestational agreements, the NCCUSL withdrew the USCACA and substituted bracketed Article 8 of the new UPA. Article 8 incorporates many of the USCACA provisions allowing validation and enforcement of gestational agreements, but eliminating the USCACA option to void them. States may omit this article without undermining the other provisions of the UPA (2002).

3. UNIFORM PROBATE CODE (UPC)

a) The UPC has been adopted in its entirety (in some cases with significant modifications) by 19 states: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah and Wisconsin.

b) The UPC has been adopted in part by numerous states.

c) The UPC incorporates the Uniform Parentage Act for establishing intestate succession (*See* McAllister at 65).

d) Posthumously born children are disregarded for Rule Against Perpetuities Determinations (*See* Djalleta at 366).

e) The UPC was amended in 2008. The amendments add, *inter alia*, a section dealing with children of assisted reproduction. A

posthumously conceived child will be considered "in gestation" at the deceased parent's death if that child is in utero within 36 months after the parent's death, or is born no later than 45 months after the parent's death. UPC (2008) § 2-120. Colorado and North Dakota enacted the amendments in 2009. Bills to adopt the amendments were introduced in Minnesota and New Mexico in 2009.

4. UNIFORM STATUTORY RULE AGAINST PERPETUITIES (USRAP) – adopts a 90-year "wait and see" period.

   a) USRAP has been adopted by the following 27 states and by the District of Columbia: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia and West Virginia.

   b) For testamentary gifts to frozen embryos, the relevant question is whether a frozen embryo is a life in being (*See* McAllister at 100).

   c) USRAP allows for conditional validation of non-vested interests.

   d) For a discussion of reproductive technologies and the Rule Against Perpetuities *See* Les A. McCrimmon, *Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities*, 34 REAL PROP. PROB. & TR. J. 697 (2000) (discusses the arguments for and against recognition of the embryo as a life in being, as well as suggestions for legislative solutions to this issue); *see also* Sharona Hoffman and Andrew P. Morriss, *Birth After Death: Perpetuities And The New Reproductive Technologies*, 38 GA. L. REV. 575 (2004).

5. State Statutes – *See* Appendix

   a) In Alabama, if decedent dies before placement of the eggs, sperm, or embryos, decedent must have consented to parenthood from assisted reproduction in a record to give the child legal status as decedent's child. ALA. CODE § 26-17-707 (West 2017). Other states with similar laws include: Delaware (DEL. CODE ANN. tit. 12, § 8-707 (West 2017), New Mexico (N.M. STAT. ANN. § 40-11A-707 (West 2017)), Texas (TEX. FAM. CODE ANN. § 160.707 (West 2017)), Utah (UTAH CODE ANN. § 78B-15-707 (West 2017)), and Wyoming (WYO. STAT. ANN. § 14-2-907 (West 2017)).

   b) In Colorado, if decedent dies before placement of eggs, sperm, or embryos, decedent must have consented to parenthood from assisted reproduction in a record to give the child legal status as decedent's child. COLO. REV. STAT. § 19-4-106 (West 2017). Colorado law also provides that a child in gestation when their parent dies, is considered to be alive at the time of the decedent's death and eligible for intestate

succession, even if a child is conceived posthumously. A child is treated in gestation at the time of the decedent's death if the child is in utero within thirty-six months after the decedent's death, or born within forty-five months after decedent's death. COLO. REV. STAT. §§ 15-11-104, 15-11-120) (West 2017).

c) California law provides that a posthumously conceived child will be the child of the deceased parent for purposes of the distribution of property if the decedent left written consent signed by the decedent and dated; the genetic material may be used by someone named in the written consent; the written notice is given to someone in a position to control the distribution of the property within four months of the decedent's death; and that the child be in utero within two years of the decedent's death. CAL. PROB. CODE § 249.5 (Deering 2017). Connecticut has a similar statute but the child must be in utero within one year of the decedent's death. CONN. GEN. STAT. § 45a-785 (West 2017).

d) Florida law provides for inheritance rights of a posthumously conceived child if the decedent included such child in the will. "A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." FLA. STAT. § 742.17(4) (West 2017).

e) Idaho law grants posthumously conceived relatives inheritance rights if they are conceived, by natural or artificial means, prior to the decedent's death and are born within 10 months of the decedent's death. IDAHO CODE § 15-2-108 (West 2017).

f) Iowa allows a posthumously conceived child to have the legal status of a child if the following requirements are met: the child is genetically the decedent's, the decedent authorized in writing to allow the surviving spouse to use decedent's sperm, eggs or embryos, the child is born within 2 years of decedent's death, and any other heir has 1 year to challenge the posthumous child's inheritance rights. IOWA CODE § 633.220A (West 2017).

g) In Louisiana, a posthumously conceived child must be born within 3 years of the decedent's death to the surviving spouse, and the decedent must authorize in writing his surviving spouse to use his gametes for the child to be considered the decedent's child with all inheritance rights. LA. REV. STAT. ANN. § 9:391.1 (West 2017).

h) Maryland law allows posthumously born children to have the same inheritance rights as decedent's child if the posthumous child is conceived prior to decedent's death, but born after the death of the decedent. No other posthumous child is entitled to distribution unless the decedent left written consent to use decedent's genetic material for posthumous conception; the decedent left written consent to be the parent of a child posthumously conceived using the person's genetic material; and that child be born within 2 years after the decedent's death. MD. CODE ANN., Est & Trusts § 3-107 (West 2017).

i) Massachusetts allows an individual in gestation at a particular time to be treated as living at the time if the individual lives 120 hours or more after birth. MASS. GEN. LAWS ch. 190B, § 2-108 (West 2017). Similar state laws include: Alaska (ALASKA STAT. § 13.12.108 (West 2017)), Michigan (MICH. COMP. LAW SERV. § 700.2108 (West 2017)), Minnesota (MINN. STAT. §524.2-108 (West 2017)), Montana (MONT. CODE ANN. § 72-2-118 (West 2017)), New Jersey (N.J. STAT. § 3B:5-8 (West 2017)), Vermont (VT. STAT. ANN. tit. 14, § 303 (West 2017)), and Wisconsin (WIS. STAT. ANN. § 854.03 (West 2017)). North Dakota has a similar statute but it must be established by clear and convincing evidence that an individual lived 120hours after birth. N.D. CENT. CODE ANN. § 30.1-04-04 (West 2017).

j) Virginia law requires the posthumously conceived child to be born within 10 months of the decedent's death to have status as the decedent's child. The decedent must have also been married to the surviving spouse. If the decedent dies before the embryo is implanted, implantation must occur before the physician is notified of the death, or the decedent must have consented to be a parent in writing before implantation. VA. CODE ANN. §§ 20-158, 20-164 (West 2017).

k) Some states allow posthumously born children to have the legal status as decedent's child, without mentioning posthumous conception. D.C. law simply states, "a child or descendant of the intestate born after the death of the intestate has the same right of inheritance as if born before his death." D.C. CODE § 19-314 (West 2017). Similar state laws include: Hawaii (HAW. REV. STAT. § 532-9 (West 2017)), Kansas (KAN. STAT. ANN. § 59-501 (West 2017)), Maine (ME. REV. STAT. tit. 18-A, § 2-108 (West 2017)), Missouri (MO. REV. STAT. § 474.050 (West 2017)), NEBRASKA (NEB. REV. STAT. ANN. § 30-2309 (West 2017)), Nevada (NEV. REV. STAT. ANN. § 111.085 (West 2017)), New Hampshire (N.H. REV STAT ANN. § 551:10 (West 2017)), Oklahoma (OKLA. STAT. tit. 84, 228 (West 2017)), South Carolina (S.C. CODE ANN. § 27-5-120 (West 2017)), and Tennessee (TENN. CODE ANN. § 31-2-108 (West 2017)). Pennsylvania has a similar statute but with a requirement that the child survive decedent by 5days. 20 PA. CONS. STAT. ANN. § 2104 (West 2017).

l) New York law grants posthumously born children inheritance rights of a future estate, but it defines posthumous children as those who were in utero at decedent's death. N.Y. ESTATES, POWERS AND TRUSTS LAW § 6-5.7 (West 2017).

Effective February 15, 2021

N.Y. ESTATES, POWERS AND TRUSTS § 4-1.3 Inheritance by children conceived after the death of an intended parent.

(a) When used in this article, unless the context or subject matter manifestly requires a different interpretation:

(1) "Genetic material" shall mean sperm or ova provided by a genetic parent.

(2) “Child” shall mean a child conceived through assisted reproduction.

(3) “Intended parent” shall have the same meaning as defined in section 581-102 of the family court act.

(b) For purposes of this article, a genetic child is the child of his or her intended parent or parents and, notwithstanding paragraph (c) of section 4-1.1 of this part, is a distributee of his or her intended parent or parents and, notwithstanding subparagraph (2) of paragraph (a) of section 2-1.3 of this chapter, is included in any disposition of property to persons described in any instrument of which an intended parent of the genetic child was the creator as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator if it is established that:

(1) the intended parent in a written instrument executed pursuant to the provisions of this section not more than seven years before the death of the intended parent expressly consented that if assisted reproduction were to occur after the death of the intended parent, the deceased individual would be a parent of the child; and

(2) the child was in utero no later than twenty-four months after the intended parent's death or born no later than thirty-three months after the intended parent's death.

(c) If the child was conceived using the genetic material of the intended parent, it must further be established that:

(1) the intended parent in a written instrument executed pursuant to the provisions of this section not more than seven years before the death of the intended parent authorized a person to make decisions about the use of the intended parent's genetic material after the death of the intended parent;

(2) the person authorized in the written instrument to make decisions about the use of the intended parent's genetic material gave written notice, by certified mail, return receipt requested, or by personal delivery, that the intended parent's genetic material was available for the purpose of conceiving a child of the intended parent, and such written notice was given;

(A) within seven months from the date of the issuance of letters testamentary or of administration on the estate of the intended parent, as the case may be, to the person to whom such letters have issued, or, if no letters have been issued within four months of the death of the intended parent, and

(B) within seven months of the death of the intended parent to a distributee of the intended parent; and

(3) the person authorized in the written instrument to make decisions about the use of the intended parent's genetic material recorded the written instrument within seven months of the intended

parent's death in the office of the surrogate granting letters on the intended parent's estate, or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them.

(d) The written instrument referred to in subparagraph (1) of paragraph (b) of this section and subparagraph (1) of paragraph (c) of this section:

(1) must be signed by the intended parent in the presence of two witnesses who also sign the instrument referred to in subparagraph (1) of paragraph (c) of this section, both of whom are at least eighteen years of age and neither of whom is a person authorized under the instrument to make decisions about the use of the intended parent's genetic material;

(2) may be revoked only by a written instrument signed by the intended parent and executed in the same manner as the instrument it revokes;

(3) may not be altered or revoked by a provision in the will of the intended parent;

(4) an instrument referred to in subparagraph (1) of paragraph (c) of this section may authorize an alternate to make decisions about the use of the intended parent's genetic material if the first person so designated dies before the intended parent or is unable to exercise the authority granted;

(5) an instrument referred to in subparagraph (1) of paragraph (b) of this section may be substantially in the following form and must be signed and dated by the intended parent and properly witnessed

(e) Any authority granted in a written instrument authorized by this section to a person who is the spouse of the intended parent at the time of execution of the written instrument is revoked by a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of the marriage between the intended parent and the spouse or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(f) Process shall not issue to a child who is a distributee of an intended parent under sections one thousand three and one thousand four hundred three of the surrogate's court procedure act unless the child is in being at the time process issues.

(g) Except as provided in paragraph (b) of this section with regard to any disposition of property in any instrument of which the intended parent of a child is the creator, for purposes of section 2-1.3 of this chapter a child who is entitled to inherit from an intended parent under this section is a child of the intended parent for purposes of a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin,

distributees (or by any term of like import) of the creator or of another. This paragraph shall apply to the wills of persons dying on or after September first, two thousand fourteen, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

(h) For purposes of section 3-3.3 of this chapter the terms "issue", "surviving issue" and "issue surviving" include a child if he or she is entitled to inherit from his or her intended parent under this section.

(i) Where the validity of a disposition under the rule against perpetuities depends on the ability of a person to have a child at some future time, the possibility that such person may have a child conceived using assisted reproduction shall be disregarded. This provision shall not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities where such validity depends on the ability of a person to have a child at some future time. A determination of validity or invalidity of a disposition under the rule against perpetuities by the application of this provision shall not be affected by the later birth of a child conceived using assisted reproduction disregarded under this provision.

(j) The use of a genetic material after the death of the person providing such material is subject exclusively to the provisions of this section and to any valid and binding contractual agreement between such person and the facility providing storage of the genetic material and may not be the subject of a disposition in an instrument created by the person providing such material or by any other person.

Illinois also requires posthumous children to be in utero at decedent's death. 755 ILL. COMP. STAT. ANN. 5/2-3 (West 2017). West Virginia also requires posthumous children to be in the mother's womb at the time of decedent's death. W. VA. CODE § 42-1-8 (West 2017).

m) Oregon law provides a rebuttable presumption of paternity for any child born within 300 days after the marriage is terminated by the death of decedent parent. The law does not mention posthumous conception. OR. REV. STAT. § 109.070 (West 2017). Indiana has a similar statute. IND. CODE ANN. § 31-14-7-1 (West 2017).

n) South Dakota law grants posthumously born children inheritance rights if they are conceived prior to decedent's death, are born within 10 months of decedent's death, and survive 120 hours or more after birth. S.D. CODIFIED LAWS § 43-3-14 (West 2017). Georgia has a similar statute. Ga. Code Ann. § 53-2-1 (West 2017). Arizona has a similar statute but without reference to time of conception. ARIZ. REV. STAT. ANN. § 14-2108 (West 2017). Arkansas has a similar statute but without reference to either time of conception or survival hours. ARK. CODE. ANN. § 28-9-210 (West 2017). Kentucky has a similar statute but without reference to survival hours. KY. REV. STAT. ANN. § 391.070 (West 2017). North Carolina has a similar statute but without reference to survival hours. N.C. GEN. STAT. § 29-9 (West 2017). Ohio

has a similar statute but the posthumously born child was born within 300 days after the death of the intestate and living for at least 120 hours after birth. OHIO REV. CODE ANN. § 2105.14 (West 2017).

o) Washington law provides that if decedent dies before placement of the eggs, sperm, or embryos, decedent must have consented to parenthood from assisted reproduction in a record to give the child legal status as decedent's child. Additionally, the embryo must be in utero no later than 36 months after the individual's death, or the child must be born no later than 45 months after the individual's death. Wash. REV. CODE ANN. § 26.26A.635 (West)..

6. Legitimacy

7. Forced Heirship Laws

8. Intestacy Laws

9. Pretermitted Child Laws

10. Family Dependency Laws

C. Cases

1. *Delzer v. Berryhill*, 886 F.3d 1282 (9d Cir. 2018). In April 1999, Owen Delzer, Ms. Delzer's late husband and the biological father of C.O.D.1 and C.O.D.2, was diagnosed with terminal cancer. He died on July 20, 1999, just four months later. On February 16, 2001, Mr. Delzer's previously cryopreserved sperm was used to fertilize eggs from Ms. Delzer. The resulting embryos were implanted in Ms. Delzer on February 19, 2001, and resulted in the twin pregnancy and birth of C.O.D.1 and C.O.D.2. Plaintiffs claimed social security insurance benefits based on the wage earnings of Mr. Delzer. After a hearing, an administrative law judge determined that Plaintiffs failed to establish that C.O.D.1 and C.O.D.2 were children of Mr. Delzer for purposes of the Social Security Act (the "Act"), 42 U.S.C. § 402(d)(1). Plaintiffs sought review of the ALJ's decision in the Central District of California. On June 21, 2016, the district court accepted the findings and recommendations of the magistrate judge and entered judgment for the SSA.

To be entitled to child's insurance benefits under the Social Security Act, a claimant must prove that he or she is the "child" of the insured decedent. 42 U.S.C. § 402(d)(1). A claimant is a "child" of the decedent, for purposes of the Act, if the claimant would qualify to inherit from the decedent under the intestacy laws of the state in which the decedent was domiciled at the time of his death (here, California). Id. § 416(h)(2)(A). The California Probate Code specifically addresses posthumously conceived children: Under Section 249.5, "a child of the decedent conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent if the child or his or her representative proves by clear and convincing evidence that," inter alia, "[t]he decedent, in writing, specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent" and the "specification [is] signed by the decedent and dated." Cal. Prob. Code §

249.5. In this case, Plaintiffs have failed to satisfy Section 249.5. They could not proves "by clear and convincing evidence" that Mr. Delzer consented to the posthumous use of his frozen sperm to conceive children after his death.

2. *Karin T. v. Michael T.* (transsexual domestic partner was estopped from abrogating support obligations to a child conceived via artificial insemination after the domestic partner agreed in writing that any child conceived from such procedure was hers and further waived any right to disclaim the child as her own). 127 Misc. 2d 14 (N.Y. Fam. Ct.1985).

3. *In re Estate of Kolacy,* 753 A.2d 1257 (N.J. Super. 2000). Plaintiff Mariantonia Kolacy's husband was diagnosed with leukemia and decided to bank his sperm prior to and in between his chemotherapy treatments. Mr. Kolacy's treatments were unsuccessful, and he died on April 15, 1995. Nearly eighteen months later, the plaintiff gave birth to twin girls conceived through in vitro fertilization (IVF) using her deceased husband's sperm. Plaintiff brought action seeking declaration that her twin daughters were intestate heirs of her late husband. The Court held that: (1) intestacy action was justiciable in state court even if adjunct to federal claims, and (2) twins conceived by in vitro fertilization and born nearly 18 months after their father's death qualified as father's legal heirs under state intestate law. In this case, the Social Security Administration's Appeals Council refused to accept the judge's decisions in part because it was not a final ruling by the state's highest court.

4. *Woodward v. Commissioner of Social Security,* 760 N.E.2d 257 (Mass. 2002). Twins were born two years after the death of their father and when their mother sought Social Security benefits, her claim was denied by the Social Security Administration. In "certain limited circuntamces," child resulting from posthumous reproduction may enjoy the inheritance rights of ''issue'' under the Massachusetts intestacy statute. These limited circumstances include cicumstances where the surviving parent establishes: (a) a proven genetic relationship; (b) affirmative consent of the decedent to conception; and (c) consent to support for the resulting child.

5. In *Gillett-Netting v. Barnhart*, the court held that because Arizona law did not treat a child conceived posthumously as an heir under its state intestacy statute, Social Security survivor benefits were properly denied because at the time of decedents death, the posthumous child failed to meet the Social Security definition of a dependant child. 231 F. Supp. 2d 961 (D. Ariz. 2002). The decision was *reversed* and remanded by the 9th Circuit in 2004, holding that posthumously conceived children were considered "children" within definition of the Social Security Act, and that children were presumed dependent for purposes of entitlement to child's insurance benefits, since their status as children is examined under applicable state law. *Gillett-Netting v. Barnhart,* 371 F. 3d 593 (9th Cir. (Ariz.) June 9, 2004).[2]

[2] Superceded by statute as stated in Capato v. Comm'r of Soc. Sec., 631 F.3d 626, 630 (3d Cir. 2011). Abrogated by *Astrue v. Capato ex rel. B.N.C,* 132 S.Ct. 2021, U.S. (2012), holding that

6. *Vernoff v. Astrue*, 2009 U.S. App. LEXIS 13046 (9th Cir. 2009). Widow had semen extracted from her late husband's body and, three years after his death, conceived his child. Late husband had not consented or indicated a desire to have a child postmortem. Widow filed an unsuccessful claim for child survivor benefits with the Social Security Administration. The 9th Circuit affirmed the denial of benefits, holding that under California law the child was not a "dependant" for the purposes of the Social Security Act. Under California law, the deceased was not presumed to be the parent of the child, nor was the child entitled to inherit from the deceased under intestacy laws. The parents' marriage was terminated by putative father's death, the child was not born within 300 days of putative father's death, as required by statute, and there was no evidence of father's consent regarding the artificial insemination of his widow following his death The court also denied the widow's claim that excluding some posthumously-conceived children from Social Security child survivor benefits violated the Equal Protection Clause.

7. *Stephen ex rel. Stephen v. Barnhart*, 386 F. Supp. 2d 1257 (M.D. Fla, 2005). Wife had the husband's sperm extracted from his deceased body. A son was born and the mother and the deceased husband were listed as the parents on the birth certificate. The issue was whether the son was the husband's "child" within the meaning of the Social Security Act so as to be able to receive survivor's benefits. The Court held he was not the child of the deceased man under Florida law and was not eligible for a claim against the husband's estate unless he was specifically provided for in the will. Even if the son were the "child" of the husband , the son was not dependent upon the husband at the time of the husband's death as required by the Act. The Court specifically distinguished *Gillett-Netting v. Barnhart*.

8. *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008). The Arkansas Supreme Court, answering a question certified to it by the U.S. District Court, held that a child created as an embryo during his parents' marriage but implanted in his mother's womb after his father's death could not inherit

---

the children, who could not inherit from the decedent under Florida's intestacy law, were not entitled to Social Security survivors benefits.

In response to Gillett-Netting, the Social Security Commissioner issued an "Acquiescence Ruling," effective September 22, 2005. See Social Security Acquiescence Ruling 05-1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005). The Acquiescence Ruling limited the application of Gillett-Netting to claims within the Ninth Circuit. Id. at 55,657. It also contained a "Statement as to How Gillett-Netting Differs From SSA's Interpretation of the Social Security Act." Id. In that Statement, the Commissioner hewed to the arguments she had made to the Ninth Circuit: in all cases, § 416(h) "provides the analytical framework that we must follow for determining whether a child is the insured's child for the purposes of section [416(e)]," and § 416(h)(2)(A) directs the application of state intestacy law or the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C) to determine whether a child is a "child." Id. An "after-conceived" child, she continued, cannot satisfy the alternative mechanisms in §§ 416(h)(2)(B) and 416(h)(3)(C), and "[consequently, to meet the definition of 'child' under the Act, an after-conceived child must be able to inherit under State law." Id.

from his father under the state's intestacy law. A plain-language reading of the intestacy statute requires that in order to inherit as a posthumous descendent, a child must have been conceived before the decedent's death. While declining to define the term "conceived", the court found that the drafters of the statute did not intend it to permit a child created through in vitro fertilization and implanted after the father's death to inherit under intestate succession. The statute was enacted in 1969, which was well before the technology of in vitro fertilization was developed. Court refused to define the word "conceived."

9. *Eng Khabbaz v. Commissioner, Social Security Administration*, 930 A.2d 1180 (N.H. 2007). The Supreme Court of New Hampshire, addressing a question certified to it by the U.S. District Court, held that a posthumously conceived child could not inherit from her father as surviving issue under New Hampshire intestacy law. A widow was artificially inseminated with her late husband's sperm and bore a child. The court held that, despite the fact that when he had his sperm banked the deceased had executed a consent form expressing his desire to be the father of any resulting child, the state's intestacy law provides for inheritance by "surviving issue", and a posthumously conceived child was not "surviving" within the plain meaning of the statute. The plain meaning of the word "surviving" was "to remain alive or in existence," which necessarily meant that child had to be alive or in existence when father passed away

10. *Astrue v. Capato*, 132 S.Ct. 2021 (2012). Twins were conceived 10 months and born 18 months after father's death. The Supreme Court held that the twins could not inherit from the decedent father when they were born after his death. The Court upheld the Social Security Administration's (SSA) denial of the mother's application for benefits under deference to administrative agency interpretation under *Chevron U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The SSA applied state intestacy law pursuant to SSA § 416(h) and held that benefits were intended to protect dependents who would suffer hardship from losing decedent's earnings. The Court held that the SSA interpretation survived rational basis review for posthumously created children, who are not part of a protected class to warrant heightened scrutiny under equal protection. Thus, the children, who could not inherit from the decedent under Florida's intestacy law, were not entitled to Social Security survivors benefits. [3]

11. *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2003). A child conceived through in vitro fertilization by a couple and born to a surrogate mother that voluntarily waived and surrendered all her rights to the child were held to be the genetic and biological parents of the child. The court held that the Utah Code unduly burdened the couple's fundamental liberty interests and overstepped its constitutional limit to the extent it conclusively deemed the surrogate to be the legal mother of the child. This surrogacy statute, Utah Code Ann. § 76–7–204(3)(a), was repealed on May 2, 2005.

[3] Abrogated *Gillett–Netting v. Barnhart*, 371 F.3d 593 (2004)

12. *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. App. Ct. 2003). Wife's eggs, fertilized by Husband's sperm, were inadvertently implanted in a single woman and resulted in the birth of a child. The court ruled that although it was uncontested that the husband did not provide his semen for the purpose of inseminating anyone other than his wife, he is the child's legal father and the single mother is the child's legal mother. The ruling comported with the State's interest in establishing paternity for all children, recognized the valid claims of gestational mothers, and adhered to the California Supreme Court's determination that there could be only one natural mother under California law.

13. *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. New York County 2007). A New York surrogates court held that a class disposition to a grantor's "issue" or "descendants" included children of the grantor's son who were conceived after the son's death but before the disposition became effective. The court suggested that EPTL 6.5-7(a) and EPTL 2-1.3, which provide that posthumous children are entitled to share in gifts made to children or issue, could be read literally to include posthumously-conceived children. Looking at the intent of the grantor, the court found that though the trust instruments were silent on the issue of posthumously conceived children, a reading of those instruments warranted the conclusion that the grantor intended all members of his bloodline to receive their share. Since the grantor intended all members of his bloodline to receive their share, pursuant to Domestic Relations Law § 73 and EPTL 6.5-7, the infants were "issue" and "descendants" for trust purposes. The court also pointed out a need for legislation to resolve issues of this nature raised by advances in biotechnology.

14. *MacNeil v. Berryhill*, 869 F.3d 109 (2d Cir. 2017). On the issue of what requirements are necessary for posthumous children to be considered children of a deceased wage earner within the meaning of 42 U.S.C. §402(d), New York courts have held to a strict compliance standard. The Second Circuit affirmed a district court decision that twins conceived and born 11 years after a decedent's death were not children of the decedent-insured because they were not considered children under the intestacy law of the state in which the insured was domiciled, which in this case was New York. Under the version of the New York law in effect at the time of the decision, children conceived and born after a decedent's death were not entitled to inherit by intestacy.

15. *See* Appendix.

D. Proposed Legislation

1. AMERICAN BAR ASSOCIATION MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (2008)

a) Unless the enacting jurisdiction's probate code provides otherwise, if an individual who consented to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased explicitly consented that if assisted reproduction were to

occur after death, the deceased individual would be a parent of that child. Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir From the Freezer*, 35 WM. MITCHELL L. REV. 433, 438-9 (2009) (citing ABA MODEL ACT, *supra*, §607).

2. The New York State Assembly has considered legislation to clarify the state's domestic relations law as it applies to children of medically-assisted reproduction. The bill before the 2009-2010 session (A6991) was referred to Judiciary Committee on January 1, 2010. The proposed legislation has not been before the Assembly since the 2011-2012 Legislative Session (A2220) but it remains active as of July 19, 2019 (referred to Judiciary Committee on January 14, 2011 and January 4, 2012).

   a) The Bills propose amending § 73 of the Domestic Relations Law to include children born by any method of assisted reproduction now in use or developed in the future, so that these children will be deemed the legitimate, natural children of the wife and her consenting husband, regardless of whether their own or donated gametes or embryos are used.

   b) A married woman and her consenting husband would be deemed the natural parents of their child for all purposes, whether the child resulted from semen, egg or embryo donated by persons then living or who have died.

   c) Such child and his or her issue would also be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for purposes of intestacy and class designations in wills or other instruments.

   d) The proposal would also clarify that the donor or donors of the genetic material (and their families) would be relieved of all parental duties and responsibilities and would have no rights over the child or to receive property from or through such child by intestacy or class designations in wills or other instruments.

3. In 2007, 2008, and 2009, another proposal was introduced in the New York State Assembly. The 2009 version of the bill (A3571) would add section 4-1.3 to the EPTL, which would deem children posthumously conceived within two years of the death of the deceased parent the legitimate, non-marital child of the deceased parent.

   a) Such a child would be able to inherit from the deceased parent under the laws of intestate succession provided that

      (1) The deceased parent had during his or her lifetime executed a written instrument, in the presence of witnesses, expressing the intent to parent the future child, and

(2) Paternity or maternity is established by clear and convincing evidence

b) The bill was referred to the Committee on Judiciary on January 27, 2009. The bill was held for consideration on June 8, 2010.

c) For a discussion of the bill, and a proposal to replace the writing requirement with a requirement that the child be born "'in circumstances indicating that the decedent would have approved of the child's right to inherit'" (*citing* Restatement (Third) of Prop.: Wills & Other Donative Transfers §2.5 (1999)), *See* Robert Matthew Harper, *Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants,* 21 QUINN. PROB. LAW JOUR. 267 (2008).

d) The bill was signed into law on November 21, 2014. EPTL § 4-1.3 requires:

(1) A writing, issued within seven years prior to the parent's death, giving express consent to the use of genetic material for posthumous conception;

(2) An authorized individual to give notice of the existence of stored genetic material, either by by certified mail or by personal delivery;

(3) The genetic child to be "in utero no later than twenty-four months after the genetic parent's death or born no later than thirty-three months after the genetic parent's death."

(4) The authorized individual must also record the express writing which expressly gave them permission to make decisions regarding the genetic material.

(5) In the case of a divorce, annulment, or legal separation, the authority granted to the named authorized individual is revoked.

4. In late 2008, the Manitoba Law Reform Commission proposed amendments to the province's Intestate Succession and Dependants Relief Acts to give rights to posthumously conceived children. The proposed amendments are available at http://www.manitobalawreform.ca/pubs/pdf/118.pdf (last visited July 19, 2019). The proposal would give succession rights to posthumously conceived children when:

a) The child is born within 2 years of the grant of administration of the estate;

b) The potential user of preserved gametes or embryos notice of the possibility of posthumous conception to the administrator of the estate and to persons whose interest in the estate may be affected,

and such notice is given within six months of the grant of administration of the estate;

c) There is proof of a biological link between a posthumously conceived child and the deceased parent; and

d) The deceased has given written consent to the use of gametic material for the purpose of posthumous conception and to the creation of inheritance rights for any posthumously conceived children.

Maryland enacted a statute stating that a child conceived of the genetic material of a decedent after his or her death would be considered the decedent's child if three criteria are met: a) the decedent consented in writing to have his or her genetic material used posthumously, b) the decedent consented in writing to be the parent of a child posthumously conceived, and c) the child posthumously conceived was born within 2 years after the death of decedent. The statute took effect on October 1, 2012. Md. Code Ann., Health-Gen. § 20-111 (West 2014); Md. Code Ann. Est. & Trusts Code § 3-107 (West 2014).

E. Summary

There is little agreement among jurisdictions and commentators on the inheritance rights of children conceived after the death of one parent. Clearly this area must be addressed by legislation. As Rameden notes, statutes restricting the time-period in which such claims must be made can effectively cut down on open-ended estate administration. The following is a sampling of some of the discussion in this area:

We are in need of a uniform definition of legal parenthood for children born and especially conceived posthumously. The variances among the states as to what constitutes an heir-at-law has caused egregious results in the Social Security Survivorship benefits context, as seen in cases such as *Woodward, supra,* where two children created of similar circumstances are treated differently based only on the substantive State law of Decedent's domicile.

For example, Texas law provides that where the spouse dies before placement of the gametes or embryos, the deceased spouse is recognized by Texas law as a parent of that child if the deceased spouse consented in a record that if assisted reproduction would occur after death, the deceased would be a parent of the child. TEX. FAM. CODE § 160.707. According to Florida law, a "child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or pre-embryos to a woman's body" is eligible for a claim against the decedent's estate where such child was provided for by the decedent's will. FLA. STAT. ANN. § 742.17. In North Dakota, a person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception, unless the deceased person specifically consented in a record to be a parent if assisted reproduction were to occur after death. N.D. CENT. CODE ANN. § 14-20-65 (West 2014). *See generally,* Amy L. Komoroski, *After Woodward v. Commissioner of Social Services: Where Do Posthumously Conceived Children Stand in the Line of Descent?* 11 B.U. PUB. INT. L.J., 297 (2002).

1. Commentary

a) Hutton Brown et al., Special Project, *Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597 (1986). Identifies five categories of children (668):

(1) legitimate.

(2) halfblood – no longer any true distinction.

(3) adopted – most intestacy laws now provide for inheritance.

(4) foster – denied inheritance under intestacy laws.

(5) nonmarital or illegitimate – should inherit from both or neither.

b) Fred H. Cate, *Posthumous Autonomy Revisited*, 69 IND. L.J. 1067 (1994).

(1) Discussing John A. Robertson's argument that societal goals are not really present with posthumous reproduction instructions.

(2) Cate questions whether society really is the beneficiary of living and testamentary wills – argues that autonomy is more important.

(3) Discusses *Astrue v. Capato*

c) Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L.REV. 967 (1996).

(1) Pointing out that discrimination against children based solely on how they are created would be an equal protection violation.

(2) Furthermore, state claims (orderly disposition of estates and the prevention of filing of stale or false claims) have not been sufficient to bar other claims of equal protection (at 992).

(3) Arguing that the combination of *Hodel v. Irving* (unconstitutional for legislature totally to prohibit both descent and devise of a particular class of property), with courts (notably California) holding that sperm is property, combine to create a constitutional right to at least devise sperm (at 980).

(4) Children conceived after death might fit under some pretermitted child statutes (at 984).

(5) Post-mortem conceived children are illegitimate by definition (at 1003).

(6) Reasons against inheritance by posthumously conceived children:

(a) no parent/child bond (or at least considerably weakened since only a potential bond in the eyes of the parent).

(b) ease of administration (at 986).

d) Larry I. Palmer, Reflection, *Who are the Parents of Biotechnological Children?* 35 Jurimetrics J. 17, 19 (1994) – discussing distinction between genetic relationships and gestation and ABA committee recommendation that for inheritance purposes, the genetic mother is the "true" parent. Describes "biotechnological children" as a "new implicit legal and social construct.

e) Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154 (2008) – Arguing that depriving posthumous conceived children from inheritance rights equates to depriving illegitimate children of such rights (which was held to be a due process violation in *Trimble v. Gordon*, 430 U.S. 762, 772 (1977).

f) Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance,* 29 Real Prop. Prob. & Tr. J. 55 (1994)

(1) Arguing that custody and disposition issues are not instructive in cryopreservation situations because the relevant question in inheritance law is whether genetic parentage will be legally recognized after a significant time lapse from conception (at 95).

(2) "If a frozen embryo is thawed and implanted within a short time after conception, the parentage issues are not conceptually different from those in any IVF case" (at 95).

g) David A. Rameden, *Frozen Semen as Property in Hecht v. Superior Court: One Step Forward, Two Steps Backward*, 62 UMKC L. REV. 377, 402 (1993) – Noting that illegitimacy statutes setting statutory periods in which paternity must be recognized or claims perfected would prevent many situations of children suing an estate for child support.

h) *Labine v. Vincent*, 401 U.S. 532 (1971) - Upholding the constitutionality of Louisiana's intestate succession statute. The Louisiana intestate succession statute, which precludes illegitimate children from claiming the succession rights of legitimate children, was within the power of the state to make and is not in contravention of the due process or equal protection clauses.

i) *Lalli v. Lalli*, 439 U.S. 259 (1978) - Upholding the constitutionality of New York's putative father statute. The statute requires

illegitimate children to provide a particular form of proof of paternity in order to inherit from their fathers. State laws classifying children on legitimacy must be substantially related to the state interest the statute is intended to promote, which was the case here.

j) Ilene Sherwyn Cooper, *Advances in DNA Techniques Present Opportunity to Amend EPTL to Permit Paternity Testing*, 71-AUG N.Y. St. B.J. 34 (1999) – Discussion of proposed legislation (1999-2000) in New York to allow posthumous testing of blood and tissue samples to determine paternity, even when exhumation is required. In February 2005, a bill was introduced to permit posthumous paternity testing. The bill provides that the costs of such testing would be borne by the person seeking paternity determination. 2005 Bill Text NY S.B. 2151.

k) Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV., 251 (1999) – Calls for clarification of congressional intent regarding availability of survivor benefits for after-conceived children.

l) Tamar Lewin, *In Genetic Testing for Paternity, Law Often Lags Behind Science*, THE NEW YORK TIMES, March 11, 2001, at A1. In another example of law failing to keep pace with changes in science (and related to inheritance and support issues surrounding paternity testing) divorced and single men who previously acknowledged paternity but later found that they were not the child's biological father are having genetic evidence of their non-paternity rejected by the courts. In spite of such evidence, many of these men have been ordered to continue to pay child support.

m) Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 AZLR 91 (2004). Examines a common fact pattern, in which the father dies leaving a will and frozen sperm. Discusses whether, when we construe the will, we should consider the possibility that children might be born years after his death. Argues that, in most cases, the remote possibility of an after-born child should not be considered in the distribution of a decedent's estate.

n) For a general discussion of posthumously-conceived children's inheritance rights and summaries of legislative history and case law, see Kayla VanCannon, Note, *Fathering a Child From the Grave: What are the Inheritance Rights of Children Born Through New Technology after the Death of a Parent?*, 52 DRAKE L. REV. 331 (2004); Michael K. Elliott, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47 (2004).

o) For a discussion of challenges posed by posthumous reproduction in the context of administering military survivor's benefits, *See* Major Maria Doucettperry, *To Be Continued: A Look at*

Posthumous Reproduction as it Relates to Today's Military, 2008-May ARMY LAW. 1 (2008).

2. Proposals

a) Ronald Chester at 1013:

(1) permit "anonymous" donors to escape all financial connection (reversible) (at 996).

(2) 2 years plus 300 days (gestation period) statute of limitations -- preserves parental connection and administrative ease.

(3) permit testamentary takings.

(4) with intestate succession, posthumously conceived children take as pretermitted child or intestate heir.

b) Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73 (1995).

(1) Three-part classification of parenting (at 671).

(a) blood relation.

(b) support obligations.

(c) societal acceptance of reproduction method.

(2) Inheritance using these classifications:

(a) AIH – biological father is the legal father. Therefore, no inheritance problem with either parent.

(b) AID – more difficult, but probably simple inheritance from mother and husband.

(c) no difference between in vitro and in vivo inheritance from the intended parents (at 688).

(d) surrogacy – child should also inherit from "intended" parents (at 688).

(e) frozen embryos – technique used should determine inheritance, not fact that embryos are frozen (at 691).

c) New York State Task Force on Life and the Law – April 1998

(1) Proposals

(a) Legitimacy

(i) Currently, § 73 of the domestic relations law recognizes the legitimacy of children born by artificial insemination where:

(A) the woman undergoing the procedure is married

(B) the woman's husband consents

(C) the procedure is performed by a physician, who certifies the service

(ii) this law should be changed to include children born by any means of artificial reproduction (This change was submitted by the Health Law Section of the New York State Bar Association for formal action at the June 2001 House of Delegates Meeting – see Appendix.)

(b) Parental Rights/Responsibilities of Sperm Donors

(i) Currently, there is no NY statute that specifically addresses the rights and obligations of sperm donors.

(ii) The law should be changed to provide for the written consent of sperm donors to the termination of their parental rights/responsibilities.

(c) Posthumous Children

(i) EPTL § 1-2.1(a)(2) includes in the definitions of children and issue, children who were conceived before, but born alive after the death of an individual.

(ii) The law should be changed to only include situations where *implantation* has occurred before the death of one parent.

(2) Assisted Reproductive Technologies, April 1998 Report.

(a) The fate of frozen embryos

(i) during marriage, both parents should have decision-making authority over the embryos' disposition.

(ii) after a divorce, the spouse who seeks to use the embryo should have control

(A) note that this goes against the of

trend of favoring the spouse who wishes to avoid parenthood – *see* Booth.

d) Djalleta

(1) control by donor(s) (at 358) -- embryos considered joint property with right of survival.

(2) ban on sale of gametes (at 359).

(3) gamete donor's right to destroy (at 360).

(4) presumption against allowing gametes and pre-embryos to pass by intestacy (at 364).

(5) statute of limitations on estate claims (as in UPC).

e) Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231 (1997)

(1) frozen sperm is viable for 10 years, allowing greater opportunity for posthumous reproduction to occur after the death of the biological father.

(2) citing proposal by Prof. W. Barton Leach that the Rule Against Perpetuities be interpreted to mean that "a [male] life in being" includes the post-mortem period during which the sperm is still viable (at 247).

f) Lisa M. Burkdall, *Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875 (1995).

(1) Proposes legislation that gives posthumously conceived child the opportunity to enjoy the same rights as other children. Emphasizes need for the law to reflect new reproductive technology (at 907).

(2) A sperm should be separate property (at 903)

(3) *Hecht* established that a man has a property interest in and the power of disposition over his sperm.

(4) recipients should be limited to women with whom there is some minimum level of relationship and commitment during lifetime (at 903).

(5) "window of fertility" time limit during which if conception occurs, child is entitled to inheritance – window should be within 2 years or death or remarriage, whichever comes first (at 906).

g) Emily McAllister's "Parentage of Children of Assisted Conception Act," proposed in *Defining the Parent-Child Relationship in an*

Age of Reproductive Technology: Implications for Inheritance, 29 REAL PROP. PROB. & TR. J. 55, 101-102 (1994).

(1) birth parent is always a parent of the child.

(2) bases parentage on the relationship of the prospective parent to the child via the birth parent.

(3) uses "spouses" – no gender requirement or number limit.

(4) statutes discussing parentage in the "traditional," heteronormative sense are not reflective of issues surrounding reproductive technologies.

(5) meed to grant legal recognition to parenthood outside of marriage or between homosexual couples.

(6) creates a rebuttable presumption of consent by spouse of birth parent.

h) Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403 (2009). The author argues that all states should enact legislation specifically dealing with inheritance rights of posthumously conceived children. Posthumous children should have inheritance rights; the burden of proof of parentage should shift depending on whether the gametes were removed during or after the deceased parent's lifetime.

(1) When gametes are removed during the parent's lifetime and a child is conceived after the parent's death, there should be rebuttable presumption that the posthumously conceived child is legal heir of the dead parent.

(2) When gametes are removed after a parent's death, and a child is then conceived, the burden should be on the living parent to prove that the deceased parent would have wanted the child to be conceived after his or her death.

(3) In both situations, states should require written consent and time restrictions (like those of LA and CA), and should remove any requirement that the parents be married.

i) Joshua Greenfield, Note, *Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN. J.L. SCI. & TECH. 277 (2007) (arguing for the exclusion of posthumously conceived children from a class bequest to all children. States that the "only workable solution for dealing with post-mortem-conception children and their inheritance rights is to establish a hard cutoff for establishing paternity in those children who it can not be proven were in gestation at the time of the father's death")

In other words, disallow the inclusion of posthumously conceived children from "all my children" clauses

V. Control Over Posthumous Paternity Testing With Respect to Alleged Lifetime Conceptions

A. History of Exhumation

1. Body Snatching – *See* Matthews, *Whose Body? People as Property*, 36 Current Legal Probs. 193, 196 (1983) (a "thriving trade in digging up buried cadavers and selling them for medical dissection existed in the late 1700's").

2. The cases dealing with exhumation require a showing of necessity, and they historically deal with reburial, corrected burial (in accordance with the decedent's instruction) and allegedly suspicious causes of death.

3. One Surrogate court justice commented on the "need for clarification of the instances in which DNA results are admissible into evidence and the weight they are to be given in estate proceedings." *In re Estate of Bonanno*, 192 Misc. 2d 86 (Sur. Ct. New York Co. 2002) (Preminger, J.).

B. Technology

1. HLA Blood Typing—can only rule out paternity

2. Genetic Marker Testing—1 in 7.5 trillion accuracy rate of paternity

C. Statutes

1. Cemetery Laws

2. Public Health Laws

D. Proposed Law

1. NY EPTL 4-1.2 (A1798) was amended by Chapter 64 of the Laws of 2010, effective April 28, 2010. (This version of 4-1.2 is effective through February 14, 2021. It has been amended by Chapter 56 of the Laws of 2020, effective February 15, 2021. Although not much has been amended, the amendment does add "or non-gestating intended parent," to possible people a non-marital child can inherit from (See NY EPTL 4-1.2 (a)(2))).

   a) The changes to the statute permit posthumous paternity testing in instances where the person seeking determination of paternity bears the costs of posthumous testing, including but not limited to exhumation of the deceased, or where the costs are sought by a guardian-ad-litem, a committee, a conservator, or a guardian appointed pursuant to the Mental Hygiene Law.

b) Despite the fact that courts have increasingly recognized the reliability of DNA testing and such tests are often not performed prior to the death of the father, many states do not authorize posthumous paternity testing.

c) This failure to authorize posthumous testing can deprive persons of their lineage, which can deprive them of significant financial benefits and perpetuates the social stigma of illegitimacy.

d) The bill provides a means by which a person can apply to the court for an order to perform a genetic marker test to determine paternity posthumously for paternal inheritance purposes.

e) For a discussion of the basis for the amendment, *See* Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(a)(D)*, 69 ALB. L. REV. 947 (2006).

f) Importantly, the 2010 amendment (and maintained in the 2020 amendment) changed the more stringent requirement under the preceeding version of 4-1.2 (a)(2)(C) (needing to prove open and notorious acknowledgement and paternity by clear and convincing evidence), to a more enabling one (clear and convincing can be established by a genetic marker test or open and notorious acknowledgement).

E. Cases

1. Cases That Permitted Exhumation for paternity testing

a) *Lach v. Welch*, 1997 WL 536330 (Conn. Super. Ct. 1997).

b) *Hornbeck v. Simmons*, 1994 WL 506620 (Conn. Super. Ct. Sept. 6, 1994).

c) *Batcheldor v. Boyd*, 423 S.E.2d 810 (N.C. App. 1992).

d) *Taxiera v. Malkus*, 578 A.2d 761, 766 n.7 (Md. 1990).

e) *Alexander v. Alexander*, 537 N.E.2d 1310 (Ohio Prob. Ct. 1988).

f) *Ullendorff v. Brown*, 24 So.2d 37 (Fla. 1945).

g) *Brancato v. Moriscato*, No. CV030472496S, 2003 Conn. Super. LEXIS 538 (Conn. Super. Ct. Feb. 27, 2003)

h) *Martin v. Howard*, 643 S.E.2d 229 (Va. 2007) (upholding trial court's order of exhumation for paternity testing purposes and refusing to read a "good cause" requirement into Code § 32.1-286(C) which explicitly allows for exhumation in such circumstances)

i) *Matter of Michael R*, 793 N.Y.S.2d 710, (N.Y.Sur., 2004). The Rockland County Surrogate Court accepted posthumous DNA

testing from a toothbrush of the decedent to prove the clear and convincing evidence prong to demonstrate paternity.

j) *Estate of Kingsbury*, 946 A.2d 389 (Me. 2008). The Supreme Judicial Court of Maine, on an interlocutory appeal, upheld a probate court's order compelling the decedent's daughter to submit to DNA testing or, if she refused, authorizing the exhumation of and DNA testing on the decedent's body. The court found that based on the evidence, there was at least a reasonable probability that decedent had another daughter who would be entitled to share in the decedent's estate. As a result, the probate court had equitable authority to order the exhumation.

2. Cases That Refused Exhumation

a) *In re Estate of Sekanik*, 271 A.D.2d 802 (N.Y. App. Div. 2000), *modified in part and rev'd in part*, 2000 N.Y. App. Div. LEXIS 8421 (N.Y. App. Div. 2000).

b) *In re Estate of Medlen v. Kreciak*, 677 N.E.2d 33 (Ill. App. 1997).

c) *Sardy v. Hodge*, 448 S.E.2d 355 (Ga. 1994).

d) *Wawrykow v. Simonich*, 652 A.2d 843 (Pa. Super. Ct. 1994).

e) *In re Estate of Janis*, 210 A.D.2d 101 (N.Y. App. Div. 1994).

f) *In re Michael R*, 793 N.Y.S.2d 710 (N.Y.Sur., 2004).

g) In *Cummins v. Estate of Reed*, 2019 WL 5681194 (Nov. 1, 2019), the Court of Appeals of Kentucky denied a petition on behalf of a non-marital child to exhume the body of his supposed father. The Court rejected the notion that exhuming a body for the purpose of obtaining genetic health information could serve as a valid reason for exhumation, while adding that some courts require proof that the exhumation will provide DNA samples that can be tested. The Court also cited to KY ST § 72.440 which allows a body to be exhumed upon a coroner's order only based upon an affidavit that the person is believed to have died from poisoning or other illegal cause.

3. Miscellaneous Cases

a) *Prato Morrison v. Doe*, 126 Cal. Rptr. 2d 509 (Cal. Ct. App. 2002). As discussed in section III(B), *supra*, in *Prato-Morrison v. Doe*, the California court of Appeals denied the alleged genetic parents the opportunity to perform a genetic test to determine parenthood. The couple used the services of a fertility clinic and suspected an unauthorized use of their genetic material by the clinic that led to the birth of two children with their genetic material to a different couple.

b) *Reese v. Muret*, 150 P.3d 309 (Kan. 2007). The Kansas Supreme Court declined to order a posthumous paternity test requested by

the decedent's widow in order to disprove a woman's claim that she was the decedent's daughter and thus entitled to inherit from decedent's estate. The court found that Kansas law required a court to order a paternity test when requested only if it is in the best interest of the child. That the "child" was an adult at the time of the action did not alter the analysis.

c) *Matter of Davis*, 2006 NY Slip Op 510 (January 24, 2006). The Second Department Appellate Division ruled that distributees must prove the open and notorious acknowledgment prong of EPTL 4-1.2(a)(2)(C) before the courts would permit posthumous DNA testing to prove the clear and convincing evidence prong of that statute. (In *In re Davis*, 56 A.D.3d 553 (2008), the Second Department Appellate Division remitted the matter to the Surrogate's Court, Kings County, for a hearing on the issue of whether the decendent openly and notoriously acknowledged the petitioner as his son and ruled that the petitioner need only present "some" evidence of open and notorious acknowledgement of paternity in order to establish entitlement to genetic marker testing (pursuant to *Matter of Poldrugovaz*)). The Fourth Department Appellate Division in *Matter of Morningstar*, 17 A.D.3d 1060 (2005) held the opposite: There was no need first prove that the decedent openly and notoriously acknowledged them before permitting a DNA test to be ordered. Later, the Second Department Appellate Division departed from its opinion in *Davis, supra,* and held that a court may order posthumous DNA testing when the party so requesting provides "some evidence that the decedent openly and notoriously acknowledged the nomarital child as his own, and establishes that genetic market testing is practicable and reasonable under the totality of the circumstances." *In the Matter of Poldrugovaz*, 50 A.D.3d 117, 129 (2008). The court identified several factors to guide this analysis, *Id.*, and noted the significance of the fact that in this case, the tissue specimens were readily available and did not require exhumation. *Id.* at 131. The Court of Appeals has not reviewed the issue.

d) The Third Department Appellate Division, in *In re Estate of Betz*, 74 A.D.3d 1459 (2010), adopted the standard set forth by the Second Department in *In the Matter of Poldrugovaz*, allowing posthumous DNA testing in a case where some evidence of "open and notorious acknowledgement" is provided. In this case, decedent's presence in pictures with non-marital child qualified as such.

   (1) A bill that would amend the EPTL to standardize the way in which a non-marital child can establish status to inherit from his or her parent under §4-1.2 passed the New York State Assembly in June 2009 (A7899). The Senate considered an identical bill (S3682). The Senate adopted the version of the bill passed by the Assembly on March 29, 2010. The bill was enacted on April 28, 2010.

e) *Anne R. v. Estate of Francis C.*, 167 Misc.2d 343 (N.Y. Fam. Ct. 1995), *aff'd*, 234 A.D.2d 375 (N.Y. App. Div. 1996).

f) In *In re Estate of Williams*, 891 N.Y.S.2d 268 (2009), the Surrogate's Court of Bronx County ruled that posthumous DNA testing can be granted on behalf of a posthumous non-marital child without requiring the presentation of any proof on the issue of open and notorious acknowledgement (pursuant to EPTL 4-1.2(a)(2)(C)). The court also held that since the child was born posthumously, an open and notorious acknowledgement by the decedent, if required, would have to relate to the decedent's acts and statements during the period of gestation. *See also Matter of Application to Compel Crenshaw*, 101 N.Y.S.3d 699 (2018) (allowing posthumous genetic marker testing before presentation of any proof on the issue of open and notorious acknowledgement of a non-marital child, pursuant to a belief that forclosing a child's opportunity to seek relevant discovery is "anathema to the purpose of [EPTL 4-1.2]").

g) *Queisser v. Abizeid*, 168 Misc. 2d 1005 (N.Y. Fam Ct. 1996).

h) *In re Estate of Sandler*, 160 Misc. 2d 955 (Sur. Ct. N.Y. Co. 1994).

i) *In re Estate of Rogers*, 583 A.2d 782, 783 n.2 (N.J. Super. Ct. App. Div. 1990).

j) *Snyder v. Holy Cross Hospital*, 352 A.2d 334 (Md. Ct. Spec. App. 1976).

There, the court held that because the parents were not "interested persons" within the meaning of the UPA, there was no standing to bring the action. Secondly, the court held that even if there were an unauthorized transfer of the parent's egg to the defendants, the best interest of the children analysis prevents the court from granting relief. The court reasoned that intruding on a 14-year relationship between the children and the presumed parents, even ordering mere blood tests, was not warranted on the possibility of proving a genetic relationship with a stranger.

F. Summary

There seems to be no serious discussion of the decedent's interests in avoiding post-mortem testing. The decedent's interests are referred to only indirectly in comments regarding the sanctity of burial grounds, and the need to show reasonable cause to disrupt a completed burial. Even then, the protected interests seem to be more societal than individual.

The cases are evenly divided in result, and they tend to be determined in accordance with a construction of the intestate succession statutes of the states involved, to see if paternity must in all events have been established during the father's life.

APPENDIX

STATE STATUTES AND CASES

A. Relevant Uniform Laws

1. UNIFORM PARENTAGE ACT (UPA) (1973, REVISED 2000, AMENDED 2002). STATES LISTED WITH #1 BELOW ARE THOSE THAT HAVE ADOPTED THE 1973 VERSION. THOSE THAT HAVE INTRODUCED THE REVISED OR AMENDED VERSION ARE NOTED. THE REVISED UPA INCORPORATES PROVISIONS OF THE UNIFORM PUTATIVE AND UNKNOWN FATHERS ACT (1988) AND THE UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988) (SEE #5 BELOW).

2. UNIFORM PROBATE CODE (UPC).

3. ALL 50 STATES & DC HAVE ADOPTED SOME FORM OF THE UNIFORM ANATOMICAL GIFTS ACT (UAGA). STATES LISTED WITH #3 BELOW ARE THOSE THAT HAVE ADOPTED THE 2006 REVISED VERSION. STATES THAT FOLLOW THE 1987 VERSION ARE NOTED. ALL OTHER STATES ARE THOSE THAT FOLLOW THE 1968 VERSION.

4. UNIFORM STATUTORY RULE AGAINST PERPETUITIES (USRAP).

5. UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA).

6. UNIFORM DETERMINATION OF DEATH ACT (UDODA). THIRTY-EIGHT STATES, PLUS THE U.S. VIRGIN ISLANDS, THE DISTRICT OF COLUMBIA AND PUERTO RICO, HAVE ADOPTED UDODA OR SUBSTANTIALLY SIMILAR VERSIONS. THOSE STATES THAT HAVE ADOPTED A VARIATION OF UDODA ARE NOTED BELOW.

B. States (numbering refers to Relevant Uniform Laws, above)

ALABAMA

#1 - Incorporated as domestic relations law. Adopted the 2002 amended UPA. Code of Ala. §§ 26-17-101 through 905.

#3 – Adopted revised UAGA. § 22-19-160 et seq.

#4 – Adopted USRAP on June 9, 2011. Ala. Code §§ 35-4A-421 through 428.

#6 - Code of Ala. § 22-31-1

ALASKA

#2 – Adopted 1990 Revision of Article II and 1989 Revision of Article VI – Title 13, Chapter 6, Section 5 to Title 13, Chapter 36, Section 100. Alaska Stat. §§ 13.06.005 through 13.36.010

#3 – Adopted revised UAGA; ch. 100 SLA 2008.

#4 – The Alaska Statutory Rule Against Perpetuities exists in the following provisions:

- Sec. 34.27.050. Statutory rule against perpetuities. [Repealed, § 9 ch 17 SLA 2000.]
- Sec. 34.27.051. Statutory rule against perpetuities
- Sec. 34.27.053. Savings provision
- Secs. 34.27.055 -- 34.27.065. When nonvested property interest or power of appointment created; reformation; ...
- Sec. 34.27.070. Application
- Sec. 34.27.075. Relationship to common law rule
- Sec. 34.27.090. Short title and uniformity of application and construction. [Repealed, § 9 ch 17 SLA 2000.]
- Sec. 34.27.100. Suspension of the power of alienation

#6 – Definition of Death, 09.68.120; Evidence of Death or Status, 13.06.035; Determination of death by Registered Nurse, 08.68.395. [Renumbered as AS 08.68.700.]

ARIZONA

#2 – Adopted 1990 Revision of Article II and 1989 revision of Article VI -- §§14-1102 to 14-7308.

#3 – Adopted revised UAGA. § 36-841 et seq.

#4 - §§ 14-2901 through 14-2907 deal with non-vested interests and an exclusion to the statutory rule against perpetuities.

#6 - § 14-1107

Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004). The District Court held that because Arizona law did not treat a child conceived posthumously as an heir under its state intestacy statute, Social Security survivor benefits were properly denied. The Circuit Court found that the children were considered “legitimate” children under state law, and therefore they were deemed

dependent without needing to demonstrate actual dependency. The Court remanded the case so that the Commissioner of Social Security could award benefits.

ARKANSAS

#3 – Adopted revised UAGA. § 20-17-1201 et seq.

#6 - § 20-17-101 is "Death – Legal Definition"

Ark. Code Ann.:

§ 28-9-210 provides for "Posthumous heirs"

28-9-209 (Michie 1987) - Children conceived through Artificial Insemination by Donor are deemed to be children of the mother's husband (McAllister at 68)

9-10-201 (Michie 1998) – A child born to a surrogate mother is the child of the "intended parents" and not that of the surrogate if "(1) The biological father and the woman intended to be the mother if the biological father is married; or (2) The biological father only if unmarried; or (3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination."

Finley v. Astrue, 270 S.W.3d 849 (Ark. 2008). The Arkansas Supreme Court, answering a question certified to it by the U.S. District Court, held that a child created as an embryo during his parents' marriage but implanted in his mother's womb after his father's death could not inherit from his father under the state's intestacy law. A plain-language reading of the intestacy statute requires that in order to inherit as a posthumous descendent, a child must have been conceived before the decedent's death. While declining to define the term "conceived", the court found that the drafters of the statute did not intend it to permit a child created through in vitro fertilization and implanted after the father's death to inherit under intestate succession.

CALIFORNIA

#1 - Incorporated UPA into Family Code under Division 12: Parent and Child Relationship. Dropped reference to recipient as married woman (McAllister at 79). Cal. Fam. Code §§ 7600 through 7730.

#3 - Adopted revised UAGA. California Health and Safety Code, chapter 3.5, §7150 et seq.

#4 - Cal Prob Code §§ 21200 (2006) et seq. provides the USRAP

#6 - Cal Health & Saf Code § 7180 (2006)

Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998), review denied June 10, 1998 - husband who signed surrogacy contract must support child after divorced, although the child had no genetic material from either "parent."

K.M. v E.G. 37 Cal 4th 130 (2005). Former lesbian partners were both mothers to children that were born by one partner using an egg donated by the other, despite the donor's waiver of parentage; under the Uniform Parentage Act (UPA), Fam C § 7600 et seq., genetic consanguinity could be the basis for a finding of maternity. Fam C § 7613(b) did not apply, even if it applied to women who donated ova, because the case at bar was not a true egg donation situation, in that the ova were supplied to produce children who would be raised in a joint home."

In re Estate of Kievernagel, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008). A California appellate court held that the intent of the donor controls; a widow could not demand distribution of her late husband's frozen sperm where her late husband had signed an agreement with the company storing the sperm providing that the sperm was to be discarded upon his death.

Cal. Prob. Code:

§ 6452 provides for a parent to inherit from a child born out of wedlock if the parent acknowledged and contributed to the support of the child.

§ 6453(b)(3) - Seems to include post-mortem conception if paternity is established by clear and convincing evidence. *But* Cal. Fam. Code § 7613(b) - Insemination with doctor assistance precludes finding of paternity.

> Specifically, 6453(b) provides the following:
>
> (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist:
>
> (1) A court order was entered during the father's lifetime declaring paternity.
>
> (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own.
>
> (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.

§ 6407 - Leaves a question about pre-death conception being necessary, or merely sufficient to establish inheritance rights (*see* Chester at 1005 - Burkdall says former, Dukeminier & Johanson claim latter).

§ 6407 provides the following: "Relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent."

§ 21200 et seq. - Adopts USRAP

Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509 (Cal. Ct. App. 2002) (holding best interest of the child supersedes claims of Biological Parenthood even where evidence suggested gestational mother delivered Plaintiff's biological child).

Hecht v. Superior Court, Previously published as 59 Cal. Rptr. 2d 222 (Cal. Ct. App.1996) (holding, in a will contest with decedent's adult children, that where Testator's intent is clear, failure to respect the Testator's intent regarding the intended donee of several vials of decedent's cryopreserved sperm violates Testator's fundamental right to procreate.)

Vernoff v. Astrue, 2009 U.S. App. LEXIS 13046 (9th Cir. 2009). Widow had semen extracted from her late husband's body and, three years after his death, conceived his child. Late husband had not consented or indicated a desire to have a child postmortem. Widow filed an unsuccessful claim for child survivor benefits with the Social Security Administration. The 9th Circuit affirmed the denial of benefits, holding that under California law the child was not a "dependant" for the purposes of the Social Security Act. Under California law, the deceased was not presumed to be the parent of the child, nor was the child entitled to inherit from the deceased under intestacy laws. The court also denied the widow's claim that excluding some posthumously-conceived children from Social Security child survivor benefits violated the Equal Protection Clause.

COLORADO

#1 - Incorporated into Children's Code (Title 19). Dropped reference to recipient as married woman (McAllister at 79). C.R.S.A. §§ 19-4-101 to 19-4-130. Colorado added sections including: § 19-4-105.5: Commencement of Proceedings – Summons; § 19-4-107.5: Required Notice of Prior Restraining Orders to Prevent Domestic Abuse – Determination of Parent and Child Relationship; § 19-4-125: 'Father' defined; § 19-4-128: Right to Trial to Court – Limitation; § 19-4-129: Child Support – Guidelines – Schedule of Basic Support Obligations; § 19-4-130: Temporary Custody Orders.

Introduced amended version in 2009 (HB 1286). Postponed indefinitely by House Committee on the Judiciary.

#2 – Adopted 1990 Revision of Article II and 1989 revision of Article VI -- §§15-10-101 to 15-17-103. HB 1287, adopting the 2008 amendments, passed in 2009 (signed by Governor May 2009).

#3 –Adopted revised UAGA. C.R.S.A. § 12-34-101 et seq.

#4 – C.R.S.A. §§ 15-11-1101

#6 – C.R.S.A. § 12-36-136

CONNECTICUT

#3 – Adopted 1987 version. Chapter 368i, Conn. Gen. Stat. §§ 19a-270 through 19a-289v. [Introduced revised version in 2008-09 (Died).]

#4 - Conn. Gen. Stat. §§ 45a-490 through 45a-496.

#6 - Conn. Gen. Stat. § 19a-504a provides for "Continuation or removal of life support system. Determination of death."

A child born in wedlock is presumed to be the child of the mother and her husband but this presumption can be overcome by a person, including a man claiming to be the child's biological father, who presents clear, convincing, and satisfactory evidence that the mother's husband is not the child's biological father. One basis for this decision was the accuracy of scientific procedures, including DNA testing, in determining a child's parentage. A second was the court's recognition of the constitutional right of an unwed father to maintain a relationship with his child. Proof must be offered at a preliminary evidentiary hearing before the case can go forward. Possible tests suggested by the court as to whether enough evidence has been offered include: (1) whether the putative father and child have developed a substantial parent-child relationship or (2) whether it is in the child's best interest to allow someone outside the present family to bring a paternity action. *Weidenbacher v. Duclos*, 661 A.2d 988 (Conn. 1995).

A child conceived by Artificial Insemination by Donor can inherit from mother & mother's spouse. An artificially inseminated by donor mother and mother's spouse may inherit the estate of a child born as a result of AID if the child dies intestate– Conn. Gen. Stat. Ann. § 45a-777.

For purposes of construing class gifts in wills or trusts, "child," "issue," and related terms include children conceived by AID - Conn. Gen. Stat. Ann. § 45a-262 (West Supp. 1993) (McAllister at 69).

Hornbeck v. Simmons, 1994 WL 506620 (Conn. Super. Ct. Sept. 6, 1994) (Granting order requested by plaintiff/administratrix for exhumation and paternity testing of alleged father of her child stating that truth is a major goal in a court of equity).

Lach v. Welch, 1997 WL 536330 (Conn. Super. Ct. Aug. 15, 1997) (granting exhumation order where the administrator did not object. The court granted this order reluctantly, after discussing the preferred and more accurate method of performing DNA tests on surviving relatives (the deceased's parents – grandparents to the disputed child). The court also reserved the right to charge the grandparents for the "cost of exhumation in light of the grandparents' refusal to voluntarily submit to the minimal intrusion of a blood test").

Brancato v. Moriscato, No. CV030472496S, 2003 Conn. Super. LEXIS 538 (Conn. Super. Ct. Feb. 27, 2003) (ordering exhumation and DNA testing of deceased in order to determine the heirs of deceased's estate).

DELAWARE

#1 - Incorporated in Title 13: Domestic Relations. Adopted the 2002 amended UPA. 13 Del. C. §§ 8-101 through 8-904. Delaware added the following sections: § 8-638: No right to reimbursement; and § 8-639: Full faith and credit.

#6 – 24 Del. C. § 1760

DISTRICT OF COLUMBIA

#3 – Revised version signed into law in 2007-08; Law 17-145 (Effective April 2008). D.C. Code §§ 7-1531.01 through 7-1531.28

#4 - §§ 19-901 through 19-907

#6 - § 7-601

FLORIDA

#3 – Fla. Stat. § 765.510 through 765.547

#4 - § 689.225

Ullendorff v. Brown, 24 So.2d 37 (Fla. 1945) (Approving exhumation orders by probate courts where it is established that (1) the issue of heirship can be disproved by an examination of the body; and (2) the issue is material and can be refuted by no other evidence).

Assisted Conception and Surrogacy -- Fla. Stat. Ann. § 742.17 – Regarding disposition of embryos, directs couples and physicians to "enter into a written agreement that provides for the disposition of the commissioning couple's eggs, sperm, and pre-embryos in the event of divorce, the death of a spouse, or any other unforeseen circumstance." The statute does not address the process or form such agreement should take. Also provides that "A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."

Determination of Parentage, chapter 742, §§ 742.011 through 742.17

Cohen v. Guardianship of Cohen, 896 So. 2d 950 (Fla. Dist. Ct. App. 4th Dist. 2005), *review denied*, 911 So. 2d 792 (Fla. 2005). Court held that testamentary disposition of a body is not conclusive of the decedent's intent if it can be shown by clear and convincing evidence that the decedent intended another disposition for his body. Decedent's will stated that decedent wanted a "traditional Jewish burial" in his family's plot in Queens, New York. However, during his life the decedent had expressed his desire to be buried in Florida, next to his wife. The court ordered

the decedent to be buried in Florida, because there was extrinsic evidence that that was his true intent.

Arthur v. Milstein, 949 So. 2d 1163 (Fla. Dist. Ct. App. 4th Dist. 2007). Mother of Anna Nicole Smith appealed trial court's order granting Smith's daughter's Guardian Ad Litem custody over Smith's remains. The Florida court of appeals affirmed the order. Applying *Cohen*, *supra*, the court found that Smith intended to be buried in the Bahamas next to her son, and that the Guardian Ad Litem intended to carry out this wish.

GEORGIA

#3 – Adopted revised UAGA. O.C.G.A. § 44-5-140 et seq.

#4 - Title 44 Chapter 6 Article 9, §§ 44-6-200 through 44-6-206.

#6 - § 31-10-16. Criteria for determining death.

Ga. Code Ann. § 53-4-2 (Michie 1982) - Permits inheritance by posthumous children (*see* McAllister 99)

Sardy v. Hodge, 448 S.E.2d 355 (Ga. 1994) (Denying alleged son's request to exhume decedent's body for paternity testing - law at time of testator's death required that paternity be established during father's life).

HAWAII

#1 - Adopted into Division 3, Title 31: Family, but eliminated provision on assisted conception. HRS §§584-1 to 584-26. Added sections: §584-3.5: Expedited Process of Paternity; §584-8.5: Paternity Determinations from Other States and Territories.

#2 – Uniform Probate Code, §§ 560:1-101 to 560:8-301, Uniform Transfer-On-Death (TOD) Security Registration Act §§539-1 to 539-12.

#3 – Adopted revised UAGA. HRS §§ 327-1 to 327-26.

#4 – HRS §§ 525-1 to 525-6

IDAHO

#2 – Adopted Part 3 of 1989 Revision of Article VI . Title 15, Uniform Probate Code, §§15-1-101 to 15-8-305.

#3 – Adopted revised UAGA. Chapter 34, §§ 39-3401 to 39-3425

#6 - § 54-1819

ILLINOIS

#1 - Incorporated in Chapter 750: Families. Amended version filed on Jan. 12, 2006, referred that same day to the House Rules Committee. Illinois Parentage Act § 750 ILCS 40/1 to 40/3; Illinois Parentage Act of 1984, § 750 ILCS 47/5 through 47/28.

[#3 – Revised UAGA introduced in 2009 as HB 1349.]

Ill. Comp. Stat. Ann.:

§ 720 ILCS 5/9-1.2 – Covers Intentional Homicide of an Unborn Child; (Smith-Hurd 1993) - Ban on discarding embryos.

750 ILCS 47/5 et seq, Gestational Surrogacy Act, provides "consistent standards and procedural safeguards for the protection of all parties involved in a gestational surrogacy contract."

750 ILCS 45/9(b) - Contemplates paternity actions after death

755 Ill. Comp. Stat. Ann. § 5/2-3 states that a "posthumous child born after death" of the decedent receives the same share as if born in the decedent's lifetime. There is no requirement that the child be conceived during the lifetime of the decedent. (*see* McAllister 99).

750 Ill. Comp. Stat. Ann. § 40/2 states that any child born from a heterologous artificial insemination is the natural child of the husband and wife, provided there is written consent between the parties.

Estate of Medlen v. Kreciak, 677 N.E.2d 33 (Ill. App. Ct. 1997) (noting that at common law, there is no property right in a dead body, that the body is not a part of the decedent's estate, and that after burial, the body is in the custody of the law - exhumation order was vacated on basis that court has no authorization to order exhumation of a body in another state)

Estate of Fischer v. Fischer, 117 N.E.2d 855, (Ill. App. Ct. 1954)

1) Decedent's will directed that he be buried in Graceland Cemetery - widow buried body in Rosehill Cemetery. Wife was unaware of directive in will, but sister knew about it. "Any right the sister as executrix might have had to inter the body of her brother in Graceland Cemetery was lost by her failure to assert that right before the body was interred in Rosehill Cemetery." (858)

2) Court noted that surviving spouse and not the next-of-kin has a "right to the possession of the body and to the control of burial . . . in the absence of a different provision by the deceased." (858)

INDIANA

#3 - Adopted revised UAGA. §§ 29-2-16.1-1 through 29-2-16.1-21.

#4 - §§ 32-17-8-1 through 32-17-8-6

#6 - § 1-1-4-3

Ind. Code Ann. § 29-1-2-6 states that descendants of the intestate will inherit as if they were born within the lifetime of the decedent if "begotten before his death but born thereafter."

Ind. Code Ann. § 29-1-3-8 states that if testator fails to provide in a will for a child of the testator, whether born before or after testator's death, that child may receive a share.

IOWA

#3 - Adopted revised UAGA. Iowa Code §§ 142C.1 through 142C.18

KANSAS

#1 - Incorporates UPA into probate for establishing paternity only. K.S.A. §§ 23-2201 to 23-2225.

#3 –Adopted revised UAGA. K.S.A. § 65-3220 through 3244.

#4 – K.S.A. § 59-3401 et seq.

#6 - K.S.A. § 77-205

Kan. Stat. Ann. § 59-501(a) (Supp. 1992) - Permits inheritance by posthumous children (*see* McAllister 99)

Kan. Stat. Ann Chapter 59 provides the Probate Code

Reese v. Muret, 150 P.3d 309 (Kan. 2007). The Kansas Supreme Court declined to order a posthumous paternity test requested by the decedent's widow in order to disprove a woman's claim that she was the decedent's daughter and thus entitled to inherit from decedent's estate. The court found that Kansas law required a court to order a paternity test when requested only if it is in the best interest of the child. That the "child" was an adult at the time of the action did not alter the analysis.

KENTUCKY

#3 – §§ 311.1911 through 311.1963

K.R.S. 391.070. Posthumous child - Inheritance by. "A child born of a widow, within ten (10) months after the death of the intestate, shall inherit from him in the same manner as if he were in being at the time of the intestate's death." K.R.S. 381.140 provides that "Posthumous child may take estate in remainder."

LOUISIANA

(Civil Law State)

La. Rev. Stat. Ch. 3, §§ § 9:121 through § 9:133 covers "Human Embryos".

La. Rev. Stat. § 9:129, "A viable in vitro fertilized human ovum is a juridical person which shall not be intentionally destroyed by any natural or other juridical person or through the actions of any other such person. An in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation, is considered non-viable and is not considered a juridical person." (It is not clear that this would comport with Roe v. Wade. See Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 Hous. L. Rev. 609, 646-51 (1997)).

§ 9:133 - No inheritance rights from donors.

LA. Rev. Stat. Ann. §8:655-- Decedent's burial wishes prevail when notarized.

La. Rev. Stat. Ann. § 9:391.1 – A child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.

La. Civ. Code Ann:

957 - Child must be conceived when succession opens in order to take.

1474 - Child must be in utero at time of death of the testator.

Male must be alive at time of conception to be "father" - Burkdall at 900.

MAINE

#1 – Introduced amended version in 2004 – placed in Senate Legislative Files on March 3, 2006 (dead).

#2 – Adopted Part 3 of 1989 Revision of Article VI -- §§ 18-A M.R.S. § 1-101 through 8-401

#3 – Adopted revised UAGA. §§ 22 M.R.S. § 2941 through 2965.

#6 – Chapter 706; §§ 22 M.R.S. § 2811 through 2813

Estate of Kingsbury, 946 A.2d 389 (Me. 2008). The Supreme Judicial Court, on an interlocutory appeal, upheld a probate court's order compelling the decedent's daughter to submit to DNA testing or, if she refused, authorizing the exhumation of and DNA testing on the decedent's body. The court found that based on the evidence, there was at least a reasonable probability that decedent had another daughter who would be entitled to share in the decedent's estate. As a result, the probate court had equitable authority to order the exhumation.

MARYLAND

3 – Adopted Revised UAGA. Md. Code Ann, §§ 4-501 to 4-522 (May 19, 2011).

#6 – Title 5, Subtitle 2; Md. HEALTH-GENERAL Code Ann. §§ 5-201 to 5-203.

Md. Est. & Trusts Code Ann. § 1-206 - Children conceived through AID are deemed to be children of the mother's husband (McAllister at 68)

Taxiera v. Malkus, 578 A.2d 761, 766 n.7 (Md. 1990) (Noting that in case where plaintiff sought declaration that decedent had fathered her child, she and estate representative joined in consent order to exhume nearly two years after decedent's death - decomposition of body prevented the retrieval of any usable specimen).

Snyder v. Holy Cross Hospital, 352 A.2d 334 (Md. Ct. Spec. App. 1976) (Holding that the decedent's father's religious objections to a post-mortem examination were outweighed by state interests in determining cause of death).

MASSACHUSETTS

[#1 – Petition for Bill: An Act Relative to Establishing Paternity, 2005 Re-file of Bill #H782 of 2003.]

#2 – Amended version signed into law by Governor in 2009; 2008 Mass, ALS 521 (Effective July 1, 2011).

3 – M.G.L.A. ch. 113A, § 1 through 25

#4 – M.G.L.A. ch. 184A §§ 1 through 11.

Mass. Gen. Laws Ann. ch. 190, § 8 - permits inheritance by posthumous children (*see* McAllister 99) [Repealed.]

M.G.L.A. ch. 46, § 4B - Legitimacy of Child Conceived by Artificial Insemination "Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."

Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (Mass. 2002). Twins were born two years after the death of their father and when their mother sought Social Security benefits, her claim was denied. In a question certified to the Massachusetts Supreme Court by the district court, the Court placed three threshold conditions on children's right to inheritance: (a) a proven genetic relationship; (b) consent of the decedent to conception; and (c) consent to support for the resulting child. The case is now back in the lower court.

T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (holding that "parenthood by contract" is not the law in Massachusetts because it violates the public policy of the state).

MICHIGAN

#2 – Adopted Part 3 of 1989 Revision of Article VI -- §§451.471 to 451.581, 700.1 to 700.993 (provisional – repealed by §§700.1101 to 700.8102 effective April 1, 2000). Michigan now has the Estates and Protected Individuals Code. *See* Raab, A Comparative Analysis Between the Uniform Probate Code and Michigan's Estates and Protected Individuals Code, 79 U Det Mercy L Rev 593 (2002).

#3 – Adopted revised UAGA. MCLS § 333.10101 et seq.

#4 - MCLS § 554.71, et seq.

#6 - MCL § 333.1031

Mich. Comp. Laws Ann. § 700.2104 and § 700.2108 allow individuals born after the death of the decedent to inherit provided they were in gestation at the time of death.

MINNESOTA

#1 -- Incorporated into probate code. M.S.A. §§257.51 to 257.75. In the 2015 legislative session, 257.75 subd. 3 was amended by Ch. 17, art. 1, § 52, and 257.75 subd. 5 was amended by Ch. 17, art 1, § 53. Both become effective March 1, 2016. [Introduced Revised UPA 2002 – referred to Judiciary Committee]

#2 – Adopted 1990 Revision of Article II -- §§524.1-101 to 524.8-103. Bills to adopt the 2008 amendments were introduced in both the Senate (SF0396) and House (HF 1228) in 2009.

#3 – Adopted revised UAGA. §§ 525A.01-525A.25.

#4 - §§ 501A.01 to 501A.07

#6 - § 145.135

Minn. Stat. Ann. §§ 609.2661 covers murder of an unborn child in the first degree. 609.266 through 609.2691 cover crimes against unborn children.

Minn. Stat. Ann. § 524.2-108 and § 524.2-104 – posthumously conceived children are prohibited from inheriting as these statutes require that the child be in gestation at the death of the decedent.

MISSISSIPPI

[#1 – Introduced Revised UPA 2000]

#3 – Adopted revised UAGA. Miss. Code Ann. §§ 41-39-101 through 41-39-147 (Repealed effective July 1, 2014).

#6 - Miss. Code Ann. § 41-36-1 et seq.

§ 93-9-1 et seq. provides the Uniform Law on Paternity

MISSOURI

#1. V.A.M.S. §§210.817 to 210.852.

#3 – Adopted revised UAGA. §§194.210 through 194.294 R.S.Mo.

#6 – V.A.M.S. § 194.005. Death, legal definition

Mo. Ann. Stat. § 474.050 (Vernon 1992) - permit inheritance by posthumous children (*see* McAllister 99)

Missouri's Probate Code encompasses V.A.M.S. Chapters 472 – 475

MONTANA

#1 -- §§ 40-6-101 et seq.

#2 – Adopted 1990 Revision of Article II and 1989 Revision of Article VI -- §§72-1-101 to 72-6-311. 72-1-101 provides that "Chapters 1 through 5 and chapter 16, part 6, shall be known and may be cited as the 'Uniform Probate Code'."

#3 – Adopted revised UAGA. §§ 72-17-101 through 72-17-312

#4 - §§ 72-2-1001 through 72-2-1017.

#6 - § 50-22-101

NEBRASKA

#2 – Adopted 1989 Revision of Article VI -- §§30-2201 – 30-2902.

#4 - Sections 76-2001 to 76-2008

#6 - §§ 71-7201 through 7203

NEVADA

#1 - Incorporated as domestic relations law. NRS §§ 126.011 through 126.331

#3 – Adopted revised UAGA. NRS § 451.500 et seq.

#4 - NRS § 111.1031

#6 - NRS. § 451.007

NEW HAMPSHIRE

#3 – Adopted 1987 version. §§ 291-A:1 through A:25.

#6 – §§ 141-D:1 and D:2

N.H. Rev. Stat. Ann. §§ 168-B:3(e) - Semen donor is father for inheritance purposes if donor & mother execute written agreement of such prior to AID.

N.H. Rev. Stat. Ann. § 168-B:15 – New Hampshire specifically permits embryo research, but it places some restrictions on the way embryos are handled.

N.H. Rev. Stat. Ann.. §290:20-- Requires compliance with the decedent's burial wishes if there are sufficient funds to do so.

Eng Khabbaz v. Commissioner, Social Security Administration, 930 A.2d 1180 (N.H. 2007). The Supreme Court of New Hampshire, addressing a question certified to it by the U.S. District Court, held that a posthumously conceived child could not inherit from her father as surviving issue under New Hampshire intestacy law. A widow was artificially inseminated with her late husband's sperm and bore a child. The court held that, despite the fact that when he had his sperm banked the deceased had executed a consent form expressing his desire to be the father of any resulting child, the state's intestacy law provides for inheritance by "surviving issue", and a posthumously conceived child was not "surviving" within the plain meaning of the statute.

NEW JERSEY

#1 - Incorporated UPA into probate code for establishing paternity only. N.J.S.A. §§9:17-38 to 9:17-59. [Amended version referred to the Senate Judicial Committee in 2004. The bill enacts the NJ Parentage Act of 2003.]

#2 § 3B:5-1, et seq provide for intestate succession, but not called the "Probate Code."

#3 – Adopted revised UAGA. § 26:6-77 et seq.

#4 - § 46:2F-10 provides for the "Permissible period of power of alienation under trust, future interest ." § 46:2F-9 abrogated the common law rule against perpetuities in N.J.

In re Estate of Rogers, 583 A.2d 782, 783 n.2 (N.J. Super. Ct. App. Div. 1990) (noting that judge rejected option to exhume after receiving unchallenged evidence of decomposition).

NEW MEXICO

#1 – Amended version signed into law by Governor in 2009; 2009 N.M. ALS 215. N.M. Stat. Ann. §§ 40-11A-101 through 40-11A-106

#2 – Adopted 1990 Revision of Article II and 1989 Revision of Article VI -- §§45-1-101 to 45-7-522. SB 497, to adopted the 2008 amendments, introduced in 2009 (Died).

#3 – Adopted revised UAGA. §§ 24-6B-1 through 24-6B-25.

#4 - § 45-2-901

#6 - § 12-2-4.

NEW YORK

[#3 – Introduced revised UAGA in 2009 (AB 6966/SB 4488).]

#4 – Introduced USRAP as AB 2202 on January 14, 2011.

#6 – Adopted provision substantially similar to UDODA. § 4306. Provides for "Rights and duties at death" pertaining to donors.

NY EPTL § 4-1.3 was signed into law on November 21, 2014. The law provides a statutory solution for rights of posthumously conceived children in New York.

Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) – Divorce proceeding - custody of 5 pre-embryos (within 14 days of creation) in question. Trial court held that there is no difference between in vivo and in vitro - wife's wishes prevail; husband's rights to avoid procreation are waived after participation in IVF program; and since a husband cannot compel or prevent an abortion, he should have no further rights over treatment of an extracorporeal embryo. The Appellate Division reversed and the Court of Appeals affirmed the reversal, holding that the contract calling for donation for research purposes in the event of disagreement controlled.

Yome v. Gorman, 152 N.E. 126, 128 (N.Y. 1926) (Holding that widow's wishes to disinter bodies of husband and children from Catholic cemetery for reburial in non-Catholic cemetery are not strong enough to outweigh contradictory behavior of decedent (raised in the Catholic church, received last rites on death bed) - decedent's wishes, while not legally binding, should be considered by the court (926 n.145).

In re Estate of Janis, 210 A.D.2d 101 (1st Dept. 1994). Issue of first impression in NY (417) -- An application to establish paternity may be made only where a blood genetic marker test had been administered to decedent during life (418).

Anne R.. v. Estate of Francis C., 167 Misc.2d 343 (N.Y. Fam. Ct. 1995), *aff'd*, 234 A.D.2d 375 (N.Y. App. Div. 1996) (Holding that where petitioner had established that decedent acknowledged the child as his own, results of blood tests performed on decedent's frozen blood could be admitted into evidence).

1. Family Court Act § 519 - blood tests must be done before death.

2. Amendments to Family Court Act §§ 418, 532(a) and (b) and CPLR § 4518(e) authorizing DNA testing in paternity proceedings.

3. Nothing in § 532 prohibits admission of post-death blood results into evidence.

Perry-Rogers v. Fasano, 276 A.D. 2d 67 (N.Y. App. Div. 2000) (holding that the gestational parent is estopped from asserting Best Interest of the child to gain *visitation* from the biological parents where any psychological bond was caused by their delay).

Colavito v. New York Organ Donor Network, Inc., 8 N.Y.3d 43 (N.Y. 2006). The New York Court of Appeals, answering a question certified to it by the Second Circuit, held that the New York Public Health Law did not vest the intended recipient of a directed organ donation with rights that can be vindicated through a common law conversion action or a private right of action inferred from the Public Health Law. Based on that ruling, the Second Circuit affirmed the district court's ruling in *Colativo v. New York Organ Donor Network, Inc.* 356 F.Supp.2d 237

(E.D.N.Y. 2005), *aff'd*, 486 F.3d 78 (2d Cir. 2007) (intended recipient of a kidney could not recover for fraud, conversion, or violation of the New York Public Health Law when the kidney, which was incompatible with the intended recipient's immune system, was implanted into another patient).

In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. New York County 2007). Surrogates court held that a class disposition to a grantor's "issue" or "descendants" included children of the grantor's son who were conceived after the son's death but before the disposition became effective. The court suggested that EPTL 6.5-7(a) and EPTL 2-1.3, which provide that posthumous children are entitled to share in gifts made to children or issue, could be read literally to include posthumously-conceived children. Looking at the intent of the grantor, the court found that though the trust instruments were silent on the issue of posthumously conceived children, a reading of those instruments warranted the conclusion that the grantor intended all members of his bloodline to receive their share. The court also pointed out a need for legislation to resolve issues of this nature raised by advances in biotechnology.

NY CLS Pub Health § 4368-- Life Medal of Honor presented to those individuals whose life-saving contribution of an organ, tissue, or bone marrow is given to a needy recipient.

NY Proposals (New York State Task Force on Life and the Law – April 1998)

1) Legitimacy

    a) Currently, NY CLS Dom Rel § 73 recognizes the legitimacy of children born by artificial insemination where:

        i) the woman undergoing the procedure is married

        ii) the woman's husband consents

        iii) the procedure is performed by a physician, who certifies the service

    b) This law should be changed to include children born by any means of artificial reproduction (see below for discussion of legislation proposed by the Health Law Section of the New York State Bar Association)

2) Parental Rights/Responsibilities of Sperm Donors

    a) Currently, there is no NY statute that specifically addresses the rights and obligations of sperm donors although such legislation has been introduced.

    b) The law should be changed to provide for the written consent of sperm donors to the termination of their parental rights/responsibilities.

3) Posthumous Children

a) Currently, § 6-5.7 covers posthumous children, providing that "Where a future estate is limited to children, distributees, heirs or issue, posthumous children are entitled to take in the same manner as if living at the death of their ancestors."

b) The law should be changed to only include situations where *implantation* has occurred before the death of one parent.

Proposal by Health Law Section of the New York State Bar Association --

Proposed legislation will be submitted by the Health Law Section of the New York State Bar Association at the House of Delegates Meeting in June 2001 to amend Section 73 of the Domestic Relations Law. The proposed legislation refers to determination of parentage of children born by *medically-assisted reproduction* as opposed to the current language which refers only to *artificial insemination*. The change would provide that a child born to a married woman by means of medically-assisted reproduction is the legitimate child of that woman and her husband for all purposes, provided that certain steps are followed. (The phrase *for all purposes* is intended to include inheritance purposes.) The amendment would be strictly limited to confirming the parentage of children born to married couples after egg or embryo transfer and would not extend to situations where an unmarried woman who receives an egg or embryo transfer has an interest in confirming her status as the sole, lawful mother, or where the birth mother is intended to be only a gestational surrogate.

In January 2009, Assembly Bill A1798 was referred to the Judiciary Committee. The bill would amend NY EPTL 4-1.2 to permit posthumous paternity testing and to permit the Surrogate's Court to authorize posthumous paternity testing and to order such testing on the remains of a deceased person. The bill provides that the costs of such testing would be borne by the person seeking paternity determination.

NORTH CAROLINA

#3 – Adopted revised UAGA. N.C. Gen. Stat. §§ 130A-412.3 through 130A-412.33.

#4 - N.C. Gen. Stat. § 41-15

#6 – Adopted provision substantially similar to UDODA. § 90-323

Batcheldor v. Boyd, 423 S.E.2d 810 (N.C. Ct. App. 1992) (Holding that where information sought was reasonably calculated to lead to admissible evidence and where defendant had shown good cause to exhume the body to establish paternity, trial court did not err in ordering exhumation)

NORTH DAKOTA

#1 – Adopted amended version in 2005. §§ 14-20-01. (101) through 14-20-66. (901).

#2 – Adopted 1990 Revision of Article II and 1989 Revision of Article VI -- §§30.1-01-01 to 30.1-35-01. HB 1072, adopting the 2008 amendments, passed in 2009 (signed by Governor March 2009).

#3 – Adopted revised UAGA. § 23-06.6-01 et seq.

#4 § 47-02-27.1

#5 – Adopted "Alternative B" §§ 14-18-01 through 14-18-09, however sections 14-18-02 through 04, 06, and 07 were repealed.

#6 - §§ 23-06.3-01 and 23-06.3-02

REPEALED by S.L. 2005, ch. 135, § 11: N.D. Cent. Code § 14-18-04 - If an individual who consented to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the individual is not a parent unless he gave written consent that if insemination were to occur after his death, he would be a parent of the resulting child.

OHIO

#1 - Adopted as domestic relation law, but eliminated provision for assisted conception. R.C. §§ 3111.01 to 3111.19.

#3 – Adopted revised UAGA. O.R.C. Ann. § 2108.01 et seq.

#6 - § 2108.40.

Ohio Rev. Code Ann. § 2105.14 forbids children who are posthumously conceived from inheriting. Descendants begotten before the death of the father but born after can inherit.

Ohio Rev. Code Ann. § 4717.22. A spouse may override decedent's burial wishes.

Alexander v. Alexander, 537 N.E.2d 1310 (Ohio Prob. Ct. 1988) (granting order where plaintiff sought exhumation of alleged father).

7. CASE OF FIRST IMPRESSION (1311).

8. TECHNOLOGY HAS CREATED NEW OPPORTUNITIES TO ESTABLISH PATERNITY - EXHUMATION AND TESTING IS PERMISSIBLE (1314).

9. ON APPEAL (560 N.E.2D 1337 (OHIO CT. APP. 1989)) - BETWEEN PROBATE COURT DECISION AND APPEAL, PLAINTIFF SETTLED WITH ESTATE OF GREAT-UNCLE (RELATIONSHIP WITH ALLEGED FATHER WAS UNIMPORTANT EXCEPT FOR ESTABLISHING ENTITLEMENT TO INHERITANCE FROM GREAT-UNCLES ESTATE) - EXHUMATION ORDER WAS NOW MOOT.

OKLAHOMA

#1 – Adopted 2002 amended UPA into Title 10: Children. 10 Okl. St. §§ 7700-101 through 902 and § 7800.

#3 – Adopted revised UAGA. 63 Okl. St. § 2200.1 et seq.

#6 - 63 Okl. St. §§ 3121 through 3123

OREGON

#3 – Adopted revised UAGA. ORS §§ 97.951 through 97.982.

#4 - ORS § 105.950

#6 - ORS § 112.582

PENNSYLVANIA

#2 [20 PA. CONS. STAT. § 21 has elements substantially similar to the UPC]

#3 – Adopted 1987 version. §§ 8601 through 8642. Introduced Revised UAGA as HB 100 on January 26, 2011

#6 §§ 10201 through 10203

In 1994, Pennsylvania passed legislation establishing the Organ Donation Awareness Trust Fund (20 Pa. Cons. Stat. § 8622 (amended in 2000)). The Department of Transportation, the Department of Revenue and the Department of Health receive contributions when Pennsylvanians make a voluntary one-dollar contribution through drivers' license renewals, vehicle registrations or state income tax returns. The law states that ten percent of the fund may be spend each year by the Pennsylvania Department of Health for reasonable medical expenses, paid to the funeral home or hospital, but not to the donor's family or estate. While the Act stipulates a maximum of $3000 per family, Pennsylvania's Organ Donor Advisory Committee has decided the payments should approximate $300 per family.

McFall v. Shrimp, 10 Pa. D & C. 3d 90 (Pa Com. Pl. 1978) (holding the only suitable donor could not be compelled in equity to donate his unique bone marrow to save his cousin's life, the court there citing the established common law doctrine of 'no duty to rescue another.')

Wawrykow v. Simonich, 652 A.2d 843 (Pa. Super. Ct. 1994) (Holding that where statute provides that paternity may be proven by clear and convincing evidence "that the man was the father of the child," use of the word "was" indicates permission for after-death testing) (845). This case was recently distinguished by *In re Marsh,* 175 A.3d 993, 995 (Pa. Super. Ct. 2017) where a deceased woman's son filed a petition for disinterment of his mother's body and was denied. *Id.*

at 995. The distinguishing factor between *Wawrykow* and *In re Marsh* is that in *Wawrykow*, the petitioner seeking after-death testing had significant evidence supporting her claim that her son was the child of the decedent. The Court reasoned that his desire to perform genetic testing on the decedent's body "is supported by nothing more than speculation." *Id.* at 998. This case does not seem to change the direction the law is taking, but provides guidance as to what factors a Pennsylvania court may take into account when determining whether to grant a petitioner after-death testing.

1. Question is one of first impression (844).

2. For exhumation, appellant needs to establish (846-847):

    a) reasonable cause that exhumation would be revealing on issue of paternity; and

    b) good possibility that exhumation would result in satisfactory samples (elapsed time factor).

Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007). The Supreme Court of Pennsylvania held that an oral agreement between a donee-mother and sperm-donor father, in which the father agreed to donate his sperm in exchange for being released from any obligation for any child conceived, was enforceable. While acknowledging that such an agreement would be unenforceable in the context of traditional sexual reproduction, the court noted that in the context of institutional sperm donation, "there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligations nor confers privileges upon the sperm donor." *Id.* at 1246. That the sperm-donor father in this case was not anonymous but had previously had a romantic relationship with the mother did not necessitate a different analysis.

RHODE ISLAND

#1 - Incorporated as domestic relations law. Also contains many provisions of the Uniform Act on Paternity, located in §§ 15-8-1 through 15-8-28.

#3 – Adopted revised UAGA. R.I. Gen. Laws §§ 23-18.6.1-1 through 23-18.6.1-25.

#6 - R.I. Gen. Laws § 23-4-16

SOUTH CAROLINA

#2 – Adopted Part 3 of 1989 Revision of Article VI -- §§35-6-10 to 35-6-100, 62-1-100 to 62-7-604.

#3 – Adopted revised UAGA. S.C. Code Ann. § 44-43-300 et seq.

#4 - S.C. Code Ann. §§ 27-6-10 through 27-6-80

#6 - S.C. Code Ann. §§ 44-43-450 and 44-43-460

SOUTH DAKOTA

#2 - §§29A-1-101 to 29A-8-101.

#3 – Adopted revised UAGA. S.D. Codified Laws §§ 34-26-48 through 34-26-72.

#4 - S.D. Codified Laws § 43-5-8 provides that the common law rule against perpetuities is not in effect in the state.

#6 - S.D. Codified Laws § 34-25-18.1

TENNESSEE

#3 – Adopted revised UAGA. §§ 68-30-101 through 68-30-120.

#4 - §§ 66-1-201 through 66-1-208

#6 - Tenn. Code Ann. § 68-3-501

Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)

Facts and History: Divorce - Custody of pre-embryos to wife. Court of Appeals - reversed. Tenn. Supreme Court affirmed. After getting custody, but before Supreme Court appeal, wife's circumstances changed. Now, she did not want to use the embryos herself, but wanted to donate them to a childless couple. The husband wanted them destroyed.

Court held:

1) Pre-embryos are neither persons nor property - special category because of potential life (597).

2) Wishes of donors should prevail (604).

3) If conflict, or unknown wishes, prior agreement binding (unless modified by mutual agreement) (597).

4) If no agreement, balance of interests (604).

5) If no other reasonable alternative, preference for use (by donor, not extended to donation to another) (604).

TEXAS

#1 – Adopted the 2002 amended UPA. Tex. Fam. Code Ann. §§ 160.001 through 160.763

#3 – Adopted revised UAGA. Tex. Health & Safety Code § 692A.001 et seq.

Inheritance statute incorporates parentage statute other than UPA (McAllister at 66).

Tx. Health and Safety Code § 711.002 allows decedent to direct disposition. Direction must be by will, a prepaid funeral contract, or written instrument signed and acknowledged.

While not a case of posthumous gamete rights, the 1st Court of Appeals in Houston, Texas decided a case involving custody of a child created from a frozen embryo. In *In the Interest of Olivia Grace McGill*, a married couple created an embryo through IVF. The frozen embryo was implanted only after the couple divorced. In spite of the fact that the father was listed on the birth certificate, the mother argued that the divorce, absent any decision regarding the future of the embryo, terminated any rights of the father. The court disagreed and granted paternity rights to the biological father of the child, stating that to do otherwise "would bastardize [Olivia]." (See Texas Lawyer, April 19, 1999).

Texas law provides that where the spouse dies before placement of the gametes or embryos, the deceased spouse is recognized by Texas law as a parent of that child if the deceased spouse consented in a record that if assisted reproduction would occur after death the deceased would be a parent of the child. Tex. Fam. Code § 160.707.

UTAH

#1 – Adopted amended version in 2005. § 78B-15-101 et seq.

#2 -- §§75-1-101 to 75-8-101.

#3 – Adopted revised UAGA. Utah Code Ann. § 26-28-101 et seq.

#4 - Utah Code Ann. §§ 75-2-1201 through § 75-2-1209.

#6 - §§ 26-34-1 and 26-34-2

Estate of Moyer v. Moyer, 577 P.2d 108 (Utah 1978)

1) Will stated deceased's desire to be cremated as directed by the executor, but body was buried -- Executor's failure to act timely constituted a waiver of any right conferred in the will.

2) Court noted that body is not property of the estate - testamentary powers only exist within limits of "reason and decency as related to the accepted customs of mankind."

VERMONT

#3 – Adopted 1987 version. 18 V.S.A. § 5250a through 5250z

#6 - 18 V.S.A. § 5218

In re Estate of Alan B. Murcury, 868 A.2d 680 (Vt. 2004). Under state statute, a child may not file a motion for genetic testing to establish paternity more than 21 years after that child's birth.

VIRGINIA

#3 - §§ 32.1-289.2 through 32.1-297

#4 - Va. Code Ann. § 55-12.1

#5 - Va. Code Ann. §§ 20-156 through 20-165

Va. Code Ann. §§ 64.1-8.1 (repealed and recodified generally as Title 64.2 [§ 64.2-100 et seq.], effective October 1, 2012), 20-158(b), 20-164 - no inheritance rights unless parents are married, and child is born w/in 10 months of father's death.

Va. Code Ann. § 54.1-2825 – individuals can designate a person to make arrangements for burial or cremation. The designation must be by a signed and notarized writing, and must be accepted by designee.

Va. Code Ann. § 32.1-286(C) – A court may order the exhumation of a deceased's body for the purpose of paternity testing. The cost of exhumation, testing, and reinterment shall be paid by the party seeking the paternity test.

Garrett v. Majied, 471 S.E.2d 479 (Va. 1996). The Virginia Supreme Court held that Code § 32.1-286 did not authorize exhumation for paternity purposes; exhumation was allowed only for suspicious cause of death determinations. The statute has twice since been amended and now explicitly allows exhumation for paternity purposes.

Martin v. Howard, 643 S.E.2d 229 (Va. 2007) (upholding trial court's order of exhumation for paternity testing and refusing to read a "good cause" requirement into Code § 32.1-286(C) which explicitly allows for exhumation in such circumstances)

WASHINGTON

#1 – Adopted the 2002 amended UPA. §§ 26.26.011 through 26.26.914

#3 – Adopted revised UAGA. Rev. Code Wash. (ARCW) § 68.64.010 et seq.

Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002) (holding donor can convey custodial rights in a fertilized egg to a third-party-non-gamete-donor by a mere contract with the non-donor).

WEST VIRGINIA

[#1 (Introduced Revised UPA 2002)] Domestic Relations law provides for paternity issues.

#3 – Adopted revised UAGA. § 16-19-1 et seq.

#4 - W. Va. Code § 36-1A-1 et seq.

#6 - § 16-10-1, et seq.

2006 W.V. HB 4565 calls for amending and enacting provisions related to vital statistics and parentage.

WISCONSIN

#2- Chapters 851 through 882 are titled "Probate" and are similar to UPC

#3 – Adopted revised UAGA. Wis. Stat. § 157.06.

#6 - Wis. Stat. § 146.71

Wis. Stat. § 854.21 (5) prohibits posthumously conceived children from taking a share of decedent's estate because the person must be conceived at the time of decedent's death.

WYOMING

#1 - Incorporated UPA into probate code for establishing paternity only. Dropped reference to recipient as married woman (McAllister at 79). Adopted the 2002 amended UPA. Wyo. Stat. § 14-2-401 et seq.

#3 – Adopted revised UAGA. Wyo. Stat. § 35-5-201 et seq.

#6 - §§ 35-19-101 through 103.