ART and the Constitution Part I: Foundations and Challenges of ART Law on Both Sides of the Atlantic

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ART AND THE CONSTITUTION – PART I
HOW DOES THE U.S. CONSTITUTION IMPACT THE USE OF ASSISTED REPRODUCTION?

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Introduction

When a person chooses to try to have a child through assisted reproductive technologies (ART), is that choice protected by the United States Constitution? If it is, to what extent is it so protected? The freedom of individuals to make choices involving liberty interests we consider to be fundamental, unburdened by the power of the state, is woven throughout the fabric of the constitution. That freedom of choice, embedded in our culture and our daily lives, illuminates the way we perceive surrogacy and other ART procedures in the U.S.

The Supreme Court of the United States has not ruled on any case involving assisted reproduction. However, it is reasonable to infer, based on the Court’s rulings in contraception, sterilization and abortion cases, that a person’s reproductive choice to have (or not to have) a child through ART enjoys constitutional protection. How much protection is afforded that choice, and when does that protection apply? When does a governmental interest in regulating or even prohibiting ART prevail over the liberty interests of individuals to choose how and when they are going to have children? When is an ART agreement enforceable? Unfortunately, since the Supreme Court has not directly addressed any of these issues, one can only speculate as to the answers to these questions. These materials present a summary of the likely sources of constitutional protection for the rights of individuals to enter into ART agreements and to have children through ART, as well as the limitations on those protections.

I. The Right to Privacy

The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution provide that the government shall deny no person “life, liberty, or property, without due process of law.” The Fourteenth Amendment specifically applies this proscription to the states. The Supreme Court first hinted, in Meyer v. Nebraska, that there was a right to privacy implied in the Due Process Clause of the Fourteenth Amendment.¹ This right was expressly

¹ 262 U.S. 390 (1923).
acknowledged by Justice Brandeis, dissenting in *Olmstead v. United States*, in which he explained that the “makers of our Constitution…conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized [people].”

The Supreme Court has subsequently held, in a series of cases dealing most famously with contraception and abortion, that there is a constitutional right to privacy arising from the due process clause of those amendments. The jurisprudence which connects due process to the right of privacy relies on the concept that there are certain rights implicit in “liberty” which cannot be unreasonably burdened without violating due process. The first of these cases in which the court’s majority expressly articulated this notion of the right to privacy was *Griswold v. Connecticut*, a case in which the court struck down a statute prohibiting the distribution of contraceptives to married couples. The court explained that “penumbras” (a word little known or understood, yet immortalized by Justice Douglas in this opinion) emanating from the First, Third, Fourth, Fifth and Ninth Amendments created a “zone of privacy created by several fundamental constitutional guarantees” that applied to the states through the Fourteenth Amendment. *Griswold* was fundamentally concerned about unwarranted governmental intrusion into intimate decisions made as part of the marital relationship. Although the issue of contraceptives clearly impacts the decisions of whether or not to have a child, Griswold did not expressly connect the right of privacy to the decision of whether or not to bear children. It did, however, provide the foundation for the subsequent cases which made that connection.

In *Eisenstadt v. Baird*, the Court struck down a Massachusetts statute prohibiting distribution of contraceptives to single (unmarried) persons. The court found that there was no rational basis for the statute, which would effectively punish unmarried persons for having sex by preventing contraception, and that it violated the Equal Protection Clause of the Fourteenth Amendment. In *dicta*, the Court expanded on Griswold’s articulation of the right of privacy and its relationship to procreation. “If the right of privacy means anything, it means the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Carey v. Population Services International* was yet another case in which the Supreme Court struck down a statute burdening the use of contraceptives. In this case, the New York statute prohibited the distribution of contraceptives to individuals under 16 years of age and required that pharmacists be the sole distributors of contraceptives. The Court again explained “that one aspect of the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment ‘is a right of personal privacy...’” and went on to explain that it’s previous decisions made “clear that among the decisions that an individual may make without unjustified governmental interference are

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2 *Olmstead v. United States*, 277 U.S. 438, 478 (1928, Brandeis, dissenting). This passage is commonly recognized as the first express acknowledgment of the right to privacy.
3 381 U.S. 479 (1965).
4 *Id* at 484. “[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy...The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.” *Id* at 484-485.
5 405 U.S. 438 (1972).
6 *Id* at 453.
personal decisions ‘relating to marriage; procreation; contraception; family relationships; and child rearing and education.’”8 “The decision of whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.”9

In Lawrence v. Texas, the Court explicitly affirmed that these articulated privacy rights rest in “the substantive force of the liberty protected by the Due Process Clause.”10 These rights, including procreation, have been reaffirmed by the Court as recently as 2015, in Obergefell v. Hodges, in which the Court held that the Fourteenth Amendment required states to license and recognize same-sex marriage.11 “Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution…”12

The Equal Protection Clause of the Fourteenth Amendment limits the ability of government to draw distinctions between groups of people without sufficient justification.13 The liberty interests which give rise to the right to procreate come from the Due Process Clause. However, “[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet each may be instructive as to the meaning and reach of the other.”14 The Equal Protection Clause dovetails with the Due Process Clause to prevent the state from burdening certain classes of people differently than other classes of people, in ways that impact procreational autonomy, without sufficient state interest.15 In many of the cases involving reproductive rights, and in the cases in which the right of procreation has been specifically discussed, it is difficult to distinguish where due process ends and equal protection begins. The Equal Protection Clause does not prevent the government from treating classes of people differently. It does, however, require that legitimate governmental interests be served when doing so.16 When the action of government disadvantages a class of people that have been historically disadvantaged, or burdens a fundamental right “explicitly or implicitly protected by the constitution,” that classification is subject to strict scrutiny.17 Strict scrutiny means the classification must serve a compelling state interest. The Supreme Court has also recognized “quasi-suspect classes, such as gender and illegitimacy, in which the classification must be related to an important governmental objection (intermediate scrutiny).”18 If the group of people being impacted by a particular action is not a suspect or quasi-suspect class, then the law “will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. It is extremely difficult to tell, from existing Supreme Court jurisprudence, whether the differing levels of scrutiny will provide any added layers of protection for certain groups participating in the ART process, but it seems clear that burdening the use of ART by

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9 431 U.S. at 685 (emphasis added).
12 135 S.Ct. at 2599. “...all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.” Citing Lawrence v. Texas.
13 U.S. Constitution, Amendment XIV, §1.
16 Id.
certain groups such as members of the LGBTQ community or unmarried persons would be constitutionally impermissible.

II. Freedom to Contract

Article I, Section 10 of the U.S. Constitution provides that “[n]o state shall enter into any… Law impairing the Obligation of contracts…” “That Clause restricts the power of States to disrupt contractual arrangements, but it does not prohibit all laws affecting pre-existing contracts…” To determine whether or not such a law violates the Contracts Clause, the Supreme Court has long applied a two-step test. The threshold issue is whether the state law has operated as a “substantial impairment of a contractual relationship.” In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party’s reasonable expectations, and prevents the party from safeguarding or reinstating his rights. If there is a substantial impairment, does the state law provide a reasonable and appropriate way to advance a “significant and legitimate public purpose.”

Although a line of cases in the late Nineteenth and early Twentieth centuries held that freedom or liberty to contract rested in the Due Process Clause of the Fourteenth Amendment, suggesting that states had limited power to legislate against future types of contracts, those cases and that notion were overruled by Ferguson v. Skrupa, which held that states “have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.”

III. Impact on Legality of ART and on ART Agreements

The Court has not accepted any case involving a dispute in an ART arrangement. It is almost reckless to attempt to predict the context in which this is most likely to arise. Will it be a dispute over frozen embryos by a divorcing couple, in which one of the progenitors does not want the embryos to be implanted, but the other wants them to be implanted (and asserts that the embryos are persons entitled to the same rights and privileges accorded to the adults fighting over them)? Will it be a challenge to an embryo disposition statute, such as the one in Arizona, which provides that in a dispute between married persons, the embryos must be awarded to the person who will have them implanted and brought to term? Will it come from someone seeking to invalidate a gestational carrier agreement, or wanting to void an egg, sperm, or embryo donation agreement? Could it be a challenge to a surrogacy statute, such as the one in Michigan making surrogacy a felony? Or will it be a challenge to a statute which enables surrogacy, from someone asserting that the rights of a child born to surrogacy are being violated? The Court has had numerous opportunities, but has chosen not to take them.

21 Id at 245-246.
23 A.R.S. § 25-318.03 (2018). It has not yet been challenged but, in this author’s opinion, suffers from several glaring constitutional infirmities.
from some unanticipated source, but given the cases being litigated in the lower courts, it appears inevitable that an ART case will land in the Court sooner rather than later.

The applicability of the Contracts Clause to ART issues is both limited and circular. First, the contracts clause only applies to state legislative action. Since only three remaining states have legislation prohibiting surrogacy, and we may soon be down to two, and since no states have legislation banning egg, sperm or embryo donation, the more likely scenario is that a court somewhere might invalidate a surrogacy agreement or an egg or embryo donation agreement. The Contracts Clause would not be implicated in a court decision invalidating a private agreement. Second, the Contracts Clause would only be implicated in legislation prospectively banning, burdening, or regulating surrogacy or donation agreements if that legislation was found to unreasonably burden rights otherwise protected by the constitution, such as the right to privacy. States may pass legislation banning or regulating surrogacy. Numerous states have done just that, and none of those statutes have yet been declared by the Supreme Court to be unconstitutional. Courts may find certain agreements to be void or unenforceable as against public policy.

The Contracts Clause is essentially superfluous when analyzing the constitutionality of a statute burdening ART. However, the mere existence of the Contracts Clause in the Constitution again highlights the way in which we, in the United States, both culturally and legally, view our right to enter into private agreements without interference from the government. The constitution, as a whole document, is written to protect the rights of individuals to make choices, so long as those choices do not cause unreasonable harm to others. This primacy of choice allows or causes, depending on your point of view, us to focus on the rights of intended parents, the rights of gamete donors, the rights of gestational carriers, and the ability of the participants to make decisions for themselves without governmental interference. While the Contracts Clause is not likely to directly affect the constitutional analysis of a case that comes before the Court in the ART context, it helps create the paradigm from which the Court will conduct its analysis. It also helps explain why the Court is less likely to view such a case from the prism of the rights of a child, born or unborn, as the result of the ART process.

On the other hand, the Supreme Court’s declarations that the right to procreate is a fundamental liberty interest should apply directly in the ART context. The breadth of the pronouncements in some of the cases, expressly espousing the rights to procreate and not to procreate, are dicta, and none of them involve ART. However, the line of cases recognizing a constitutional right to procreate reaches all the way back to *Skinner v. Oklahoma*, and the unbroken line of cases connecting the right to procreate with due process and equal protection extends half a century, from *Griswold* to *Obergefell*. It appears inescapable, at this point, that

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that her parental rights were denied without due process and that the child’s liberty interests were unconstitutionally infringed by the California statute. These constitutional claims (and the surrogate’s other claims) were rejected by the California court and certiorari was denied by the Supreme Court. In rejecting the constitutional claims raised by the surrogate and the claims she raised on behalf of the child, the California court did not explicitly rely on the Supreme Court’s right to privacy jurisprudence, instead relying on its own state supreme court decision in *Johnson v. Calvert*, infra. See also, *P.M. v. T.B.*, infra, cert denied, T.B. v. P.M., 139 S.Ct. 125 (2018); *Johnson v. Calvert*, infra, cert denied 510 U.S. 874 (1993); see also the denial of certiorari in embryo dispute cases: *Szafranski v. Dunston*, 34 N.E.2d 1132 (Ill. App. 2015), cert denied 136 S.Ct. 1230 (2016); *Litowitz v. Litowitz*, 48 P.3d 261 (Wash.banc. 2002), cert denied, 537 U.S. 1191 (2003).

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26 See e.g. In re: *Baby M.*, 537 A.2d 1227 (1988).
due process liberties and equal protection protect procreative choices. We already know, from *Eisenstadt* and *Carey*, that individuals have the right to use artificial means to prevent conception. In *Eisenstadt*, the language refers to the decision of whether to bear or beget a child. In *Carey*, that language is expanded to “*whether or not* to bear or beget a child.” The use of the word “beget” in each of these cases is deliberate, and makes clear that the court is not distinguishing between the rights of women and men. The use of the words “*whether or not*” clearly indicate both a positive and a negative right. Is there a reason that the traditional and historical respect for the right to procreate, recognized in the line of cases discussed above, not be applied to the technology of ART? If the language of these decisions, dicta or not, is taken at face value, then the liberty interests protected by the Due Process and Equal Protection Clauses should not be limited simply by the fact that the method of procreation is different than those previously addressed by the Court.

State supreme courts and other courts of record have already dealt with some of these issues and their constitutional implications. Most commonly, this has happened in cases involving two people in a dispute over what to do with frozen embryos. These courts have relied on the language used by the Court in the cases recognizing a right to procreate. In *Davis v. Davis*, the seminal case involving such a dispute, the Tennessee Supreme Court succinctly articulated the competing constitutional interests of the parties in controversy.

The right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation…As they stand on the brink of potential parenthood, Mary Sue Davis and Junior Davis must be seen as entirely equivalent gamete providers.

Other courts have expressly held that it would be a violation of the right not to procreate, for one party to be allowed to implant embryos and bring them to term against the wishes of the other party.

Only a handful of cases involving the enforceability of gestational surrogacy agreements have resulted in precedential opinions in lower courts of record. In the most recent case, the Iowa Supreme Court, in *P.M. v. T.B.*, held a surrogacy agreement to be enforceable and rejected the claims of the gestational carrier that her rights to due process and equal protection had been violated by the agreement. This decision in this case did not, however, rest on the intended parents’ constitutional rights to procreate. The Ohio and California Supreme Courts, among others, have also specifically upheld gestational surrogacy agreements, in the absence of statutes permitting or in any way regulating gestational surrogacy. None of these cases tested the idea of whether or not the intended parents’ right to procreate should limit the court in its ability to interfere with the enforceability of a surrogacy agreement for reasons of public policy.

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29 842 S.W.2d 588 (Tenn. 1992).
30 Id at 601.
31 *J.B. v. M.B. and C.C.*, 783 A.2d 707, 717 (N.J. 2001); *McQueen v. Gadberry*, 507 S.W.3d 127, 147 (Mo.App. 2016). See also *Rooks v. Rooks*, in which the Colorado Supreme Court acknowledged that the issue was one of equal, competing constitutional rights—the right to procreate and not to procreate. 429 P.3d 579 (2018).
32 907 N.W.2d 522, 542-543 (Iowa 2018)
Conclusion

Although no Supreme Court case has directly addressed the use of ART, there is a substantial body of constitutional law which is analogous. The liberties which are protected by the Due Process Clause and, by extension, the Equal Protection Clause, reach to “personal choices central to individual dignity and autonomy.” These liberties undeniably include the personal, intimate decisions involved in whether to have a child, when to have a child, and how to have a child. It isn’t difficult to make a case that the decisions necessary when attempting to have a child through ART are even more profoundly personal and intimate than the decisions people make to have children, or not to have children, through sexual intercourse. When the Supreme Court does take a case in which it has to determine the rights of participants in ART, it will have a sturdy foundation upon which to build. The case will be easily distinguishable from the contraception and abortion cases. The medical technology is relatively new and the involvement of third parties creates potentially competing interests that did not exist in those cases. However, there does not appear to be compelling rationale which would justify viewing these competing interests through a different constitutional lens than the interests of people involved in the natural biological conception of a child. This does not mean that the government has an obligation to provide ART to persons under its jurisdiction. It should, however, mean that there is some level of constitutional protection for persons who chose, on their own, to have (or not to have) a child through ART. The extent of that protection, and the contexts in which that protection applies, are the questions that remain to be answered.

34 Eisenstadt, supra at 453 Griswold, supra at 484-486.
LEGAL PARENTAGE AND POSTHUMOUS CONCEPTION IN THE UK*

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Bioscientific developments have progressed with such speed that it is now possible for a child to be conceived after the death of one or both parents. Sperm, ova and embryos can now be frozen, stored, and used at a later date to produce a child.1 These scientific developments coupled with the possibility of reproductive travel2 and a growing awareness of fertility challenges have brought with them not only fraught ethical3 dilemmas but also challenging legal questions in the UK and throughout the world. Can gametes be used after death or in cases of incapacity? Can such gametes be exported for use abroad and used in a surrogacy arrangement in, say, the USA? And, if so, what impact, if any, is there on the law of parentage?

Reports suggest that the first posthumous conception occurred in 1977 and the first posthumous sperm retrieval was in 1980. Egg retrieval and preservation is even more recent. States’ approaches to issues such as legal parenthood in the context of posthumous conception4 vary greatly, depending on the State’s cultural, political and legal environment. Opinion is divided on whether widows in such circumstances should be permitted to have children in this way. Where children are connected with more than one State or move cross-border, the application of different rules on jurisdiction, applicable law and the international circulation of foreign public documents (i.e., birth certificates, civil status documents) and judicial decisions (i.e., rules on recognition) has led to situations of uncertain and ‘limping’ legal parentage. What is clear, however, is that there is, as yet, no international consensus how to establish and contest legal parentage in these circumstances.5

The landmark English case of R v. Human Fertilisation and Embryology Authority, ex parte Blood6 required the English Courts to give consideration to the posthumous use of sperm and its export for use abroad. The subsequent case law in England (and elsewhere)7 demonstrates that the Court of Appeal was overoptimistic in 1997 when it observed that ex parte Blood raised issues ‘which should never arise again’.8

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* For a more comprehensive (and comparative) discussion see Michael Wells-Greco and other authors in Horatia Muit Watt (ed) et al. Global Private International Law: Adjudication Without Frontiers (Edward Elgar, 2019), Part VI.
1 Gametes (sperm, eggs and embryos) and reproductive tissues are special, inasmuch as they can lead to conception – in other words, to the creation of an individual whose genetic complement is partially derived from the gamete donor.
2 Consider, for example, the export of gametes for use abroad. See generally Guido Pennings, ‘Legal Harmonization and Reproductive Tourism in Europe’ (2004) 19(12) Human Reproduction 2689–94.
3 For a global discussion of the challenges, see Pamela Ferguson and Graeme Laurie, Inspiring a Medico-Legal Revolution: Essays in Honour of Sheila McLean (Abingdon, Routledge 2015).
5 Given these national differences, the Permanent Bureau of the Hague Conference on Private International Law has been working specifically on the private international law issues surrounding the status of children, including issues arising from ISAs (the Parentage / Surrogacy Project) since 2010. The Parentage/Surrogacy Project focuses on the issue of cross-border recognition of parent-child relationship statuses.
6 [1997] 2 All ER 687. The question before the court was not whether the removal of gametes had been lawful but whether the decision taken by the Human Fertilisation and Embryology Authority to refuse to make a Direction permitting export to Belgium was a lawful one. The Court of Appeal was principally required to consider the guarantees concerning free movement within the then European Community for the provision of medical services.
7 The ex parte Blood decision has also had an impact beyond the UK. For example, in France (see CE, 31 mai 2016, n°396848), in Australia (see RE H, AE (No 3) [2013] SASC 196), in Japan (see Takamatsu High Court, Judgment of 16 July 2004 1748), in the USA (see Re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. 2007)).
My concern here is not to examine the points of law which were directly at stake in the English case law but to identify some wider themes which have relevance to family and fertility law practitioners more generally. For practitioners in the USA, it may also be of interest to note that we have already experienced cases of the export of gametes to the USA in posthumous conception and surrogacy cases.

1. POSTHUMOUS CONCEPTION AND LEGAL PARENTHOOD

Posthumous conception can occur through at least two mechanisms. It can be accomplished using genetic material—a sperm, an egg, or an embryo—that was cryopreserved during an individual’s lifetime to allow for the possibility of future parenthood, or it can be accomplished using genetic material that was harvested after an individual’s death at the request of a survivor. The former mechanism is the more common at present, and one can imagine a variety of reasons that a living individual might elect to cryopreserve his or her genetic material, including concerns about infertility resulting from medical treatment (e.g., chemotherapy), exposure to toxins or other dangers (e.g., in the course of combat), or normal aging processes.

One of the primary legal issues arising from posthumous conception is parentage, yet at present comparative research suggests that only a small minority of States have legislation addressing whether deceased gamete-providers should be viewed as the parents of posthumously conceived children. In a European context, posthumous conception is permitted in, for example, the UK, the Netherlands and Greece, and subject to specific conditions; soon to be permitted in Ireland, but prohibited in, for example, Switzerland and Italy. In those States which permit posthumous conception, consideration has had to be given to the legal framework for such conception and the impact on birth registration and the law of parentage.

When the laws on parenthood were first passed in the UK 1990, however, they made clear that any man who conceived posthumously would not be treated as the legal father. In 2003, it was recognised that men should be treated in law for the purposes of birth registration as the father of a child where the child has resulted from certain fertility treatment undertaken after the man’s death. The law was amended to allow a father conceiving posthumously to be named on his child's birth certificate. HFEA 2008 introduced parallel provisions for same-sex partners where a surviving partner conceives after her partner's death (after 6 April 2009).

This has left a rather complex set of rules on legal parenthood in posthumous conception cases in England:

- if a woman's stored eggs or embryos are used to conceive a child (for example through surrogacy) after she has died, she is not treated as the legal mother. In line with the general law on parenthood, the woman who carries the child is treated as the mother.

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9 If the Assisted Human Reproduction Bill 2017 is passed. The law will also permit gametes and embryos to be used for posthumous fertility treatment by the patient's surviving partner, if the applicable consents are in place. See <http://health.gov.ie/blog/publications/general-scheme-of-the-assisted-human-reproduction-bill-2017/>.

10 While national law commonly treats children born within a certain accepted time period after the father’s death (generally, around 300 days from the father’s death) as any other child who is born into the relationship, posthumous conception can extend the timeframe for a longer period, and potentially, indefinitely. See Kees Saarloos, 'European private international law on legal parenting? Thoughts on a European instrument implementing the principle of mutual recognition in legal parenting' (Dissertation, Maastricht University 2010).


12 Section 39 HFEA 2008.


14 Section 47 HFEA 2008.
• if a woman is inseminated with her husband or partner's sperm after his death, or if embryos are transferred to her after his death that are either created with his sperm or created with donor sperm before he died, he can be named on the birth certificate if his wife or partner makes a special written election within 42 days of the birth. However, he is not the legal father for any purpose other than naming him on the birth certificate.  

• if a woman is inseminated with donor sperm after her husband or partner’s death, or if embryos are transferred to her after his death that were created with donor sperm after he died, the man is not the father for any purpose and cannot be named on the birth certificate.  

• if a man dies when his wife or partner is pregnant, he is treated as the father for all legal purposes, including succession. This applies both where he is the genetic father and in certain circumstances where donor sperm has been used.  

• if a man's sperm or embryos created by his sperm are used to conceive a child after he has died, the position is a little more complex. In the UK, the Human Fertilisation and Embryology Act of 1990 (which was amended in 2008) allows for posthumous conception when the deceased provided sperm and consented in writing (and, importantly, he did not withdraw the consent) for the use of his sperm by a specific woman after his death, and for his being named as the father on the birth certificate of any resulting child. Similar legal determinations exist for same-sex female couples.

If a child is conceived posthumously and legal parentage of the deceased parent is not established then the child will not have legal parent-child relationship with significant resulting legal consequences for that child as well as questions relating to the social construction of kinship and status.

2. THE NEED FOR CONSENT FOR GAMETES TO BE USED IN ANY FERTILITY TREATMENT

The Human Fertilisation and Embryology Act 1990 requires the written consent of a person before their gametes can be used in any fertility treatment. That this should be explicitly required is no surprise given the serious consequences of such treatment both for the person whose gametes are used but also for any child born as a result of that use. The Court of Appeal in ex parte Blood held that the sperm should not have been retrieved and stored on an interim basis in the absence of effective consent by the husband. It also held that both Mrs Blood's proposed treatment and the continued storage of her husband's sperm was prohibited by the 1990 Act and the UK’s Human Fertilisation and Embryology Authority’s (‘HFEA’) had no power to authorise treatment in the UK. However, recognising the reality that the sperm had already been retrieved and stored (albeit unlawfully) the HFEA's refusal to authorise the export of her husband's sperm abroad infringed her right to receive medical treatment in another state of the European Union and the Court allowed the appeal on the basis that the HFEA could make a special direction enabling export of the sperm to another member state.

The recent case of Y v A Healthcare NHS Trust and others [2018] EWCOP 18 is also a significant decision. Mrs Justice Gwynneth Knowles exercised the Court's powers under s16(1)(a) of the Mental Capacity Act

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15 Section 39(1)(d) HFEA 2008.  
16 See sections 39–40 HFEA 2008, respectively. Note the separate provisions here for posthumous genetic fatherhood and posthumous non-genetic fatherhood.  
19 Section 39(1) and (3) HFEA 2008.  
20 For example, because the UK’s statutory conditions are not satisfied.  
21 For example, citizenship, inheritance rights and access to social benefits.
2005 to order that a named individual could sign a consent form for fertility treatment where the husband ("P") lacked capacity following a catastrophic brain injury. Under the terms of the Order the clinicians were authorised to retrieve, store and posthumously use P's sperm. This overcame the absence of any written consent signed by P himself. In granting declaratory relief, the Judge determined that it was in the husband's best interests for his sperm to be retrieved, stored and used in fertility treatment because (1) he had had a settled intention to have a child with his wife. The couple were in the early stages of fertility treatment in the hope of having a child; (2) he had sought a referral for fertility treatment. The accident occurred just days before the couple were due to attend a further clinic appointment to progress their treatment; (3) he had discussed the issue of posthumous use of his sperm with his wife and had agreed to posthumous use and (4) he and his wife were under the care of a consultant obstetrician and gynaecologist and had undergone and arranged a further appointment for the purposes of undergoing treatment.

This compassionate and forward thinking legal ruling by the Court helps honour the wishes of P and his wife for further children. Her Ladyship cautioned that the case was decided on its facts and there was strong evidence before the Court both of his desire and wishes for a child and for the use of his sperm posthumously if anything untoward happened to him during the treatment.

3. CONSENT FOR THE PERIOD OF STORAGE OF GAMETES

The need for consent for the period of storage of gametes has also been subject to judicial consideration. In Jefferies v. BMI Healthcare Ltd and another22 the key issue before the Court was whether the deceased had validly varied his consent to storage from a period of ten years to a period of two years. The claimant, Samantha Jefferies, and her husband Clive were just about to commence their third cycle of IVF when Clive unexpectedly passed away from a subarachnoid brain haemorrhage. When Samantha and Clive first started IVF treatment, they had been asked to sign a number of consent forms by the clinic, including the HFEA’s prescribed consent forms (the ‘WT and MT forms’). The WT and MT forms contain provision for a person to consent to storage of embryos, or gametes, for a period of up to ten years. Samantha and Clive filled out the forms at home and agreed to store their embryos for a period of ten years. At the time, the clinic’s policy was to offer storage for an initial period of two years, to reflect the period of NHS-funded storage. Clive’s MT form was amended to say that he agreed to a two-year period, however the amendment was not signed, contrary to the statutory requirements.

Samantha wanted to be able to store the embryos for longer than two years. Clive had given written consent to the use of the embryos in Samantha’s treatment after his death, so there was no issue about their posthumous use. However, the clinic was told by the HFEA that it could not store the embryos for longer than two years without a declaration from the Court that this would be lawful. Any consent to storage and any variation of that consent must be in writing and signed by the person giving it. The Court found that the form as originally signed by Clive at home, consenting to a ten-year storage period, was a valid consent for the purposes of the 1990 Act. The amendment made to the MT form had not been signed (all other amendments to the form had been initialled by Clive) meaning that there had been no valid variation to the form.

Fortunately, the case was, in the end, reasonably straightforward from a legal perspective because it was clear that the requirement for consent to be in writing and signed had not been fulfilled. However, the case exposes some uncertainties in the statutory requirements. For example, a future case may require the Court to answer the question of whether amendments to written consents must also be informed and what is meant by an informed consent in this context (that is whether a person should be offered counselling and given such information as is proper before the written consent is withdrawn or amended).

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22 [2016] EWHC 2493 (Fam).
In *L v. Human Fertilisation & Embryology Authority & Secretary of State for Health* the Court of Appeal held that the HFEA’s absolute requirement of effective consent for use of continued storage and use of sperm is compatible with the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR).

The claimant wished to undergo fertility treatment services using her deceased husband’s sperm in order to have the chance of a full genetic sibling for her daughter. On 26 June 2007 the claimant's husband died in hospital unexpectedly after an appendectomy. Shortly after his death the claimant made an urgent out-of-hours application to retrieve and preserve his sperm, which was granted. The hospital was notified of that application, but HFEA was not. The sperm was transferred to a clinic where it continued to be stored. The claimant then sought declaratory relief so that the sperm could lawfully continue to be stored and then used either in the UK or exported for storage and use in a clinic abroad. The claimant also applied to the HFEA for permission to transfer the sperm abroad. The HFEA adjourned the application for export pending the court's ruling as to the lawfulness of the storage of the sperm. The Court dismissed the claimant's application. Mr. Justice Charles commented that ‘at the heart of the competition between the rights of those involved is the issue of autonomy and choice’. The Court held that the absolute and bright line rules relating to effective consent for storage for use (and that subsequent use) in the UK as they relate to a dead person were within the State’s margin of appreciation. In relation to storage for use and such subsequent use outside the UK, the Court regarded the position as less clear, given the discretion conferred on the HFEA to authorise the import or export of gametes subject to such conditions as the HFEA thinks fit.

Whilst the Human Fertilisation and Embryology Authority could grant a special direction permitting export of sperm and modify the provisions of the 1990 Act governing licence conditions and consent for export purposes, it had no power to modify licence provisions for the purposes of storage and use of sperm in the UK prior to any transfer abroad.

4. POSTHUMOUS CONCEPTION AND SURROGACY

As illustrated above, the most common scenario for a posthumous conception is that the partner of the deceased, generally his widow or girlfriend, seeks to use his frozen gametes herself, intending to fertilise the egg and carry the pregnancy to term. However, other scenarios are arising, including in the context of using eggs of the deceased and in surrogacy arrangements. In February 2016, Mr. and Mrs. M were granted permission to appeal an English decision in which he held that the Statutory Approvals Committee (the ‘Committee’) of the HFEA was entitled to decline Mr. and Mrs. M's application to export the eggs of their deceased daughter, AM, to a fertility centre in the United States of America. The couple had claimed that AM had consented to the posthumous use of her eggs and anonymous sperm to allow Mrs. M to become a surrogate mother and grandmother simultaneously.

AM had been diagnosed with cancer at the age of 21 and had died six years later in 2011. Throughout the greater part of that time, she had been in hospital. In 2008, three years before her death, AM had been counselled and given relevant information before she signed a consent form, which had been provided by

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23 [2008] EWHC 2149 (Fam).
24 (1950) ETS 5. Article 8 ECHR: Right to respect for private and family life.
25 At para 94.
26 Applying Evans v. UK App No 6339/05 (ECHR, 10 April 2007).
a London based IVF Clinic, to permit her eggs to be harvested and stored after her death. However, AM was not offered the relevant form in which to state how she wanted her eggs to be used in the event of her death. Her failure to complete this form meant that her eggs could not be used posthumously by her mother to conceive a child in the UK.

One way to overcome AM's lack of written consent was for Mr. and Mrs. M to apply to the HFEA to export AM's eggs to the USA, fertilise them with anonymous sperm and for any resultant embryos to be implanted in Mrs. M. When such an application is made, the HFEA via the Committee, may waive the written consent requirement. However, in doing so, it must not evade the purposes of the HFEA 1990 Act. Therefore, the Committee had to consider whether there was sufficient evidence that AM had consented to her mother acting as a surrogate after AM's death. It concluded that AM had not been given the relevant information relating to posthumous conception and that she had not made her intentions clear in any way which could be regarded as an effective consent.

Mr. and Mrs. M sought judicial review of the Committee's Decision. They submitted that the Committee had disregarded the greater part of Mrs. M's evidence of AM's verbal wishes. It had also erroneously considered that AM could not have consented to Mrs. M becoming a surrogate mother and a grandmother unless she had received information about all the necessary steps for that to be achieved.

Lady Justice Arden gave the Court's unanimous decision and considered three factors to be of relevance in allowing Mr. and Mrs. M's appeal: (i) the Committee had misstated that there was no evidence of AM's consent to the use of her eggs by her mother to become pregnant after AM's death; (ii) the Committee had failed to explain why AM, in order to give an effective consent, needed to have received all the information relevant to each of the steps which her mother would have to take to give birth to AM's posthumous child; and (iii) the Committee had not revealed what information the HFEA 1990 Act required AM to have been given for her consent to be effective.

Lady Justice Arden accepted that the requirement of relevant information for those seeking fertility treatment was fundamental to the policy behind the HFEA 2008 Act. It not only ensured regulatory certainty but it also respected the autonomy of patients. However, there was no abstract concept of relevant information laid down in the Act. It merely requires 'such relevant information as is proper' to be given. Such information would vary according to the circumstances of the case including the type of treatment and the nature of the person seeking it.

Following the Court of Appeal’s judgment, the Committee has ‘in the exceptional and unique circumstances of this case’, granted Special Directions for the export of three eggs to New York. Nevertheless, the status

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29 See Section 12 and Schedule 3 to the HFEA 1990.
30 R (on the application of IM and another) v. Human Fertilisation and Embryology Authority [2016] EWCA Civ 611, [2016] All ER (D) 06.
31 Ibid., paras 63 to 84.
32 At para 2.
33 Schedule 3 specifies the requirements for effective consent from the provider of the gametes for the storage and subsequent use of the gametes, including, para 1, which provides: ‘A consent under this Schedule must be in writing and, in this Schedule, “effective consent” means a consent under this Schedule which has not been withdrawn,’ and para 3, which provides: ‘(1) Before a person gives consent under this Schedule- (a) he must be given a suitable opportunity to receive proper counselling about the implications of taking the proposed steps, and (b) he must be provided with such relevant information as is proper.’ He must also be informed of the effect of para 4 of Sch 3, namely, informed that he can vary or withdraw his consent.
34 See Centre 0078 (IVF Hammersmith) – application for Special Directions to export gametes to New York Fertility Services, New York, USA Friday, 5 August 2016 available at <https://ifqlive.blob.core.windows.net/inspectiondocuments/6096.pdf>. See also <
of a child conceived in this way would be problematic under UK law. Mr. and Mrs. M would not be eligible, on the face of the Act, to apply for a parental order for the child under section 54 HFEA 2008 as neither of their gametes would have been used to procreate the child.36

5. IMPLICATIONS

The issues raised in this paper touch upon difficult questions of public policy. While (prospective) parents can experience an increase in autonomy due to new reproductive technologies which enable posthumous conception, the children born as a result do not necessarily experience a commensurate increase in equality in the eyes of the law as UK law demonstrates. For example, is the deceased father or mother a legal parent for all purposes (e.g. succession or survivor benefits)? And if there are other children born before the use of posthumous conception, are the children legal siblings?

From a practical perspective, these cases illustrate the importance of gamete providers and gamete recipients alike consenting to fertility treatment involving them or their bodily material and that when the decision to freeze gametes is made, all possible uses of those gametes (possibly abroad and surrogacy) are considered, discussed and recorded. Sometimes these matters will need to be considered quite quickly and at times of emotional distress, but what is clear is that it is important to think through the implications to ensure that they are stored and used as the gamete provider intends whether in the UK or elsewhere.


35 Section 54(1) provides: ‘On an application made by two people (“the applicants”), the court may make an order providing for a child to be treated in law as the child of the applicants if— (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination, (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo …’

36 An adoption order might be a possibility although Theis J’s concerns which she expressed in B v. C (Surrogacy: Adoption) [2015] EWFC 17, [2015] 1 FLR 1392 would have to be considered.