

The Legal and Medical Ethics of Post-Mortem Sperm Retrieval on Behalf of Grandparents

by
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Introduction

The case law and legal literature concerning post-mortem sperm retrieval (PMSR)¹ is relatively new and sparse.² In most

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¹ “Post-mortem sperm retrieval” is also called “posthumous sperm retrieval.” Further, in some cases and the literature, the word “retrieval” is replaced with the word “collection” or “extraction” or “harvest” or “procurement.” This article will use the now more common term “post-mortem sperm retrieval” (PMSR).

The retrieval of sperm *after death*, including brain death and irreversible coma, is to be distinguished from those cases concerning sperm that is collected and preserved *during the life before brain death or irreversible coma* of the sperm donor (often in the face of cancer treatment) and then used for insemination/conception after death (“post-mortem insemination”). “Doctors encourage patients who undergo medical treatment that may negatively affect their reproduction (such as cancer patients undergoing chemotherapy) to preserve sperm or eggs beforehand, and such harvesting is part of routine medical practice today.” Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 J.L. & HEALTH 29, 36-37 (2014). See, e.g., *Delzer v. Berryhill*, 722 Fed. Appx. 700 (Mem) (9th Cir. 2018); *MacNeil v. Berryhill*, 869 F.3d 109 (2nd Cir. 2017); *Estate of Kievernagel*, 83 Cal. Rptr.3d 311 (Cal. Ct. App. 2008); *Hecht v. Sup. Ct.*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993); *Hall v. Fertility Inst. of New Orleans*, 647 So. 2d 1348 (La. Ct. App. 1994); *Woodward v. Comm’r Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Certified Question from U.S. Dist. Ct. W. Mich.*, 825 N.W.2d 566 (Mich. 2012); *Khabaaz ex rel. Eng v. Comm’r Soc. Sec.*, 930 A.2d 1180 (N.H. 2007); *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Surr. Ct. 2007); *Burns v. Astrue*, 289 P.3d 551 (Utah 2012). See generally Benjamin C. Carpenter, *Sex Post Facto: Advising Clients Regarding Posthumous Conception*, 38 ACTEC [AMERICAN COLLEGE OF TRUSTS AND

cases, the claim for the use of the sperm has come from a widow or sweetheart.³ A new, and to some troubling, scenario is becom-

ESTATES COUNSEL] L.J. 187 (2012); Cynthia E. Fruchtman, *Tales from the Crib: Posthumous Reproduction and ART*, 33 WHITTIER L. REV. 311 (2012); Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521 (1993); Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 296; Jessica Knouse, *Liberty, Equality, and Parentage in the Era of Posthumous Conception*, 27 J.L. & HEALTH 9 (2014); Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y. 332 (2009); E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J. L. & HEALTH 229 (1987); Ellen Trachman & William E. Trachman, *The Walking Dead: Reproductive Rights for the Dead*, 3 SAVANNAH L. REV. 91 (2016); Ruth Zafran, *Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47 (2007). *See also* CAL. PROB. CODE § 249.5 (2015) (“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 . . . [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”); UNIF. PARENTAGE ACT § 708 (2017), 9B U.L.A. 76 (Supp. 2019) (“If an individual who consented in a record 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 spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.”); UNIF. PROB. CODE § 2-220 (2010), 8 pt. 1 U.L.A. 130 (2013) (the deceased’s consent to posthumous reproduction must be proved, either in writing or via other clear evidence); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, prefatory note (1988), 9C U.L.A. 365 (2001); UNIF. ANATOMICAL GIFT ACT § 2(30) (2006), 8A U.L.A. 87-8 (2014) (harvesting of sperm comes within the purview of the Act).

² Although the first successful PMSR was in 1978, even as of 2018, forty years later, “few of the cases dealing with gamete retrieval and use have been published. Therefore, it is difficult to understand the reasoning and the legal grounds that courts have used to authorize gamete retrieval and use.” Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction Be Legally Permissible Without the Deceased’s Prior Consent?*, 5 J. L. & BIOSCIENCES 329, 334 (2018).

³ *E.g.*, *Robertson v. Saadat*, 48 Cal. App. 5th 630 (May 1, 2020) (widow and parents of deceased sought use of sperm harvested from husband/son while in irreversible coma); *In re Matter of Daniel Thomas Christy*, Johnson County (IA) Case No. EQCV068545 (Sept. 13, 2007); *see also* Dorian Block, *Judge Allows Wife to Harvest Dead Husband’s Sperm*, N.Y. DAILY NEWS (Apr. 18, 2009), <https://www.nydailynews.com/new-york/bronx/judge-wife-harvest-dead->

ing more common: post-mortem sperm retrieval by the deceased's parents so that they may become grandparents.⁴

husband-sperm-article-1.361746; Jose Martinez, *After Husband Kills Himself, Wife Goes to Court Saying She Wants His Sperm*, N.Y. DAILY NEWS (Oct. 15, 2010), <http://www.nydailynews.com/new-york/husband-kills-wife-court-sperm-article-1.189691>. See generally Lisa V. Brock & Anna C. Mastroianni, *Sperm and Egg Retrieval for Posthumous Reproduction: Practical, Ethical and Legal Considerations*, in OFFICE ANDROLOGY 267, 271 (Phillip E. Patton & David E. Battaglia eds. 2005); Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289; Charles P. Kindregan, Jr., *Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons*, 7 J. HEALTH & BIOMEDICAL L. 147 (2011); Jean Denise Krebs, *Any Man Can Be a Father, but Should a Dead Man Be a Dad?: An Approach to the Formal Legalization of Posthumous Sperm Retrieval and Posthumous Reproduction in the United States*, 47 HOFSTRA L. REV. 775 (2018); Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159, 1176-77 (2010) (discussing unreported cases that permitted retrieval and potential procreative use of decedents' sperm on the application of the wife and parents in light of evidence of decedent's prior expressed intention to father children); Simana, *supra* note 2; Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J. L. & HEALTH 243 (1999/2000); Bethany Spielman, *Pushing the Dead into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J.L. MED. & ETHICS 331 (2009); Devon D. Williams, Comment, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181 (2011); Zafran, *supra* note 1; Lark Zink, *A Framework for Untangling Intents in Posthumous Sperm Extraction*, 8 OKLA. J. L. & TECH. 61 (2012). For a view regarding other countries' laws, see Ron Kodama & Keith Jarvi, *Postmortem Sperm Retrieval: The Canadian Perspective*, 30 J. ANDROLOGY 407 (2009); Benjamin Kroon et al., *Postmortem Sperm Retrieval in Australia*, 52 AUSTL. & N.Z. J. OBSTETRICS & GYNECOLOGY 487, 488 (2012) (discussing the law in Victoria, Australia that allows exportation of retrieved sperm to a State or a Territory that allows use without written consent of the deceased).

⁴ An excellent survey of the case law and literature prior to 2019 regarding the question at hand, with special emphasis on both the therapeutic value of grandparenthood and the Israeli experience of PMSR, is Nofar Yakovi Gan-Or, *Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law*, 37 COLUM. J. GENDER & L. 109 (2019).

At the risk of taking a complex question and boiling it down to four words, the key inquiry in any PMSR is the "intent of the deceased" and not the wishes of the grandparents absent that intent. Even in countries that recognize grandparent custody and visitation rights, i.e., United States, England, Canada, and Israel, "none of these countries recognize the right of parents' parents to claim

This article provides a guide to the law and ethics concerning post-mortem sperm retrieval. Part I provides a description of the medical procedure of PMSR. Part II surveys the case law, domestic and foreign, that has addressed PMSR with a focus on PMSR on behalf of grandparents. Part III surveys the legal ethics implicated in such cases. Part IV provides a general introduction to medical ethics. Part V is a survey of PMSR guidelines and hospital protocols for PMSR, again focusing on PMSR requests on behalf of grandparents. Part VI is a discussion of the ethical perspectives concerning PMSR. Finally, in the conclusion, the authors urge that the law catch up to the medical ethics concerning PMSR, and focus not on the consent of the deceased, but on the best interests of the child.

I. PMSR Procedures

The first successful PMSR procedure was reported in 1980 by Dr. Cappy Miles Rothman.⁵ Dr. Rothman reported that in 1977, Rothman had surgically extracted and frozen viable sperm from a man who had sustained a fatal brain injury in a motor vehicle accident. Since 1980, requests for PMSR have increased⁶ and several different methods have been documented.⁷ These

the birth of their grandchildren.” FAR 7141/15 *Anonymous v. Anonymous* 34-35 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

⁵ Cappy Miles Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 J. FERTILITY & STERILITY 512, 512 (1980) (describing the first successful postmortem sperm retrieval procedure).

⁶ Joshua M. Hurwitz et al., *Posthumous Sperm Procurement: An Update*, 78 FERTILITY & STERILITY S242 (Sept. 2002).

⁷ In his 1980 publication, Rothman notes there were four potential options to obtain viable sperm from the man who arrived to the hospital with brain death. At the time, Rothman chose a surgical approach after the deceased also underwent organ donor surgery. See also Dana A. Ohl et al., *Procreation After Death or Mental Incompetence: Medical Advance or Technology Gone Awry?*, 66 FERTILITY & STERILITY 889, 889-91 (1996) (providing a literature review and case studies of seven cases in which PMSR was requested); Ralph Spira, *Artificial Insemination After Intrathecal Injection of Neostigmine in a Paraplegic*, 267 LANCET 670, 670-71 (1956) (discussing the first reported case of successful impregnation by sperm retrieved from a paraplegic using injection at the spinal cord).

methods include electroejaculation (EEJ), biopsy, full testicle removal, and aspiration.⁸

EEJ uses electrical stimulation of the pelvic nerves via rectal probe to induce ejaculation. Because it relies on an intact ejaculatory reflex, EEJ can only be performed on an individual who maintains cardiac activity.⁹ This is the preferred method for the deceased that still have cardiac activity because it is minimally invasive and can yield a large quantity of viable sperm.

Removal of testicular tissue through biopsy can yield a large volume of tissue that can be stored for longer and does not require immediate storage in appropriate freezing conditions (cryopreservation). It can also be performed by more general urologists and surgeons, or a pathologist during autopsy.

Removal of the entire testicle (orchiectomy) can also be performed by general urologists, surgeons, and pathologists. Orchiectomy maximizes the volume of tissue that can be obtained.

The process of aspiration involves drawing sperm into a hollow needle which can be inserted into several parts of the reproductive tract via puncture or small incision.¹⁰ This procedure also has the advantage of being minimally invasive and prevents

⁸ Other methods include, but are not limited to, injection at the spinal cord and manual stimulation.

⁹ Medical literature distinguishes between antemortem and postmortem in scenarios when a person still has cardiac activity, versus the cessation of cardiac activity. Though “antemortem” translates to “before death,” the procedure in this scenario is still considered postmortem sperm retrieval. See *supra* note 1, defining “postmortem” as referring to brain death, irreversible coma, and full biological death.

¹⁰ Acacio Fertility Center in California describes three types of sperm aspiration: vasal sperm aspiration, epididymal sperm aspiration, and testicular sperm aspiration. In vasal sperm aspiration, sperm are collected via a hollow needle from the vas deferens. Microscopic vasal sperm aspiration requires a small incision in the vas deferens, while percutaneous vasal sperm aspiration is done through a puncture in the skin. In epididymal sperm aspiration, sperm are collected via a hollow needle from the epididymis. Epididymal sperm aspiration can also be done via an incision or a small puncture. Finally, in testicular sperm aspiration, sperm are collected via a hollow needle from various locations around the testis. *Surgical Sperm Retrieval*, ACACIO, <http://www.acaciovfertility.com/surgical-sperm-retrieval> (last visited June 8, 2020).

contamination of sperm from other parts of the deceased's body.¹¹

Once viable sperm are successfully retrieved, cryopreservation is required for storage. The absolute limit on how long sperm can stay viable in a cryopreserved state is unknown, but several cases of successful live birth using sperm that has been frozen for decades have been documented.¹² The time constraints on the actual PMSR, i.e., post-mortem sperm retrieval, however, are more constricted. The absolute limits are unclear, but medical literature suggests PMSR be performed within 24-36 hours after death. Because of these time constraints, well established legal and medical ethics are necessary; there is simply not enough time to engage in extended debate.

II. Cases Addressing PMSR

In *Matter of Zhu*,¹³ the deceased Peter Zhu was a cadet at West Point Military Academy, scheduled to graduate in May

¹¹ Miriam Hadj Moussa et al., *Postmortem Sperm Retrieval: Ethical, Legal, and Logistical Considerations*, in *THE COMPLETE GUIDE TO MALE FERTILITY PRESERVATION* 140-42 (Ahmad Majzoub & Ashok Agarwal eds. 2008).

¹² In 1979, a patient with cancer had his sperm cryopreserved. In 1998, the man and his partner were accepted for IVF treatment. Sufficient embryos were created in the IVF cycle that were subsequently returned to cryopreservation. In 2001, the frozen embryos were thawed and transferred, resulting in a healthy baby boy born in 2002. When this case report was published in 2004, it was believed to be the longest period of sperm cryopreservation, resulting in a live birth. Greg Horne et al., *Live Birth with Sperm Cryopreserved for 21 Years Prior to Cancer Treatment: Case Report*, 19 *HUM. REPROD.* 1448, 1449 (2004). At some time in calendar year 1971, a man donated his sperm and it was cryopreserved. In October 2011, a 25 year old patient completed an ICF cycle and successfully received a frozen embryo transfer in December 2011. Two healthy baby girls were delivered. The semen was stored for approximately 40 years and resulted in a live birth, the longest reported storage at the time of publication. Andras Z. Szell, *Live Births from Human Semen Stored for 40 Years*, 30 *J. ASSISTED REPROD. & GENETICS* 743, 744 (2013).

¹³ 103 N.Y.S.3d 775 (N.Y. Sup. Ct. 2019). See also Allyson Chiu, *Their Only Son Died Unexpectedly. But a Court Order to Retrieve His Sperm Means His Legacy Could Live on*, *WASH. POST* (Mar. 5, 2019), <https://www.washingtonpost.com/nation/2019/03/05/their-only-son-died-unexpectedly-court-order-retrieve-his-sperm-means-his-legacy-could-live/>; Liam Stack, *Parents of Dead West Point Cadet Can Use His Sperm, Judge Rules*, *N.Y. TIMES* (May 22, 2019), <https://www.nytimes.com/2019/05/22/nyregion/west-point-cadet-sperm-grand>

2019. In February 2019, Peter was involved in a ski accident. As a result of severe fractures to the spinal cord, Peter was declared brain dead at Westchester County Medical Center on February 27, 2019, but remained alive through life support pending organ donation, pursuant to Peter's express wishes on his organ donation card. Peter was scheduled for organ donation removal surgery at 3 P.M. on March 1, 2019. On the morning of March 1, 2019, Peter's parents brought a petition requesting that the Medical Center retrieve sperm from Peter and provide that sperm to a sperm bank or similar facility of the parents' choosing. The Medical Center represented that while the hospital did not consent to the procedure, neither did it object and that it would comply with any duly issued order. The court granted interim relief,¹⁴ and Peter's sperm was successfully retrieved and preserved at a sperm bank.

The court then set a hearing to deal with the issue of the ultimate disposition of Peter's sperm. At the hearing, the parents testified that their decision to seek relief was "essentially, to preserve the possibility of the use of Peter's sperm in the future in order to posthumously realize his dream of having children and continuing the family line." The court noted that the parents had not definitively decided they would use the sperm to create a grandchild, nor had they lined up a surrogate. They just wanted to keep open that possibility. The court framed the issue as follows: "Who, if anyone, should be given the authority to determine the disposition of Peter's genetic material, now preserved in the sperm bank."¹⁵

child.html, for a fuller description of the facts of the case, including interviews with the grandparents.

¹⁴ On March 1, 2019, the Court granted the following interim relief: ORDERED that the Westchester Medical Center is hereby directed to retrieve sperm from the Petitioner's son, PETER ZHU, and to provide such sperm to a sperm bank or similar facility of Petitioners' choosing for storage until further Order of this Court regarding disposition of such sperm, and that the Westchester County Medical Center has the Court's permission to release to said facility all information necessary to effect the transmission of such material to the sperm bank or other facility including but not limited to HIV and hepatitis related information.

Matter of Zhu, 103 N.Y.S.3d at 776-77.

¹⁵ *Id.* at 777.

The court stated that the intent of the deceased was the only issue.¹⁶ While Peter had an organ donor card, “Peter left no express direction with respect to the posthumous disposition or use of his genetic material, including how or whether it could or should be used for procreative purposes.”¹⁷ The court nevertheless found, based on testimony concerning Peter’s “prior actions and statements,”¹⁸ that Peter intended sperm retrieval. These actions and statements included: organ donation, and service to others as evidenced by his intended career in the military.

Thus, even though Peter did not expressly state that he wanted his sperm to be used for reproductive purposes, should his parents chose [sic] to do so in the future, it would not do violence to his memory. Indeed, as his parents confirmed in their Petition and testimony, such use would not be contrary to Peter’s moral or religious beliefs, but would be consistent with his past conduct and statements.¹⁹

Most important to the court was testimony concerning Peter’s devotion to family:

For example, Peter’s parents testified to conversations they had over time with Peter, in which he related to them his dream of having several children, and the responsibility he felt to carry on his cultural and family legacy. His parents shared with the Court a card sent by Peter to a religious studies professor after a trip to China, in which he related to the professor that “[y]ou are the type of teacher who I will share with my children. The stories that you told me will be passed on for future generations to come!” More recently, Peter communicated to his Company’s Tactical Officer at West Point, Captain Marc Passmore, his plans for the future, which included a family and children. . . . This and the other aspirations were reflected in a writing called a “baseball card” (due to its resemblance to the back, statistical side of a typical major league player’s baseball card) which each cadet completes in his or her senior year, as Peter did. Peter’s card, completed by him only months ago, lists as his “Family/Goals/Notes” to “[h]ave three kids, Get married before 30; Become a career officer in the military.” Thus, . . . the importance of family to Peter was a hallmark.²⁰

The court went on to rely on New York’s intestacy and anatomical gift statutes to conclude the parents were the individuals

¹⁶ See cases cited *supra* note 3.

¹⁷ *Matter of Zhou*, 103 N.Y.S.3d at 284.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 284-85.

the cadet “would have intended to make decisions with respect to the preservation and disposition of the procreative fluids at issue.”²¹ Nowhere did the court find that Peter specifically consented to the use of his sperm to create children after his death.

A California Court distinguished *Zhu* in *Robertson v. Saadat*.²² In that case, Aaron Robertson entered into an irreversible coma due to a genetic disease, Marfan Syndrome. Shortly before his death, Sarah Robertson, his wife, arranged to have his sperm extracted and banked for future use. Ten years later, when Sarah requested the sperm from the sperm bank, the facility reported it had lost the sperm. Sarah and Aaron’s parents brought suit, Sarah asserting contract and tort claims based on the loss of her ability to have a child biologically related to her deceased husband. The court concluded as to Sarah:

We agree with the trial court. Under California law, the donor’s intent controls the disposition of his or her gametic material upon death. The only allegations regarding plaintiff’s husband’s intent were that plaintiff, at the time she requested her husband’s sperm be extracted, represented to his physicians that she and her husband had always wanted to have children together, and provided letters and cards written by her husband similarly indicating a desire to have children with his wife. Although those allegations, if true, would establish that the husband wished to have children with his wife while he was alive, they fail as a matter of law to establish that the husband intended his wife to conceive a child with his sperm posthumously.²³

As to Aaron’s parents, the court stated that they simply did not have standing to assert damages. Distinguishing *Zhu*, where there was no explicit finding that Peter wished to be a father after death, the court stated:

Zhu also is not persuasive. As we have discussed, neither California’s intestacy law nor the UAGA applies to a spouse’s use of gametic material for posthumous conception, so to the extent the analogous laws in New York provided a statutory basis for the decision in *Zhu*, that basis is lacking here. Further, we respectfully disagree that the signing of an organ donor card and expressions of a desire to have children and carry on the family legacy are sufficient to indicate an intention to allow one’s gametic material to be used for posthumous conception.²⁴

²¹ *Id.* at 288.

²² 262 Cal. Rptr.3d 215 (Cal. Ct. App. 2020).

²³ *Id.* at 218.

²⁴ *Id.* at 223.

It appears that California, the birthplace of post-mortem sperm retrieval for widows and sweethearts,²⁵ was drawing the line at grandparents.

Other cases concerning grandparents requesting post-mortem sperm retrieval are unreported trial court cases or from another country. In the United States, in an early case, *In re Daniel Thomas Christy*,²⁶ Daniel Christy suffered severe head trauma in a motorcycle accident, was in a coma, and was declared brain dead. As in *Zhou*, Daniel was an organ donor. Daniel's fiancée and parents asked the hospital to perform sperm retrieval. When the hospital refused to do so without a court order, Daniel's parents filed for an emergency order. The Iowa court granted the request, citing as its authority the Uniform Anatomical Gift Act. The court held that under the UAGA, the term "anatomical gift" includes sperm donation. Such a donation may be granted by either the donor himself or, if he did not refuse to make such a donation, his parents.²⁷

In another case from 2007, Nikolas Evans, age twenty-three, was killed in a bar fight. His mother, Marissa, applied for an emergency court order to authorize retrieval of Nikolas's sperm and its later use to create a grandchild for her. Marissa's application was based on "her many conversations with her son about his desire to have three sons." The judge granted the relief requested,²⁸ and Marissa proceeded with her plan to create grandchildren.²⁹

In the first case in Israel in 2007, an Israeli soldier, Kevain Cohen, age twenty, was killed by a sniper in the Gaza Strip. He was unmarried and had no will. At the request of his parents, the soldier's sperm was retrieved two hours after his death and

²⁵ Estate of Kievernagel, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008); Hecht v. Superior Ct., 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

²⁶ *Christy*, No. EQVO68545.

²⁷ *Id.* See also Spielman, *supra* note 3, at 332.

²⁸ Martha Neil, *Texas Judge Tells Medical Examiner to Help Mom Get Dead Son's Sperm*, ABA J. (Apr. 8, 2009), <https://www.abajournal.com/news/article/sperm>.

²⁹ *In re Estate of Nikolas Colton Evans, Deceased*, No. C-1-PB-09-000304, 2009 WL 7729555 (Tex. Prob. Ct. Apr. 7, 2009). See Frank Heinz, *Texas Mother Closer to Creating Dead Son's Child*, NBC NEWS DALLAS-FORT WORTH (July 12, 2011), <https://www.nbcdfw.com/news/local/texas-mother-closer-to-creating-dead-sons-child/1898152/>.

stored in a hospital. When the parents sought access to the sperm, the hospital refused, stating that only a spouse could make such a request. On January 15, 2007, a Tel Aviv court granted the parent's request, finding that the soldier had "yearned to have a family," and ruled that the sperm could be injected into a woman selected by the deceased's family.³⁰

³⁰ Family Court (Tel-Aviv) No. 4940/05, Cohen v. Attorney General of Israel.

This case can be contrasted with a more recent case from Israel, where the high court ruled that a dead soldier's parents could not use the sperm of their deceased soldier son, Shaked Meiri, because he had left a widow, and she did *not* consent to such use. FAR 7141/15 Anonymous v. Anonymous 110-111 (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.). See Jeremy Sharon, *Supreme Court Prevents Use of Dead Soldier's Sperm*, JERUSALEM POST (Apr. 4, 2017), <https://www.jpost.com/israel-news/supreme-court-prevents-use-of-dead-soldiers-sperm-486082>. For a fuller discussion of the the Shaked Meiri case, see Gan-Or, *supra* note 4, at 134.

Another Israeli case concerning a fallen soldier took the same path: approval by the family court later overturned by the appellate court, because the fallen soldier had left a widow or fiancée. File No. 7141/15 Supreme Court (Jerusalem), Anonymous v. Anonymous (Dec. 22, 2016), Nevo Legal Database (by subscription, in Hebrew). According to Shelly Simana:

The Supreme Court rejected the parents' application to use the deceased's sperm, and particularly the claim that they had a protected interest in grandparenthood. The Court explained that the right to grandparenthood is not recognized under Israeli law when the grandchild's parents are alive and legally competent. In addition, even when grandparents' rights are recognized, they only extend to grandchildren who have already been born. Parents, the Court ruled, do not have the right to demand the birth of their grandchildren. It determined that with the exception of unique cases, the deceased's parents should not have standing in terms of clarifying their son's wishes if that son had a life partner. The Court, however, left unresolved the question of whether parents should also be prohibited from using their child's gametes in instances in which the deceased had been single. That having been said, a minority opinion by Justice Hanan Melcer maintained that the parents should be allowed to use their son's sperm based on the deceased's right to continuity. Justice Melcer asserted that the evidence makes clear that the deceased wanted to have continuity through reproduction and leave a mark in this world. The Court thus, so he argued, must protect the deceased's interest.

Simana, *supra* note 2, at 340. See generally AVISHALOM WESTREICH, ASSISTED REPRODUCTION IN ISRAEL: LAW, RELIGION AND CULTURE (Brill Boston, 2016); Irit Rosenblum, *Being Fruitful and Multiplying: Legal, Philosophical, Religious,*

Since this case, the practice has become, if not common, widely accepted in Israel. As stated by one commentator:

The case was unique because Cohen neither left his wishes in writing, nor did he know the woman that would raise his child. A designated mother is now pregnant with his sperm, and is expected to give birth to the world's first baby to be born twelve years after his father's death. The Cohen case paved the way for a string of legal precedents in Israel. In December 2009, a family court approved the verbal Biological Will of Idan Snir, and empowered his parents to donate his sperm to a single woman who wished to raise a child from a known sperm donor. In April 2011, an Israeli court approved a written Biological Will in which Baruch Posniansky empowered his parents to choose a single woman who wished to conceive with his sperm. These cases are significant because the Israeli legal system affirmed the young men's right to father children after death and independent of a female partner, validated the Biological Will, and recognized its benefits for children, parents, and grandparents.³¹

A few cases that are not strictly PMSR, because the sperm was preserved well before brain death, bear discussion, since they deal with grandparents seeking the use of the sperm of their dead sons. In a case from Russia, Andrei Zakarova had his sperm frozen before undergoing cancer treatments. Two years after he died, his mother, Ekaterina Zakarova, aged fifty-five, persuaded doctors to use the frozen sperm to fertilize a donor egg that was then implanted in a surrogate mother. After the baby was born, Russian officials refused to register Andrei as the father because he died two years prior to the child's birth. Further, because the egg donor was anonymous, the baby did not have a mother. Thus, the baby had no legal parents, did not officially

and Medical Perspectives on Assisted Reproductive Technologies in Israel and Internationally, 36 *SUFFOLK TRANSNAT'L L. REV.* 627, 633 (2013).

³¹ Rosenblum, *supra* note 30, at 633. *See, e.g.*, File No. 6699-06-13 Family Court (Petah Tikva) 16699-06-13, *Shahar v. Attorney General of Israel* (Sept. 27, 2016), Nevo Legal Database (by subscription, in Hebrew) (concerning Omri Shahar, allowing petitioners, Omri's parents, to use their dead son's sperm to create a grandchild; "If Omri was standing in front of us, there is no doubt that he would have expressed a definitive will that, under these circumstances, his parents should fertilize a donated egg with his sperm and raise the child on their own"), *overruled* File No. 45930-11-16 District Court (Central District), *State of Israel v. Shahar* (Jan. 29, 2017), Nevo Legal Database (by subscription, in Hebrew). A full discussion of the case of Omri Shahar can be found in Simana, *supra* note 2, at 338-40.

exist, and could not have a birth certificate. The Civil Registry further said that Ekatarina had no claim on her grandchild.³²

On the other hand, a case from India in 2018 allowed post-mortem conception.³³ In this case, Prathamesh Patil (Patil) died from a brain tumor in 2016. As is common with men about to undergo chemotherapy, he decided to preserve his sperm. Patil specifically authorized his mother and his sister to use it in the event of his death.

Following Patil's death, his mother procured the sperm and used it to fertilize eggs from an anonymous donor. The resultant embryos were implanted into the mother's cousin. The twin babies were born February 12, 2018, and Patil's mother said she will raise the twins as her own children.³⁴

The European Court of Human Rights recently weighed in on the issue in *Petithory Lanzmann v. France*, in a decision dated November 12, 2019.³⁵ In that case, Petithory Lanzmann, the widow of French filmmaker Claude Lanzmann ("Shoah"), sought to transfer the sperm of her late son, Felix Lanzmann, to a fertility clinic in Israel. Felix died of cancer in 2017 at the age of twenty-three, three years after he was diagnosed with the disease. His frozen sperm had been deposited with the Cochin Hospital in Paris. According to his mother Petithory, it was her son's final wish before death to have children. "After his diagnosis, Felix made it clear to his family that he regretted not having the op-

³² Michael Leidig, *Russian Woman May Lose Grandson Conceived from Dead Son's Frozen Sperm*, 332 *BMJ* 627, 627 (2006), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1403200/>.

³³ Georgia Everett, *Woman Uses Dead Son's Sperm for IVF Grandchildren*, *BioNews* (Feb. 19, 2018), https://www.bionews.org.uk/page_96375.

³⁴ *Id.*

³⁵ European Court of Human Rights, Application No. 23038/18. The decision is available in French only at <https://perma.cc/9LQP-BYQA>. The press release issued by the Registrar of the Court may be found at: <https://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-6581546-8718168&file name=Decision%20Petithory%20Lanzmann%20v.%20France%20-%20refusal%20to%20allow%20Claude%20Lanzmann%u2019s%20widow%20to%20export%20her%20deceased%20son%u2019s%20sperm.pdf>. A translation by the Library of Congress is available at: <https://www.loc.gov/law/foreign-news/article/france-european-court-of-human-rights-upholds-french-refusal-to-transfer-deceased-mans-sperm-abroad-for-medically-assisted-reproduction/>.

portunity to start a family and that he wanted to preserve his sperm for those purposes.”³⁶

Petithory’s main argument was that the restrictions contained in French law violated her and her son’s rights to privacy and family life, as defined by Article 8 of the European Convention of Human Rights. Specifically, it violated her son’s right to decide how and when to become a parent, and it violated her own right to become a grandparent.

The European Court of Human Rights stated that neither the prohibitions on post-mortem procreation, nor the refusal to authorize the export of gametes on behalf of a deceased person, as codified in France, are violations of Article 8 of the Convention. Additionally, the Court ruled that the deceased son’s right to decide when and how to become a parent is nontransferable, and therefore Petithory could not claim to be a victim of an Article 8 violation on her son’s behalf. Furthermore, the Court explicitly stated that even though the desire for genetic continuity was a respectable personal aspiration, Article 8 of the Convention did not include a right to become a grandparent.³⁷

III. Legal Ethics and PMSR

As noted above, Israel is at the forefront of PMSR for grandparents. At the opposite extreme, France, Germany, Sweden, Taiwan, and the state of Victoria, Australia have banned PMSR completely.³⁸

In England, pursuant to the Human Fertilization and Embryology Act, posthumous sperm extraction is legal if written consent was obtained from the deceased, and if the woman seeking to conceive with the deceased’s sperm was given that permis-

³⁶ K. Thor Jensen, *Court Rules Mother Cannot Use Dead Son’s Sperm to Make Grandkids*, NEWSWEEK (Dec. 9, 2019), <https://www.newsweek.com/court-rules-mother-cannot-use-dead-sons-sperm-make-grandkids-1476273>.

³⁷ Cf. Annalisa Merilli, *France Has OKed the Transit of a Dead Man’s Sperm Across Its Borders*, QUARTZ GLOBAL BUS. NEWS (May 31, 2016), <https://qz.com/695960/a-french-court-just-made-it-legal-to-export-sperm-for-post-mortem-insemination/>.

³⁸ David Teitelbaum, *Be Fruitful and Multiply After Death, but at Whose Expense?: Survivor Benefits for the Posthumously Conceived Children of Fallen Soldiers*, 14 CARDOZO PUB. L. POL’Y & ETHICS J. 425, 430 (2016).

sion in writing. Canada has a similar law.³⁹ Argentina, Belgium, Latvia, the Netherlands, New Zealand, and Spain also require explicit written consent for posthumous sperm extraction.⁴⁰

In the United States, there are no laws prohibiting posthumous reproduction, and there are instead state intestacy and probate laws, as well as Uniform Laws, that are intended to ease PMSR, all focusing on the deceased's intent.⁴¹ Whether PMSR for a deceased's parent[s] is legally allowed in a particular state will depend on that state's interpretation of its own laws. As noted above, contrast the different results in *Zhu* and *Robertson v. Saadat*, based in large part on the interpretation of the state's intestacy laws.⁴² "As a result, posthumous sperm retrieval and reproduction is regulated locally, oftentimes based on guidelines implemented by individual hospitals."⁴³

Thus far, the legal considerations have focused on the rights of the deceased to control his parenthood.⁴⁴ Further, there are no ethical rules governing an attorney's conduct in a PMSR case.⁴⁵

³⁹ Human Fertilisation and Embryology Act, 1990, c. 37, § 12, sch. 3 (Eng.); Assisted Human Reproduction Act, R.S.C. 2004, c. L-2 (Can.) (both proscribing removing sperm for reproductive purposes without consent).

⁴⁰ Teitelbaum, *supra* note 38.

⁴¹ See Jon B. Evans, Comment, *Post-Mortem Semen Retrieval: A Normative Prescription for Legislation in the United States*, 1 CONCORDIA L. REV. 133, 140 (2016); discussion *supra* in text at note 3.

⁴² See discussion, *supra*, text and notes 22-24.

⁴³ *Id.* See *infra* discussion Part IV.

⁴⁴ See Susan L. Crockin & Gary A. Debele, *Ethical Issues in Assisted Reproduction: A Primer for Family Law Attorneys*, 27 J. AM. ACAD. MATRIM. LAW. 289 (2015).

⁴⁵ The relatively new and unregulated practice of ARTs stands in contrast with adoption where adoption agencies are licensed and regulated by the state . . . No such body of ethical principles or agreed upon practices and regulations have yet coalesced in ARTs practice. It is for the most part completely self-regulated; it is a billion dollar industry awash in money; and its ultimate focus is on intended parents determined to have a child using their own genetic material or genetic material that has been carefully selected and vetted by the intended parents. Intended parents with fertility problems can also be vulnerable and in need of solid, ethical representation.

Crockin & Debele, *supra* note 44, at 295-96. This article contains an excellent and thorough discussion of an attorney's ethical duties under the Model Rules of Professional Conduct when representing ART clients.

Any ethical discussion must, however, focus on the child as well, as it always does when a parent dies and custody is at stake.⁴⁶ A child conceived and born through PMSR and surrogacy for the benefit of grandparents will be brought into the world as an orphan.⁴⁷ There is a greatly increased likelihood that

⁴⁶ See Tiffany Korte, Comment, *Terminally Ill Parents and Their Children: Determining the Proper Placement of Children Through the Best Interests of the Child or the Parental Preference Standard*, 17 FLA. COASTAL L. REV. 161 (2015).

For examples of child-centered perspectives on parental rights, see Katharine T. Barlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371 (1994); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents Rights*, 14 CARDOZO L. REV. 1747 (1993).

⁴⁷ In Shelly Sarig & Nili Tabak, *An Unusual Petition for Posthumous Sperm Retrieval? What Does It Add to the Debate?*, 27 MED. & L. 463, 466 (2008), the authors state:

[W]hen a child is born close in time to the death of a parent there develops, consciously or unconsciously, a tendency to identify the child with the late parent. The expectation arises that the child will fill the dead parent's place and bear their identity. The children themselves tend to idealize the missing parent. If this development is not temporary it can be harmful, with the child liable to perceive the surviving parent as wicked or punitive or hostile. The children may also demand from themselves that they meet unrealistically high standards.

There is also evidence that the death of a parent when the child is small carries the risk of the child being made a 'memorial lamp', a living monument to the dead father or mother. The memory of the dead parent enshrined in the living child can generate a dual emotional life and a dual identity, the child living both his or her own life and the life of the 'commemorated' parent. Orphanhood also brings with it strong feelings of pain, longing and missed opportunities. All this invites the question - does the desire of a parent to bear or have born a child they know will be orphaned of one parent outweigh the right of a child to have two living parents? Does a desire stemming from the pain of loss justify bringing into the world a child who will never know or enjoy the missing mother or father, a lack and deprivation that will last their whole life through?

Possibly, the "memorial lamp" metaphor is even stronger for those who wish to become grandparents by PMSR. See also Ruth Landau, *Planned Orphanhood*, 49(2) SOC SCI. & MED. 185, 188-94 (1999).

On the other hand, the Israeli family court in the case of Omri Shahar, discussed above in note 31, rejected the claim that the child would be subject to

the child will outlive the grandparent caregivers, leaving the child without care, protection, and support, unless the grandparents have planned very carefully for their death.⁴⁸ Moreover, such a child will usually not be entitled to Social Security Survivor Benefits.⁴⁹ These considerations should have a place when a child is going to be brought into the world without parents.⁵⁰

“planned orphanhood,” or would be “a living monument.” Instead, it assessed the child’s interests and affirmed that Omri’s parents would have an excellent parental capacity to raise the child. File No. 16699-06-13 Family Court (Petah Tikva) 16699-06-13, *Shahar v. Attorney General of Israel* (Sept. 27, 2016), Nevo Legal Database (by subscription, in Hebrew). The court reached this conclusion despite Omri’s mother explicitly stating, “A branch from our family tree has been cut, and there is nothing we can do about it. . . . But because of the new technology, we can make sure new leaves appear. We simply wish for the grandchildren that should have been.” Joseph Frankel, *Families Want to Use the Sperm of Their Dead Soldier Sons to Have Babies: Should This Be Allowed?*, NEWSWEEK (Dec. 1, 2017), <https://www.newsweek.com/families-use-sperm-dead-soldier-sons-have-babies-should-be-allowed-728412>.

⁴⁸ Indeed, one commentator noted: “[G]randparent caregivers’ health may diminish due to stress from taking on a parental role at an elderly age. Some health problems that have been attributed to grandparent caregivers’ duties include ‘depression, insomnia, back and stomach problems, and hypertension.’” Neta Sazonov, Note, *Expanding the Statutory Definition of “Child” in Intestacy Law: A Just Solution for the Inheritance Difficulties Grandparent Caregivers’ Grandchildren Currently Face*, 17 ELDER L.J. 401, 403 (2010).

⁴⁹ *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541 (2012). See Nathan Rick Allred, Note, *The Uncertain Rights of the Unknown Child: Federal Uniformity to Social Security Survivors Benefits for the Posthumously Conceived Child After Astrue v. Capato*, 66 OKLA. L. REV. 195 (2013); Katie Christian, “It’s Not My Fault!”: *Inequality Among Posthumously Conceived Children and Why Limiting the Degree of Benefits to Innocent Babies Is a “No-No!”*, 36 MISS. C. L. REV. 194 (2017); Mary F. Radford, *Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 33 (Fall 2009); Mark Strasser, *Capato, ART, and the Provision of Benefits to After-Born Children*, 2013 MICH. ST. L. REV. 1341, 1368.

⁵⁰ See BROWNE LEWIS, *THE ETHICAL AND LEGAL CONSEQUENCES OF POSTHUMOUS REPRODUCTION: ARROGANCE, AVARICE, AND ANGUISH* 1 (Sheila A.M. McLean ed., 2017); Bruce L. Wilder, *Test-tube Parents: Cryopreservation and the Fertile Corpse: A Retrospective*, 40 FAM. ADVOC. 40 (Spring 2018).

A summary of the concerns for the child in PMSR cases can be found at Catherine Robey, *Posthumous Semen Retrieval and Reproduction: An Ethical, Legal, and Religious Analysis* 6-8 (Master’s Thesis May 2015), https://wake.space.lib.wfu.edu/bitstream/handle/10339/57125/Robey_wfu_0248M_10703.pdf.

The lack of consideration for the child and the exclusive focus on the intent of deceased parent and the procreative wishes of the grandparent is evident in the various cases discussed above. In the case of Marissa Evans, discussed above,⁵¹ she described the extraction of her son's sperm as a gift to herself, stating, "Why can't *I* have a gift? Why do *I* lose everything?" She also asserted that her son "would want [her] to do whatever [she] needed to do and [*she*] wanted something to live on."⁵²

Most commentators simply dismiss any focus on the best interests of the child. Typical is the following:

However, there are two reasons why the interests of posthumously conceived children should be given relatively little weight in deciding whether consent should be presumed. The first two arguments above amount to arguments that the child is better off not being born at all, which is always difficult to maintain.

Second, the above arguments about a child's best interests go to whether posthumous reproduction should be allowed at all, or what benefits posthumously conceived children should be entitled to, rather than to whether consent should be presumed. Since I am assuming posthumous reproduction is permissible with consent, these issues of the child's best interests are not relevant to the question at hand. Of course, one may reject the premise that posthumous reproduction is permissible where both genetic parents consent, but in that case, this article should be rejected in its entirety as relying on a false premise.⁵³

Nonetheless, just as an attorney should not advocate for a parent he or she believed would not be a good parent in a custody case, ethics should require that the impact on the child of being born without legal and social parents be considered.⁵⁴ In-

⁵¹ See *supra* discussion in text at notes 28 and 29.

⁵² Krebs, *supra* note 3, at 794, citing Susan Donaldson James, *Sperm Retrieval: Mother Creates Life After Death*, ABC NEWS (Feb. 23, 2010), <http://abcnews.go.com/Health/Wellness/mother-murdered-son-hopes-create-grandchild-post-mortem/story?id=9913939> (emphasis added).

⁵³ Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27 J.L. & HEALTH 68, 84 (2014). To the same effect, Simana, *supra* note 2, at 352-54.

⁵⁴ As stated by Crockin and Debele:

In addition to concerns about carriers being exploited, increasingly worries are being raised about whether anyone is looking out for the best interests of the children in terms of screening intended parents as to their fitness to parent children (some suggest there should

deed, the European Society of Human Reproduction and Embryology (ESHRE) stated that PMSR revolves around two principles: [1] “the autonomy of persons to decide about reproduction” and [2] “the principle of beneficence as expressed in the concern for the welfare of the child.”⁵⁵ Similarly, the United Na-

be something comparable to an adoption home study and review by licensed social workers who would assess the fitness and appropriateness for the child of the intended parents) and mental health screenings for the carriers regarding fitness to participate in the process in a healthy fashion that is fair and non-exploitive.

Crockin & Debele, *supra* note 44, at 345 and notes therein.

Although it would be novel, if not impossible, under current law, perhaps a guardian ad litem should be appointed to represent the interests of the gamete when insemination/conception is certain to occur. *See Hecht*, 20 Cal. Rptr. 2d at 860 (“At this point, it is also entirely speculative as to whether any child born to Hecht using decedent’s sperm will be a burden on society. Real parties also offer no authority for their suggestion that if the sperm is to be distributed to Hecht, the probate court should first treat the matter as a surrogacy arrangement or adoption and appoint a guardian ad litem for the unborn child(ren) and conduct a fitness hearing as to Hecht’s fitness to bear a child. We know of no authority which would authorize the probate court to proceed in the foregoing manner, much less provide it authority to address the issue of Hecht’s fitness to bear a child.”); *see generally* Mark H. Bonner & Jennifer A. Sheriff, *A Child Needs a Champion: Guardian ad Litem Representation for Prenatal Children*, 19 WM. & MARY J. WOMEN & L. 511 (2013); Susan Goldberg, *Of Gametes and Guardians: The Impropriety of Appointing Guardians ad Litem for Fetuses and Embryos*, 66 WASH. L. REV. 503 (1991).

On the other hand, adoption law could make room for consideration of the best interests of the child in cases of PMSR, by requiring that children conceived as a result of PMSR on behalf of grandparents would have to be adopted by those grandparents. *See* Maricris Lactao Real Prendingue, *Avoiding Designer Babies by Regulating Mitochondrial Replacement Therapy Under a Child-Oriented Policy Framework*, 32 REGENT U. L. REV. 163, 176-77 (2019-2020); *cf.* I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 427, 437 (2011) (concluding that best interest arguments are “problematic” if directed at the best interests of a “resulting” child—as opposed to an “existing” child—especially in cases where the ultimate issue is “whether or not a particular child will come into existence”).

⁵⁵ G. Pennings et al., *ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction*, 21 HUM. REPROD. 3050, 3051 (2006), <http://humrep.oxfordjournals.org/content/21/12/3050.full.pdf>.

See also (although it truly pains me to cite with approval The Federalist Society) Libby Emmons, *No, People Shouldn’t Commission a Grandchild Using Their Dead Son’s Sperm*, THE FEDERALIST (May 29, 2019), <https://thefederalist.com/2019/05/23/no-grandparents-shouldnt-commission-grandchild-using->

tions Convention on the Rights of the Child⁵⁶ provides as a core tenet that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁵⁷ Surely a child born as the result of PMSR would fall within its protection.

Others commentators agree. In response to the case from India,⁵⁸ Hari Ramasubramanian, founder of the Indian Surrogacy Law Centre, described the ethical issues in the case, and it was clear the focus was on the best interests of the child:

There are four issues here. First, did the son give consent that his semen be used for procreation after his death? Second, how are the grandparents going to secure the future of the newborns in all aspects of life and living? Third, while a person has the right to become a parent, the right to become grandparents is completely outside the ambit of fundamental rights. Fourth, and most importantly, what about the rights of the child to have normal parenting?⁵⁹

As a final note, although it should go without saying, it would be egregious for an attorney to assist in what would be a criminal act. Despite PMSR being illegal in the United Kingdom,⁶⁰ the parents of a twenty-six year-old man killed in a motorcycle accident had their dead son’s sperm extracted and sent to the United State for storage in order to create a grandson via surrogacy.⁶¹ An investigation ensued.⁶² Legal experts claim this

dead-sons-sperm/ (grieving parents who mourn their lost future as grandparents should not be making decisions about whether to bring their son’s motherless orphans into the world).

⁵⁶ Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

⁵⁷ *Id.*, Convention on the Rights of the Child, Article 3(1).

⁵⁸ See *supra* discussion in text at note 33.

⁵⁹ Everett, *supra* note 33.

⁶⁰ Human Fertilisation and Embryology Act 1990 and 2008.

⁶¹ For various takes on the story, see Michael Cook, *British Grandparents Use Dead Son’s Sperm to Create Child*, BIO EDGE NEWS (Sept. 15, 2008), <https://www.bioedge.org/bioethics/british-grandparents-use-dead-sons-sperm-to-create-child/12815>; Zoe Drewett, *Parents Use Sperm of Son Killed in Motorbike Crash to Create ‘Designer Grandson,’* METRO NEWS (Sept. 9, 2018), <https://metro.co.uk/2018/09/09/parents-use-sperm-of-son-killed-in-motorbike-crash-to-create-designer-grandson-7927904/>; Caroline Graham, *Wealthy British Couple Harvested the Sperm of Their Dead Son, 26, to Create a ‘Designer Grandson’*

means the couple may have committed a criminal act and could face prosecution. A former chairman of the British Fertility Society, Professor Allan Pacey, stated that “[i]f the son in this case wasn’t being treated by a clinic, and has not signed the necessary consent forms for the posthumous retrieval, storage and use of his sperm, then a criminal act has probably taken place.”⁶³

IV. Medical Ethics: An Introduction

At the National Medical Convention in 1847, the American Medical Association (AMA) adopted The Code of Medical Ethics (the Code), opening with the declaration, “Medical ethics, as a branch of general ethics, must rest on the basis of religion and morality. They comprise not only the duties, but, also, the rights of a physician.” It continues, “Well and truly was it said by one of the most learned men of the last century, that the duties of a physician were never more beautifully exemplified than in the conduct of Hippocrates, nor more eloquently described than in his writings.”⁶⁴ The Hippocratic Oath, the foundation of the practice of medicine and bioethics, states as its key tenet: first, do

Three Days After He Was Killed in a Motorcycle Accident, DAILY MAIL (Sept. 8, 2018), <https://www.dailymail.co.uk/news/article-6147071/Wealthy-British-couple-harvested-SPERM-dead-son-26-create-designer-grandson.html>.

⁶² Martha Henriques, *Dead Son’s Sperm Used to Create Grandson Without Consent*, BIO NEWS (Sept. 17, 2018), https://www.bionews.org.uk/page_138523 (reporting that the fertility who performed the procedure that although formal consent had not been received from the deceased, and the Human Fertilisation and Embryology Acts 1990 and 2008 require written consent, “he had not been aware that the couple had breached any UK laws”).

⁶³ Gemma Mullin, *‘Desperate for Heir’: Wealthy Brit Couple Created ‘Designer Grandson’ After Harvesting Sperm from Dead Son Who Was Killed in Motorbike Crash*, SUN (Sept. 9, 2018, 5:27 AM), <https://www.thesun.co.uk/news/7212088/british-couple-designer-grandson-sperm-deadson>.

For an American perspective on the British case, see Ellen Trachman, *Deceased Son’s Genetic Material Used to Make Grandson - Is That Even Legal?*, ABOVE THE LAW (Sept. 26, 2018), <https://abovethelaw.com/2018/09/deceased-sons-genetic-material-used-to-create-grandchild-is-that-even-legal/>.

⁶⁴ CODE OF MEDICAL ETHICS ADOPTED BY THE AMERICAN MEDICAL ASSOCIATION 5 (H. Ludwig & Co. New York 1848). See also ALBERT R. JONSEN, A SHORT HISTORY OF MEDICAL ETHICS 70 (Oxford University Press reprint ed. 2008).

no harm.⁶⁵ From the Hippocratic Oath, to the AMA Code of 1847, to the current AMA Code and the current Principles of Medical Ethics,⁶⁶ the main principles of medical ethics are self-determination or autonomy; fairness, equity, and justice; and beneficence or non-maleficence.⁶⁷

Self-determination or autonomy is the ability and right to decide and act for oneself. Central to autonomy is mental capacity. For this reason, autonomy can be understood as “informed consent.”

Medicine should also strive to treat equal cases equally, and strive for justice and equity. These principles are exemplified in the history of medicine and public health’s call for a focus on social determinants of health and health disparities.⁶⁸ In addition to the focus on equity for the patient, fairness must also take into consideration whether one patient’s wishes would unfairly impact others. Fairness to a patient must also consider conflicts of interests that a physician may have.

Beneficence and non-maleficence is the Hippocratic notion of doing good, or doing no harm. Recognizing that “good” and “harm” are context dependent and are unfortunately sometimes unavoidable, in medical ethics this principle is the attempt to maximize benefit and minimize harm.

⁶⁵ Despite the fact that everyone associates this phrase with the Hippocratic Oath, the phrase does not in fact appear in the Hippocratic corpus. The Oath does, however, contain the phrase “I will do no harm.” *Greek Medicine*, NAT’L LIB. MED. (2002), https://www.nlm.nih.gov/hmd/greek/greek_oath.html.

⁶⁶ AMA Principles of Medical Ethics, <https://www.ama-assn.org/about/publications-newsletters/ama-principles-medical-ethics> (last visited June 9, 2020).

⁶⁷ Ann Somerville, *A Practical Approach to Ethics*, in *EVERYDAY MEDICAL ETHICS AND THE LAW* 1-16 (BMJ Books 2003). Other key principles include honesty, integrity, and confidentiality. *Id.*

⁶⁸ Paula Braveman reviews past evidence and makes the case for increased focus on social determinants of health. Paula Braveman, *The Social Determinants of Health: It’s Time to Consider the Causes of the Causes*, 129 *PUB. HEALTH REP.* 19-31 (2014). The American College of Physicians (ACP) put out a position paper calling for increased efforts to address disparities and social determinants of health. The ACP position paper is a vision statement related to barriers to care, equity and justice, and social determinants of health. Renee Butkus et al., *Envisioning a Better U.S. Health Care System for All: Reducing Barriers to Care and Addressing Social Determinants of Health*, 172 *ANNALS INTERNAL MED.* S50-S59 (2020).

For any case, ethical theories provide guidance toward an ethically correct resolution. The four broad categories of ethical theories are: utilitarianism, in which the moral action is one that produces the greatest good for the greatest number; deontology, which emphasizes duty because the action itself is morally right, unconcerned with the outcome; virtue ethics, which judges a person by his or her character, rather than one by any one action that may be a deviation from character; and ethical contracts or rights ethics, which holds rights as ethically correct since they are agreed upon in a social contract.⁶⁹ No one theory is the correct in every circumstance, but rather each theory is an argument and offers a lens through which to examine the reasonableness of a position. Notably, different fields or case studies may rely more heavily on different theories or principles. For example, public health often emphasizes justice over autonomy and relies on the theory of utilitarianism in the matter of vaccination.⁷⁰ A doctor specializing in end-of-life care may struggle to balance autonomy, non-maleficence, and deontology.⁷¹ Clinical psychology or psy-

⁶⁹ For a simple explanation of these different theories in medical ethics, see “the trolley problem” described in Michael Boylan, *Ethical Reasoning*, in *MEDICAL ETHICS* 7-9 (Wiley 2013). The trolley problem, at its essence, involves deontological versus consequentialist approaches, i.e., a rule-bound system versus utilitarianism. Judith Jarvis Thomson, *The Trolley Problem*, 94 *YALE L.J.* 1395 (1985). See also Michael Schur, “The Trolley Problem,” *The Good Place*, Season 2, Episode 5, NBC, Oct. 19, 2017.

⁷⁰ In *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), the Court upheld the right of the state to enact compulsory vaccination measures:

There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government,—especially of any free government existing under a written constitution, to interfere with the exercise of that will. But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29. The Court here relies on utilitarianism and the doctrine’s tenet that the benefit for the greater good ethically outweighs the rights to autonomy that the plaintiff Jacobson was asserting.

⁷¹ Consider a patient in pain and suffering from a terminal illness. Following counseling to confirm mental capacity, the patient consents to physician-assisted suicide. Deontology would hold that killing is wrong even if continuing

chiatry has maintained a duty to protect society over the right of confidentiality.⁷² Consequently, the field of reproductive medicine may stress different ethical principles and arguments than other medical fields in the matter of PMSR.

V. PMSR Guidelines and Hospital Protocols

As noted above, there is no federal or state law governing PMSR. Without such law, medical institutions have enacted their own guidelines; when no guidelines are in place at a hospital, requests for PMSR are considered on a case by case basis. A 2017 report⁷³ published the results of a survey of the top 75 academic medical centers to gather information on the presence and content of PMSR. Of the 41 institutions that provided responses, only 11 (26.8%) had policies regarding PMSR. Among those that had formal policies, what was acceptable varied by institution. The authors of the report recommended that medical centers adopt policies based on guidelines published by the American Society for Reproductive Medicine (ASRM)⁷⁴ and other publications to allow for decisions based on established and agreed upon ethical frameworks.

The Ethics Committee of the ASRM (Committee) provides guidelines on the circumstances in which PMSR is ethically permissible.⁷⁵ First, the deceased's interests are considered. Of

to keep the patient alive is causing pain. In jurisdictions where physician-assisted suicide is legal, the argument is that autonomy and minimizing harm outweigh all else. In jurisdictions where physician-assisted suicide is illegal, some may argue that any killing of a person is wrong.

⁷² *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976). For more examples and case studies, see Center for Practical Bioethics, <https://practicalbioethics.org/resources/case-studies.html> (last visited June 9, 2020).

⁷³ Nicholas J. Waler, et al., *Policy on Posthumous Sperm Retrieval: Survey of 75 Major Academic Medical Centers*, 113 J. UROLOGY 45 (2017).

⁷⁴ The current guidelines from the Ethics Committee of the ASRM were published in 2018, after the publication of the survey by Waler et al. Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion*, 110 FERTILITY & STERILITY 45 (2018). The current guidelines replaced the earlier guidelines that were published in 2013. Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion*, 99 FERTILITY & STERILITY 1842 (2013).

⁷⁵ Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Retrieval*, *supra* note 74.

course, the experiential interests in reproduction, i.e., pregnancy or raising a child, are unavailable to the deceased. The deceased may have, however, an interest in the knowledge that a genetically related child may be born. The Committee states that this interest is sufficiently ethically compelling, however, when there is a surviving partner:

The remaining interests are critical interests in such matters as the knowledge that a genetically related child might be born after the individual's death or that a partner might be able to raise a child conceived posthumously. Thus, it has been argued that this interest is "so attenuated that it is not an important reproductive experience at all, and should not receive the high respect ordinarily granted core reproductive experiences when they collide with the interests of others." This interest is not sufficiently attenuated, however, that it can be dismissed if a spouse or intimate partner shares it. This situation contrasts with that of individuals with an interest in posthumous reproduction who die without an intended partner. In this case, the attenuation of the interests in the deceased is not mitigated by the shared aspiration of a surviving partner, and the case for further preservation of frozen gametes or harvesting of gametes is far less compelling.⁷⁶

The deceased may also have an interest in *not* reproducing posthumously. Many people would oppose having children without being able to care for them, and would oppose bringing a parentless children into the world. If the deceased has made this opposition clear, it cannot be ignored. In the case where the deceased made his wishes to *not* engage in PMSR but his surviving partner wishes to use his sperm because it would be the partner's only chance to have a child biologically related to the deceased, the Committee asserts, "the wishes of the deceased are clear, and thus the deceased has an interest in not reproducing that outweighs the survivor's interest in having a biologically related child."⁷⁷

The Committee also considers the deceased's interests in consent and autonomy. The Committee highlights the necessity of informed consent in other forms of ART and argues that the only way to ensure that any procedures are consistent with the wishes of the deceased is to require written, informed consent.

Without written consent, some argue, it is difficult to know what the deceased would have wanted. In some cases, the only evidence of their

⁷⁶ *Id.* at 46.

⁷⁷ *Id.*

wishes will be the testimony of a person bearing an apparent conflict of interest, namely the one who wishes to use the deceased's sperm or eggs to reproduce.⁷⁸

If a sudden death leaves no time to obtain written, informed consent, as in *Zhu*, additional ethical issues are raised. The Committee recommends that physicians and programs develop written guidelines to address all such scenarios and familiarize themselves with state and local laws. The Committee also makes explicitly clear its position on PMSR requests from intended grandparents:

The desire of a surviving partner to have a child with the gametes of the deceased, in light of their intention to have a family together, may be viewed with sympathy. A more troubling situation is when the request for gametes for posthumous reproduction does not come from a spouse or life partner, but from the parents of the deceased, who see this intervention as promulgating the legacy of their child or as the only way to become grandparents. Ethically, these situations are not comparable. In the case of a surviving parent, no joint reproductive project can ever be said to have existed. Nor do the desires of the parents give them any ethical claim to their child's gametes. Programs, then, that are open to considering requests for posthumous gamete procurement or reproduction from surviving spouses or life partners in the absence of written instructions from the decedent should decline requests for such services from other individuals.⁷⁹

In sum, in the absence of written and informed consent from the deceased, reproductive medicine programs should not honor requests from any party other than a surviving partner for PMSR. Though the Committee issued this opinion, it is still up to individual clinics and programs to create their own guidelines.

Weill Cornell Medicine (WCM) in New York has created and published institutional guidelines for PMSR to address the issues that arise in light of the lack of federal and state regulation.⁸⁰ WCM will consider requests for PMSR *only* from the deceased's wife; no other family members or next-of-kin will have their requests considered. The request must provide clear and convincing evidence that the man not only would have wanted children, but "would have wanted to conceive children *this*

⁷⁸ *Id.* at 48.

⁷⁹ *Id.* at 48-49.

⁸⁰ Weill Cornell Med., *Postmortem Sperm Retrieval*, <https://urology.weillcornell.org/Postmortem-Sperm-Retrieval> (last visited June 10, 2020).

way.”⁸¹ WCM will consider stated, written, or acted on wishes prior to death.

Beyond the retrieval itself, WCM also has guidelines regarding the use of sperm. When deciding to pursue PMSR, the wife should be counselled that the retrieval does not necessarily indicate ART will be provided at WCM and a one-year waiting period with psychological counseling is strongly recommended. After the completion of the one-year period, WCM hopes “the wife is able to begin decision-making based more on thoughtful consideration of the treatment and consequences of assisted reproduction, rather than from a state of grief alone.”⁸²

VI. Medical Ethical Perspectives Regarding PMSR

As with any dilemma, there is no clear single answer; applications of ethics theories frame the issues arising from PMSR in a variety of ways that may offer palatable resolutions. Many commentators have offered varied perspectives to examine the debate around PMSR.

In examining the ethical issues surrounding PMSR, Valerie K. Blake and Hannah L. Kushnick consider the interests of the parties involved: the deceased, the requester, and the resulting child.⁸³ Focusing on social, legal, and ethical norms of the United States, Blake and Kushnick structure their arguments with a rights-based approach and follow the idea that individuals are morally entitled to certain rights.

Though PMSR may be a relatively new and unique ethical issue, it can be broken down to focus on the interests of the deceased in the aspects of death more generally and the interests of the deceased in reproduction more generally. Blake and Kushnick use customs and laws surrounding wills and organ donations as evidence to suggest American society has granted cer-

⁸¹ *Id.* (emphasis added).

⁸² *Id.* These guidelines by WCM clearly push the decision-making in a desired direction.

⁸³ Valerie K. Blake & Hannah L. Kushnick, *Ethical Implications of Posthumous Reproduction*, in *THIRD-PARTY REPRODUCTION: A COMPREHENSIVE GUIDE* 197 (James M. Goldfarb, ed., 2014). Blake and Kushnick also consider the interests of third-parties such as gestational surrogates, physicians, and others.

tain rights of autonomy to the dead. “Our respect for the dead is an extension of our respect for persons and our respect for bodily integrity arising from respect for individuals’ autonomy and their right to be free from bodily invasion, as well as respect for the deceased person’s memory and their loved ones.”⁸⁴

Further, there is agreement that individuals have the right to decide matters surrounding reproduction more generally. So this raises a question for PMSR: how does society as a whole translate these agreed upon rights to the deceased for posthumous reproduction? Blake and Kushnick argue that in Western culture, because law and society have emphasized individual liberty and respect for bodily autonomy, “the greatest protection we can afford the deceased is some measure of legitimate and meaningful informed consent for posthumous reproduction.”⁸⁵ The authors note, however, that even unequivocal, express consent does not consider the effects on the partner or the well-being of the child, and these interests must be taken into account as well.

The second stakeholder to consider is the person or persons who make the request for PMSR. Blake and Kushnick argue that in the United States, reproduction is seen as a personal choice, and relatives are not considered to have a stake in another person’s reproductive choices.⁸⁶ While a partner has a stake in reproduction, romantic partnership does not automatically equal reproduction, and one partner’s interest cannot override the other’s. When the desire to reproduce is shared, allowing the partner to continue with PMSR to have the deceased’s child “fulfill[s] that collective intentionality” and is ethically acceptable.⁸⁷ Though it may be ethically acceptable with respect to the de-

⁸⁴ *Id.* at 198.

⁸⁵ *Id.* at 199.

⁸⁶ *Id.* at 201. Though Blake and Kushnick are discussing the United States in general, it would be painting with too broad a brush to say this is a universal sentiment. For example, in many orthodox religious sects and other cultures, reproduction is a religious duty and relatives have a strong interest in a relative’s reproduction. Though the third-party relatives don’t have a *legal* right to have a say in another person’s reproduction, it can be argued that relatives have agreed upon *cultural* rights. See John Gastil, Justin Reedy, Donald Braman & Dan M. Kahan, *Deliberation Across the Cultural Divide: Assessing the Potential for Reconciling Conflicting Cultural Orientations to Reproductive Technology*, 76 *GEO. WASH. L. REV.* 1772 (2008).

⁸⁷ Blake & Kushnick, *supra* note 83, at 201.

ceased's autonomy, the partner's autonomy must also be considered. Grief can complicate sound mental capacity, and for this reason a waiting period after collection and before use protects the informed consent and autonomy of the partner.

Finally, the interests of the hypothetical child must also be considered. PMSR and posthumous reproduction have the potential to inflict harm or otherwise endanger the well-being of the child. Family dynamics can impose harm on the child. A child born to grandparents that requested PMSR would be born an orphan. A child could feel resentment that he or she is a substitute for grief. A parent could feel resentment if attitudes surrounding the decision to pursue PMSR change. In addition, there is the potential harm from social stigma. Without clear scientific evidence or long-term studies, Blake and Kushnick acknowledge these potential harms are speculations. Additionally, the only way to avoid these harms would be to not have been born at all, and the law has presumed that existing is better than not existing.⁸⁸

Without taking a definitive stance, Blake and Kushnick conclude there is an absence of social consensus and each case of PMSR can be decided by considering the interests of the involved parties. The most ethical way to consider all parties is with a focus on informed consent and autonomy of both the deceased and the requester, and the well-being of the child.⁸⁹

Taking a more definitive stance, R.D. Orr and M. Siegler examine respect for the dead, informed consent, and the well-being of the child to determine when PMSR is ethically permissible.⁹⁰ Like Blake and Kushnick, Orr and Siegler analyze these positions through a lens of what is acceptable in Western cultures.

Respect for the dead and dead bodies is evidenced in Western culture's funeral rites and the acceptance of both autopsies and organ donation. The right to perform an autopsy or procure organs, however, is not absolute and without consent it would be disrespectful. Orr and Siegler make the point that consent of the

⁸⁸ See Seana Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117 (1999).

⁸⁹ Blake & Kushnick, *supra* note 83, at 204.

⁹⁰ R. D. Orr & M. Siegler, *Is Posthumous Semen Retrieval Ethically Permissible?*, 28 *J. MED. ETHICS* 299 (2002).

deceased is not final and consent can also come from the state or the family in certain scenarios. For example, without consent of either the deceased or the family and over the objections of the family, the state may authorize an autopsy. Further, consent for organ donation must come from the family as well as the deceased. When the deceased has consented to organ donation but the family objects, a transplant team would not retrieve the organs. However, when the deceased has not consented to organ donation but the family has, the wishes of the deceased take precedence. These issues highlight the weight placed on consent.⁹¹

Ethically valid consent must be informed consent in which a person has mental capacity, be given adequate information to make a decision, and the decision must be voluntary and without coercion. To address informed consent of all involved parties, Orr and Siegler suggest using the hierarchy that is often used in other medical decisions such as end-of-life care: 1) patient's current statement; 2) written advance directive; 3) report of previously stated wishes; 4) recognized values; and 5) presumed best interests. This gets complicated with PMSR, however, as the deceased has no current statements and if a young man dies unexpectedly there may be no indication of PMSR wishes if he even has an advance directive at all.⁹²

Finally, a doctor must consider the obligation to do no harm. Orr and Siegler raise the question, "Does the physician also have a responsibility to decline procedures which may be harmful to a future individual or future generation?"⁹³ When deciding whether to proceed with PMSR, a physician should consider the well-being of the future child. This can vary case-by-case and from physician to physician, but it should not be ignored.⁹⁴

With these considerations in mind, Orr and Siegler conclude that a request for PMSR should not be honored without convincing evidence of the deceased's consent. With consent, the doctor should consider the welfare of the child to ensure proceeding with PMSR is an ethical decision.⁹⁵

⁹¹ *Id.* at 300.

⁹² *Id.*

⁹³ *Id.* at 301.

⁹⁴ *Id.*

⁹⁵ *Id.* at 302.

Finally, although the article is more than twenty years old, the perspective of Dr. Rothman, who performed the first documented PMSR,⁹⁶ should be examined.⁹⁷ Rothman argues that seeking happiness is the underlying driving force of humankind.⁹⁸ Because PMSR would provide happiness to the grieving partner or family member, it would be unethical to deny that happiness. Rothman asserted that “bestow[ing] such consolation at a time of grief and tragedy is clearly part of my role as a leader.”⁹⁹

Rothman notes that the ethical issue with PMSR is one surrounding consent and that there may be instances in which PMSR would not be ethical, such as when there are questions surrounding the intent of the deceased. “But deciding whose rights to sperm should prevail is not my role; lessening grief and offering alternatives remain my priorities.”¹⁰⁰ Rothman goes further, arguing from a position of inferred consent or presumed consent.¹⁰¹ Since most men want to have children, Rothman states, PMSR would be consistent with that desire.¹⁰² There is only an ethical conflict when the wishes of the deceased man are inconsistent with the wishes of the requesting party. Rothman concludes that this ethical issue will be decided on the basis of cultures and values, but he asserts that overall medical ethics is a hindrance to medical advances.¹⁰³

⁹⁶ See *supra* discussion in text at note 5.

⁹⁷ Cappy Miles Rothman, *Live Sperm, Dead Bodies*, 20 J. ANDROLOGY 456 (1999).

⁹⁸ Dr. Rothman is stating the tenet of Epicurean ethics based on hedonism, that the greatest good is achieved by maximizing pleasure or happiness.

⁹⁹ Rothman, *supra* note 97, at 456.

¹⁰⁰ *Id.* at 457.

¹⁰¹ For additional discussion on presumed consent, see Kelton Tremellen & Julian Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Procurement and Conception*, 30 REPRODUCTIVE BIOMEDICINE ONLINE 6 (2015).

¹⁰² Rothman states, without citation, “Of the millions of men, married, to be married, or just in relationships, over 95% would want to father children.” Rothman, *supra* note 97, at 457. Of course, the issue here with PMSR for grandparents such as in *Zhu* is that these men do not have partners - they are not in relationships.

¹⁰³ *Id.* at 457.

Conclusion

As requests for PMSR increase, so too will the perspectives and ethical arguments, both legal and medical, expand. While one perspective is not the ultimate answer, these perspectives should be considered and evaluated.

At the very least, the authors herein posit that any decision to engage in PMSR by the parents of the deceased to bring their grandchild into the world must consider not only the explicit consent of the deceased that his sperm be used for this purpose, but also the best interests of the child, whether through adoption law or surrogacy law. It is time for the law to catch up to the biomedical ethics in the area of PMSR on behalf of grandparents.