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A Framework for Untangling Intents in Posthumous Sperm Extraction

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A FRAMEWORK FOR UNTANGLING INTENTS IN POSTHUMOUS SPERM EXTRACTION

I. Introduction

Posthumous reproduction involves the conception and birth of a child by the means of artificial reproductive technology, after the death of either parent. Through technological innovation, death is no longer a bar to the creation of new life. By means of technologies that separate reproduction from the coital act, a widow may assert a claim to the sperm of her deceased husband in order to bear his genetically-related child.[1] A woman may petition the probate court to enforce the will of her late boyfriend, entitling her to dispositional control over his cryogenically preserved sperm.[2] A mother may carry on the memory of her murdered son by creating her biological grandchild through the use of posthumously extracted sperm and a gestational surrogate.[3]

While medical practice and technological advances have yielded a wide range of reproductive possibilities, the law has lagged behind in its recognition and legal characterization of such acts. In this new legal forefront, courts have generally responded to the prospect of posthumous reproduction in one of two ways: 1) by effectuating the intent of the donor, or 2) employing a constitutional balancing of rights test.

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[1] *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 312 (Ct. App. 2008).
[2] Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 279 (Ct. App. 1993).
[3] Susan 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#.TvFUF1auFpk.

This paper will trace the development of these two tests. The donor intent test requires identifying, and giving effect to, a legally sufficient statement of the decedent's intent to reproduce posthumously. Litigated disputes in this area frequently concern the sufficiency of proof in support of decedent's asserted intent to reproduce posthumously. By contrast, the constitutional balancing test weighs the rights of the decedent to posthumously dictate the use of his gametic material against the procreational rights of the surviving claimant. In addition to questions of proof, this test implicates constitutional considerations and public policy as relevant factors for the court to consider.

Cases to date arise in the context of lifetime extraction, followed by a posthumous request to obtain and use the sperm for reproductive purposes. This paper will borrow by analogy from the case law covering lifetime extraction to argue in the context of posthumous extraction and reproduction, that the appropriate approach blends the donor intent and constitutional balancing tests. This blended approach will effectuate the donor's intent as far as possible, while at the same time recognize the constitutional rights of the surviving claimant.

II. The Donor's Intent Test

A. Genesis of the Test

In a case of global first impression,[4] the French court in *Parpalaix c. CECOS*[5] was called upon to determine the legal status of sperm that had been voluntarily extracted prior to the decedent's death, and remained in cryogenic storage at a state operated sperm

[4] Janet J. Berry, Essay, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 235 (1997) (citations omitted).

[5] This case is unreported, but is discussed at length in E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229-33 (1985-87).

bank. In 1981, Alain Parpalaix was undergoing chemotherapy for testicular cancer.[6] Alain's doctor advised him that the treatment would make him sterile.[7] Armed with this grim prognosis, Alain made a "deposit" of sperm at the Centre D'Etude et de Conservation du Sperme (CECOS).[8] Alain left no instructions for the fate of the sperm in the event of his death.[9] The sperm was cryogenically frozen in liquid nitrogen, where it remained for over two years.[10]

At the time of his deposit, Alain was living with his girlfriend, Corinne.[11] Two days before his death, Alain and Corinne were wed in a hospital ceremony.[12] Corinne subsequently requested the release of Alain's stored sperm,[13] which she planned to use for conception through artificial insemination.[14] CECOS refused, asserting that its procedures did not allow for the return,[15] and that CECOS was not legally required to release the sperm to Corinne.[16] In response, Corinne and her in-laws sought review before the Tribunal de grand instance, on a claim sounding in contract.[17]

Corinne asserted that the sperm was property, and therefore inheritable.[18] She relied on the French Civil Code, which provided that in the event of death, goods deposited by a bailor would be returned to the bailor's heirs.[19] In addition, Corinne and Alain's parents testified that Alain intended for Corinne to use his sperm to reproduce

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[6] *Id*. at 229.
[7] *Id*.
[8] *Id*.
[9] *See id*. at 229-30.
[10] *Id*. at 230.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *See id*. at 229-33.
[15] *Id*. at 230.
[16] *Id*.
[17] *Id*. at 230-31.
[18] *Id*. at 230.
[19] *Id*.

posthumously, even though he did not leave written instructions to that effect.[20] CECOS responded *inter alia* that its sole legal obligation was to the donor and contended that the sperm was not inheritable property.[21] Instead, the sperm was an indivisible part of the body itself.[22]

In its ruling, the court instead likened the sperm to "the seed of life," holding that it was tied to the fundamental right of humans to conceive or abstain from conception.[23] This fundamental right was not subject to contract provisions.[24] In order to safeguard the right, the fate of the sperm would be determined exclusively by the intent of the donor.[25] The court then established a two-part inquiry to determine a donor's intent. To hold in favor of Corinne, the court would have to find: (1) that Alain intended for Corinne to use his sperm to undergo posthumous artificial insemination, and (2) that his intent was "unequivocable."[26]

In its decision, the court found sufficient confirmation of Alain's reproductive intent in extrinsic evidence, and did not require a written declaration of intent.[27] It was instead persuaded by the testimony of Alain's next-of-kin that Alain wanted Corinne to reproduce with his sperm to mother a common child.[28] Similarly, the court noted that the timing of the wedding, just two days before Alain's imminent and expected death, was intended to facilitate and further Corinne's claim to the sperm.[29] On the basis of this

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[20] *Id*. at 230-31.
[21] *Id*. at 231.
[22] *Id*.
[23] *Id*. at 232.
[24] *Id*.
[25] *Id*.
[26] *Id*.
[27] *See id*.
[28] *Id.*
[29] *Id*.

testimonial and circumstantial evidence, the court was satisfied that Alain's posthumous dispositional intent with respect to his sperm, although unwritten, had been adequately established. Thus, the court held that Corinne was entitled to Alain's sperm stored with CECOS.[30]

Although the court's conclusion was based upon a finding that Alain's intent to reproduce posthumously was adequately established by extrinsic proof, it should be noted that the overriding concern of the court was to protect the fundamental right of choice in matters of procreation. To this end, the court refused to adopt the extreme classification positions advanced by either side: that the sperm be treated as property, as advocated by Corinne, or as an indivisible body part, as advanced by CECOS. Instead, the court adopted a middle-ground fundamental reproductive rights approach. By rejecting Corinne's designation of the sperm as property, the court declined Corinne's invitation to apply the principles of property law in resolving the case. Since the sperm was not held to be property, by extension it could not be inherited;[31] the sperm, therefore, could not be the subject of a bailment contract between the donor and the sperm bank.[32] On the other hand, by refusing to categorize the sperm as an indivisible body part, the court avoided holding that the decedent's wishes would die with him, and be given no posthumous effect. By instead classifying the sperm as the physical embodiment of a fundamental reproductive right of choice, the court was able to achieve the desirable outcome of honoring Alain's intent and effectuating his wishes even after the termination of his legal personality by death. More importantly, the court was able to do so without implicating

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[30] *Id*. at 233.
[31] *See id*. at 232.
[32] *See id*.

the negative consequences that a wholesale application of property law to sperm would engender.[33]

B. Transatlantic Adoption of the Donor Intent Test

1. Hecht v. Superior Court

In the United States, *Hecht v. Superior Court*[34] is the seminal case to adopt the intent approach in determining the posthumous disposition of sperm. In *Hecht*, the decedent, William Kane, anticipated taking his own life.[35] Accordingly, he deposited 15 vials of sperm with California Cryobank, Inc., and signed a storage agreement authorizing release of the sperm to his girlfriend, Deborah Hecht, or to Hecht's physician, in the event of his death.[36] In addition, Kane executed a will that was admitted into probate.[37] The will named Hecht as executor, and bequeathed "all right, title, and interest" in the sperm to Hecht.[38] Kane's will contained a "Statement of Wishes," which conveyed his intent that Hecht use his stored sperm to conceive posthumously.[39] Kane's reproductive intent was further demonstrated in a letter addressed to his two adult children from a prior marriage, and to his potential posthumous offspring.[40] Thereafter, Kane committed suicide in a Las Vegas Hotel.[41]

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[33] One example of the negative consequences that follow from a wholesale application of property law to sperm, is the difficulty of applying the intestacy scheme to sperm as an indivisible *res*, where there is more than one heir.
[34] 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
[35] *Id*. at 277.
[36] *Id*. at 276.
[37] *Id*.
[38] *Id*.
[39] *Id*. at 276-77.
[40] *Id*. at 277.
[41] *Id*. at 276.

For reasons not revealed in the record, Hecht was not appointed administrator of Kane's estate.[42] Instead, Hecht initiated suit to prevent the personal representative of Kane's estate from destroying the sperm stored at Cryobank.[43] Kane's two adult children joined the estate's administrator in opposing Hecht's request for the 15 vials of sperm.[44] In a case of first impression for United States courts, the California Superior Court was called upon to determine the disposition of a decedent's cryogenically-preserved sperm.[45]

Hecht first asserted claim to the sperm by *inter vivos* gift, or *gift causa mortis*.[46] She posited that neither the estate nor Kane's adult children held any property interest in the sperm which would afford them a right to its distribution or destruction. [47] In the event that the court classified the sperm as an estate asset, Hecht alternatively argued *inter alia* that she was entitled to the sperm in furtherance of her constitutional privacy and procreation rights as sole beneficiary under Kane's will.[48] The estate administrator, joined by Kane's two adult children, responded that Kane did not have a property or ownership interest in his sperm once it was removed from his body.[49]

The court first noted that the legal status of property rights in the human body is unsettled.[50] It found that the body's biological materials are objects *sui generis*, whose unique characteristics precluded classifying the sperm categorically, as either property or

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[42] *See id*. at 276 n.1.
[43] *Id*. at 276.
[44] *Id*.
[45] *Id*.
[46] *Id*. at 279.
[47] *Id*.
[48] *Id*.
[49] *See id*. at 280-81 (citing authority under Moore v. Regents of Univ. of Cal., 793 P.2d 479 (Cal. 1990) and the California Health and Safety Code).
[50] *Id*. at 281 (stating that the *Moore* court's recognition of a quasi-property right in the human body did not "resolve the debate over the existence or extent of a property interest in one's body").

body part.[51] Since sperm is "gametic material" with the potential to create life, it is especially unique in comparison to nearly all other human tissue. [52] As a result, the court concluded that Kane held a quasi-property interest in his sperm at the time of his death.[53] Although the court stopped shy of declaring that Kane had a complete property right in his sperm, the hybrid classification of quasi-property was sufficient to subject the sperm to the probate court's jurisdiction.[54] Hence, the law generally applicable to personal property was not implicated even though Kane was acknowledged to have held an interest in his sperm in the nature of ownership.[55] Consequently, Kane was entitled to decisional authority over his sperm's posthumous disposition, subject only to applicable public policy and health and safety laws.[56] The court noted that several outstanding issues of material fact prevented it from deciding the ultimate fate of the sperm.[57] However, before remanding for final determination, the court observed that there was no public policy against inseminating an unmarried woman, or against posthumous reproduction *per se*, that would preclude effectuating Kane's intent.[58]

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[51] *Id*.
[52] *Id*. at 283 (citing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), with approval).
[53] *Id.* (similarly relying on *Davis* for authority). It is relevant that this case was brought before the probate court. Classifying the sperm as quasi-property enabled the court to invoke its probate jurisdiction, while at the same time holding that sperm had unique *sui generis* attributes.
[54] *Id*.
[55] *Id*. at 281.
[56] *Id*.
[57] *Id*. at 289 n.9 (noting that the will's validity, the decedent's testamentary capacity, the validity and enforceability of the sperm bank contract, and the validity and enforceability of the parties' two prior settlement agreements remained to be determined by the trier of fact, and that these outcomes would influence the lower court's decision regarding the sperm's ultimate disposition).
[58] *See id*. at 284-91.

2. *In re* Estate of Kievernagel

The Court of Appeals for the Third District of California clarified its adoption of the donor intent test in *In re Estate of Kievernagel*.[59] The decedent, Joseph Kievernagel, and his wife, Iris Kievernagel, underwent in vitro fertilization (IVF) treatment with the Northern California Fertility Medical Center, Inc.[60] The Center's protocol required Joseph to provide a frozen sperm sample for back-up purposes and to sign a consent agreement specifying disposition of the sperm in the event of death or incapacitation.[61] The form permitted two options: (1) disposal, or (2) donation to spouse.[62] Joseph initialed, and Iris checked, the box stating that the sperm was to be discarded.[63] Joseph later died unexpectedly in a helicopter crash.[64] When Iris requested her late husband's sperm, the Center refused release absent a court order.[65] In opposing the sperm's distribution, Joseph's parents joined as interested parties.[66] Iris contended that the "unequivocable intent" standard in *Hecht* was unworkable and difficult to apply.[67] She lobbied the court to adopt a balancing test in which the surviving spouse's right to procreate would prevail.[68] Joseph's parents countered that distribution of the sperm was contrary to Joseph's express wishes as evidenced in the storage agreement, and further,

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[59] *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 316 (Ct. App. 2008).
[60] *Id*. at 312.
[61] *Id*.
[62] *Id*.
[63] *Id*. at 312-13.
[64] *See id*. at 312.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 313.
[68] *Id*.

that his intent was corroborated by their personal knowledge that their son did not wish to procreate in life.[69]

In resolving the dispute, the court cited *Hecht* with approval, holding that by virtue of its potential to produce life, gametic material constitutes a unique form of property that does not implicate general personal property law.[70] Since Joseph was the sole provider of the gametic material, he alone held an interest likened to ownership, which afforded decisional authority over subsequent reproductive use of his sperm.[71] Therefore, to determine the posthumous disposition of Joseph's frozen sperm, only Joseph's intent was material.[72] In addition, the court found that Iris' constitutional right of reproduction was not implicated.[73] Since Iris had failed to make a showing that she could only become pregnant with Joseph's sperm, her procreative autonomy was not affected to a degree entitling her to the right of decisional authority over the sperm's distribution.[74]

III. The Constitutional Rights Balancing Test

A. The *Davis v. Davis* Perspective

The court in *Kievernagel* adopted the donor intent test to resolve competing claims to the posthumous disposition of sperm. In so doing, the court explicitly rejected

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[69] *Id*. at 312.
[70] *Id*. at 316.
[71] *Id*.
[72] *See id*. (stating that "the trial court properly relied on Joseph's intent" in determining the posthumous disposition of Joseph's sperm).
[73] *Id*. at 318.
[74] *Id*. at 317-18.

the decision of the Tennessee Supreme Court in *Davis v. Davis*,[75] an opinion adopting a constitutional balancing test rather than according primacy to the intent of the donors.[76] In *Davis*, the parties disputed the disposition of pre-embryos – the gametic material created by the union of sperm and egg that exists once an egg has been fertilized but before implantation has occurred.[77] In a divorce action, Junior Davis and his wife, Mary Sue Davis, disagreed as to who retained custody of the couple's seven cryogenically frozen pre-embryos from a preceding *in vitro* fertilization treatment.[78] Junior sought control of the pre-embryos to effect their destruction.[79] Although Mary Sue originally sought possession of the pre-embryos in order to become pregnant after the dissolution of her marriage, by the time the case was heard on appeal, Mary Sue had subsequently remarried and no longer wished to use the pre-embryos to impregnate herself.[80] Instead, Mary Sue sought to donate the pre-embryos to a childless couple.[81]

The court decided in favor of Junior, rejecting Mary Sue's claim to the cryopreserved pre-embryos .[82] Having first noted that the wishes of the parties could not

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[75] *Id.* at 317.
[76] Davis v. Davis, 842 S.W.2d 588, 603-04 (Tenn. 1992). Despite indicating a preference to effectuate the intent of the donors, the *Davis* Court was unable to give donor intent dispositive weight. The disputed gametic materials were several pre-embryos. Because the two donors disagreed over the disposition of the pre-embryos, and because there was no statutory law, case law, or prior agreement between them which the Court could enforce, the Court instead opted for a constitutional balancing test.
[77] *Id.* at 589-90. Whereas sperm is a gamete that consists of the genetic contribution of one male donor, a pre-embryo represents the union of gametic materials that occurs once a sperm cell fertilizes an egg. *See* Elizabeth A. Trainor, Annotation, *Right of Husband, Wife, or Other Party to Custody of Frozen Embryo, Pre-embryo, or Pre-zygote in Event of Divorce, Death, or Other Circumstances*, 87 A.L.R.5th 253, §2[a] (originally published in 2001).
[78] *Davis*, 842 S.W.2d at 589.
[79] *Id*. at 590.
[80] *Id*. at 589-90.
[81] *Id*. at 590.
[82] *Id*. at 604.

simultaneously be given effect,[83] and without the benefit of statutory law, case law, or a prior enforceable disposition agreement between the parties to direct the case's outcome,[84] the court settled on a constitutional balancing test to resolve the dispute between the parties and provide for the ultimate disposition of the pre-embryos.[85] It began by addressing the appropriate legal classification to apply to pre-embryos. The *Davis* court held that pre-embryos occupy an interim category somewhere in the continuum between property/tissue and person.[86] As a hybrid entity, the court categorized the pre-embryos closer to the property end of the spectrum.[87] Hence, contract principles were deemed applicable to resolve the disposition of the disputed pre-embryos, such that the court was willing to recognize as valid and enforceable a former agreement between the donating parties that spoke to dispositional outcomes in the event of death or divorce.[88] Additionally, in the context of constitutional rights balancing, only the interests of the respective donors and the merits of their possessory claims would be weighed.[89]

To that end, the court began by recognizing two aspects to procreational autonomy: the right to procreate and the right *not* to procreate.[90] After conceding that the constitutional parameters of procreational autonomy are unclear, the court declared that each right was of equal significance.[91] In balancing the two, the court considered Junior's

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[83] *See id*. at 601-05 (noting the "equivalence of and inherent tensions between" the interest of producing a life via reproduction, and avoiding procreation via abortion).
[84] *Id*. at 590.
[85] *Id*. at 604.
[86] *Id*. at 597.
[87] *See id*. at 595 (citing Roe v. Wade, 410 U.S. 113 (1973), to the effect that pre-embryos do not enjoy the protections of legal personality under federal law).
[88] *Id.* at 597 (adding the requirement that the initial agreement be subject to subsequent mutual modification).
[89] *Id*. at 604.
[90] *Id*. at 601.
[91] *Id*.

interest against procreation and forced parentage as against Mary Sue's interest in securing the success of the IVF treatment and the continued viability of her genetic contribution via donating the pre-embryos to another couple.[92] It determined that Junior and Mary Sue must be treated as equal gamete providers, despite the argument that the IVF process was more invasive to the female participant.[93] Despite these differences in the invasiveness of the procedure, the court concluded that, generally, the party seeking to avoid procreation would prevail.[94]

B. The Right to Refrain from Procreation

The right to refrain from procreation has been affirmed repeatedly by the United States Supreme Court.[95] Most applicable are the Court's precedents authorizing the use of contraceptives and recognizing a right to pre-viability abortions.[96] In *Griswold v. Connecticut*, the Court heard a challenge from a licensed physician, on behalf of himself and the married couples to whom he had provided reproductive treatment and counseling. The plaintiffs denounced a Connecticut statute prohibiting the dissemination or use of contraceptives.[97] Speaking for the Court, Justice Douglas overturned the statute as an overly broad infringement on the penumbral right of marital privacy guaranteed by the Constitution.[98] In *Eisenstadt v. Baird*, the Court heard a challenge to a Massachusetts

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[92] *Id.*
[93] *Id*.
[94] *Id*. at 604 (noting that this outcome, while far from automatic, was particularly warranted when the party pursuing parenthood had alternate means to achieve pregnancy).
[95] *See* Susan Kerr, *Post-Mortem Sperm Procurement: Is it Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 69 (1999) ("From contraception to abortion the Supreme Court has … clearly established a well pronounced right not to procreate.") (citations omitted) .
[96] JUDITH F. DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 104-37 (2006 ed.) (citing cases covering contraceptive use and abortion in support of an affirmative right to reproduce).
[97] 381 U.S. 479, 480-81 (1965).
[98] *See id* at 485.

law.[99] The law prohibited single persons from obtaining contraceptives in order to prevent pregnancy, but permitted married couples to do so through a registered physician.[100] Holding that the statute impermissibly provided dissimilar treatment for married and unmarried couples similarly situated in their desire to avert pregnancy, the Court invalidated the statute on equal protection grounds, thereby extending the penumbral protections of privacy to unmarried individuals.[101]

In *Roe v. Wade*, the Court confronted the topic of abortion with a challenge to state legislation criminalizing abortion in Texas.[102] Justice Blackmun held that the scope of the fundamental right to privacy, whether grounded in the Fourteenth Amendment's recognition of personal privacy or the Ninth Amendment's declaration of reserved rights to the people, was broad enough to include the decision to terminate a pregnancy.[103] In *Planned Parenthood of Southeastern Pa. v. Casey*, this essential holding of *Roe v. Wade* was reaffirmed when the Court held that women have a right to pre-viability abortion without undue state interference.[104] Through these holdings guaranteeing access to the means of preventing and terminating pregnancy, recognition of the right to avoid procreation has received strong constitutional sanction and support.[105]

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[99] 405 U.S. 438, 440 (1972).
[100] *Id*. at 440-42.
[101] *See id*. at 454-55.
[102] 410 U.S. 113, 116 (1973).
[103] *Id*. at 153.
[104] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).
[105] Kerr, *supra* note 95, at 69.

C. An Inferred Right to Procreation

By contrast, the affirmative right to procreate has not received as much constitutional sanction.[106] In large part, the paucity of state attempts to limit reproduction within the marital relationship has engendered few lawsuits[107] to enforce and clarify the right to procreation.[108] As a result, the parameters of the right remain ill-defined.[109]

Despite this dearth of explicit law defining and solidifying an affirmative right to procreate, the Supreme Court in dicta, as well as lower courts, have spoken approvingly concerning the right to procreate. The strongest Supreme Court support for the right to procreate is found in *Skinner v. Oklahoma*.[110] In *Skinner*, the Court invalidated a mandatory sterilization law which applied to three-time larceny convicts but exempted embezzlers.[111] Although resolved on equal protection grounds, the Court stressed, in dicta, the fundamental nature of marriage and procreation.[112] Similarly, Justice Brennan, writing for the majority in *Eisenstadt v. Baird*, provided a powerful endorsement for the right to procreate when he famously penned that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted

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[106] *Id*. at 70 (stating that the right to procreate, while "significant, has never received explicit legal recognition").
[107] One circumstance in which the right to procreate has increasingly been litigated is for prisoners. Recognizing that an inmate retains only those rights not "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," inquiry is made into whether the right to procreate survives incarceration. *See* Richard Guidice Jr., Note, *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, 29 FORDHAM URB. L.J. 2277, 2278 (2002). *Gerber v. Hickman*, 291 F.3d 617, 619 (9th. Cir. 2002), is typical of the judicial response to such requests (finding that the right to procreate does not survive incarceration).
[108] Kerr, *supra* note 95, at 71 (citations omitted).
[109] *Id.* at 70-71.
[110] 316 U.S. 535 (1942).
[111] *Id*. at 541 (holding that the distinction is "a clear, pointed, unmistakable discrimination").
[112] *Id*.

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[113]

While this impassioned support of the right to privacy was dicta to the Court's holding extending contraceptives to unmarried individuals, the statement does reveal one significant point in the Court's treatment of the right to procreate. To the extent that such a right can be recognized, it is a negative right against governmental interference rather than a positive right to reproductive services or resources.[114] In other words, even if the right to procreate is constitutionally protected, it may not extend to procreation by assisted methods.[115]

D. Rights of the Decedent

In the aftermath of its adoption in the United States, the common law precept that causes of action are personal and abated with the death of the individual[116] has been discredited in favor of recognizing tort claims for wrongful death and survival.[117] Despite this change in substantive law, it is nonetheless true that these causes of action accrue to the surviving next of kin of the deceased, and not to the decedent himself.[118] In terms of relevant law that applies to dead bodies, it can more accurately be stated, as did the court in *Whitehurst v. Wright*, that "[a]fter death, one is no longer a person within our

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[113] 405 U.S. 438, 453 (1972).
[114] Kerr, *supra* note 95, at 70 (citations omitted).
[115] *See* DAAR, *supra* note 96, at 137 (noting that the Supreme Court has not directly addressed whether procreation using assisted reproductive technologies is constitutionally protected); *cf.* Webster v. Reprod. Health Servs., 492 U.S. 490, 509-11 (1989) (holding, in the analogous context of abortion, that the State has no affirmative duty to use public facilities and staff in furtherance of a nontherapeutic abortion).
[116] The first statement of the common law rule, *action personalis moritur cum persona*, was found in Lord Ellenborough's opinion in *Baker v. Bolton*. STUART M. SPEISER & JAMES E. ROOKS, JR., RECOVERY FOR WRONGFUL DEATH § 1:2 (4th ed.) (citations omitted).
[117] *See id*. §§ 1:6-1:7; 1 AM. JUR. 2D *Abatement, Survival, and Revival* §53 (2012).
[118] 25A C.J.S. *Death* § 51 (2012).

constitutional and statutory framework, and has no rights of which he may be deprived."[119]

In *Whitehurst*, the decedent was fatally shot by a police officer who mistakenly believed him to be a robbery suspect.[120] The officer claimed the shot was fired for self-defense, in response to an initial shot from Whitehurst.[121] Although no weapon was initially discovered on or in the vicinity of the deceased, a detective arriving on the scene later discovered a weapon 27 inches from the dead body.[122] When it was determined that the gun was a planted police weapon previously confiscated by police in a drug raid over one year prior, the decedent's mother brought suit, alleging that the shooting and subsequent cover-up violated her son's civil rights.[123] The Court of Appeals for the Fifth Circuit affirmed the trial court's holding that a constitutional rights claim cannot be maintained for alleged violations to a decedent.[124] Since the alleged predicate events of the cover-up occurred after Mr. Whitehurst's death, and because no claim was advanced that the police conspired to kill the decedent and conceal their misdeed before the fatal encounter, the court concluded that a claim for civil rights violations could not be entertained on the facts.[125]

By contrast to the constitutional rights and protections of individuals which terminate upon death,[126] the spouse and family members of the decedent have a recognized quasi-property right in the decedent's remains that manifests at the death of

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[119] 592 F.2d 834, 840 (5th Cir. 1979).
[120] *Id*. at 836.
[121] *Id*.
[122] *Id*.
[123] *Id*. at 836-37.
[124] *See id*. at 840.
[125] *Id*.
[126] *Id.*

the individual as a right of possession, preservation, and burial.[127] Although not an absolute right,[128] this quasi-property interest typically entitles the next-of-kin to dispose of their family member's remains.[129] Under appropriate circumstances, the next-of-kin are also authorized to permit organ donation, so long as the decedent had not expressed an intent to the contrary while alive.[130]

Significantly, public policy can also circumscribe or wholly prohibit effectuating a decedent's intent with regard to the disposition of decedent's remains. For example, autopsies may be performed without considering the wishes of the decedent or next-of-kin when evidence exists that the decedent died under suspicious or violent circumstances.[131] In addition, burial is another area in which the intent of the decedent may be subject to posthumous limitation.[132] Thus, the state is at liberty to impose municipal regulations restricting the right of burial, as dictated by health, sanitation, and other public policy considerations.[133]

IV. Analysis

Where it is known how the decedent prefers to posthumously dispose of his sperm, the decedent's intent should control. This outcome is in accordance with the general legal philosophy that undergirds wills and trusts law, in which the decedent may

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[127] *See* Kerr, *supra* note 95, at 59 (citation omitted).
[128] Deference is due to the wishes of the decedent. *Id.* at 48-49. In addition, the State, acting under its police powers, may prohibit certain conduct as public policy and health and sanitation considerations dictate. *Id.* at 49-51.
[129] 25A C.J.S. *Dead Bodies* § 15 (2012).
[130] UNIF. ANATOMICAL GIFT ACT §§ 7, 9 (last amended in 2006).
[131] Kerr, *supra* note 95, at 50.
[132] *Id.*; 22A AM. JUR. 2D *Dead Bodies* § 6.
[133] 22A AM. JUR. 2D *Dead Bodies* § 6.

direct the disposition of his property after his death.[134] It is further supported by the logic of the court in *Davis*. In the context of pre-embryos, which consist of the physical union of male and female gametic materials, the court decided to resolve the disposition dispute by balancing the rights of the two interest holders. By analogy, where the gametic material at issue belongs only to one individual, as is the case with sperm or ova, the manifested intent of the sole donor should be given dispositive weight. Hence, the court in *In re Estate of Kievernagel* held that the decedent's plain intent to have his sperm sample destroyed upon his death defeated his widow's request to conceive using his sperm.[135]

As the court in *Hecht* was careful to note, the outcome in which primacy is accorded to the known intent of the decedent is best accomplished by recognizing that the decedent has a quasi-property interest in the nature of ownership in his sperm, such that he may control the posthumous disposition of his gametes.[136] This middle-ground approach avoids the pitfalls of outright classification at the extremes of either property or person.[137] If a wholesale property designation is adopted, complications will arise in the implementation of intestacy schemes. Multiple legal claims to an indivisible *res*, particularly where the intestate takers do not share a common dispositional desire, will result in heated and protracted legal disputes. These problems will be further

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[134] 95 C.J.S. *Wills* § 182 (2012) (noting that a "testator of sound mind has … absolute dominion over the disposition of his or her property, and authority to dispose of it as he or she sees fit, provided the testator does not violate the law or public policy.") Even a seemingly unjust, unequal, or unnatural disposition, whether motivated by "caprice, frivolity, revenge," or any other salient emotion, does not by itself invalidate the will. Rather, the testator's intent is to be effectuated, "unless undue influence was actually exercised on the testator. *Id.*

[135] *In re* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 316-17 (Ct. App. 2008).

[136] Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993).

[137] Katheleen R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 206-07 (1997).

compounded by the operation of representation.[138] Meanwhile, from a public policy perspective, the greater the degree of attenuation between the decedent and the heir who ultimately receives the gametic matter, the more uncomfortable it may become to accept the operation of default rules to direct the ultimate disposition of this highly personal material.[139]

Conversely, classifying the gametic material as a person would be at odds with Supreme Court precedent, to wit, the holding in *Roe v. Wade* that a fetus is not a person.[140] This classification would result in several significant consequences. First, the ambit of criminal liability could drastically expand to include reckless abandonment, involuntary manslaughter, reckless endangerment, and a host of other potential criminal charges for conduct of the soon to be mother that occurs before the birth of her child. As an example, drinking alcohol, or exposing the fetus to second hand smoke may carry criminal consequences. Second, this increased criminal liability would enhance the trauma of unpreventable miscarriages or stillbirths. A woman newly grieving the loss of her fetus' viability would be further tormented by the possibility or even the reality of a criminal prosecution. Third, promising work in the area of embryonic stem-cell research, and the field of artificial reproductive technology would be dealt a deathblow. While programs such as embryonic stem-cell research have previously operated in the face of

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[138] Even where the number of legally recognized heirs is not thereby increased, the potential for intergenerational conflict may be compounded.
[139] The concepts of laughing heirs and escheat to the state might be difficult to reconcile with the highly personal nature of gametic materials.
[140] Roe v. Wade, 410 U.S. 113, 158 (1973).

limitations on the use of federal funding,[141] the attachment of criminal liability to these scientific endeavors would likely prove fatal to the program's continued existence.[142]

Once the classification of sperm is accomplished, questions surrounding the adequacy of proof – the resort to intrinsic or extrinsic evidence, the necessity *vel non* of a writing, and the degree of authenticating requirements of form necessary – are best left to the individual states to decide as public policy dictates. Flexible standards of proof may be established in conjunction with rebuttable presumptions that operate to give legal recognition and enforcement to an adequate demonstration of the decedent's intent, without the constraints a rigid adherence to the dictates of formalism would require.

One such method would involve giving effect to a decedent's *reasonably inferred* intent.[143] In the contexts both of organ donation, where the decedent has not previously signed donor cards, or discussed his preference with a physician,[144] and provision of life support for patients without an advance directive,[145] it is clear that other areas of the law already recognize that making decisions based on a patient's reasonably inferred wishes is consistent with a respect for patient autonomy.[146]

By extension, where the decedent's dispositional intent is unknown, the constitutional balancing test could support substituting a surviving individual's intent for

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[141] Rachel Benson Gold, *Embryonic Stem Cell Research-Old Controversy: New Debate*, GUTTMACHER REP. ON PUB. POL'Y (June 15, 2012, 7:55 PM), http://www.guttmacher.org/pubs/tgr/07/4/gr070404.html.
[142] It is for this reason that the opponents of Oklahoma's proposed Personhood Act are concerned that the act will jeopardize in vitro fertilization treatment, and disproportionately impact Oklahoma's infertile couples. S. 1433, 53d Leg. (Okla. 2012); *Oklahoma*, PARENTS AGAINST PERSONHOOD, http://www.parentsagainstpersonhood.com/legislation/oklahoma/ (last accessed Apr. 20, 2012) (noting that the proposed bill "does not contain exceptions for IVF, birth control, or lifesaving pregnancy care").
[143] Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347, 348 (1999).
[144] *Id*.
[145] Carson Strong et al., *Ethics of Postmortem Sperm Retrieval After Death or Persistent Vegetative State*, 15 HUMAN REPROD. 739, 742 (2000).
[146] *Strong*, *supra* note 143, at 348.

the intent of the decedent, in limited situations. The constitutional right to reproduce, though not given explicit authorization in Supreme Court holdings, is nonetheless discussed with a high degree of approbation in dicta.[147] At least two commentators have argued that this dicta is highly suggestive that if the Court were to be confronted with a case that directly restricted the rights of married couples to reproduce, it would assert an affirmative right to procreation.[148] Lower courts have similarly confirmed the existence of an affirmative right to procreate.[149] Some, including the *Davis* court, have held that "whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation."[150]

In view of the circumscribed rights decedents currently possess in the disposition of his own remains, rights which may be limited by the surviving spouse or next-of-kin exercising their "right of burial," or by municipal restrictions, public policy, and health and sanitation considerations, it may be tempting to conclude that the constitutional balancing test will similarly prevail over the decedent's contrary intent, and favor effectuating the surviving sperm claimant's wishes, to the detriment of the decedent's desires.[151] However, while the constitutional balancing test may counsel that the intent of the survivor predominates, such an outcome is not advisable in all circumstances.

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[147] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).
[148] JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22-42 (1994); Kerr, *supra* note 95, at 71.
[149] Davis v. Davis, 842 S.W.2d 588, 601 (Tenn. 1992).
[150] *Id*.
[151] Kerr, *supra* note 95, at 50; 22A AM. JUR. 2D *Dead Bodies* § 6.

Requests for the use of a particular decedent's sperm are potentially varied and many.[152] It would appear ill-advised to approach this vast tangle of interpersonal relationships with a rigidly enforced and unyielding pre-determined outcome. This is particularly true given the myriad legal consequences of posthumous reproduction on the decedent's estate. These include: alterations to the class size of decedent's descendants, entitlement to benefits ranging from social security to workers' compensation and tort recoveries, and standing to bring wrongful death or survivor claims, among others. Each of these contingencies can potentially yield numerous controversial and contested legal issues.

Given this breath of legal implications, uniformity in the law is desirable. Among the advantages of uniformity, enhanced predictability of legal outcome and increased legitimacy for the legal system are of primary importance. With predictability, the public can anticipate a likely outcome and modify its behavior as needed, assured in the belief that regional variations will not prevail. In turn, increased predictability fosters legitimacy, to the extent that legal outcomes are seen as grounded in the law and applied systematically to all, rather than as justice dispensed at the whim of an arbitrary judiciary.

In the interest of generating a bright line rule to address the problems discussed above, the following approach is offered: where decedent's intent is not formally documented or reasonably inferred, his spouse may, in certain circumstances, authorize posthumous extraction.[153] This neither implies that marriage is an appropriate proxy for a decedent's intent to procreate, nor that marriage in all circumstances is undertaken with the intent of the parties to reproduce. Nonetheless, it remains true that marriage, which

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[152] Requests may come from any person relationally connected to the decedent, such as his widow, girlfriend, mistress, mother, siblings, extended female family member, and the like. Conversely, the request may come from a complete stranger.

[153] The court declined to enumerate or detail such circumstances, however.

often lends legal sanction to procreative attempts, arguably represents one step closer on the continuum towards a couple exercising its reproductive choice. Setting a requirement of marriage would support the public policy objective of limiting the number of legally valid claims, such that strangers would be prevented from making demands on a particular decedent's sperm, in the quest for a cash or celebrity baby. Further, establishing this rule as a rebuttable presumption would appropriately place the burden of proof on the challenging party, such that the decedent's intent could be increasingly effectuated in circumstances where his intent was not documented in a writing, but was nonetheless known to his next-of-kin. At best, this rule would enable decedent's intent to be honored more frequently; at worst, it would err on the side of respecting the procreative right and reproductive preference of the surviving spouse.

Admittedly, one regrettable outcome of the marital limitation would be the impact on couples whose relationships do not have the sanction of legal recognition. However, to the extent that the wishes of these individuals could be carried out with an appropriate manifestation of intent, tailored to the requirements of their jurisdiction, such negative consequences can be mitigated.

V. Conclusion

Posthumous sperm extraction is a practice that occurs largely in the absence of governing statutory law. Given this lack of legal guidance, the decision to grant a request for post-mortem sperm removal is frequently conducted by hospital staff in an ad-hoc fashion, and on the basis of primarily ethical rather than legal considerations. To curb this legal uncertainty, the following approach is advocated: In the first instance, the decedent has a recognized quasi-property interest in his gametic material. His

dispositional intent should govern where it is documented in writing, or reasonably inferred. In the alternative, the request of a surviving spouse may be honored in certain situations, as a matter of respect for the spouse's constitutional right to procreate. Such an approach effectuates the intent of the decedent, where this intent can be discerned, without overly compromising the reproductive rights of the surviving spouse.