

REGULATING REPRODUCTION AFTER DEATH: MINIMIZING THE POTENTIAL ‘HARM’ CAUSED TO STAKEHOLDERS BY POSTHUMOUS CONCEPTION

Claire McGovern*

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* Lecturer in Law at Maynooth University, 2024.

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I. INTRODUCTION

Due to advances in reproductive science throughout the twentieth century, the death of a person no longer prevents them from conceiving a child and producing genetic offspring. Posthumous conception involves the use of cryopreserved sperm, eggs, or embryos in assisted human reproduction, with conception occurring after the death of the person who is the source of the gamete.¹ The practice can arise in a variety of scenarios, namely:

By using gametes or embryos in assisted conception which were cryopreserved by the deceased prior to death.²

By harvesting viable gametes from a patient in a comatose or permanent vegetative state (PVS) and using the gametes in assisted conception after the source has received a clinical determination of death.³

By harvesting viable sperm from the body of deceased man within thirty-six hours of his death, and subsequently using the sperm in assisted conception.⁴

And lastly, by harvesting viable eggs from the body of a woman who has received a clinical determination of brain-stem death but remains on life support, and later using the eggs in assisted conception.⁵

In each scenario, the source of the gamete will be clinically deceased at the time when their gametes are used in assisted conception, and when any resulting child is born.⁶

¹ G. Bahadur, *Death and Conception*, 17 *HUM. REPROD.* 2769, 2769 (2002); John A. Robertson, *Posthumous Reproduction*, 69 *IND. L. REV.* 1027, 1030 (1994).

² *Kate Jane Bazley v. Wesley Monash IVF Pty Ltd* (2010) QSC 118 (Austl.).

³ *R v. Hum. Fertilisation and Embryology Auth., ex parte Blood*, [1997] 2 All ER 687 (Eng.); Dana A. Ohl et al., *Procreation After Death or Mental Incompetence: Medical Advance or Technology Gone Awry?*, 66 *FERTILITY AND STERILITY* 889, 889 (1996).

⁴ Cappy M. Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 *FERTILITY STERILITY* 512, 512 (1980).

⁵ David M. Greer et al., *Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury*, 363 *NEW ENG. J. MED.* 276, 280 (2010).

Recent years have seen a wealth of literature published on this topic. This discourse focuses heavily on the deceased as the primary stakeholder.⁷ The studies which have emerged primarily concentrate on autonomy, and whether a standard of consent from the deceased should be necessary when regulating the practice.⁸ Alongside the deceased, however, each instance of posthumous conception implicates the interests of seven additional stakeholders. These include the deceased's surviving partner, the extended family, the resulting child, the State, society, and the medical professionals who are involved in both the posthumous gamete retrieval procedure (if required), and those who carry out the assisted conception procedure.⁹ The interests of these stakeholders and the potential harm which may be caused to them by posthumous conception will vary in strength and over time.¹⁰

This piece departs from the existing literature by providing a comprehensive analysis of the specific interests and potential harms

⁶ I adopt the medico-legal definition of death as a clinical determination of cardiac or brain stem death. For different philosophical, theological and societal understandings of death advanced in the literature, see Frederick J. White, *Controversy in the Determination of Death: The Definition and Moment of Death*, 86 LINACRE Q. 366, 366 (2019); HEATHER CONWAY, *THE LAW AND THE DEAD* (1st ed. 2016); P.L. CHAU & JONATHAN HERRING, *DEATH RITES AND RIGHTS* 13 (B. Brooks-Gordon et al. eds., 2007); STUART J. YOUNGNER ET AL., *THE DEFINITION OF DEATH: CONTEMPORARY CONTROVERSIES* (2002).

⁷ Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?*, 5 J. L. BIOSCIENCES 330, 330 (2018).

⁸ *Id.*; See Belinda Bennett, *Posthumous Reproduction and the Meaning of Autonomy*, 23 MELB. UNIV. L. REV. 286, 286 (1999); R.D. Orr & M. Siegler, *Is Posthumous Semen Retrieval Ethically Permissible?*, 28 J. MED. ETHICS 299, 300 (2002); Frances R. Batzer et al., *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79(6) FERTILITY STERILITY 1263, 1265 (2003); Frederick Kroon, *Presuming Consent in the Ethics of Posthumous Sperm Procurement and Conception*, 1 REPROD. BIOMEDICINE SOC'Y ONLINE 123 (2015); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 7 NORTH CAROLINA L. REV. 901, 901 (1997); Hilary Young, *Presuming Consent to Posthumous Reproduction*, 27 J. L. HEALTH 68, 69 (2014); Kelton Tremellen & Julian Savulescu, *A Discussion Supporting Presumed Consent for Posthumous Sperm Retrieval and Conception*, 30 REPROD. BIOMEDICINE ONLINE 6, 6 (2015); Rebecca Collins, *Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma*, 30 J. MED. PHIL. 431, 431 (2005).

⁹ In cases where the gametes have not been harvested and stored by the progenitor during their lifetime, it is unlikely that the same physician will perform both the posthumous gamete extraction and the assisted conception procedure.

¹⁰ See Usha Ahluwalia & Mala Arora, *Posthumous Reproduction and Its Legal Perspective*, 2 INT. J. INFERTILITY FETAL MED. 9, 12 (2011).

caused to each of the additional stakeholders implicated by posthumous conception. To do so, I adopt Fienberg's interest theory and Mill's harm principle. These are the leading accounts of interests and harm provided for in the bioethical literature and are the routine starting point for conducting a liberal analysis in the field of reproductive ethics.¹¹ To put briefly, Fienberg states that a person has an interest when they have a "stake" in the wellbeing of an object or in a particular state of affairs.¹² People have "interests" when they are invested in a certain state or object, and when they stand "to gain or lose depending on the nature or condition" of that object.¹³ Dworkin claims that people are guided in life by two sets of interests: "experiential" and "critical" interests.¹⁴ Experiential interests are the interests that people have daily. They consist of the pains and pleasures that people experience in everyday life based on the things that happen to them.¹⁵ In contrast, "critical interests" are those which are established based on a person's convictions of what constitutes an overall good life.¹⁶ They represent a person's critical judgments rather than their experiential preferences. People do not pursue critical interests because of the experience of doing them. Rather, people pursue critical interests because they believe that their overall life will be better because they do them.¹⁷ The realization or unfulfillment of a critical interest will contribute to that person's view of whether their life was fundamentally good or bad.¹⁸

The principle of "harm" originates from John Stuart Mill. Mill argued that people should be at liberty to act as they please so long as

¹¹ R. McDougall, *Acting Parentally: An Argument Against Sex Selection*, 31 J. MED. ETHICS 601, 601 (2005); John Harris, *Sex Selection and Regulated Hatred*, 31 J.MED. ETHICS 291, 292-93 (2005).

¹² JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 13 (1984); J. Angelo Corlett, *The Philosophy of Joel Feinberg*, 10 J. ETHICS 131, 132 (2006).

¹³ *Id.* at 33-34.

¹⁴ RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 201-02 (Alfred A. Knopf eds., 1993).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 202.

¹⁸ Rebecca Dresser, *Dworkin on Dementia: Elegant Theory, Questionable Policy*, 25 HASTINGS CTR. REP. 32, 33 (1995).

the action does not result in harm to third parties.¹⁹ Mill did not define “harm”, nor expand on what precisely constitutes as sufficient harm to justify curtailing liberty.²⁰ However, the harm principle is routinely viewed in line with a person’s interests and Feinberg states that the notion of “harm” refers to the setting back, defeating, or the “thwarting” of a person’s interest.²¹ According to this specification, a person is harmed when something goes against their interest, or when the outcome for which their interest stands has been defeated.²² When harm is viewed as a setback to interests, mere momentary annoyances and irritations do not qualify as harms. Rather, “harms” have the potential to affect the quality of a person’s life and to interfere with their wellbeing.²³ Both Mill and Feinberg restrict the application of the principle to harmful actions which infringe on other people’s rights.²⁴ Whether or not a person has been “harmed” by an event is usually determined by reference to the position in which the party found themselves prior to the purported harm. It is then objectively assessed whether that person’s position has improved or regressed.²⁵ This is referred to as the counterfactual account of harm.²⁶ A person is said to suffer “harm” from an action when they are placed in a “worse-off” position than they otherwise would have been in, had the action not occurred.²⁷ Ultimately, people flourish when their interests are promoted, and they are harmed when their interests are thwarted, set back, or defeated.²⁸

The following sections of this paper examine each of the additional stakeholders implicated by posthumous conception in turn. I identify the specific interests of these stakeholders and the potential

¹⁹ JOHN S. MILL, *ON LIBERTY* 18, 94 (2009).

²⁰ Piers N. Turner, “Harm” and Mill’s Harm Principle, 124 *ETHICS* 299, 300-01 (2014).

²¹ FEINBERG, *supra* note 12, at 34.

²² *Id.*

²³ A.P. SIMESTER & ANDREAS VON HIRSCH, *CRIMES, HARMS, AND WRONGS: ON THE PRINCIPLES OF CRIMINALISATION* 37 (2011).

²⁴ Turner, *supra* note 20, at 299-326.

²⁵ Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 *SOC. PHIL. POL’Y* 145, 149 (1986).

²⁶ *Id.*

²⁷ *Id.*

²⁸ FEINBERG, *supra* note 12, at 34.

harms which may be inflicted on them by the technology. I further consider existing worldwide policies on posthumous conception and demonstrate how the interests of these stakeholders can be protected, and the potential harms caused to them by posthumous conception can be significantly reduced through effective legal regulation. I argue that professional counseling should be mandatory for both surviving partners and extended family members when proceeding with posthumous conception. In addition, I contend that a waiting period of at least one-year should have passed prior to treatment being provided. These measures serve to minimize family conflict and reduce the likelihood of parties making rash or impulsive decisions in response to grief. I further argue that inheritance clauses can lessen any potential identity harm posed to the child, and protect the interests of the deceased's extended family and the State in the administration of the deceased's assets. This can be done by symbolically recognizing the deceased as the child's parent and simultaneously precluding the child from inheriting. Lastly, I submit that States can adhere to the interests of the dead and to society's interest in the treatment of the dead and dying by incorporating a consent policy for posthumous conception, requiring some degree of consent from the deceased before treatment is provided. By regulating in this way, this paper ultimately contends that posthumous conception can be facilitated with considerable harm reduction for all stakeholders.

II. THE SURVIVING PARTNER

A. Interests

One of the primary stakeholders in posthumous conception is the deceased's surviving partner who seeks to use the deceased's gametes in assisted conception to conceive a child.²⁹ The surviving partner has a clear interest in reproducing.³⁰ The desire for parenthood is strong for many people and there are several reasons why people seek to reproduce. These include procreative interests such as gestation, genetic continuity and social parenthood.³¹ Unlike the deceased,

²⁹ Simana, *supra* note 7, at 349.

³⁰ *Id.*

³¹ *Id.* at 341, 349-50.

who no longer has any interest in reproduction, these procreative interests will not necessarily cease for the surviving partner simply because the deceased has died.³² Indeed, Parker claims that the desire to reproduce will survive in the mind of the surviving partner and that “there remains a live desire which can be satisfied” even when one of the parties has died.³³

If the surviving partner is female, they will remain in a position where they can gestate and experience pregnancy. Gestation will be unique for each person; however, many women consider pregnancy and childbirth to be an enjoyable experience.³⁴ Some women have a genuine fondness for being pregnant. They appreciate the bond which is created with the fetus throughout gestation and take pleasure in both childbearing and birth.³⁵ Pregnancy and childbirth can be an exciting time for prospective parents and is often perceived to be a positive and emotional experience for families.³⁶ Some people seek to reproduce simply because they desire this experience.³⁷ Indeed, depending on the stage in which the surviving partner is at in their life, reproducing with the gametes of their deceased partner may be their only reasonable chance of experiencing pregnancy and gestation.³⁸ This is particularly the case with female surviving partners whose ability to reproduce will begin to decline as they age.³⁹

Furthermore, irrespective of gender, posthumous conception can allow the surviving partner to pass on their genes and maintain a genetic line. Aspiring parents generally have an interest in producing

³² Badahur, *supra* note 1, at 2772; M. Parker, *Response to Orr and Siegler—Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception*, 30 J. MED. ETHICS 389, 391 (2004).

³³ *Id.*

³⁴ P.J. Parker, *Motivation of Surrogate Mothers: Initial Findings*, 140 AM. J. PSYCHIATRY 117, 117-18 (1983).

³⁵ *Id.*

³⁶ Kristen S. Montgomery et al., *Women’s Desire for Pregnancy*, 19 J. PERINATAL EDUC. 53, 58 (2010).

³⁷ *Id.*

³⁸ See Jenny Kleeman, *I Want My Late Husband’s Children’: the Fight for Posthumous Conception*, GUARDIAN, (Mar. 18, 2017, 5:30 PM), <https://www.theguardian.com/lifeandstyle/2017/mar/18/late-husbands-children-posthumous-conception>.

³⁹ Tremellen & Savulescu, *supra* note 8, at 9.

children with whom they will share genetically similar traits.⁴⁰ Parents wish to share similar traits with their children: characteristics which will identify the particular parents and child as members of the same familial group, in terms of ethnic appearance and so forth.⁴¹ Indeed, genetic reproduction is often viewed as a manifestation of a couple's union,⁴² and many people will seek out their prospective partner on the basis of that person's appearance, temperament, and interests.⁴³ They will choose a partner with traits that they deem to be desirable, to pass these attributes on to any future offspring the couple may have.⁴⁴ This interest is particularly relevant in the context of posthumous conception and might contribute towards the surviving partner's desire to reproduce after the death of their partner. Katz and Hashiloni-Dolev note that for some, posthumous conception is viewed as a natural extension of their bond with their deceased partner.⁴⁵ Thus, the surviving partner might specifically desire that the deceased's genetic material is used when they reproduce.⁴⁶ Badahur makes a similar point and observes that in *Hecht v. Superior Court of Los Angeles County*, the deceased specifically bequeathed his gametes to his surviving partner to use in posthumous conception.⁴⁷ Thus, the very act of attempting to reproduce posthumously would have had a special meaning for the couple.⁴⁸ The desire of a surviving partner to reproduce specifically with their deceased partner can also be seen in the famous English case of *R v. Human Fertilisation and Embryology Authority ex parte Blood*.⁴⁹ Here, the applicant sought to use her deceased husband's preserved sperm in posthumous concep-

⁴⁰ Fred Norton, *Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 798 (1999).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 803.

⁴⁴ *Id.*

⁴⁵ Ori Katz & Yael Hashiloni-Dolev, *(Un) Natural Grief: Novelty, Tradition and Naturalization in Israeli Discourse on Posthumous Reproduction*, 33 MED. ANTHROPOLOGY Q. 345, 356 (2019).

⁴⁶ *Id.*

⁴⁷ *Hecht v. Superior Ct. of L.A. Cnty.*, 16 Cal. App. 4th 836, 840 (1993).

⁴⁸ Badahur, *supra* note 1, at 2772.

⁴⁹ *R v. Hum. Fertilisation and Embryology Auth., ex parte Blood*, [1997] 2 All ER 687 (Eng.).

tion.⁵⁰ She admitted to the court that she could have used an anonymous sperm donor to conceive a child if she wished.⁵¹ However, the significance of posthumous conception for her was that it allowed her to use her deceased husband's genetic material.⁵² It was important to her that her late husband's genes contributed to the genetic makeup of her resulting child or children.⁵³

The surviving partner might also seek to use their deceased partner's gametes to produce a genetic sibling for an already existing child. This was the case in the New Zealand High Court case of *Re Lee (Long) deceased*.⁵⁴ The applicant in this case was already pregnant with the deceased's child at the time of her application.⁵⁵ However, she still sought possession of sperm samples which had been retrieved from her late husband so that she could use her husband's gametes in the future to produce a genetic sibling for their unborn child.⁵⁶ Young observes that restricting the availability of posthumous conception limits the surviving partner's ability to reproduce with the partner of their choice.⁵⁷ Of course, she admits that people have "little (if any) legitimate interest in reproducing with *whomever* they want."⁵⁸ For example, Cohen explains that although Brad Pitt's adoring fans may wish to genetically reproduce with him specifically, people have no right to force others to reproduce with them.⁵⁹ However, Young distinguishes the surviving partner's interest in reproducing with the deceased from the "Brad Pitt" scenario, based on the prior existing relationship between the deceased and the surviving partner.⁶⁰ She states that the relationship between the parties may

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *In re Lee (Deceased) and Long (Applicant)* [2017] NZHC 3263 at [5] (N.Z.).

⁵⁵ *Id.* at ¶ 8.

⁵⁶ *Id.*

⁵⁷ Young, *supra* note 8, at 70.

⁵⁸ *Id.* at 78.

⁵⁹ I. Glenn Cohen, *The Right Not To Be A Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1156 (2008).

⁶⁰ Young, *supra* note 8, at 81.

have generated an expectation of procreation.⁶¹ Thus, there are grounds for the surviving partner's interest in procreating with the deceased specifically.⁶² Indeed, Simana adds that this claim is more compelling if it transpires that the surviving partner has no alternative way of genetically reproducing.⁶³

The surviving partner is also in a position where they will play an active role in raising the posthumously born child. Raising a child is challenging, however, there are several positive aspects to parenthood and many people seek to reproduce based on their interest in founding and raising a family.⁶⁴ The desire to become a parent is a tradition that is shared by all sexes, races, religions and societal classes.⁶⁵ People have an interest in parenting because they find satisfaction in the experience of caring for a child. Parenthood gives people the opportunity to invest in future generations by allowing them to influence, educate and watch a child grow.⁶⁶ Women in particular are often motivated to become a parent to meet gender role stereotypes.⁶⁷ They believe that becoming a mother will provide them with a sense of accomplishment and fulfil their role as a woman.⁶⁸ Ultimately, parenthood is perceived to be a fulfilling and rewarding experience and many people enjoy the responsibility that parenthood entails.⁶⁹

Alongside routine procreative interests, there are also several independent factors which can influence the surviving partner's motivation to reproduce with the deceased's gametes. It has been suggested that posthumous conception can help the surviving partner in the grieving process by providing them with a living memory of the

⁶¹ *Id.*

⁶² *Id.*

⁶³ Simana, *supra* note 7, at 349.

⁶⁴ Abbie E. Goldberg et al, *Why Parenthood, and Why Now?: Gay Men's Motivations for Pursuing Parenthood*, 61 FAM. RELS. 157, 158 (2012).

⁶⁵ Abraham Benshushan & Joseph G. Schenker, *The Right to an Heir in the Era of Assisted Reproduction*, 13 HUM. REPROD. 1407, 1407 (1998).

⁶⁶ See Goldberg et al, *supra* note 64, at 170.

⁶⁷ Christopher R. Newton et al., *Motives for Parenthood and Response to Failed in Vitro Fertilization: Implications for Counseling*, 9 J. ASSISTED REPROD. GENETICS 24, 29 (1992).

⁶⁸ *Id.*

⁶⁹ Goldberg et al, *supra* note 64, at 163.

deceased.⁷⁰ Shuster observes that posthumous conception permits people to “transcend death” and that this can be a source of comfort for the deceased’s surviving partner.⁷¹ Similarly, Simpson describes posthumous conception as a manner in which some bad deaths can be made “good” to an extent, by alleviating some of the grief for the surviving partner.⁷² Lastly, some authors claim that surviving partners might even be motivated by financial greed and the desire to obtain the benefits of the deceased’s inheritance.⁷³

B. Harms

There are several potential harms posed to the surviving partner by posthumous conception technology. It is suggested that posthumous conception can impact the surviving partner’s psychological wellbeing.⁷⁴ The primary concern is that it can interfere with the grieving process. It is argued that reproducing posthumously can prevent the surviving partner from accepting the death of their loved one and stop them from moving on with their life.⁷⁵ This concern was raised in the Queensland Supreme Court case of *Re Gray*.⁷⁶ Chesterman J. concluded that the applicant’s request for the retrieval of sperm from her deceased husband was not in her best interests.⁷⁷ The court stated that the applicant was naturally suffering from grief and shock following the sudden death of her husband.⁷⁸ Given the cir-

⁷⁰ This was alluded to by the applicant in a New South Wales Supreme Court case. *MAW v. Western Sydney Area Health Servs.* [2000] NSWSC 358, ¶ 20. Here, the applicant stated to the court in her affidavit that posthumous conception would give her the opportunity to keep part of her deceased husband with her.

⁷¹ Evelyne Shuster, *Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. POL’Y 401, 410 (1999).

⁷² Bob Simpson, *Making “Bad” Deaths “Good”: The Kinship Consequences of Posthumous Conception*, 7 J. ROYAL ANTHROPOLOGY INST. 1, 1 (2001).

⁷³ Angela K. Lawson et al., *Blurring the line between life and death: a review of the psychological and ethical concerns related to posthumous-assisted reproduction*, 21 EUR. J. CONTRACEPTION REPRODUCTIVE HEALTH CARE 339, 340 (2016); Ruth Landau, *Planned Orphanhood*, 49 SOC. SCI. MED. 185, 189 (1999).

⁷⁴ *Id.* at 341.

⁷⁵ Tremellen & Savulescu, *supra* note 8, at 9.

⁷⁶ *In re. of Gray* [2000] QSC 390.

⁷⁷ *Id.*

⁷⁸ *Id.*

cumstances of her application, the court held that the applicant's decision was not the result of rational and careful deliberation.⁷⁹ Similar concerns were also raised by the Queensland Supreme Court in *Baker v. Queensland*.⁸⁰ Muir J. noted that the existence of a posthumously born child would prevent the applicant from starting fresh with her life.⁸¹ The court also raised concerns regarding the impact that a newborn child would have on the applicant's social life and her ability to enter new relationships.⁸²

Landau claims that when surviving partners seek out posthumous conception treatment, they refuse to accept the finality of their partner's death.⁸³ In fact, she claims that surviving partners seem to hold onto conflicting wishes: "the desire for continuity as though nothing has happened and the desire to memorialize the deceased."⁸⁴ Furthermore, while in the process of grieving, the surviving partner is also at risk of added distress should extended family members contest the use of the deceased's gametes in posthumous conception.⁸⁵ Alternatively, Shuster claims that surviving partners might even feel compelled to reproduce with the deceased's gametes if they have been bequeathed by the deceased to them, and further obliged if this pressure comes from the deceased's surviving family.⁸⁶ Landau and Shalev also raise this concern. In fact, both authors claim that the technology threatens the autonomy of women by imposing a "moral obligation" on surviving widows to reproduce.⁸⁷ Furthermore, Lawson and others note that female surviving partners in particular run the risk of undergoing further loss in circumstances where they expe-

⁷⁹ *Id.*

⁸⁰ *Baker v. Queensland* [2003] QSC 2 ¶ 7.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Landau, *supra* note 73, at 187.

⁸⁴ *Id.*

⁸⁵ Lawson et al., *supra* note 73, at 341.

⁸⁶ Shuster, *supra* note 71, at 414.

⁸⁷ Yael Hashiloni-Dolev & Zvi Triger, *The invention of the extended family of choice: the rise and fall (to date) of posthumous grandparenthood in Israel*, 39 NEW GENETICS SOC'Y 250, 252 (2020); C. Shalev, *Posthumous Insemination: May He Rest in Peace*, 27 MED. L. 96, 96 (2002); Ruth Landau, *Posthumous sperm retrieval for the purpose of later insemination or IVF in Israel: an ethical and psychosocial critique*, 19 HUM. REPROD. 1952, 1954 (2004).

rience complications with conceiving or carrying the pregnancy to term.⁸⁸ Lastly, there has been little research conducted on the emotional effects of raising a posthumously born child who is a living reminder of the deceased for the surviving partner,⁸⁹ and it has been argued that the surviving partner is likely to suffer financial hardship as a result of raising the child alone.⁹⁰

C. Minimizing Harm to the Surviving Partner

It is possible to prevent many of the potential harms posed to the surviving partner by ensuring they have received professional counseling on posthumous conception and have taken adequate time following the deceased's death before treatment is provided. Regulating in this way is not uncommon and can be seen in legislation and guidelines across many jurisdictions, including the United Kingdom,⁹¹ New Zealand,⁹² the Australian State of Victoria,⁹³ and is further recommended at a national level across Australian States and Territories.⁹⁴ The European Society of Human Reproduction and Embryology Taskforce on Ethics and Law also strongly recommends that surviving partners undergo professional counseling.⁹⁵ The rationale for counseling is to ensure that the surviving partner fully

⁸⁸ Lawson et al., *supra* note 73, at 341.

⁸⁹ *Id.*

⁹⁰ Tremellen & Savulescu, *supra* note 8.

⁹¹ Human Fertilisation and Embryology Act, 1990 (U.K.) (requiring that the patient is provided with full information and is given a suitable opportunity to receive proper counselling on the implications of their proposed treatment); Human Fertilisation and Embryology Act, 2003 (U.K.).

⁹² NAT. ETHICS COMM. ON ASSISTED HUM. REPROD., GUIDELINES ON THE USE, STORAGE AND DISPOSAL OF SPERM FROM A DECEASED MAN 6 (2000), <https://acart.health.govt.nz/assets/Uploads/ACART/Publications/acart-guidelines-storage-use-disposal-sperm-deceased.pdf> (providing that when the sperm of a deceased man is being used in posthumous conception, treatment clinics must ensure that the surviving partner receives appropriate counselling).

⁹³ Assisted Reproductive Treatment Act, 2008 (Austl.).

⁹⁴ NAT. HEALTH MED. RSCH. COUNCIL, ETHICAL GUIDELINES ON THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGY IN CLINICAL PRACTICE AND RESEARCH 17-58 (2023), <https://www.nhmrc.gov.au/about-us/publications/art>.

⁹⁵ G. Pennings et al., EUR. SOC'Y HUM. REPROD. EMBRYOLOGY TASK FORCE ETHICS L., *ESHIRE Task Force on Ethics and Law 11: Posthumous assisted reproduction*, 21 HUM. REPROD. 3050, 3053 (2006).

understands the social consequences of proceeding with posthumous conception and that they take the welfare of the resulting child into consideration.⁹⁶ The Taskforce also deems it necessary for surviving partners to be psychologically evaluated before treatment to ensure that they are not acting in response to guilt or grief for their loved one.⁹⁷

It is also common to require surviving partners to withstand a waiting period before they are permitted to use the deceased's gametes in posthumous conception. The rationale for such a requirement is to ensure that the surviving partner has been given an adequate opportunity to reflect on the death of their deceased partner and to ensure that their decision to proceed with posthumous conception treatment is not clouded by intense grief for their loved one.⁹⁸ This is recommended at a national level by the Australian National Health and Medical Research Council's *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* which states that surviving partners should withstand a standard period of mourning prior to using the deceased's gametes in posthumous conception.⁹⁹ The Australian guidelines do not stipulate how long the waiting period should be.¹⁰⁰ However, based on the recommended guidance from other jurisdictions, a standard waiting period is typically one year.¹⁰¹ This is the position taken by the ESHRE Taskforce on Ethics and Law in its ethical statement on posthumous assisted reproduction,¹⁰² and is also strongly recommended by the Cornell Guidelines issued by the Weil Cornell Medical Centre in the United States.¹⁰³ It is also the position which has been proposed

⁹⁶ *Id.* at 3052-53.

⁹⁷ *Id.*

⁹⁸ Kelton Tremellen & Julian Savulescu, *Posthumous conception by presumed consent. A pragmatic position for a rare but ethically challenging dilemma*, 3 REPROD. BIOMEDICINE SOC'Y ONLINE 26, 28 (2016).

⁹⁹ NAT. HEALTH MED. RSCH. COUNCIL, *supra* note 94, at 58.

¹⁰⁰ *Id.*

¹⁰¹ G. Pennings et al., *supra* note 95.

¹⁰² *Id.* at 3053.

¹⁰³ *Postmortem Sperm Retrieval (PMSR)*, WEIL CORNELL MED., <https://weillcornell.org/services/urology/male-infertility-and-sexual-medicine/patient-resources/postmortem-sperm-retrieval> (last visited Mar. 18, 2024).

for regulating posthumous conception in Ireland.¹⁰⁴ Belgian legislation also provides for a reflective period before posthumous conception treatment can begin, however, that period is only six months.¹⁰⁵

Of course, it must be noted that grief is complex and subjective. The process of mourning will vary depending on the person and cannot be rigidly defined by applying a blanket “standard period of mourning” for all.¹⁰⁶ Kübler-Ross and Kessler note that grief is not time bound. In fact, they suggest that grief can last forever.¹⁰⁷ They claim that people do not “get over” the loss of a loved one, but rather, they learn to move on with their lives over time.¹⁰⁸ The authors’ do suggest, however, that it is important for people to take some time following the death of a loved one to process and heal from any intense feelings of sadness, anger and emotional pain that can manifest.¹⁰⁹ A standard period of mourning does not guarantee that the surviving partner will have “overcome their grief” before proceeding with posthumous conception. However, it does provide the surviving partner with a period of reflection and can prevent them from making an impulsive decision in response to their grief.¹¹⁰ This can be evidenced by a research study which was carried out with the purpose of assessing the desire to conceive posthumously. The findings demonstrated that after undergoing a standard mourning period of six months to one year, over half of the surviving partners who initially sought out posthumous conception did not follow up with treatment.¹¹¹

¹⁰⁴ Health (Assisted Human Reproduction) Bill, 2022 (Ire.).

¹⁰⁵ Iryna Checkhovska et al., *Postmortal and Posthumous Reproduction: Ethical and Legal Approaches to Legalization*, 24 J. L., ETHICAL, REGUL. ISSUES 1, 3 (2021), <https://www.abacademies.org/articles/postmortal-and-posthumous-reproduction-ethical-and-legal-approaches-to-the-legalization-12228.html>.

¹⁰⁶ Therese A. Rando, *Grief, Dying, and Death: Clinical Interventions for Caregivers* 115 (1984); see also Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion and the Law of Burial Disputes*, 34 U. NEW SOUTH WALES L. J. 860, 865 (2011).

¹⁰⁷ ELISABETH KÜBLER-ROSS & DAVID KESSLER, ON GRIEF AND GRIEVING: FINDING THE MEANING OF GRIEF THROUGH THE FIVE STAGES OF LOSS 230 (2014).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ G. Bahadur, *Posthumous assisted reproduction (PAR): cancer patients, potential cases, counselling and consent*, 11 HUM. REPROD. 2573, 2573 (1996).

¹¹¹ *Id.*

III. EXTENDED FAMILY MEMBERS

A. Interests

The deceased can also potentially be survived by their parents, siblings or any existing children. As a result of posthumous conception, extended family members will automatically become genetic relatives of the resulting child. The surviving family, particularly the deceased's surviving parents, may have an interest in maintaining a genetic bloodline or ensuring the continuation of its family name.¹¹² Simana observes that the extended family's interest in posthumous conception reflects, first and foremost, its interest in realizing their deceased relative's interest in genetic continuity.¹¹³ However, it can also reveal the extended family's own interest in the continuation of the genetic bloodline.¹¹⁴ This interest will of course, vary in strength depending on the family's cultural values.¹¹⁵ Maddox notes that the deceased's cultural beliefs (and those of their family) will contribute to the surviving family's interest in maintaining a genetic line.¹¹⁶ This was the case in *Re Lee (Long) deceased*,¹¹⁷ where the surviving partner's application for posthumous sperm retrieval was fully supported by the deceased's extended family whose traditional ethnic values favored the continuation of their family bloodline.¹¹⁸ That being said, the interest in maintaining a genetic line is not solely reserved to cases where the family's cultural beliefs favor genetic reproduction.¹¹⁹ Affdal and Ravitsky put forward that genetic continuity is in the interest of all human beings, irrespective of culture.¹²⁰ Posthumous

¹¹² Young, *supra* note 8.

¹¹³ Simana, *supra* note 7, at 350.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 342.

¹¹⁶ NEIL MADDOX, CONSENT AND THE REGULATION OF POSTHUMOUS CONCEPTION 16 (2019), <https://mural.maynoothuniversity.ie/10930/1.haslightboxThumbnailVersion/posthumousconceptionris.pdf>; Neil Maddox, *Retrieval and Use of Sperm after Death: In the Matter of Lee (Deceased) and Long (Applicant) [2017] NZHC 3263*, 15 OTAGO L. REV. 303, 304 (2018).

¹¹⁷ Maddox, *supra* note 116, at 303.

¹¹⁸ *Id.* at 304.

¹¹⁹ Aliya O. Affdal & Vardit Ravitsky, *Parents' Posthumous Use of Daughter's Ovarian Tissue: Ethical Dimensions*, 33 BIOETHICS 82, 86-87 (2019).

¹²⁰ *Id.*

conception allows extended family members to realize both the interests of the deceased and their own interests in this regard.¹²¹

The surviving family can also have interests in having a relationship with the posthumously born child, either as a grandparent, an aunt, uncle, sibling etc.¹²² The strength of this interest will of course, vary depending on the proximity of the surviving family member's relationship to the deceased. However, it is particularly relevant for surviving parents, who not only have a critical interest in becoming grandparents, but also an experiential interest in experiencing grandparenthood.¹²³ This is evidenced by the recent influx of reports detailing requests made by surviving parents to use their deceased children's gametes in posthumous conception to fulfil their own desire of becoming grandparents and raising a genetic grandchild.¹²⁴ Simana observes that when children pre-decease their parents it goes against the natural order. It takes away the parent's opportunity to watch their child grow into adulthood and to reap the rewards of being grandparents.¹²⁵ Posthumous conception keeps the possibility of experiencing the joys of grandparenthood intact for the deceased's surviving parents.¹²⁶ Affdal and Ravitsky further argue that the interests of surviving family members in maintaining a genetic line only becomes meaningful in cases when they establish a relationship with the genetically related child.¹²⁷ Raising a genetic grandchild can also potentially help surviving parents with the bereavement process by providing them with comfort and solace.¹²⁸ Indeed, when requests are made by surviving parents, their application is usually justified

¹²¹ *Id.* at 87-88.

¹²² Young, *supra* note 8, at 82.

¹²³ *Id.* at 81.

¹²⁴ *Mr. & Mrs. M v. Hum. Fertilisation and Embryology Auth.* [2016] EWCA Civ 611 (appeal from UK); *Petithory Lanzmann v. France*, [2019] App. No. 23038/19 (appeal from Euro. Ct. H.R.); see also Georgia Canton, *Woman Uses Dead Son's Sperm for IVF Grandchildren*, BIONEWS (Feb. 19, 2018), https://www.bionews.org.uk/page_96375; Nofar Yakovi Gan-Or, *Securing Posterity: The Right to Postmortem Grandparenthood and the Problem for Law*, 37 COL. J. GENDER L. 109, 134-57 (2019); Affdal & Ravitsky, *supra* note 119.

¹²⁵ Simana, *supra* note 7, at 350-51.

¹²⁶ *Id.* at 351.

¹²⁷ Affdal & Ravitsky, *supra* note 119, at 87.

¹²⁸ Gan-Or, *supra* note 124, at 138.

on the basis of providing a remedy for their own personal grief.¹²⁹ Several authors have made this point and claim that simply having the deceased's gametes available for use in posthumous conception can provide the grieving family with hope, even if it is never realized.¹³⁰ Posthumous conception can also be a way for the family to commemorate their deceased relative by providing the family with a living memory of them.¹³¹ Bahadur states that posthumous conception gives grieving families the opportunity to see physical parts of their loved one in the resulting child.¹³² The child not only acts as a living memorial or legacy for the deceased, but is also a physical means in which the family can stay connected with them.¹³³ Recent studies have even described maintaining a link with a deceased relative as 'healthy grieving' when compared to the approach of letting go.¹³⁴ Thus, commentators have argued that by allowing surviving families to continue their bond with the deceased, posthumous conception is natural in the grieving process.¹³⁵

If the deceased had expressed a pre-mortem desire to become a parent, posthumous conception can also be a way for the extended family to fulfil the deceased's wishes even though they are no longer around.¹³⁶ This occurred in the English case of *R (on the Application of Mr. and Mrs. M) v. Human Fertilisation and Embryology Authority*.¹³⁷ The deceased's surviving parents sought to have their daugh-

¹²⁹ *Id.* at 111; Mary Kathryn Sapp, *In Re Zhu: Implied Consent to Posthumous Sperm Retrieval*, 23 S. METHODIST U. SCI. TECH. L. REV. 89, 90 (2020).

¹³⁰ Katz & Hashiloni-Dolev, *supra* note 45, at 357; Simpson, *supra* note 72, at 11; Affdal & Ravitsky, *supra* note 119, at 87.

¹³¹ Gan-Or, *supra* note 124, at 146.

¹³² See generally Bahadur, *supra* note 1; Bahadur, *supra* note 110, at 2573.

¹³³ A. Starza-Allen, *Texan Judge Permits Post-Mortem Sperm Collection*, BIONEWS (Apr. 14, 2009), https://www.bionews.org.uk/page_91022; See *In Re Estate of Nikolas Colton Evans, Deceased*, No. C-1-PB-09-000304, 2009 WL 7729555 (Tex. Prob. Apr. 7, 2009) (Here, the applicant mother, who was granted permission by a Texan Probate Court to harvest sperm samples from the body of her deceased son was quoted saying that she was motivated to harvest her son's sperm following his death because she wanted her son to 'live on' and she wanted to 'keep part of him' with her.).

¹³⁴ Affdal & Ravitsky, *supra* note 119, at 87; Katz & Hashiloni-Dolev, *supra* note 45, at 357.

¹³⁵ Katz & Hashiloni-Dolev, *supra* note 45, at 357-58.

¹³⁶ Gan-Or, *supra* note 124, at 147.

¹³⁷ *R (on the application of Mr. & Mrs. M) v. Hum. Fertilisation and Embryology Auth.*, [1997]

ter's cryopreserved eggs transported from the United Kingdom to the United States so that the deceased's mother could use her daughter's gametes with an anonymous sperm donor to produce a genetic grandchild.¹³⁸ Extensive evidence was provided to the court indicating that the deceased had a strong desire to become a mother.¹³⁹ Prior to death, the deceased went to great lengths to preserve her chances of genetically reproducing.¹⁴⁰ It was clear to the court that the deceased had wished for her eggs to be used posthumously by her parents and that she did not want her gametes to perish.¹⁴¹ In this case, posthumous conception was a way in which the surviving family could give effect to their daughter's wishes even though she was no longer around. As noted earlier, Simana claims that the extended family's interest in posthumous conception primarily reflects their desire to realize the deceased's interest in genetic continuity.¹⁴² Indeed, Ram-Tiktin and others have stated that when surviving families pay respect to the deceased's wishes, it can have a positive effect on their own personal welfare.¹⁴³ Moreover, they may even feel that it is expected of them to uphold the deceased's wishes, or that it will allow them to reconcile with the death of their loved one.¹⁴⁴

B. Harms

One of the alleged harms caused by posthumous conception to the extended family is that the resulting child will cause disruption to the existing family structure. This was at issue in the Californian Supreme Court case *Hecht v. Superior Court of Los Angeles County*.¹⁴⁵ Here, the deceased cryopreserved several samples of his sperm prior to taking his own life. There was a dispute between the deceased's

AC 687 (appeal taken from Eng.).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Simana, *supra* note 7, at 350.

¹⁴³ Efrat Ram-Tiktin et al., *Expanding the Use of Posthumous Assisted Reproduction Technique: Should the Deceased's Parents be Allowed to Use His Sperm?*, 14 CLINICAL ETHICS 18, 23 (2019).

¹⁴⁴ *Id.*

¹⁴⁵ *Hecht v. Superior Ct. of L.A. Cnty.*, 16 Cal. App. 4th 836, 844 (1993).

surviving partner (Hecht) and his pre-existing children from a previous marriage as to the fate of his deposited sperm samples.¹⁴⁶ Hecht sought to use the deceased's sperm to conceive a child and relied on provisions in his will which bequeathed the sperm samples to her.¹⁴⁷ However, the deceased's children contested the validity of the will and sought for their father's sperm to be destroyed to prevent the disruption that a posthumously born child would have on their existing family structure.¹⁴⁸ Steinbock and O'Brien note that in *Hecht*, the deceased's existing children opposed the application on the basis that it was egotistical and irresponsible to bring a child into the world who would never have the chance of being raised in a traditional family.¹⁴⁹ They contended that destroying their father's sperm would help safeguard the existing family unit.¹⁵⁰ Nolan makes a similar observation and states that the primary objection raised by pre-existing children in cases such as *Hecht*,¹⁵¹ is that the addition of a posthumously born child will jeopardize the existing family structure and result in emotional turmoil for the deceased's surviving family.¹⁵² The extended family might also be concerned with the impact that a posthumously born child might have on the deceased's inheritable estate. Kindregan and McBrien note that if a posthumously born child is entitled to inherit from the deceased's estate, it might have the effect of reducing any entitlement that the surviving family would otherwise have to inherit from the deceased.¹⁵³ The potential harm in this case is likely to be strongest for the deceased's surviving children, if any, as they would be considered equal to the posthu-

¹⁴⁶ *Id.* at 842-843.

¹⁴⁷ *Id.* at 840.

¹⁴⁸ *Id.* at 842-44.

¹⁴⁹ Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. POL'Y REV. 57, 57-58 (1995); Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. POL'Y 332, 341 (2009).

¹⁵⁰ Steinbock, *supra* note 149, at 57-58.

¹⁵¹ *Hecht v. Superior Ct. of Los Angeles Cnty.*, 16 Cal. App. 4th 836, 844 (1993).

¹⁵² Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter?* 11 BRIGHAM YOUNG U. PUB. L. 1, 23 (1997) (citing *Hall v. Fertility Institute of New Orleans*, 647 So.2d 1348, 1350 (1994)).

¹⁵³ Charles P. Kindregan Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L. Q. 579, 595 (2005).

mously born child in the line of succession.¹⁵⁴ Alternatively, extended family members might contest the application on the basis that posthumous conception is a selfish or unnatural act.¹⁵⁵ This was put forward by the children in *Hecht*,¹⁵⁶ and was also a key concern identified by Katz and Hashiloni-Dolev when conducting interviews with stakeholders.¹⁵⁷ The authors quoted interviewees who viewed posthumous conception as “fighting nature” and as “pathological and unnatural.”¹⁵⁸

Surviving families will also naturally have interest in the treatment of their deceased relative’s corpse. Conway notes that grieving families often have emotional objections to procedures which they feel ‘violates’ the body of their deceased relative.¹⁵⁹ Indeed, they might be offended by a procedure such as posthumous gamete retrieval and view this as an indecent interference with the deceased’s body. Alternatively, the surviving family might object on cultural or religious grounds. Conway and McEvoy observe that many cultures and religions attribute significant importance towards respecting the dead,¹⁶⁰ and the nature and content of the deceased’s funeral rites will ordinarily be determined by the deceased’s own, or their family’s culture or religion.¹⁶¹ Objections to posthumous gamete retrieval and conception might come from extended family members whose cultural background or religious beliefs dictate that the deceased’s corpse is dealt with in a particular manner, or that oppose the practice.¹⁶² Indeed, the process of posthumous gamete retrieval might even place a delay on the deceased’s funeral and burial. This

¹⁵⁴ *Id.*

¹⁵⁵ Young, *supra* note 8, at 81.

¹⁵⁶ *Hecht v. Superior Ct. of L.A. Cnty.*, 16 Cal. App. 4th 836, 844 (1993) (children put forward the argument that posthumous conception was egotistical and selfish); Steinbock, *supra* note 149, at 57-58; O’Brien, *supra* note 149, at 341.

¹⁵⁷ Katz & Hashiloni, *supra* note 45, at 346-47.

¹⁵⁸ *Id.*

¹⁵⁹ CONWAY, *supra* note 6, at Chapter 1, Part II; Young, *supra* note 8, at 90.

¹⁶⁰ Heather Conway & Kieran McEvoy, *The Dead, the Law, and the Politics of the Past*, 31 J. L. SOC’Y 539, 542 (2004).

¹⁶¹ Remigus Nnamdi Nwabueze, *Legal Control of Burial Rights*, 2 CAMBRIDGE J. INT’L COMPAR. L. 196, 200 (2013).

¹⁶² Simana, *supra* note 7, at 342.

would certainly be the case for facilitating gamete retrieval from a woman who has suffered brain-stem death, as the process of ovarian hyperstimulation and egg retrieval takes nine to ten days.¹⁶³ The strength of this harm will be highly subjective and will vary depending on the extent to which the deceased's family members adhere to a particular culture or religion, and the proximity of their relationship to the deceased.¹⁶⁴

It is also argued that posthumous conception can affect the psychological wellbeing of surviving family members by impacting their ability to grieve and find closure following the death of their loved one.¹⁶⁵ Lawson and others highlight that there is risk of added distress where there is familial conflict regarding the use of the deceased's gametes such as in the case of *Hecht*.¹⁶⁶ Lastly, there is a concern in respect of surviving parents using their child's gametes in posthumous conception. Batzer and others note that surviving parents can sometimes be motivated by posthumous conception to provide them with a "replacement child" to parent. The worry is that this scenario may blur the boundaries between parents and grandparents and that the deceased's parents might raise that child as if they were their own child, rather than as their grandchild.¹⁶⁷

C. Minimizing Harm to the Extended Family

There are several ways in which regulation can be used to minimize the potential harm posed by posthumous conception to the extended family. First and foremost, parents do not typically have a say in whether their child reproduces. Likewise, existing children do not ordinarily have a say in whether their parents continue to have more children. While the extended family members might have an interest

¹⁶³ It is unlikely that the procedure of posthumous gamete retrieval from a man would place an undue delay on the deceased's funeral/burial as the retrieval of sperm from a deceased man must take place within thirty-six hours of death. Greer et al., *supra* note 5.

¹⁶⁴ See C. Robey, *Posthumous Semen Retrieval and Reproduction: An Ethical, Legal and Religious Analysis* (2015) (Master's Thesis, Wake Forest University) (noting different religious perspectives on posthumous gamete retrieval and conception).

¹⁶⁵ Young, *supra* note 8, at 90.

¹⁶⁶ Lawson et al., *supra* note 73, at 341; *Hecht v. Superior Ct. of L.A. Cnty.*, 16 Cal. App. 4th 836, 844 (1993).

¹⁶⁷ Frances R. Batzer et al., *supra* note 8, at 1265.

in becoming or in avoiding becoming a genetic relative of the resulting child, both Katz and Young claim that any interest of the extended family members in this regard is relatively weak when balanced against the interests of the deceased's surviving spouse in reproducing.¹⁶⁸ Admittedly, extended family members may have a legitimate interest in how the body of their deceased relative is treated, and they may be genuinely upset or offended by any procedure that attempts to interfere with the body of the deceased such as post-mortem gamete retrieval. Alternatively, they may object to any interference with the deceased's body on religious grounds.¹⁶⁹ However, ultimate control over how the deceased's body is treated and disposed of is going to rest with the executor of the deceased's estate (where they died testate), or the most senior available next of kin (where they died intestate).¹⁷⁰ The hierarchy of control over the deceased's body will rank from the deceased's surviving spouse and then fall to any existing children, parents, siblings, and other specified family members.¹⁷¹ Thus, the interests of extended family members in the treatment of the deceased's body are going to be weak when compared to any interest of the deceased's surviving spouse. What's more, Mill and Feinberg suggest that "harm" must infringe on other people's rights.¹⁷² The extended family do not have any recognized right to contribute to the reproductive decision making of their deceased relative, to avoid family conflict, or to control the body of the deceased in cases where they are not the direct next of kin.¹⁷³ Despite this, it is certainly necessary to prevent family litigation and to ensure that there is certainty regarding who can access posthumous conception treatment. Thus, regulation should be used to ensure that the availability of posthumous conception is clearly defined and solely limited

¹⁶⁸ Katherine D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 307 (2006); Young, *supra* note 8, at 82.

¹⁶⁹ Young, *supra* note 8, at 90.

¹⁷⁰ Heather Conway, *Dead, But Not Buried: Bodies, Burial and Family Conflicts*, 23 LEGAL STUDIES 423, 426 (2003).

¹⁷¹ *Id.*

¹⁷² PAUL SMITH, *MORAL AND POLITICAL PHILOSOPHY: KEY ISSUES, CONCEPTS AND THEORIES* 76-77, (Palgrave MacMillan, 2008th ed.) (2008).

¹⁷³ Frances R. Batzer et al., *supra* note 8, at 1265; Katz, *supra* note 168, at 307.

to one party. This can be achieved by simply legislating to ensure that the deceased's most senior available next of kin has the ultimate power of veto when it comes to requesting treatment.

Secondly, regarding the extended family member's interest in inheriting from the deceased, it is possible to legislate in such a way to preclude the posthumously born child inheriting from the deceased's estate and thus prevent any disruption to the existing family members rights of inheritance. This is currently the law in the United Kingdom where the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 (UK) has the effect of disentitling posthumously born children benefiting from their deceased father's estate.¹⁷⁴ Similar legislation can also be seen in the Australian State of Victoria.¹⁷⁵ Like the UK legislation, the Status of Children Act 1974 (VIC) permits the deceased father of a posthumously born child to be registered as the parent of the child on their birth certificate.¹⁷⁶ However, it does not allow the child to inherit from the deceased's estate.¹⁷⁷ Lastly, as with the surviving partner, it is possible to prevent the potential psychological harm posed by posthumous conception to the surviving parents or extended family by ensuring that they undergo professional counseling and have had adequate time to mourn the deceased prior to using the deceased's gametes in posthumous conception.¹⁷⁸ Lawson and others suggest that psychological consultations are necessary for surviving families who seek posthumous gamete retrieval or conception as it can aid their decision making following a traumatic death.¹⁷⁹ Counseling can also address any competing desires of family members in the context of posthumous conception, along with the risks and benefits of posthumous conception to families.¹⁸⁰

¹⁷⁴ Human Fertilisation and Embryology (Deceased Fathers) Act (2003) § 1(2) (Eng.).

¹⁷⁵ *Status of Children Act 1974* (Vic) § 37(2)(b) (Austl.).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Bahadur, *supra* note 110, at 2574.

¹⁷⁹ Lawson et al., *supra* note 73, at 343.

¹⁸⁰ *Id.*

IV. THE POSTHUMOUSLY BORN CHILD

If successful, posthumous conception is going to result in a child or children. Therefore, the interests of the resulting child and the potential harms caused by posthumous conception to them are significant in determining how the practice should be regulated.¹⁸¹ The effects of posthumous conception on the welfare of the child born are not well documented in the literature.¹⁸² However, there are four common objections specifically raised when it comes to the welfare of posthumously conceived children. These include concerns regarding parental acknowledgement, rights of inheritance, family structure and identity harm.¹⁸³

A. Harms

A primary concern raised by courts and commentators relates to the legal status of the resulting child. The issue is whether the posthumously born child can be regarded as the legal offspring of their deceased parent and the effect that a lack of parental acknowledgement might have on the child.¹⁸⁴ Ordinarily, the dead cannot be classed as legal parents. However, there is a common law presumption in favor of paternity where the child has been born within the normal period of gestation measured from the date of the parent's death (usually 300 days).¹⁸⁵ In most cases, it is unlikely that the requesting party will be able to conceive in the days following the death of their partner.¹⁸⁶ First, they will be in a state of mourning, and they might also experience legal barriers or difficulty with conceiving.¹⁸⁷ Thus, it is doubtful that the surviving partner will manage to conceive within the requisite time for the presumption of paternity to

¹⁸¹ Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 J. L. HEALTH 29, 30-41 (2014).

¹⁸² Bahadur, *supra* note 1, at 2772.

¹⁸³ Sabatello, *supra* note 181, at 56.

¹⁸⁴ *Id.*

¹⁸⁵ Neil Maddox, *Inheritance and the Posthumously Conceived Child*, 81 CONVEYANCING PROP. LAW. 405, 410 (2017); Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 La. L. Rev. 613, 613 (2004).

¹⁸⁶ Star, *supra* note 185, at 615.

¹⁸⁷ *Id.*

apply and for the deceased to be recognized as the child's legal parent.¹⁸⁸ This results in a scenario where the resulting child will only have one legal parent. Furthermore, they will be unable to inherit from the deceased's estate or be entitled to receive any available social security benefits.¹⁸⁹ Having one legal parent is not socially unacceptable and there are already circumstances permitted by law which result in children being born without legal fathers (such as donor insemination).¹⁹⁰ However, there are certainly benefits for the child to be recognized as the deceased's legal offspring. Parental acknowledgement can give the child certainty regarding their lineage. They will know exactly who their parent was, and they will know that they loved their surviving parent. This can contribute towards the child's sense of feeling that they were wanted, and it can help to validate the child's place within the family unit.¹⁹¹ There are also practical benefits. It will ensure legal relationships with the deceased's wider family and that any pre-existing children of the deceased and the surviving partner are recognized as full siblings of the resulting child, rather than half siblings.¹⁹² This can be of symbolic importance for some families such as those in the New Zealand High Court case of *Re Lee*.¹⁹³ The importance of having the deceased symbolically recognized as the parent of a posthumously born child was successfully put forward by Diane Blood in a case taken by her against the UK's Department of Health in 2003.¹⁹⁴ Following the birth of her posthumously born children, Mrs. Blood challenged the former UK law which prevented her deceased husband from being registered as the

¹⁸⁸ Maddox, *supra* note 185, at 410.

¹⁸⁹ Ruth Zafran, *Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. POL'Y 47, 58-59 (2007).

¹⁹⁰ James France, *Estates on Ice: The Case for Paternity and Succession Rights of Posthumously Conceived Children* 24 (Oct. 2018) (Bachelor of L. Thesis, Univ. of Otago).

¹⁹¹ Sabatello, *supra* note 181, at 58; *see* France, *supra* note 190, at 24.

¹⁹² *See* France, *supra* note 190, at 24.

¹⁹³ Here, the deceased's parents were supportive of the surviving partner's application for posthumous conception based on their desire to continue the deceased's bloodline and to have genetic grandchildren. Moreover, the surviving partner wished to produce a genetic sibling for the couple's unborn child. *In re Lee (Deceased) and Long (Applicant)* [2017] NZHC 3263 (N.Z.).

¹⁹⁴ *See generally R v. Hum. Fertilisation and Embryology Auth., ex parte Blood*, [1997] 2 All ER 687 (Eng.).

father of her posthumously conceived children on their birth certificates.¹⁹⁵ Mrs. Blood claimed that the UK law amounted to a breach of her right to private and family life under Article 8 of the European Convention of Human Rights and her right to marry and found a family under Article 12 of the Convention.¹⁹⁶ Mrs. Blood was successful in her application and the UK provision has since been amended to permit the registration of deceased fathers on the birth certificates of posthumously born children.¹⁹⁷

Another argument raised is that the resulting child will be disadvantaged by their inevitable family structure.¹⁹⁸ Posthumously conceived children have been labeled by some commentators as 'half-orphans'.¹⁹⁹ The child will be born into a single parent household, and they will never have the opportunity of being raised by both genetic parents. This concern was put forward by the New South Wales Supreme Court in *MAW v. Western Sydney Area Health Service*:²⁰⁰ "... Such a child would never have the prospect of knowing its father. Such a child would come to [recognize] that he or she was not sought to be procreated during the life of the father."²⁰¹

Some writers suggest that it is simply preferable for children to be raised by two parents rather than one parent,²⁰² while others contend that the absence of a parental figure can negatively impact on the psychological wellbeing of the child.²⁰³ The absence of a genetic parent can result in the child having doubts regarding their origins and their position within society. There is also an argument that being raised by a single parent can lead to the child being economically

¹⁹⁵ *Id.*; Human Fertilisation and Embryology Act (1990) § 28(6)(b), (Eng.).

¹⁹⁶ *R v. Hum. Fertilisation and Embryology Auth., ex parte Blood*, *supra* note 194; JOINT COMMITTEE HUMAN RIGHTS, EIGHTH REPORT, 2002-03, HL 25, ¶ 31 (U.K.).

¹⁹⁷ *R v. Hum. Fertilisation and Embryology Auth., ex parte Blood*, *supra* note 194; Human Fertilisation and Embryology (Deceased Fathers) Act (2003) § 1(2), (Eng.).

¹⁹⁸ Sabatello, *supra* note 181, at 58-59.

¹⁹⁹ Sorin Hostiuc & Cristian George Curca, *Informed Consent in Posthumous Sperm Procurement* 282 ARCHIVES GYNAECOLOGICAL OBSTETRICS 433, 436 (2010); Landau, *supra* note 73.

²⁰⁰ *MAW v. W. Sydney Area Health Serv.* (2000) (Qld.).

²⁰¹ *Id.* at ¶ 43.

²⁰² Landau, *supra* note 73, at 1953; Bahadur, *supra* note 1, at 2772.

²⁰³ Hostiuc & Curca, *supra* note 199, at 436.

disadvantaged as they are being raised in a single income family.²⁰⁴ Indeed, there is also a fear that because the parent is potentially acting in response to grief and loss, they will be unable to raise the child within a stable family setting.²⁰⁵ Lastly, it has been suggested that the nature of the child's conception can lead to the child being socially ostracized by their peers.²⁰⁶ This was raised by the Queensland Supreme Court in *Re Gray*:²⁰⁷ "...The very nature of the conception may cause the child embarrassment or more serious emotional problems as it grows up."²⁰⁸

It is also suggested that it can be damaging for a child to feel that they were born simply to provide a symbolic memory of their deceased parent.²⁰⁹ This concern was expressed by the New South Wales Supreme Court in *MAW v. Western Sydney Area Health Service*.²¹⁰ O'Keefe J. quoted statements made by the applicant in her affidavit which stated: "...I feel that I can't live without my husband, and this is giving me the opportunity to have at least part of him still with me."²¹¹

The court held that the applicant's motives for posthumous conception were based on her desire to "keep her husband with her despite his death."²¹² The court was also concerned that societal attitudes towards posthumous conception would result in an unhappy situation for the child and concluded that it was not in the best interests of a child to be brought into existence in such a manner.²¹³ Some courts and commentators have suggested that a posthumously con-

²⁰⁴ Carson Strong et al., *Ethics of Post-mortem Sperm Retrieval*, 15 HUM. REPROD. 739, 742 (2000).

²⁰⁵ Sabatello, *supra* note 181, at 59.

²⁰⁶ Tremellen & Savulescu, *supra* note 8, at 7; Jason Pobjoy, *Medically mediated reproduction: posthumous conception and the best interests of the child*, 15 J. L. MED. 450, 450-468 (2007); see *MAW v. W. Sydney Area Health Serv.* [2000] NSWSC 358, ¶ 43 (Aust.), (same argument raised by O'Keefe J. in New South Wales Supreme Court).

²⁰⁷ *In re Gray* [2000] QSC 390 (Aust.).

²⁰⁸ *Id.* at 9.

²⁰⁹ Young, *supra* note 8, at 84.

²¹⁰ *MAW*, *supra* note 206, at ¶ 24-25.

²¹¹ *Id.* at ¶ 20.

²¹² *Id.*

²¹³ *Id.* at ¶¶ 25, 44.

ceived child is likely to experience identity issues due to the expectation that they must act as a replacement for their deceased parent and might feel obligated to assume characteristics of the deceased.²¹⁴ Overall, the long-term psychological impacts of being conceived after the death of a parent are not well documented.²¹⁵ There is a risk that the child's psychological health might suffer due to the compromised parenting of a grieving parent, and they could suffer confused identity and upset when compared to the deceased.²¹⁶

B. The Non-Identify Problem and the Interest in Existing Argument

The difficulty with objecting to posthumous conception based on harm to the resulting child is the "non-identity problem."²¹⁷ The non-identity problem claims that in some cases, our present choices and actions will affect the very existence, identity and quality of life for future existing people.²¹⁸ It raises questions regarding the obligations that we owe to future people who, other than by our own actions, will otherwise not exist.²¹⁹ The idea was first introduced by Robert Adams, in his paper *Must God Create the Best?*²²⁰ Adams argued that people cannot be harmed by coming into existence.²²¹ Even when people are created in circumstances which are less desirable than the most favorable circumstances, they are not harmed because those *specific* beings would otherwise not exist in the best possible world.²²² Adams argued that it is only wrong to create life in circumstances where it is better for the beings who have been created not to exist at all.²²³ Parfit coined this idea as the "non-identity problem."²²⁴

²¹⁴ Sabatello, *supra* note 181, at 61; *MAW*, *supra* note at ¶ 20; Lawson et al., *supra* note 73, at 343.

²¹⁵ Lawson et al., *supra* note 73, at 343.

²¹⁶ *Id.* at 342-43; Sabatello, *supra* note 181, at 35.

²¹⁷ Robertson, *supra* note 1, at 1040; Strong et al., *supra* note 204, at 741.

²¹⁸ Matthew Hanser, *Harming Future People*, 19 PHIL. PUB. AFF. 47, 47 (1990).

²¹⁹ David Boonin, *How to Solve the Non-identity Problem*, 22 PUB. AFF. Q. 129, 129 (2008).

²²⁰ Robert M. Adams, *Must God Create the Best?*, 81 PHIL. REV. 317, 319 (1972).

²²¹ *Id.* at 319-20.

²²² *Id.* at 320.

²²³ *See id.*

Parfit notes that timing plays a crucial part in forming personal identity.²²⁵ The argument is that an individual's identity is dependent on the exact timing and nature of their conception. Thus, if a particular person was not conceived at the very time in which they were in fact conceived then that specific individual would never exist at all.²²⁶ Cohen adds that "any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist."²²⁷ In the case of posthumous conception, the purported "harm" to the child is the very act which brings the child into being.²²⁸ Thus, by claiming that a child is harmed by being born through posthumous conception suggests that the child is in a better position by not coming into existence altogether.²²⁹ Indeed, under Feinberg's counterfactual theory of harm, one needs to show that the person who has been harmed is in a "worse off" position than they would otherwise be in, had the harm had not occurred.²³⁰

The traditional response to the "harm to children" argument is that children have an "interest in existing."²³¹ Robertson argues that children have an interest in being born.²³² On this account, life is the overriding benefit.²³³ Irrespective of a particular child's circumstances, they're going to value their life and cannot be harmed by being brought into existence.²³⁴ Robertson claims that restricting reproductive liberty is only justified when the harm inflicted on the resulting child is so severe that the child will truly feel that their life is worse

224 DEREK PARFIT, REASONS AND PERSONS 359 (1984).

225 *See id.*, at 351-352.

226 *Id.*

227 Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423, 426 (2011).

228 Strong et al., *supra* note 204, at 741.

229 Robertson, *supra* note 1, at 1040.

230 Feinberg, *supra* note 25.

231 Cynthia B. Cohen, "Give Me Children or I Shall Die!" *New Reproductive Technologies and Harm to Children*, 26 HASTINGS CTR. REP. 19, 20-21 (1996).

232 *See generally* John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth* 69 VA. L. REV. 405, 440 (1983).

233 Cohen, *supra* note 231, at 21.

234 Robertson, *supra* note 233, at 434.

than non-existence.²³⁵ Similarly, Cohen contends that children cannot be harmed by being brought into existence unless they are given a life which is not worth living.²³⁶ Certainly, one must be mindful of responsible reproduction and conceiving in cases where it is highly likely that any child born as a result will suffer from serious or fatal genetic disabilities and health conditions may justify limiting the parent's interest in reproduction.²³⁷ However, Robertson suggests that in most cases, the child is going to have an interest in existing. So long as the child's life is on balance "worth living", then the prospective parent's reproductive autonomy should not be curtailed by advancing the argument of harm to child welfare.²³⁸

Some object to applying Feinberg's concept of "harm" to the unborn because it compares existence with non-existence.²³⁹ The "interest in living argument" presupposes that it is in the interest of all children who might be born, to be brought into existence. Indeed, it assumes that there is a hypothetical world of unborn children who are waiting to come into existence, and whose positions are less desirable than they would be should they be born.²⁴⁰ Mulligan suggests that it is better for us to view life as "neutral," rather than to view life as an overriding benefit, given that the alternative state of not living is unknown. "The neutral view does not show that the child may be made worse off than he was before by being born, but it does show that some lives confer only disadvantage rather than advantage."²⁴¹

Prior to being born, however, the "child" does not have any interests which can be served or harmed.²⁴² Feinberg notes that to be "better off," it is "necessary to be."²⁴³ Thus, the "interest in existing" argument can only be rationally advanced after the birth of the child.

²³⁵ *Id.*

²³⁶ Cohen, *supra* note 227, at 437.

²³⁷ See generally Bonnie Steinbock, *A Philosopher Looks at Assisted Reproduction*, 12 J. ASSISTED REPROD. GENETICS 543, 549-50 (1995).

²³⁸ Robertson, *supra* note 232, at 434.

²³⁹ Strong et al., *supra* note 204, at 741.

²⁴⁰ Cohen, *supra* note 231, at 21.

²⁴¹ Andrea Mulligan, *Fundamental Rights and Organising Principles in the Regulation of Assisted Reproduction in Ireland* 290 (2013) (Ph.D. thesis, Trinity College Dublin).

²⁴² *Id.*

²⁴³ Feinberg, *supra* note 230, at 158.

It is only when the child has been born that their interest in living comes into play.²⁴⁴

One view is that although a child may not be 'harmed' by being born, it may be unfair or "wrong" for prospective parents to knowingly conceive when there is a high chance that any child born as a result will not benefit from a normal opportunity at life.²⁴⁵ Steinbock and McClamrock claim that children have a minimal birth-right to be born with the potential to live a relatively good life.²⁴⁶ In their view, it is morally wrong to bring a child into the world where they will suffer from serious impediments to their wellbeing.²⁴⁷ This argument is based on harmless wrongdoing or legal moralism as a valid liberty limiting principle.²⁴⁸ Harmless wrongdoing aims to prevent people from acting in ways which are immoral, even when their actions do not result in anybody being harmed or offended. The argument for harmless wrongdoing is that although the conduct is victimless *per se*, the particular act is still wrong by moral standards and should therefore be prevented.²⁴⁹ In the case of posthumous conception, the argument would be that although the posthumously born child might not be harmed in the sense of the harm principle by being born, it is still *morally* wrong to bring the child into existence in circumstances where it might potentially suffer from identity harm, disruption to the family structure, lack of parental acknowledgment etc. With the "wrong to children" argument, however, there is the difficulty of accessing a standard for what will constitute as substantial "wrong" to justify limiting the prospective parent's reproductive autonomy. Robertson notes that while being born into less than desirable circumstances is not ideal, it surely does not amount to wrongful life. In most cases, it is argued that life, is better than no life at all,²⁵⁰ and while there may be no harm or wrong inflicted on a child by

²⁴⁴ Cohen, *supra* note 231, at 25.

²⁴⁵ LAURA M. PURDY, REPRODUCING PERSONS: ISSUES IN FEMINIST BIOETHICS 115 (1996).

²⁴⁶ Bonnie Steinbock & Ron McClamrock, *When is birth unfair to the child?* 24 HASTINGS CTR. REP. 15, 15 (1994).

²⁴⁷ *Id.*; Strong et al. *supra* note 204, at 741.

²⁴⁸ Cohen, *supra* note 227, at 431.

²⁴⁹ JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW, VOLUME 4: HARMLESS WRONGDOING 3 (1988).

²⁵⁰ See Robertson, *supra* note 1, at 1040-41.

preventing its birth altogether, limiting access to posthumous conception will infringe on the present interests of the prospective parent or extended family in procreating.²⁵¹

C. Minimizing Harm to the Child

If one accepts the position that a child can be harmed by being born through posthumous conception, it is still possible to regulate in ways to reduce this potential harm. Moreover, there are several counter arguments which can be advanced in response to this view.

Firstly, in terms of the concerns regarding the effect that a lack of parental acknowledgment might have on the child, it is possible to avoid this by simply registering the deceased as the child's legal parent. As noted, this is already the law in the United Kingdom. UK law currently permits deceased fathers to be registered on the birth certificate of any posthumously born children.²⁵² This law provides the child with certainty of lineage and can buttress their relationships with the deceased's wider family.²⁵³ However, the legislation in the UK does not entitle the child to inherit from the deceased's estate.²⁵⁴ The provisions of the UK statute merely serve to symbolically acknowledge the deceased as the child's father.²⁵⁵ In this way, the UK provisions do not interfere with any of the State's interests in the timely administration of estates,²⁵⁶ nor the inheritance interests of any of the deceased's extended family members.²⁵⁷ Furthermore, regarding concerns that the child will be disadvantaged by being unable to inherit from the deceased's estate or receive any available social security benefits, it is highly unlikely that the resulting child will suffer detrimentally because of this. Indeed, it is common for the surviving partner or the extended family members of the deceased to inherit

²⁵¹ *See id.*

²⁵² Human Fertilisation and Embryology (Deceased Fathers) Act 2003, c. 24, § 1 (UK).

²⁵³ France, *supra* note 190.

²⁵⁴ 402 Parl Deb HC (6th ser.) (2003) (UK). Human Fertilisation and Embryology (Deceased Fathers) Act 2003 § 1(2).

²⁵⁵ Maddox, *supra* note 185, at 412.

²⁵⁶ DEPARTMENT OF HEALTH AND SOCIAL SECURITY, REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, Cmnd. 9314, at 55 (UK) (discussing the interests of the State in posthumous conception).

²⁵⁷ Kindregan & McBrien, *supra* note 153, at 595.

from their estate, and these are the very people who will be raising the resulting child.²⁵⁸ Moreover, posthumous conception is likely to be a lengthy and highly expensive endeavor. Thus, one cannot assume that those who do undergo the process are not fully committed to providing a comfortable upbringing for the child.²⁵⁹ Of course, there is a genuine concern regarding the surviving partner's financial ability to raise the resulting child. More than likely, the child will be raised in a single income family, and it has been shown that severe economic hardship can result in poor childhood development.²⁶⁰ However, many single parents are in a position where they can provide comfortable upbringings for their children and there is no certainty that the surviving partner will struggle financially to raise the resulting child.²⁶¹ Furthermore, regulating to ensure that the surviving partner undergoes professional counselling and is provided with full information regarding the financial consequences of proceeding with posthumous conception treatment could minimize this harm.

Secondly, regarding family structure, several studies have shown that children who are raised by single parent families are not detrimentally disadvantaged in their development.²⁶² In fact, research illustrates that children are highly creative when adapting to complex family relationships and they do not view a particular family structure as having harmed them in any way.²⁶³ Additionally, it is very common for grandparents, aunts/uncles, neighbors, family friends or new partners to play a role in the lives of children who are raised by single parents. Thus, it is not guaranteed that the resulting child of posthumous conception will long for a specific parental figure.²⁶⁴ This point was emphasized by Morris J. in the Victorian Civil and Administrative Tribunal case of *Y.Z. v. Infertility Treatment Authori-*

²⁵⁸ Sabatello, *supra* note 181, at 66.

²⁵⁹ Tremellen & Savulescu, *supra* note 98.

²⁶⁰ NAT'L ACAD.'S OF SCIS., ENG'G, AND MED. 47, A ROADMAP TO REDUCING CHILD POVERTY (Greg Duncan & Suzanne Le Menestrel eds., 2019).

²⁶¹ *Id.*; Sabatello, *supra* note 181, at 59.

²⁶² S.J. Fasouliotis & J.G. Schenker, *Social aspects in assisted reproduction*, 5 HUM. REPROD. UPDATE 26, 29 (1999); Sabatello, *supra* note 181, at 60; Tremellen & Savulescu, *supra* note 8, at 10.

²⁶³ Sabatello, *supra* note 181, at 60.

²⁶⁴ Tremellen & Savulescu, *supra* note 8, at 10.

ty.²⁶⁵ “It is trite to observe that many children born naturally do not have a father—or a loving father—yet still live long and happy lives. Further, according to the Victorian Law Reform Commission, there is a growing body of methodologically rigorous studies that demonstrate that it is not family structure that determines emotional, social and psychological outcomes for children, but the quality of family processes and relationships.”²⁶⁶

What is important for the child’s development is that the child has loving and supportive relationships and a positive home environment.²⁶⁷ Indeed, being raised by a single parent does not prevent this scenario and this fact has been acknowledged by courts in several posthumous conception cases.²⁶⁸

There is valid argument that posthumously born children are at the risk of suffering identity dilemmas due to the expectation that they must act as a replacement for their deceased parent.²⁶⁹ However, both Collins and Sabatello highlight that prospective parents frequently expect their children to inherit and mirror their traits and characteristics.²⁷⁰ The idea that the child might feel bound to assume characteristics of the deceased or feel upset when they are compared to their deceased parent is not unique to posthumous conception.²⁷¹ This concern could be raised in debates regarding people’s motives to use other forms of ART and even with natural reproduction.²⁷² Furthermore, Tremellen and Savulescu object to the argument that posthumously born children will be ostracized by their peers regarding their family structure. The authors observe that there is no requirement that any information regarding the nature of the child’s concep-

²⁶⁵ *Y.Z. v. Infertility Treatment Authority* [2005] VCAT 2655 (Aust.).

²⁶⁶ *Id.*

²⁶⁷ Fasouliotis & Schenker, *supra* note 262, at 29.

²⁶⁸ See e.g., *Re The Estate of the Late Mark Edwards* [2011] NSWSC 478 (Aust.); *Re Cresswell* [2018] QSC 142 (Aust.).

²⁶⁹ Young, *supra* note 8, at 77; Sabatello, *supra* note 181, at 61.

²⁷⁰ Collins, *supra* note 8, at 435; Sabatello, *supra* note 181, at 66.

²⁷¹ Sabatello, *supra* note 181, at 62.

²⁷² *Id.*

tion be made public whereby the child will be open to any sort of ridicule by their peers.²⁷³

Ultimately, posthumous conception is going to bring the child into the world and grant them the opportunity to experience life.²⁷⁴ Thus, even if one did accept all arguments against posthumous conception on the basis of "harm caused to the resulting child," it still cannot be said that such a life amounts to one which is not worth living. The premise that there are lives which are worth living, and lives which are not worth living is controversial, and the threshold for what falls on either side of the notional line is open to debate.²⁷⁵ In the sense of the harm principle, Cohen notes that a life which is "not worth living" is one which is 'so burdensome and without compensating benefits to the individual . . . that it is worse than never existing at all.'²⁷⁶ Similarly, Bennett and Harris suggest that when used in conjunction with the principle of harm, a worthwhile life is one which is not overwhelmed by suffering, and one which we can rationally consider to be valuable when compared with non-existence.²⁷⁷ Cohen observes that those who do defend the idea that there are lives which are not "worth living" can usually only cite two specific diseases in support of the claim. These include Lesch-Nyhan and Tay-Sachs diseases,²⁷⁸ both of which result in a short, traumatic, and painful life for any child born with either disorder.²⁷⁹ When applied in the sense of the harm principle, it is difficult to conclude that the purported harms caused to children by posthumous conception amount to a life which is "not worth living" when compared to non-existence.²⁸⁰

²⁷³ Tremellen & Savulescu, *supra* note 8, at 10.

²⁷⁴ Strong et al., *supra* note 204, at 742.

²⁷⁵ See generally Anna Smajdor *How useful is the concept of the 'harm threshold' in reproductive ethics and law?* 35(5) THEORETICAL MED. BIOETHICS 321, 325 (2014).

²⁷⁶ Cohen, *supra* note 227, at 472.

²⁷⁷ Rebecca Bennet & John Harris, *ETHICAL ISSUES IN MATERNAL FOETAL MEDICINE* (Donna L. Dickenson ed., 2002).

²⁷⁸ Cohen, *supra* note 227, at 473.

²⁷⁹ I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187, 1214 (2012).

²⁸⁰ Robertson, *supra* note 232, at 434.

V. MEDICAL PRACTITIONERS

A. Interests

Posthumous conception will implicate the interests of the physicians involved in both the posthumous gamete retrieval and the assisted conception procedure. Physicians have an interest in the well-being of their patient. If the patient is in a comatose or PVS and is still alive, it is unlikely that gamete retrieval will be a medical necessity to preserve their life.²⁸¹ However, even in such cases, physicians might have an interest in preserving the gametes of their patient to secure their future fertility should they recover.²⁸² They might also deem it to be in the best interests of the particular patient to proceed with the retrieval given the circumstances of the case.²⁸³ Alternatively, if their patient has received a clinical determination of cardiac or brain-stem death and is determined clinically dead, physicians might have an interest in preserving the deceased's gametes as a means of alleviating the pain of the deceased's family.²⁸⁴ Dr. Cappy Rothman (the first physician to publish medical reports detailing methods of retrieving gametes from comatose and deceased patients) has stated that his primary motive as a healer is to relieve the pain and suffering of his patients and their relatives.²⁸⁵ He notes that the act of preserving viable gametes from deceased patients for use by their family in posthumous conception is a way in which physicians can alleviate the suffering of grieving families.²⁸⁶ Lastly, physicians involved in the assisted conception aspect of posthumous conception might be financially motivated by posthumous conception given that the cost of harvesting, cryopreserving, and storing gametes, and the cost of undergoing assisted conception treatment is known to be expensive.²⁸⁷

²⁸¹ Batzer et al., *supra* note 8, at 1266.

²⁸² Gwendolyn P. Quinn et al., *Physician's Undecided Attitudes towards Posthumous Reproduction: Fertility Preservation in Cancer Patients with a Poor Prognosis*, 10 J. SUPPORTIVE ONCOLOGY 160, 161 (2012).

²⁸³ *Y. v. NHS Healthcare Trust* [2018] EW COP 18 (U.K.).

²⁸⁴ Cappy Miles Rothman, *Live Sperm, Dead Bodies*, 20 J. ANDROLOGY 456, 456 (1999).

²⁸⁵ Rothman, *supra* note 4.

²⁸⁶ *Id.*

²⁸⁷ Alex K. Wu et al., *Out-of-Pocket Fertility Patient Expense: Data from a Multicenter Prospective Infertility Cohort*, 191 J. UROLOGY 427, 430 (2014).

Ultimately, the process of posthumous conception could end up being highly lucrative for the physicians involved.²⁸⁸

B. Harms

Physicians might have professional or personal reservations regarding posthumous gamete retrieval or posthumous conception. The physician might be hesitant to proceed because of their own religious or personal views that do not favor unnecessary interference with deceased bodies or posthumous parenting.²⁸⁹ Firstly, if the patient is in a comatose or permanent vegetative state and still living, the physician might feel that the preservation of gametes is not a medical necessity.²⁹⁰ Jenkins notes that harvesting gametes from patients requires ethical judgment.²⁹¹ When the procedure is not for the purposes of medical treatment it may not serve the overall interests of the patient.²⁹² Berger, Rosner and Cassell make a similar point.²⁹³ They state that ethical standards of medical practice deem it inappropriate to perform unnecessary medical procedures on living patients without their consent.²⁹⁴ Thus, the physician might be reluctant to carry out the gamete retrieval procedure on this basis.²⁹⁵ Secondly, following a clinical determination of cardiac or brain stem death, the patient will be considered dead, and physicians have an ethical duty to treat the patient's corpse with respect.²⁹⁶ They might object to posthumous gamete retrieval as the procedure is not for the purpose

²⁸⁸ See generally *id.*

²⁸⁹ Quinn, *supra* note 282, at 166.

²⁹⁰ Batzer et al., *supra* note 8 at 1266; Jeffrey T. Berger et al., *Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients*, 17 J. GEN. INTERN. MED. 774, 775 (2002).

²⁹¹ Simon Jenkins et al., *Who gets the gametes? An argument for a points system for fertility patients*, 32 BIOETHICS 16, 16 (2017).

²⁹² *Id.* at 16.

²⁹³ Jeffrey T. Berger et al., *Ethics of Practicing Medical Procedures on Newly Dead and Nearly Dead Patients*, 17 J. GEN. INTERN. MED. 774, 774 (2002).

²⁹⁴ *Id.*

²⁹⁵ Berger, *supra* note 290, at 775.

²⁹⁶ *Id.* at 775.

of facilitating organ donation, conducting an autopsy, or facilitating burial.²⁹⁷

When confronted with requests for the posthumous retrieval of gametes, physicians are presented with conflicting clinical and ethical dilemmas; they are cautious to proceed with the retrieval of gametes in the absence of the deceased's consent, while also keen to facilitate the request of the surviving partner or family.²⁹⁸ However, Bewley observes that sympathy for the surviving partner or family members does not impose an obligation on the physician to provide them with assistance.²⁹⁹ Furthermore, as the law regarding the retrieval of gametes from both comatose and deceased patients remains unlegislated for in many jurisdictions, some doctors may be cautious to proceed with harvesting gametes from comatose or deceased patients in fear that they may be left open to professional sanctions or legal assault charges.³⁰⁰

The physician might also have doubts regarding the feasibility of posthumous gamete procurement or the safety of posthumous conception treatment. This is particularly relevant in cases where the deceased is female due to the extended measures required to retrieve viable gametes from a woman who has suffered brain death.³⁰¹ In addition, given that it is recommended for posthumous sperm recovery to be performed within thirty-six hours of the patient's death,³⁰² there may be issues with the quantity or quality of the sperm which is retrieved.³⁰³ Clinicians who are involved in the assisted conception procedure will have a further interest in the health and safety of the prospective parent and fetus. They will be under a duty to ensure that any gametes which have been retrieved from the deceased are screened and assessed prior to their use in posthumous conception so as to reduce the possibility of any disease or infection transmission to

²⁹⁷ *Id.* at 776.

²⁹⁸ Michael Swinn et al., *Retrieving Semen from a Dead Patient*, 317 BRIT. MED. J. 1583, 1583 (1998).

²⁹⁹ S. Bewley, *The Patient was Assaulted*, 317 BRIT. MED. J. 1584, 1584 (1998).

³⁰⁰ Tremellen & Savulescu, *supra* note 8, at 10; Badahur, *supra* note 1, at 2770.

³⁰¹ Greer et al., *supra* note 5, at 280.

³⁰² Jamie Thomas et al., *A Case Report on the Prolonged Viability of Postmortem Human Testicular Sperm*, 4 FERTIL STERIL REPS. 235, 235 (2023).

³⁰³ Batzer et al., *supra* note 8, at 1268.

the prospective parent.³⁰⁴ Indeed, as the quality of thawed cryo-preserved gametes has not been rigorously assessed, the physician might have reservations about any abnormalities that might arise as a result of using posthumously procured gametes in treatment.³⁰⁵

C. Minimizing Harm to the Medical Practitioners

Regulation can be used to significantly reduce any potential harm posed by posthumous conception to medical practitioners. By introducing clear professional guidelines or legislation on gamete retrieval from both comatose and deceased patients, physicians will have clarity regarding the permissibility of the procedure and will have assurance regarding their professional liability. Furthermore, physicians would ultimately be under no duty to honor requests for posthumous conception should they personally express moral reservations with the practice.³⁰⁶ It is not impractical for gamete retrieval and posthumous conception procedures to be carried out solely by physicians who are content with the process.³⁰⁷ By clearly setting out laws regarding gamete retrieval from comatose and deceased patients and by ensuring that posthumous conception procedures are performed by willing physicians, the potential harms caused by posthumous conception to the interests of the medical practitioners can be negated entirely by regulation.

VI. THE STATE/PUBLIC INTEREST

A. Interests

The State is an important stakeholder in posthumous conception and will have several legitimate interests which pertain to the permissibility of the technology. The primary reason why Governments would support the use of posthumous conception is to maintain their interest in the formation of families.³⁰⁸ States generally have an inter-

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 1266.

³⁰⁷ Strong et al., *supra* note 204, at 743.

³⁰⁸ Nolan, *supra* note 152, at 22.

est in backing the use of reproductive technologies to give infertile and same-sex couples the opportunity to reproduce and create families.³⁰⁹ Of course, this interest is not directly applicable to posthumous conception, and it is likely that surviving partners could find an alternative means of establishing a family (either through the use of a sperm donor, adoption and so forth). However, it is important public policy for the State to promote autonomy for its citizens in reproductive matters as this has been described as forming a central part of personal dignity and identity.³¹⁰ Furthermore, artificial reproductive technology remains privately funded in many jurisdictions.³¹¹ Therefore, the State could have an economic incentive to promote the use of this technology to boost the economy.³¹²

B. Harms

There are also several potential harms caused by posthumous conception to the interests of the State and society generally. Firstly, Governments have a legitimate interest in the efficient administration of the deceased's property. The State has an interest in maintaining stable land titles and ensuring that property is effectively wound up in a succession context.³¹³ Concerns regarding the efficient administration of the deceased's estate is one of the primary issues which is raised against posthumous conception on behalf of the State. In the Warnock Report 1984 (UK), the dominant concern raised by the UK's Committee of Inquiry regarding posthumous conception was that posthumously born children would disrupt the timely distribution of the deceased's assets.³¹⁴ There are also issues regarding whether it is

³⁰⁹ *Id.* at 21.

³¹⁰ *Id.*

³¹¹ RUAIRI FLOYD & GLORIA BACHMANN, A REVIEW OF THE LITERATURE ON THE BENEFITS OF PUBLIC FUNDING FOR ASSISTED REPRODUCTIVE TECHNOLOGIES FROM AN IRISH PERSPECTIVE (2019),

https://www.researchgate.net/publication/336346131_A_Review_of_the_Literature_on_the_Benefits_of_Public_Funding_for_Assisted_Reproductive_Technologies_from_an_Irish_Perspective.

³¹² *Id.*

³¹³ Collins, *supra* note 8, at 432.

³¹⁴ DEP'T OF HEALTH AND SOC. SEC., REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY 55 (1984) (U.K.).

just for the State to permit a posthumously born child to interfere with any rights of inheritance held by the deceased's existing family.³¹⁵ Posthumous conception can also have financial implications for the State. If the State has committed to publicly funding the use of artificial reproductive technology, then the use of the industry for posthumous conception could become costly for the State.³¹⁶ Furthermore, the State may oppose posthumous conception to prevent children from being born into one parent families. The State has an interest in protecting its vulnerable citizens and there is a risk that children born to single parents will have cost implications for society in terms of State welfare.³¹⁷ More generally, the State has an interest in protecting the basic unit of the family within society and there is an argument that promoting one parent households does not meet societies ideal of the "nuclear family."³¹⁸ Lastly, the State has an interest in the treatment of the deceased and dying, and there are societal expectations of how we treat dead and dying patients.³¹⁹ Young observes that society has an interest in seeing itself in a particular light.³²⁰ She argues that we like to perceive ourselves to be a society that respects the dead.³²¹ There is a risk that the extraction of gametes from a dying or deceased patient could be viewed by society as unnecessary, or as a distasteful interference with a corpse.³²² Furthermore, there is a societal fear that posthumous conception can lead to the commodification of human bodily products and treats the dead as a means to serve the interests of the still living.³²³

³¹⁵ Kindregan & McBrien, *supra* note 153, at 595.

³¹⁶ Young, *supra* note 8, at 82.

³¹⁷ Robertson, *supra* note 1, at 1039, 1041; Batzer et al., *supra* note 8, at 1266.

³¹⁸ Strong et al., *supra* note 204, at 742.

³¹⁹ Berger et al., *supra* note 290, at 774.

³²⁰ Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right it is*, 14 MARQUETTE ELDER'S ADVISOR 197, 223 (2013).

³²¹ *Id.*

³²² *Id.*; Tremellen & Savulescu, *supra* note 8, at 7.

³²³ Neil Maddox, *Children of the Dead: Posthumous Conception, Critical Interests and Consent* 27 J. L. MED. 645, 658 (2019).

C. Minimizing Harm to the State

There are many ways in which regulation can be used to minimize the potential harm posed by posthumous conception to the interests of the State and of the public generally. Firstly, as referenced throughout this paper, it is possible to legislate in a way which precludes the posthumously born child inheriting from the deceased. Legislating in this way will protect the interests of the State in the timely administration of the deceased's assets.³²⁴ Secondly, the arguments raised regarding the financial implications of posthumous conception for the State are not compelling. The artificial reproductive technology industry tends to be privately funded. Indeed, even in States where public funding has been made available for the use of reproductive technologies, it is still common for the industry to run on a private, for-profit basis.³²⁵ In addition, there is no guarantee that posthumously born children will be dependent on State welfare.³²⁶ As discussed earlier in this paper, posthumous conception is a timely and expensive process. It cannot be presumed that those who seek treatment are not fully prepared to provide for the resulting child.³²⁷ Moreover, legislating to ensure that the surviving partner receives professional counselling and is provided with full information regarding the financial implications of proceeding with posthumous conception can help to reduce this potential harm.

Lastly, regulation can be used to protect any interests of the State and of society generally in the treatment of the dead. This can be seen across several jurisdictions which require a degree of consent from the deceased prior to proceeding with posthumous conception.³²⁸

³²⁴ Human Fertilisation and Embryology (Deceased Fathers) Act (2003), c. 24, § 1(2), (Eng.); Kindregan & McBrien, *supra* note 153.

³²⁵ This has been the case in several developed countries which provide ART on a public basis. See Georgina M. Chambers et al., *The Economic Impact of Assisted Reproductive Technology: A Review of Selected Developed Countries* 91 FERTILITY AND STERILITY 2281, 2286 (2009).

³²⁶ Young, *supra* note 8, at 82.

³²⁷ Tremellen & Savulescu, *supra* note 8, at 10.

³²⁸ See Claire McGovern, *Reproduction After Death: The Legal and Ethical Challenges in the Regulation of Posthumous Conception in Ireland* (Dec. 7, 2022) (Ph.D. thesis, Maynooth University), 210-252 (for a comparative analysis on consent laws to posthumous conception).

Some argue that proceeding with posthumous conception in the absence of consent from the deceased breaches their autonomy. This is because procedures of posthumous gamete retrieval and posthumous conception will reflect the deceased's personal ideals regarding the kinds of bodily interference that they would have deemed appropriate, and whether they would have chosen to become a genetic parent.³²⁹ In this context, consent laws are being used by States to protect the choices of the deceased.³³⁰ When States use consent to regulate posthumous conception, the level of consent which is necessary is dependent on the degree of autonomy which is attributed to the deceased. This is the issue which is central to the debate on posthumous conception.³³¹ Commentators are not agreed on the level of consent which should be required for posthumous conception, and whether this should take the form of expressed consent, implied consent, presumed consent, or no-consent.³³²

Each format of consent will attribute the dead with a different level of autonomy. For example, expressed consent regimes will grant the dead with full autonomy, and require that pre-mortem consent from the deceased (either written or verbal) is present before proceeding with treatment.³³³ Implied consent will grant the deceased with partial autonomy and allow those who seek to use the gametes in posthumous conception—i.e. the surviving partner or family members—to produce circumstantial evidence which can be used to infer that the deceased would have consented to posthumous conception in the particular case.³³⁴ A presumed consent policy to posthumous conception does not attribute any autonomy to the dead.³³⁵ However, a presumed consent model does admit that still living people have interests in what happens to them after death.³³⁶ Presumed consent works in the same way as an opt-out system. It al-

³²⁹ Simana, *supra* note 7, at 345; Schiff, *supra* note 8, at 963.

³³⁰ Schiff, *supra* note 8, at 945.

³³¹ Simana, *supra* note 7, at 334.

³³² Orr and Siegler, *supra* note 8; Batzer et al., *supra* note 8; F. Kroon, *supra* note 8.

³³³ Katz, *supra* note 168, at 302.

³³⁴ *Id.* at 304-305.

³³⁵ Young, *supra* note 8, at 68; See Tremellen and Savulescu, *supra* note 8.

³³⁶ Young, *supra* note 8, at 68.

lows the deceased to opt-out of posthumous conception during their lifetime.³³⁷ However, in the absence of an expressed or inferred refusal from the deceased, posthumous conception is permitted based on their presumed consent.³³⁸ In this way, a presumed consent model adheres to the autonomy of still living people by acknowledging the expressed wishes of the dead and permitting the living to opt-out should they wish to so do.³³⁹ Lastly, a model of no-consent requires absolutely no evidence of the deceased's views on posthumous conception prior to proceeding with the practice—whether this be evidence of the deceased's consent or evidence of the deceased's refusal. In this way, no-consent grants the dead with no autonomy and further ignores any expressed wishes in this regard.³⁴⁰ It is, of course, not within the scope of this paper to argue in favor or against any one of these consent regimes.³⁴¹ Rather, I aim to demonstrate that by opting to use a degree of consent when regulating posthumous conception, States can protect the interests of society in the treatment of the dead to the level that they deem appropriate. In this way, consent regulation can be used to minimize any potential harm posed by posthumous conception to the interests of the State.

VII. CONCLUSION

Posthumous conception raises novel and complex issues of law and ethics. This piece has demonstrated how the practice will implicate a series of familial and societal interests and involve a crossover between the interests of the living, the dead and the not yet living. I essentially argue that regulation can be used to effectively reduce the potential harm posed by the technology to the additional stakeholders. Regulating to ensure that surviving partners or extended family members of the deceased receive professional counselling and withstand a waiting period before treatment is provided can minimize the

³³⁷ *Id.*

³³⁸ Young, *supra* note 8, at 72; Tremellen and Savulescu, *supra* note 8 at 11.

³³⁹ Young, *supra* note 8 at 97.

³⁴⁰ Kelsey Baird, *Dead Body, Surviving Interests: The Role of Consent in the Posthumous Use of Sperm* (October 2018) (LL. B. thesis, University of Otago).

³⁴¹ See McGovern, *supra* note 328 (detailed discussion on autonomy and consent to posthumous conception).

potential psychological harm posed to them. Regulating in this way can further protect the welfare of the resulting child and safeguard any economic interests of the State. Additionally, incorporating inheritance clauses into legislation or guidelines on posthumous conception can act to reduce any potential identity harm posed to the child by symbolically recognizing the deceased as the child's parent. The inheritance interests of the deceased's extended family and the interests of the State in the administration of the deceased's assets can also be protected by simultaneously precluding the child from inheriting. Lastly, States can adhere to the interests of the dead and societies interest in the treatment of the deceased and dying by incorporating a consent policy for posthumous conception and requiring some degree of consent before treatment is provided. Ultimately, as public awareness of posthumous conception increases across the world, it is reasonable to assume that so too will requests to use this form of technology. It is, therefore, crucial to explore the ethical and legal challenges posed to those implicated by the practice. This paper has demonstrated that regulation can be used in several ways to protect the interests of these additional stakeholders, and to reduce any of the potential harm posed to them by this novel technology.