2022

The ART of Inheritance: Comparing the UPC and UPA to Determine Which Act Suits Embryo Inheritance Rights Best.

Morgan G. Valeo

I. INTRODUCTION

You know how the sayings go, "tomorrow isn't guaranteed to anybody." "There are only two things that are certain in life- death and taxes," and my personal favorite, "life is uncertain; death is certain." The point is that we are all going to die. You, me, family, friends, neighbors, all of us. This sounds doom and gloom, but the beauty is found in what we make of our time on this planet.

For some of us, the definition of a life well lived is one where we fall in love and start a family of our own. Deciding to bring a life into this world is a decision most do not take lightly. Having a child changes your life forever—you are responsible for this child for a minimum of 18 years. Unfortunately, not all couples are able to get pregnant without medical intervention.

For couples that cannot get pregnant the traditional way or have reason to delay contraception past the age of prime reproductivity, Artificial Reproductive Technologies ("ART") are available. Almost 2% of children born every year are conceived through ART[1]. In fact, a recent survey found that 33% of US adults used or know someone who used fertility treatments to conceive a child[2]. Due to the growing rate of infertility (largely due to obesity), the number of couples using ART is estimated to increase by 5-10% per year[3]. ART includes fertility treatments that involve eggs or embryos, especially, in vitro fertilization ("IVF")[4]. IVF involves extracting a

---

[1] CDC, Art success rates Centers for Disease Control and Prevention (2021), https://www.cdc.gov/art/artdata/index.html (last visited Nov 23, 2021).
[2] Gretchen Livingston, *33% of US adults used fertility treatments or know someone who has*, Pew Research Center (2020), https://www.pewresearch.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/ (last visited Nov 23, 2021).
[3] Vardit Ravitsky & Sarah Kimmins, *The forgotten men: Rising rates of male infertility urgently require new approaches for its prevention, diagnosis and treatment*, 101 Biology of Reproduction 872–874, 872 (2019).
[4] CDC, Art success rates Centers for Disease Control and Prevention (2021), https://www.cdc.gov/art/artdata/index.html (last visited Nov 23, 2021).

woman's eggs, then fertilizing the eggs with sperm in a laboratory, creating embryos[5]. The embryos can be transferred to the woman right away, or frozen to prolong IVF.

The benefit of freezing the embryo gives the couple an opportunity to delay contraception. Reasons for delay may include wanting to establish a career before starting a family or waiting to get healthy after a long battle with cancer. Sometimes embryos are left over from successful IVF cycles and the couple wants to wait to use the extra embryo at some point in the future. The frozen embryos are typically stored at a fertility clinic by a process known as "cryopreservation." Cryopreservation involves storing the embryos in liquid nitrogen at -321 degrees Fahrenheit[6].

What happens to these frozen embryos if one or both parties of the couple dies? Most fertility clinics require couples to complete a disposition form before going through with the procedure to prepare for such a tragic event. If these embryos are left to a family member to conceive, who are the parents? Could that child then inherit from the original parents' estate? What are the inheritance rights of post-mortem children under the Uniform Probate Code (UPC) and the Uniform Parentage Act (UPA)? This paper will answer these questions through the perspective of a married, heterosexual couple where each partner contributed their genetic material to produce the frozen embryo (in other words, there is no egg or sperm donor). This paper will also look at inheritance rights from the perspective of a will and the probate process.

The UPC takes the best approach in answering these questions because it allows for the intended parents to have complete control over their genetic material. According to the UPC, a testator can pass its frozen embryo through a will (if the jurisdiction considers embryos as property), however, the implanted embryo would not be able to inherit from the testator's estate,

---

[5] *Id*.
[6] Women and Infants, Embryo Freezing Women & Infants Fertility Center In Rhode Island (2021), https://fertility.womenandinfants.org/treatment/fertility-preservation/embryo-freezing (last visited Nov 23, 2021).

unless the testator's intention to do so is clear and convincing. Current laws do not provide couples with sufficient protection in regard to their property rights in their frozen embryos. Therefore, a couple should devise their frozen embryos in their wills to ensure the embryo will be used (or not used) the way they feel most comfortable about. The only way to ensure control of one's property beyond death is through a proper will. However, once the embryos are transferred through a will upon death, it then belongs to the beneficiary and the beneficiary may do what they wish.

Why does this matter? As this paper will discuss, ART is a growing industry with more couples each year deciding to use it to conceive a child. Since the law is essentially nonexistent on the topic of embryo transfers through a will, it is important for estate planners to understand property interest rights in embryos and to create provisions for their clients that will protect the distribution of their genetic materials.

Part II of this paper will discuss the procedure involved when using ART as a means of conception and identify inheritance issues that may arise from using ART. Part III of this paper will discuss the legal framework that is used to reconcile the inheritance issues that arise from ART and the status of embryos as property. Part IV will shine light on proposed legislation and my solution to the inheritance issues. Finally, Part V will argue the best course of action to take when answering hard legal question ART creates.

II. TECHNOLOGY AND HOW INHERITANCE ISSUES ARISE

"This embryo and I could have been best friends," says a 26-year-old woman who gave birth to a 24-year-old embryo[7]. Cryopreservation makes it possible for unique situations to arise.

[7] Sarah Zhang, *A 26-year-old gave birth from an embryo frozen for 24 years*, The Atlantic (2017), https://www.theatlantic.com/science/archive/2017/12/frozen-embryo-ivf-24-years/548876/ (last visited Nov 26, 2021).

In theory, and in practice, a woman could give birth to her biological sibling. This could happen when a couple creates two frozen embryos, but only uses one. The couple passes away in a tragic accident, and the left-over embryo is passed from the parents to the child. Once the child is of age to have a baby of her own, she may use the frozen embryo of their parents, therefor giving birth to her sibling. Is the child her child or is the child her sibling? Who can the child inherit from?

A. The Process

The road to obtaining a frozen embryo for IVF involves several steps. The process begins when the woman starts to receive hormone injections over the course of 8-12 days in effort to stimulate ovulation for egg retrieval[8]. Then, the woman is ready to have her eggs retrieved by a physician using an ultrasound machine to ensure accuracy[9]. The physician then fertilizes the egg with sperm to create an embryo[10]. An embryologist will determine whether the embryo is suitable for implantation[11]. At this point, the embryo can be frozen or implanted. Once frozen, the embryo is stored in liquid nitrogen at -321 degrees Fahrenheit to prevent any biological aging[12].

Deciding to use ART as means of conception is a major financial decision for most couples. The average cost of IVF in the United States is between $11,000 and $12,000[13]. Clearly, implanting a frozen embryo through IVF is more costly than the traditional way of conception. The high cost is another incentive for couples to have a plan in place in the event that they would

[8]Freezing eggs vs. freezing embryos: Which one is right for me?, Extend Fertility (2019), https://extendfertility.com/freezing-eggs-vs-freezing-embryos/ (last visited Nov 26, 2021).
[9] Jon Johnson, *Embryo freezing: What is the process and who benefits?* Medical News Today (2019), https://www.medicalnewstoday.com/articles/314662#what-is-an-embryo-and-how-do-people-create-one (last visited Nov 26, 2021).
[10] *Id.*
[11] *Id.*
[12] Care New England, Embryo freezing Women & Infants Fertility Center In Rhode Island (2021), https://fertility.womenandinfants.org/treatment/fertility-preservation/embryo-freezing (last visited Nov 26, 2021).
[13] Cost of fertility treatment - insemination, IUI and IVF, Advanced Fertility Center of Chicago (2021), https://advancedfertility.com/fertility-treatment/affording-care/fertility-treatment-costs/ (last visited Nov 26, 2021).

not be able to use the embryos. In the event of both parents' death, the embryo would be considered abandoned. Most fertility clinics will have a disposition form for patients to decide how they want their embryos dispose in the event of death or divorce. However, these forms are not always legally enforceable[14]. These forms may not hold up in a court of law due to issues that include but are not limited to the questionable signing circumstances or ambiguous language used in the agreement[15]. The options for disposition include discarding the embryos, donating the embryos to medical research, or donating embryos to another person or couple so that they could have a child. Legal scholars argue that courts and legislatures should resist the trend and refuse to enforce embryo disposition forms due to their lack of expressing the true intent of the parties[16]. When a couple wants to donate the embryo to a specific person or couple, the donor couple should consider devising the embryos in their wills rather than leaving the future of their embryos up to a fertility clinic to control.

B. Inheritance Issues that may arise with ART

At death, property may be devised primarily one of two ways: intestate or by a will. When the deceased chooses not to create a will, then their property is distributed at death according to state intestate law. Typically, a spouse will inherent the deceased spouses' estate. If there is no surviving spouse, then the estate typically goes to the deceased's children. With a will in place, the deceased is able to devise his or her property as they would like.

The benefit of creating a will is that you have control of how your property is devised. Without a will, your estate is devised according to your state's intestate laws, which may not align

[14] *Jessica Bilbao v. Timothy R. Goodwin*, 217 A.3d 977 (Conn. 2019).
[15] Deborah L. Forman, Embryo Disposition and Divorce: Why Clinic Consent Forms Are Not the Answer, Vol. 24, 57 (2011).
[16] *Id* . at 105.

with your true wishes. According to a recent survey, it is estimated that $36 trillion will flow from one generation to another over the next 30 years in the United States[17]. The same survey indicated that Americans inherited $427 billion in 2016[18]. This is an unprecedent amount of wealth being passed through inherence—it is safe to say that everyone would want their share. The rise of ART will confront the phenomenon of growing inheritances due to the unique situations that can arise.

When a child is born after one or both of its parents' death, that child is considered a "post-mortem" child. The most common instance of a post-mortem child is when a father dies while the mother is pregnant with a child. In this case, the child becomes the father's post-mortem child because the child was born after the father's death. In the case of the 26-year-old woman giving birth to a 24-year-old embryo, the embryo was donated to her, so there were no inheritance issues because she essentially "adopted" the embryo. But let's switch up the facts. The 26-year-old woman, "Ann" gave birth to a 24-year-old embryo that was given to her by her parents through their will. When Ann was two years old her parents decided they wanted more children, but Ann's mom was starting to surpass the again of peak reproductivity, so they decided to create two frozen embryos to buy themselves more time. Turns out that Ann's parents only used one of the frozen embryos and gave birth to David. The other embryo remained at the fertility clinic in storage. About two decades later, Ann's parents are in a fatal accident. Upon simultaneous death, the wills devise the estate equally among Ann and David, with the exception that Ann receives the embryo that was stored in the fertility clinic. Ann is now 26 and is ready to start a family of her own, she decides to use the frozen embryo that her parents left for her. Is Ann giving birth to her sister or

[17] Ben Steverman, *Trillions will be inherited over the coming decades, further widening the wealth gap*, Los Angeles Times (2019), https://www.latimes.com/business/story/2019-11-29/boomers-are-thriving-on-an-unprecedented-9-trillion-inheritance (last visited Nov 26, 2021).
[18] *Id*.

her daughter? If she is giving birth to her sister, does the child become a post-mortem child and have an inheritance right to her parent's estate? The paper will answer these questions.

When an embryo is frozen, it can still be used after a parent, or parents, death. If both parents die, the embryo could be donated to another couple in need. If one parent remains alive, that parent may use the embryo. If the woman is alive, she may decide to have the embryo implanted in her. If the man is alive, he may have the embryo implanted in a surrogate, or even a new partner. The UPC and UPA provide different approaches on how to legally analyze inheritance issues that may arise from ART.

III. LEGAL FRAMEWORK

This section explores the different approaches to solving legal issues, specifically inheritance rights, that may arise when ART is used to conceive a child. Particularly, the UPC and the UPA are the principal approaches when analyzing these legal issues.

A. UPC Approach

Since the Uniform Probate Code (UPC) governs disposition of property, it is important to establish the property rights that parents have in frozen embryos.

1. Owner's Property Rights of Frozen Embryos

Browne Lewis explores the property interest rights in frozen embryos. Lewis argues, "Cryopreservation of eggs has given women even more reproductive freedom. Because of the increasing use of cryopreservation, legislatures and courts will likely face the difficult task of deciding whether or not women should be able to treat their frozen eggs like any other personal

property.[19]" Although Lewis speaks specifically about frozen eggs, frozen embryos also fall into the debate as to whether they classify as personal property or not due to their ability to develop into human life.

a. Case Law

With the development of ART, pre-embryos, and children are being treated more like property than ever before. In 2015, Jennifer Cramblett, of Ohio, lost her "wrongful birth" lawsuit against an Illinois sperm bank when her child was born bi-racial after she requested sperm from a blond-haired, blue-eyed, white man[20]. Cramblett's "breach of warranty" claim makes the child sound more like a product, rather than a human[21]. However, the product here is the sperm, and the clinic failed to deliver the product contracted for when they gave Cramblett the sperm of a black man[22]. Cramblett's story is one of many that show the legal issues of ART that associate children as property and/or products.

In *York v. Jones*, the court treated frozen embryos like personal property.[23] The frozen embryos belonged to a couple who created and stored the frozen embryos at a clinic in Virginia.[24] When the couple moved to California, the couple requested that the clinic transfer the embryos to a clinic in San Diego.[25] The Virginia clinic refused to comply with the couple's request, and the couple therefore filed suit.[26] The court ruled in favor of the couple using the rationale that the frozen embryos were personal property of the couple.[27] The reasoning behind the court's decision was

---

[19] Browne Lewis, You Belong to Me: Unscrambling the Legal Ramification of Recognizing a Property Right in Frozen Human Eggs, 83 TENN. L. REV. 645, 687 (2016).
[20] Associated Press & Dailymail.com Reporter, *Court Throws Out Lesbian's Lawsuit over Sperm Donor Mix Up*, DAILYMAIL.COM.
[21] *Id*.
[22] *Id*.
[23] *York v. Jones*, 717 F. Supp. 421, 422-23 (E.D. Va. 1989).
[24] *Id*. at 423.
[25] *Id*.
[26] *Id*. at 424.
[27] *Id*. at 425.

that the cryopreservation agreement between the couple and the clinic created a bailment relationship and therefore the clinic was legally obligated to return the subject of the bailment (the embryos) to the couple after the purpose of the bailment had ended.[28]

However, a few years later, in *Davis v. Davis*, the Tennessee Supreme Court did not find frozen embryos to be personal property.[29] A couple created frozen embryos, but then went through a divorce.[30] Upon the divorce, the woman wanted to donate the frozen embryos to a childless couple, but the man wanted the embryos to be destroyed.[31] The court determined that the embryos were neither people nor property and therefore deserved their own category due to their potential to transform into human beings.[32] Although the court ultimately ruled that the couple did not have a property interest in the embryos, they did have an ownership right that gave them decision-making authority over the disposition of the embryos.[33] Interestingly, the Tennessee Supreme Court made it clear that the couple's decision making power was restricted to the scope of public policy set by law.[34] The UPC would be an example of law limiting the decision-making power of the couple because the UPC dictates decision-making rights of people dispersing their property.

The American Fertility Society has stated, "It is understood that the gametes and concepti are the property of the donors. The donors therefore have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines…"[35]

The UPC states, "An individual in gestation at a decedent's death is deemed to be living at the decedent's death if the individual lives 120 hours after birth. If it is not established by clear and

---

[28] *Id*.
[29] *Davis v. Davis*, 842 S.W. 2d 588, 596 (Tenn. 1992).
[30] *Id*. at 589.
[31] *Id*. at 590.
[32] *Id*. at 596.
[33] *Id*. at 597.
[34] *Id*.
[35] Ethics Com. of the Am. Fertility Society, *Ethical Considerations of the New Reproductive Technologies* (1986) 46 Fertility and Sterility 89s.

convincing evidence that an individual in gestation at the decedent's death lived 120 hours after birth, it is deemed that the individual failed to survive for the required period.[36]" This means that an individual is considered a post-mortem child when they are in the mother's womb at the time of either parents' death and live at least 120 hours (five days) after birth. The post-mortem child can inherit from the deceased parent's estate. The UPC does not define "in gestation," but it refers to the phrase "en ventre sa mere," ("in the belly of his mother")[37].

This section of the UPC, 2-104 (a)(2) would suggest that an embryo *not* in gestation (and therefore not born to be alive for at least 120 hours) would not be able to inherit from its genetic parent's estate upon their death.

On the topic of embryo disposition, Christine Djalleta argues that "Because of their potential for life, the disposition of gametes and pre-embryos should not be unrestricted. Legislatures should adopt laws to regulate such gifts. Laws should be passed to assure that post-mortem children are treated fairly, while acknowledging the need for finality in winding up an estate."[38]

In regard to inheritance rights, a parent-child relationship, as defined by the UPC, must exist in order for the child to inherent from its parent estate. The most updated version of the UPC refers to posthumously conceived children in the following context:

> a parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Consent

[36] UPC § 2-104 (a)(2).
[37] *See* U.P.C. § 2-901, cmt. (child in gestation later born alive regarded as "alive during gestation").
[38] Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMPLE L. REV. 335, 370 (1994)

to assisted reproduction by the birth mother with intent to be treated as the other parent of the child is established if the individual:

(1) before or after the child's birth, signed a record that, considering all the facts and circumstances, evidences the individual's consent; or

(2) in the absence of a signed record under paragraph (1):

(A) functioned as a parent of the child no later than two years after the child's birth;

(B) intended to function as a parent of the child no later than two years after the child's birth but was prevented from carrying out that intent by death, incapacity, or other circumstances; or

(C) intended to be treated as a parent of a posthumously conceived child, if that intent is established by clear and convincing evidence[39].

According to this section of the UPC, a parent-child relationship exists between the deceased parent and the child, if the child was born and there was clear and convincing evidence to support the intent of the deceased parent being the parent of the child. However, this section is only applicable when the birth mother is alive. This question still remains as the inheritance rights of a postmortem child who was born from frozen embryos passed through a will.

UPC § 3-703 may be the gateway into giving post-mortem children inheritance rights when a frozen embryos are passed through a will. UPC § 3-703 gives the decedent's personal representative authority to take account of the possibility of posthumous conception in the timing of the distribution of part or all of the estate[40]. To establish and parent-child relationship and to be in full compliance with the UPC § 2-120 (f), the decedent must provide clear and convincing

[39] UPC § 2-120 (f) Child Conceived By Assisted Reproduction Other Than Child Born To Gestational Carrier.
[40] Comment on UPC § 2-121 Subsection (h), referring to UPC § 3-703 (b)

evidence that they were the intended parents of the frozen embryo. A theoretical application of this UPC provision would be parents devising an embryo to their son or daughter in their will. Then, the son or daughter decide to gestate the embryo. Since the testators intended for that child to be their child, the gestated embryo is entitled to an inheritance from the testator's estate if the personal representative deems the timing to be appropriate by not prolonging finalizing the estate. This can create a problem because if the child is determined to be the child of the testator, and the testator is dead, that would leave the child parentless. According to the UPA, the parents of the child would be the ones who gestated the child in this situation[41]. A person who gives birth to a child is the presumed parent, unless there is a surrogacy agreement in place, and therefore the child is not the child of the testator and is not entitled to any inheritance rights[42]. To solve this problem, the testator can create a conditional gift in the will. The testator may devise a specific gift to an heir if that heir decides to gestate the embryo left for them. This means that the embryo would not be childless because the heir who gestated it would be deemed the parent, and the heir would have extra financial support for the gestated embryo since the condition was fulfilled.

Since legislatures have not kept up with the legal issues that may arise from ART, the courts were forced to apply principles of property law. However, the courts have been reluctant to categorize gametes as property due to their ability to transform into life. Despite the resistance to categorizing gametes as property, that is in fact what they are. The probate courts are then left to determine the disposition of the gametes.

[41] UPA § 201 (1).
[42] *Id*.

Bridget Fuselier dubs frozen embryos as "legal purgatory" because they are not property of one specific person, and the line between property and person is blurred due to the ability of the frozen embryos developing into life upon gestation.[43]

In fact, only Louisiana has legislation that addresses the status of frozen embryos[44]. The statute states: "an in vitro fertilized human ovum is a biological human being which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum."[45] Under another section, the law states: "an in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration."[46] Unfortunately, there has not be a case to observe the court's applicability of these statutes.

The United States Supreme Court has held that almost anything could fall into the category of property.[47] In *Till* the Supreme court declared that the word property covers "cash, notes, stock, personal property or real property; in short, anything of value."[48] This definition by the Supreme Court would likely cause *Davis* to be ruled differently. The court in *Davis* expressly stated that the couple did not have property rights of the embryos, but ownership rights. The Supreme Court ruling in *Till* seems to make "ownership" and "property" one of the same. Ownership of property grants people certain legal rights, typically referred to as the "bundle of sticks."[49] The "bundle of sticks" include the right to include, the right to exclude, the right to destroy, and the right to oppose.[50]

---

[43] *See* Bridget M. Fuselier, *Pre-Embryos in Probate: Property, Person or Something Else?*, PROBATE AND PROPERTY, September/October 2010.
[44] Cara M. Koss, *The ART of Probate: Cryopreserved Reproductive Materials in the Estate*.
[45] LA Stat. Ann. § 9:126.
[46] LA Stat. Ann. § 9:130.
[47] *Till. v. SCS Credit Corp.*, 541 U.S. 465, 488 (2004).
[48] *Id*.
[49] J.E. Penner, *'"The Bundle of Rights" Picture of Property,* 43 UCLA L. REV. 711, 712 (1996).
[50] *Id*.

Although the case only dealt with frozen sperm, the court in *Hecht v. Superior Court of Los Angeles County* held that frozen sperm was a type of property over which the probate court has jurisdiction and that may be bequeathed through a will[51]. Specifically, the court explains:

> Although it has not yet been joined with an egg to form a pre-embryo, as in *Davis*, the value of sperm lies in its potential to create a child after fertilization, growth, and birth. We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.[52]

However, the court in *Hecht* would not address the validly or enforceability of a contract or will constructed to express a decedent's intent with respect to stored genetic material[53]. This is due to the fact that sperm is reproductive material, which falls into its own category of property[54].

The issue then becomes a battle of that is more important: the best interest of the child, or the donor's wishes being carried out. In this scenario, it may be more important for the donor's wishes to be carried out. Referring to the bundle of sticks, it is a property owner right to determine how they want to dispose of their property.

In cases like *Roe v. Wade* the Supreme Court determined that it is a fundamental right to have full body autonomy[55]. Further, in *Troxel v. Granville*, the Supreme Court holds that it is a

---

[51] *Hecht v. Superior Court of Los Angeles County*, 16 Cal. App. 4th 836, 860 (App. 2d Dist. 1993).
[52] *Id.* at 850. Citing California Probate Code § 62 ("Property" means anything that may be the subject of ownership and includes both real and personal property and any interest therein).
[53] *Id.*
[54] *Id.*
[55] *Roe v. Wade*, 410 U.S. 113, 154 (1973).

fundamental right to parent a child[56]. Property rights, body autonomy rights, and parentage rights, which are all protected by the Fourteenth Amendment[57], leads to the conclusion that the embryo donors' intent should take priority when constructing statues regarding inheritance rights of postmortem children.

2. Advantages to Having a Will

Since the law is not developed, it is important for attorneys to have a grasp on the legal issues that may arise from ART. Two estate planning attorneys, Alexis Gettier and Margaret St. John Meehan dive into the "ART" of estate planning in their article. They emphasize the importance of a client's intent to be clearly understood when genetic material, such as a frozen embryo, is involved[58]. Further, there should be a written agreement in place amongst the parties to determine the custody and control of the genetic material in the event of death, divorce, or other unforeseen consequences[59]. However, Gettier and St. John Meehan agree with Forman that clinic forms are not the answer to having a written agreement[60] Their reasoning is simple, yet practical; clinic forms do not contemplate for the complex issues that arise with estate planning[61]. Further, each party should consider retaining separate counsel to review such agreements to ensure that both parties' wishes are represented in the agreement[62].

In *In re Estate of Kievernagel,* The decedent signed the fertility clinic's consent agreement, which referred to the sperm sample as the decedent's sole and separate property, and stated that he

---

[56] *Troxel v. Granville*, 530 U.S. 57, 73 (2000).
[57] Constitution of United States of America 1789 (rev. 1992), Amend XIV.
[58] Alexis S. Gettier and Margaret St. John Meehan The 'ART' of Estate Planning: Assisted Reproductive Technology Issues to Consider, Tax Management Estates, Gifts, and Trusts Journal, Vol. 43, No. 3, p. 193, 05/10/2018
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.

retained all authority to control its disposition[63]. On the consent agreement, the decedent indicated that, at his death, he wanted his stored sperm to be destroyed[64]. When then decedent died unexpectedly, his wife attempted to retrieve the sperm stored at the clinic, but the clinic refused because it was directed to destroy the sperm[65]. The court disagreed with the balancing test that *Davis* proposed, which was balancing the two rights of procreational autonomy- the right to procreate and the right not to procreate[66]. "The right of procreative autonomy "dictates that decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status."[67] However, this case is different from *Davis* because it only involves frozen sperm, not frozen pre-embryos. This is significant because the sperm at issue here came from one person, the decedent. In this situation, the court aligned with the court's reasoning in *Hetch* where the decedent had "an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction."[68] The court sided with the fertility clinic in not allowing the decedent's sperm to be used to impregnant his wife against his agreement with the clinic because doing so would not restrict the wife's right to procreate[69]. It would be restricting on the widow's right to procreate if she could only become pregnant with the decedent's sperm[70].

When constructing a will and devising property, an important rule to keep in mind is the Rule Against Perpetuities. Essentially, this rule prevents gifts in a will to last perpetually. For example, a grandmother cannot devise her wedding ring to her daughter, then her daughter, then her

---

[63] *Estate of Kievernagel*, 166 Cal. App. 4th 1024, 1026 (Ct. App. 2008).
[64] *Id*.
[65] *Id*.
[66] *Id*. at 1032.
[67] *Id*.
[68] *Id*. at 1032-1033.
[69] *Id*. at 1026.
[70] *Id*.

daughter, then her daughter, etc. Specifically, "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[71] This is an interesting concept when ART enables a couple to create an embryo and devise the embryo to an individual or couple upon death. The Rule Against Perpetuities would prevent and unborn frozen embryo from inheriting from its parents' estate if the parents die before the embryo is implanted in another woman's womb. Sharona Hoffman and Andrew Morriss purpose a solution to the problem the Rule Against Perpetuities creates for couples creating a will, and for children born posthumously. Hoffman and Morriss propose:

> If the deceased did not explicitly provide in the will for posthumous children, there should be a rebuttable presumption that the will contains an implicit provision posthumously born individuals[72].

The scholars go on to explain that the presumption can be rebutted by showing evidence that the testator intended at the time of their death to provide for the posthumously born child(ren) but had not yet made a will or a provision in their will prior to their death[73].

The UPC, as amended in 2010 is in line with Hoffman and Moriss' proposal. The UPC states that if there is a signed record by a decedent that evidences the decedent's intent that a posthumously-conceived child be considered the decedent's heir, then that child will have the legal status of an heir[74].

To summarize, the UPC, and other state legislatures, has been amended to take into account the unique situation of post-mortem children being born through the use of ART. Although the

---

[71] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).
[72] Sharona Hoffman & Andrew P. Morriss, *Birth after Death: Perpetuities and the New Reproductive Technologies*, 38 Ga. L. Rev. 575, 624 (2004).
[73] *Id*.
[74] UPC §2-120(f)(2)(c) (amended 2010).

law now considers the rights of these children, the rights of post-mortem children being conceived after their embryos are passed through a will is still questionable. There is no concrete law regarding the inheritance rights of embryos that have been given to individuals or couples through a will.

The advantage that the UPC has to offer is that it is the model body of law for all legal questions arising from inheritance and gifts devised in wills. However, the UPC fails to consider the parent-child relationship between the gestated embryo and the person the embryo was gifted.

Since inheritance is tied to family relation, it is important to look turn to the Uniform Parentage Act (UPA) to determine the parent-child relationship of embryos being used after being donated through a will.

B. UPA Approach

In order for a child to inherit through intestacy, or receive Social Security benefits, a parent-child relationship must exist. Before ART, it was generally easy to identify the legal mother of a child. The woman who gave birth to a child was determined to be that child's mother. However, now that ART exists, a woman can give birth to a child without being its legal, or genetic, mother. In *In re CKG*, the court explains, "We now live in an era where a child may have as many as five different "parents." These include a sperm donor, an egg donor, a surrogate or gestational host, and two nonbiologically related individuals who intend to raise the child."[75]

There are two different approaches to determining parentage when genetics alone is not a sufficient determining factor[76]. The intent test and the genetics test are the tests that the courts

[75] *In re C.K.G.*, 173 S.W.3d 714, 721 (Tenn. 2005)
[76] Emily Stark, Comment, *Born to No Mother:* In Re Roberto D.B. *and Equal Protection for Gestational Surrogates Rebutting Maternity*, 16 AM. U. J. GENDER SOC. POL'Y & L. 283, 287 (2007).

typically turn to when parentage of a child is in dispute[77]. In *Johnson v. Calvert,* the California Supreme Court used the intent test to determine the legal mother of a child in a case where the surrogate was the child's biological mother[78]. The court reasoned, "she who intended to procreate the child-that is, she who intended to bring about the birth of a child that she intended to raise as her own-is the natural mother under California law."[79] However, in *Belsito v. Clark,* an Ohio court held that the genetics test should be used to determine who the legal mother was in another surrogacy case[80]. The court concluded that a DNA blood test must establish a genetic connection between a person and child in order for that person to be deemed as the natural parent of that child.[81]

The Uniform Parentage Act (UPA) takes a position that supports parentage rather than supporting the donor's intent. The UPA states:

> (a) If an individual who intends to be a parent of a child conceived by assisted reproduction dies during the period between the transfer of a gamete or embryo and the birth of the child, the individual's death does not preclude the establishment of the individual's parentage of the child if the individual otherwise would be a parent of the child under this [act].
>
> (b) If an individual who consented in a record to assisted reproduction by a woman who agreed to give birth to a child dies before a transfer of gametes or embryos, the deceased individual is a parent of a child conceived by the assisted reproduction only if:

---

[77] *Id*.
[78] *Johnson v. Calvert,* 851 P.2d 776, 782 (Cal. 1993).
[79] *Id*.
[80] *Belsito v. Clark*, 644 N.E. 2d 760, 763 (Ohio Com. Pl. 1994).
[81] *Id*. at 766.

(1) either:

(A) the individual consented in a record that if assisted reproduction were to occur after the death of the individual, the individual would be a parent of the child; or

(B) the individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear and convincing evidence; and

(2) either:

(A) the embryo is in utero not later than [36] months after the individual's death; or

(B) the child is born not later than [45] months after the individual's death.[82]

In essences, the UPA explains that a parent-child relationship is formed when a post-mortem child is born when there is intent to be a parent by clear and convincing evidence. Although there is no mention of inheritance rights, the UPA establishes a parent-child relationship which is essential in order for a child to inherit intestate (when the deceased does not have a will).

"A central claim against posthumous reproduction is that it may not be in the best interests of the child. This line of reasoning claims that bringing a fatherless or motherless child into the world would harm him or her.[83]" Maya Sabatello argues that the legislature, and the courts, should take into consideration the best interest of post-mortem children in order for them to have a "fair

[82] UPA (2017) SECTION 708. PARENTAL STATUS OF DECEASED INDIVIDUAL.

[83] Orr & Siegler, *supra* note 29, at 301; Lewis, *supra* note 62, at 1175; Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. POL. 401, 409–10 (1999).

and equal chance in life.[84]" Sabatello also explores how the best interest of the child can be fulfilled by analyzing the Massachusetts's Supreme Court decision in *Woodward v. Commission of Social Security*[85]. In *Woodward*, the court held that children conceived after a father's death is still entitled to receive social security benefits just as a child who was conceived before a father's death[86]. The court's reasoning is that even though a post- mortem child comes into the world differently than most children, the child is still a child nonetheless[87].

Up until this point, this paper discussed the legal framework of post-mortem children's inheritance rights. Although a social security check or a gift of inheritance puts the child in a more comfortable financial situation, it would be remiss not to touch on the self-identity issues that may arise for children who were conceived postmortem. For example, Ruth Landau explains that some children who are conceived post-mortem grow up to feel like their deceased parent's "memorial candle."[88] Social attitude also plays a role into the identify issues post-mortem children face[89]. These identity issues should not be taken lightly and should be taken into consideration when drafting legislation for children in these situations. For posthumously conceived children, the focus should be on equal rights, and ensuring they have the same rights as those children who are born in a more "traditional" manner.

Lewis Browne, a prominent legal scholar on the topic of posthumously conceived children, argues that the courts must take a stance and decide whether deceased people have reproductive

---

[84] Maya Sabatello, Posthumously Conceived Children: An International and Human Rights Perspective, 27, 66-67 J.L. & HEALTH 29 (2014).
[85] *Id*. at 46.
[86] *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257, 266 (Mass. 2002).
[87] *Id*.
[88] Ruth Landau, *Planned Orphanhood,49* **Soc.** Sci. & MED. 185, 188 (1999).
[89] Maya Sabatello, Posthumously Conceived Children: An International and Human Rights Perspective, 27, 63 J.L. & HEALTH 29 (2014).

rights, and if so, how should those rights be protected[90]. Also, legislatures have to ensure that posthumously children are supported, whether that be through inheritance or government benefits[91]. Scientists and doctors have come so far to develop technologies to enable those to have children that may not have been able to have a child before. It is only right for the legislature to keep up with the evolving technology in order to eliminate legal consequences that may arise from using art (such as parentage disputes).

Many scholars argue that post-humous reproduction should only take place upon the parents' consent[92]. However, Shelly Simana argues that prior consent should not be a requirement[93]. In fact, there should be a presumption of parentage that is rebuttable by previous objection or strong indication that the person would not agree to post-humous reproduction[94]. Further, Simana argues that decisions to prohibit posthumous reproduction should not be based on bodily integrity and autonomy, but rather be based on the deceased's interest in genetic continuity, the child's opportunity to come into existence, and the partner's interest in procreating and becoming a parent.

Despite the voluminous amounts of literature and case law on parentage, there is little to no support by the UPA that gives parent's the right to devise their unborn frozen embryos through a will. For this reason, the UPC gives the best guidance on how to devise an embryo through a will.

---

[90] Browne Lewis, Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously, 60 Case W. Rsrv. L. Rev. 1159, 1182 (2010).
[91] *Id*.
[92] Shelly Simana, Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent? Journal of Law and the Biosciences, 329–354, 354 (August 2018).
[93] *Id*.
[94] *Id*.

The advantage of the UPA is that it clearly defines a parent-child relationship, which makes it clear who the embryo inherits from. However, the UPA does not control the disposition of property, which is where the UPC can fill the gaps.

In summary, there is case law and legislation that exists to define the parental status of a child that was born post-mortem specifically, by using the deceased father's sperm. The UPA is able to give guidance on determining parentage when using sperm from a deceased man. However, the UPA does not answer the initial question of the inheritance rights of children who were born from an embryo passed through a will.

Consider the scenario posed in Section II of this paper where Ann decides to use the frozen embryo that her parents left for her. Although the child is genetically her sister, the UPA would deem the gestated embryo to be her daughter. The child only has inheritance rights from Ann's estate.

IV. Proposed Legislation and My Solution

A. Notable proposals

Bridget Fuselier, a property scholar, proposed a new approach for frozen embryos that would "take the property laws and modify them to meet the needs of this property with special dignity."[95] Fuselier's proposal is based in two distinct theories.

First, frozen embryos should be recognized as held by the gamete-providers in a modified tenancy by the entirety. The typical application of a modified tenancy by the entirety would be in effect, where each tenant spouse owns the undivided whole property with rights of survivorship. The wrinkle here is that a few alterations to the traditional rule would have to happened in order

[95] Bridget M. Fuselier, *Pre-Embryos in Probate - Property, Person, or Something Else*, 24 PROB. & PROP. 31, 32 (2010).

for the rule to apply seamlessly to frozen embryos. The alterations include: (1) The tenancy by the entirety would be extended to the genetic parents of the embryos even if they were unmarried; (2) During the lives of the tenants by the entirety, no severance or partition of the embryos would be permitted; (2) On the death of the first tenant, the decedent's interest would pass automatically to the surviving tenant and, although the surviving tenant now holds a 100% interest in the embryos, the survivor's ability to use, transfer, or destroy the embryos would still be restricted by the express, written desires or objections of the decedent made during the decedent's lifetime; and (4) On the death of the survivor, if no lifetime disposition of the embryos was made by the survivor, the embryos will be destroyed without express, written objection by either party.[96]

Second, Fuselier's proposal eradicates frozen embryos from the definition of "property" for the purposes of probate. According to the Restatement (Third) of Property, probate property is "property owned by the decedent at death and property acquired by the decedent's estate at or after the decedent's death."[97] Ownership at death is defined as "property that the decedent had actual ownership of and not merely ownership in substance."[98] Actual ownership is property that is "true legally recognized ownership," while ownership in substance is property that "decedent did not own but over which the decedent had sufficient control, such as through the power to become the owner or to be treated as the owner for some purposes."[99] These definitions are essential to understand in order to correctly apply Fuselier's proposed legislation. Under Fuselier's train of thought, couples who create embryos should be regarded as having control over the embryos, but not "actual ownership" over them in such a way that the embryos would be included in the couple's estates. As a result, Fuselier argues that since the embryos cannot be included in the probate estate

[96] *Id*.
[97] Restatement (Third) of Property § 1.1.
[98] *Id*. cmt. B
[99] *Id*.

of the couple, they do not pass as part of the estate, and the remaining embryos should be destroyed at the death of the surviving tenant by the entirety without express written objection of either tenant.[100]

Fuselier's proposal is in line with the court's decision in *Davis* where the embryos were not the couple's property however, they did have decision making authority over the embryos. However, ordering embryos to be destroyed rather than being passed through a will is harsh, wasteful, and irresponsible. Legislation should give couples freedom to do what their property as they wish. In the grand scheme of things, the couple paid for the embryos, underwent an emotional experience, and ultimately created something that has the ability to transform into life. Couples should be able to pass their embryos through a will in order to give the embryos an opportunity not to go to waste, and develop into life. Of course, the counter argument would be that embryos that are unused are unused for a reason. Perhaps the couple does not have the financial means to gestate all of the embryos created, or maybe they are perfectly happy with the amount of children they already have (or don't have). A couple leaving their unused embryos to somebody else may create an emotional burden on that person because they feel compelled to use the embryos even if they do not want to.

In her article, *Including the Frozen Heir: Expanding the Florida Probate Code to Include Posthumously Conceived Children's Inheritance Rights*, Erin Hoyle argues four changes the Florida legislature should make to its probate code[101]:

(1) address posthumously conceived children in intestacy statues;

---

[100] Bridget M. Fuselier, *Pre-Embryos in Probate - Property, Person, or Something Else*, 24 PROB. & PROP. 31, 36 (2010).

[101] Erin J. Hoyle, *Including the Frozen Heir: Expanding the Florida Probate Code to Include Posthumously Conceived Children's Inheritance Rights*, 43 Stetson L. REV. 325, 330 (2014).

(2) require signed and witnessed parental consent to support any posthumously conceived children;

(3) impose limits on posthumously conception; and

(4) place notice requirements on surviving partners to inform the estate administrator of any intent to conceive posthumously with the decedent's reproductive material[102].

Florida is the first state to address the eligibility of postmortem children being able to inherent from their parents.[103] However, the statute is enacted in the State's parentage act, and not the probate code.[104] This is because the legislator prioritizes the child's best interest, determined in the Parentage act, rather than satisfying the testator's likely intent.[105] However, the downside of from placing this statute within the Parentage Act includes (1) identifying and upholding the decedent-parent's intent; (2) protecting rights of traditionally born children to obtain their inheritance in a timely manner; and (3) balancing the interests of any potential posthumously conceived children with the decedent-parent's intent and the rights of other heirs.[106]

B. My Solution

Fuselier and Hoyle both propose legislation important changes that would affect states' probate laws. Legislation takes a long time to enact, and ART is becoming more popular with time. This means that the legislature cannot keep up with the rise of ART and the legal issues that come along with it.

---

[102] *Id*.
[103] Fla. Stat. §742.17(4) (2013) (requiring a posthumously conceived child to be named in a will to inherit from a deceased parent).
[104] Fla. H. Comm. on Health Care, *Final Bill Analysis & Economic Impact Statement*, 3 (Apr. 20, 1993).
[105] Benjamin C. Carpenter, *A Chip off the Old Ice block: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It,* 21 Cornell J.L. & Pub. Policy 347, 359 (2011).
[106] Fla H. Comm, *supra* n. 59.

Will drafters and estate planners can take action now for their clients. If testators want to pass their embryos through their wills to a specific person, while still providing support for the embryo, the testator should make a conditional gift. To go back to the hypothetical posed earlier, a conditional gift provision in Ann's parents' will should be drafted as follows: "If Ann gestates the embryo left for her to create a child of her own, then she shall receive an additional $25,000 from our estate. If Ann does not gestate the embryo, the $25,000 shall go to the residue of the estate and distributed as directed in the residuary clause."

This solution avoids inheritance and parentage issues because the clause is clear. Ann would be the parent, and a parent-child relationship is formed as defined by the UPA, and the child would then inherit from Ann, under the UPC. Of course the conditional gift is not necessary, but it is a way for the testators to provide indirect support for the embryo they created without claiming the child as their own and making it parentless.

V. Conclusion

In conclusion, to determine the inheritance rights of children born from embryos that were passed through a will, the UPC should be used as a starting point. Due to the quick development of ART, and the more accessible it is becoming, legal issues surrounding the technologies are only going to increase. Couples should be able to devise their embryos in a will, and if they intend to leave that unborn child an inheritance, they should be allowed to, as long as the gift complies with the Rule of Perpetuities. Banning embryo's to be passed through a will is an infringement on property rights and is also creates a slippery slope. If people cannot pass embryos through a will, then people may create revocable inter vivos trust and leave the embryos to the trust, under the care of the trustee.

It is important not to rely on the disposition forms provided by the clinic. The forms are signed during an emotional time, without independent counsel to offer advise throughout the decision-making process. Further, the disposition forms provided by the clinic are not always clear as to the intent of the parent signing a form. Using a will is a better instrument that allows the parents to have control over the future of the embryos. Shall the couple elect to have the embryos destroyed, then that is a decision the couple made together with advice from an attorney, that can be reflected in a will. The will is also a better instrument than the disposition forms because the will must be witnessed, so there is no confusion on the circumstances the testator was under when the will was signed. Property law gives us the right of possession, the right of control, the right of exclusion, the right of enjoyment, and the right of disposition of property. Although not all courts have come to an agreement that embryos are property, many states agree that couples have decision making authority over the embryos. That means the couple can decided to keep the embryos in storage and not let anyone else use them, actually use the embryos, dispose of the embryos, give the embryos to someone they know or donate them to a couple struggling with fertility issues.

Ultimately, the answer to the difficult, yet interesting, questions that ART creates relies on the intent of the parent/testator. Since intent is so important, the intent should be clearly stated in a will in order to overcome any kind of standard of proof. Once stated in the will, legislatures and courts need to decide who that child should inherit from. In the best scenario, the testator would explicitly state whether or not he/she wants the embryo to inherit from the estate. However, from an efficiently perspective, it would be best for the embryo to have inheritance rights only if gestated within a certain number of years. Probate courts are not interested in having estate matters open for decades after the testator has died. It's in the courts' (and taxpayers') best interests to close estate matters as quickly as possible to avoid unnecessary costs that arise in monitoring and

litigating. Whether to use the embryo should be entirely up to the beneficiary, however if using the embryo within the allotted time period for the child to still inherit from the genetic parents, then the beneficiary may have an incentive to gestate the child knowing there will be financial support.

As mentioned in the beginning of this paper, death is inevitable. It doesn't matter who you are or where you came from, we are all going to die, and there is no controlling it. However, to make matters lighter, we are in control of our property and how to distribute that property amongst family and friends. For some people, if not most, children are their most prized "possession." Children are not property; they are human beings with fundamental rights. Many parents decide to leave their property and assets to their children in order for their children to live more financially secure without their parents being around. ART not only gives couples an opportunity to have children when that opportunity may not have been possible for them, but it also gives children the opportunity to inherit their parent's genetic material.