DYING TO BE MOMMY: USING INTENTIONAL PARENTHOOD AS A PROXY FOR CONSENT IN POSTHUMOUS EGG RETRIEVAL CASES

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INTRODUCTION

She’s never going to wake up. The words pound in Ms. Ayash’s head as she sits in Kfar Sava’s Meir Hospital, clutching her daughter’s lifeless hand.1 Ms. Ayash has been in the same seat for the past ten days staring at her daughter, ventilators coiled around her body like translucent snakes. Ms. Ayash replays the memories of the past seventeen years all leading up to the morning ten days ago when she rushed to the hospital after learning that her daughter had been hit by a car.2 She fiddles with the organ donation card she had been given by the nurses and reads the potential donations like a shopping list. Ms. Ayash suddenly stops reading. Maybe, some way, I can have my daughter back. When the doctor returns to the room, Ms. Ayash slowly and solemnly lists the organs she wants donated.3 As the doctor is preparing to leave, Ms. Ayash quickly adds and I would like to save my daughter’s

1. See Israeli Woman’s Eggs Can Be Harvested and Frozen After Her Death, Court Rules, HUFFINGTON POST (Aug. 8, 2011, 7:01 PM), http://www.huffingtonpost.com/2011/08/08/israeli-woman-eggs-harvested-frozen-death_n_921639.html [hereinafter Israeli Woman’s Eggs Can Be Harvested]. On July 24, 2011, Chen Aida Ayash, a seventeen year old girl residing in the Sharon region in Israel was hit by a car. Id. Ten days after the accident, she died in the Kfar Sava Meir Hospital. Id. The following paragraph is a fictional account of the events that occurred in the interim period between Chen Aida Ayash’s accident and her case before the Kfar Sava Magistrates to determine whether her parents could posthumously harvest her eggs while she was still connected to life support.


3. See Israeli Woman’s Eggs Can Be Harvested, supra note 1 (stating that “[a]fter deciding to donate her organs, Ayash’s family obtained an order from the Kfar Sava Magistrate’s Court to allow her eggs to be harvested and frozen”).
eggs. The doctor is puzzled, as is Ms. Ayash after the words escape her lips. The doctor leaves the room, assuring Ms. Ayash he will return momentarily, after ascertaining whether it is legally and ethically permissible to do something that has until recently been medically impossible.

On August 7, 2011, the presiding magistrates in Kfar Sava, Israel set global legal harvest and freeze her eggs. Ayash’s parents intended to give the frozen eggs to a childless family member for later fertilization. There have been cases throughout the world where a woman has been granted permission by the judicial system to use her deceased husband’s sperm, harvested and cryopreserved while he was still alive, to impregnate herself after his death. Medical technology has now advanced to a point where it is possible for an individual’s gametic material to be retrieved after his or her death. However, because these technological advances are so recent, the decision of whether to harvest gametic material from the deceased has only been addressed by emergency room doctors and urologists; Chen Aida Ayash’s

5. Id. Maayan Maor, a spokesperson for the medical center in Kfar Sava stated, “This is a unique case, since this is the first time an Israeli court has approved the extraction and freezing of ovarian eggs from a dead woman.” Id.; see also Ryan Jaslow, Dead Girl’s Family Harvests Her Eggs: Was It Unethical?, CBSNEWS.COM (Aug. 11, 2011, 3:52 PM), http://www.cbsnews.com/8301-504763_162-20091343-10391704.html (discussing how the case set important legal precedent for families seeking to seek continuity after the death of a family member).
6. Id. Jaslow noted that after the court order was granted, Ayash’s family decided to discontinue their attempt to utilize Chen’s frozen eggs. Id.
8. See discussion infra Sections I.A-B. This process is known as premortem gamete cryopreservation where an individual harvests and preserves his gametes prior to death. See id.
9. See discussion infra Section I.A. See generally CHRISTOPHER J. DE JONGE & CHRISTOPHER L.R. BARRATT, ASSISTED REPRODUCTIVE TECHNOLOGY: ACCOMPLISHMENTS AND NEW HORIZONS 411 (2002) (discussing the various advancements in medical technology and how they are utilized within the ART context).
10. See RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 46 (2010) (discussing how requests for posthumous sperm retrieval are being made with increasing frequency); see, e.g., Plaintiff’s Mem. of Law in Support of Her Emergency Mot. for a T.R.O. at 1, Dhanooolal v. U.S. Dep’t of the Army, No. 4:08-CV-42 (CDL) (M.D. Ga. Apr. 4, 2008) (arguing that deceased’s wife could have the deceased’s sperm removed before his body was embalmed because he explicitly stated he wished to
case was the first known instance where a court ruled on whether a deceased's gametic material could be retrieved after death.11

Much of the current scholarship on posthumous gamete retrieval (PGR) advocates for a total ban on the procedure in instances where the deceased's consent to posthumous parentage has not been specifically stated prior to death.12 Scholars supporting a ban on the procedure have expressed concern that PGR would make a deceased individual a parent absent a proper inquiry into whether he or she wanted to become a parent posthumously.13 However, the scholarly evasion of the PGR issue has left no solutions

have children). The American Society for Reproductive Medicine supports the position that postmortem harvesting of gametes should be prohibited absent the donor's prior consent. Joshua S. Rubenstein, Advances in Medical Technology, N.Y. L.J., Sept. 7, 1999, at 9, 11. The New York State Task Force on Life and the Law has stated that PGR, specifically sperm retrieval, should not be permitted without the written consent of the person from whom the sperm would be harvested. N.Y. STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 266 (1998). However, the Task Force did note:

[1]In most states, the Uniform Anatomical Gift Act allows next-of-kin to consent to the retrieval of organs . . . , unless there is evidence that the decedent would not have consented. It is arguable that these statutes would authorize the posthumous retrieval of sperm . . . in the absence of a clear objection by the subject before he died.

Id. (citing N.Y. PUB. HEALTH §§ 4300-4310 (McKinney 2007)); see also discussion infra Section I.A.

11. Courts have addressed what is to be done with gametic material after it has been harvested from an individual while they were alive but have since died. See discussion infra Subsection II.A.1.

12. See, e.g., Charles P. Kindregan, Jr., Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons, 7 J. HEALTH & BIOMEDICAL L. 147, 151 (2011) (arguing that “[t]he fact that a dead or incompetent person has arranged to have their gametes cryopreserved does not of itself mean that others . . . can legally retrieve them, fertilize them, or transfer them to produce a pregnancy. The prior consent of the deceased or incompetent person to use the preserved gametes is still needed”); Carson Strong, Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State, 27 J.L. MED. & ETHICS 347, 348 (1999) (arguing that “reasonably inferred consent provides a basis for respecting patient autonomy—and not that reasonably inferred consent makes postmortem sperm retrieval ethically justifiable”); Gladys B. White, Commentary, Legal and Ethical Aspects of Sperm Retrieval, 27 J.L. MED. & ETHICS 359, 360 (1999) (disagreeing with Carson Strong's consideration of reasonably inferred consent and advocating posthumous sperm retrieval in instances only when explicit prior consent has been given with the exception in the case of PVS if the wife is still married to the husband and cannot remarry).

to the question of who should be the legal parent of a posthumously conceived child. The United States Supreme Court was recently baffled by the legal status of a posthumously conceived child in the case of Astrue v. Capato. The Court was asked to consider whether a posthumously conceived child qualified as a "child" under the Social Security Act for obtaining benefits. However, the Court could not find any clues within the Social Security Act about whether a qualifying child had to be conceived prior to the death of the deceased. Ultimately, the Court evaded the issue and left it up to individual states to decide whether a posthumously conceived child should be considered a child of the deceased for Social Security purposes.

Although scholars raise legitimate concerns about making the deceased a legal parent against his or her wishes, many have failed to consider that there are alternative models of parentage establishment in which the gamete provider would not be considered the legal parent of the resulting child. Thus, all of the fears surrounding unascertained consent would

mean strongly desired children while still alive, it is not clear whether this desire cements his intent once dead.

14. The parentage question raises serious implications in other areas of law including whether the resulting child could inherit from the deceased gametic provider, his family, and his estate. See, e.g., UNIF. PROBATE CODE § 2-103 (2012) (stating that "[a]ny part of the intestate estate not passing to a decedent’s surviving spouse . . . passes . . . to the decedent’s descendants by representation"); Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002) (holding that children could inherit if wife showed that "decedent affirmatively consented to posthumous conception and to the support of any resulting child"). For a discussion of the legal problems surrounding tax laws, estate planning, and possible inheritance rights of a posthumously conceived child, see Lori B. Andrews, The Legal Status of the Embryo, 32 Loy. L. Rev. 357, 392-95 (1986); John D. Battersby, Woman Is Carrying Her Daughter’s Babies, N.Y. Times, Apr. 9, 1987, at A9 (discussing the legitimacy of triplets carried by a South African woman who was implanted with the ova produced by her daughter and fertilized in vitro with her son-in-law’s sperm).

16. Id. at 2026.
17. Id. at 2027-28 (stating that “[u]nlke § 416(e)(2) and (3), which specify the circumstances under which stepchildren and grandchildren qualify for benefits, § 416(e)(1) lacks any elaboration”).
18. Id. at 2034.
19. See, e.g., Strong, supra note 12, at 352 (arguing that “[e]ven if the wife has legal authority to make decisions concerning the disposition of his body, ethically, that authority ought not extend to include a right to have sperm removed from his body against his wishes"); Michael K. Elliott, Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child, 39 REAL PROP. PROB. & TR. J. 47, 58 (2004) (noting that “[t]he prevailing view is that there must be consent and intent to reproduce posthumously on the part of the decedent. This can be evidenced by either an express writing or conduct and statements by the decedent”).

20. In her article, Dying To Be a Father: Legal Paternity in Cases of Posthumous Conception, Ruth Zafran considers applying the Intentional Parentage Doctrine, or the Intent Model as she refers to it, to the posthumous conception or posthumous gamete retrieval context. 8 Hous. J. Health L. & Pol’y 47, 75 (2007). However, Zafran chooses to advocate
be alleviated if the deceased gamete provider would not even be considered the parent of the child in the first place. The two most popular alternative models of parentage establishment, the Gestational and Intentional Parentage Doctrines, originated within the framework of surrogacy agreements. In jurisdictions applying alternative approaches, a genetic relationship with the child is only one way to establish legal parentage; legal parentage can also be established by means of giving birth or manifesting an intent to parent.

Even though the number of scholars seeking a ban on PGR continues to increase, the reality is that requests for PGR are becoming more prevalent as medical technology advances. Currently, the decision of whether to grant a request for PGR is left entirely to individual hospitals’ preferences and moral standards; the continued lack of PGR regulation will only further the disparity in how hospitals handle PGR requests. The more urgent issue that must be addressed before the PGR procedure is scientifically perfected is who should be considered the legal parent of a child born from a deceased’s gametes. The application of the Intentional Parentage Doctrine, the definition of parenthood through the lens of the Relational Model, as posited by feminist ethicist and psychologist Carol Gilligan. See discussion infra Section IV.B. See discussion infra Section III.B. See discussion infra Section III.B. 21. See discussion infra Section IV.B. 22. See discussion infra Section III.B. 23. See discussion infra Section III.B. 24. The first published report of sperm harvested from a neurologically dead man was by Rothman in 1980. See Batzer, Hurwitz & Caplan, supra note 13, at 1263 (citing C.M. Rothman, A Method for Obtaining Viable Sperm in the Postmortem State, 34 FERTILITY & STERILITY 512 (1980)). Between 1980 and 1995, there were a reported total of eighty-two requests at forty facilities across the United States. Joshua M. Hurwitz et al., Posthumous Sperm Procurement: An Update, 2002 FERTILITY & STERILITY S242 (2002). In 2002, there was a 60% increase in requests and a 68% increase in retrievals. Id. In addition, twenty-one facilities have since established formal policies. Id.; see discussion infra Section II.B. 25. See Katheryn D. Katz, Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying, 2006 U. CHI. LEGAL F. 289, 315-16 (raising in her conclusion the question of whether legislative intervention is needed or whether PGR procedure should remain solely a question of medical ethics); Marjorie Maguire Shultz, Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality, 1990 WIS. L. REV. 297, 300 (arguing that the issue of procreation is profoundly linked with individual and societal beliefs and values). 26. The Intentional Parentage Doctrine was first enunciated by the California Supreme Court in its 1993 decision of Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). The Johnson court noted that under the California Uniform Parentage Act, technically both a gestational surrogate and an intended mother who donated her own eggs to the procedure could
traditionally applied by courts in the context of surrogacy agreements, to the current PGR debate will serve as a successful proxy for the deceased’s unascertained consent to the PGR procedure. The Intentional Parentage Doctrine will ensure that the former spouse is able to maintain his reproductive autonomy by being able to conceive and bear a child with the partner of his choice; at the same time, the doctrine makes certain that the deceased will not be considered a legal parent of the child because she lacks the requisite intent to raise the child as her own. Therefore, because the deceased will not be considered a legal parent, she and her estate will be relieved of all the financial and parentage obligations that would otherwise be thrust upon the deceased if courts applied a parentage model that determined legal parentage by way of genetics.

Part I addresses the historical background of posthumous reproduction and gamete retrieval, including scientific and legal advancements. Part II discusses the constitutional concerns created by the conflicting rights to procreate and avoid procreation, including the degree of constitutional protection, if any, that should be granted to a deceased individual. Part III examines the various doctrines courts have created to establish legal parentage within the surrogacy context, including the Intentional Parentage Doctrine. Part IV then analyzes the weaknesses of the Genetic Contribution Doctrine as applied within the PGR context and advocates for the adoption of the Intentional Parentage Model to relieve the deceased and her estate of parental and financial obligations. Further, the Intentional Parentage Doctrine is applied to the three most common scenarios where PGR requests have been made to emergency room doctors and urologists.

I. FROM SCIENCE FICTION TO REALITY: THE HISTORICAL BACKGROUND OF CREATING LIFE AFTER DEATH

Up until the late twentieth century, posthumous reproduction seemed to be a bizarre concept from a science fiction novel. However, medical technology has advanced to a point where both posthumous reproduction and PGR have the potential to become fairly common practices. While posthumous reproduction and PGR may at first sound like the same con-

both be considered the legal mothers under the terms of the Act: the surrogate by giving birth and the intended mother by consanguinity. Id. at 781. In resolving the parentage “tie,” the California Supreme Court held that “when the two means do not coincide in one woman, 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.” Id. at 782.

27. See discussion infra Subsection III.B.2.
28. See discussion infra Sections I.A-B.
29. See discussion infra Subsections II.A.1-2; Section II.B.
30. See discussion infra Part III.
31. See discussion supra note 7 and accompanying text.
cept, it is impossible to fully understand the modern criticisms of PGR without fully understanding the difference between the two procedures. Furthermore, much of the much of the scholarly work on posthumous conception has not been extended to the PGR context.

A. Life After Death, the Difference Between Posthumous Reproduction and PGR

Posthumous reproduction and PGR differ in two important regards: the ascertainment of consent to posthumous parentage prior to death and the complexity of a determination of legal parentage. First, consent to PGR has usually not been ascertained prior to death whereas in instances of posthumous conception the fact that the deceased stored his or her gametes before death provides some indicia of the desire to procreate. Second, as discussed below, because the deceased’s consent to PGR has not been attained, the determination of legal parentage is much more complicated; traditional legal parentage responsibilities have the potential to rest with more than two people because the individual requesting the gametes may be in a relationship with or remarried to another individual.

1. Posthumous Reproduction: The Effortless Ability to Ascertain Consent

Posthumous reproduction occurs when a child is born after one or both of the genetic parents has died. Historically, this occurred when a man impregnated a woman and then died before the child was born. Consent to becoming a parent in this instance is fairly easy to ascertain because, as

32. See also Katz, supra note 25, at 289 (arguing PGR is different from posthumous reproduction and conception because “it is usually non volitional and because the law governing the practice is so underdeveloped”); see also discussion infra Section II.A.
33. See discussion infra Section II.A.
34. See Katz, supra note 25, at 299 (stating that “[t]here is some legislative and judicial direction on issues such as inheritance after posthumous conception, the status of cryopreserved pre-embryos, and parentage when donated gametes are used to achieve pregnancy, but nothing specifically addresses PMGR”).
35. John A. Robertson, Posthumous Reproduction, 69 Ind. L.J. 1027, 1027 (1994) (noting that posthumous reproduction normally has arisen in instances where fathers die before the birth of their children and women die in childbirth).
36. There have also been instances where some females have given birth after their deaths. See, e.g., Daniel Sperling, Maternal Brain Death, 30 Am. J.L. & Med. 453, 455 n.16 (2004) (noting that there are instances where irreversibly brain-damaged women are kept on life support so that their organs could be harvested for donation and that this could extend into the child-bearing context). For example, women have oftentimes been kept on life support so that a child may be carried to term and delivered. See, e.g., Infant Born to Dying Mother Dies As Result of Infection, N.Y. Times (Sept. 13, 2005), http://www.nytimes.com/2005/09/13/national/13braindead.html.
scholars have noted, a man would likely know that a child could result from sexual intercourse.\textsuperscript{37} Under United States law, a child who was conceived while the father was alive but born after his death would be considered as if born during the father's life.\textsuperscript{38} Furthermore, the determination of parentage is also simple within the posthumous reproduction context—all scholars are in agreement that the legal parents of the resulting child are the two genetic parents, even if one of them has died prior to the birth of the child.\textsuperscript{39}


While posthumous reproduction has been in existence for hundreds of years, posthumous conception has been defined as "the beginning of the human gestational process after the death of one or both biological parents."\textsuperscript{40} The posthumous conception process resulted from the technological advancements in artificial insemination methods—particularly the ability to freeze and preserve human gametes through the process of cryopreservation.\textsuperscript{41} Premortem gamete cryopreservation and posthumous conception historically arose in two instances: men going off to war\textsuperscript{42} and patients beginning chemotherapy.\textsuperscript{43} In many of these instances, an individual will have

\begin{itemize}
\item \textsuperscript{37} Katz, \textit{supra} note 25, at 291 (noting that "[c]onception in these cases was purposeful in the sense that the male was aware that a pregnancy might result from his act of sexual intercourse").
\item \textsuperscript{38} MADOFF, \textit{supra} note 10, at 40.
\item \textsuperscript{39} Id.
\item \textsuperscript{41} See Renee H. Sekino, Posthumous Conception: The Birth of a New Class, 8 B.U. J. SCI. & TECH. L. 362, 364-65 (2002) (arguing that "[b]ecause of the lengthy period of time over which human semen, ova, and embryos may be preserved, children may be conceived after the death of a particular donor, raising numerous legal issues relating to parental relationship and intestate succession"); Monica Shah, Comment, Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception, 17 J. LEGAL MED. 547, 550 (1996).
\item \textsuperscript{42} Kristine S. Knaplund, Postmortem Conception and a Father's Last Will, 46 ARIZ. L. REV. 91, 91 (2004) (detailing how men going to fight in the Iraq and Gulf Wars deposited their sperm in banks in case they suffered infertility problems). The impetus behind preserving sperm arises from a man's fear of dying while in combat or the concern that chemical or biological warfare will render him sterile. Id. Recently, women who are suffering from or undergoing treatment for a disease have opted to freeze either preembryos or their ovaries. Id.; see also Katheryn D. Katz, The Clonal Child: Procreative Liberty and Asexual Reproduction, 8 ALB. L.J. SCI. & TECH. 1, 35-39 (1997) (discussing cryopreservation of preembryos).
\item \textsuperscript{43} See generally Annika K. Schroder, Diedrich Klaus & Michael Ludwig, Strategies for Preventing Chemotherapy and Radiotherapy Induced Gonadal Damage, 3 AM. J.
harvested and stored his sperm but not have left any instructions about what should become of the stored gametes in the event of death. Various court decisions have struggled to reconcile the absence of specific instructions with the donor's intention to procreate posthumously. While some courts have looked to the fact that the deceased froze his sperm during his lifetime as a possible indication that the individual desired to procreate, others have required a specific verbalization of a wish to use the frozen gametic material after death.

3. PGR: An Unascertainable Consent Standard?

PGR, by contrast, occurs when an individual's gametic material is harvested after he or she has already passed away or is brain dead, comatose, or in a persistent vegetative state. Many PGR requests occur when the deceased dies in a tragic accident at a young age. Although several hospitals have their own protocol when it comes to PGR requests, the law...
governing the practice is significantly underdeveloped. Courts have yet to address whether PGR is even ethically permissible and, if it is, under what circumstances a PGR procedure can be performed.\(^5\)

Although the area of posthumous reproduction is still in its legal infancy, any developments in one area of the field can potentially be applied to a different area. PGR is quite different than posthumous reproduction and conception because there are normally not any outward indicia of consent. When an individual cryopreserves his or her gametes, there is normally some process whereby he or she can give instructions as to how the stored material should be deposited in the event of death.\(^5\) In instances where requests for PGR arise, however, doctors are not so fortunate to have explicit instructions regarding whether the deceased would have wanted to be a parent posthumously.

B. Scientific Advances in the Area of Female Gamete Harvesting

Since 1999, more than 1,000 requests for PGR have been made each year.\(^5\) Additionally, twenty-one known facilities have established formal PGR policies.\(^5\) The main scientific advancement that makes life after death even possible is cryopreservation, the freezing of the gametic material necessary for reproduction.\(^5\) Cryopreservation was first successfully used to freeze sperm in 1953\(^5\) and then embryos several years later.\(^5\) The first successful pregnancy from a cryopreserved egg occurred in 1986.\(^5\)

Each case is assessed on four criteria: issues of consent, medical contraindications, resource availability, and one-year waiting period for bereavement and recipient evaluation. Id. All of the proposals acknowledge that some form of premortem consent should be required, but differ on whether or not explicit consent is required. Id. See discussion supra notes 6–9 and accompanying text. See Soules, supra note 45, at 363 (noting the process by which sperm banks require additional information about the disposition of the sperm before it is cryopreserved). For an example of a standard disposition form, see Sperm Banking Preparation and Procedures, U. WOMEN’S HEALTH CARE, http://www.kyinfertility.com/services/sperm-bank-procedures.shtml (last visited Jan. 23, 2013).

53. James, supra note 49.

54. See Batzer, Hurwitz & Caplan, supra note 24, at 1263.


58. Ester Polak de Fried et al., Pregnancy After Human Donor Oocyte Cryopreservation and Thawing in Association with Intracytoplasmic Sperm Injection in a Patient with Ovarian Failure, 69 FERTILITY & STERILITY 555, 556 (1998) (stating that “[n]early a decade has passed since the first reports of pregnancies following cryopreservation of human oocytes were published”).
Sperm retrieval from men who are deceased, comatose, brain dead, or in a persistent vegetative state has been technically feasible since 1980. In order to harvest eggs, medical personnel must induce artificial maturation of the eggs through ovarian stimulation using gonadotropin. When the eggs have matured, they are then collected transvaginally with a needle. There has been no known case of its successful attempt. Furthermore, cryopreservation of unfertilized eggs is more difficult than cryopreservation of fertilized eggs or embryos because of complications in freezing and successfully thawing the eggs, although the rate is now improving.

Even though there are lingering complications with the freezing of female gametic material, it is reasonable to conclude that the rapid advancement of medical technology will make posthumous retrieval of female gametic material a perfected reality. Therefore, it is necessary to begin addressing the various concerns that arise when a woman’s eggs are posthumously extracted and utilized for later fertilization.

59. See Carson Strong, Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State, 14 J.L. & HEALTH 243, 244 (2000) (discussing the first case of extracting sperm from a man’s body following death in 1980). There are a variety of techniques that can be used to extract the sperm from a deceased male including “stimulated ejaculation, microsurgical epididymal sperm aspiration or testicular sperm extraction.” See Katz, supra note 25, at 293 (quoting The Ethics Committee of the American Society for Reproductive Medicine, Posthumous Reproduction, 82 FERTILITY & STERILITY. 260, 620 (Supp. 1 Sept. 2004)).

60. Greer et al., supra note 13, at 280. “[T]he typical protocol for controlled ovarian hyperstimulation involves 7 to 10 days of gonadotropin stimulation before oocyte retrieval. The neurology ICU team would [need] to determine whether the patient could be supported for that length of time.” Id.


62. Id. at 392. Goodwin notes that the process “poses health risks as well as potential psychological side-effects,” including “nausea, bloating, and depression.” Id.

63. Even though Chen Aida Ayash’s parents were able to secure the court order allowing them permission to harvest Chen’s eggs, they ultimately did not go through with the procedure. See Israeli Woman’s Eggs Can Be Harvested, supra note 1.

64. See DAAR, supra note 55, at 561.

II. THE CONSTITUTION AND A FORMER SPOUSE'S RIGHT TO RETRIEVE AN EGG

The first inquiry in determining whether or not PGR should even be permitted begins with an analysis of the constitutional rights at stake. In parentage cases within the paternity and assisted reproduction technology (ART) context, courts have examined competing privacy rights, notably the right to procreate versus the right not to procreate. The PGR context is similar to instances of paternity establishment and ART because there are at least two individuals with competing constitutional interests: an individual who desires to procreate, whether it is the former spouse, significant other, or family member of the deceased, and the deceased, whose desire to procreate will most likely not be known at the time of his or her death. PGR adds an additional dimension to the constitutional debate: whether the rights of the deceased are comparable to or lesser than those of the living.

A. Privacy Rights and Procreational Autonomy

The United States Supreme Court has never explicitly recognized a fundamental right to procreate, but has implied the right’s existence since 1923. The decision to have children is now considered a fundamental right covered by the constitutional right to privacy derived from the penumbras of the Constitution. Although the right to procreate was explicitly enunciated

66. Additional constitutional conundrums that arise in the parentage context are the right to raise a child as one pleases as well as the rights of grandparents. See Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (holding that parents have a fundamental right in choosing how to educate their children); Troxel v. Granville, 530 U.S. 57, 75 (2000) (holding that the interests of parents in the “care, custody, and control” of their children is a fundamental right that the state may not abridge without a compelling interest); see also discussion infra Subsections II.A.1-2.

67. See discussion infra Section IV.B-C.

68. See discussion infra Section II.B.

69. See Meyer, 262 U.S. at 399 (1923) (“Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, . . . bring up children, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness”); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (holding that a forced sterilization law “deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring”).

70. The initial enunciation of a fundamental right of privacy was set forth in Griswold v. Connecticut, 381 U.S. 479, 499 (1965). In Griswold, the Court invalidated a statute that made it a crime for a person to use any form of contraceptives. Id. at 480. The Court refused to defer to the legislature and noted that the law operated “directly on an intimate relation of husband and wife.” Id. at 482. The right to privacy was then extended to unmarried individuals in Eisenstadt v. Baird, 405 U.S. 438, 443 (1972). The Court stated that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be
by the Court, it has been argued that this right should extend to noncoital methods that involve ART. The Supreme Court has not yet encountered the question of whether the right to procreate extends to the posthumous context. However, if the Court finds that it does, the Court will then be faced with the issue of whether a former spouse’s or an infertile family member’s interest in procreation can trump the unknown or contrary wishes of the deceased to not become the legal parent of the resulting child.

1. The Desire to Be Mommy

The concept of reproductive autonomy now includes the right to procreate, the right to purchase condoms, and the right to choose to have an abortion. These recognized rights, however, fall within the context of coital reproduction. It is unknown whether these rights would be the same in the context of noncoital reproduction. The Supreme Court has recognized that the right of privacy belongs to the individual—as opposed to the couple as a unit. Thus, issues arise when individuals have different procreative interests.

free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Id. at 453.


72. The fundamental right to procreate was first recognized by the United States Supreme Court in Skinner v. Oklahoma where the Court struck down a mandatory sterilization law for third time criminal offenders. 316 U.S. 535, 541 (1942). The Court recognized marriage and procreation as “the basic civil rights of man.” Id. In Stanley v. Illinois, the Court determined that an unmarried father had a right to rear his children, stating that “[t]he rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘rights far more precious . . . than property rights.’” 405 U.S. 645, 651 (1972) (internal citations omitted).

73. Eisenstadt, 405 U.S. at 447 (1972) (extending a married individual’s right to purchase contraceptives to a single person).

74. Roe v. Wade, 410 U.S. 113, 166-67 (1973) (holding that a woman has the right to choose to have an abortion before viability and to obtain it without undue interference from the State); Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992) (upholding Roe v. Wade’s essential holding that a woman had the right to choose to have an abortion before fetal viability without undue interference from the state).

75. See Lawrence Wu, Family Planning Through Human Cloning: Is There a Fundamental Right?, 98 COLUM. L. REV. 1461, 1474 (1998) (arguing that using ARTs to procreate should receive the same protections as coital reproduction).

76. See Elliott, supra note 19, at 55-56. Elliott notes that “[t]he Supreme Court never has distinctively addressed whether an individual has a constitutional right to posthumous reproduction. Nor has the Court ever addressed the rights of children born through posthumous reproductive methods.” Id. at 56.

77. Eisenstadt, 405 U.S. at 453.
Lower courts have noted that a deceased individual has an interest in how his or her gametes are used after death if he or she manifested a specific intention of how the gametes should be used while alive. For example, in *Hecht v. Superior Court of Los Angeles*, the California Court of Appeals did not have a difficult time ascertaining the deceased’s wishes with regard to posthumous reproduction. Prior to committing suicide, William Kane had fifteen vials of his sperm stored at the local sperm bank. Kane made several recorded statements that he wanted his sperm to be given to his girlfriend, Deborah Hecht, so that she could become pregnant with their children. Kane’s two children challenged his decision to leave his sperm to Hecht, arguing that (1) a posthumously born child would disrupt their existing family structure for inheritance purposes, (2) the posthumously born child would suffer because he would not be raised in a traditional family home with both parents, and (3) if Hecht were impregnated with Kane’s sperm it would violate public policy because the two were unmarried. The court ruled against the children’s arguments and instead focused on Kane’s explicit intent to procreate after death. The *Hecht* court ultimately concluded that posthumous conception was not contrary to public policy.

Thus, it appears as though some courts are willing to honor the deceased’s interest to procreate after death when this interest coincides with the interests of the living. However, cases of PGR, when the consent of the deceased normally has not been obtained, raise more difficult questions. Should the court presume that the deceased would have wanted children during his or her lifetime? What if the living former spouse never had the

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78. See *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002) (holding that the deceased father’s reproductive autonomy should be respected when ascertaining whether children born years after his death using frozen sperm should be declared his heirs).

79. 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

80. Id. at 276.

81. Id. Kane also executed a will in which he stated that it was his wish for Hecht to “become impregnated with [his] sperm, before or after [his] death.” Id. at 277. The will also referenced “our future child or children.” Id. Further, Kane wrote a letter to his future not-yet-conceived children, in which he stated: “I’ve been assiduously generating frozen sperm samples . . . . [T]his letter is for my posthumous offspring . . . with the thought that I have loved you in my dreams, even though I never got to see you born.” Id. (internal quotations omitted).

82. See id. at 279, 284.

83. See id. at 291. The *Hecht* court noted that “[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.” Id. 290-91 (quoting *Johnson v. Calvert*, 851 P.2d 776, 787 (1993)).

84. See id. at 287, 290-91. The case then went back to the probate court for a determination on how Kane’s frozen sperm should be distributed. *Kane v. Superior Court*, 44 Cal. Rptr. 2d 578, 580 (Ct. App. 1995).
opportunity to have a child with the deceased? Should the living former
spouse be prevented from having children even though the deceased will
have no obligations to the child?

2. The Desire Not to Be Mommy

The Supreme Court first recognized a right to contraception as an el­
ement of marital privacy in 1965.85 The right to contraception is generally
regarded as the right to decide “whether to bear or beget a child.”86 In most
cases of artificial reproduction, both parties consent to procreation.87 How­
ever, if the parties are in disagreement, courts must weigh the relative inter­
ests of the parties.88 The situation is further complicated in instances of PGR
where courts will have to consider whether the freedom not to procreate
posthumously is more or less important than the freedom not to procreate
while the person is still alive.

The Tennessee Supreme Court in Davis v. Davis recognized that while
the right to procreate is a fundamental right, it must be balanced against the
right not to procreate.89 Davis involved a dispute between a recently di­
vorced husband and wife over the ownership of their cryopreserved
preembryos.90 The couple had deposited the preembryos at an IVF clinic but
did not execute an agreement as what would become of any unused embry­
os.91 The court attempted to balance Junior Davis’s right not to procreate

86. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that “[i]f the right of
privacy means anything, it is the right of the individual, married or single, to be free from
unwarranted governmental intrusion into matters so fundamentally affecting a person as the
decision whether to bear or beget a child”).
87. Most clinics throughout the United States require spouses to sign informed con­
sent forms for a number of different assisted reproductive technology procedures including in
vitro fertilization, intracytoplasmic sperm injection, and embryo cryopreservation. See In­
formed Consent for Assisted Reproduction, WOMEN’S HEALTH AT MAGNOLIA PARKE
UNIVERSITY OF FLORIDA available at http://repro.med.ufl.edu/docs/form_sartconsent. In
2010, the Centers for Disease Control and Prevention reported 147,260 ART cycles per­
fomed. Assisted Reproductive Technology, CENTERS FOR DISEASE CONTROL AND
majority of these cases result in no legal repurcssions.
88. Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992). The Davis court noted that
ordinarily the individual who sought to avoid procreation would normally prevail in the
balancing inquiry if the party who desired procreation had other means and opportunities to
procreate. Id.; see also Litowitz v. Litowitz, 48 P.3d 261, 269 (Wash. 2002) (holding that the
egg donor could not prevent the man from donating preembryos to another couple); Kass v.
Kass, 696 N.E.2d 174, 182 (N.Y. 1998) (holding that courts needed to consider the intent
manifested in the consent agreement).
89. 842 S.W.2d at 604.
90. Id.
91. Id. at 590.
with the right of Mary Sue Davis, who wanted to use the preembryos either to implant herself or to donate them. 92

The court acknowledged that Mary Sue Davis's right to procreate would normally have trumped Junior Davis's desire not to procreate. 93 For this proposition, the Davis court cited the Supreme Court's rationale in Planned Parenthood of Central Missouri v. Danforth that stated """"inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."""" 94 However, the court ultimately held that Junior's right not to procreate prevailed in this instance because Mary Sue Davis wanted to donate the preembryos to a couple as opposed to using them herself. 95 The Tennessee court stressed the importance of considering each case on its individual facts and even giving weight to the unique personalities of the parties. 96 The court also noted that if Mary Sue was allowed to donate the preembryos, Junior """"would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it."""" 97 Importantly, the Davis court stated that even if other courts balanced an individual's desire to procreate against the desire not to procreate, the Davis decision should not stand for the rule of an automatic veto on the ability to procreate. 98

Although at first glance these decisions may imply that the right not to procreate would trump the desire to procreate, courts must consider the fact that if the living individual, a spouse, significant other, or family member specifically desires the genetic material of the deceased to create a child, there may not be any alternative avenues to create a child with the genetics

92. Id. The case began as a divorce proceeding and all issues were resolved except Junior Davis's objection to the use of the preembryos where he stated """"that he preferred to leave the embryos in their frozen state until he decided whether or not he wanted to become a parent outside the bounds of marriage."""" Id. at 589.

93. Id.

94. Id. at 601 n.24 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 71 (1976)).

95. Id. at 604. The court noted that the """"[d]onation, if a child came of it, would rob him twice—his procreational autonomy would be defeated and his relationship with his offspring would be prohibited."""" Id.

96. Id. at 603-04. The court considered the fact that Junior Davis had a rough upbringing and was vehemently opposed to fathering a child that would not live with both parents. Id. at 603.

97. Id. at 604.

98. Id. The rationale used in Davis was adopted by a New Jersey appellate court that allowed a wife to destroy the frozen embryos after the termination of the marriage, even though her husband wanted to use the embryos with another woman. J.B. v. M.B., 751 A.2d 613, 619-20 (N.J. Super. Ct. App. Div. 2000). In reaching its conclusion, the New Jersey court stated that the wife's desire to avoid procreation would not impair the husband's right to procreate because he still retained the capacity to father children. Id. at 619.
and bloodline of the deceased. Some scholars have argued that the desire to avoid procreation should not be considered unless the deceased left specific instructions.

**B. Are There Rights Beyond the Grave?**

What if Mary Sue Davis had petitioned the Tennessee Supreme Court to use Junior Davis’s sperm after he was deceased? Or what if he had already died and her wishes of having children were thwarted? PGR introduces an additional layer of unique and competing constitutional claims. Not only must the freedom to procreate be weighed against the freedom not to procreate, but an additional consideration must be given to whether a person’s constitutional claim has more or less merit because he or she is deceased. This inquiry has split critics. In several case studies where medical personnel have considered performing PGR when the deceased’s consent to the procedures was unknown, bioethicists have noted that once a patient is dead, “any right she may have had to direct and control how she is treated by physicians and nurses ceases with her death.” Although courts have not addressed the varying degrees of constitutional rights in the context of posthumous genetic harvesting, they have done so in other legal contexts.

**1. Rights Within the Civil Rights Context**

In *Whitehurst v. Wright*, the Fifth Circuit considered whether a mother could bring suit on behalf of her deceased son for deprivation of his

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99. See discussion infra Subsection IV.C.1.

100. See Robertson, supra note 35, at 1039-40 (arguing that “the question of the donor’s right to reproduce posthumously arises only if he had issued instructions that contemplated posthumous use of his sperm. . . . [U]nless he had issued a directive that the stored semen be destroyed, his right to avoid posthumous reproduction would not be involved”).

101. See Strong, supra note 12, at 352. Carson Strong muses that in cases where a wife requests procedures in opposition to a man’s reasonably inferred desire that they not be performed, freedom not to procreate posthumously is less important than freedom not to procreate while the individual is still alive although considerations of physical manipulation of the body and other avenues available to the wife should be given significant weight. *Id.*

102. Compare Katz, supra note 25, at 312 (arguing that if an individual expressed an intention to not procreate, those wishes should be honored much like how we honor testamentary provisions concerning the disposition of property), with James M. Jordan III, Note, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women*, 22 GA. L. REV. 1103, 1108-12 (1988) (discussing University Health Service, Inc. v. Piazzi where the court held that the constitutional rights of a brain-dead pregnant woman were extinguished at death).


104. 592 F.2d 834 (5th Cir. 1979).
Fifth, Sixth, Thirteenth, and Fourteenth Amendment rights after he was murdered as part of an alleged police conspiracy. The district court found that Whitehurst's § 1983 action was nonexistent because the claim was brought subsequent to his death and, thus, he could not be deprived of any constitutional rights. Furthermore, the court also found that there was no § 1985(3) claim because it was extinguished upon Whitehurst's death and could not be established retroactively. The Fifth Circuit affirmed the lower court's holding, stating that “[a]fter death, one is no longer a person within our constitutional and statutory framework, and has no rights of which he may be deprived.” Subsequent decisions have held that while claims may be viable if the deceased had been alive at the initiation of the proceedings, any constitutional rights were extinguished at death.

Doctor Susan Kerr has equated the constitutional rights of the dead with the constitutional rights of a fetus in the context of Roe v. Wade. Kerr and the Fifth Circuit in Whitehurst noted that Roe held that a fetus is not considered a person under the Fourteenth Amendment and, therefore, has no rights. The defendants in Whitehurst argued that because a fetus

105. Id. at 836-37.
   Every person who, under color of any statute . . . subjects, or causes to be subject-
   ed, any citizen of the United States or other person within the jurisdiction thereof
   to the deprivation of any rights, privileges, or immunities secured by the Constitu-
   tion and laws, shall be liable to the party injured in an action at law.
107. Whitehurst, 592 F.2d at 837.
108. Section 1985(3) provides:
   [I]f one or more persons [in any State or Territory] engaged therein do, or cause to
   be done, any act in furtherance of the object of such conspiracy, whereby another is
   injured in his person or property, or deprived of having and exercising any right or
   privilege of a citizen of the United States, the party so injured or deprived may
   have an action for the recovery of damages occasioned by such injury or depriva-
   tion, against any one or more of the conspirators.
109. Whitehurst, 592 F.2d at 837.
110. Id. at 834.
111. See Estate of Conner v. Ambrose, 990 F. Supp. 606, 618 (N.D. Ind. 1997) (dis-
    trict court dismissed a § 1983 lawsuit against coroner, for improperly performing an autopsy,
    stating that “[a] person’s civil rights may only be violated while that person is alive. After
    death, one is no longer a ‘person’ within our constitutional and statutory framework and has
    no rights of which he may be deprived” (citations omitted)); Ford v. Moore, 237 F.3d 156,
    165 (2d Cir. 2001) (stating that “[e]ven if there were a viable claim against Moore for con-
    duct after Ford’s death, the death would have extinguished any claim of Ford’s”); Helmer v.
    Middaugh, 191 F. Supp. 2d 283 (N.D.N.Y. 2002) (dismissing all constitutional claims
    against a defendant whose only involvement in the alleged violation occurred after the dece-
    dent’s death).
112. Susan Kerr, Postmortem Sperm Procurement: Is it Legal?, 3 DePaul J. Health
    Care L. 39, 47 (1999).
113. Whitehurst, 592 F.2d at 840 n.9 (“Neither party has pointed to any case that
    recognizes or refuses to recognize the civil rights of a corpse. Appellees’ brief, however,
does have potential for life in the future, a corpse, which has no potential for life in the future, does not have any constitutional rights.  

2. Rights Within Other Contexts  

While the deceased may not have any judicially recognizable rights within the civil rights contexts, scholars have advocated for recognition in other areas of law. Professor Anne Reichman Schiff has argued that "certain acts committed after a person's death can harm that individual's interests, despite the fact that the person no longer exists and is therefore unaware of the occurrence."  Scholars have noted that while a body may not have civil rights, the practice of disposing a deceased's body and property according to his or her wishes is still honored.  Thus, individuals advocating that the rights of the dead extend into the procreative context argue that while the living spouse does have the freedom to procreate, this freedom should be trumped by the rights of the deceased to remain free from posthumous physical manipulation and the potential desire to not be a parent.

3. Right to Procreate Amongst the Living and the Dead  

Only a few scholars have considered the comparability of procreative rights between the living and the dead. Professor John Robertson of the does call to our attention Roe v. Wade, which found that a fetus is not a person under the 14th amendment and has no rights thereunder. From that principle, appellees forcefully argue that if a being capable of sustaining life in the future is not a person, a fortiori, a corpse, having no potential for life is not a person within the protection of our constitution. The argument that a corpse has no civil rights is further strengthened by the treatment of actions involving interference with dead bodies . . . . Although a cause of action exists in each situation, the claim belongs to the survivor of the deceased. If the corpse were an entity capable of possessing rights, the action would belong to him or to his personal representative." (citations omitted)). See also Kerr, supra note 112, at 48 (1999) (arguing that even though Roe and Whitehurst hold that corpses lack constitutional rights, society still cannot do whatever it pleases with the deceased's body).

114. Whitehurst, 592 F.2d at 840 n.9.
116. See Strong, supra note 12, at 349 (stating that "freedom can be implicated in postmortem procreation. . . . [W]hen one makes a request while alive to have one's gametes used (or not used) for procreative purposes after death, or to have gestation continue (or not continue) after death, it is appropriate to speak of procreative freedom"); Katz, supra note 25, at 312 (stating that "[i]f an individual has expressed clear intention to procreate with a particular individual or not to procreate, then those wishes should be honored in the same way that testamentary provisions receive deference").
117. Strong, supra note 12, at 352. Strong argues that "[e]ven if the wife has legal authority to make decisions concerning disposition of [the deceased's] body, ethically, that authority ought not extend to include a right to have sperm removed from his body against his wishes." Id.
University of Texas has argued that the freedom to procreate after death has little importance. Robertson points out that experiences associated with procreation after death are “so attenuated that one could argue it is not an important reproductive experience at all.” In contrast, Professor Carson Strong of the University of Tennessee College of Medicine has argued that there are other aspects of procreation other than those associated with gestating and rearing children that make it meaningful to participants. Therefore, Strong concludes that even though the dead may not have the same rights as the living, there should be some weight given to a deceased individual’s desire to avoid procreation, even after death.

The questions that arise concerning procreative autonomy do not typically arise in the paradigm of a married couple conceiving a child by coital reproduction. Therefore, when reproduction occurs nontraditionally and noncoitally within the ART context, it is essential to consider whether the individuals’ interests are the same. When a PGR request is made, the living individual is exercising his or her fundamental right to procreate. As case law and some scholars suggest, the constitutional rights of the deceased are not on par with those of living. Furthermore, the application of a nontraditional model of parentage to the PGR context will indeed quell the fears of those who argue that PGR infringes upon both the constitutional right not to procreate and the deceased’s interest in not becoming a legal parent posthumously.

III. PICKING A MOMMY: MODELS OF PARENTAGE WITHIN THE ART CONTEXT

The first case of PGR to garner international attention involved Diane Blood, a British woman whose husband died suddenly of meningitis in 1995. While her husband was in a coma, Ms. Blood requested that doctors

118. See Robertson, supra note 35, at 1032.
119. Id.
120. See Strong, supra note 59, at 257. Strong cites the creation of a person, the affirmation of mutual love, and the desire to have a link to the future as reasons why individuals may desire to procreate after death. Id.
121. Id. Strong notes that although “the argument for respecting freedom to procreate in the ordinary scenario is stronger than the argument for respecting freedom to procreate after death . . . [and] decisions to attempt procreation after death . . . can be meaningful to some persons.” Id.
122. See Robertson, supra note 35, at 1029.
123. See discussion supra Subsection II.A.1.
125. See generally discussion infra Part III.
remove Mr. Blood’s sperm so that she could use it after his death. The doctors complied with Ms. Blood’s request for PGR, however, the Human Fertilisation and Embryology Authority denied Ms. Blood the opportunity to use the sperm for fertilization because Mr. Blood had not provided written consent for his wife to use his sperm posthumously. Furthermore, Ms. Blood also faced difficulty receiving court permission to place her deceased husband’s name on the resulting children’s birth certificates as the legal father. The international publicity generated by Ms. Blood’s effort to have children demonstrates how compelling the situation may be when a loved one dies before he or she has the chance to become a parent. Unlike the heavy regulation of PGR internationally, requests for PGR in the United States currently occur in a legal void. Many physicians in the United States have acceded to requests for PGR on the assumption that there were no significant legal ramifications.

A troubling consequence of posthumously created children is the need to identify the legal parents of those children. Just as Diane Blood wished to name her deceased husband on her children’s birth certificates, so too will United States hospitals and courts struggle with determining legal parentage in cases of PGR without any judicial or legislative guidance. Within the ART context, courts are currently split on which individuals involved


128. Id. Ultimately, Ms. Blood was permitted to use the sperm and gave birth to a son in December of 1998 and a second son in 2002. See CATHERINE BARNARD, THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS 366 (2d ed. 2007). The British Court of Appeal permitted Ms. Blood to take the sperm to Belgium where she could use it for fertilization. See Blood, 2 All E.R. at 698, 701. Belgium did not require written consent from the deceased in order to use his sperm for posthumous conception and reproduction. See id. at 698.

129. After Ms. Blood’s first child was born, she had to register the father’s name as “unknown” on the birth certificate. See Cherry Norton, At Last, Diane Blood Can Put the Name of Her Husband on Son’s Birth Certificate, INDEP. (Aug. 25, 2000), http://www.independent.co.uk/news/uk/crime/at-last-diane-blood-can-put-the-name-of-her-husband-on-sons-birth-certificate-710510.html.

130. See discussion infra Subsections IV.C.1-3.

131. See discussion supra Section I.A.


133. See supra text accompanying notes 127–39.

in the reproduction process should be considered a legal parent.\textsuperscript{135} Case law addressing the debate between genetics, gestation, and intent currently recognize three women who can potentially be named the legal mothers of the resulting child: the genetic mother who donated the eggs,\textsuperscript{136} the gestational mother who gave birth to the child,\textsuperscript{137} and the intended mother\textsuperscript{138} who, in many cases, bears neither a genetic nor gestational relationship with the child but through her deliberate actions precipitated the events that led to the conception of the child.\textsuperscript{139} Therefore, in determining appropriate policies of permitting PGR, the doctrines of establishing legal maternity recognized in current case law can serve as potential guideposts in deciding whether or not to retrieve eggs from a deceased woman and can also provide examples of the potential effects PGR may have on the deceased.

A. Genetic Mother as Legal Mother: The Genetic Contribution Doctrine

In instances of coital reproduction, it is obvious that the woman who conceived and bore the child is his or her legal mother.\textsuperscript{140} Within the ART context, however, there is potentially more than one woman involved in the reproductive process.\textsuperscript{141} The Genetic Contribution Doctrine establishes legal parentage solely on the genetic relationship between the child and the individual who provided the genetic material.\textsuperscript{142} Courts that follow the Genetic Contribution Doctrine assert that even if the child is born from a gestational surrogate,\textsuperscript{143} the woman who provides the child’s “genetic imprint” should be considered the legal mother of the child unless she has relinquished or

\textsuperscript{135} See supra text accompanying notes 126-39.
\textsuperscript{136} See infra text accompanying notes 140-55.
\textsuperscript{137} Discussion of the Gestational Model of parentage is beyond the scope of this note. For a general discussion on the doctrine, see John Lawrence Hill, What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 394-400 (1991).
\textsuperscript{138} See infra text accompanying notes 160-63. Intentional Parentage can further be analyzed in the context of Functional Parentage. See infra text accompanying notes 225-31.
\textsuperscript{139} See infra text accompanying notes 160-63.
\textsuperscript{140} Cf. Robertson, supra note 35, at 1029.
\textsuperscript{141} See supra text accompanying notes 135-39.
\textsuperscript{142} See Hill, supra note 137, at 368-69 n.68 (coining the term Genetic Contribution Doctrine based of the Baby M case in which the husband’s genetic contribution to the child rendered him a “parent” under the court’s analysis). See generally In re Baby M, 537 A.2d 1227 (N.J. 1988).
\textsuperscript{143} A gestational surrogate is a woman who is implanted with the eggs of another woman that have been retrieved and inseminated with sperm. Ardis L. Campbell, Annotation, Determination of Status as Legal or Natural Parents in Contested Surrogacy Births, 77 A.L.R. 5TH 567, 574 (2000). A traditional surrogate, on the other hand, is a woman whose own eggs are injected with the sperm of a man whose partner is unable to become pregnant. Id.
waived her parental rights. Advocates of the Genetic Contribution Doctrine cite the significance of raising a child comprised of one’s own genetic likeness, the historical importance of a blood bond between parent and child, and the potential property interest that an individual has in his or her own gametic material as reasons for the doctrine’s superiority.

The Genetic Contribution Doctrine was first enunciated by the Ohio Court of Common Pleas in Belsito v. Clark. In Belsito, Shelly Belsito had undergone a hysterectomy; her sister, Carol, volunteered to be Shelly’s gestational surrogate. One of the Shelly’s eggs was fertilized by her husband’s sperm and then implanted into Carol who planned to be only an aunt to the child. Under Ohio law, the birth mother was listed on the child’s birth certificate; the child would also be considered illegitimate if the birth mother was not married to the child’s genetic father. Shelly and her husband filed a complaint requesting that they be declared the legal parents of the child. A complication arose, however, because under Ohio law, the gestational carrier of the child is the individual listed on the birth certificate as the child’s mother, not the woman who provided the eggs and was the intended mother of the child. Ohio had a version of the Uniform Parentage Act that provided that maternity could be established genetically or through the birth process. Thus, the Ohio Court of Common Pleas had to formulate its rationale for deliberately forgoing the requirement that the gestational mother be listed on the child’s birth certificate.

In establishing the Genetic Contribution Doctrine, the Belsito court specifically rejected the Intentional Parentage Doctrine as initially set forth

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144. See Belsito v. Clark, 644 N.E.2d 760, 765-66 (Ohio Misc. 2d 1994). This assumption exists so long as the individuals who have been identified as the genetic parents have not waived their rights to become legal parents. Id. at 66.

145. See Hill, supra note 137, at 389-94. Professor Hill from the Indiana University Robert H. McKinney School of Law notes, however, that while the genetic relationship between the gamete donor and resulting child is strong, this may be in fact due to the psychological and physical involvement of actually extracting the gametes rather than the genetic connection per se. Id. at 390-91. Thus, adopting Professor Hill’s rationale, if an individual is deceased and cannot experience the psychological and physical involvement of becoming a donor, then perhaps the link between the genetic provider and the resulting child are not as strong as previously considered.

146. 644 N.E.2d at 760.

147. Id. at 761.

148. Id.

149. Id. at 762.

150. Id.

151. Id. Furthermore, the hospital informed the genetic mother that because the surrogate sister and genetic father were not married, the resulting child would be considered illegitimate. Id.

152. OHIO REV. CODE ANN. § 3111.02 (LexisNexis 2001).
in Johnson v. Calvert. The court created a two-part test for determining parentage based upon the historical acceptance of genetic parents as the legal parents. First, if the sperm donor and egg donor did not waive their right to parentage, they were presumed the legal parents. Second, if the female genetic provider waived her parental rights, only then would the surrogate be the legal mother.

The two-part test enunciated in Belsito is fairly straightforward when applied to ART cases where the female genetic provider is seeking to be declared the legal parent of the resulting child. In the PGR context, however, the genetic mother will be deceased and she will not be fighting to become the child's legal mother. The attribution of legal parentage to genetic parents establishes a number of responsibilities on the individual. Just because an individual is a genetic provider does not necessarily mean that he or she has the intention to be a parent to the child, especially in the context of PGR. Thus, an alternative formulation of legal parentage must be established within the PGR context to ensure that the deceased is not a parent against her will, while at the same time guaranteeing that the resulting child does have a legal parent.

B. The Intentional Parentage Doctrine

Unlike the Genetic Contribution Doctrine where the court examines the genetic connection between a potential parent and the resulting child, the Intentional Parentage Doctrine is applied in instances where individuals

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153. 644 N.E.2d at 764 (citing 851 P.2d 776 (Cal. 1993)). The Belsito court noted that allowing "the replication of the unique genes of an individual[] should occur only with the consent of that individual." Id. at 766. Furthermore, when a woman donates her genetic material, the Belsito court views this as a surrender of basic constitutional liberties. Id. The court also found the Intentional Parentage Doctrine to be a circumvention of adoption laws. Id. at 765-66. The court noted that Ohio adoption laws required the natural mother to have an unpressured opportunity to surrender her parental rights. Id. at 765. The Belsito court noted that Johnson's Intentional Parentage Doctrine did not address those issues and further "subordinat[ed] the consent of the genetic-providing individual to the intent to procreate of the surrogate who intends to keep and raise the child." Id. at 766. For a further discussion of Johnson's formulation of the Intentional Parentage Doctrine, see discussion infra Subsection III.B.2.


155. Id. at 767.

156. Id.; see also In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Ct. App. 1994) (holding that Johnson v. Calvert would only be applied in instances where the Uniform Parentage Act yielded ambiguous results and when genetics and giving birth were present in one woman, she was the natural mother of the child).

157. See discussion infra Section IV.A.


159. See discussion infra Section IV.A.
who have no biological connection with the child but who orchestrated the child's conception seek to be deemed the child's legal parents. The doctrine arose as a response to disputes between intended parents and surrogate mothers who attempted to keep babies after giving birth. Advocates of the Intentional Parentage Doctrine argue that the intention to become a parent of a genetically unrelated child should be legitimized and the individual should be deemed the child's legal parents. Not only does the doctrine examine the intent of an individual to become a legal parent, but courts can also use the doctrine to relieve someone of parenting obligations if they do not want to be considered a legal parent of the child.

1. Intent Not to Become a Legal Parent

In A.Z. v. B.Z., a couple entered into a contract that would have permitted the wife to continue having the embryos comprised of her eggs and her husband's sperm implanted even if their marital relationship deteriorated. After the couple was divorced, but while the embryos still remained frozen, the husband stated that he no longer wished to become a legal parent to the resulting child if the wife chose to implant the remainder of the sperm. In striking down the agreement between the former couple, the Massachusetts Supreme Judicial Court explained:

We derive from existing State laws and judicial precedent a public policy in this Commonwealth that individuals shall not be compelled to enter into intimate family relationships, and that the law shall not be used as a mechanism for forcing such relationships when they are not desired. The policy is grounded in the notion that respect for liberty and privacy requires that individuals be accorded the freedom to decide whether to enter into a family relationship.

In this instance, the husband's desire not to be a legal parent outweighed his wife's desire to conceive another child. Furthermore, the court recognized that the desire to be a parent can later be revoked prior to

160. See Hill, supra note 137, at 413-14 (noting that the intentional parents are the individuals who have brought together the sperm and egg and have contracted with the surrogate to bear the child).

161. See discussion infra Subsection III.B.2.

162. See Shultz, supra note 25, at 346 (stating that "[i]f the concept of 'family' can be given some fluidity and enlarged to capture essential interpersonal meanings rather than frozen into fact-specific parameters, the creation and legitimation of parent-child bonds within diverse relationships could actually be seen as strengthening family ties rather than weakening them").

163. See discussion infra Subsection III.B.1.

164. 725 N.E.2d 1051, 1054 (Mass. 2000).

165. Id. at 1053.

166. Id. at 1059.

167. Id.
implantation of gametic material. Courts that have examined the A.Z. v. B.Z. decision have noted that a decedent’s silence, or his equivocal indications of a desire to parent posthumously, “ought not to be construed as consent.”

2. Intent to Become a Legal Parent

Several jurisdictions throughout the United States have begun to rely upon parental intent as a proxy for a genetic or gestational relationship in determining legal parentage. The California Supreme Court created a balancing test to ascertain whose intention to be the legal mother prevailed in the case of Johnson v. Calvert. In Johnson, Crispina and Mark Calvert entered into a surrogacy contract with Anna Johnson whereby she agreed to be implanted with a preembryo comprised of the sperm of Mark and the egg of Crispina; Anna was genetically unrelated to the child. After Anna was implanted with the preembryo, the relationship between the parties deteriorated. Anna threatened to refuse to surrender the child unless the Calverts

168. Id. This case was subsequently affirmed by New Jersey in the case of J.B. v. M.B., 783 A.2d 707 (N.J. 2001). The New Jersey court held that “contracts to enter into familial relationships” should not be enforced against individuals who revoke those decisions. Id. at 717.

169. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 269 (Mass. 2002) (quoting Schiff, supra note 115, at 951 (“When an individual has left no instructions regarding the posthumous use of cryopreserved gametes for procreation, silence ought not to be construed as consent”)).

170. Although the Intentional Parentage Doctrine was first enunciated by the California Supreme Court in the case of Johnson v. Calvert, courts were beginning to examine the role of intent several years before the Johnson decision. For example, in Adoption of Matthew B., a surrogate mother who was impregnated with the father’s sperm attempted to withdraw her consent to a stepparent adoption by the father’s wife following an artificial insemination procedure. 284 Cal. Rptr. 18, 21 (Ct. App. 1991). A California statute provided that the donor of semen used in the artificial insemination of a woman other than the donor’s wife is treated in law not to be the father of the child conceived. CAL. CIV. CODE § 7005(b) (repealed 1994). In Matthew B., the court relied primarily on equitable estoppel, stating that the birth mother gave birth to the child with the intention, as enunciated in the surrogacy agreement, that the father of the child would be the natural father. 284 Cal. Rptr. at 34.

171. 851 P.2d 776, 782 (Cal. 1993). The court found that both women had interests in the child, but recognized that the goal of the parties “was to bring [the couple’s] child into the world, not for [the couple] to donate a zygote to [the surrogate, who] would not have been given the opportunity to gestate . . . had she . . . manifested her own intent to be the child’s mother.” Id.

172. Id. at 778. According to the terms of the surrogacy contract, the Calverts were to pay the ten thousand dollar for her services. Id. Additionally, the Calverts also agreed to pay premiums on Johnson’s life insurance policy. Id.

173. Id.
paid her the remaining balance owed under the surrogacy agreement.174 Both Anna and the Calverts sought a court declaration of legal parentage.175

The court was quickly able to determine that Mr. Calvert was the legal father because he was genetically related to the child.176 The Johnson court examined the California Uniform Parentage Act and found that technically both the surrogate and the intended mother had a mother-child relationship with the child under the terms of the Act.177 Anna by giving birth and Crispina by genetics.178 Therefore, because there essentially was a "tie" between the two women, the California Supreme Court inquired into the women's intentions when they entered into the surrogacy agreement.179 The court held that "when the two means [genetics and gestation] do not coincide in one woman, 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."180 The court held that but for the Calvert's affirmative act of in vitro fertilization, the child would not exist.181 The court further noted that the goal of the Calverts was to produce a child, not to donate their gametic material to the gestational surrogate.182

Although the Johnson court was credited with establishing the Intentional Parentage Doctrine, it is important not to overlook the fact that genetics played an important role in the court's determination of parentage. Had Crispina Calvert not provided her own eggs for fertilization and implantation, the court would not have found her to fit within the definition of "par-

174. Id.
175. Id.
176. Anna J. v. Mark C., 286 Cal. Rptr. 369, 378 (Ct. App. 1991). The trial court ruled that the Calverts were the child's "'genetic, biological, and natural'" parents, that Anna had no parental rights to the child, and that the surrogacy contract was enforceable. Id. at 373 (citation omitted). The Court of Appeals affirmed and noted that Crispina's genetic contribution was equivalent with natural, and therefore legal, motherhood. Id. at 376.
177. Johnson, 851 P.2d at 778-85. The Uniform Parentage Act, as codified by CAL. CIV. CODE §§ 7000-7021 provided that a "parent and child relationship 'may be established by proof of her having given birth to the child.'" Id. at 780.
178. Johnson, 851 P.2d at 781. The Court found that:
Although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, 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. Id. at 782.
179. Id.; see also Hill, supra note 137, at 415 (arguing that the genetic relationship should not be accorded priority in determining who is parent in a surrogacy context because the child would not have been born but for the efforts of the intended parents).
180. Johnson, 851 P.2d at 782. The court noted that the Calverts intended to raise the child and took all the necessary steps to effectuate this intent. Id.
181. Id.
182. Id.
ent” under the California Uniform Parentage Act.\textsuperscript{183} Thus, genetic parentage was initially an important factor that California courts took into consideration when ascertaining who would be the legal mother of a child conceived by ART in the event of a “tie.”

Several years later, in the case of \textit{In re Marriage of Buzzanca}, the California Court of Appeals extended Johnson’s holding to an instance where neither of the intended parents were genetically related to the resulting child.\textsuperscript{184} In \textit{Buzzanca}, both intended parents were infertile and obtained sperm and eggs from anonymous donors, which were then implanted into a surrogate through in vitro fertilization.\textsuperscript{185} During dissolution of marriage proceedings, John Buzzanca asserted that because the child was genetically and gestationally unrelated to both him and his wife, Luanne, he should not have to pay child support.\textsuperscript{186} Once the appellate court determined that Luanne could establish maternity under the relevant statutes, it next had to determine whether the surrogate or Luanne should be declared the child’s legal mother.\textsuperscript{187} The \textit{Buzzanca} court noted that Johnson’s intentional parentage doctrine was not only implicated in instances where there was a “tie” between the gestational and genetic mother, but also whenever a child would not have been born “but for the efforts of the intended parents.”\textsuperscript{188} The court noted that John and Luanne’s consent to the medical procedures triggered the pregnancy and birth of the child and that they were therefore the legal parents.\textsuperscript{189}

The Intentional Parentage Doctrine ascribes utmost significance to the intention of contracting individuals at the time the surrogacy agreement was

\begin{itemize}
\item \textsuperscript{183} Similarly, in McDonald \textit{v. McDonald}, a New York Appellate Court held that either the gestational surrogate or the genetic parents could be considered the legal parents based on what party intended to raise the child. 608 N.Y.S.2d 477, 480 (N.Y. App. Div. 1994).
\item \textsuperscript{184} \textit{In re Marriage of Buzzanca}, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).
\item \textsuperscript{185} \textit{Id}. at 282.
\item \textsuperscript{186} \textit{Id}. at 282-83.
\item \textsuperscript{187} \textit{Id}. at 284.
\item \textsuperscript{188} \textit{Id}. at 291.
\item \textsuperscript{189} In a dissolution custody dispute, the wife, who was the gestational, but not genetic, mother was held to be the natural mother of twins, three years old at the time of trial, born through in vitro fertilization using a donor’s eggs and the husband’s sperm in McDonald \textit{v. McDonald}, 608 N.Y.S.2d 477, 480 (App. Div. 1994). The husband contended that he was the only genetic and natural parent available to the children and, therefore, his claim to custody was superior to that of the wife by virtue of the fact that she utilized donor eggs to become pregnant. \textit{Id}. at 479. The court relied heavily on the reasoning of the California Supreme Court in Johnson \textit{v. Calvert}. \textit{Id}. Looking to Calvert, the court noted that in a true egg donation situation, the intent of the parties would be controlling. \textit{Id}. at 480. The court ordered that the wife was the natural mother of the children, even though she had no genetic relationship to them. \textit{Id}.
\end{itemize}
The doctrine as formulated by the Johnson and Buzzanca courts has been adopted in virtually the same form by other jurisdictions, although some have modified it slightly. The Intentional Parentage Doctrine


191. Recently, the Connecticut Supreme Court upheld a gestational surrogacy agreement where one partner in a same-sex couple was genetically unrelated to the child. Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011). In Raftopol, a couple entered into a gestational surrogacy agreement with a woman who agreed to carry the couple’s fetus, created from the egg of an anonymous donor and the sperm of one of the men. Id. at 787. The Raftopol court stressed the importance that the intended father obtained parental status not by having his name placed on the birth certificate, but by an adjudication deeming the gestational agreement valid. Id. at 793.

192. Drafters of various model rules and acts have begun to codify various components of the parentage models. In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act (UPA) to protect the rights of nonmarital children. Unif. Parentage Act prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2006). In the debate between parentage established by biology versus intention, the Uniform Parentage Act sides with the Intentional Parentage Doctrine. Id. “Parent,” as defined by the UPA, is “an individual who has established a parent-child relationship” with the child. Unif. Parentage Act §102(13) (2000). A parent-child relationship is defined as the legal relationship between the parent and the child. Id. §102(14). A parent-child relationship can be established in a multitude of ways:

[T]he woman’s having given birth to the child; . . . an adjudication on the woman’s maternity; or adoption of the child by the woman; or an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under Article 8 or is unenforceable under other law. Id. § 201(a). The UPA recognizes biological connection with the child as well as various social connections, such as marriage to the child’s mother or functional parenthood, as bases for establishing paternity. See id. § 201(b). The provision requires the specific consent of an individual to be the parent of a child; without this clearly articulated and documented consent, the obligations of parenthood will not attach. In the comments to this section, the drafters acknowledge that “a child born through assisted reproduction accomplished after consent has been voided by divorce or withdrawn in a record will have a legal mother . . . however, the child will have a genetic, but not a legal father.” Id. § 706 cmt. Section 702 provides that a gametic donor will not be considered a legal parent of a child conceived by ART. Id. § 702 (stating that “[a] donor is not a parent of a child conceived by means of assisted reproduction”). Sections 706 and 707 both place an individual’s intention above genetics in determining parentage. Id. §§ 706-707. Section 707 provides that if an individual originally consented to be a parent by ART and dies before the process begins, the deceased individual will not be considered a parent. Id. § 707 (stating that “[i]f an individual . . . dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child”). Further, the section provides that any children implanted and born of cryopreserved embryos after the death of their genetic father shall not be considered his children, unless the father has specifically consented to include such children as his heirs. Id. § 707 cmt.

193. The Tennessee Supreme Court declined to adopt a strict application of either the Genetic Parentage or Intentional Parentage Doctrines in assessing who would be considered the legal mother in a maternity dispute. In re C.K.G., C.A.G., & C.L.G., 173 S.W.3d 714, 726 (Tenn. 2005). Instead, the court fashioned a rule that was essentially a hybrid of the
represents an increased judicial deference to adults’ autonomous choices about constructing their own form of family, even in the PGR context. This deference represents a more open reshaping of family relationships that extends beyond mere biology to the very intentions and actions that accompany the formation of a family.

IV. THE INTENTIONAL PARENTAGE DOCTRINE AS APPLIED WITHIN THE PGR CONTEXT

Inherent within the concepts of ART and PGR is the splitting of the previously unified role of the parent amongst a multitude of individuals. Motherhood, although once easy to define, has become fractured into genetic motherhood, gestational motherhood, and intentional motherhood within the surrogacy context. Although recent scholarly debate centers on whether PGR is ethically permissible, hospitals are already approving these procedures with very little legislative or judicial guidance. As a result, gametes are harvested that ultimately will be used to create human life without a consensus amongst hospitals as to who will be considered the

Genetic Parentage and Intentional Parentage Doctrine. *Id.* at 720-24. In *In re C.K.G.*, the couple, Charles and Cindy, had a preembryo comprised of Charles’s sperm and an anonymous donor’s egg implanted into Cindy’s uterus, which resulted in triplets. *Id.* at 718. The couple intended to raise the children together. *Id.* at 716. Some years later, the relationship between the couple ended and Cindy filed a parentage action seeking custody and support. *Id.* Charles countered that Cindy was not a legal parent because she was genetically unrelated to the children. *Id.* Although the Tennessee Supreme Court reaffirmed the lower court’s holding that Cindy was the legal mother of the resulting children, it declined to adopt the Intentional Parentage Doctrine. *Id.* The court created a hybrid of the two and focused on the unique facts of the case and: (1) the joint procreative intent of Cindy, the gestator, and Charles to the children’s conception and birth and the fact that Cindy would be the legal mother; (2) the fact that Cindy gave birth to the triplets as her own, as opposed to having birthed them from a surrogate; and (3) the lack of another party competing with Cindy for the role of “mother.” *Id.* at 733.

194. Susan B. Apel, *Cryopreserved Embryos: A Response to “Forced Parenthood” and the Role of Intent*, 39 FAM. L.Q. 663, 672 (2005) (discussing the development of ART and its creation of multiple definitions of parentage); *see also* Shultz, *supra* note 25, at 299 (stating that “[v]arious stages of the biological process can now be severed, allowing specific impaired aspects of the procreative process to be replaced by workable substitutes”).

195. Andrea E. Stumpf, *Note, Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 187 (1986) (stating that “[t]he legal definition of ‘mother’ has traditionally carried an unshakeable presumption: She was the one from whose womb the child came”); *see also* UNIF. PARENTAGE AcT § 3 (providing natural mother is the woman who gave birth). The comments to section 21 of the Uniform Parentage Act states that the drafters anticipated that issues related to who was the mother of a child would arise so rarely and could be addressed so easily by a judge that they left out of the 1973 statute any sort of guidance as to how to determine the mother-child relationship. *Id.* § 21 cmt.

196. *See discussion supra* Section III.A.

197. *See discussion supra* notes 12–13 and accompanying text.

legal parents of the resulting child. While factors such as evidence of pre-mortem consent to posthumous retrieval, the circumstances surrounding death, and a mandatory bereavement period are taken into consideration before a hospital approves a PGR request, hospitals do not anticipate the complications arising from a parentage determination, or lack thereof, within the PGR context.

If the deceased is adjudicated to be the legal parent of the resulting child by way of genetic contribution, a number of serious complications will arise that will further incite scholars' aversion to PGR. The deceased will have financial obligations to the child even after death; furthermore, the child will be able to inherit from the deceased's estate, regardless of whether or not this was the deceased's intent. In contrast to the Genetic Contribution Doctrine, which increases the fears of unwanted parentage, application of the Intentional Parentage Doctrine to the PGR context will dually ensure that the deceased individual will not be subjected to the obligations of legal parentage while at the same time allowing those closest to the deceased the opportunity to exercise their constitutional right of procreation.

A. Harm from Unwanted Genetic Parenthood

By its very nature, the Genetic Contribution Doctrine fails to confront the full complexity of the PGR issue and the multitude of factors that bear on the decision. It is possible for the legislature or the court system to create a bright-line test where the posthumously conceived children would always be treated as the child of the genetic parents for inheritance and other purposes, regardless of the circumstances surrounding their conception. Some proponents of the Genetic Contribution Doctrine emphasize the unique link between the genetic provider and resulting child and the continuity that bonds them. Others cite the child's best interests; these scholars maintain it is important for the child to know his or her origins. Finally, others argue that the biological connection between the parent and the child yields instinctive care in that the genetic parent is the individual who can provide the child with the best possible care.

Applying the Genetic Contribution Doctrine in a PGR case would make the deceased egg provider the legal parent. However, what if the de-

199. See discussion supra notes 20–22 and accompanying text.
200. See discussion infra Subsections IV.C.1-3.
201. See discussion supra note 14.
202. See discussion infra Section IV.A.
203. See Hill, supra note 137, at 389-90.
ceased’s former husband is remarried at the time of delivery and wants the new spouse to be recognized as the legal mother? Or what if an infertile family member desires to be considered the legal mother of the child she intentionally created using the eggs? As noted by Ray D. Madoff of Boston College Law School, application of the Genetic Contribution Doctrine to the PGR context has the potential to interfere with the procreative wishes of both the living and the deceased. 206 It seems unfair to declare the deceased woman to be the mother simply because she provided the eggs.207 Conversely, it seems equally unjust to deny the living former spouse the opportunity to exercise his procreative liberty with the individual of his choosing. Moreover, application of the Genetic Contribution Doctrine runs counter to the 2000 Uniform Parentage Act, which provides that posthumously conceived children should not be treated as children of the deceased parent.208

In terms of inheritance law, “a person’s estate cannot be distributed until all possible heirs are identified.”209 Thus, because it is now scientifically possible to store gametic material for many years after its initial retrieval, application of the Genetic Contribution Doctrine would essentially make it impossible to close an estate as long as gametic material was stored.

Moreover, some aspects of the rationale for the Genetic Contribution Doctrine weaken its applicability to PGR cases. Because the genetic mother has died before fertilization has taken place, one can no longer speak of the “instinctive bond”211 between her and the child or presume that she will provide the best possible care.212 Beyond that, automatically recognizing the genetic mother entails recognizing her family—parents, siblings, and other offspring—as well. If relations between those family members and the husband were strained—for example, if the deceased family objected to the use of the eggs and birth of the child—it might be unwise, and even contrary to

206. See Madoff, supra note 10, at 45. Madoff notes that “few courts . . . allow[] posthumously conceived children to be treated as the child of the predeceased parent . . . if, first, the parent intended for his or her genetic material to be used for posthumous reproduction and, second, the child is born within a reasonable time after the parent’s death.” Id.
207. For a discussion of different contexts, see Bartholet, supra note 204, at 330.
209. See Madoff, supra note 10, at 45.
210. See supra Sections I.A-B.
211. I. Glenn Cohen, The Right Not To Be a Genetic Parent?, 81 S. CAL. L. REV. 1115, 1144 (2008). Studies have shown that “a genetic father’s bond with his genetic children erodes the lesser the residential proximity, the longer they live apart, when the father no longer maintains a romantic relationship with the mother, and when the father takes up a relationship with a new partner.” Id. (citing Ellen Waldman, The Parent Trap: Uncovering the Myth of “Coerced Parenthood” in Frozen Embryo Disputes, 53 AM. U. L. REV. 1021, 1040-46 (2004)).
212. See supra note 205 and accompanying text.
the best interests of the child, to apply the Genetic Contribution Doctrine.\textsuperscript{213} Ruth Zafran, professor at the Radzyner School of Law in Israel, has argued that

\begin{quote}
[i]t should be stressed that . . . the importance of genetics [should not be discredit-ed]. The [genetic relation is an important consideration in defining family relations [and] . . . should play a significant role in determining parenthood in cases of coital reproduction and serve as a powerful barrier against state intervention to sever that relationship.\textsuperscript{214}
\end{quote}

However, the Genetic Contribution Doctrine loses some of its force in cases of ART, where more than two individuals bring the child into the world, and PGR cases where a genetic parent has died. The absence of one of the genetic parents and the potential presence of a genetically-unrelated person assuming a parental role warrant caution of whether the Genetic Contribution Doctrine should be applied.

B. Benefits of the Intentional Parentage Doctrine

An emergency room doctor confronted with an urgent request for PGR by a grief-stricken family member will not always have ample time to assess the particularities of each request. The question of who will become the resulting child's legal parent will probably not be one of the first issues the doctor addresses nor will he have time to consider the implications the determination will have in different regards. However, application of the Intentional Parentage Doctrine to the PGR context will honor the procreative autonomy of the living individual while simultaneously preventing the deceased from becoming a posthumous legal parent subject to the consequences and financial responsibilities that parentage implies.

Although the Intentional Parentage Doctrine has gained jurisdictional support,\textsuperscript{215} the theory is not without its critics. Opponents of the doctrine are concerned that intentional parentage subordinates biology to intent "in determining the relative parental rights and obligations of the parties."\textsuperscript{216} Addi-

\begin{footnotes}
\textsuperscript{213} See Cohen, supra note 211, at 1135 (arguing that "there is a harm that stems from the unwanted existence of a child to whom one stands in the relationship of parent").
\textsuperscript{214} See Zafran, supra note 20, at 73 (arguing that "the Genetic Model is based on the exaggerated importance that Western culture ascribes to biological origins and genetic identity. It invokes the myth of blood relation . . . and considers relation by blood . . . to be superior to any other").
\textsuperscript{215} See supra notes 164–93 and accompanying text.
\textsuperscript{216} Compare Apel, supra note 194, at 663 (expressing concern that the Intentional Parentage Doctrine actually severs parent-child ties instead of creating them), with Anne R. Dana, Note, The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers, 18 DUKE J. GENDER L. & POL'Y 353, 384 n.201 (2011) (noting that "some states, such as Florida, Nevada, New Hampshire, and Virginia have passed statutes . . . that recognize the parenthood of intending parents[,] . . . but these statutes all include provisions requiring that
\end{footnotes}
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otionally, challengers are concerned that application of the Intentional Parentage Doctrine will also allow parents of coitally-conceived children to avoid parental responsibilities. Another concern that advocates of the Genetic Contribution Doctrine have voiced about the Intentional Parentage Doctrine is that it interferes with the best interest of the child because it makes the relationship contract-based and negotiable.

The concerns scholars have with the Intentional Parentage Doctrine will actually be alleviated within the PGR context in instances where consent to the procedure has not been obtained. Critics are fearful of the fact that a party can renege on his desire to become a legal parent and will thus leave the child parentless. However, the decision to become a parent by intention will take effect immediately at conception and clarifies legal parenthood before any significant actions are taken—namely the creation of new life. Furthermore, parenthood by intent seems fair for several reasons. First, individuals should bear the consequences of their voluntary decisions. Second, people who intend to create a child are more likely to act in that child's best interest than are those who conceive accidentally or inci-

at least one of the intending parents to be a genetic parent of the child and that the intending parents be married to each other.

217. See Austin Caster, Note, Don’t Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime, 10 CONN. PUB. INT. L.J. 477, 508 (2011) (stating “if intent ruled, a biological father who did not want a child could avoid child support in situations where birth control was ineffective”); Amy M. Larkey, Note, Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements, 51 DRAKE L. REV. 605, 623-24 (2003) (“If intent determines parenthood in cases of noncoital reproduction, will people who become parents through coital means be able to sidestep parental responsibilities because parenthood was unintended?”).

218. The Ohio Court of Common Pleas in Belsito v. Clark criticized the Intentional Parentage Doctrine by finding it to be contrary to polices of adoption and the fear that the parent-child relationship appears to be a negotiated one that is conditional and possibly even disposable. 644 N.E.2d 760, 765-66 (Ohio Misc. 2d 1994); see also Zafran, supra note 20, at 75.

219. Jessica Hawkins, My Two Dads: Challenging Gender Stereotypes in Applying California’s Recent Supreme Court Cases to Gay Couples, 41 FAM. L.Q. 623, 634-35 (2007) (stating that “[u]nder this gender-neutral, intent-based approach, a gay couple’s intent to raise the child would override any claims a gestational mother may have to parental rights”).

220. See Zafran, supra note 20, at 75.

221. See In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998) (where neither the surrogate nor the intended parents wanted the resulting child); Dana, supra note 216, at 383 (2011) (stating that “[b]ecause intent manifests legal parenthood prior to the child’s birth, the state can hold the intended parents legally and financially responsible for the child even if they no longer wish to raise the child”).

222. “Our society generally favors the fulfillment of individual purposes and the amplification of individual choice. Developments that expand the arena of voluntary purposeful decision and action are strongly favored. Our political and cultural traditions emphasize individual liberty, particularly in central arenas of personal life, such as reproduction.” See Shultz, supra note 25, at 327.
dentally.\textsuperscript{223} Finally, determination of legal parental status before the child is actually born “clarifies adult-child relationships from the beginning of the child’s life” and prevents emotional and arduous litigation after the child is born.\textsuperscript{224}

For some time now, courts and scholars have generally approved of the Functional Parentage Doctrine as a way to recognize the important relationships children foster with individuals who function as their legal parents but who lack the legal status.\textsuperscript{225} The Functional Parentage Doctrine focuses on the relationship between the child and genetically unrelated individual after the child is born.\textsuperscript{226} By contrast, the Intentional Parentage Doctrine allows an individual to be declared a legal parent of the child at the moment of the child’s birth, absent any inquiry into genetic contribution or functional actions.\textsuperscript{227}

For instance, if the PGR procedure is performed on a deceased woman who in fact did not want to procreate posthumously, application of the Intentional Parentage Doctrine would relieve her and her estate of the legal and financial obligations that would accompany legal parenthood had a Genetic Contribution Doctrine applied.\textsuperscript{228} Conversely, if in fact the deceased woman had wanted to procreate posthumously, application of the Intentional Parentage Doctrine would protect her reproductive autonomy.\textsuperscript{229}

A closer look at several situations of requests for PGR may thus shed light on how conceptions of parentage within the ART and PGR context must be viewed. The scenarios demonstrate the various constitutional tensions that are at play in a PGR request while detailing how the Intentional

\textsuperscript{223} See Elizabeth Bartholet, Family Bonds: Adoption, Infertility, and the New World of Child Production 81 (rev. ed. 1999) (stating that “there is no reason to think that adoptive parents pose more of a risk than biologically linked parents do. Indeed, the fact that adoptive parents have consciously chosen parenthood would seem more than enough to compensate for any difficulties that might be inherent in adoptive parenting” (emphasis omitted)). Furthermore, some scholars have argued:

Protecting the child’s welfare by banning posthumous use of sperm would protect the child by preventing it from being born. . . . Surely being born to a single parent or when one or both progenitors are dead does not make a child’s life so painful or stressful that being born amounts to wrongful life.

Robertson, supra note 35, at 1040. See also Dana, supra note 216, at 383 (stating that “[i]t is arguable that this method provides children with the “best and most committed” parents, given that those who performed the major tasks in creating the child exercised a deep desire for the child”).


\textsuperscript{225} See supra Section III.B.

\textsuperscript{226} See discussion supra Section III.B.


\textsuperscript{228} See discussion supra Section IV.A.

\textsuperscript{229} See discussion supra Subsection II.A.1.
Parentage Doctrine simultaneously respects the autonomy of the living and the dead.

C. Defining Parenthood in PGR Cases: Applying the Intentional Parentage Doctrine

Reproductive technology is currently on the verge of a medical breakthrough that will soon permit a woman’s eggs to be posthumously harvested from her body. Some scholars view the potential for female PGR as an opportunity for a family to continue the bloodline and pay tribute to the deceased. Contrarily, other scholars view the extraction of eggs from a dead woman as forced motherhood, potentially in violation of her right not to procreate.

Overcoming the issue of unobtained consent presents a problem to spouses, significant others, and family members requesting the PGR procedure after a loved one has passed away. Much like petitions for the use of a deceased’s cryopreserved gametes, a spouse or a family member could maintain that the individual would have wanted children and manifested some outward indicia of this desire. However, hospital staffs that have been presented with this issue have noted a lack of outward indicia of consent as well as potential conflicts of interest amongst family members of the deceased. The husband’s claim that his wife would have wanted retrieval could be biased by his own desire to have children. Contrarily, parents of the deceased and other family members may be similarly biased in that they want to continue the family line or replace the deceased child.


231. Laurence C. Nolan, Posthumous Conception: A Private or Public Matter?, 11 BYU J. PUB. L. 1, 23 (1997) (asserting that “[f]or the donee, to have a child who is genetically-related to the donor may ease the grieving process and aid in the donee’s adjustment to life without the donor”).

232. See Elliott, supra note 19, at 63-64 (discussing the judiciary’s recognition of a decedent’s right of reproductive choice in the face of “forced procreation” after death).

233. See supra Subsection II.A.1.

234. See, e.g., New York Hospital Guidelines, supra note 50: A reasonable expectation that the recently deceased would consent to having his sperm used for procreation would best be determined by his actions and discussions prior to death with respect to intended pregnancy. The premorbid wishes of the sperm donor should be weighed significantly in making decisions as to whether to retrieve that individual’s sperm for use in artificial conception.

235. The Medical College at Cornell University takes into the consideration the fact that many of the individuals making PGR requests may have competing reasons for so doing.
scholars have advocated for an inquiry into whether independent grounds exist for believing that the individual would have consented to retrieval, these concerns about becoming a parent after death could be alleviated by the application of the Intentional Parentage Doctrine to the PGR request.

The Intentional Parentage Doctrine has been applied in two instances: where it is impossible to clearly establish parentage under any statutory or constitutional principle as well as in instances where a genetic and gestational relationship does not coincide in the same person. The following scenarios are a representation of situations where emergency room doctors in the United States were confronted with emergency requests to perform the PGR procedure. All of the scenarios share a common plot: a woman is either pronounced brain dead or is in a persistent vegetative state and an individual related to the woman desires to harvest her eggs for later use. Furthermore, there is no evidence as to whether the woman would have desired to be a parent posthumously or would have consented to the PGR procedure. At this point, the stories will divert, depending on the identity of the individual requesting the PGR procedure and the uses of the harvested gametic material. The question that arises in all of these scenarios is who should be declared the legal mother of the child: the deceased genetic mother, the intended mother, neither, or both?

1. A Woman Dies and Her Former Spouse Requests Retrieval of Her Eggs

Suppose that at the time of Chen Aida Ayash’s death, she had been married but had never expressed any wishes as to whether or not she desired to procreate posthumously. Her husband, however, has always wanted to

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Id. Thus, Cornell’s guidelines state that “[a]ny detectable conflict among interested parties should be a contraindication to [PGR].” Id.

236. See Strong, supra note 12, at 351 (stating that “[t]he absence of explicit prior consent does not make the reasons irrelevant, provided the person’s wishes can reasonably be inferred”); L. Cannold, Who Owns a Dead Man’s Sperm?, 30 J. MED. ETHICS 386, 386 (2004). Cannold writes:

[A] legitimate decision to grant a sperm seeker access to a dead man’s sperm needs to be grounded in a belief that the seeker’s access and use of the sperm would not contravene the dead man’s autonomy but—through doing what “he would have wanted”—extend it. Such a decision would also need to be based on a clear conviction that in attempting to gain access to the dead man’s sperm, the seeker is not using the dead man as a means to their own ends, but both expressing her love for him and attempting, by enabling the birth of his genetic offspring, to pay tribute to him.

Id.

237. Johnson v. Calvert, 851 P.2d. 776, 782 (Cal. 1993); see also discussion supra Subsection III.B.2.

238. See supra text accompanying notes 1–6.
have children and seeks to have her eggs harvested, fertilized with his sperm, and implanted into a gestational surrogate.

There are numerous reasons why a man might want to use PGR in order to harvest his deceased wife’s eggs in order to have a child. For example, a man may believe that using his deceased wife’s eggs would be a way to pay tribute to her.239 A man may also believe that raising his wife’s child would help him cope with the loss of his wife.240 Furthermore, he may want to know “‘the genetic origins of [his] child.’”241 If the husband uses his deceased wife’s eggs, he will presumably know much more about the resulting child’s family and genetic history than if he used donated eggs.242

Generally, if a woman dies, her husband243 would have some legal rights surrounding the circumstances of her death, such as the ability to consent to the removal of her organs for donation and the disposition of her body.244 Furthermore, Chen’s fictional husband also possesses the fundamental right to procreate.245 Thus, his request for retrieval, insemination, and implantation is an exercise of his constitutional reproductive freedom.246 The issue that arises is whether the man’s freedom to procreate should prevail despite an absence of his wife’s reasonably inferred consent.247 Unlike the case of Davis v. Davis, the gametes in this instance will be used by Chen’s fictional husband and not donated to an unknown party.248 Furthermore, with application of the Intentional Parentage Doctrine, it could not be argued that the deceased Chen would be in doubt as to her parental status of

239. Cf. Devon D. Williams, Comment, Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval, 34 CAMPBELL L. REV. 181, 199-200 (2011) (arguing that a child of a deceased man would have peace of mind knowing that he had a genetic connection with his mother’s deceased husband and that he was conceived from a loving relationship).

240. See id. at 199.

241. Id. (citation omitted).

242. See id. at 200.

243. But see MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECH. §102(21) (2008), available at apps.americanbar.org/family/committees/artmodelact.pdf (approved by the A.B.A. Family Law Section in 2007 and the House of Delegates in 2008). The word “spouse” assumes the existence of marriage. However, under the Model Act, “[I]egal spouse” means an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage.” Id. This definition of “spouse” allows individuals living in a state that recognizes domestic partnerships or civil unions to be considered legal spouses for ART purposes. See id.

244. See Greer et al., supra note 13, at 281-82.

245. See discussion supra Subsection II.A.1.

246. See discussion supra Subsection II.A.1.

247. See discussion supra Subsections II.A.1-2; see also Strong, supra note 12, at 349 (arguing that the “freedom not to beget and freedom not to gestate are valuable in part because these freedoms are important for directing the course of one’s life”).

248. See supra notes 83–96 and accompanying text.
the resulting child because she would not be considered a legal parent under the Intentional Parentage Doctrine. An argument could be made that Chen’s fictional former husband has other areas of procreation available to him, but the unique facts surrounding PGR—the fact that the woman he desired to procreate with is dead—counters this argument.

Scholars that have considered PGR requests have given the most weight to those from spouses and have noted that these requests have the potential to cause disagreements between the spouse and the other family members of the deceased. However, application of the Intentional Parentage Doctrine to this context has the ability to relieve many of these difficulties.

First, if the request for PGR is granted, the husband will have to find a gestational surrogate to carry the preembryo formed from the deceased wife’s egg and the sperm of either himself or of an anonymous donor. Because it is the husband who is deliberately seeking a surrogate in order to create the child, he will be considered the legal parent of the resulting child. Conversely, because the deceased wife had died before her eggs were even harvested for the procedure, it cannot be said that “but for” her efforts, the child would have been conceived and born. Therefore, under the Intentional Parentage Doctrine, the deceased wife and egg donor will not be considered a legal parent; in terms of inheritance laws, the resulting child will not be able to inherit from her nor any members of her family.

2. A Woman Dies and Her Significant Other Requests Retrieval of Her Eggs

The main difference between this example and the previous one is that the couple in this instance lacks a traditional marital relationship. Sometimes a request to retrieve the eggs of a woman is made by a significant other or a fiancé. It might be asked whether absence of a marital relation-

249. Contra Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992), wherein the court noted that Junior Davis “would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.”

250. In determining whether the right to procreate trumped the right not to procreate, courts should consider whether the party who wants to procreate has alternative means of procreating. See supra note 100 and accompanying text.

251. See discussion supra Section IV.B; see also Greer et al., supra note 13, at 281 (“In this case, the retrieval and fertilization of the eggs of the incompetent patient could raise family disputes over who had the power to control their use, but if fertilized with the sperm of the husband, his decision would control.”).

252. See discussion supra Section III.B.

253. See discussion supra Subsection II.B.2.

254. See In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998).

255. See supra note 49 and accompanying text.
ship makes it ethically justifiable to carry out the request.\textsuperscript{256} It is possible to argue that the lack of marriage does not, in and of itself, make the retrieval unethical.\textsuperscript{257} For instance, if family members had previously talked to the deceased, posthumous retrieval would promote her freedom to make decisions about procreation after death. Also, respect for the reproductive freedom of the deceased’s significant other is also being taken into consideration.\textsuperscript{258} The law recognizes that families are often formed outside of marriage;\textsuperscript{259} therefore, someone who had explicit permission for PGR and utilization of the gametes might have a valid claim against the institution that denied a request. There is legal precedent for cases in which sperm was given premortem to a significant other.\textsuperscript{260} The reasons given above for respecting a husband’s freedom to procreate would also apply to a significant other or fiancé. Because a number of the reasons for valuing procreative freedom apply to single as well as married people, there are grounds for respecting procreative freedom regardless of whether the persons are married.

3. A Woman Dies and Her Family Members Request Retrieval of Her Eggs

Now suppose a United States court is confronted with a situation akin to that of the original story of Chen Aida Ayash, where a woman is rendered dead and her parents request the retrieval of her eggs for use by either the parents or another family member.\textsuperscript{261} Most hospitals that have enacted pro-

\textsuperscript{256} See Devon D. Williams, Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval, 38 CAMPBELL L. REV. 181, 192 (2012) (arguing that “it is much easier to prove the requisite consent when the couple was married . . . a presumption against [PGR] surfaces when the couple is not married”). One scholar has even stated that “the non-married person has no legal right to the decedent’s sperm. Everyone agrees to that.” Norman Bauman, Law Provides Little Guidance for Postmortem Sperm Retrieval, UROLOGY TIMES, Oct. 1998, at 21, 22.

\textsuperscript{257} For instance, in Eisenstadt v. Baird, the Supreme Court recognized that the right of privacy and, by extension, the right to procreate was available to the individual as well as to the marital couple. 405 U.S. 438, 454-55 (1972). The Court noted that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 453.

\textsuperscript{258} See discussion supra Subsection II.A.1.

\textsuperscript{259} See, e.g., Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that “[n]or has the law refused to recognize those famil[i]es . . . unlegitimized by a marriage ceremony”).

\textsuperscript{260} See Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348, 1349-50, 1352-53 (La. Ct. App. 1994); see also Hecht v. Superior Court of L.A., 59 Cal. Rptr. 2d 222, 223-24, 227 (Ct. App. 1996) (depublished) (finding that sperm bequeathed to a decedent’s significant other should be granted to her and the children of the decedent had no cognizable interest).

\textsuperscript{261} See supra notes 1–6 and accompanying text.
tocol to deal with PGR requests have chosen to recognize the wishes of a spouse or significant other over those of the deceased’s parents or family members. Furthermore, hospitals within the United States have expressed their concerns over allowing a family member other than a spouse or fiancé from utilizing the deceased’s gametes for reproductive purposes. However, where courts have been inclined to balance the procreative desires of the husband or spouse against the unknown wishes of his wife or significant other, it seems fair to conclude that courts would be less receptive to requests from family members because the right to procreate using the deceased’s gametes appears to have more significance to a spouse or significant other than to a family member. Furthermore, when the woman’s eggs are harvested, they will not be fertilized with the sperm of her spouse or significant other. Rather, it may be a family member’s husband, significant other, or sperm donor who provides his sperm for the fertilization process.

CONCLUSION

Scientific developments and an altering concept of what it means to constitute a family have made it possible to use PGR and ART to create families. While this is a positive change, there are complex challenges that accompany this revolution. One of the most significant of those challenges is determining parentage in cases of PGR. In the PGR context, one of the genetic parents is dead and an additional person must participate in the creation of the family. At the same time, legal parentage has many obligations that accompany it and the deceased’s desire to take on these additional responsibilities posthumously may not be known.

Although not perfected, the medical technology that would make posthumous egg retrieval possible is on its way to becoming a reality. Nevertheless, with rapid advances in medical technology, PGR has not yet been the subject of case law, legislation, or regulation. This is most likely due to the fact that the various definitions of parentage within these situations are complex, controversial, and in a state of flux. But these difficulties make it obvious that a regulatory regime is essential. The absence of such a scheme will continue to promote inconsistency in determinations of parentage, which will lead to excessive litigation and legal woes in the future.

262. See e.g., New York Hospital Guidelines, supra note 50 (“The wife is the individual who is best capable of determining the deceased man’s intentions for conception and is best able to give procedural consent... Next of kin are typically empowered to provide consent for other anatomic gifts, consistent with the presumed intent of the deceased.”).

263. See id.

264. Id. (“The wife should be the only individual for whom these sperm could be considered for conception... [T]hird party designation of specimens for use by an individual who is not the wife is to be discouraged.”).
The Intentional Parentage Doctrine will ensure that the child born as a result of PGR has at least one legal parent while at the same time making sure that the deceased, her family, and her estate will not be burdened with the financial obligations that accompany legal parentage. Furthermore, adoption of the Intentional Parentage Doctrine will provide an answer to the baffling question posed in *Astrue v. Capato* of whether or not a child conceived after the death of a gamete provider is entitled to the same benefits as a child conceived during the deceased’s lifetime. Unlike the other models of parentage that currently exist, the Intentional Parentage Doctrine captures the complexity of the situation in which PGR requests are made and has the flexibility to recognize the needs and interests of all of the potential individuals involved.