ADAPTING POSTMORTEM INSEMINATION TO THE PHILIPPINE SETTING: AN ANALYSIS OF ITS LEGAL CONSEQUENCES

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ABSTRACT

Before the discovery of artificial insemination, in vitro fertilization, and embryo transfer, reproduction could occur by only one means: sexual intercourse. It was a requirement that a man and woman engage in sexual intercourse during their lifetime in order to have child. If a man died before having children of his own, his opportunity to become a parent also died with him. Whenever the term "child" was used, in the law or elsewhere, it was reasonable to presume that the child was conceived at a time when both his father and mother were living. It was never imagined that a child could be conceived after the death of his alleged father; neither was the idea of this person demanding his rights against a man's estate equally conceivable.

At present, with the advent of "postmortem insemination," the above-mentioned scenario is no longer impossible. The procedure of postmortem insemination involves obtaining several vials of sperm from the husband which are stored and kept frozen or cryopreserved. With the aid of glycerol, the sperm is able to withstand the freezing process and outlive the donor husband. After the husband's death, it is still possible for the wife to bear his child by having herself artificially inseminated with the cryopreserved sperm.

Although postmortem insemination has not yet been openly introduced in the Philippines, the prospect of Filipino couples resorting to such a procedure is not an impossibility considering the family-oriented and sentimental, if not romantic, nature of Filipinos. The desire to continue the family line has always been part of the Filipino culture.

The prospect of postmortem insemination, however, raises some controversial issues of status and inheritance rights of children born under this procedure which our laws are not prepared to address. In addition, the propriety of resorting to such a procedure as will be seen later is also prone to attack on various moral and ethical grounds.

This study will show that if adapted in a Philippine setting, resort to postmortem insemination is a fundamental liberty which a couple may not be deprived of. Moreover, legal issues brought about by postmortem insemination may well be addressed by proposed amendments to our present law.

I. INTRODUCTION

Part of human nature is to dream of immortality. Call it egotistic, but no man would want to walk this earth without being remembered. One way this dream can find realization is to have one's own children. For men, having a child means having someone to carry their family name and continue the family line. For women, it means the fulfillment of one's being, of one's purpose -- being a mother. Under those circumstances, one can just imagine the pain of not being able to conceive a child.

Artificial insemination is one solution to the infertility of couples. The process is nothing new. It is done by taking the sperm of the donor or of the husband and using the same to impregnate a woman. The most common reason for resorting to such a process is to aid couples who are having difficulty in having children. Precisely because it provides a solution to the problem of infertility, artificial insemination has gained widespread acceptance. Moreover, medical technology has made it more easily available to needy couples.

A similar, but controversial, process which also uses the extracted sperm of the husband / donor is postmortem or posthumous insemination. The distinctive feature of postmortem insemination is that the insemination is done after the death of the husband. This process garned popularity when scientists who discovered that human sperm could withstand freezing, proposed that widows whose husbands were killed at war use frozen sperm from sperm banks to have children. In the 1960s, freezing, or cryopreservation of sperm was made available to the Apollo astronauts so that if space travel were to harm their reproductive systems, they could still father healthy children using stored sperm. At present, postmortem insemination is also being resorted to by men diagnosed with certain illnesses whose treatment may cause their sterility, such as cancer. Postmortem insemination makes it possible for such men to sire children after their treatment or even after their death.

A. Background

Imagine this scenario: Just a month ago Mr. X and Ms. Y got married. The two had great plans including, of course, having children. But Mr. X has just been diagnosed with cancer. The doctor told him he has barely a year to live. With the doctors diagnosis the couple's dreams are shattered. But they do not have to worry, says the doctor, for Mr. X's life still has a chance of being prolonged by chemotherapy. Chemotherapy may, however, render Mr. X sterile. The couple is now faced with a tough decision. Prolonging the husband's life through treatment may mean not having any children at all in the future. On the other hand, trying to preserve the husband's reproductive capacity by not opting to undergo chemotherapy will definitely mean his early demise. The couple comes up with an intelligent and practical solution. Mr. X goes to the sperm bank and deposits several vials of his sperm with the intention that should he pass away without his wife becoming pregnant, the latter may use his sperm and fulfill their dream of raising a family.

Upon Mr. X's death, his wife decides to claim the deposited sperm in order to have Mr. X's child. This can be done. The problem, however, does not end there. In fact, it may just be beginning.

B. Statement of the Problem

Postmortem insemination raises controversial issues because existing laws, including Philippine laws, cannot supply reasonable answers to certain questions.

First, there is the question of impropriety in resorting to postmortem insemination. In other words, the constitutional right of a married couple to procreate and to choose the method of procreation to be used is put in issue.

Second, the issue of the categorization of human sperm is also involved. Can sperm be considered property, which may be bequeathed? And can it be bequeathed to anybody not otherwise disqualified to inherit by law as in the case of other kinds of property?

Third, when the child conceived as a result of postmortem insemination is born, two related issues are raised. The first concerns the status of the child: is the child considered legitimate or illegitimate? The second concerns the inheritance rights of the child: does the child have the capacity to inherit from his deceased father? If the child can inherit from his father, does he inherit as a legitimate or an illegitimate child?

The Family Code and Civil Code of the Philippines have provisions which provide answers to these issues; however, the situation which results from the application of these provisions is unfair, if not absurd.

C. Objectives of the Study

This paper aims to examine the process of postmortem insemination and to adapt it to the Philippine setting. An analysis of the legal consequences of such a process shall also be made. This study will endeavour to find possible solutions to different problems and questions arising from postmortem insemination, such as the status of the child and said child's inheritance rights. It shall also be the aim of this study to propose certain changes or amendments to our law to provide reasonable answers to the above-mentioned problems.

D. Methodology

Since the process of postmortem insemination is not yet common, or is yet to be tried in the Philippines, our courts have not yet been given the opportunity to pass upon issues concerning postmortem insemination. Therefore, this paper will rely heavily on decisions of the United States Supreme Court. Although U.S. decisions may not be binding on local courts in this respect, their decisions shall be used to shed light on our own laws as well as on our understanding of certain concepts such as "property," "the right to privacy," and "the right to procreate."

E. Limits of the Study

This study shall be limited to the issues concerning the child's status and inheritance rights. The question of whether sperm should or should not be considered as property shall also be addressed. Pertinent provisions of the New Civil Code and the Family Code of the Philippines shall be dealt with, as these are the laws which affect the rights and status of the posthumously-conceived child.

Only the legal consequences of conceiving a child through postmortem insemination will be tackled. Questions regarding the legal consequences of doing the process itself– i.e. the liability of sperm banks and the valuation of sperm – shall be excluded. Other issues unrelated to the consequences of the child's status and inheritance rights or to the right of the husband and wife to resort to such a process shall not be resolved.

II. ARTIFICIAL INSEMINATION AND CRYOPRESERVATION OF SPERM — A BRIEF BACKGROUND

A. Artificial Insemination

The artificial insemination procedure is not new. The impregnation of an Arab mare with the semen of a stallion, in the Fourteenth Century, is believed to be the first successful artificial insemination. For centuries, cattle breeders used frozen bull semen to artificially inseminate their cattle. In 1770, in England, a surgeon named John Hunter successfully performed the procedure on a human for the first time. Artificial insemination was slow to be accepted in the United States; it was not until 1866 that Dr. Marion Simms successfully used the procedure on a woman in the United States. Unfortunately, Dr. Simms' success was regarded with disdain rather than praise due to the community's deep-seated moral and religious values concerning the unnatural pregnancy. Consequently, Simms was prevented from further experimentation. At present, over 100 years later, artificial insemination has gained widespread acceptance and medical technology has made it increasingly available and inexpensive.[1]

Today, the term "artificial insemination"(AI) is used to denote the process by which a female is impregnated with the sperm of a donor without sexual contact between the female and the donor.[2] It is "the introduction of semen into the vagina by artificial means."[3]

[1] Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 524 (1993) [*hereinafter* Gilbert].

[2] Christopher P. Litterio, *Artificial Insemination, In Vitro Fertilization, and Surrogate Motherhood: Breeding Life and Legal Problems in the United States and Great Britain*, 10 SUFFOLK TRANSNATIONAL L.J. 533 (1986) [*hereinafter* Litterio]

[3] Ellen Crabtree, *Proteating Inheritance Rights of Children Born Through In Vitro Fertilization and Embryo Transfer: Suggestions For a Legislative Approach*, 27 SAINT LOUIS UNIV. L.J. 901 (1983) *citing* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 745 (24th ed., 1965).

Here in the Philippines, artificial insemination is gradually becoming a popular solution to a married couple's infertility. Even before the rise in its popularity, however, a number of medical specialists have already been practicing the procedure. A good example is the case of Dr. Roger Mendiola. It has been 25 years since he first tried his hand at artificial insemination. For a good part of those years, however, he practiced in secret because then, Philippine law on artificial insemination was not yet clear. In Dr. Mendiola's words, "it is not legal or illegal. The law is not clear."[4] At that time, Dr. Mendiola could only hope for the passing of legislation addressing the problem. Now with the advent of the new Family Code of the Philippines, particularly Article 164[5], artificial insemination is already a recognized and accepted process.

There are various types of artificial insemination, namely, Artificial Insemination Homologous (AIH), and Artificial Insemination Heterologous (AID).[6] There is also third type, known as Confused or Combined Artificial Insemination (CAI).[7]

Artificial Insemination Homologous (AIH)

Homologous artificial insemination, commonly known as artificial insemination by husband, is a procedure by which at the time of ovulation, a woman is inseminated using a syringe containing her husband's semen, which may have been deposited and frozen, or cryopreserved, at another time.[8] AIH is used when a married couple is having difficulty conceiving through sexual intercourse.[9]

Artificial Insemination Heterologous (AID)

If the husband has no sperm and this problem cannot be successfully treated, one solution is for the wife to have "artificial insemination" with "donor sperm," termed AID.[10] Typically, semen is obtained from compensated donors who are assured of anonymity.[11] The semen is either used fresh, or is frozen, later thawed, and then used for insemination.[12]

[4] Candy Quimpo, *Dr. Roger Mendiola, Andrologist* , Mr. & Ms., Oct. 6, 1987, at 34.

[5] Art. 164 reads as follows:
Children conceived or born during the marriage of the parents are legitimate.
Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

[6] Litterio, *supra* note 2, at 534.

[7] Gilbert, *supra* note 1, at 526.

[8] *Id.*

[9] Lori B. Andrews, *In Vitro: A Symposium*, 32 LOYOLA L. REV. 311, 412 (1986) [hereinafter Andrews].

[10] SHERMAN J. SILBER, M.D., HOW TO GET PREGNANT WITH THE NEW TECHNOLOGY, 213 (1991).

[11] Andrews, *supra* note 9, at 413.

[12] *Id.*

To many couples, AID may seem undesirable, but in fact, it is no different from adoption. It is simply a matter of "adopting sperm." In such a situation, the baby is adopted at a much earlier stage, that is, prior to conception. Artificial insemination, using the sperm of a well-selected anonymous donor, is the most realistic and sensible solution for wives whose husbands suffer from incurable infertility. In fact, it has tremendous advantages over classic adoption, for parental bonding and child development.[13]

Although AID was traditionally used by infertile married couples, the procedure is increasingly being used by unmarried women who want children without the legal and emotional attachment to the baby's biological father. These women may be in lesbian relationships or just cannot or do not want to find a companion with whom to have a child, but still wish to experience motherhood.[14]

Confused or Combined Artificial Insemination (CAI)

In this type of artificial insemination, because the husband's sperm count is low, his semen is mixed with that of an anonymous donor.[15] The reasons for using this method are psychological:

> [I]t gives the husband some basis for believing that he is the natural father of the resulting child[,]... it eases the physician's fear of committing perjury by listing the husband as the natural father on the birth certificate, [and finally,] it strengthens the already almost irrebuttable judicial presumption that the husband is the natural father of a child born during the marriage.[16]

B. Cryopreservation of Sperm

All men dream from time to time about the possibility of immortality.[17] Science fiction novelists frequently toy with the idea of human beings being placed in a deep freeze just prior to the moment of death, to be revived perhaps two hundred years later, at which time science may have better treatments for illnesses and a way of prolonging life indefinitely.[18]

It has been known since 1776 that human sperm is remarkably resistant to the damaging effects of freezing. In that year an Italian scientist exposed spermatozoa to freezing temperatures and noted that, after warming, some of them regained their motility. It was speculated then that frozen semen might be used not only in breeding the finest farm animals but also for saving the sperm of a man going off to war so

13 *Id.*

14 Gilbert, *supra* note 1, at 527.

15 *Id.* at 526.

16 *Id.* at 527.

17 SILBER, *supra* note 10, at 225.

18 *Id.* at 226.

that his wife might have a child from him even though he had already died on the battlefield.[19]

Although these crude, early studies established that sperm could survive freezing and thawing, the sperm used in these studies was so terribly damaged that there was no possibility of practical application. But in 1949, British scientists discovered completely by accident that when a relatively common chemical, glycerol, is added to the semen before it was frozen, the majority of the sperm survive freezing and thawing uneventfully. The researchers who made this discovery were so surprised to find live, healthy sperm in large concentrations after thawing that they had to go back to their laboratory shelf to find out which of the chemicals accidentally added to the sperm suspension was the one that protected the sperm against freezing. It took very little time after their remarkable discovery for frozen-sperm banks to rapidly find acceptance in the field of cattle breeding, and today the vast majority of calves born in the world are the result of artificial insemination from frozen bull semen.[20]

Four years later, in 1953, it was demonstrated that frozen and thawed human sperm could result in pregnancy and the delivery of normal babies. The first human sperm bank was established the following year. Doctors originally thought that, by using this method of freezing sperm, a husband with a very low sperm count could have as many as fifty ejaculates frozen, stored, and combined for use in artificial insemination of the wife. They hoped that with such a large number of sperms, the wife would be more likely to get pregnant. These hopes, however, were dashed when they discovered that sperm from infertile men tolerate the freezing process very poorly. It was discovered that the process of freezing causes much sperm death despite the use of glycerol. A decent specimen could never be obtained for inseminating the wife. Doctors have since come to understand that some men's sperm tolerate freezing better than others'. Even men whose sperm usually freeze well have variations in their ejaculations. Sometimes their ejaculates freeze and thaw without any significant loss, and at other times they freeze and thaw very poorly.[21]

Sperm freeze better than most other cells because they have little cellular water content. The sperm head is basically an extremely compact, dense arrangement of DNA with much less water content than any other cell. Therefore, there is very little intracellular ice crystal formation to damage it. Nonetheless, even sperm require some sort of "cryoprotectant", in this case glycerol, whose function is to pull water out of the cell and to get inside it to act as a sort of antifreeze, to prevent ice formation of any remaining water .[22]

The technique for freezing and storing the sperm is extremely simple. A fresh

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

semen specimen is collected in a sterile container and several drops of glycerol, equal to one-tenth of the volume of the specimen, are added to the jar. The semen and glycerol must be very thoroughly mixed together. This mixture is then drawn up into a straw, and held over the vapors of liquid nitrogen to freeze it. Then it is inserted into the liquid nitrogen bath for permanent storage. When the time comes to thaw the frozen sperm, the plastic straw is simply removed from the liquid nitrogen bath, and either placed in warm water for one minute or left on a table at room temperature to thaw. There has been an improvement in "cryoprotection" by adding test yolk buffer to the glycerol and freezing the sperm in a more carefully controlled, programmed, slow freeze approach.[23]

The cryopreservation process has now gained widespread acceptance. This is because the use of fresh semen is no longer an acceptable option. Sperm banks still obtain semen specimens from different donors such as students, but now they compile more extensive background information on the donor, including the test for exposure to AIDS and hepatitis. A masturbation specimen of semen is then frozen and stored for up to six months, at which time the AIDS antibody blood test is repeated. Only when the second test is negative can the sperm bank safely release the specimen for use. The reason for the delay is it can take several months for an individual infected with the AIDS virus to develop detectable amounts of antibodies in the blood. For these reasons, couples are urged to deal only with sperm cryopreservation banks.[24]

The use of frozen semen affects fertility treatment in several ways. First, freezing and transporting sperm over long distances in liquid nitrogen canisters is far more costly than using a fresh specimen. Second, although each specimen contains millions of sperm, a significant number die or lose their vitality and motility during the freezing and thawing process. However, even if half of the sperm in a semen specimen fail to survive cryopreservation, pregnancy can still occur because fertilization of an egg requires only one healthy sperm out of the millions contained within a specimen.[25] Finally, there is no increased risk of birth abnormalities over a normal population. Whatever harm may come to sperm from freezing, either in the sperm's structure or ability to fertilize, there does not appear to be any increased risk of defective children. Extensive research both in cattle and in humans has now documented that artificial insemination with frozen sperm from sperm banks is safe. Literally hundreds of thousands of normal pregnancies and births in humans from this technique have been reported in the scientific literature.[26]

[23] *Id.*

[24] GEOFFREY SHER, M.D. ET AL., IN VITRO FERTILIZATION, THE A.R.T. OF MAKING BABIES, 169 (1995).

[25] *Id.*

[26] SILBER, *supra* note 10, at 228.

III. THE CONTROVERSY OF POSTMORTEM INSEMINATION — SETTING THE BACKGROUND

Postmortem or posthumous insemination is a species of homologous artificial insemination or AIH. Here, the woman is also inseminated using a syringe containing her husband's semen, which may have been deposited and frozen, or cryopreserved, at another time as in the case of ordinary AIH. As its name denotes, however, postmortem or posthumous insemination is done after the death of the donor husband. As stated earlier, this procedure has been made possible with the discovery of the use of glycerol in preserving human sperm. Because of this scientific breakthrough, human sperm may survive its donor even years after the latter's death.

In the Philippines, there is as yet no reported case of postmortem insemination, it is not impossible, however, for such a procedure to be made available locally considering the emergence of competent local medical experts.

There are two "leading" cases involving the issue of postmortem insemination, *Hecht v. Superior Court* and *CECOS v. Parpalaix*, which are to be discussed later. These cases deal with the different legal issues and problems brought up by postmortem insemination. Although the decisions in these two cases are not binding on Philippine courts, and not all the issues discussed in these cases may be relevant for our purposes, the facts of these cases may help lay the foundation for an analysis of postmortem insemination. The basic facts of these cases will be of help in understanding why postmortem insemination adapted in a Philippine setting may bring about legal issues which our laws are not prepared to address at present without causing injustice to the posthumously conceived child.

A. Cecos v. Parpalaix[27]

Corinne Parpalaix's husband, Alain, died of testicular cancer two days after they were married. Two years prior to his death, however, when Alain was first diagnosed with cancer and warned that chemotherapy treatments might render him sterile, he deposited his sperm at the *Centre d' Etude et de Conservation du Sperme* (CECOS), a government-backed research center and sperm bank in France. The sperm was frozen and stored for over two years. Alain, however, left no instructions regarding the future use of his sperm. At that time, he was living with Corinne, but when his condition began to deteriorate rapidly, the two decided to get married. After his death, Corinne requested for her husband's sperm deposit from CECOS so that she could use it to have his child by artificial insemination. The sperm bank refused this request. Thus, Corrine brought an action against the sperm bank to recover Alain's sperm.

[27] Gilbert, *supra* note 1, *discussing* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993) as to the unavailability of GAZETTE DU PALAIS, Sept. 15, 1984, at 11-14, in which Parpalaix v. CECOS was unofficially reported).

Corinne's argument was based on contract law. As Alain's natural heirs, she and her in-laws became the owners of the sperm and CECOS had broken its contract by not returning it. This view required the sperm to be considered as property and thus, inheritable. Additionally, Corinne argued that, although not written, Alain's intent was for his wife to conceive after his death. Finally, Corinne's attorney argued that it was her "most sacred right" to have the child.

On the other hand, CECOS, the sperm bank, claimed that Alain's reason for depositing the sperm was a therapeutic one. It was merely to assure himself that once the chemotherapy treatments rendered him sterile, he would still be able to have a biological child should he become well again. CECOS also argued that sperm should be considered an indivisible part of the body and therefore not inheritable absent express instructions from the owner. Since Alain failed to give any instructions with regard to the sperm's future use, and because it is impossible to know what his intentions were at the time of his death, the sperm should not be given to his wife. Finally, the sperm bank also claimed that its only legal obligation was to the donor, not to the latter's wife, since under CECOS's normal deposit arrangement, the sperm is not returnable to the next of kin of a deceased depositor.

In its decision, the Court described sperm as:

> [t]he seed of life tied to the fundamental liberty of a human being to conceive or not to conceive. This fundamental right must be jealously protected, and is not to be subjected to the rules of contracts. Rather, the fate of the sperm must be decided by the person from whom it is drawn. Therefore the sole issue becomes that of intent."[28]

The *Tribunal de grand instance* then determined that Alain did indeed intend for Corinne to have his child and ordered CECOS to return the sperm to Corinne's physician.

B. Hecht v. Superior Court[29]

Deborah Hecht was living with William Kane for five years when he committed suicide at the age of 48. A few weeks prior to his death, William had deposited fifteen vials of his sperm in an account at California Cryobank, a sperm bank, where he signed a "Specimen Storage Agreement." Part of the agreement stated that in the event of his death, the sperm should continue to be stored upon the request of the executor of the estate or should be released to the executor. An "Authorization to Release Specimens" provided authorization by William to the sperm bank to release his sperm to either Deborah or her physician.

In his will executed one month prior to his death, William named Deborah as the executor of his estate. He also bequeathed all of the sperm stored in the sperm bank to Deborah. Included in the will was a "Statement of Wishes" providing for his

[28] *Id.* at 559.

[29] *Id.*

intentions that the sperm samples be used by Deborah, if she chose to, for her impregnation, and that she should preserve his diploma and framed mementos for their future child or children. In addition, William wrote a letter several days before the suicide to his two children from a previous marriage, with an explicit reference to other children that might later be born to him by Deborah using the sperm specimens.

Several months after William's death, Deborah attempted to retrieve the sperm from California Cryobank. Because William's two children, Katharine Kane and William Kane Jr., petitioned the court to have the sperm destroyed, the sperm bank refused to release the specimens to her.

The Kane children advanced several arguments supporting their position that the sperm should be destroyed and hence, procreation avoided. First, the Kanes contended that William had no ownership or possessory interest in his sperm once it left his body and therefore he could not bequeath it to Deborah. Second, the Kanes argued that even if the sperm is inheritable, public policy forbids the artificial insemination of an unmarried woman. The third justification for destruction of the sperm was that public policy forbids postmortem insemination because it is in truth, the creation of orphaned children by artificial means with state authorization. Finally, the Kanes argued that the posthumous birth of Hecht's child would create psychological burdens on the Kanes by affecting their family integrity, as well as financial burdens on society and on the estate.

Conversely, Ms. Hecht maintained that neither the estate nor the Kanes had any property interest in the sperm because it was gifted to her at the time William deposited it. In the alternative, Deborah argued that even if the sperm is considered part of the estate, it should be given to her because (1) the will specifically authorizes that she be the sole beneficiary of the sperm; and (2) to destroy the sperm against her wishes would be a violation of her rights to privacy and procreation under the Federal and California Constitutions.

The court relied greatly on the *Parpalaix* decision in its ruling, stating that it was the only case which addressed the issue of postmortem insemination and which was instructive and pertinent to the case at bar. First, the court characterized the nature of sperm as "reproductive material which is a unique type of 'property'". The court then found that it was part of William's estate:

> [T]he decedent's interest in his frozen sperm vials, even if not governed by the general law of personal property, occupies "an interim category that entitles them to special respect because of their potential for human life" and at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the sperm within the scope of policy set by law. Thus, decedent had an interest in his sperm which falls within the broad definition of property in Probate Code section 62, as "anything that may be the subject of ownership and includes both real and personal property and any interest therein.[30]

[30] *Id.* at 561.

Next, the court concluded that there was no authority to support the premise that public policy forbids the artificial insemination of Deborah because she was unmarried. The court further found that assuming that both Deborah and the decedent desired to conceive a child using decedent's sperm, the parties, nevertheless failed to establish a state interest sufficient to justify interference with that decision. In other words, as long as the intent is present, it is the gamete providers' decision to use their gametes as they wish and the government may not violate this right to procreate, or to avoid procreation. Since it is the gamete providers who bear the consequences of these decisions, no one else has the right to decide what these consequences will be.

Additionally, the court found no authority to support the Kanes' argument that public policy forbids postmortem insemination. The court also said that there was no factual or legal basis to show how Deborah's use of posthumous insemination would impose psychological burdens on the adult Kane children or on society. Finally, the court discussed the inheritance issues as an implication of Kanes' contention that the birth of a child through artificial insemination of Deborah with William's sperm would create financial burden on the decedent's estate. The court concluded that it is unlikely that the estate would be subject to claims with respect to any children born posthumously. Accordingly, the order to destroy William Kane's sperm was vacated.

The cases of *Hecht* and *CECOS* clearly illustrate that several issues may be raised when a married couple decides to have a child through postmortem insemination. Foremost is the issue of whether it is wrong or improper to resort to postmortem insemination. In other words, does a married couple have a constitutional right to procreate and to choose a method of procreation?

Second, the issue of the categorization of human sperm is involved. Is sperm property capable of being bequeathed? And if it is, can it be bequeathed to anybody not otherwise disqualified to inherit by law as in the case of other kinds of property?

IV. CONSTITUTIONAL CONCERNS CREATED BY POSTMORTEM INSEMINATION

A. The Right to Procreate

To say that the right to reproduce is a fundamental human right is reasonable and may be justified. Indeed, several international declarations of human rights speak about the right to procreate.[31] According to Article 16.1 of the 1978 United Nations Declaration of Human Rights, "Men and women of full age without any limitation due to race, nationality or religion, have the right to marry and found a family".

[31] RICHARD T. HULL, ETHICAL ISSUES IN THE NEW REPRODUCTIVE TECHNOLOGIES 9 (1990) [hereinafter HULL].

In the Philippines, the Supreme Court, in the case of *Chi Ming Tsoi v. Court of Appeals*,[32] recognized the act of procreation as an obligation, not merely a right. The case was originally commenced by the plaintiff wife against her defendant husband for the nullification of their marriage on the ground of psychological incapacity. The wife alleged that during the time they were married, her husband never attempted to have sexual intercourse with her. Thus, their marriage was never consummated. The lower court decreed the nullity of the marriage and this was affirmed by both the Court of Appeals and the Supreme Court. The Supreme Court stated that:

> Evidently, one of the essential marital obligations under the Family Code is "To procreate children based on the universal principle that procreation of children through sexual cooperation is the basic end of marriage." Constant non-fulfillment of this obligation will finally destroy the integrity or wholeness of the marriage. In the case at bar, the senseless and protracted refusal of one of the parties to fulfill the above marital obligation is equivalent to psychological incapacity.[33]

Moreover, there have been a few cases brought to the United States Supreme Court that test the question directly. Aside from laws on involuntary sterilization of mentally retarded persons and laws on fornication and cohabitation that attempt to confine reproduction to marriage, there have been few attempts by the state to stop people from reproducing.[34]

In *Buck v. Bell*,[35] the United States Supreme Court upheld a statute authorizing the "sterilization of patients confined in institutions whenever the superintendent of said institutions shall be of the opinion that it is for the best interest of the patients and of society that an inmate under his care be sexually sterilized."

Under the statute, patients who were inflicted with hereditary forms of insanity or imbecility were operated on under certain safeguards provided under the statute. The Court in this case used "public welfare" as a justification for the passage of such a statute saying that if these defective patients would be allowed to produce children, who would most probably be defective themselves, then these patients would only become a menace to society and should, therefore, not be discharged from the institutions in which they were confined.

On several occasions, however, the Supreme Court has indicated strong support for procreative liberty, particularly of married persons.[36] Although these cases have not involved state attempts to prevent married couples from reproducing, they do suggest that the Court would recognize such a right if ever it faced a direct limitation on a married couple's desire to reproduce by sexual intercourse.[37]

[32] 226 SCRA 324 (1997).

[33] Chi Ming Tsoi v. Court of Appeals, 226 SCRA 324, 333 (1997).

[34] *Id.*

[35] 274 U.S. 200 (1927).

[36] HULL, *supra* note 31.

[37] *Id.*

It must be noted, however, that at the time these cases were decided, noncoital reproduction, that is, reproduction through artificial means such as artificial insemination, was not referred to nor mentioned by the Court. A careful reading of these cases will show that the Court was referring to coital reproduction as said cases dealt mostly with contraception, sterilization, or abortion. Nevertheless, a reading of these decisions shows that the language employed by the Court was broad enough to extend to both coital and noncoital reproduction.

In *Skinner v. Oklahoma*,[38] the Court said that procreation is "one of the basic civil rights of man" and that "marriage and procreation are fundamental to the very existence and survival of the race." In this case, the Court declared as unconstitutional a mandatory sterilization law for habitual criminals, otherwise known as Oklahoma's Habitual Criminal Sterilization Act. The Court therein held that:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[39]

The *Skinner* decision directly supports the affirmative right to procreate. A reading of the case, however, shows that it says nothing about whether the right to make procreative decisions, such as choosing the method of conception, is also fundamental. Therefore, the issue of whether a married couple may resort to artificial means of conception without derogating against public policy was not addressed.

After the *Skinner* decision, the right to privacy has served as the basis for striking down a number of laws that interfered with the individual's decisions concerning childbearing.[40] These privacy cases involved, specifically, the decision to avoid procreation using artificial contraceptives. But since the decision to procreate is clearly also a decision concerning childbearing it can be argued that the affirmative right to procreate and decisions relating to the exercise of this right may well be supported on the basis of these decisions.

In *Griswold v. Connecticut*,[41] the Court invalidated a statute criminalizing the distribution of contraceptives. In declaring said statute unconstitutional, the Court recognized a fundamental right to privacy in the marital relationship. Since the fundamental rights provided for in the Bill of Rights were the only rights protected by the Due Process guarantees of liberty, the Court based this newly-articulated "right to privacy" on the Bill of Rights. The Court held that to effectuate the central rights,

[38] 316 US 535 (1942).

[39] Skinner v. Oklahoma, 316 US 535, 541(1942).

[40] Gilbert, *supra* note 1, at 532.

[41] 381 US 479 (1965).

other rights, related to the Bill of Rights, must be protected as well. These related rights form 'penumbras' which, taken as a whole, constitute the general right to privacy. Thus, because the right to privacy is comprised of 'emanations' from several fundamental constitutional guarantees, any relationship lying within this zone of privacy must be afforded the same protection as that given to the central rights explicitly provided for in the Bill of Rights. As such, any restrictions implicating these 'penumbral' rights are subject to strict scrutiny by the Court. A statute will withstand this heightened level of review if it is justified by a compelling state interest and is narrowly drawn to express only the legitimate interests at stake.

In evaluating the statute, the Court found that it implicated a relationship lying within this zone of privacy: the marriage relationship. The Court found that the statute was unnecessarily broad and would have a "maximum destructive impact upon that relationship" since it (the statute) forbade the use of contraceptives rather than just to regulate their manufacture or sale.

In *Eisenstadt v. Baird*,[42] the Court invalidated a statute prescribing their (contraceptives) distribution to married persons only by registered physicians and pharmacists. The Court held that:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. *If 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.*[43] (emphasis supplied)

It must be noted that *Eisenstadt* supports the unmarried woman's right to make procreative decisions with the same protection from unwarranted government intrusion given to married couples. Since the right to procreate is a fundamental human right, all persons must be able to exercise said right, whether that person is married or not.

In the case of postmortem insemination, however, the writer believes that the exercise of the right to procreate by resorting to postmortem insemination should be regulated. If adapted in a Philippine setting, postmortem insemination must be limited to married couples. This means that only the widow shall have the right to the sperm of her deceased husband. For although single individuals are not precluded from begetting children, still, more protection is given by the law to legitimate families. In other words, the stigma attached to non-marital pregnancies has not yet been totally removed in our country.

[42] 405 US 438 (1972).

[43] Eisenstadt v. Baird, 405 US 438, 453 (1972).

Nevertheless, the *Eisenstadt* decision establishes a guide in defining the right to privacy and, consequently, the right to procreate. According to the court, the right to privacy means "...the right of the individual...to be free from unwarranted governmental intrusion into matters...as the decision whether to bear or beget a child."

In *Carey v.Population Servs. Int'l.*,[44] the Court found unconstitutional a statutory provision which prohibited the distribution of non-medical contraceptives to persons under the age of sixteen and for anyone other than a licensed pharmacist to distribute contraceptives to persons sixteen or over. The Court therein held that:

> The decision whether or not to bear or beget a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right to privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, ... and abortion....This is understandable, for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.[45]

The above-cited cases basically dealt with statutes concerning contraception. The Court consistently upheld the right of couples to resort to the use of contraceptives in order not to procreate. Although Philippine courts have not yet been faced with the task of evaluating similar statutes, perhaps due to the fact that our legislature is not as liberated as that of the United States, the above-quoted decisions may be used as guidelines in evaluating laws which deal with family matters. The above-mentioned U.S. decisions explicitly declare that a person has the freedom and the right to decide for himself or herself whether or not he or she would want to have a child. And in the absence of any justifiable reason, this should not be interfered with by the government. Applying such teaching to the Philippine setting, and for the purpose of this study, the so-called "right to procreate" enunciated in said cases should be acknowledged by the government as an existent right of married couples.

Furthermore, these mentioned cases all dealt with coital reproduction. The Supreme Court's statements supporting a couple's right to marry and found a family generally assume that reproduction will occur only as a result of sexual intercourse, because the statements were made before IVF and widespread use of donor sperm occurred.

Be it coital or noncoital, however, it is fair to say that a couple's interest in reproducing remains the same. The manner by which reproduction occurs is of no moment. The basic purpose underlying a right of coital reproduction strongly suggests as well, a married couple's right to noncoital reproductions and, arguably, to have the assistance of donors as needed.

The right to reproduce through coital means has for its purpose the raising of a family. It is for the same reason that couples who may not be successful in reproducing

[44] 431 US 678 (1977)

[45] Carrey v. Population Servs, Int'l., 431 US 678, 685 (1997).

through natural means resort to artificial means of reproduction. As such, there seems to be no reason for denying a married couple the right to noncoital reproduction.

Coital reproduction is legally protected not for the coitus but for what the coitus makes possible: it enables the couple to unite egg and sperm to acquire the possibility of rearing a child of their own genes and gestation. The use of noncoital techniques, such as IVF or artificial insemination (particularly AIH), to unite egg and husband's sperm, necessitated by the couple's infertility, should then also be protected.[46]

The married couple's right to reproduce should thus extend to noncoital means of conception, which include the wide range of choices made possible by developments in reproductive technology. Indeed, this right might also be found to extend to posthumous reproduction, which might occur with stored sperm or preembyos after the death of a spouse.[47]

And as mentioned earlier, the Supreme Court of the United States has yet to have an opportunity to expressly extend the fundamental right to make procreative decisions using the new reproductive technologies. Nevertheless, at least one district court has done so and at least three other state courts have implied the same, as have various commentators.[48]

In *Lifchez v. Hartigan*,[49] the Illinois Abortion Law was passed. Section 6(7) of said law prohibited the sale of or experimentation upon a human fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation was therapeutic to the human fetus. Dr. Lifchez represented a class of physicians who specialized in reproductive endocrinology and fertility counseling. They filed an action for declaratory judgment assailing the constitutionality of said provision. Among the procedures that Dr. Lifchez performed on his patients which supposedly fell within the ambit of the prohibition were *in vitro* fertilization and the many techniques spawned through research into *in vitro* fertilization.

The Northern District Court of Illinois struck down this provision of the law. One of the reasons why the court invalidated the provision was that it impermissibly restricts a woman's fundamental right of privacy, in particular, her right to make reproductive choices free from governmental interference. Because the language of the statute seemingly prohibited one of the new reproductive technologies, embryo transfer, the court explored current boundaries of the right to privacy and expanded them to include the right to use noncoital methods to procreate. The Court held

[46] HULL, *supra* note 31, at 11.

[47] *Id.*

[48] Gilbert, *supra* note 1, at 536 *citing* Johnson v. Calvert, 19 Cal. Rptr. 2d 494 (1993); Hecht vs. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993); Lifchez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990); Davis v. Davis, 842 S.W. 2d 588 (Tenn. 1992).

[49] 735 F. Supp. 1361 (1990).

that it takes no great leap of logic to see that within the cluster of constitutionally protected choices which include the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.

Two recent California decisions imply the existence of a fundamental right to use the new reproductive technologies to procreate. In *Johnson v. Calvert*, a case involving a surrogacy contract and in the *Hecht* case, the courts concluded that "any...effort [to inhibit the use of reproductive technology] would raise serious questions in light of the fundamental nature of the rights of procreation and privacy."[50]

In *Davis v. Davis*, a case involving the disposition of embryos conceived through *in vitro* fertilization, the Tennessee Supreme Court indirectly extended the right to procreate to include *in vitro* fertilization. There the court reasoned that:

> [H]owever far the protection of procreational autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete-providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status... [N]o other person or entity has an interest sufficient to permit interference with the gamete-providers' decision to continue or terminate the IVF (*in vitro* fertilization) process, because no one else bears the consequences of these decisions in the way that the gamete-providers do.[51]

It is, therefore, apparent that the *Davis* decision also supports the existence of a fundamental right to make procreative decisions to use reproductive technology, and thus, a fundamental right to noncoital reproduction.

Finally, additional support for the individual fundamental right to procreate noncoitally is secured through the numerous cases which recognize the fundamental right to be free from state interference in matters relating to family life.[52] This right to procreate through noncoital means is a corollary of an individual's right to privacy. And, in keeping with the individual's right to privacy to make procreative decisions, it is appropriate to give the individual the right to control the destiny of his or her reproductive materials.[53] As one writer said, these rights should be fervently protected because they are part of the freedom of intimate association and strongly implicate the values of caring and commitment, intimacy, and self-identification.[54]

Therefore, the argument that resort to postmortem insemination is against public policy because it will only become a breeding ground for orphaned children, although seemingly logical and reasonable since the posthumously-conceived child would definitely be born without a father, cannot override the fundamental right of

[50] Gilbert, *supra* note 1, at 537; *see* note 48.

[51] *Id.*

[52] *Id.*

[53] Andrews, *supra* note 9 at 402.

[54] Joseph J. Saltarelli, *Genesis Retold: Legal Issues Raised by the Cryopreservation of Preimplantation Human Embryos*, 36 SYRACUSE L. REV. 1021, 1033 (1985).

a person to procreate. The right to procreate, although not explicitly mentioned as one of the rights enumerated under the Bill of Rights, is an inherent right of every person which must be equally respected and protected and, in the absence of any justifiable reason, cannot be interfered with by the state.

B. The Right To Equal Protection

Aside from the question of whether it is against public policy to resort to postmortem insemination, more questions will definitely arise once the child is already born. One basic question is how this child should be treated under the law. The issues regarding the child's status and inheritance rights will be discussed in a subsequent chapter. But first, it is important to point out that under the Constitution, said child is entitled to Equal Protection.

The right to equal protection refers more to the right of the child conceived as a result of postmortem insemination. As will be discussed in greater detail later, a child conceived through postmortem insemination is considered under our law as illegitimate.[55] However, considering that the child is the biological child of two persons who were validly married, it seems more logical to confer on the child the status of legitimacy. The posthumously conceived child is, in effect, treated differently from other children who are also biological children of two persons who are validly married, though not posthumously conceived. The only difference, therefore, lies in the time in which conception of the children occurred. In the former case, conception occurred after the husband's death. In the latter, conception occurred during the lifetime of the husband.

This is abhorrent to the equal protection guaranteed by our Constitution.[56] The equal protection clause is a specific constitutional guarantee of the Equality of the Person.[57] The equality it guarantees is legal equality or, as it is usually put, the equality of all persons before the law.[58] Under it, each individual is dealt with as an equal person in the law, which does not treat the person differently because of who he is or what he is or what he possesses.[59]

Nevertheless, it is an established principle in our jurisdiction that the equal protection clause does not prohibit classification. The classification, however, must be reasonable. And to be reasonable, such classification must: (1) rest on substantial distinctions; (2) be germane to the purpose of the law; (3) not be limited to existing conditions only; and (4) apply equally to all members of the same class.[60] In other words, as long as persons similarly situated are treated in the same way, there is no violation of the equal protection guarantee.

[55] *See* Family Code of the Philippines, art. 165.

[56] PHIL. CONST. art. III, § 1.

[57] JOAQUIN G. BERNAS, SJ, THE 1987 PHILIPPINE CONSTITUTION A REVIEWER PRIMER 38 (1992).

[58] *Id.*

[59] *Id.*

[60] People vs. Cayat, 68 Phil. 12, 18 (1939).

It is, therefore, apparent that treating children conceived through postmortem insemination, more specifically, when the sperm used is that of the husband, differently from other legitimate children conceived through natural means is a violation of the equal protection clause of the Constitution. As stated earlier, both kinds of children came from the gametes of their parents, the only differences being first, the time they were conceived and second, the manner of their conception -- one naturally, the other artificially.

It is true that under Philippine family law, the legitimacy of a child is a function of the existence of a valid marriage between the child's parents. It is conceded that in the case of postmortem insemination, at the time of the child's conception and birth, no valid marriage existed anymore. At such time, the husband is already deceased, thereby terminating the marriage. Following our present law on the matter, the child will have to be considered as illegitimate.

But again, looking at the circumstances surrounding the case, an obvious unfairness results. And this unfairness may be obliterated by a possible amendment of the law, making postmortem insemination an exception to the general rule.

V. ARGUMENTS AGAINST POSTMORTEM INSEMINATION

B. Ethical Issues

As earlier stated, in the Philippines, the obligation to procreate has been recognized by our Courts as one of the "essential marital obligations." It is recognized in our jurisdiction that within the context of a valid marriage, procreation is something which is demandable and must be complied with.

Moreover, based on the United States Supreme Court decisions discussed earlier, it can be safely inferred that there exists a right which may be termed "procreative liberty." This right denotes freedom in activities and choices related to procreation, but the term does not tell us which activities fall within its scope.[61] There is also a crucial distinction between actions designed to *avoid* procreation and those designed to *cause* procreation.[62]

Postmortem insemination is, of course, designed to cause procreation. In a predominantly Catholic country whose culture looks favorably upon couples who welcome the idea of having children, it seems the introduction of reproductive technology such as postmortem insemination would not cause many problems regarding its acceptance.

Noncoital reproduction, which includes postmortem insemination, does raise the possibility of symbolic harm. Its main impact may be on the moral or religious

[61] KENNETH D. ALPERN, THE ETHICS OF REPRODUCTIVE TECHNOLOGY 249 (1992).

[62] *Id.*

notions about sexuality, reproduction, family, female roles, and similar value-laden concerns. Such concerns are of immense importance to individuals and society.[63]

In our country, the family is regarded as the basic unit of society. Being the foundation of the nation, it is a basic social institution which public policy cherishes and protects.[64] The family, of course, is a result of the union between a man and a woman through marriage. Marriage, in turn, is said to be the foundation of the family and an inviolable social institution.[65] It is, thus, obvious that we Filipinos have such a high regard for marriage and, consequently, the family.

The Church's teachings on marriage and human procreation affirm the "inseparable connection, willed by God and unable to be broken by man on his own initiative, between the two meanings of the conjugal act: the unitive meaning and the procreative meaning. Indeed, by its intimate structure, the conjugal act, while most closely uniting husband and wife, makes them capable of the generation of new lives, according to laws inscribed in the very being of man and of woman."[66] This principle, which is based upon the nature of marriage and the intimate connection of the goods of marriage, has well-known consequences on the level of responsible parenthood.[67]

"By safeguarding both these essential aspects, the unitive and procreative, the conjugal act preserves in its fullness the sense of true mutual love and its ordination toward man's exalted vocation to parenthood."[68] It is this doctrine concerning the link between the meanings of the conjugal act and between the goods of marriage which throws light on the moral problem of homologous artificial insemination. According to this doctrine, the unitive and procreative aspects are not meant to be separated. In other words, procreation must be the direct result of the conjugal act. It is in and through their bodies that couples consummate their marriage and become father and mother.[69]

When couples resort to homologous artificial insemination, however, the resulting offspring cannot be said to be the direct result of the couple's conjugal act as medical intervention had to take place. This very same argument can be raised against postmortem insemination, it being a species of homologous artificial insemination. Nevertheless, such ethical concerns are not enough to override the constitutional right of a married couple to beget children, whether through natural means or through medical or biotechnological intervention.

[63] *Id.* at 225.

[64] Family Code of the Philippines, art. 149.

[65] Family Code of the Philippines, art. 1.

[66] HULL, *supra* note 31, at 29, *citing* Pope Paul VI, Encyclical Letter *Humanae Vitae*, no. 12; AAS 60 488-489 (1968).

[67] HULL, *supra* note 31, at 29.

[68] *Id.* at 30.

[69] *Id.*

C. State Interest For Restricting the Use Of Postmortem Insemination

It has always been the policy of the State to recognize the sanctity of family life.[70] The State has always been concerned with promoting the rights of the traditional family, that is, a family composed of the father, mother, and their children. Various laws have been passed protecting and regulating the rights of the family, most especially the rights of the children.

A possible state interest for restricting the use of postmortem insemination is that the procedure is representative of future reproductive technology that, if allowed to continue, "may lead down a slippery slope to complete genetic and technical control of humans."[71] This argument has been called "the slippery slope argument." To some, posthumous insemination crosses a line toward the dangerous practices created by certain new technologies.[72] And as expected, many are still not open to the idea of "tampering with nature" especially when what is at stake is human life. Nevertheless, as mentioned earlier, there is a fundamental right of every individual to beget children. It has also been said that it is safe to assume that procreative liberty covers the right to noncoital reproduction. The "slippery slope argument" cannot override this basic right.

Assuming that the government interest in creating restrictions to noncoital reproduction in general is compelling enough to override the constitutional concerns, each reproductive technique still has to be considered on its own merit and not prohibited simply because other types of reproductive technologies may have dangerous consequences. To enact a blanket prohibition would deprive a person of his or her constitutionally protected right to procreate noncoitally even though the exercise of this right would not involve any of the state's anticipated dangers — a violation of due process.[73]

A second state interest is the protection of the child.[74] There is the fear that the child might suffer certain negative effects when the child discovers that he or she was conceived by a dead man. This might cause some kind of trauma on such child. This is mere speculation and like the slippery slope argument, it is only an anticipated danger. Moreover, the fact that the child was brought into this world, albeit by artificial means, is still better than the child never having been born at all. Besides, once the child is born, he or she shall still be entitled to the same protection given by existing laws to children born naturally. He or she shall be entitled to the same love and care from his or her surviving parents. Thus, concern for the effects which may possibly be caused by the child's discovery of how he or she was conceived is not a sufficiently

[70] PHIL. CONST. art. II, sec. 12.

[71] Gilbert, *supra* note 1, at 544, *citing* John A. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 CAL. L. REV. 1023 (1986).

[72] *Id.* at 545.

[73] *Id.* at 546.

[74] *Id.*

compelling state interest to prohibit posthumous insemination. This is because without the said process, the child would not even exist.[75]

Finally, there is the state interest that the decision to have the dead man's child may not be a well thought-out one since the woman is probably still going through the grieving process (because of her husband's death) and thus, not thinking rationally. This is not a convincing reason to justify state intervention. Prohibiting posthumous insemination based on this ground would certainly be a violation of equal protection. For even if the woman's decision to bear her deceased husband's child were not sufficiently thought through, neither are the many occurrences when women or teenagers accidentally become pregnant through intercourse.[76]

In sum, the above-mentioned arguments for justifying state prohibition of posthumous insemination must fail. The arguments are mostly based on speculation and fears which, although not totally groundless, may be avoided through proper state legislation. The state may not totally prohibit the use of postmortem insemination; but as the guardian of the family and more especially, of the child, the state may regulate its use through legislation to ensure that the well-being of the resulting child is promoted. A proposal of such state legislation will be given later.

Also, it cannot be denied that government intervention in the area of reproductive decision-making may be needed, for the protection of the interests of women as a group. As pointed out by one writer:

> Policy decisions may have to be made in the reproductive area which will contradict or expand in a new direction current feminist ideology on reproductive freedom. We have a responsibility, not just to women who want children and who may be infertile, but to the generations of people who will be the results of the use of new technology. To retain control over human experimentation, women may have to consider state intervention of some kind in the areas of research funding, research application and reproductive rights—with all its inherent dangers...We may have to call for an end to research which would have helped infertile women to conceive, in consideration of the danger to women as a social group of loss of control over 'natural' childbearing.[77]

[75] *Id.* at 547.

[76] *Id.*

[77] Norma Juliet Wikler, *Society's Response to the New Reproductive Technologies: The Feminist Perspective*, 59 SOUTHERN CALIF. L. REV. 1043, 1051 (1986), *citing* R. Rowland, *Motherhood, Patriarchal Power, Alienation and the Issue of "Choice" in Sex Preselection* 14 (Apr. 1984) at 17.

VI. THE RIGHT OF A MAN TO BEQUEATH HIS SPERM: IS SPERM PROPERTY OR LIFE?

The question of a married couple's right to procreate and to resort to artificial means of reproduction having been answered, the next issue which must be taken up is the right of a man to bequeath his sperm to his wife.

Whether a man has a right to bequeath or to donate his sperm depends on the manner in which a man's sperm is to be categorized. If sperm is to be considered as property, then a man has a right to do whatever he wants with it, subject to the laws regulating the use of property. Another way of categorizing sperm is to classify it as human biological material (such as an organ, human tissues, anatomical human remains or infectious waste) over which the person from whom it is drawn has no ownership or possessory interest once it leaves his body.[78] Still another option is to view sperm as a unique kind of property because of its potential for human life.[79] The man from whom it is drawn retains ownership and possessory interest over the sperm.[80] Such classification empowers the sperm depositor with primary decision-making authority in the use of his sperm for reproduction, consistent with a person's liberty to procreate or to avoid procreation.[81] Present sperm bank policy regarding anonymous donors coincides with the view of sperm as a unique type of property; that donors are required to waive their rights to the sperm is an acknowledgment by the sperm banks that the donor indeed owns his sperm.[82]

The sperm depositor should indeed retain an ownership interest in the sperm when he is alive. After his death, however, if he had ownership interest in the sperm, a woman would only be entitled to use it for postmortem insemination if the decedent bequeathed it to her or if she were the beneficiary of the estate of which it would become a part. Because of the sperm's potential for human life, the woman requesting the use of the sperm to procreate should, in some cases, be granted her request even if she does not have a property interest in the sperm. Therefore, consistent with the view of sperm as a unique type of property, the sperm donor, while still living, should have an ownership interest in the sperm, since he will be alive to bear the consequences of it use.

When the sperm depositor is dead, the sperm's unique characteristics, and its potential for human life, combined with the woman's right to procreate, should sometimes override the decedent's property interest in the sperm. Consequently, a request to use the sperm for postmortem insemination should sometimes be entertained even when the woman does not "own" the sperm. This way, the potential for human life will be realized and, at the same time, the decedent will not be adversely affected.[83]

[78] Gilbert, *supra* note 1, at 547.

[79] *Id.* at 548.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 549.

In our jurisdiction, property is defined as anything which may be the object of appropriation.[84] The Civil Code of the Philippines classifies property as real[85] or personal.[86] The issue of which classification of property the sperm belongs has never been addressed by our courts. As in other countries, Philippine courts still find the prospect of interest in the human body taboo. In the United States, some judges fear body substance property could engender a black market for body parts.[87] The same may be said by our own judges because treating the body as property has always been against our public policy.

In the United States, however, the issue of whether sperm should be considered as property has already been addressed by the courts. Their decisions on this aspect are not binding on us nor may they be of much persuasion, but a study of them may shed light on the matter and the logic of said decisions may be of significance to us.

In the Hechtcase, the Court first addressed the issue of recognizing property rights in sperm.[88] Years before the Hecht case was decided, however, there had been decisions suggesting that sperm was not subject to property rights.

A. Moore v. Regents of the University of California [89]

This case did not involved sperm but spleen cells; however, the property issues involved in *Hecht* and this case are similar.

The plaintiff, John Moore, underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). After hospitalizing Moore and extracting extensive amounts of blood, bone marrow aspirate, and other bodily substances, Dr. David W. Golde (Golde), one of the defendants, confirmed his diagnosis. Golde recommended Moore's spleen be removed as part of his treatment. Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy. With Moore's spleen cells, Golde was able to establish a cell line over which the Regents of the University of California applied for a patent, listing Golde as one of the inventors. This cell line became a billion-dollar "business." Moore sued Golde and others for conversion of his spleen cells. The California Court of Appeals found that Moore retained a property interest in his cells, and he therefore could state a claim for conversion of the cells. The California Supreme Court reversed this decision saying Moore did not retain a property interest in his cells and could only state a claim for breach of informed

[84] Civil Code of the Philippines, art. 414.

[85] Civil Code of the Philippines, art. 415.

[86] Civil Code of the Philippines, art. 416.

[87] Jennifer Long Collins, *Hecht v. Superior Court: Recognizing a Property Right in Reproductive Material*, 33 UNIV. OF LOUISVILLE J. OF FAMILY LAW 661, 663 (1994-95)[hereinafter Collins].

[88] *Id.* at 662.

[89] 271 Cal. Rptr. 146 (Cal. 1990).

consent (since his physicians did not inform him that his cells were being used for research). The Court therein held:

> Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological material as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property...[90]

> Lacking direct authority for importing the law of conversion into this context, Moore, relies, as did the Court of Appeal, primarily on decisions addressing privacy rights. One line of cases involves unwanted publicity...[91] These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law.[92]

In the end, the majority cited three reasons for refusing to extend the conversion theory to Moore's situation: (1) the policy interest in encouraging medical research and development; (2) the legislature is better suited to address the scope of property rights in the human body; and (3) the tort of conversion is not necessary to protect the patient's rights.

B. York v. Jones[93]

Before the *Hecht* decision, *York v. Jones* was the only decision which recognized a property right in human cells. Although this case involved the question of property interest in a frozen embryo, the decision may still be used by analogy in addressing the question of property interest in sperm.

Plaintiffs, Steven York and Risa Adler-York were the progenitors of the cryopreserved human pre-zygote at issue in this case. Plaintiffs were married in 1983 and had been attempting to achieve a pregnancy since 1984. Because of damage to Mrs. York's remaining fallopian tube, the Yorks were unable to achieve a pregnancy through normal coital reproduction. They were advised that through *in vitro* fertilization, they would be able to become the parents of their own genetic child. Thus, the Yorks were accepted into the IVF program at the Jones Institute in Norfolk, Virginia, which, later on, housed their frozen embryo. At the time the Yorks entered the IVF program in Norfolk, they were residents of New Jersey. During the course of treatment, the Yorks moved to California. They asked the Jones Institute to transfer the frozen embryo to a hospital in California. There, another doctor was to thaw the

90 Id. at 156.

91 Cases cited were Lugosi v. Universal Pictures, 25 Cal. 3d 813, Cal. Rptr. 323, 603 P.2d 425 (1979) and Motschenbacher v. R.J. Reynolds Tobacco Company (9th Cir.) 498 F.2d 821(1974) [interpreting Cal. law].

92 *Id.* at 156-7.

93 717 F. Supp. 421 (E.D. Va. 1989).

embryo and insert it in Mrs. York's uterus by *in vitro* fertilization. The Jones Institute refused to send the embryo to California, claiming the Yorks' contract precluded transfer.

The court held that the Cryopreservation Agreement entered into by the Yorks, and the Jones Institute, created a bailor-bailee relationship between the plaintiffs and defendants. In finding a bailment relationship existing between the Yorks and the Jones Institute, the Court impliedly found that the Yorks had property in the embryo. The Court relied on the Cryopreservation Agreement, which referred to the embryo as property. The Court stated:

> The Court begins its analysis by noting that the Cryopreservation Agreement created a bailor-bailee relationship between the plaintiffs and defendants... [A]ll that is needed "is the element of lawful possession however created, and duty to account for the thing as the *property* of another that creates the bailment..." The obligation to return the property is implied from the fact of lawful possession of the *personal property* of another.[94]

> In the instant case, the requisite elements of a bailment relationship are present. It is undisputed that the Jones Institutes' possession of the pre-zygote was lawful pursuant to the Cryopreservation Agreement.... Finally, defendants consistently refer to the *pre-zygote as the "property"* of the Yorks in the Cryopreservation Agreement...[95]

> The defendants have further defined the limits of their possessory interest by recognizing the *plaintiff's proprietary rights in the pre-zygote.* The Agreement repeatedly refers to "our pre-zygote," and explicitly provides that in the event of a divorce, the *legal ownership of the pre-zygote "must be determined in a property settlement"* by a court of competent jurisdiction. The Agreement further provides that the plaintiffs have "the principal responsibility to decide the disposition of the pre-zygote and that the pre-zygote will not be released from storage without the written consent of both plaintiffs..." [D]efendants fully recognize plaintiff's property rights in the pre-zygote and have limited their rights as bailee to exercise dominion and control over the pre-zygote. (emphasis supplied)[96]

Furthermore, the court found support in an American Fertility Society report, which stated that in an *in vitro* fertilization situation, gametes and concepti are the property of the donors. Said report further stated that the donors have the right to decide at their sole discretion the disposition of these items, provided such disposition is within medical and ethical guidelines as outlined in the same report.[97]

The embryo in this case was considered as property; however, three years after this decision, another case was decided differently.

94 *Id.* at 425.

95 *Id.*

96 *Id.*

97 *Id.* at 426 n5.

C. Davis v. Davis[98]

The case began as a divorce action wherein a Tennessee couple fought over custody of seven frozen embryos created from the couple's reproductive cells. Mrs. Davis wanted the embryos so a doctor could implant them in her uterus. Mr. Davis, not ready to parent a child, wanted the embryos left frozen.

The Tennessee Supreme Court rejected the *York* court's suggestion that the frozen embryo's are subject to property rights. Specifically, the *Davis* Court criticized the *York* court for assuming that the Yorks had property in the embryo. The *Davis* Court found that embryos are neither life nor property, but their legal status lay somewhere in between. In so holding, the Tennessee Supreme Court relied on The American Fertility Society's ethical standards.

Specifically, the Ethics Committee of The American Fertility Society defined the following ethical positions on the status of embryos: (1) the pre-embryo is a human subject after fertilization and must be afforded the rights of a person; (2) the pre-embryo has the same status as all other human tissue, and subject to the consent of those who have decision-making authority over the pre-embryo, no limitations should be placed on actions taken with pre-embryos; (3) the pre-embryo deserves greater respect than that accorded to human tissue, but not the degree of respect given to actual persons. The *Davis* Court found the intermediate position persuasive and concluded that "pre-embryos are not strictly speaking either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life."

The Court further held that while the Davises did not have a "true property interest" in the embryos, they do have an interest in the nature of ownership to the extent that they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law. *Davis* did not address the legal status of gametes individually, but only addressed the legal status of the embryo.

Thus, before *Hecht*, the state of the law suggested that human tissue and sperm are not property and cannot be the subject of a claim based on the interference with property rights.

D. Hecht v. Superior Court[99]

In finding that a property right exists in sperm, the *Hecht* Court relied on *Davis* and distinguished *Moore* on its facts and procedural posture. Interestingly, the *Hecht* court did not rely on *York*, the only case to hold that individuals may retain property rights in their cells.

[98] Collins, *supra* note 87, at 666, *discussing* Davis v. Davis, 842 S.W. 2d 588 (Tenn. 1992).

[99] *Id.* at 669, *discussing* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct.App1993).

In *Hecht*, Kane's children contended the *Moore* decision barred the court from recognizing a property right in sperm and required the court to order Kane's sperm destroyed. However, the court distinguished *Moore*, reasoning that while Moore could not expect to retain a property interest in his cells after they were excised from his body, Kane retained an interest in his sperm. The court relied on Kane's contract with the sperm bank, which provided for the release of his sperm to Hecht after his death. The court found the contract evidenced Kane's intent to retain control of his sperm after he deposited the sperm in the bank.

The court also noted that while none of the laws on artificial insemination address the issue of who owns sperm, sperm banks generally treat sperm as property. They also acknowledged the American Fertility Society's position that gametes and concepti are property of the donors. Reliance was also placed on the *Davis* decision. An analogy was made by the court between sperm and frozen embryos and it found that sperm stored for the purpose of artificial insemination is "unlike other human tissue because it is 'gametic material' that can be used for reproduction." Furthermore, the court reasoned that the value of sperm lies in its potential to create a child after fertilization, growth, and birth. It concluded that when Kane died, he had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction.

The court also examined the definition of property in California and found that Kane's interest "in the nature of ownership" fit into California's definition of property. That definition states that property is "anything that may be the subject of ownership and includes both real and personal property and any interest therein." The court concluded that Kane's sperm was part of his estate and the probate court had jurisdiction regarding the disposition of the sperm.

Analyzing the above-quoted decisions, it can thus be said that there is logic in conferring human sperm the categorization of property. However, since sperm may also be considered as lying somewhere in between life and property in the sense that it has a potential for human life, the use of sperm must also be regulated. Just because a person (particularly male) has proprietary interest in his own sperm, this should not give him unwarranted use of the same.

The discussion of treating sperm as property leads us to the conclusion that our existing property law may not be strictly applied to human sperm, as well as to other human biological materials. Property law is imbued with certain attributes that make its application to discoveries in the field of biotechnological research in the human body questionable.[100] This is because those who participate in property discourse treat goods which are considered as property primarily as market goods. Thus, property, in a broad sense, is understood to include everything of

[100] Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167, 1171 (1995).

pecuniary value to its possessor.[101] The human body and its component parts, including human sperm, are not market goods. Strictly speaking, human sperm cannot, be valued like other kinds of property. Because of its potential for human life, human sperm cannot be indiscriminately disposed of by the donor despite his interest in it as owner. This then brings us back to the point of allowing the government some form of regulation, not total restriction, in the application of postmortem insemination. This may be done through proper legislation.

VII. OTHER IMPORTANT ISSUES WHICH MUST BE ADDRESSED

A. The Question of Status: Is The Child Legitimate or Illegitimate?

Should a child conceived and born through postmortem insemination be considered legitimate or illegitimate?

Article 164 of the Family Code of the Philippines provides that children conceived or born during the marriage of the parents are legitimate. For a child to be considered as legitimate, he must at the very least be either born during the marriage of his parents even though conceived before the marriage, or conceived during such marriage even though born after the termination of the marriage. The problem concerning the status of the child resulting from postmortem insemination stems from the fact that said child is conceived and born after the death of his father—meaning, after the termination of the marriage of his parents.

According to Article 165 of the Family Code, children conceived and born outside a valid marriage are illegitimate, *unless otherwise provided in this Code* (emphasis supplied). The Family Code itself provides for exceptions to the rule that children conceived and born outside a valid marriage are illegitimate.

Under Article 54 of the Family Code, children conceived or born before the judgment of annulment or absolute nullity of the marriage (where the ground for voiding the same is the psychological incapacity of one spouse to perform his or her marital obligation) has become final and executory shall be considered legitimate. Also, under the same Article 54, children born out of a subsequent void marriage due to the contracting parties' failure to comply with the mandatory provisions of Articles 52 and 53 of the Family Code shall likewise be considered legitimate. It is clear therefore that unless considered otherwise as an express exception by law, a child born outside a lawful wedlock shall be illegitimate.[102]

Does this mean, then, that since the Family Code does not provide as one of the exceptions the case of the posthumously-conceived child, said child should be considered outright as illegitimate? A strict application of the Family Code yields an affirmative answer. However, wouldn't this be unfair and unreasonable considering that the child was the product of the union of the sex cells of two persons who were previously married?

[101] FEDERICO B. MORENO, PHILIPPINE LAW DICTIONARY, 756 (1988).

[102] MELENCIO STA. MARIA, FAMILY RELATIONS LAW, 192 (1991).

Neither does the second paragraph of Article 164 of the Family Code, which addresses the situation involving artificial insemination provide a fair and reasonable answer. Said provision states that:

> ART. 164 Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.

Basically, a child born through artificial insemination is considered by our law as legitimate for as long as the above-mentioned conditions are met.

While it is true that there are moral and religious objections to artificial insemination, it serves no purpose whatsoever to stigmatize as a bastard a child, produced through artificial insemination (especially using the semen of a donor other than the husband) with the full consent of the husband and wife, or to compel the parents formally to adopt in order to confer upon such child the status and privilege of the rights of a legitimate child. Moreover, since there is consent by the husband, there is no marital infidelity.[103]

Following this logic, there seems to be no reason to stigmatize as illegitimate, a child born as a result of postmortem insemination considering that it is the sperm of the husband that is used on the wife. Clearly, there can be no marital infidelity.

The problem, however, is not that easily settled. A reading of the Minutes of the Joint Meeting of the Civil Code and Family Law Committees shows that the intent of the law was to address the status of a child artificially inseminated during the lifetime of both its father and mother. During the deliberations, there was much debate on how the second paragraph of Article 164 should be worded. At one point, Professor Bautista suggested that to be consistent with the first paragraph (of Art. 164), the second paragraph should be modified to read "children conceived or born during the marriage with the sperm..."[104] Justice Puno opined that "conceived" is all right since it is with reference to 'sperm.'[105] In this connection, Justice Edgardo Caguioa cited a case of a wife who conceived as a result of artificial insemination, where there is consent of both husband and wife, but during the pendency of the pregnancy, they divorced or the husband died.[106] Nevertheless, this point was not further elaborated on. The debate was focused on the status of the child who is a result of artificial insemination with the sperm of a donor– whether it would be better to change the word "or" between husband and donor to "and." None of the points brought up directly addressed tha situation wherein the artificial insemination is done after the death of the husband but still using his sperm.

[103] *Id.* at 193.

[104] MINUTES OF THE JOINT MEETING OF THE CIVIL CODE AND FAMILY CODE COMMITTEES 4 (27 July 1985).

[105] *Id.*

[106] *Id.*

It can be inferred, that the main reason the issue of postmortem insemination was not brought up was that there had not yet been such a case in the Philippines. It was for the same reason that *in-vitro* fertilization and implantation was excluded from the coverage of the provision. During the deliberations, Justice Puno suggested that, to clarify that they are excluding *in-vitro* fertilization and implantation, the phrase "of the wife" should be inserted between "artificial insemination" and "with the sperm."[107] This suggestion was approved by the Commmittee. Therefore, it can be safely inferred that the provision was meant to refer strictly to artificial insemination, that is, insemination with the sperm of the husband or of a donor other than the husband, done during the lifetime of both the husband and the wife, and with their written consent.

That the child conceived during postmortem insemination should be considered illegitimate under the present law is further emphasized by Article 169 of the Family Code, which provides: "The legitimacy of a child born after three hundred days following the termination of the marriage shall be proved by whoever alleges such legitimacy or illegitimacy".

In other words, even if the child was born of the union of two persons who were validly married, if the child was born after three hundred days following the termination of the marriage–by death, annulment of marriage, declaration of nullity of marriage, or legal separation–said child shall not enjoy the presumption of legitimacy. The absence of a presumption of legitimacy can be explained as follows:

> Ordinarily, a woman carries a child approximately between 270 to 280 days after its conception. Generally, experience shows that the longest period of gestation is 300 days. However, it is improbable that there can be shorter gestation periods.[108]

> ... In the absence of any subsequent marriage after the termination of thef irst marriage, the father of the child born after 300 days can be anybody. This includes tah husband of the previous marriage as it is not improbable that the gestation period may even extend beyond 300 days. As a matter of fact, there have been cases where the gestation period reached 330 days.[109]

A posthumously-conceived child, on the other hand, is born and conceived outside the 300 day period. As such, the child cannot even avail of Article 169. He cannot even prove that he is legitimate simply because under the law, he is not.

It is apparent that our present law's answer to the question of the posthumously-conceived child's status is that there is no other choice but to treat said child as illegitimate, notwithstanding the circumstances of the case. Although the law provides an answer to the issue of legal status, it is still unable to settle the controversy. An application of the law leaves us with an obviously unfair and questionable

[107] *Id.* at 5.

[108] STA. MARIA, *supra* note 102, at 201.

[109] *Id.* at 210, *citing* Ousley v. Ousley, 261 SW 2d 817.

situation. Clearly, the child is still the biological child of his father and mother, the only difference being the fact that the child was conceived and born after his father's death, thereby making him illegitimate.

However, it must be noted that, as mentioned earlier, the law itself provides for certain exceptions to the rule that a child conceived and born outside a valid marriage is illegitimate. The case of postmortem insemination is not one of them. This omission can be explained by the fact that as shown earlier, the Committee that drafted the Family Code did not contemplate such a situation. The framers of the law were probably not aware of the possibility of postmortem insemination. But at present, the idea of postmortem insemination being practiced in the Philippines is no longer a remote possibility. There is no reason why our law should not be re-examined and its insufficiency supplied accordingly.

B. The Inheritance Issue

The issue regarding the posthumously-conceived child's status is closely related to that concerning the child's inheritance rights. Under the law, a child of a decedent will certainly inherit from the decedent's estate, whether by testacy or intestacy. In other words, whether said decedent leaves a will or institutes said child as an heir, devisee or legatee, the child's right to inherit cannot be overlooked. The law mandates that in the absence of any of the grounds for disinheritance or unworthiness, that child must and will inherit. Whether legitimate or illegitimate, a child of the decedent shall be entitled to at least his legitime.

It seems logical to conclude that the posthumously–conceived child has the right to inherit and that the remaining issue to be addressed is the manner or capacity (whether as legitimate or illegitimate) in which the child is to inherit. But the situation is not that simple.

Before tackling the issue of the manner in which the child is to inherit and before explaining why it would be unfair to allow him to inherit as an illegitimate child, it is important to determine whether under our present law, a posthumously–concieved child *conceived after the death of his father* is capacitated to inherit from his father's estate.

The pertinent provision in the Civil Code yields a negative answer. Said provision reads:

> ART. 1025. In order to be capacitated to inherit, the heir, devisee or legatee *must be living at the moment the succession opens*, except in case of representation, when it is proper.
>
> A child *already conceived at the time of the death of the decedent* is capable of succeeding provided it be born later under conditions prescribed in article 41. *(emphasis supplied)*

According to Article 777 of the same Code, "The rights to the succession are transmitted from the moment of the death of the decedent." In other words, succession opens at the moment of the death of the person whose succession is in issue.

Under the law, the posthumously–concieved child, having been conceived after the death of his father, is incapacitated to inherit whether testate or intestate. On this point alone, unfairness results since in such a situation, a biological child is being denied the right to inherit from his father's estate.

It must be remembered that the Civil Code took effect in 1950. It is safe to assume that the Civil Code was drafted at a time when postmortem insemination could not have been contemplated by the legislators. It is thus apparent that this provision of the Civil Code has to be amended to accommodate the situation of the posthumously–concieved child as an exception to the general rule that in order for a person to be able to inherit, whether as an heir, legatee or devisee, he must at least be conceived at the moment of the decedent's death.

Nevertheless, amending the said provision of the Civil Code accordingly (without amending the Family Code) will not totally resolve the controversy. Assuming that the law is amended to allow the child to inherit, there is still the question of the manner by which said child should inherit. In fact, if Family Code is to be applied strictly, the posthumously–concieved child shall be accorded the status of an illegitimate. Consequently, said child shall inherit as an illegitimate child.

While the present trend in the area of law-making is to protect the rights of children, the stigma attached to the status of an illegitimate child has not yet been removed. Our present civil law grants more successional rights to legitimate children.

Article 886 of the Civil Code of the Philippines enumerates those who are considered compulsory heirs, namely:

(1) Legitimate children and descendants, with respect to their legitimate parents and ascendants;
(2) In default of the foregoing, legitimate parents and ascendants, with respect to their legitimate children and descendants;
(3) The widow or widower;
(4) Acknowledged natural children, and children by legal fiction;
(5) Other illegitimate children referred to in Article 287.

Under the Family Code, however, the distinction between the different classes of illegitimate children has been removed, thus leaving only two classes of children: legitimate and illegitimate.

The legitime of legitimate children consists of one-half of the hereditary estate of the father and mother.[110] On the other hand, the legitime of each illegitimate child consists of one-half of the legitime of a legitimate child.[111] Therefore, the legitime to which the posthumous child is entitled depends on the status conferred on him. It will also determine how the said child will inherit from his deceased father in case the latter dies without a will or if he leaves a void one.

Under the provisions on intestate succession, both legitimate and illegitimate children shall succeed to the estate of the deceased parent. They succeed in different proportions, depending on whether they concur with other intestate heirs and also on who these other concurring intestate heirs are. The difference in successional rights of legitimate and illegitimate children can be basically seen in article 983 of the Civil Code which provides that "if illegitimate children survive with legitimate children, the shares of the former shall be in the proportions prescribed by article 895." Article 895 of the Civil Code has been replaced by article 176 of the Family Code which, as mentioned earlier, provides that the illegitimate child will get one-half the share of a legitimate child.

Determining the status of the posthumous child becomes more significant in the light of article 992 of the New Civil Code, which provides:

> An illegitimate child has no right to inherit ab intestato from the legitimate children and relatives of his father or mother; nor shall such children or relatives inherit in the same manner from the illegitimate child.

Applying this provision to the case of the posthumous child, if the child would be considered as a legitimate child of his deceased biological father, notwithstanding the fact that he was conceived after the termination of the marriage of his parents, then said child would still be able to inherit from his father's legitimate relatives. On the other hand, if said child be considered illegitimate, being born outside a valid marriage, strictly speaking, the child would be barred from inheriting from his father's legitimate relatives notwithstanding the fact that said child is the biological child of said father who was validly married to his mother. Moreover, the posthumously–concieved child is definitely a blood relative of his father's legitimate relatives. Yet, the child is barred from inheriting from them by intestacy and vice-versa. Again, unfairness results because of the peculiar circumstances of postmortem insemination and the insufficiency of our laws in addressing the same.

[110] Civil Code of the Philippines, art. 888.

[111] Family Code of the Philippines, art. 176.

VIII. POSSIBLE SOLUTIONS TO POSTMORTEM INSEMINATION-RELATED ISSUES

The issues concerning postmortem insemination may be addressed or resolved in several ways. These solutions can be termed the judicial solution, the human solution and the legislative solution. As will be shown, however, the judicial solution and the human solution may not completely solve the problem, thereby making the need to resort to the legislative solution even more pressing.

A. The Human Solution

The simplest solution would be for a man intending to father children posthumously to explicitly provide for such a child or children in a will. The will could include, in the interest of the finality in the distribution of the estate, a cut-off date before which the birth must occur to receive the inheritance.[112] The provision could also limit the number of occasions of birth (not the number of children since there might be multiple births).[113] However, whether the decedent may bequeath his sperm to a woman other than his wife is a totally different question. For our purposes, the right to bequeath a man's sperm must be limited to his wife. Corollarily, only the widow shall have the right to the decedent's sperm.

Although logical and practical, this solution becomes questionable in light of article 1025 of the Civil Code which, as earlier discussed, incapacitates or prevents a posthumously-conceived child (particularly if conceived after the decedent's death) from inheriting from his deceased father's estate. The human solution will only become a solution after the law has been amended accordingly.

B. The Judicial Solution

One way by which the question regarding the child's status may be settled would be for a court to issue a judiciary decree authorizing the child's right to inherit in cases where the decedent explicitly provided for such a child in a will or where evidence of the decedent's intent to father such a child by his wife exists. In a situation where evidence of intent is lacking, any resulting child should be barred from claiming a part of the decedent's estate. In other words, it permits the child to inherit only when the decedent truly intended to have such a child and assumes that the decedent would have provided for the child had he been able to do so.[114]

Unfortunately, under the present law, the posthumous child does not have the

[112] Gilbert, *supra* note 1, at 556.
[113] *Id.*
[114] *Id.*

capacity to inherit; a decree of the court authorizing otherwise would be tantamount to judicial legislation. Such an act is in derogation of the accepted principle in our jurisdiction that the function of the judiciary is to apply the law and execute it faithfully. Again, only an amendment of the present law will permit resort to this judicial solution.

C. The Legislative Solution

Evidently, Philippine laws are insufficient to answer several issues related to post-mortem insemination. Application of these laws would result in an unjust situation.

One solution would be for the legislature to enact a law specifically addressing these issues. Regarding the status and inheritance rights of the child, the legislature could enact legislation stating that a child conceived posthumously will not be treated as the child of the deceased man, thereby precluding the child's inheritance from the decedent, unless the child is instituted in the will by the decedent himself. This would put an end to the confusion of the child's inheritance rights. This would contradict, however, the present trend of recognizing, rather than denying blood relationships.[115] Such a statute may be attacked on constitutional grounds since it could be argued that it violates the equal protection clause. Lastly, to deny the posthumously-conceived child the right to inherit from his biological father would be detrimental to the child's best interests which are protected by the state.

The legislature could also enact a statute recognizing the child as that of the decedent so long as the insemination occurs within a specified period after the man's death.[116]

The legislature can pass laws to address the different issues of postmortem insemination which may differ from state to state, or from country to country, depending on the public policy and culture of the legislating jurisdiction.

In our jurisdiction, there seems to be no need to enact a new law because of the presence of the Family Code. What needs to be done is to amend the Code in order to fairly address the issue of postmortem insemination, more particularly the question of status. With regard to the inheritance issue, the Civil Code may be amended accordingly to allow the posthumously-conceived child to inherit, whether by will or intestacy.

[115] *Id.*
[116] *Id.* at 557.

IX. PROPOSAL FOR LEGISLATION REGULATING POSTMORTEM INSEMINATION IN THE PHILIPPINES

Since the only issues concerning postmortem insemination which seem to remain unresolved are those concerning the posthumously-conceived child's status and his inheritance or successional rights, the laws which have to be closely examined are the Civil Code and Family Code. While they provide clear-cut answers to these issues, the resulting unfair situation brought about by the application of said laws cannot be justified. Amendments to these laws are in order to remedy this unfair situation.

The Status Issue

For easy reference, the pertinent provisions of the Family Code which need to be amended are the following:

> Article 164. Children conceived or born during the marriage of the parents are legitimate.
>
> Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.
>
> Article 169. The legitimacy or illegitimacy of a child born after three hundred days following the termination of the marriage shall be proved by whoever alleges such legitimacy or illegitimacy.

As an amend amendment of Article 164, the following may be added:

> Children conceived through artificial insemination of the surviving wife with the sperm of the husband after the death of the husband (postmortem insemination) shall be considered legitimate, provided, that there is written consent of the husband to the effect that he intended his sperm to be used for the purpose of conceiving his child subsequent to his death.

Article 164 will thus read as follows:

> Article 164. Children conceived or born during the marriage of the parents are legitimate.
>
> Children conceived as a result of artificial insemination of the wife with the sperm of the husband or that of a donor or both are likewise legitimate children of the husband and his wife, provided, that both of them authorized or ratified such insemination in a written instrument executed and signed by them before the birth of the child. The instrument shall be recorded in the civil registry together with the birth certificate of the child.
>
> Children conceived through artificial insemination of the surviving wife with the sperm of the husband after the death of the husband (postmortem insemination) shall be considered legitimate, provided, that there is written consent of the husband to the effect that he intended his sperm to be used for the purpose of conceiving his child subsequent to his death.

Under the proposed provision, before the child conceived as a result of postmortem insemination may be considered as legitimate, the following conditions must be present:

1) The artificial insemination must be done with the sperm of the husband and not of any other donor;
2) The insemination must be done on the surviving wife;
3) There must be written consent of the husband to the effect that his sperm be used for that purpose. Compliance with this requisite may be in the form of a will validly executed;
4) The insemination is done after the death of the husband.

Moreover, a new provision, Article 169-A may be added:

> Article 169-A. The previous article shall not apply to children conceived and born as a result of postmortem insemination who shall be considered legitimate, provided, that the conditions set forth under Article 164 are present.

The resulting provisions would thus be read as follows:

> Article 169. The legitimacy or illegitimacy of a child born after three hundred days following the termination of the marriage shall be proved by whoever alleges such legitimacy or illegitimacy.
>
> Article 169-A *The previous article shall not apply to children conceived and born as a result of postmortem insemination who shall be considered legitimate, provided, that the conditions set forth under Article 164 are present.*

As long as all the requisites above-mentioned are present, then the child conceived as a result of posthumous insemination shall be considered legitimate notwithstanding his birth outside the three hundred day-period, without proof other than the written consent of the husband referred to earlier.

The Inheritance Issue.

For easy reference, the provisions of the Civil Code which needs to be amended is as follows:

> Art. 1025. In order to be capacitated to inherit, the heir, devisee or legatee must be living at the moment the succession opens, except in case of representation, when it is proper.
>
> A child already conceived at the time of the death of the decedent is capable of succeeding provided it be born later under the conditions prescribed in article 41.

As an amendment, the case of a child conceived through postmortem insemination shall be provided as an exception. The amended provision should, therefore, read as follows:

> Art. 1025. In order to be capacitated to inherit, the heir, devisee or legatee must be living at the moment the succession opens, except in case of representation, when it is proper, and *in the case of a child conceived through postmortem insemination.*
>
> A child already conceived at time of the death of the decedent is capable of succeeding provided it be born later under the conditions prescribed in article 41.

With the proposed amendments to both the Family Code and the Civil Code, the unjust situation is remedied. The posthumously-conceived child can now be conferred legitimate status with all the corresponding rights granted by law to legitimate children, including the right to inherit.

X. CONCLUSION

Through the years, advances in science and medical technology have opened new possibilities. The advent of a scientific breakthrough known as artificial insemination has made it possible for many infertile couples to conceive. They now have the prospect of begetting their own children.

But science abhors limitations. It has taken artificial insemination one step further to what we now know as postmortem insemination. Postmortem insemination as a process is prone to attack on ethical or moral grounds. But as seen earlier, these ethical and moral objections cannot override the fundamental liberty of a married couple to procreate. The right and obligation to procreate includes the right to decide by what means procreation shall be done.

Postmortem insemination is yet to be introduced in the Philippines possibly in the near future. Philippine laws, particularly our laws on family relations and succession, are not ready to face certain consequences of postmortem insemination fairly. Postmortem insemination is imbued with peculiar circumstances which our present laws do not contemplate. Therefore, it would be best to equip our legal system as early as now so that in the event that the postmortem insemination is introduced in our jurisdiction, whatever issues would be brought by the use of such a procedure would become easily answerable by mere reference to our laws. A more importantly, so that a reference to our laws may not work injustice to the posthumously-conceived child.