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Review Article

Posthumous Reproduction and the Rights of the Deceased

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ABSTRACT

Posthumous reproduction -- the retrieval and use of gametes or the transfer of embryos after the death of one intended parent -- raises questions that ordinary bioethical frameworks for consent were not designed to answer.

This review surveys the clinical and ethical debate over whether meaningful consent to posthumous parenthood is possible without an explicit prior directive, including the competing arguments for and against a presumption of consent in its absence.

It then examines how legal systems in the United States, United Kingdom, and Israel have handled the resulting questions of parentage and inheritance, a body of law that has developed unevenly and largely in reaction to individual court cases rather than through deliberate policymaking.

Comparative and religious perspectives, particularly the rapid expansion of practice in Israel, illustrate how cultural assumptions about family and lineage shape what counts as an acceptable basis for proceeding.

We conclude that explicit advance consent remains the least ethically contested basis for posthumous reproduction, and that the range of institutional and legal safeguards developed in its absence reflects an ongoing effort to manage a decision that ideally would involve the person most affected.

Keywords: posthumous reproduction; reproductive autonomy; informed consent; assisted reproduction law; bioethics

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INTRODUCTION

A man dies suddenly, and within hours his parents or his widow are asking a hospital to retrieve his sperm before the window for viable extraction closes. There is usually no written directive, no prior conversation

anyone can point to with confidence, and a clinical team that did not sign up to make end-of-life decisions about reproduction. This scenario, once a medical curiosity, now recurs often enough that fertility clinics, ethics committees, and courts across several

jurisdictions have had to develop something like a settled practice around it, even though the underlying ethical question has never been settled at all [1,2]. Posthumous reproduction -- the retrieval and use of gametes, or the transfer of embryos, after one member of the couple who created them has died -- sits at the intersection of reproductive autonomy, family grief, and a legal system built mostly around the living.

The central puzzle is deceptively simple to state and difficult to resolve: can a person meaningfully consent, in advance, to becoming a parent after death, and if they did not, does anyone else -- a surviving spouse, a parent, a court -- have standing to decide on their behalf? The American Society for Reproductive Medicine's ethics committee has revisited this question repeatedly since the 1990s precisely because clinical demand has outpaced consensus, and its most recent guidance still treats explicit advance consent as the ethical gold standard while acknowledging that most requests arrive without it [3]. What follows examines how the field has tried to build a workable ethics and law around requests that, by definition, come from people who cannot be consulted at the moment the decision has to be made.

THE CONSENT PROBLEM: DECIDING FOR SOMEONE WHO CANNOT BE ASKED

Posthumous sperm retrieval requests typically arrive in an emergency room within hours of an unexpected death, when viable sperm can still be recovered, and almost never with a signed directive from the deceased addressing the question [4]. Clinicians are asked, in effect, to infer a dead man's reproductive wishes from secondhand testimony offered by grieving relatives under enormous time pressure -- precisely the conditions least suited to careful ethical deliberation. A recent comprehensive review of the clinical and ethical literature found that most institutions that have developed a posthumous retrieval policy at all converge on requiring some evidence of the deceased's prior intent, even if that evidence falls short of a formal document, while institutions without any policy tend to make the decision ad hoc, case by case, at the treating physician's discretion [5].

That divergence has prompted some ethicists to argue for a presumption in the other direction. Rather than requiring the deceased to have affirmatively consented, several commentators have defended a "presumed consent" model under which sperm retrieval is permissible unless there is evidence the deceased would have objected, on the reasoning that most men who are asked hypothetically say they would want their partner to be able to have their child, and that requiring an explicit prior statement sets an evidentiary bar most people never think to clear before they die [6]. Critics of this position respond that presumed consent inverts the burden that autonomy-based bioethics is supposed to protect: it treats silence as authorization for one of the most

consequential decisions a person can make, rather than treating the absence of consent as the default that should govern in its place [7]. A parallel debate has emerged over requests initiated not by a spouse but by the deceased's parents seeking genetic grandchildren, which several legal commentators treat as ethically weaker still, since the interest asserted belongs to the parents rather than to anyone who shared reproductive plans with the deceased [8,9].

Recently developed institutional protocols try to split the difference by requiring a documented decision-making process rather than a fixed evidentiary threshold: written consent when available, testimony from multiple family members when it is not, a mandatory waiting period before any retrieved gametes can actually be used, and psychological counseling for the requesting party built into the process rather than treated as optional [10]. These protocols do not resolve the underlying philosophical disagreement about presumed versus explicit consent, but they do at least ensure that a decision this consequential is not made by a single exhausted resident at 3 a.m. without institutional support.

LEGAL RECOGNITION: PARENTAGE, INHERITANCE, AND THE TIMING PROBLEM

Even when gametes are retrieved and successfully used to conceive a child, a second and largely separate legal question arises: is the deceased the child's legal parent, and does the child inherit accordingly? Legal systems built around intestacy statutes generally assume that any child of the deceased was at least conceived, if not born, before the parent died, and posthumously conceived children -- who may be conceived years after a parent's death, once cryopreserved gametes or embryos are eventually used -- fit that assumption poorly [11]. In the United States, this tension reached the Supreme Court in *Astrue v. Capato*, where twins conceived via in vitro fertilization roughly eighteen months after their father's death were denied Social Security survivor benefits because Florida's intestacy law, which the relevant federal statute incorporated by reference, did not recognize children conceived after a parent's death as heirs absent specific conditions the twins did not meet [12]. The decision left the underlying question to state law rather than resolving it nationally, and states have responded with a patchwork of statutes: some require the deceased's written consent to posthumous use plus conception within a defined window (commonly two to three years) for inheritance rights to attach, others remain silent entirely [13].

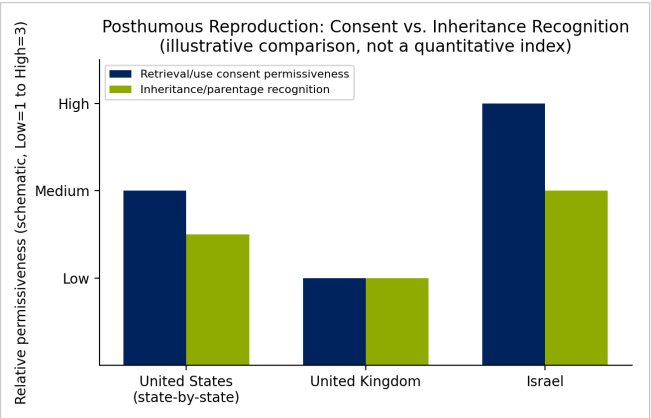
Table 1 summarizes how several jurisdictions have approached the two questions that recur across this literature -- what a legal system requires before allowing posthumous conception at all, and what it further requires before granting the resulting child inheritance or parentage rights. Figure 1 presents the same comparison schematically, plotting relative

permissiveness on consent requirements against relative permissiveness on inheritance recognition; the pattern that emerges is that these two dimensions do not move together; a jurisdiction can be comparatively liberal about retrieval and use while remaining conservative about treating the resulting child as an heir, and vice versa.

Table 1. Comparative approach to posthumous reproduction across three jurisdictions: consent requirements for retrieval/use and recognition of inheritance or parentage for the resulting child.

Jurisdiction	Consent requirement for retrieval/use	Inheritance / parentage recognition
United States (varies by state)	No uniform federal standard; some states require the deceased's prior written consent, others allow family-testimony-based decisions	Generally requires conception within a defined window (often 2-3 years) after death and, in many states, the deceased's written consent, per <i>Astrue v. Capato</i> 's deference to state intestacy law
United Kingdom	Written consent from the deceased obtained before death is required under the Human Fertilisation and Embryology Act framework	A deceased man may be registered as legal father for birth-certificate purposes under narrower conditions, but this does not automatically confer inheritance rights
Israel	Comparatively permissive; courts and the Ministry of Health have processed retrieval requests based on family testimony even absent written consent, particularly after 2023	Case-by-case judicial recognition; no single codified inheritance rule, with courts weighing family testimony and circumstances individually

Figure 1. Schematic, illustrative comparison of relative permissiveness on consent for posthumous retrieval/use versus recognition of inheritance or parentage across three jurisdictions discussed in this review. Values are qualitative assessments drawn from the legal literature, not a quantitative index.



United Kingdom law took a more codified path earlier than most other jurisdictions, after a series of cases -- most prominently the *Diane Blood* litigation in the 1990s and subsequent embryo-specific disputes -- forced Parliament to specify, through the Human

Fertilisation and Embryology Act framework, that posthumous use of sperm or embryos requires the deceased's written consent obtained before death, while separately allowing a deceased man to be registered as a legal father for birth-certificate purposes under narrower conditions that do not automatically confer inheritance rights [14]. That split between "who counts as a legal parent for identity purposes" and "who counts as an heir for property purposes" is itself revealing: it suggests legislators found it easier to extend a symbolic recognition than to extend the material consequences that typically follow from parentage.

COMPARATIVE AND RELIGIOUS PERSPECTIVES

Israel offers the most fully developed body of practice and public debate on posthumous reproduction anywhere, driven in part by a cultural and demographic context in which continuing a bloodline carries particular weight, and in part by a marked rise in requests following the October 2023 attacks and the resulting military casualties, which pushed the country's courts and Ministry of Health to process posthumous retrieval requests at a pace and volume with few international parallels [15]. Even within that permissive environment, empirical surveys have found meaningful ambivalence: one recent study reported that nearly half of Israeli men surveyed opposed the idea of their parents pursuing posthumous sperm retrieval and use without their own prior explicit consent, a finding that complicates any assumption that most people would, if asked, want this outcome for themselves [16]. Rabbinic authorities have engaged with the question through the lens of Jewish law's own frameworks for lineage and mourning, reaching varied conclusions that generally permit retrieval under specified conditions rather than treating the practice as straightforwardly permitted or forbidden [17].

A cross-cultural analysis comparing posthumous reproduction practices and attitudes across several countries found that the ethical weight given to each stakeholder -- the deceased, the surviving partner, the resulting child, and in some cases the deceased's parents -- varies systematically with underlying cultural assumptions about whose reproductive interests a family, rather than an individual, is entitled to pursue, and that gender asymmetries run through nearly every jurisdiction studied, since posthumous retrieval overwhelmingly involves recovering sperm from deceased men rather than eggs or ovarian tissue from deceased women, a difference driven as much by the comparative technical difficulty of the latter as by any explicit legal distinction [18]. Comparative regulatory surveys note that most legal systems that have addressed posthumous reproduction at all have done so reactively, in response to a specific case that reached a court or a legislature, rather than through

deliberate advance policymaking -- which helps explain why the resulting rules are so unevenly developed across otherwise similar jurisdictions [19].

THE DECEASED'S INTERESTS AND THE RESULTING CHILD'S INTERESTS

Underneath the consent and inheritance questions lies a harder philosophical one: does a dead person have interests at all, and if so, can those interests be wronged by decisions made after they can no longer be affected by anything? One influential line of bioethical argument holds that a person can have "critical interests" -- interests in how their life's narrative concludes and in projects they cared about being carried forward -- that survive their death in a morally relevant sense, so that using their gametes against their known wishes, or in a manner inconsistent with the reproductive plans they actually held while alive, can wrong them even though they are no longer present to experience the wrong [20]. This framework gives content to the intuition that consent matters here even though the person whose consent is sought is no longer capable of being harmed in any ordinary sense.

The resulting child's interests receive comparatively less sustained attention in this literature, in part because the child does not exist at the time the central decision is made and therefore cannot be consulted any more than the deceased parent can. What limited scholarship does address the child's position tends to focus on two concerns: whether a child deliberately conceived to be fatherless or motherless from birth is thereby harmed in some way that ordinary single-parenthood by choice is not, and whether the psychological burden of being conceived explicitly as a memorial to a parent, rather than out of an ongoing relationship between two living partners, deserves separate ethical weight [5]. Neither concern has produced anything like a settled answer, and the empirical study of donor-conceived and posthumously-conceived children remains thin relative to the volume of legal and philosophical writing about the adults who request the procedure.

CONCLUSION

Posthumous reproduction forces bioethics to answer questions it usually gets to avoid: what a person's consent can bind after they can no longer revise or withdraw it, whether family members may act as proxies for a decision this intimate, and what obligations, if any, the living owe to interests a dead person can no longer experience being served or frustrated. The clearest point of convergence across the clinical, legal, and philosophical literature reviewed here is that explicit advance consent -- ideally in writing, ideally discussed with a partner rather than inferred by a grieving parent -- remains the least ethically fraught basis for proceeding, even though it is available in only a minority of the cases that actually arise. Everything built on top of that gap --

presumed-consent arguments, institutional waiting periods and counseling requirements, statutory conception windows tied to inheritance, and the uneven recognition different legal systems extend to posthumously conceived children -- represents an attempt to manage a decision that ideally would never need to be made without the person most affected able to weigh in. Until advance-directive practices around fertility preservation and reproductive wishes become as routine as they are rare today, that gap, and the improvised governance built to fill it, are likely to persist.

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Conflict of Interest

The authors declare no conflicts of interest relevant to this work.

Author Contributions

Jakub Ortega conceived the review and drafted the sections on consent and clinical practice. Katarzyna Saez-Bermudez conducted the literature synthesis on legal recognition and inheritance and critically revised the manuscript. Fredrik Larsen contributed the comparative and philosophical sections and provided final approval of the submitted version. All authors read and approved the final manuscript.

Ethics Statement

As a literature review synthesizing previously published, publicly available research, case law, and policy analysis, this article did not involve new data collection from human participants and did not require institutional ethics committee approval.

Data Availability

No new data were generated or analyzed for this review. All sources discussed are cited in the reference list and are publicly available through their respective publishers.

REFERENCES

1. Postmortem parenthood and the need for a protocol with posthumous sperm procurement (2003) Fertility and Sterility, DOI:[10.1016/S0015-0282\(03\)00384-4](https://doi.org/10.1016/S0015-0282(03)00384-4).
2. Posthumous reproduction (2004) Fertility and Sterility, DOI:[10.1016/S0015-0282\(04\)01040-4](https://doi.org/10.1016/S0015-0282(04)01040-4).
3. Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion (2018)

Fertility and Sterility.

4. Postmortem sperm retrieval: an ethical dilemma (2004) The American Journal of Medicine, DOI:[10.1016/S0002-9343\(04\)00170-6](https://doi.org/10.1016/S0002-9343(04)00170-6).
5. Ethical Considerations in Post-Mortem Sperm Retrieval: A Comprehensive Review (2024) PMC, PMID:PMC11152432.
6. A discussion supporting presumed consent for posthumous sperm procurement and conception (2015) Reproductive BioMedicine Online, DOI:[10.1016/j.rbmo.2014.10.005](https://doi.org/10.1016/j.rbmo.2014.10.005).
7. Presuming consent in the ethics of posthumous sperm procurement and conception (2018) PMC, PMID:PMC6001348.
8. The Legal and Medical Ethics of Post-Mortem Sperm Retrieval on Behalf of Grandparents (2020) American Academy of Matrimonial Lawyers Journal, Vol. 33.
9. Post-mortem Sperm Retrieval and Posthumous Grandparenthood (2020) Indian Journal of Medical Ethics / Original Article.
10. Ethical and logistical considerations for the development of institutional posthumous sperm retrieval policies (2025) Journal of Assisted Reproduction and Genetics, DOI:[10.1007/s10815-025-03768-z](https://doi.org/10.1007/s10815-025-03768-z).
11. Inheritance Rights of Posthumously Conceived Children (2012) Connecticut General Assembly Office of Legislative Research, Report 2012-R-0240.
12. Astrue v. Capato (2012) SCOTUSblog, Supreme Court of the United States.
13. Legal Implications of Assisted Reproductive Technologies: Intestacy, Survivorship Claims Post-Mortem, and Frozen Embryo Custody Disputes (2023) American Bar Association Health eSource.
14. Caselaw update: posthumous embryo use (2023) Farrer & Co.
15. Redefining remembrance: Posthumous sperm retrieval in Israel after 7 October (2024) Progress Educational Trust.
16. Nearly half of Israeli men oppose posthumous sperm use by parents, study finds (2024) Ynetnews.
17. Does Jewish law permit posthumous sperm retrieval for the purpose of reproduction? Schechter Institutes.
18. A cross-cultural analysis of posthumous reproduction: The significance of the gender and margins-of-life perspectives (2018) PMC, PMID:PMC5952694.
19. Life after death: regulating posthumous reproduction, How to Regulate?
20. Children of the Dead: Posthumous Conception, Critical Interests and Consent, Maynooth University Research Archive Library.