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Life After Death: The Authority of Estate Fiduciaries to Dispose of Decedents' Reproductive Matter

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LIFE AFTER DEATH: THE AUTHORITY OF ESTATE FIDUCIARIES TO DISPOSE OF DECEDENTS' REPRODUCTIVE MATTER

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I. INTRODUCTION

With the advent of artificial reproductive technology, it is now possible for a decedent to conceive children after death. The potential for posthumous conception, however, does not necessarily give rise to absolute, unfettered discretion on the part of an estate fiduciary to make decisions concerning the disposition of a decedent's reproductive material. As more fully explained below, such decisions are subject to a quasi-property right, the exercise of which is colored by a decedent's intentions. An estate fiduciary is duty-bound to respect those intentions and should refrain from authorizing the use of a decedent's reproductive matter, except when the decedent's intent to reproduce posthumously is apparent.

II. ASSISTED REPRODUCTIVE TECHNOLOGY

Until recently, the prospect of posthumous conception more closely resembled science fiction than contemporary medicine.[1]

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[1] Robert M. Harper, *Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants*, 21 QUINNIPIAC PROB. L.J. 267, 268-69, 270, 271 (2008) (discussing artifi-

However, with the advent of artificial reproductive technology ("ART"), posthumous and other previously unfathomable forms of conception are now scientific realities—the impact of which cannot be denied.[2] From 1985 to 2006, ART yielded approximately 500,000 births in the United States alone.[3] Today, nearly one in every one hundred American-born children is a product of ART.[4]

There are several methods of ART, through which posthumous conception is possible, including in vitro fertilization, cryopreservation, artificial insemination, and embryo lavage and transfer, among others.[5] In vitro fertilization ("IVF") is a common method, accounting for a substantial percentage of ART procedures.[6] It involves "fertilizing [a] human egg . . . outside of the mother's body, and then . . . implanting it in the mother's uterus."[7]

Cryopreservation is a subset of IVF.[8] It entails freezing sperm in nitrogen in order to preserve the material for subsequent use.[9] Cryopreservation is more advantageous than other ART methods, since it allows for (1) the transfer of embryos on multiple occasions; (2) the implant of embryos during the mother's natural men-

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cial reproductive technology ("ART")).

[2] *See* Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 548-49 (1996); *see also* Bridget M. Fuselier, *The Trouble with Putting All of Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes over Cryopreserved Pre-Embryos*, 14 TEX. J. C.L. & C.R. 143, 146, 147-48 (2009) (discussing ART).

[3] American Society for Reproductive Medicine ("ASRM"), Frequently Asked Questions About Infertility, http://www.asrm.org/Patients/faqs.html (last visited on March. 11, 2010) ("Since 1985, . . . through the end of 2006, almost 500,000 babies have been born in the United States as a result of reported Assisted Reproductive Technology procedures . . . . ").

[4] ASRM, *supra* note 3 ("In 2002, approximately one in every hundred babies born in the US was conceived using ART and that trend continues today.").

[5] *See generally* Shah, *supra* note 2, at 548-51.

[6] Fuselier, *supra* note 2, at 146.

[7] Shah, *supra* note 2, at 549; *see also* Erica Howard-Potter, *Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law*, 14 BUFF. WOMEN'S L.J. 23, 27 (2006)

> The steps involved in in vitro fertilization ("IVF") are as follows. First, a woman takes "ovulation inducing drugs" in order to produce multiple "oocytes" (eggs). Next, the eggs are harvested from the ovaries and placed into a petri dish where they are combined with 50,000 preselected "motile" sperm. Then, once (if) fertilization occurs, the resulting embryos are transferred . . . .

Id.

[8] Howard-Potter, *supra* note 7, at 28.

[9] Harper, *supra* note 1, at 270.

strual cycle, rather than a drug-induced cycle, which is disfavored for implantation; and (3) "may reduce the occurrence of multiple pregnancies."[10]

Gamete intrafallopian transfer ("GIFT") is another type of IVF.[11] In GIFT, a female's eggs are deposited into her fallopian tubes with high quantities of sperm.[12] GIFT is widely regarded as more desirable than other ART methods because it mirrors fertilization under natural circumstances, which typically occurs in the fallopian tubes.[13]

Artificial insemination is also an ART method that is often "used to combat male infertility."[14] It involves placing a male donor's sperm into a female's cervical canal, uterus or vagina.[15] Artificial insemination is favored in many circumstances, due to its relatively low cost and the ease with which it can be performed.[16]

The final noteworthy ART method is embryo lavage and transfer.[17] In the embryo lavage and transfer method, the egg is fertilized inside the donor's uterus, and then transferred to the donee's uterus several days later.[18] The risk inherent in this procedure is that it may be impossible to remove the egg from the donor's uterus, thereby resulting in an otherwise unwanted pregnancy.[19]

As ART has developed, so too have several legal issues, not the least of which is the extent to which the parties involved have property rights in the subject genetic material.[20] Courts, counsel, commentators, and the parties themselves have, as more fully explained below, struggled to resolve this question.

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[10] Howard-Potter, *supra* note 7, at 28.

[11] Harper, *supra* note 1, at 270; Howard-Potter, *supra* note 7, at 28.

[12] Harper, *supra* note 1, at 270; Howard-Potter, *supra* note 7, at 28.

[13] Howard-Potter, *supra* note 7, at 28 ("[I]t is assumed that the [fallopian] tube is a better incubator than a Petri dish." (internal quotations omitted)).

[14] Shah, *supra* note 2, at 548-49.

[15] *Id.* at 549.

[16] *Id.*

[17] *Id.* at 551.

[18] *Id.*

[19] Shah, *supra* note 2, at 551.

[20] *See generally* Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348 (La. Ct. App. 1994) (addressing the estate's interest in the decedent's frozen semen, which was deposited with a sperm bank); *see also* Susan Kerr, *Post-Mortem Sperm Procurement: Is it Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 59 (1999) (explaining that "there is no traditional property right in a corpse").

III. PROPERTY RIGHTS IN THE HUMAN BODY AND ITS PARTS

American courts have, historically, hesitated to acknowledge the existence of property rights in the human body.[21] More recently, however, courts in the United States have carved out a limited, quasi-property interest in the human body, its parts and reproductive matter.[22]

A. Quasi-Property Interest in the Human Body and Its Parts

A quasi-property interest in the human body includes, among other things, the right to dispose of a deceased relative's remains for burial purposes and to donate certain body parts.[23] It is widely regarded as a limited "right in the nature of a 'sacred trust' that a court will uphold as a result of natural sentiment, affection, and reverence."[24] The qualified-property interest is one in the nature "of cus-

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[21] Charles M. Jordan, Jr. and Casey J. Price, *First* Moore, *Then* Hecht*: Isn't it Time We Recognize a Property Interest in Tissues, Cells, and Gametes?*, 37 REAL PROP. PROB. & TR. J. 151, 172 (2002).

[22] *Id.*; *see also* Michelle Bourianoff Bray, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX L. REV. 209, 220 n.77 (1990) ("A quasi-property right is a limited property right—the owner of the property has some but not all of the sticks in the bundle of property rights."); Pierce v. Proprietors of Swan Pt. Cemetery, 1872 WL 3575, at *7 (R.I. Sup. Ct. Mar. 1872).

> That there is no right or property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; and a duty on the part of others to abstain from violation; it may therefore be considered as a sort of *quasi* property . . . .

Id.

[23] Jordan, *supra* note 21, at 172; *see also* Painter v. U.S. Fid. & Guar. Co., 91 A. 158 (Md. 1914).

> The courts hold that the surviving husband or wife or next of kin have a quasi-property right in the body in the absence of testamentary disposition. The right is not a property right in the general meaning of property right, but is extended for the purpose of determining who shall have the custody of the body in preparing it for burial.

Id. at 160; Unif. Anatomical Gift Act § 8(a) (2009) (authorizing gifts of body parts for certain purposes).

[24] Snyder v. Holy Cross Hosp., 352 A.2d 334, 341 (Md. 1976).

tody, control, and disposition . . . [,] not material property[,]" and does not carry with it the right to sell a corpse for profit.[25]

The quasi-property interest implicated in disposing of organs and other body parts is slightly broader than the limited right to dispose of a corpse.[26] Under the appropriate circumstances, an individual may donate her organs for transplant and, perhaps, even sell them for other purposes.[27] After the individual's death, the organs may be donated by her surviving relatives.[28] Indeed, under the National Organ Transplant Act and Uniform Anatomical Gift Act, the sale of human organs is permissible when it is made for research, not transplantation, purposes.[29]

However, the existence of a quasi-property right in remains is not limited to the disposition of corpses and organs. In addition, as discussed below, it also has been construed to include a right to dispose of reproductive matter.

B. Property Rights in Human Reproductive Matter

The seminal cases concerning property rights in reproductive matter are *York v. Jones*,[30] *Davis v. Davis*,[31] *Hecht v. Superior Court*,[32] and *Hall v. Fertility Clinic of New Orleans*.[33] The import of these cases is quite clear; namely, that the quasi-property right in the human body and its parts extends to reproductive matter.[34]

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[25] *Id.*; *see also* Pettigrew v. Pettigrew, 56 A. 878, 879 (Pa. 1904) (explaining that the quasi-property right "is not absolute").

[26] *See* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 375-76 (2000) (discussing the rights to dispose of organs and other body parts).

[27] *Id.*

[28] *Id.* at 376.

[29] *See generally* 42 U.S.C.A. § 274 (2009); Unif. Anatomical Gift Act §§ 2, 10 (2009).

[30] 717 F. Supp. 421 (E.D. Va. 1989).

[31] 842 S.W.2d 588 (Tenn. 1992).

[32] 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

[33] 647 So. 2d 1348 (La. Ct. App. 1994).

[34] *See* Shah, *supra* note 2, at 552-58 (discussing the treatment of reproductive matter as "persons" or "property"); *see also In re* Dahl, 194 P.3d 834, 842 (Or. Ct. App. 2008) (considering whether "it is just and proper to dispose of . . . embryos in the manner that the parties chose at the time that they underwent [IVF]"); Kurchner v. St. Farm Fire & Cas. Co., 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003) (noting that "[c]ases from other jurisdictions hold that preserved sperm or eggs constitute personal property"); A.Z. v. B.Z., 725 N.E.2d 1051, 1052, 1059 (Mass. 2000) (considering contract rights and procreation rights); Kass v. Kass, 696 N.E.2d 174, 179-82 (N.Y. 1998) (addressing the enforceability of an agreement between progenitors of reproductive matter concerning the disposition of said material).

In *York v. Jones*, the plaintiffs, a husband and wife, deposited reproductive material with the defendant medical professionals and center.[35] After the defendants refused the plaintiffs' request that the reproductive matter be transferred to another facility, the plaintiffs commenced an action in the United States District Court for the Eastern District of Virginia, alleging breach of contract and detinue in connection with said material.[36] Although the defendants moved to dismiss the action for failure to state a claim, the court denied that motion, based upon, among other things, the assumption that the plaintiffs had a property interest in their reproductive material.[37]

The Tennessee Supreme Court reached a similar, though farther-reaching, conclusion in *Davis v. Davis*. In *Davis*, the plaintiff sought a divorce from the defendant, his wife.[38] In connection with the divorce proceeding, the defendant requested control of the genetic material the parties previously deposited with a reproductive center.[39] While the defendant intended to use the material to conceive a child after the divorce, the plaintiff objected, asserting that he should be able to decide whether to father a child.[40]

Although the trial court initially ruled in the defendant's favor, the Tennessee Court of Appeals reversed and the defendant appealed to the State's court of last resort.[41] However, by the time the case reached the Tennessee Supreme Court, the parties' positions had changed.[42] The defendant had remarried and no longer intended to use the material to impregnate herself.[43] Instead, she wanted to donate the reproductive matter to a childless couple, so that they could conceive a child.[44] The plaintiff "adamantly opposed" the defendant's proposal and sought to have the reproductive material discarded.[45]

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[35] *York*, 717 F. Supp. at 423, 424.

[36] *Id.* at 422-23.

[37] *Id.* at 427; *see also Kurchner*, 858 So. 2d at 1221 (opining that "the trial court properly found that sperm outside of the body is property").

[38] *Davis*, 842 S.W.2d at 592.

[39] *Id.* at 589.

[40] *Id.*

[41] *Id.* at 589-90.

[42] *Id.* at 590.

[43] *Davis*, 842 S.W.2d at 590.

[44] *Id.*

[45] *Id.*

After first noting that the genetic material could not be considered "persons" under Tennessee law, the court opined that it was entitled to "special respect . . . to protect the welfare of potential offspring . . . who might be born after transfer."[46] This "special respect" gave rise to what the court described as an "ownership" interest on the part of the material's progenitors to make decisions concerning its disposition.[47] Accordingly, based upon the "ownership interest," the plaintiff had a right to prevent the defendant from using the genetic material to reproduce.[48]

Shortly after *Davis* resolved the extent to which a living party has a quasi-property right in reproductive material, a California court addressed whether that interest passes to a decedent's estate.[49] In *Hecht v. Superior Court*, the decedent deposited sperm at California Cryobank, Inc. ("Cryobank"), instructing Cryobank to store or release the specimens to the executor of his estate, upon his death.[50] Alternatively, the decedent authorized Cryobank to release the specimens to the petitioner, his live-in girlfriend.[51] He also executed a will, nominating the petitioner to serve as executor and bequeathing his interests in the specimens to the petitioner should she wish to become pregnant with them.[52]

The decedent committed suicide a month later.[53] Following the decedent's death and contests to the will, the court-appointed special administrator of his estate petitioned to have the sperm samples destroyed, among other things.[54] The decedent's children from a prior marriage supported the administrator's petition, to which the petitioner objected.[55] The petitioner alternatively argued that she should take the samples as a gift from the decedent or as a bequest under his will.[56] Accordingly, she argued, the estate's administrator

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[46] *Id.* at 595, 596 (internal quotations omitted).
[47] *Id.* at 597.
[48] *Davis*, 842 S.W.2d at 604.
[49] *Hecht*, 20 Cal. Rptr. 2d at 276, 283.
[50] *Id.* at 276.
[51] *Id.*
[52] *Id.* at 276-77.
[53] *Id.* at 276, 277.
[54] *See Hecht*, 20 Cal. Rtpr. 2d at 278-79.
[55] *Id.* at 279.
[56] *Id.*

could not cause the samples to be destroyed.[57]

Although the California Superior Court ordered that the samples be destroyed, the Court of Appeal reversed that decision.[58] In doing so, the court acknowledged that, "at the time of his death, [the] decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction."[59] Such an interest was "sufficient to constitute 'property' " under California law.[60] Thus, the samples constituted estate assets, which the executor had a duty to preserve, pending completion of the proceeding.[61]

In *Hall v. Fertility Institute of New Orleans*, the Louisiana Court of Appeal reached a similar conclusion, holding that the decedent's sperm deposits belonged to his estate.[62] There, the decedent deposited sperm with a fertility clinic in order to ensure that he could reproduce after undergoing treatment for cancer.[63] He also executed an Act of Donation form, purportedly gifting the sperm samples to his girlfriend.[64]

After the decedent's death, the executor of his estate sought a judgment declaring the sperm samples to be estate property, or alternatively, directing that the samples be destroyed.[65] The decedent's girlfriend intervened, arguing that she owned the samples pursuant to the Act of Donation.[66] In opposition, the executor alleged that the Act of Donation was invalid for lack of capacity and undue influence, among other grounds.[67]

Upon considering the parties' contentions, the Civil District Court and Court of Appeal concluded that the executor presented a prima facie case entitling her to possession of the frozen material, pending a hearing to determine the Act of Donation's validity.[68] As

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[57] *Id.*

[58] *Id.* at 279-280, 283-84.

[59] *Hecht*, 20 Cal. Rtpr. 2d at 283.

[60] *Id.* (citing CAL. PROB. CODE § 62 (West 1993)).

[61] *Id.*

[62] *Hall*, 647 So. 2d at 1351.

[63] *Id.* at 1349.

[64] *Id.* at 1350.

[65] *Id.* at 1349.

[66] *Id.*

[67] *See Hall*, 647 So. 2d at 1350. Decedent's mother, Mary Alice Hall, was named testamentary executor of his will. *Id.* at 1349.

[68] *See id.* at 1351-52.

the Court of Appeal explained, the "[executor was] the proper party to claim and preserve succession assets."[69] Accordingly, the court held that a preliminary injunction enjoining the sperm bank from releasing or injecting the samples into the decedent's girlfriend was warranted.[70]

In addition to establishing that a quasi-property right in reproductive material exists, the *York*, *Davis*, *Hecht*, and *Hall* cases are significant because they have laid the foundation for civil claims arising from the wrongful destruction of such material.[71] For example, in *Jeter v. Mayo Clinic Arizona*, an Arizona court permitted the plaintiffs to sue the defendant reproductive medicine clinic for the negligent loss or destruction of their pre-embryos.[72] Likewise, in *Frisina v. Women & Infants Hospital of Rhode Island*, the Superior Court of Rhode Island denied the defendant's motion for summary judgment concerning the plaintiffs' emotional harm due to the loss of irreplaceable property claim, based upon the theory that the pre-embryos at issue were "property."[73] The courts likely would have dismissed the claims asserted in *Jeter* and *Frisina*, absent prior judicial recognition for the quasi-property right to reproductive material.

Though previously unthinkable, the development of a property right in reproductive material has given rise to unanticipated legal issues. From a trusts and estates perspective, the most critical of those issues may be the extent to which an estate fiduciary has authority to dispose of a decedent's reproductive matter as property of the decedent's estate.

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[69] *Id.* at 1351.

[70] *See id.* at 1352.

[71] *See* Jeter v. Mayo Clinic Arizona, 121 P.3d 1256, 1272-74 (Ariz. Ct. App. 2005) (citing prior cases in recognizing a claim for the negligent loss or destruction of pre-embryos); *see also* Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *6 (Ill. App. Ct. Feb. 22, 2005) (acknowledging the existence of a "property right" in genetic materials, but dismissing the conversion claim for failure to allege the right to "immediate, absolute, and unconditional possession"); *see also* Frisina v. Women & Infants Hosp. of R.I., No. Civ-A. 95-4037, 2002 WL 1288784, at *10 (R.I. Super. Ct. May 30, 2002) (denying the defendants' motion for summary judgment with respect to the plaintiffs' emotional harm due to the loss of irreplaceable property claim).

[72] *See Jeter*, 121 P.3d at 1271-73.

[73] *Frisina*, 2002 WL 1288784, at *9.

IV. FIDUCIARY AUTHORITY TO DISPOSE OF REPRODUCTIVE MATTER

Despite the existence of the quasi-property rights discussed above, an estate fiduciary does not have absolute discretion to make decisions concerning the disposition of a decedent's reproductive matter.[74] To this extent, courts have held that the authority of an estate fiduciary to make these decisions is circumscribed by the intentions of the decedent.[75]

Judicial opinions are consistent with the long-standing principle that an estate fiduciary must act in accordance with the decedent's wishes.[76] Indeed, all other concerns are subordinated to the intentions of the decedent.[77] Generally, a fiduciary cannot substitute his or her own judgments for the expressed intentions of the decedent, no matter how reasonable or prudent the fiduciary's rationale.[78]

The notion that a deceased donor's intent governs the disposition of reproductive matter dates back to 1984, when a French court decided *Parpalaix v. Centre d'Etude et de Conservation du Sperme*

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[74] *See* E. Donald Shapiro & Benedene Sonnenblick, *The Widow and The Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 229-33 (1985-1987) (discussing the French case *Parpalaix c. Centre d'Etude et de Conservation du Sperme*); *see also* Am. Med. Ass'n Council on Ethical & Judicial Affairs, Code of Med. Ethics: Current Opinions E-2.04 (issued June 1993; updated Dec. 2004), *available at* http://www.ama-assn.org/ama/pub/ physician-resources/medical-ethics/code-medical-ethics/opinion204.shtml (last visited on Mar. 11, 2010).

[75] *See* Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 316 (Cal. Ct. App. 2008) (explaining that the sperm donor's intent should govern).

[76] *Cf.* Richard C. Bishop, *Ethics in Estate Planning*, 1 ETHICAL LAWYERING IN MASSACHUSETTS §§ 16:1, 16:8 (2007) ("Because of its fiduciary position a[n] . . . executor has a duty to carry out the testator's intent and to act in the best interest of the estate and the various beneficiaries."); *see also In re* Fabbri's Will, 140 N.E.2d 269, 271 (N.Y. 1957) ("The prime consideration here as in all construction proceedings is the intention of the testator as expressed in the will."); *In re* Godfrey's Will, 36 N.Y.S.2d 414, 415 (Sur. Ct. Richmond County 1941) ("There is one cardinal principle of testamentary construction to which all others are subordinate, namely, 'that the intention of the testator is to be sought in all his words, and, when ascertained, is to prevail.' ") (citations omitted).

[77] *In re Fabbri*, 140 N.E.2d at 271 ("All rules of interpretation are subordinated to the requirement that the actual purpose of the testator be sought and effectuated as far as is consonant with principles of law and public policy.").

[78] 11 WARREN'S HEATON ON SURROGATE'S COURT PRACTICE § 187.01(4)(d) (7th ed. 2007); *see also* Ilene S. Cooper & Robert M. Harper, *Exoneration Clauses—Not All They're Cracked Up to Be*, 81 N.Y. ST. B.J. 26, 26 (Oct. 2009) (explaining that a decedent's intent must be respected).

(the "CECOS").[79] In *Parpalaix*, the decedent deposited his sperm with the CECOS after learning that his treatment for testicular cancer would render him infertile.[80] Although the decedent lived for another two years, he did not leave any written directions as to the disposition of the sperm upon his death.[81]

Following the decedent's death, his surviving wife requested that the sperm deposit be released to her.[82] When the CECOS rejected her request on the ground that "no law mandated the return[,]" the decedent's wife and parents commenced litigation in the French courts.[83] In support of their claims, the wife and parents argued that they were the decedent's natural heirs and, therefore, had an ownership interest in the subject sample.[84] They also testified that the decedent intended for the wife to "use the sperm to conceive after his death."[85]

In deciding the case, the court opined that the decedent's intent was its paramount concern.[86] To establish that they were entitled to the sperm sample, the decedent's wife and parents had to demonstrate that the decedent intended for his widow to conceive with his sperm and that his intent was "unequivocal."[87] The court concluded the wife and parents satisfied this burden with their testimony that the decedent intended for the wife to have a child with his sperm.[88] Accordingly, the court held that the decedent's wife and parents were entitled to the sperm sample.[89]

An American case often cited for the proposition that a decedent's intent governs the disposition of reproductive matter (as estate property) is *Estate of Kievernagel*. In *Kievernagel*, the decedent deposited a sperm sample with the Northern California Fertility Medical Center, Inc. ("NCFMC").[90] He also signed an "IVF Back-Up

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[79] *See* Shapiro & Sonnenblick, *supra* note 74, at 229, 232 (discussing *Parpalaix c. Centre d'Etude et de Conservation du Sperme*).

[80] *Id.* at 229.

[81] *Id.* at 229-31.

[82] *Id.* at 230.

[83] *Id.*

[84] Shapiro & Sonnenblick, *supra* note 74, at 230.

[85] *Id.* at 230-31.

[86] *Id.* at 232.

[87] *Id.*

[88] *Id.*

[89] Shapiro & Sonnenblick, *supra* note 74, at 233.

[90] *Kievernagel*, 83 Cal. Rptr. 3d at 312.

Sperm Storage and Consent Agreement" (the "Agreement"), which provided that the sample was the decedent's "sole and separate property and [that] he retained all authority to control its disposition."[91] The Agreement further stated that the sample should be discarded upon the decedent's death.[92]

After the decedent died unexpectedly in July 2005, a California court appointed his wife, the petitioner, to act as administrator of his estate.[93] Thereafter, the wife petitioned the NCFMC to have the decedent's sperm sample released to her. NCFMC refused to do so without a court order.[94] That refusal prompted the wife to petition the Superior Court of the State of California, County of Sacramento, for an Order directing the release of the sperm sample to her.[95] The decedent's parents objected on the ground that the decedent did not wish to father a child after death.[96]

Following an evidentiary hearing, the court made several factual findings.[97] The court found that: (1) although the decedent and petitioner loved each other a great deal, they did not agree on the issue of whether to have children;[98] (2) the decedent deposited his sperm with NCFMC because he knew that the petitioner wanted to have children and believed she would divorce him if he failed to make the deposit;[99] (3) the Agreement itself afforded the decedent an opportunity to designate the petitioner as the ultimate beneficiary of the deposit or to direct that the sample be discarded upon his death;[100] and (4) the decedent chose to direct that the sample be discarded upon his death.[101]

The Probate Court denied the petition, finding that the decedent's intent governed the distribution of his sperm sample as an asset of his estate.[102] In affirming the Probate Court's decision, the

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91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*
95 *Kievernagel*, 83 Cal. Rptr. 3d at 311.
96 *Id.* at 312.
97 *See id.* at 312-13.
98 *Id.* at 313.
99 *Id.*
100 *Kievernagel*, 83 Cal. Rptr. 3d at 312, 313.
101 *Id.* at 313.
102 *Id.*

Court of Appeal reasoned that "the intent of the deceased donor" directed its decision.[103] The Court of Appeal reasoned that "gametic material, with its potential to produce life, is a unique type of property and thus not governed by the general laws relating to gifts or personal property or transfer of personal property upon death."[104]

Accordingly, the decedent, "as the person who provided the gametic material, had at his death an interest, in the nature of ownership, to the extent he had decisionmaking authority as to the use of the gametic material for reproduction."[105] The petitioner could not circumvent the decedent's expressed intent in her capacity as administrator of his estate and, thus, the court was duty-bound to deny the petition.[106]

A New York court recently reached a similar conclusion in *Speranza v. Repro Lab Inc.*[107] The issue in *Speranza* was whether the plaintiffs, the administrators of a decedent's estate, could compel the defendant, a tissue bank with which the decedent previously deposited sperm, to release the samples to them in their fiduciary capacities.[108] The plaintiffs intended to use the samples to conceive a child, notwithstanding the decedent's direction that the samples be destroyed upon his death.[109]

After the defendant denied their request, the plaintiffs commenced an action in the Supreme Court of the State of New York, seeking a declaration that the samples belonged to the decedent's estate.[110] The Supreme Court dismissed the action, based upon New York Department of Health regulations.[111] The regulations required that a donor depositing sperm for use by anyone other than his regular sexual partner undergo extensive medical testing.[112] Absent such

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[103] *Id.*

[104] *Id.* at 316 (citing *Hecht*, 20 Cal. Rptr. 2d at 283).

[105] *Kievernagel*, 83 Cal. Rptr. 3d at 316 (citing *Hecht*, 20 Cal. Rptr. 2d at 283) .

[106] *Id.* at 317-18.

[107] *See generally* 875 N.Y.S.2d 449, 452-54 (App. Div. 1st Dep't 2009).

[108] *Id.* at 450-51.

[109] *Id.* at 451.

[110] *Id.*

[111] *Id.* at 451-52.

[112] N.Y. COMP. CODES R. & REGS. tit. 10, § 52-8.6(g) (2009) ("A client-depositor who wishes to direct stored semen for use by a specific recipient, other than his current or active regular sexual partner, shall first be fully evaluated and tested in accordance with [specific] requirements."). Such requirements include providing a complete medical history and releasing certain information regarding the donor and the donor's reproductive tissue to the

screening, the donor's sperm sample could not be used by anyone other than his regular sexual partner.[113]

The Appellate Division, First Department, affirmed the Supreme Court's dismissal.[114] The Appellate Division premised its decision on the fact that the plaintiffs—as opposed to the decedent's regular sexual partner—sought access to the samples and that the decedent never underwent the requisite medical testing.[115] Those factors prevented the plaintiffs from establishing compliance with the State's regulations and necessitated dismissal.[116]

In addition to seeking a declaration that the sperm samples belonged to the estate, the plaintiffs also sought to have the decedent's agreement with the defendant reformed "to eliminate the applicability of the directive that the specimens be destroyed, or to otherwise claim a legal right to ownership of the specimens."[117] However, the court declined to reform the agreement, as doing so would contravene the decedent's expressed intent.[118] The court explained that the agreement "represent[ed the decedent's] determined choice that the sperm should be available to him so he could protect his ability to procreate *if he survived*."[119] "It [did] not protect any possibility that his genetic or biological issue could be created after his death; indeed, the directive that his semen be destroyed in the event of his death precludes such a possibility."[120] Accordingly, considering that the decedent's intent was the foremost concern and that the agreement made clear his intent not to procreate after death, the court held that there was no evidence to "justify reforming the contract so as to permit [the plaintiffs] to fulfill their wish [to use the samples after the decedent's death]."[121]

As *Paralaix*, *Kievernagel*, and *Speranza* demonstrate, a decedent's intent to procreate after death is the paramount concern in any dispute concerning the disposition of reproductive matter. Notwith-

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recipient. *See id.* § 52-8.5.

[113] *Id.* § 52-8.6(g).

[114] *Speranza*, 875 N.Y.S.2d at 454.

[115] *Id.* at 452, 453.

[116] *Id.* at 453.

[117] *Id.*

[118] *Id.*

[119] *Speranza*, 875 N.Y.S.2d at 453 (emphasis in original).

[120] *Id.*

[121] *Id.*

standing the existence of a quasi-property right in reproductive matter, estate fiduciaries have only been permitted to authorize the use of such material when the decedent's intent to do so is clear. Estate fiduciaries are otherwise proscribed from substituting their own intentions for those of the decedent, especially when there is no evidence of the decedent's intent or the evidence conclusively shows that the decedent did not intend to procreate posthumously.

V. CONCLUSION

Despite the development of ART and the existence of a quasi-property right concerning reproductive matter, an estate fiduciary does not have absolute discretion to make decisions regarding the disposition of a decedent's genetic material. Instead, the estate fiduciary is duty-bound to act in accordance with the decedent's intention. Toward that end, an estate fiduciary must refrain from authorizing the use of the decedent's reproductive matter, except to the extent that the decedent's intent to conceive posthumously is apparent.