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DEAD SOLDIERS AND THEIR POSTHUMOUSLY CONCEIVED CHILDREN

*Charles P. Kindregan, Jr.**

I. INTRODUCTION

The potential for conceiving a child in vitro through the use of cryopreserved gametes of a deceased person, or those of a person who has become incompetent, raises many legal concerns. A decision to harvest sperm or eggs from a deceased or incompetent person and use the harvested gametes to produce a child has implications for inheritance, estate planning, will drafting, trusts, social security claims, child support responsibility, and custody issues. This article focuses on the issues arising from the posthumous use of reproductive material to produce a child in the context of the use of cryopreservation by members of the military. Although individuals on active duty in the military make up only one half of one percent of the general population of the United States,¹ a solution to the problems created by posthumous conception of children in the military may have many ramifications for civilians as well.² For example, a civilian may cryopreserve his or her gametes before undergoing aggressive cancer treatment in the hope that the person will still have the ability to conceive a genetically connected child whether they survive the treatment or not.³ Civilians have also requested the removal of the sperm or eggs of an injured

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1. Donna Miles, *Survey Shows Growing Gap Between Civilians, Military*, U.S. DEP'T OF DEF. (Nov. 28, 2011), <http://www.defense.gov/News/NewsArticle.aspx?ID=66253>.

2. See generally Charles P. Kindregan, *Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons*, 7 J. HEALTH & BIOMEDICAL LAW 147 (2011) (giving various examples of harvesting of gametes from dead or incompetent persons).

3. *Id.* at 162-64.

or recently killed person and the use of such cryopreserved materials to produce a pregnancy.⁴ In the civilian context, posthumous conception of children may be sought for many different reasons: providing tribute to the deceased loved one, producing a sibling for a previously born child, or reducing the cost of conceiving a child using donor gametes provided by a clinic.⁵ The military context provides a useful opportunity to explore posthumous conception, including issues of consent, rights of survivors, and access to public benefits that depend on a child's relationship to the deceased or incompetent genetic parent.

II. THE POTENTIAL FOR POSTHUMOUS CONCEPTION

When a service-member is killed or rendered incompetent in combat or in an accident, it may be assumed that this prevents the service-member from parenting a genetically connected child. The same is true of a service-member who suffers a severe injury that harms the service-member's reproductive organs and renders them infertile. These assumptions, however, are not necessarily true. Contemporary medical procedures using Assisted Reproductive Technology ("ART")⁶ have made it possible for dead or incompetent individuals to conceive genetically related children even after death or serious injury.⁷ This is done by retrieving and cryopreserving gametes⁸ or embryos⁹ produced to be used for in vitro fertilization.¹⁰ The

4. *Id.* at 156-58.

5. Benjamin C. Carpenter, *A Chip off the Old Iceblock: How Cryopreservation has Changed Estate Law, Why Attempts to Address it Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y. 347, 358-59 (2011) (noting various reasons people may seek to conceive a child posthumously).

6. Assisted Reproductive Technology [hereinafter "ART"] means "medical or scientific intervention . . . for the purpose of achieving live birth that results from assisted conception." MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(2) (2008) [hereinafter "A.B.A. MODEL ACT"].

7. Kindregan, *supra* note 3, at 147-48.

8. Retrieval of gametes is also sometimes called "harvesting." *Id.* at 149 n.12. Gametes are sperm or eggs. A.B.A. MODEL ACT § 102(13). Cryopreservation of sperm is a technology which has been used for at least a half century. *See* Carpenter, *supra* note 6, at 349 (noting that the first successful pregnancy using frozen sperm occurred in 1953). Preservation of unfertilized eggs developed much more slowly than cryopreservation of sperm, but appears to be more common today. *See also* Mitch Leslie, *Melting Opposition to Frozen Eggs*, 316 SCIENCE 388, 388-89 (2007) (noting development of technologies for freezing and thawing of eggs).

9. Embryos are fertilized eggs that can be preserved after in vitro fertilization. *See* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169, 170-71 (2004) (survey of various legal issues created by the preservation of hundreds of thousands of embryos).

gametes or embryos can later be used to cause a pregnancy and birth of a child who is genetically related to the incompetent or deceased person.¹¹ The potential legal issues may not be initially evident, but issues arising from consent standards for harvesting and using gametes and embryos can take place both in the context of military service and in civilian life.¹²

III. DO DEAD PEOPLE HAVE A RIGHT TO REPRODUCE?

Posing the question about posthumous reproduction in terms of a deceased person's right to reproduce may be inappropriate since after death, a person essentially has no enforceable legal rights.¹³ Nevertheless, our legal system does recognize the right of a living person to plan for events after his or her death by execution of a will or creation of a testamentary trust to impose duties on his or her estate.¹⁴ A person cannot force others to use his or her gametes to conceive the deceased's child after death; however, a person can cryopreserve his or her gametes, allowing a spouse or loved one to have the choice of using them.¹⁵ In such a circumstance, the donor can even limit this choice to persons he or she designates as entitled to make the decision for him or her.¹⁶ A person can also affect the posthumous decision to harvest his sperm or her eggs by consenting to this in a record, which also details how and by whom the harvested gametes are to be used after his or her death.¹⁷ For example, individuals about to undergo chemotherapy, which will negatively affect their fertility, sometimes choose to store gametes in case he or she dies or is rendered infertile.¹⁸ In the United States, there is currently no statutory restraint or prohibition on gamete retrieval or storage.¹⁹

10. A.B.A. MODEL ACT § 102(20) (defining in vitro as "the formation of a human embryo outside the human body").

11. See Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 579 (2005); Vardit Ravitsky, *Posthumous Reproduction Guidelines in Israel*, 34 HASTINGS CTR. REP. 6, 6 (2004); Bruce A. Fowler & Teresa C. Baird, *Frozen in Time: An Analysis of Postmortem Insemination, Planning for the Posthumously Conceived Children*, 37 COLO. LAW. 45, 45 (2008); Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433, 434 (2009).

12. See Kindregan, *supra* note 3, at 160-61.

13. Kirsten R. Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 763 (2009).

14. *Id.*

15. Kindregan, *supra* note 3, at 148.

16. *Id.* at 152.

17. *Id.* at 150.

18. *Id.* at 162-64.

19. *Id.* at 153.

There is some doubt whether there is a protected fundamental right to procreate.²⁰ After the 1949 Revolution, China enacted a policy of population limitation by restricting the right of women to give birth to more than one child.²¹ Such a government program in the United States would be met with strong constitutional objection.²² While the Supreme Court of the United States previously held that a state may forcibly deprive a person of the ability to reproduce by compulsory sterilization based on eugenic factors,²³ state compulsory sterilization laws are rarely, if ever, enforced today.²⁴ Now, states have instead turned to specifically prohibiting the use of cloning as a means of conceiving human children.²⁵ While there is some doubt about the extent of the legally protected right to procreate, there is substantial *dictum* suggesting that there is a basis for protecting the individual's right to reproduce as well-founded in American constitutional law:²⁶ "If the right of privacy means anything, it is the right of the individual married or single, to be free of unwarranted governmental intrusion into

20. See Charles P. Kindregan, Jr., *State Power Over Human Fertility and Individual Liberty*, 23 HASTINGS LAW J. 1401, 1407-08 (1972) (quoting *In re Cavitt*, 157 N.W.2d 171, 174-75 (Neb. 1968)) (analyzing the Supreme Court of Nebraska's discussion of a right "to bear and . . . beget children" that can be limited by the state).

21. Xizhe Peng, *Population Policy and Pregnancy in China: Challenge and Prospectives*, 35 TEXAS INT'L L. J. 51, 52-53 (2000).

22. See Kindregan, *supra* note 21, at 1402 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg J., concurring)).

23. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding the power of a state to forcibly sterilize a feeble-minded woman on eugenic grounds to prevent her from reproducing a child). This decision was not rendered obsolete by a subsequent Supreme Court decision in *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942), which invalidated a state law which allowed sterilization of persons determined to be habitual criminals and which was applied on a racially discriminatory basis. *Id.* at 542 (noting that *Bell* did not involve the same equal protection violations that caused the court to reject the application of the habitual criminal statute in *Skinner*).

24. *Tennessee v. Lane*, 541 U.S. 509, 535 (2004) (Souter J., concurring) (noting that eugenics long has "lapsed into discredit").

25. See Charles P. Kindregan, Jr. & Maureen McBrien, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW & SCIENCE § 8.4 (2d ed. 2011) (summarizing the laws of nineteen states regarding human cloning).

26. See generally John A. Gibbons, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination, Mortem Insemination*, 14 J. CONTEMP. HEALTH. L. & POL'Y 187, 195-98 (1997) (arguing that there is a constitutional right to reproduce by using assisted reproduction, but this does not encompass the right to have a posthumously-conceived child declared the child of the deceased parent); see also Browne Lewis, *Graveside Birthday Parties: The Legal Consequences of Forming Families Posthumously*, 60 CASE W. RES. L. REV. 1159, 1159-60 (2010) (discussing the potential rights and interests to deceased gamete providers, their posthumous children, spouses and other survivors).

matters so fundamentally affecting a person as the decision whether to bear or beget a child.”²⁷ This *dictum* seems to best reflect the values of American law regarding freedom of individual choice in regard to human reproduction.²⁸ While there have been a number of court decisions dealing with posthumous reproduction,²⁹ none of them have addressed the issue of a deceased person’s purported constitutional right to conceive a child posthumously.³⁰

IV. THE MILITARY, DEAD SOLDIERS, AND THEIR GAMETES

In 2002, an Israeli soldier, Kevian Cohen, was killed by a sniper.³¹ His sperm was harvested shortly after his death.³² If his sperm were to be used for reproduction it would be necessary to have a surrogate carrier.³³ This would require medical assistance for in vitro fertilization and implantation of any resulting embryo. Because the hospital refused to release the sperm, it was necessary to obtain court approval for this procedure. Cohen’s parents learned of the possibility that their son could father children posthumously from media reports about Advocate Irit Rosenblum’s proposal to establish a sperm bank for Israeli Defense Forces in 2001. Shortly after their son’s death, Cohen’s parents contacted Rosenblum, seeking to use Cohen’s sperm so that their son could become a parent posthumously.³⁴ Cohen was not

27. *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (declaring unconstitutional a Massachusetts statute which prohibited distribution of contraceptives to unmarried persons).

28. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (discussing *Eisenstadt* and noting that “our law affords constitutional protections to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”).

29. *See generally* Kindregan & McBrien, *supra* note 12 (discussing various legal decisions and statutes governing posthumous reproduction).

30. *See, e.g.*, *Woodward v. Comm’r. of Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002); *Khabbas v. Comm’r of Soc. Sec.*, 930 A.2d 1180, 1185-86 (N.H. 2007).

31. Irit Rosenblum, *Dead 11 Years, Soon To Be a Father*, THE TIMES OF ISRAEL (Nov. 26, 2013, 6:01 AM), <http://blogs.timesofisrael.com/dead-for-11-years-and-soon-to-become-a-father/>; *see also* Harriet Sherwood, *Israeli Couple Seek Right to Use Dead Son’s Sperm*, THE GUARDIAN (Feb. 8, 2011, 4:16 PM), <http://www.theguardian.com/world/2011/feb/08/israeli-parents-dead-son-sperm>. Much of the information about this event was provided orally to the author by Irit Rosenblum, the attorney who was retained by the family of Kevian Cohen in two conversations and confirmed in subsequent emails.

32. Sherwood, *supra* note 32.

33. *Id.*

34. Rosenblum, *supra* note 32; *see also*, Dan Even, *Dead Woman’s Ova Harvested After Court Okays Family Request*, HARRETTZ (Aug. 8, 2011, 2:10 AM), <http://www.haaretz.com/print-edition/news/dead-woman-s-ova-harvested-after-court->

married, and the Attorney General of Israel³⁵ initially opposed the request.³⁶ The Attorney General took the position that only the surviving spouse of a deceased person could request a court's approval to use his sperm to inseminate a female carrier.³⁷ Eventually, Rosenblum, the family's lawyer, found a woman who agreed to be inseminated with the dead soldier's sperm.³⁸ In a prolonged legal dispute with the attorney general of Israel Rosenblum set a precedent by winning the right for a woman chosen by the Cohen family to raise Keivan's child as her own by conceiving a baby girl with his sperm. The woman presented evidence of the soldier's intent and, after many years of litigation,³⁹ the Court approved the woman's petition for insemination.⁴⁰ In 2013, the woman gave birth to Kevian Cohen's biological daughter eleven years after his death.⁴¹

In the United States, public information began to appear in the media regarding the cryopreservation of sperm by male service-members before their deployment into combat when sperm banks began advertising to military service-members in the early 2000's.⁴² Although less has been written about the potential for female service-members to preserve their fertility by cryopreservation of eggs, there is no reason to doubt that eggs can also be harvested and preserved.⁴³ Once preserved, they can later be

okays-family-request-1.377495 (explaining that an Israeli court allowed parents to harvest the eggs of their teenage daughter after she died in an accident).

35. The Attorney General of Israel "serves as legal counsel for the Government and public authorities, directs the state prosecution and supervises the legal department that prepares and reviews proposed legislation." *The Attorney General*, ISRAEL MINISTRY OF FOREIGN AFFAIRS, <http://mfa.gov.il/MFA/AboutIsrael/Spotlight/Pages/The%20Attorney%20General.aspx> (last visited Oct. 10, 2014).

36. Rosenblum, *supra* note 32.

37. *Id.*

38. *Id.*

39. *Id.*

40. After the litigation began, the woman was substituted as the petitioning party for the soldier's parents. *Id.* The original surrogate carrier had fertility problems, and another woman was substituted as the petitioning party. *Id.*

41. Rosenblum, *supra* note 32.

42. Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY (Jan. 26, 2003), http://www.usatoday.com/news/nation/2003-01-26-bank-usat_x.htm; see also Valerie Alvord, *Troops Start Trend with Sperm Banks*, USA TODAY (Jan. 26, 2003), http://www.usatoday30.usatoday.com/news/nation/2003-01-26-sperm-inside_x.htm.

43. See generally Michael J. Tucker, GEORGIA REPRODUCTION SPECIALISTS, *The Freezing of Human Oocytes (Eggs)*, <http://www.ivf.com/freezing.html> (last visited Oct. 5, 2014).

fertilized by in vitro fertilization to create embryos, which can be immediately implanted or cryopreserved for future implantation.⁴⁴

The potential for posthumous reproduction using the gametes of dead military personnel was noted in a pioneering article published in a pamphlet of the United States Army by U.S. Army Major Doucettperry, a Judge Advocate General (“JAG”).⁴⁵ Although there was no litigation involving military personnel and assisted reproductive technology,⁴⁶ Major Doucettperry correctly analogized the issue to cases in which the courts considered the status of posthumously conceived children under state inheritance laws for eligibility for Social Security benefits.⁴⁷ Under the Army’s Readiness Process Training, soldiers preparing for deployment should have access to legal advice on matters such as estate planning, medical directives, and other legal documents.⁴⁸ Major Doucettperry suggested that this would be an opportune time to counsel the soldiers about posthumous reproduction, and if they wish to do so, clarify their consent and intent.⁴⁹ Major Doucettperry stated that soldiers preparing to deploy should be briefed on cryopreservation as part of their Soldier Readiness Process Training.⁵⁰ This is important since there have been reports of posthumously conceived children in the United States from the use of the stored sperm of soldiers killed in foreign combat.⁵¹ A USA TODAY report stated that there

44. *Id.*

45. Major Maria Doucettperry, *To be Continued: A Look at Posthumous Reproduction As it Relates to Today’s Military*, ARMY LAW, May 2008, at 1-22.

46. *Id.*

47. *Id.* at 9-13; *see* Woodward v. Comm’r. of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002) (on certified questions, interpreting its inheritance statute to include a posthumously conceived child as the deceased father’s heir under Massachusetts law). *Cf.* Khabbas v. Comm’r of Soc. Sec., 930 A.2d 1180, 1185-86 (N.H. 2007) (holding that a posthumously conceived child was not an heir under New Hampshire law); Finley v. Astrue, 270 S.W.3d 849, 853 (Ark. 2008) (posthumously conceived child not an heir under Arkansas law); Astrue v. Capato, 132 S. Ct. 2021, 2034 (2012) (deferring to the Social Security Administration’s interpretation that a Florida statute excluded a posthumously conceived child from inheritance, and thereby from Social Security Benefits, unless named in the deceased father’s will); *see generally* Jennifer Matystik, *Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After Astrue v. Capato*, 28 BERKLEY J. GENDER L. & JUST. 269 (2013) (examining the Supreme Court’s decision in *Astrue v. Capato*).

48. Doucettperry, *supra* note 46, at 21.

49. *Id.*

50. *Id.*

51. Gregg Zoroya, *Science Makes Fallen Soldier a Father*, USA TODAY (Feb. 12, 2007), http://usatoday30.usatoday.com/news/nation/2007-02-11-soldier-child-cover_x.htm (report of a baby boy conceived with the use of his father’s sperm and born two years after his soldier-father was killed in Iraq). The same article mentions another

was a spike of calls to sperm banks before the deployment of soldiers at the start of the Iraq war.⁵²

V. PROPOSED LAWS ON ASSISTED REPRODUCTION

The Uniform Parentage Act⁵³ addresses some of these matters, but does so in the context of the law of parentage. The Uniform Probate Code⁵⁴ deals with issues relating to gratuitous transfers on death and trust issues, both as to assisted reproduction and surrogacy. The American Bar Association Model Act Governing Assisted Reproductive Technology⁵⁵ is much broader than the uniform laws, and attempts to regulate multiple aspects of ART beyond parentage and probate issues.⁵⁶

Outside of assisted reproduction parentage the law requires consent to sexual relations for legal parenthood if a child is conceived and carried to term.⁵⁷ However, assisted reproduction is by definition a non-sexual method of reproduction and the consent issues are, out of necessity, examined by a different set of concerns.⁵⁸ When human gametes are harvested and cryopreserved, the issue turns on the gamete provider consenting to retrieval⁵⁹ and/or actual transfer⁶⁰ of gametes into the body of a woman with

widow of a soldier killed in Iraq who became pregnant using the sperm of her deceased husband. *Id.*

52. *Id.*

53. UNIF. PARENTAGE ACT §§ 702, 703 (2000) (as amended 2002), 9B U.L.A. 7 at 68 (Supp. 2010).

54. UNIF. PROB. CODE §§ 2-120, 2-121 (amended 2010), 8 U.L.A. at 71 (Supp. 2010) (describing inheritance rights to and from children conceived posthumously by assisted reproduction or surrogacy arrangements).

55. A.B.A. MODEL ACT (approved by the A.B.A. Family Law Section in 2007 and the A.B.A. House of Delegates in 2008).

56. *See, e.g., id.* §§ 201-06 (informed consent to ART), 801-02 (payments to donor and gestational carriers).

57. Kindregan, *supra* note 3, at 149.

58. *Id.* at 149-50.

59. A.B.A. MODEL ACT § 102(34) (defining “retrieval” as the “procurement of eggs or sperm from a gamete provider”). This is also frequently referred to as “harvesting.” NYU Fertility Center, *About the Egg Freezing Process* (2014), <http://www.nyufertilitycenter.org/egg-freezing/cryopreservation-process>. Embryos are not retrieved but are procured by fertilization in vitro of harvesting egg and sperm, which had been retrieved. *Id.*

60. *See* A.B.A. MODEL ACT §§ 102(37) (defining “transfer” as the “placement of an embryo or gametes into the body of a woman with the intent to achieve pregnancy and live birth”), 606(2) (providing that the “consent of an individual to assisted reproduction may be withdrawn by that individual at any time before placement of eggs, sperm, or embryos”).

the intent to conceive a child.⁶¹ This clearly differs from sexual reproduction, because unlike sexual in assisted reproduction, the intent to transfer the gamete for the purpose of producing a pregnancy is paramount. In contrast to assisted reproduction, to establish parenthood in sexual reproduction there is no need to show consent to an intent to produce a pregnancy.

VI. EXPLORING THE CONSENT ISSUE

The law of battery gave rise to the law governing informed consent to bodily touching. In the context of assisted reproduction, informed consent is given when a person agrees to the retrieval and use of gametes taken from his or her body.⁶² The retrieval of gametes is the first step toward the conception of a child by posthumous reproduction.⁶³ The retrieved gametes are placed in the custody of others such as physicians and clinics so that they can be transferred to the reproductive organ of a woman.⁶⁴ Consent for retrieval is an important consideration, and there seems to be a general (but not universal) agreement that consent must have been given by the person from whom the gamete was retrieved.⁶⁵ In accordance with the Uniform Parentage Act and the A.B.A. MODEL ACT, consent should be given in a retrievable record.⁶⁶ As of 2014, express consent is generally not a statutory requirement in most United States jurisdictions, except in California⁶⁷ and New Mexico.⁶⁸

61. Kindregan, *supra* note 3, at 149.

62. *Id.* at 150.

63. *Id.*

64. *Id.*

65. See generally Amy Lai, *A Critique of the Model Act Governing Assisted Reproductive Technology*, 24 AM. J. FAM. L. 218, 218-25 (Winter 2011) (critically analyzing the Model Act's strict intent-based parenthood approach as applied to posthumous reproduction).

66. A.B.A. MODEL ACT § 102(33) (defining a "record" as "information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form").

67. CAL. PROB. CODE § 249.5 (2014) (requiring for probate purposes that the decedent have consented in writing to posthumous reproduction during his lifetime); see CAL. FAM. CODE § 4052.5(a) (2014) (providing for child support purposes that a child may have more than two parents). This may have implications for parenthood of children conceived by ART.

68. N.M. STAT. ANN. § 45-2-120(F)(1), (2)(c) (2011) (New Mexico recognizes a child of assisted reproduction if its parent consented in a record signed before or after its birth, or in the absence of a record the parent was intended to be treated as a posthumously conceived child if the intent is established by clear and convincing evidence).

States also place different emphases on the timing of conception. Minnesota provides that a parent-child relationship does not exist for purposes of inheritance “between a child of assisted reproduction and another person unless the child of assisted reproduction is in gestation prior to the death of such person.”⁶⁹ However, Minnesota does not prohibit a person from providing for a child conceived after his death in his or her will.⁷⁰ Colorado recognizes a parental relationship between an individual and a gestational child “whose sperm or eggs were used after the individual’s death or incapacity under a gestational agreement . . . if the individual intended to be treated as the parent of the child.”⁷¹ In the absence of a written agreement, the intent in this type of agreement is measured by a test of clear and convincing evidence.⁷²

When a dead or incompetent person has previously consented to have his or her gametes harvested and cryopreserved, this does not usually mean that others (spouses, lovers, parents, researchers etc.) can legally retrieve them, fertilize them, or transfer them to produce a pregnancy without prior consent of the person.⁷³ The general view is that the law should require proof of such consent given in a record.⁷⁴ However, a court, even in a jurisdiction whose statute does not require a record of consent, may be able, under its equity powers, to allow use of the gametes by court authorization finding consent on the basis of other proof through clear and convincing evidence.⁷⁵ In accordance with the principles of informed consent a person should not have his or her gametes used to conceive a child without his or her knowledge or prior consent, except perhaps in extraordinary circumstances, such as when there is undisputed and compelling evidence of consent, but it is not found in a record.⁷⁶ An example would be a mature minor who has

69. MINN. STAT. ANN. § 524.2.120(10) (West 2013) (expressly noting that a parent-child relationship does not exist between a deceased parent and a posthumously conceived child unless the child was “in gestation prior to the death of” the deceased parent).

70. *See generally* MINN. STAT. ANN. § 257 (West 2013) (statute related to children and legitimacy). The Minnesota law governing wills does not expressly provide for posthumously conceived children but does not prevent a testator or testatrix from providing for them. *See generally* § 524.2.501-517. This is true in other states as well, but is noted here because of the express exclusion of such children in the states’ inheritance statute.

71. COLO. REV. STAT. ANN. § 15-11-121(5) (West 2013).

72. COLO. REV. STAT. ANN. § 15-11-121(5)(a)-(b).

73. Kindregan, *supra* note 3, at 149-51.

74. *Id.* at 150.

75. *Id.* at 158 n.49.

76. *Id.* at 152.

made his intent known orally to several disinterested persons before he entered the military but has never executed a written record.

It can be argued that medical intervention by assisted reproduction to produce a child for a dead or incompetent person without his or her consent would offend basic principles of bodily integrity. Critics of the prior consent requirement may argue that mandating proof of such consent leaves a surviving partner or a family without an opportunity to have a child that is genetically connected to the deceased loved one.⁷⁷ However, the argument that the survivor(s) should be able to give a substituted consent in such cases seems to be weak under current uniform law proposals and under the A.B.A. MODEL ACT proposal.⁷⁸ Allowing another person to decide if the dead or incompetent person will become a parent without their prior consent to the use of cryopreserved gametes or embryos seems beyond the pale of current legal and ethical thought on the subject.

VII. VARIOUS SOLUTIONS TO THE CONSENT REQUIREMENT

There may be other ways of thinking about the requirement of prior consent before assisted reproduction can be used to create a parent-child relationship with a posthumously conceived child. Most courts are likely to hold to a strict requirement that a deceased or incompetent service-member has previously given prior consent in a record.⁷⁹ The position of the American Bar Association, as reflected in the A.B.A. MODEL ACT, provides the best protection against one person using the gametes of a dead person to impose parentage on that person without his or her prior consent.

However, some less strict proposals may be considered. One such idea would be to allow an inference of consent by clear and convincing evidence showing an unequivocal intent to consent prior to death or incompetence to both the harvesting and use of his or her gametes. A standard like this could be enforced by an express requirement that consent be established by clear and convincing evidence from whatever circumstances are relevant. This idea has the merit of requiring some substantial proof of the deceased person's intent, even without a written record.

Another idea is to allow the deceased or incompetent person's executor, estate administrator, or guardian to make the choice by substituted consent when the deceased person has not consented in a record. This author

77. *Id.*

78. *But see* A.B.A. MODEL ACT § 205(1) (requiring prior written consent from the deceased but also allowing "the individual's authorized fiduciary who has express authorization from the principal to so consent").

79. Kindregan, *supra* note 3, at 150 n.15 (noting a potential exception to the written record requirement in cases involving a minor).

believes this idea is unacceptable because it travels too far from the fundamental premise that parentage by assisted reproduction should not be imposed on a person without his consent. The person giving substituted consent may believe he or she is doing what the deceased person would have wanted done, but that is clearly different from what the deceased actually chose to do.

Lastly, a policy could be developed by court decisions or legislation to allow specified surviving family members of the deceased or incompetent person (such as a spouse or parent) to decide on how and when to use the gametes even when the deceased has not provided a record of consent. The problem with this procedure is that the interests of the surviving person(s) may not be identical, and perhaps even in conflict with the interests of the deceased with regard to parentage or inheritance.

VIII. COURT APPROVAL SHOULD BE REQUIRED FOR POSTHUMOUS USE OF GAMETES

Whichever of the possible policies is approved by legislation or applied in practice in regard to posthumous use of gametes, court approval of the choice should be required before using the gametes of a deceased person to actually conceive and produce a child. While some survivors may resent court intrusion in what may be perceived as a private family decision, the reality is that an independent, neutral court decision may be the best insurance against misuse of the gametes of a dead incompetent person.

IX. SURVIVING SPOUSE SEEKING TO HARVEST DEAD SPOUSE'S GAMETES

Note: In Sections IX and X of this article the author has borrowed from some ideas and analysis which he previously expressed in his article titled *Genetically Related Children: Harvesting Gametes from Deceased or Incompetent Persons*, 7 J. HEALTH & BIOMEDICAL LAW 147 (2011), in order to apply those ideas and analysis to the subject matter of this article.

A surviving spouse⁸⁰ sometimes seeks to have medical personnel retrieve the sperm or eggs of a recently deceased spouse.⁸¹ There are no known

80. A.B.A. MODEL ACT § 102(21) (defining legal spouse as “an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage”). This definition allows persons living in a state which recognizes registered domestic partnerships or civil unions to be treated as a legal spouse for purposes of ART even if not technically married. As more states recognize various legal types of personal intimate family relationships (domestic partnerships, civil unions, etc.), the definition of “spouse” becomes increasingly important in resolving the question of who is a surviving partner as the functional equivalent of a married person.

reports of such requests arising in the military context, and in the case of a combat death, it is unlikely to arise because access to the body by the surviving spouse within hours of death cannot usually occur.⁸² However, the situation can arise in the case of an accidental death on a domestic base or in a training context.⁸³ Can this request be allowed when the deceased spouse cannot consent to the removal of his sperm or her eggs? In the United States, it is doubtful that the medical staff would consent to this without either a court order or at least a formal opinion by a hospital counsel authorizing the harvesting of a dead or incompetent soldier's gametes.⁸⁴ Hospital or clinic counsel may be reluctant to approve removal of gametes from a dead person unless authorized by a judicial order.⁸⁵

Malpractice concerns often dictate caution in making choices. While this is understandable, the narrow window of opportunity to harvest the sperm from a dead body requires a prompt decision by a judge. Will a judge allow the retrieval without credible evidence that the spouse expressly consented to this before his or her death or incompetence? No doubt judges may answer this question differently, since it essentially involves the substituted judgment of the court for that of the deceased person in the absence of strong evidence of intent. A survivor may seek judicial approval to have gametes harvested in case of an accident or other unexpected death or injury resulting in incompetence.⁸⁶ However, under the A.B.A. MODEL ACT, in the absence of proof of prior consent of the now deceased or incompetent person to having a child, a judicial order of harvesting, or even more unlikely placement of the gametes, may not be forthcoming.⁸⁷

81. Susan Crockin, *Legally Speaking*, ASRM NEWS, Sept. 30, 2009 (approving the request after the dead man's fiancée told the judge that her fiancé told her he wanted to have another child with her just a day before he died); see Maggie Gallagher, *New York Forum About the Sperm The Ultimate Deadbeat Dads*, NEWSDAY, Feb. 1, 1995, at A28 (sperm taken from body of deceased husband and cryopreserved at request of his widow); Ike Flores, *Newlywed Dies in Crash, but Hopes for Children Live in Extracted Sperm Florida: A Rare Surgical Procedure Performed After Groom's Death Could Allow Widow to Become Pregnant. But Chances of Success are Slim, Doctors Warn*, L.A. TIMES, July 3, 1994, at A10 (sperm removed from dead body of newlywed husband for possible future use of widow).

82. Doucetperry, *supra* note 46, at 2.

83. *Id.*

84. Kindregan, *supra* note 3, at 157.

85. Bethany Spielman, *Pushing the Dead into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J. OF L. MED. & ETHICS 331, 332 (2009).

86. *Id.*

87. A.B.A. MODEL ACT § 205 (prohibiting collection of gametes from dead or incompetent persons unless the individual has previously consented in a record).

The difference between “harvesting” gametes and the “placement” of gametes after they have been retrieved is an important one.⁸⁸ For example, a woman’s request for retrieval of her husband’s sperm from his dead body will have to be acted on promptly.⁸⁹ There is a narrow window of time in which the sperm will remain vital.⁹⁰ If not retrieved within this narrow window of time (around 30 hours of death) the sperm will not be viable.⁹¹ Once this window has closed posthumous reproduction becomes impossible. However, there will no doubt be emergency situations in which consent will be alleged by a survivor but not proven by production of a consent record.⁹² It is for this reason that the A.B.A. MODEL ACT contains the following exception to the requirement that gametes not be retrieved from a dead body unless he or she gave his or her consent prior to their death in a record:

In the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating physician, loss of viability would occur as a result of delay, and where there is a genuine question as to the existence of consent in a record, an exception is permissible.⁹³

When a surviving spouse or partner asserts that her husband or partner had previously consented to harvesting of his sperm in case of his death, the physician will have to make the decision to retrieve or not retrieve the sperm.⁹⁴ However, in the absence of a record, such as that contemplated by Section 205 of the A.B.A. MODEL ACT, counsel might recommend seeking an emergency ruling from a court authorizing the harvesting of the gametes even in the absence of a record consent.⁹⁵

88. Kindregan, *supra* note 3, at 157.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. A.B.A. MODEL ACT § 205(2); Kindregan, *supra* note 3, at 157; *see also* Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433, 440 (2009) (advocating the enactment of more uniform legislation to clarify status of posthumously conceived children); Susan Kerr, *Post-Mortem Sperm Procurement: Is it Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 68 (1999) (advocating that legal survivors be allowed to remove sperm from dead body); *see* David M. Greer, M.D. et al., *Case Number 21-2010: A Request for Retrieval of Oocytes from a 36 Year Old Woman with Anoxic Brain Injury*, 363 NEW ENG. J. MED., 276, 282 (2010) (including analysis of the A.B.A. MODEL ACT provisions).

94. Kindregan, *supra* note 3, at 158.

95. *Id.* at 150, 158 n.49 (noting that a party could seek an equitable ruling if allowed by local procedure); A.B.A. MODEL ACT § 205(2) (depending on local procedure, a ruling could be sought under a statute which specifically provides for it, or an action in equity or declaratory judgment).

X. GOOD PRACTICE REGARDING DISPOSITION OF SPERM BY DEPLOYED SOLDIERS

Some male military personnel who are assigned to duty in a combat zone may consider storing their sperm before deployment.⁹⁶ The number of soldiers who do so may initially be relatively small,⁹⁷ but this will likely grow as knowledge of this option becomes better known. Service-members are in an especially good position to consider whether to cryopreserve gametes prior to deployment because they are encouraged to consult with counsel regarding their legal affairs.⁹⁸ This can include discussion of the preservation of their gametes in case of a serious wound which could harm their potential for having genetically-related children, or even to allow a surviving spouse or designated partner to use the sperm for the same purpose in case of death in combat. This turns on the intent of the service-member or his or her partner. Thus, before deployment and the sperm storage, the service-member and his or her spouse or other persons affected by the consent document should consult counsel and make a record of their intent with regard to any restrictions.⁹⁹

The record should make clear the circumstances under which the survivor(s) will have access to the sperm or eggs and whether access is limited only to the death of the soldier or includes access in case of his or her incompetence.¹⁰⁰ The consent document should also make clear any time limitations involved. For example, the record may require that the survivor use the sperm within a certain number of years, or be destroyed after a period of time.¹⁰¹ The consent document may restrict the use of the sperm if the surviving spouse or partner remarries or enters a new intimate relationship.¹⁰² In this case, the record should clearly spell out the soldier's intent, and should do so in clear and unequivocal language; to be safe the record should unambiguously express the soldier's intent to become a parent through posthumous reproduction.¹⁰³

96. See generally Doucettperry, *supra* note 46 (noting issues created by sperm storage before combat deployment and relatives of injured or dead soldiers requesting access to their sperm); see also Alvord, *Some Troops Freeze Sperm Before Deploying*, *supra* note 43.

97. One report in USA Today estimated that, as of 2008, about 100 troops have deposited sperm in the three largest national sperm banks. Zoroya, *supra* note 52.

98. Doucettperry, *supra* note 46, at 21.

99. *Id.*

100. Kindregan, *supra* note 3, at 160.

101. *Id.*

102. *Id.*

103. *Id.*

The record itself can take many forms. It can be a contract between the soldier and his wife or partner. It could also be a deed of gift to the spouse partner, or a provision in a will, conveying the cryopreserved sperm. It could also, or in addition, be a document authorizing a sperm bank to preserve his sperm and to allow the surviving spouse or partner to access the cryopreserved gamete. The record can even be a provision in a testamentary instrument.¹⁰⁴ The best practice would be to use all of these records to clearly establish consent. The storage facility should be expressly willing to abide by the wishes of the couple.

An early decision on posthumous reproduction was a California Court of Appeals decision in which the question was raised whether a court would recognize a man's ability to transfer his sperm to his girlfriend by deed and will for her use after his death. The man stored his sperm, left instructions with the sperm bank to give his girlfriend access to the cryopreserved sperm, and executed a will gifting it to her before he killed himself.¹⁰⁵ There, the court reasoned that the sperm was properly considered part of the estate and the trial court erred in finding as a matter of law that the deceased could not gift away the sperm in his will.¹⁰⁶

If a soldier is not married to the woman he designates as the person entitled to the sperm, the record of consent should make clear that the transfer is his intent notwithstanding that the woman is not his spouse. If the record is contested (for example by the soldier's legal spouse or family member) in court, the question may be raised whether it is contrary to public policy for a judge to approve the transfer of sperm to a person who is not a spouse.¹⁰⁷ Many children are born out of marriage today, but someone may ask: "should the law condone it by allowing an unmarried woman access to sperm to conceive a child posthumously?"¹⁰⁸ I think it is unlikely that a court today would focus on whether or not the intended parents are married since the right of unmarried persons to have a child is not likely to be successfully contested in modern America.¹⁰⁹ This is reflected in the A.B.A. MODEL ACT, which, while recognizing the interests of legal spouses in

104. *Id.* at 161.

105. *Hecht v. Sup. Ct.*, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993) (involving a challenge to the girlfriend's access to the stored sperm of her deceased boyfriend by the man's prior-born children).

106. *Id.* at 283-84.

107. *Kindregan*, *supra* note 3, at 161.

108. *Id.*

109. *Id.*

regard to parentage,¹¹⁰ does not place any limitation on the use of assisted reproduction by unmarried persons.¹¹¹

XI. THE STATUS OF THE POSTHUMOUSLY CONCEIVED CHILD

The issues discussed above directly raise questions regarding the legal status of children of posthumous conception, *i.e.*, the parenthood of a man or woman whose child is conceived after that person's death. The law has long recognized that for purposes of inheritance, a child conceived naturally before the father's death, but born after the father's death, is the father's legal child.¹¹² This situation is different from the problem of a child born after a father's death because it involves the intentional potential post-mortem *conception* of a child. Posthumous conception today is entitled to recognition under the Uniform Probate Code which recognizes that an individual can be the legal parent of a gestational child conceived after his or her death if the child is in utero no later than 36 months after the parent's death or is born no later than 45 months after the parent's death.¹¹³

In the United States, the definition of who is considered the child of a deceased person has historically been determined by state law.¹¹⁴ The best analogy is found in Social Security law, where the determination of the benefits of a surviving child of a Social Security beneficiary is determined by the law of the state.¹¹⁵ In 2012, the U.S. Supreme Court ruled that a posthumously conceived child of a deceased Social Security beneficiary who was domiciled in Florida was not his legal heir since a Florida statute restricted recognition of posthumous conception to those who were named in the parent's will.¹¹⁶ This result also exists in other state statutes, although if

110. See A.B.A. MODEL ACT § 605(1)-(2), for limitations on the right of the legal spouse to dispute parentage of a child born to his wife by assisted reproduction; see also *id.* § 604(1) (stating the right of an "individual" to use ART to become a parent is clearly recognized by the person's consent in a record).

111. Kindregan, *supra* note 3, at 161-62.

112. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1(d) (1999).

113. UNIF. PROB. CODE § 2-120(k) (amended 2010), 8 U.L.A. at 59 (Supp. 2010).

114. Kindregan, *supra* note 3, at 168.

115. *Id.*; see 42 U.S.C. § 416(h)(2)(A) (2012) ("In determining whether an applicant is the child or parent of a fully or currently insured individual . . . the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled.").

116. *Astrue v. Capato*, 132 S. Ct. 2021, 2034 (2012) (holding that children conceived through in vitro fertilization after Florida-domiciled wage earner's death were not entitled to survivor child's insurance under the Social Security Act because children did not qualify for inheritance under Florida's intestacy law).

the state inheritance statute recognized the posthumous reproduction as producing an heir, the Social Security law could provide benefits.¹¹⁷

The critical question then relates to the military survivor benefits of the deceased service-member: under the law of his or her state, is the posthumously conceived child legally the child of the deceased service-member? However, it is also possible that a court would look to statutory definitions of children used in other military benefits law when confronted with the question of whether a posthumous child conceived using the gametes of a dead service-member is that service-member's child. For example, the military pension law defines a dependent as:

[a] child who (i) has not attained the age of 21, (ii) has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary and is, or was at the time of the member's or former member's death, in fact dependent on the member or former member's for over one-half of the child's support, or (iii) is incapable of self-support . . .¹¹⁸

A court might also look to the definition of an "unmarried legitimate child" to describe the child of a member or former member of the military,¹¹⁹ which in turn may depend on the status of the child under state law.¹²⁰

It will be important to resolve this question when the posthumously conceived child of a deceased soldier applies for benefits. The Veteran's Administration (VA) benefits program is complex and includes benefits for survivors of military service members who die or become incapacitated while on active duty.¹²¹ The definition of "child" is inconsistent among the various relevant statutes.¹²² Under the Dependency and Indemnity Compensation Act (DIC), a "child" includes a person who is unmarried and under the age of 18 or is under the age of 23 and pursuing a course of instruction at an approved educational institution) and (i) is legitimate, (ii) is legally adopted, (iii) is illegitimate and has been acknowledged in a signed writing by the father, or (iv) had paternity for purposes of child support

117. *See, e.g.*, Woodward v. Comm'r. of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002) (holding that under limited circumstances, posthumously conceived children may enjoy the inheritance rights of "issue" under Massachusetts intestacy law).

118. 10 U.S.C. § 1072(2)(D)(i)-(iii) (2012).

119. 10 U.S.C. § 1072(6)(A); *see also* 10 U.S.C. § 1447(11)(A) (defining "dependent child" under the Military Survivor Benefit Plan).

120. Doucettperry, *supra* note 46, at 19-20.

121. *Id.* at 14.

122. *Id.* at 20.

determined judicially determined before the father's death.¹²³ However, the same statute also provides that the child may be determined to be the child of the veteran if the veteran is "otherwise shown by evidence satisfactory to the Secretary to be the father of such child."¹²⁴ As to the medical and dental care of a dependent child of the soldier who died on active duty,¹²⁵ at the time of this article, there is no controlling court decision on the status of the posthumously conceived child under laws dealing with military benefits.¹²⁶

While it is not absolutely certain, it seems more likely than not that this question will be resolved in a way analogous to the determination of a posthumous child's status as in the Social Security cases. This uncertainty might cause some to doubt the financial wisdom of conceiving children with the sperm of dead service-members, but for many the desire of a surviving spouse or partner for a genetic connection to the deceased soldier may still be sufficient grounds to approve the practice.

XI. POST INJURY FERTILITY TREATMENT FOR THE INJURED SOLDIER

In recent years, many men and women have been called to military duty from their Reserve and National Guard status.¹²⁷ These service-members have been placed on active duty and the death and injury rate has substantially increased among members stationed in Iraq and Afghanistan.¹²⁸ While the prior commitment of the military to assignment in places such as Afghanistan may be substantially winding down, it is inevitable that future conflicts will again expose the American military service members to the various dangers of combat.¹²⁹ The nature of combat and even assignments to meet with civilians exposes these civilians and soldiers to the risk of pressure-plate improvised explosive devices, death, or serious injury.¹³⁰

123. 38 U.S.C. § 101(4)(A) (2012).

124. *Id.*; see also 38 U.S.C. § 1313 (Veterans Dependency and Indemnity Compensation for Service-Connected Death) (providing for financial compensation for the children of soldiers when the parent is killed in a connected death and there is no surviving spouse entitled to the compensation).

125. See generally 10 U.S.C. § 1076 (2012) (defining the access of dependents of soldiers who died on duty to medical and dental care).

126. Doucetperry, *supra* note 46, at 1-2.

127. DEFENSE SCIENCE BOARD TASK FORCE, DEPLOYMENT OF MEMBERS OF THE NATIONAL GUARD AND RESERVE IN THE GLOBAL WAR ON TERRORISM 7 (Sept. 2007), available at <http://www.acq.osd.mil/dsb/reports/ADA478163.pdf>.

128. Doucetperry, *supra* note 46, at 1 n.5.

129. *Id.* at 1.

130. William R. Levesque, *IED's Continue to Kill and Maim U.S. Troops Despite Multibillion Dollar Effort*, TAMPA BAY TIMES, Sept. 12, 2007, <http://www.tampabay.com/news/military/war/ieds-continue-to-kill-and-maim-us-troops-despite-multibillion-dollar-effort/1253728>.

Even if death does not result, loss of reproductive capacity can occur due to injury.¹³¹ Some service-members may be issued ballistic underwear, which can help reduce the risk of injury to the reproductive organs.¹³² This should be uniform policy for the Department of Defense: to provide the best possible protection against such injuries. Most service-members, male and female, are still in their most fertile years,¹³³ and if their reproductive capacity is injured or compromised, they may not be able to start or continue the development of their families after their deployment ends. At the very least, it should be military policy to advise service-members to take steps to protect their reproductive potential by wearing the best available protective clothing and equipment. This would not conflict with promotion of pre-deployment cryopreservation of gametes, but would supplement a service-member's protection of a vital human capacity to reproduce while they are serving their country.¹³⁴

What happens when a service-member has sustained injuries to his or her reproductive system? Some military services treat infertility problems caused by injury while service-members remain in the military. For example, the Army provides infertility services for injured soldiers, such as in vitro fertilization.¹³⁵ However, service-members who are injured to the point that they are not able to remain in the service will undergo transfer to the VA Services.¹³⁶ After separation from the military, the former service-member may only have access to the limited services provided by the VA department,¹³⁷ unless he or she has access to comprehensive private or other medical services. While the VA program provides some infertility services such as intrauterine insemination, the important service of in vitro

131. Doucettperry, *supra* note 46, at 2.

132. Sgt. 1st Class Raymond Piper, *Deploying Soldiers to receive ballistic briefs*, U.S. ARMY (Oct. 6, 2011), <http://www.army.mil/article/66916/>.

133. U.S. DEP'T OF DEF., *2012 Demographics: Profile of the Military Community* at 36 available at http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf (noting that 65.7% of active duty service-members are 30 or younger, with that number rising to 80.4% when considering members 35 and younger).

134. The author was first made aware of the potential for military persons to wear protective clothing by Stephen J. Patten, an LL.M. candidate at Suffolk University Law School. Mr. Patten served as a Captain and Judge Advocate General in the United States Army during two tours in Afghanistan with 82nd Airborne Division, during which he was awarded the Bronze Star.

135. Maria Gallegos, *Double amputee gets another chance of starting family*, U.S. ARMY (Apr. 24, 2013), www.army.mil/article/101764; see generally U.S. DEP'T OF THE ARMY, DEP'T OF DEF. INST. 1300.24, RECOVERY COORDINATION PROGRAM (Dec. 1, 2009).

136. Leslie C. Rogall, *An Attorney's Guide to Veterans' Rights and Benefits*, GPSOLO MAG. 22 (Jan.-Feb. 2005), http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/anattysguide.html.

137. *Id.*

fertilization (which could assist some wounded former soldiers to have children) is not available from the VA.¹³⁸ While legislation has been introduced into Congress to extend infertility services available to active-duty personnel for injured veterans,¹³⁹ it has not yet gained majority support in Congress. These injured men and women, upon separation from the military, have to depend on private health insurance to provide for some fertility treatments or even ART services.¹⁴⁰ Such ART services are not mandated in most state statutes governing health care insurance.¹⁴¹ When the damage to the fertility system has been caused by injuries incurred while serving their country in the military, this seems an arbitrary method of enabling a veteran to start or continue a family after their service.

XII. CONCLUSION

Since combat presents such a substantial risk that a healthy young person may be exposed to high risk of death or serious injury, the analysis of posthumous reproduction can perhaps be most clearly discussed in the context of the military. This context also presents the potential for advising such persons of the importance of planning to preserve their fertility through use of cryopreservation before their deployment and of clearly setting out any requirements for others to have access to use their gametes in the case of their death or incompetence. Of course, the same situation can arise in a non-military context where a death or injury occurs.

138. 38 C.F.R. § 17:38 (c)(2) (2011).

139. *See generally* The Women Veterans and Other Health Care Improvements Act of 2013, S.131, 113th Cong. (2013); H.R. 958, 113th Cong. (2013). In addition to providing infertility services available to active duty soldiers, the proposed Acts would require the VA to provide infertility treatment and services to severely injured servicepersons and their consenting spouse or surrogate when the infertility problem was incurred or aggravated during their service. S.131 § 3(a), H.R. 958 § 3(a).

140. The Veteran's Administration covers certain fertility treatments but is barred by regulation from assisting with in vitro fertilization. *See Reproductive Health: Women Veterans Health Care*, DEP'T OF VETERAN AFFAIRS (March 2010), available at http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2301 (noting that the VA can cover some fertility treatments, including intrauterine insemination); 38 C.F.R. § 17.272(a)(28) (2013) (barring coverage of in vitro fertilization and "noncoital reproductive technologies").

141. NAT'L CONF. OF STATE LEGISLATURES, *State Laws Related to Insurance Coverage for Infertility Treatment* (June 2014), <http://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> (explaining that only fifteen states "require insurers to either coverage or offer coverage for infertility diagnosis and treatment"); *see generally* Kindregan & McBrien, *supra* note 26 at 223-28 (most states do not mandate assisted reproduction coverage, or only require limited coverage, for treatment of infertility).

Posthumous reproduction by military personnel raises many unanswered questions. This article has pinpointed some of these issues, and made some suggestions as to how the law can deal with them in a way that accords both with policy in an all-volunteer military, and their possible application of civilian law models. Hopefully, this article further helps the discussion of these issues by the various stakeholders. Even in the absence of statutory clarification of the issues, it is the author's hope that military practice and policy may clarify some of the issues associated with posthumous conception in the coming years.