

## ***Karène Parizer-Krief***

*Doctor in Law and Social Sciences, Member of the Centre for Studies of Legal Rules  
(CENJ)*

### **Post mortem procreation in French and British Law**

In the field of medically-assisted procreation (MAP), new gamete-freezing techniques have been developed for application to sperm cells, egg cells, and embryos. Donations initially intended for couples can also be made to single women. Likewise, patients undergoing treatment that is liable to make them sterile have solicited the services of sperm and ova banks, in order to preserve their fertility in the future. The possibility for the individual to preserve his or her own gametes has broadened the vision of intentional parenthood, hitherto limited to a couple-based model.

More generally, the increased weight granted to individual will in this process is likely to distance policymakers from the model imitating spontaneous procreation. A parallel means of reproduction, independent from the traditional family model, is gradually emerging for single men and women.

According to Marcel Gauchet<sup>1</sup>, a prominent French sociologist, the more a child is the fruit of invention as opposed to nature, the more he is desired. He “belongs” to his parent or parents, rather than to society. This statement has social ramifications worthy of investigation. As reproduction becomes possible outside the structure of the couple, traditionally required by society, single people are considering parenthood on their own. An age-old reproductive necessity is being challenged.

MAP offers technological solutions to single men and women wishing to become parents. The scientific fact has been approached differently by French and British legislators. Before dealing with the question of reproduction following a partner’s death, that is, posthumous or post-mortem procreation (section 2), we shall briefly present the laws governing access to MAP for single women<sup>2</sup> in France and Britain (section 1). The two issues are closely related. If MAP is authorized for single

---

<sup>1</sup> M. Gauchet, “L’enfant du désir”, *Le Débat*, n° 132, Nov.-Dec. 2004, p. 98.

<sup>2</sup> Let us note that neither of the two systems has ever authorized access to MAP for single men.

women, there is no reason to deny it to women who wish to bear the child or children of a partner who consented to parenthood before dying. The criterion of the welfare of the child is the same in both cases.

### 1) MAP access for single women

The question of access to MAP for single women is entirely unrelated to the issues of adoption or abortion. In the latter two areas, women have the right to choose, even though society is solicited in both cases. However, in the field of MAP, France has denied access to single women since the program's inception, because MAP was historically intended for heterosexual couples. British law, by contrast, has never banned access to single women.

**French** legislation explicitly refuses access to MAP for single persons. Article L 2142-2, al. 2 of the French public health code states “the man and woman forming the couple<sup>3</sup> must be alive and of reproductive age, and must have given prior consent to the embryo transfer or insemination. Obstacles to insemination or embryo transfer are constituted by the death of one of the members of the couple, initiation of divorce or separation proceedings, or cessation of cohabitation, as well as either partner's written revocation of consent, filed with the doctor in charge of proceeding with the medically assisted procreation procedure”. The fact that access to MAP is contingent on the pathological nature of medically-diagnosed infertility<sup>4</sup> excludes any request by a single woman for artificial insemination: such a request would be a matter of personal convenience rather than medical necessity. Performing MAP procedures for any purpose other than the ones defined by the law is punishable by up to 5 years in prison and a fine of 75,000 euros<sup>5</sup>.

Nevertheless, despite the importance of the couple-based “parental project”, a founding concept of the French legislative apparatus, the field of donations is beginning to show evidence that a more individualistic trend is developing, overshadowing the couple. It is true that the surviving partner alone has always determined the fate of the embryo, if the other partner dies<sup>6</sup>. However, as regards gamete donation, the hypothesis was initially considered differently. Before sperm-donation procedures were set by law, the CECOS banks (Centre d'Étude et de

---

<sup>3</sup> French law n° 2011-814 dated 7 July 2011 on bioethics deleted the requirement for the couple to have been living together for at least two years.

<sup>4</sup> Art. L 2142-2, al. 1, CSP.

<sup>5</sup> Art. 511-24, C. pén.; art. L. 2162-5, CSP.

<sup>6</sup> Art. L 2142-4, II, CSP.

Conservation des Oeufs et du Sperme humains), where sperm donation originated, promoted the concept of a “couple-to-couple” donation. The couple-based model was a precaution taken for the purposes of avoiding any association of insemination with adultery<sup>7</sup>. The founders of the CECOS<sup>8</sup> supported the original, three-pillar French regime: the donor had to be married, or at least living in a stable couple; he had to have had children already; and his wife’s consent was required.

Whereas the original draft of Article L1244-2 of the public health code permitted gamete donation only if the “couple” had already reproduced<sup>9</sup>, in 2004<sup>10</sup> the lawmaker accepted donor sperm from single people, as long as they had already reproduced<sup>11</sup>. The purpose of the latter condition was to avoid any regret, in retrospect, on the part of childless people whose gametes had been given to another couple. During the debate prior to the revision of 2011<sup>12</sup>, several thinkers advocated eliminating the requirement that the donor, male or female, have reproduced earlier<sup>13</sup>, granting greater powers to the donor’s decision-making abilities. Currently, there is a shortage of gametes. In order to encourage egg-cell donations from young women, who produce the highest quality of oocytes, the law was changed. Henceforth, if the donor is over the age of 18, the reproduction requirement is waived. He is offered the option to collect and conserve some of his gametes or germ tissues should he wish to proceed with medically assisted procreation for himself at a later date<sup>14</sup>.

The **United Kingdom** has never denied access to MAP to single women. The 1990 *Human Fertilisation and Embryology Act* stated only one condition: the child’s welfare, and his or her need for a father. According to §13(5), “*a woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth*”. In 2008, this

<sup>7</sup> *Simone Bateman* (Les passeurs des gamètes, Presses Universitaires de Nancy, 1994) believes this policy was related to the Catholic beliefs of the founder of the CECOS, *George David*. She shows that religious considerations played a key role in the elaboration of the entire French bioethics model. David, a committed Catholic, conferred with priests and theologians in an effort to produce an innovative Catholic vision of MAP. It was primordial to avoid any assimilation of the practice with adultery. In this context, David invented the specifically French concept of the couple-to-couple donation. The instruction issued by the Vatican in 1987, *Donum vitae: On Respect for Human Life in Its Origin and the Dignity of Procreation*, stripped David of his illusions, for it condemned all forms of both conjugal and extra-conjugal assisted reproduction.

<sup>8</sup> *G. David*, “Don de sperme: le lien entre l’anonymat et le bénévolat”, *Andrologie*, 2010, 20, p. 63-67.

<sup>9</sup> “The donor must belong to a couple that has already reproduced”.

<sup>10</sup> French law n° 2004-800 dated 6 August 2004 on bioethics.

<sup>11</sup> “The donor has to have reproduced”.

<sup>12</sup> French law n° 2011-814 dated 7 July 2011 on bioethics.

<sup>13</sup> Professor *René Frydman*, interview with Radio France Info, 12 Nov. 2010.

<sup>14</sup> Art. L 1244-2, al. 3, CSP.

condition was replaced, and the law now states the child's need for a "*supportive parent*"<sup>15</sup> further confirming potential access for single women.

Single women have the right to obtain donor insemination (DI) as well as surrogacy. However, unlike heterosexual and homosexual couples, who can request that the court establish their parental relationship to the child by specific procedure, namely Parental Order, single women must file for adoption in order to establish motherhood of a child born by surrogacy.

Two options are available to them. The first is by obtaining donor sperm and a donor egg (if the intentional mother's oocyte cannot be used; British legislation impose no ban whatsoever on the donation of both gametes) and by surrogacy. This course can only be carried out by an approved clinic.

The second option consists of insemination with donor sperm, to be used to fertilize her own egg cells. This process does not necessarily involve admission to an approved clinic, because it can be carried out at home (the "turkey-baster method").

In practice, it seems that the great majority of these single women finance the MAP treatments themselves. Only one fifth of the National Health Service (NHS) centers meet the standards set by the NICE (*National Institute for Health and Care Excellence*)<sup>16</sup> in 2004, regarding the three courses of IVF treatment they should offer.<sup>17</sup> As a result, certain legal scholars, like Emily Jackson<sup>18</sup>, are careful to distinguish between the category of women raising children in single-parent families exposed to the risk of poverty, and a second category of women who have access to MAP, a choice they can afford.

## 2) Post-mortem reproduction

Although cases of post-mortem reproduction are extremely rare, the question is an opportunity to gain insight into the social purpose of MAP (because society is solicited): is it a remedy for infertility, or a new way of giving life? The right to post-mortem reproduction is related to the extension of autonomy, but it can also reflect a natalist policy. Post-mortem reproduction also involves the question of equality

---

<sup>15</sup> Human Fertilisation and Embryology Act, 2008.

<sup>16</sup> NICE is an independent agency that sets standards and issues clinical guidelines. These recommendations are not mandatory, but they do have an impact on the availability of healthcare in the public sector. To review NICE guidelines and on the application and use of NHS resources, see <http://nice.org.uk>

<sup>17</sup> "Single women being offered IVF on the NHS," *Telegraph*, 24 Oct. 2011; "A fifth of PCTs offer single women IVF on the NHS," 31 Oct. 2011, *R. Paxman*, *BioNews* 631.

<sup>18</sup> *E. Jackson*, *Medical Law*, Oxford University Press, 2nd ed. 2010, p. 772.

between men and women. It can be articulated with surrogacy because technically, men could also use embryos conceived with a deceased partner, or her egg cells<sup>19</sup>.

In Europe, the countries that authorize post-mortem reproduction, like Belgium, Spain, the Netherlands, and the United Kingdom, make no distinction between the use of frozen sperm and embryo transfer. This absence of distinction is coherent, if we consider that the will of the couple to pursue plans for parenthood must be fulfilled beyond the death of one of the members of the couple, and that this is so regardless of how far they have technically advanced towards this fulfillment. Likewise, from the child's point of view, the criterion of his or her welfare is not affected by the choice between post-mortem insemination or embryo transfer. Conversely, the two practices could be dissociated, in order to authorize post-mortem embryo transfer. The distinction could be justified by the lack of symmetry between sperm and embryos, and the recognition that existing embryos deserve some respect.

The principal arguments in favor of authorizing access to post-mortem reproduction are:

- The autonomy of widows committed to assuming single parenthood: they could demand this right on the grounds that other women have the right to choose to have children unrecognized by a biological father; no one forces them to abort fatherless children.
- The fact that these situations are not the product of the development of MAP and especially IVF alone, because a woman whose partner happens to die during the pregnancy faces the same choice, and is not required to terminate her pregnancy as a consequence.
- That the point is to continue a parental intention that has been carefully thought out, at least in the case of an embryo transfer.
- Because the number of such cases is statistically limited, authorizing post-mortem reproduction would have no impact on society as a whole.

---

<sup>19</sup> "A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury", *New England Journal of Medicine*, vol. 363, n°3, 15 July 2010, p. 276-283, Case 21-2010, *David M. Greer, M.D., Aaron K. Styer, M.D., Thomas L. Toth, M.D., Charles P. Kindregan, J.D., LL.M., and Javier M. Romero, M.D.* Also, for a study of various provisions made by US state legislatures, with the financial implications of authorization, see *K. KNAPLUND*, "Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century", *Real Property, Probate and Trust Law Journal*, vol. 43, No. 3, 2008, Pepperdine University Legal Studies Research Paper No. 2009/01, <http://ssrn.com/abstract=1334915>

- That because it is in the child's interest to be born, he or she will feel even more desired, and will have a father figure – an abstract one, true, but an undeniable father.

*A contrario*, opponents of authorizing post-mortem reproduction cite the following arguments:

- Society has the right to investigate, because it is solicited to assist and program the birth of a child whose father is dead.

- Single-parent households, often associated with poverty, should be avoided.

- The child's interest is ignored, because he or she would be growing up fatherless, in an incomplete family structure.

- No one has “the right to a child”; post-mortem reproduction is a selfish desire, a deviation caused by MAP; it is against Nature and does not deserve to be encouraged.

- Post-mortem reproduction deprecates the mortal human condition we all share; it is the fulfillment of an inappropriate desire for self-perpetuation. To quote Professor Carbonnier, “even if the procedure was not judged in the least immoral, it would have to be held illicit: it is a bid for immortality, even on a reduced scale, whereas mortality is unconditional”<sup>20</sup>.

- It is impossible to obtain truly informed consent from the man, who cannot realize the extent of his commitment.

- Women who are bereaved are subject to pressure; sometimes, their request for MAP may reflect a struggle to work through grief, more than a real desire to have a child.

- No legal system has ever considered the embryo as a person: as a result, post-mortem embryo transfer cannot be authorized on the grounds that the embryo exists.

- Authorizing post-mortem reproduction discriminates against fertile couples who, since they do not resort to IVF, have no embryos available, should one partner die.

- Post-mortem reproduction could be a source of complications in the field of parenthood law, and especially inheritance rights, where abuses might follow.

On the European level, the absence of consensus between the member states on the scientific and legal definition of the start of life makes the departure point for the right to life a subject that the European Court of Human Rights (ECHR) allows

---

<sup>20</sup> J. Carbonnier, *Droit civil*, t.1, Les personnes, Presses universitaires de France, Coll. Thémis, 18<sup>th</sup> ed., n° 20.

member states to rule upon<sup>21</sup>. So far, it has been impossible to determine a common position on the issue of post-mortem embryo transfer.

French legislation has not authorized access to any form of post-mortem reproduction, and as a result, the issue has been hotly debated and cases have been brought before the courts. There are two reasons why the practice has not been the focus of as much controversy in the United Kingdom. First, a clear legal framework has been set up, and second, cases of post-mortem reproduction are rare. In fact, the UK even permits post-mortem reproduction through surrogacy, a MAP practice that is banned in France.

In **France**, as we said, the law<sup>22</sup> requires that the man and woman who are the prospective parents must be alive, and must give prior consent to embryo transfer or insemination. These two conditions rule out any possibility of post-mortem reproduction.

*Post-mortem* embryo transfer and insemination are understood to be outside the purposes of MAP; e.g., to help a couple with a clearly diagnosed pathological infertility to have a child.

The presence of the man and woman is inspected at the time of the intake interview with the physician<sup>23</sup>. The physician is supposed to be informed if either partner dies between intake and the day scheduled for the treatment. This legal norm is confirmed by Article 311-20 *al.* 3 of the French Civil Code, which stipulates that in case one partner dies, permission for MAP is revoked. Although French criminal law does not provide for any specific charges in the case of *post mortem* reproduction, engaging in MAP procedures for any purpose other than those defined by the law<sup>24</sup> carries criminal penalties for the physician<sup>25</sup>. The Guide to Good Practices<sup>26</sup> stipulates that frozen sperm cannot be delivered to anyone except for the patient himself, within the framework of gamete conversation for the use of the patient himself.

---

<sup>21</sup> CEDH, 8 July 2004, *Vo c/ France*, n° 53924/00 (D. 2004, p. 2456 (PRADEL); JCP 2004, II, 10158 (LEVINET); D. Chr. 2004, p. 2801 (SERVERIN)).

<sup>22</sup> Art. L 2142-2, CSP.

<sup>23</sup> Art. L 2141-10, CSP.

<sup>24</sup> Art. L 2141-2, CSP.

<sup>25</sup> Art. 511-24, C. pénal stipulates a 5-year prison sentence and 75,000-euro fine.

<sup>26</sup> Ministerial decree dated 3 August 2010 regarding rules for good clinical and biological practices in MAP (French Ministry of Health and Sports, published in the *Journal Officiel* dated 11 September 2010).

Conversely, the surviving partner may give permission for an embryo to be donated to another couple<sup>27</sup>.

The legislative ban on any form of post-mortem reproduction goes back to the 1994 law, the terms of which were discussed at length at the time the bill was drafted<sup>28</sup>.

This law followed the Braibant Report of 1988<sup>29</sup>, recommending a ban on pursuing plans for parenthood in case of the death of one of the members of the couple, even if while alive the husband had given his consent for this use. The authors of this report expressed the opinion that “it seems excessive to give a person the extreme power to impose on another the amputation of half of his ancestry”, for even in single-parent families (following divorce or death), the child has two parents (he is entitled to inherit from both parents, to be fed by both, to bear the name of both, etc.). “The admission of single women... changes the conception of MAP at the root. It makes this procedure a form of convenience freely available to any individual, a pure and simple alternative to natural procreation”<sup>30</sup>.

Before the 1994 law went into effect, post-mortem reproduction was condemned by jurisprudence when courts rejected requests for the return of sperm samples. The first ruling published in this field concerned the Parpalaix case, which

---

<sup>27</sup> Art. L 2141-5, *al.2*, CSP.

<sup>28</sup> From the outset, the first draft bill (Law n°94-654) prohibited post-mortem procreation by establishing the following condition for access to MAP: “the members of the couple must be living at the time of the insemination or of the transfer of fertilized human eggs”. This wording was later rectified: the term “couple” was replaced by “the man and woman forming the couple” to exclude homosexual couples, and because a couple is not considered to be a legal entity.

An amendment supporting post-mortem transfer was suggested by the Communist Party caucus at the first Senate review of the bill (amendment 177 JO Sénat 18 January 1994, p.239), to preserve individual freedom, as long as a certain time frame was imposed. This amendment was rejected.

Modifications made to the draft bill chiefly concerned what would happen to the embryos should one of the partners die. From the outset, provision was made for these embryos to be made available to another couple, upon request. However, the second time the French National Assembly reviewed the bill, an amendment suggested by the committee was adopted, according to which “should one of the members of the couple die, embryo conservation shall be terminated”.

On this subject, differences of opinion appeared during parliamentary debates, but finally, the first option is the one stipulated in the text of the law that was passed. The second draft bill (n° 94- 653) strengthened the prohibition established by the first, because it added a requirement for the couple’s prior consent, and asserted that the consent was null and void in case a death occurred before MAP had been carried out. This statement was a way of condemning embryo implantation after a husband’s death. A reference to prior consent to art. L. 152-2, CSP was finally added to the first text.

<sup>29</sup> *G. Braibant*, Sciences de la vie, de l’éthique au droit, La Documentation française, 1988.

<sup>30</sup> *Ibid.*, p. 57. This opinion was shared by the authors of the *Mattéi* Report (*J.-F. MATTÉI*, La vie en questions, pour une éthique biomédicale, La Documentation française, 1994), who considered that “despite all of the arguments, all of an emotional order, it does not seem congruent with the normal course of things and with the child’s welfare to accept the deliberate conception of an orphaned child”.



had been covered in the media. The District Court of Créteil had ruled in 1984<sup>31</sup> to allow a widow to recover sperm from the CECOS sperm bank. It avoided the issue of how the sperm would later be used – e.g., for insemination – which, in the absence of any law, was considered to be subject to the judgment of the physician and the widow. The officials in charge of the CECOS, vehemently opposed to the consequences of this ruling, began to have sperm donors sign a contract stipulating that the sperm they conserved under their own name could only be used by the depositor, “present and consenting”, and therefore living<sup>32</sup>.

After this ruling, courts opposed restoring sperm samples. They explained that even if they were called upon to rule on the return of the samples alone, and not their subsequent use for insemination, the goal of recovering the gametes was insemination<sup>33</sup>. The same approach was taken to embryos: a spouse could not claim parental custody of an embryo, because an embryo is devoid of legal existence<sup>34</sup>. A decision by the Toulouse Appellate Court<sup>35</sup> even ordered that frozen embryos be disposed of, asserting that because the goal of MAP was fighting sterility, when the couple no longer existed, there was no longer any reason to conserve the embryos. The only purpose of *in vitro* embryos was to lead to life (except for legal authorization); if it was impossible to implant them, they had to be disposed of. This ruling was appealed, and on January 9, 1996, the Cour de Cassation confirmed the ban on post-mortem embryo transfer<sup>36</sup>. However, it did not authorize the destruction of the embryos, due to the possibility they could be donated to another couple. Such donations were authorized by the law following the Appellate Court ruling. The Cour de Cassation stated that only constituted families were eligible for MAP, even before

<sup>31</sup> TGI Créteil, 1<sup>st</sup> August 1984, no 4225/84, *Parpalaix c/ CECOS*: *Gaz. Pal.* 1984, 2, 560 (*LESEC*); *JCP Gén.*, 1984, II, no 20321 (*CORONE*); *RTD civ.* 1984, p. 703 (*REBULLIN-DEVICHI*).

<sup>32</sup> *B. Pulman*, Mille et une façons de faire les enfants – La révolution des méthodes de procréation, Calmann – Lévy, 2010, p 72.

<sup>33</sup> TGI Toulouse, 26 March 1991, no 91-570, *Galon c/ CECOS Midi-Pyrénées*: *JCP Gén.* 1992, II, no 21807 (*PÉDROT*); *D.* 1992, somm., p. 61 (*LABBÉE*); *RTD civ.* 1991, p. 310 (*HAUSER*); *LPA*, 26 April 1991, n°50 (*BERGOUNIOU*).

<sup>34</sup> TGI Rennes, 30 June 1993, n°93001308, *Orhan c/ CECOS de l'Ouest*: *JCP, Gén.* 1994, I, n°22250 (*NEIRINCK*); *JCP, Gén.*, 1995, II, n°22472 (*NEIRINCK*). This ruling contradicted the recommendation of the Rennes bioethics committee, and was handed down after the French national bioethics council CCNE had issued an opinion endorsing the legalization of post-mortem embryo transfer.

<sup>35</sup> CA Toulouse, 18 April 1994, no 2563/93, *P. c/ Centre hospitalier de la Grave*, *JCP, Gén.* 1995, II, n° 22472 (*NEIRINCK*).

<sup>36</sup> Cass., Civ. 1ère, 9 January 1996, n° 94-15998: *D.* 1996, p. 376 (*DREIFUS-NETTER*); *LPA*, 3 April 1996, no 41 (*MASSIP*); *JCP Gén.* 1996, II, no 22666 (*NEIRINCK*); *LPA*, 15 mai 1996, no 59 (*VIGNEAU*); *JCP* 1996, n°44, 1560-62 (*NEIRINCK*); *Def.* 1996, p. 532 (*MASSIP*); *RTD civ.* 1996, p. 359 (*HAUSER*).

the 1994 law went into effect, thereby ruling out both post-mortem insemination and embryo transfer<sup>37</sup>.

After several parliamentary reports excluding the possibility of post-mortem insemination or IVF, but wishing to permit post-mortem embryo transfer<sup>38</sup>, and despite proposals to reformulate laws on inheritance and filiation to overcome technical problems that might arise<sup>39</sup>, the 2004 law maintained the interdiction of all forms of post-mortem reproduction, confirming its opposition to access to this practice in principle. A third paragraph was added to Article L 2141-2 of the French public health code (CSP): “insemination and embryo transfer are prohibited following the death of one of the members of the couple...” and clinics were obligated to inform candidates of “the prohibitions on carrying out a transfer of conserved embryos

---

<sup>37</sup> “Whereas, even prior to the commencement of Art. L 152-2 of the French Public Health Code, originating with the law dated 29 July 1994, medically assisted procreation could have no legitimate goal other than to give birth to a child within a constituted family, thereby excluding access to an in-vitro fertilization process, or the pursuit thereof, if the couple that intended to raise the child has been dissolved by the husband’s death prior to the completion of embryo transfer, the final step in this process”.

<sup>38</sup> Conseil d’État, Les lois de Bioéthique, cinq ans après, La Documentation française, 1999; OPECST, rapport n°232 (1998-1999), Feb. 1999, sur l’application de la loi n° 94-654 du 29 juillet 1994 (HURIET, CLAEYS); Assemblée nationale, rapport n° 3525, January 2002, la délégation aux droits des femmes sur le projet de loi relatif à la bioéthique.

<sup>39</sup> In the provisions adopted by the National Assembly at first reading on January 29, 2002, post-mortem transfer was authorized, under certain conditions (the main ones being written consent regarding the possibility of death and a timetable for carrying out the procedure: between 6 and 18 months after the death). Correlatively, the terms of parenthood and inheritance law were revised. Concerning parenthood law, for legitimate parenthood, on the one hand, the idea of conception is assimilated to the start of pregnancy. The child is presumed to have been conceived between the 300<sup>th</sup> and 180<sup>th</sup> day prior to birth. In the case of IVF, conception is understood to begin on the day of the transfer, which can occur within 18 months after the man’s death. Secondly, regarding natural parenthood, a new article, 311-21 of the Code Civil, provides a framework for automatically designating the parenthood of the child, starting at the time when the father signs an authorization for his female partner to carry out MAP after his death. Regarding inheritance law, the point is to introduce an exception enabling a child born of a post-mortem transfer to be called for inheritance from his father, with the same rights as his siblings, if there are any (via an administrative trustee in charge of the case, designated by a District Court judge). Likewise, legislators provided for the maintenance of full joint tenancy rights as long as the deceased parent consented to post-mortem MAP, and as long as embryos are extant (by modifying art. 815 of Civil Code). On 30 January 2003, the Senate eliminated the provisions allowing post-mortem transfer. Senator Francis Giraud insisted on the difficulties involved in implementing this proposal, noting “the extremely low number of cases per year, the provisions adopted by the National Assembly actually relevant to individual law” (from the Giraud report: “would the mother’s suffering justify giving birth to an orphan?”). The senator pointed out legal obstacles he evaluated as insurmountable: first, regarding the demonstration of consent (witnessed by the physician? opposable by third parties?); the possibility of giving and revoking consent by last will and testament, the possibility that the will would not be discovered until months after the death); second, concerning establishing parenthood (the incompatibility between post-mortem transfer and the 300-day rule, possible commercial exploitation of the possibility for a woman to give birth anonymously (“*sous X*”) to a child from an embryo that was transferred post-mortem, the problem of implantation with a third-party donor); thirdly, settling an estate (especially the knowledge by third parties of the existence of the embryo and the fact it had been implanted). Finally, on second reading, the National Assembly refused to enshrine post-mortem transfer in law, even though it had been approved on first reading.

should the couple divorce or should one of the members die<sup>40</sup>. Therefore, the prohibition was reinforced in order to avoid any misunderstanding<sup>41</sup>.

On 22 June 2010, the Rennes appellate court rejected a petition from Fabienne Justel to recover the frozen sperm of her late husband, who had died in 2008<sup>42</sup>. Ms. Justel pleaded that the sperm was part of his estate. She wished to use it for insemination in another country. She filed her petition for a summary judgment based on the argument that refusal to restore the sperm to her caused her “patently illicit disturbance”, a condition that met court requirements<sup>43</sup>. The Appellate Court upheld the ruling in the first judgment, which had been handed down in October 2009 by the District Court of Rennes<sup>44</sup> by summary judgment<sup>45</sup>, following a literal interpretation of Article L2141-2, CSP banning insemination or embryo transfer after the death of one member of the couple.

After a lengthy discussion of the issue<sup>46</sup>, the 2011 law maintained the existing regime, despite opinions expressed in various parliamentary reports making a

---

<sup>40</sup> Art. L 2141-10, 2 bis, CSP.

<sup>41</sup> The 2004 law also introduced Art. 16-11, C. civ., according to which, in the absence of explicit consent from the person while living, DNA testing could not be carried out after his or her death.

<sup>42</sup> CA Rennes, 20 June 2010, 6<sup>th</sup> Ch., n°09/07299, Dictionnaire permanent de bioéthique, bull. July 2010, p. 3-4 (VIGNEAU).

<sup>43</sup> Art. 809, C. proc. civ.

<sup>44</sup> TGI Rennes, 15 Oct. 2009, n°09/00588: *Gaz. Pal.* 21 Nov. 2009, 20, p. 10 (PIERROUX); *Droit et santé*, Nov. 2009, 32, p. 505-507 (LAMBERT-GARREL); *JCP Gén.* Oct. 2009, 44, p. 377 (BINET).

<sup>45</sup> *C. Chabault-Marx* (“La frilosité du juge français face à l’insémination ‘post mortem’,” *D.* n° 41, 2009, p. 2758) points out that the plaintiff filed for a District Court summary judgment (under the conditions established by Art. 809, Code de procédure civile: *i.e.*, to prevent imminent damage or to end a patently illicit disturbance); nevertheless, to date, the procedure is usually applied to labor law or real estate disputes, and even protection of private life. It is somewhat unusual to see it applied to a matter of bioethics.

<sup>46</sup> The draft bill presented to the cabinet in October 2010 did not mention post-mortem reproduction. However, an amendment was drafted in special committee, suggesting that post-mortem transfer be permitted in certain cases. The National Assembly adopted it on first reading. The amendment provided for the following means of application: written consent from the male to continue the “parental plan” after his death, including establishment of paternity, a timetable for implantation, causes justifying a refusal to transfer (marriage or remarriage). In the matter of inheritance rights, a child born following the implantation of an embryo fertilized *in vitro* at the time when the spouse or live-in male partner was alive would be said to be born upon conception, when his interest is at stake (an application of the adage *Nasciturus pro iam nato habetur, quotiens de commodis eius agitur*, which does not consider the embryo as a legal person). On January 26, 2011, the Special Committee on Bioethics authorized *post mortem* embryo transfer, opposing government opinion. The committee members adopted two identical amendments filed by MPs Alain Claeys and Jean-Luc Le Déaut (Socialist Party) and by Martine Aurillac (UMP-Center Right). The procedure would be subject to a strict timetable: the woman must wait for at least 6 months after the father’s death prior to undergoing implantation, and she would have 18 months in which to succeed. The MPs pointed out that this measure would only be applied in “unusual situations”. Conversely, posthumous insemination remained prohibited. Nora Berra, Secretary of State for Health, attested to the government’s opposition to the amendment, asserting that authorizing post-mortem transfer would lead to “causing orphans to be born”. These provisions were introduced by the National Assembly on first reading, but they were rejected by the Senate on first reading, and have not been reintroduced since.

distinction, as they had during the preceding revision, between post-mortem insemination and embryo transfer, prohibiting the former and authorizing the latter<sup>47</sup>.

In fact, this ban cannot be evaded by traveling to another country (unless the death was foreseeable and the couple entrusted the gametes to a foreign sperm bank in a country where post-mortem reproduction is not forbidden by law)<sup>48</sup>. This is because in France, sperm and embryos are cryoconserved by the CECOS, which does not restore them<sup>49</sup>. Likewise, the Agence de la Biomédecine (ABM) must authorize their export, and it apparently systematically denies permission.

Prohibition of post-mortem reproduction, in line with healthcare professionals' position<sup>50</sup>, is debated more nowadays than when it was introduced. More specifically, in addition to many parliamentary reports, several legal scholars have asked for the legalization of post-mortem embryo transfer<sup>51</sup>. Moreover, the French National Consultative Ethics Committee (Comité consultatif national d'éthique, CCNE) has repeatedly published opinions endorsing legalization of post-mortem embryo transfer<sup>52</sup>. Its most recent opinion on the subject, published in 2011<sup>53</sup>, suggested that

<sup>47</sup> Rapport parlementaire n° 2832, L'enfant d'abord, 100 propositions pour placer l'intérêt de l'enfant au cœur du droit de la famille, (V. Pecresse, P. Bloche), La Documentation française, April 2006; OPECST, 20 Nov. 2008, L'évaluation de l'application de la loi du 6 août 2004 relative à la bioéthique (A. Claeys, J.-B. Vialatte); Assemblée nationale, Rapport d'information n° 2235, la Mission d'information sur la révision des lois de bioéthique (A. Claeys, J. Leonetti), January 2010. *A contrario*, Conseil d'État, La révision des lois de bioéthique, 2009, La Documentation française.

<sup>48</sup> Such as Belgium, the United Kingdom, the Netherlands, Spain, or Israel.

<sup>49</sup> Every year, the CECOS receive 4 or 5 requests for "recovery" of sperm from women whose husbands have died (Le Point, 11 March 2010).

<sup>50</sup> According to the report drafted after the October 1, 2008 "Experts' Day" (Questionnaire Assistance Médicale à la Procréation GEFF, BLEFCO with the participation of the Collège National des Gynécologues Obstétriciens (CNGOF), the Société Française de Gynécologie (SFG) and the Fédération Nationale des Collèges de Gynécologie Médicale (FNCGM), drafted by J. Belaisch-Allart, Ph Merviel et P. Clement), only 19% of practitioners are in favor of providing services to widows. They admit that an embryo-transfer situation is much more problematical than a simple insemination. They believe that the CECOS sperm banks, who have been dealing with this type of request for almost 30 years, usually in the days or weeks following the death of the husband, have observed that the request often disappeared once the widow managed to work through the mourning process.

<sup>51</sup> For legalizing access to post-mortem procreation, see C. Chabault-Marx, "La frilosité du juge français face à l'insémination 'post mortem'", cited above; V. Depadt-Sebag, "La procréation post mortem", D. 2011, p. 2213; M. Matei, "L'insémination artificielle post mortem ou lorsque le désir d'enfant devient un problème bioéthique", Gaz. Pal., spécial Droit de la santé, n° 15-16, January 2010, p. 27-29; J. Rubellin Devichi, JCP, Gén., 1994, Chron. dr. fam., n° 24, 3771. *A contrario*, for maintaining the prohibition on any form of post-mortem procreation, see v. J. HAuser, "Procréation post-mortem: un nouveau droit à ..., le droit à l'éternité?", RTD civ., 2010, p. 93; A. Mirkovic, "Un enfant ne peut être conçu après le décès de son père," JCP, Gén., n°37, Sep. 2010, 897.

<sup>52</sup> CCNE, Avis n° 40 sur le transfert d'embryons après décès du conjoint (ou du concubin), 17 December 1993, unable to see "who or what authority could ultimately assert for embryos rights equal to or greater than those of the woman, and oppose her intention, duly informed and explicitly stated, to undertake a pregnancy following the transfer of frozen embryos... the death of the man does not annul the rights the woman might consider she has to these embryos, the result of a procedure in which she and her late partner were engaged"; Avis n°60, 25 June 1998 relatif au réexamen des lois de bioéthique; avis n°67 sur l'avant-projet de révision des lois de bioéthique, 18 January 2000; avis n° 105, 9 Oct.

the legal difficulties associated with post-mortem reproduction could be solved, and that the legalization issue itself was a matter of ethics, not of law.

In the **United Kingdom**, the legislation has never made a distinction between posthumous insemination with frozen sperm and embryo transfer following the death of the biological father. The decisive matter was obtaining the consent of both members of the couple, regardless of how far they had progressed in their intention to become parents. This position can also be explained by the fact that the British regime never sought to imitate either a family model or a naturalist one. In the British understanding, medically-assisted procreation is a method that exists alongside spontaneous procreation.

Despite the recommendations of the Warnock Report, actively discouraging the practice of inseminating a widow with sperm from her deceased husband<sup>54</sup>, the law passed in 1990 did not provide for any explicit prohibition of it. According to §28(6)(b), “Where... the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child”. As a result, the child could make no claim to the estate of his genetic father, and would be stripped of paternal filiation.

The Diane Blood case received extensive coverage in the media, and caused a change in the situation. Specifically, when Mr. Blood was on his deathbed, in a coma from meningitis, a sample of his sperm was retrieved by electroejaculation. His widow hoped to be inseminated with it, and applied to the Human Fertilisation and

---

2008, Questionnements pour les États généraux de la bioéthique.

<sup>53</sup> CCNE, avis n° 113, 10 Feb. 2011, La demande d’assistance médicale à la procréation après le décès de l’homme faisant partie du couple. The French national ethics committee CCNE set three conditions on authorizing posthumous embryo transfer: 1. While alive, the man has to have given explicit consent to the transfer, after his death, of a frozen embryo; 2. The woman must deliberate her decision to undergo implantation for a certain amount of time following the death of her husband, to avoid making a decision when she is “in a state of great vulnerability”. Should she decide to go ahead with implantation, she must undergo the procedure within a certain number of months so that “the birth of the child does not occur too long after the father’s death”. Also, she must be offered counseling. 3. Legal changes are necessary so that “the child’s paternity is established”. In the opinion of the committee members, refusing the woman’s request for embryo transfer places her “in a situation made even more painful by the fact that she is forced to make an impossible choice” as to the fate of the embryo: destruction, donation to research, or donation to another couple. Also, “the fact that the birth of a fatherless child is intentionally planned is not sufficient grounds, in itself, for justifying a prohibition on post-mortem reproduction” (p. 11).

<sup>54</sup> A Question of Life - The Warnock Report on Human Fertilisation and Embryology, London, *Basil Blackwell*, 1985, p. 55, §10.9. According to the authors of this report, if one of the members of a couple dies, “the right to use or dispose of any embryo stored by that couple should pass to the survivor”. If both partners die, “the right should pass to the storage authority”. Likewise, recommendation 61 suggested that the draft bill should specify that any child conceived with IVF who had not been transferred *in utero* before the date of the father’s death should be deprived of any inheritance rights.

Embryology Authority (HFEA) for the release of the sperm from the facility where it was stored, the Infertility Research Trust. The HFEA refused to give Ms. Blood authorization to use it on British soil, due to the absence of the required written consent<sup>55</sup>. The authority also refused to order the release of the sperm for delivery to a facility abroad, a decision it had the power to make on the grounds of its discretionary authority<sup>56</sup>. Ms. Blood requested a judicial review of the ruling. In the first instance, her request was rejected, on the same grounds of absence of consent<sup>57</sup>. She appealed the ruling, arguing that on the one hand, §4(1)(b) of the 1990 law exempted from the consent rule couples who had undergone treatment together, the way she and her late husband had. She also pleaded that the ruling refusing to send the sperm abroad was a violation of her right to obtain healthcare services in other European Union member states. In February 1997, the Court of Appeal<sup>58</sup> ruled that the legal exception Ms. Blood cited applied only when the sperm had already been used as is, and not when it was merely frozen. As a result, this exception did not apply in the Diane Blood case, and the HFEA had no right to authorize insemination on British soil. However, the judges did determine that European Union law was applicable, and that by refusing to grant Ms. Blood authorization to go abroad with the sperm, the HFEA had failed to take into consideration her right to medical treatment abroad, according to articles 59 and 60 of the Treaty of Rome, establishing a direct and enforceable right to receive healthcare services in another member State. The judges concluded that the permission to export the sperm would not constitute undesired precedent. According to Lord Chief Justice Woolf, “Because this judgment makes it clear that the sperm of Mr. Blood has been preserved and stored when it should not have been, this case raises issues as to the lawfulness of the use and export of sperm which should never arise again... There should be, after this judgment has been given, no further cases where sperm is preserved without consent”.

Actually, the Court of Appeal broached the subject of consent to storage, without ruling on that of the retrieval itself, whereas storing sperm retrieved from an

---

<sup>55</sup> §4(1), Schedule 3 of the 1990 law.

<sup>56</sup> §24(4) of the 1990 law.

<sup>57</sup> The first-instance ruling was never published.

<sup>58</sup> R v HFEA (1997) 2 A II ER 687. *D. Morgan, R. Lee*, “In the name of the father? *Ex Parte* Blood Dealing with Novelty and Anomaly,” *Modern Law Review*, 1997, 60, p. 840-855; *J. Flauss-Diem*, “Insémination post-mortem, droit anglais et droit communautaire,” in *Liber amicorum M.-T. Meulders Klein*, Bruylant, 1998, p. 217-230; *R. Sefton-Green*, “La procréation médicalement assistée entre droit national et droit communautaire”, *Rev. gén. droit médical*, numéro spécial - la recherche sur l’embryon, 2000, p. 101-107; *J.-S. BERGÉ*, “Le droit communautaire dévoyé. Le cas Blood”, *JCP Gén.*, n°7-8, 16 Feb. 2000, p. 289-293.

unconscious man without his consent was an infraction. As a result, the Infertility Research Trust was not found guilty. Let us note that the judges did not authorize insemination in the absence of donor consent. The only permission they granted was to export the sperm on the basis of European Union law, to evade the lack of consent<sup>59</sup>.

Following the ruling by the Court of Appeal, Ms. Blood took the sperm to Belgium, a country where MAP was unregulated at the time. She gave birth to two sons, one after the other, from the same sample. Influenced by media coverage of the case, the British government commissioned a report from Dr. Sheila McLean on Common Law consent procedures and the 1990 Human Fertility and Embryology Act<sup>60</sup>. Published in July 1998, the McLean report recommended that the requirement for written consent be maintained for treatments covered by the 1990 Act.

As a result, the *Human Fertilisation and Embryology (Deceased Fathers) Act* was adopted in 2003. It explicitly permitted posthumous insemination as well as embryo transfer, as long as the deceased father had given his consent while alive. The mother could request that the deceased father be registered as the child's father on the birth certificate, as long as the father had signed written consent prior to his death. It thereby added a possibility for paternity to the Human Fertilisation and Embryology Act of 1990 in §1(1)5A, setting the following conditions:

- If the embryo had been fertilized with the semen of a deceased man after his death, or if it had been fertilized prior to his death but transferred to the woman's uterus after his death;
- If the woman had been married to this man prior to his death;
- If the man had given his consent in writing, and, prior to his death, had not withdrawn his consent for the use of his sperm or for the transfer of the embryo fertilized with his sperm after his death;
- If, within 42 days after the child's birth, the mother declares in writing that this man is indeed the father, and that no other man can be designated as the father<sup>61</sup>.

---

<sup>59</sup> For a critique of this use of EU law as a means of evading national bans, see *J. S. BERGÉ*, "Le droit communautaire dévoyé. Le cas Blood", cited above, or a critique of the way the judges implicitly assimilated gametes with export goods, see *J. Flauss-Diem*, "Insémination post-mortem, droit anglais et droit communautaire", cited above.

<sup>60</sup> Consent and the law: Review of the Common Law provisions relating to the Removal of gametes and of the consent provisions in the Human Fertilisation and Embryology Act 1990, 1998.

<sup>61</sup> If -

The same rules are applied to an unmarried couple who has undergone treatment together, as well as to a couple, married or not, who conceived an embryo following a donation of sperm. This written consent, containing certification by a registered medical practitioner as to the medical facts concerned, must be filed in a special register, in order to record the birth of the child.

We shall specify that appropriate consent must be accurate: that is, it must name a particular individual, thereby avoiding confusion, such as grandparental claims. The Act was retroactively effective<sup>62</sup>; as a result, it covered children born after 1 August 1991<sup>63</sup>. It is important to note that the law went into effect while §13(5) of the 1990 Act stipulated that access to treatment was contingent upon “the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth”. In the 2008 law, this clause regarding “the need for a father” was replaced by “the need for supportive parenting”.

Therefore, even if access to MAP was not prohibited for single women, the authors of the law considered that the child’s welfare required the existence of a father figure in his family circle, a figure that cannot exist for a child conceived posthumously. Lastly, §1(1)5I<sup>64</sup> defined the scope of the paternity under discussion. It

- 
- (a) a child has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination,
  - (b) the creation of the embryo carried by her was brought about by using the sperm of a man after his death, or the creation of the embryo was brought about using the sperm of a man before his death but the embryo was placed in the woman after his death,
  - (c) the woman was a party to a marriage with the man immediately before his death,
  - (d) the man consented in writing (and did not withdraw the consent) — (i) to the use of his sperm after his death which brought about the creation of the embryo carried by the woman or (as the case may be) to the placing in the woman after his death of the embryo which was brought about using his sperm before his death, and (ii) to being treated for the purpose mentioned in subsection (5I) below as the father of any resulting child,
  - (e) the woman has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated for the purpose mentioned in subsection (5I) below as the father of the child, and
  - (f) no-one else is to be treated as the father of the child by virtue of subsection (2) or (3) above or by virtue of adoption or the child being treated as mentioned in paragraph (a) or (b) of subsection (5) above, then the man shall be treated for the purpose mentioned in subsection (5I) below as the father of the child”.

<sup>62</sup> §3(1).

<sup>63</sup> Therefore, Mrs. Blood’s children were henceforth considered legitimate.

<sup>64</sup> “The purpose referred to ... is the purpose of enabling the man’s particulars to be entered as the particulars of the child’s father in (as the case may be) a register of live- births or still-births kept under the Births and Deaths Registration Act 1953 or the Births and Deaths Registration (Northern Ireland) Order 1976 or a register of births or still-births kept under the Registration of Births, Deaths and Marriages (Scotland) Act 1965”. This provision was maintained in §39(3) of the 2008 law: “the purpose referred to in subsection (1) is the purpose of enabling the man’s particulars to be entered as the particulars of the child’s father in a relevant register of births”, and §40(4), identical in content.



actually merely covered the registration of the child at birth; more precisely, the fact that the father's name could be listed as such on the birth certificate. Other implications of paternity, such as the transmission of inheritance rights, titles of nobility, or rights to nationality, were not applicable, according to this understanding. Clearly, the goal of the system for regulating posthumous reproduction was to assist these families, widows and children born of assisted conception to forge an identity for themselves. However, the question of inheritance rights was never broached, no doubt in order to avoid abuses<sup>65</sup>.

The 2008 law incorporated these provisions. Its §39 covers children conceived by assisted reproduction, with the sperm of a deceased father, by artificial insemination or embryo transfer, regardless of whether the man and woman were married. Provided that the deceased man signed written consent prior to death, he is considered to be the father of the child conceived after his death. §40 concerns the case of sperm donation: it makes a distinction on the basis of whether the woman is married. If she is not married, §40(2)(b) provides that the embryo must have been conceived during treatment by a licensed practitioner in the United Kingdom<sup>66</sup>. Likewise, §46 extends the possibility of parenthood to the deceased woman partner in a same-sex Civil Partnership if, prior to death, she has signed written consent to parenthood (§46(1)), as long as the embryo was not created at a time when the woman who carried it was in a marriage or civil partnership, and that another person had signed written consent establishing parenthood (§46(2))<sup>67</sup>. In this case, the issue is not paternity, but parenthood: the partner of the woman who bore the child conceived by MAP is considered by law to be the second parent.

However, long before the 2008 law went into effect, the presumption of the judges in the Diane Blood case – *i.e.*, that there would never again be a case of sperm conservation in the absence of prior consent – was proven false. Let us examine the ruling in *L v HFEA* in 2008<sup>68</sup>. This case concerns the claim made by a woman who wanted to be inseminated with her deceased husband's sperm, retrieved without his consent shortly after his sudden and unexpected death. The claim included the right to store the sperm for use in the United Kingdom, or the right to transfer it to another

---

<sup>65</sup> This was recommended by the Warnock Report (A Question of Life - The Warnock Report on Human Fertilisation and Embryology, cited above, recommendation 61).

<sup>66</sup> Although whether the source of the gametes is the husband (§39(2)) or a third-party donor (§40(3)), paternity is established, whether insemination or embryo transfer take place in the United Kingdom or on foreign territory.

<sup>67</sup> Applying the agreed female parenthood conditions set forth in §44 of the act.

<sup>68</sup> *L v HFEA* (2008) EWHC 2149 (Fam).

country, for storage and use there. At the same time, a request for authorization to export the sperm was submitted to the HFEA. The Authority suspended the request, however, until a judicial decision on the legality of the storage was handed down. Just as in the Blood case, the widow's claim was based on incompatibility with supranational law; but in this case, it was grounded on article 8 of the European Convention on Human Rights, ECHR (the right to respect for private and family life).

The High Court of Justice dismissed the case, chiefly on the basis of the absence of consent from the partner. The judges pointed out that the absolute and bright line rules relating to effective consent for storage were within the margin of appreciation of the member states, as had been confirmed in the Evans ruling<sup>69</sup>. It is interesting to note that, according to the judges, the HFEA has the discretion, following the Blood case, to authorize the exportation of gametes; the fact that the storage of the gametes could be challenged does not rule out this discretionary power, lodged in §24(4) of the 1990 law. Therefore, even though in general, storage without consent is forbidden, and can be considered a criminal offence, in this specific case, the HFEA indicated that it did not intend to pursue regulatory action against the clinic, or to order the destruction of the sperm. Concerning the incompatibility of the HFEA decision with the ECHR, the judges asserted that the issue could not be ruled upon until the HFEA had published a decision on exporting the gametes. Judge Charles observed that the case was an opportunity to provide guidelines regarding whether the court could grant effective relief relating to the retrieval of sperm from a deceased husband, but that in the absence of a request from the Secretary of State for Health to rule on this issue, he was not convinced that it was lawful to retrieve gametes from a deceased person who had not given consent prior to death, even if the claimant had demonstrated that the intention of the deceased man to have children was at least as compelling as the evidence advanced by Diane Blood<sup>70</sup>.

This case demonstrates the omnipotence of the HFEA: on the one hand, the authority possesses discretionary decision-making power on the import and export of gametes, even if they were extracted in the absence of the person's consent, and therefore unlawfully. On the other hand, the HFEA can elect to waive legal

---

<sup>69</sup> CEDH, 10 April 2007, *Evans v UK*, Grand Chamber, Application No. 6339/05 (JCP Gén. 2007, II, 10097 (MATHIEU); RTD civ. 2007, p. 295 (MARGUÉNAUD); Rev. trim. dr. fam. 2008, p. 708 (GALLUS); RTDH 2008, p. 879 (MARGUNÉAUD); RDC, 1<sup>st</sup> August 2007, n° 4, p. 1321 (F. BELLIVIER et C. NOIVILLE).

<sup>70</sup> The couple already had one child together, and six days before the husband's death, they had sought information on the possibility of proceeding with IVF, due to the wife's age.

proceedings, even when it has taken note of a criminal violation. Therefore, loopholes in the legal framework can be found.

It seems that the reasoning that was the basis for authorizing posthumous assisted procreation for insemination and embryo transfer is equally valid in the field of surrogacy. In the 2011 ruling on *A & A v P, P & B*<sup>71</sup>, the High Court of Justice granted a parental order to a married couple<sup>72</sup> for a child born in India whose intentional father, who was also the child's biological father, died five months after the request for the Parental Order was submitted. The ruling was explicitly based on the intention of the Parliament when the 2008 Act was adopted; *i.e.*, that surrogacy agreements could only be made by persons in an enduring relationship, and that it opposed applications by single persons to become parents. The primary goal of §54 was to establish a legal relationship between the child and the intentional parents. Moreover, refusing to grant a parental order could have harmful consequences on the child, whose welfare is the most important consideration. The child would be deprived of official filiation with his biological father, and would thereby be denied the social and emotional benefits of this bond, as well as the financial disadvantages. He will suffer from the incompatibility of legal reality and daily life, and from identity problems (Article 8, demanding protection for the child's right to an identity, would thereby not be respected).

This leads us to a paradoxical observation: although posthumous assisted reproduction involves single women, and is based on the reasoning that individual procreation is possible, it ultimately results in couple-based reasoning, because it allows a deceased person to become a father and, indirectly, prolong the couple's history.

## Conclusion

Despite a legal framework for post-mortem reproduction, or attempts to constitute one, the couple-based model persists. In fact, even under the most liberal systems, this "couple model" appears to be immovable.

Whereas the evolution of MAP towards increasing autonomy could explain the emergence of claims from single persons who are would-be parents, we are forced to observe that the couple-based strategy has been upheld and even strengthened.

---

<sup>71</sup> *A & A v P, P & B* (2011) EWHC 1738 (Fam).

<sup>72</sup> Based on §54 of the 2008 Act.

Support for the model is due in large part to psychological studies of children who grew up in homoparental families. They concluded that the parents' sexual orientation played a minor role in comparison to that played by the availability of two adults in a harmonious and stable environment<sup>73</sup>. The couple-based strategy, which originated with attempts to establish a normative model of the heterosexual couple, has been adopted by LGBT activists who very often position themselves as couples in their claims for access to MAP<sup>74</sup>.

Of the two countries studied, **France** is the one where the couple model was promoted most energetically in the legislative regulation of MAP, a logical consequence of the "couple myth" in French law. In fact, some scholars consider that "the concept of the "couple" is probably the newest and most significant contribution of the law dated 19 July 1994 on medically-assisted procreation<sup>75</sup>". In the Braibant Report, MAP was to be offered to "two parents, and not one more; two parents, and not one less<sup>76</sup>". Two decades later, during the parliamentary debates prior to the revision of the law in 2011, two reports, although they took opposing positions, were alike in citing the couple as the framework justifying access to MAP: the Terranova Report<sup>77</sup>, self-defined as "progressive," recommended that unmarried couples be granted access to adoption and MAP, regardless of how long they have been living together, claiming that the intention to become parents is, in itself, an indication the couple is stable<sup>78</sup>. The Leonetti Report<sup>79</sup>, based on medical authority, insisted on the

---

<sup>73</sup> S. Golombok *et al.*, "Children with Lesbian Parents: A Community Study", *Developmental Psychology*, 39, no.1, Jan. 2003, p. 20-33; W. Manning, K. Lamb, "Adolescent Well-Being in Cohabiting, Married, and Single Families", *Journal of Marriage and the Family*, n° 65, Nov. 2003, p. 876-893; S. Brown, "Family Structure and Child Well-Being: The Significance of Parental Cohabitation", *Journal of Marriage and the Family*, n° 66, May 2004, p. 351-367; G. Neises, C. Grüneberg, "Socioeconomic Situation and Health Outcomes of Single Parents", *Journal of Public Health*, vol.13, n° 5, oct.2005, p.270-278; R. GARG *et al.*, "Educational Aspirations of Male and Female Adolescents from Single-Parent and Two Biological Parent Families: A Comparison of Influential Factors", *Journal of Youth and Adolescence*, vol.36, n° 8, Nov. 2007, p.1010-1023, cited by J. Merchant, "L'intérêt de l'enfant. Homoparenté et homoparentalité aux États-Unis," *La vie des idées*, 20 May 2010, <http://www.laviedesidees.fr/L-interet-de-l-enfant.html>

<sup>74</sup> See the study by M. Gross and D. Mehl ("Homoparentalité et GPA", *Enfances, Familles, Générations*, 2011), based on semi-directive interviews carried out from July to December 2009. Of 39 homosexual men, only two were single.

<sup>75</sup> See F. Dekeuwer-Deffossez, "Réflexions sur les mythes fondateurs du droit contemporain de la famille", RTD. cit. 1995, p. 249.

<sup>76</sup> G. Braibant, *Sciences de la vie, de l'éthique au droit*, cited above, p. 57.

<sup>77</sup> Terranova, "Accès à la parenté. Assistance médicale à la procréation et adoption. Pour une révision progressiste de la loi bioéthique", G. Delaisi De Parseval, V. Depadt-Sebag, 2010.

<sup>78</sup> Referring to the child's welfare, the authors of the report assert that having two parents of the same sex is not an obstacle to psychological fulfillment, as long as the couple has completed the psychological growth called "parentality". A child needs two parents, in order to structure his identity ("triangulation").

<sup>79</sup> Rapport d'information, la Mission d'information sur la révision des lois de bioéthique, A. CLAEYS,

fact that MAP should be used to treat infertility, not for reasons of convenience. This report tends to oppose medical arguments to claims for access to MAP from single women. It cites the fact that sterility is a difficult condition to diagnose precisely; in other words, sterility cannot be “verified” in the absence of a male partner. Likewise, within the framework of the 2011 revision of the law, the Senate surprisingly offered access to MAP to lesbian couples, thereby excluding single homosexual women. This amendment was struck down.

In the **United Kingdom**, the absence of the couple-based model in the 1990 law gave single women an opportunity to fulfill their wish to have children via MAP. However, paradoxically, the couple appeared, as we saw, in authorization for post-mortem reproduction. Likewise, it reappeared later, in the 2008 law, by authorizing the recognition of parenthood from the birth of a child conceived through MAP by same-sex parents.

In cases of surrogacy, as well, the Parental Order, hitherto limited to married (and therefore necessarily heterosexual) couples, is now accessible to other couples, both heterosexual and homosexual. When the law was revised, the British Parliament explicitly requested that surrogacy contracts be signed only by persons living in a stable couple relationship, not by single persons.

Seen from this perspective it is clear that the United Kingdom, although it differs from France by granting single women access to MAP, also reasons on the basis of a couple-based model due to the fact that it recognizes homosexual parentality.

