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### The Legal and Ethical Considerations of the Posthumous Retrieval of Gametes

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## THE LEGAL AND ETHICAL CONSIDERATIONS OF THE POSTHUMOUS RETRIEVAL OF GAMETES

### ABSTRACT

*In the United States, federal and state laws on the issue of posthumous retrieval of gametes are almost non-existent. As the field of medicine continues to grow and more posthumous gamete retrieval procedures become viable, state courts and hospitals are left on their own when patients and family members ask their doctors to perform such procedures. As such, there exists wide variability from hospital to hospital and state to state for a deeply personal and time-sensitive procedure. By reviewing state court cases and hospital policies, this article demonstrates the variability between practices and illustrates key questions that arise when requests for these procedures are made. The purpose of this article is to argue for an expansion of the Uniform Anatomical Gift Act (UAGA) which would explicitly allow posthumous gamete retrieval in instances where the deceased donor gives express consent. The vast majority of states have enacted anatomical gift statutes similar or identical to the UAGA. By expanding the UAGA to explicitly include posthumous gamete retrieval procedures, the United States can begin to create uniformity surrounding the practice.*

## I. INTRODUCTION

On February 23, 2019, Peter Zhu, a twenty-one-year-old West Point cadet, suffered an accident while skiing that severed his spinal cord.<sup>1</sup> Zhu was flown to Westchester Medical Center in New York, where he was declared brain-dead on February 27.<sup>2</sup> Since Zhu was a registered organ donor, the Westchester Medical Center prepared his body for organ donation.<sup>3</sup> Zhu's parents subsequently filed a petition seeking an emergency court order "[d]irecting Westchester Medical Center to retrieve sperm from [Zhu]" and to allow Zhu's parents to "use [Zhu's] sperm for third party reproduction."<sup>4</sup> Zhu's parents testified that although he was unmarried and left no directive for postmortem sperm retrieval, Zhu had repeatedly expressed his intentions to have a family.<sup>5</sup> The New York Supreme Court found that Zhu's presumed intent for use of his genetic material could be "gleaned from certain of his prior actions and statements" and concluded that Zhu's parents were the proper parties to make decisions regarding that genetic material.<sup>6</sup>

As medical technology has advanced, so too have the methods for human reproduction. One such avenue for posthumous reproduction involves the posthumous retrieval of sperm or eggs (collectively known as "gametes").<sup>7</sup> Posthumous retrieval of gametes is a procedure whereby a physician extracts gametes from a recently deceased or brain-dead patient.<sup>8</sup> The purpose of retrieving the gametes is to use them for conception of an embryo.<sup>9</sup> The untimely death of a young person, as described above, is a common situation for the posthumous retrieval of gametes.<sup>10</sup> However, Zhu's situation is unique in that his *parents* asked for the retrieval of his gametes.<sup>11</sup> In many cases, a deceased's spouse or fiancé is the party that makes the request.<sup>12</sup> It is important to note that

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1. *In re Zhu*, 103 N.Y.S.3d 775, 776 (N.Y. Sup. Ct. 2019).

2. *Id.*

3. *Id.*

4. *Id.*

5. Peter D. Kramer, *Parents of Dead West Point Cadet Can Use His Sperm to Make Baby, Judge Rules*, USA TODAY (May 23, 2019), <https://www.usatoday.com/story/news/nation/2019/05/23/west-point-cadet-peter-zhu-parents-can-use-his-sperm/1203763001/>.

6. *In re Zhu*, 103 N.Y.S.3d at 775, 778.

7. Cynthia E. Fruchtman, *New Life after Death - The Legal Landscape of Posthumous Collection and Use of Gametes*, SCITECH LAW., Summer 2016, at 12, 13.

8. *Id.*

9. *Id.*

10. *Id.*

11. Ethics Comm. Am. Soc'y for Reprod. Med., *Posthumous Retrieval and Use of Gametes or Embryos: An Ethics Committee Opinion*, 110 FERTILITY & STERILITY 45, 46 (2019).

12. See Bethany Spielman, *Pushing the Dead into the Next Reproductive Frontier: Post Mortem Gamete Retrieval Under the Uniform Anatomical Gift Act*, 37 J.L. MED. & ETHICS 331, 334-35 (2009). See also Brief for Appellant at 9, *Robertson v. Saadat*, 262 Cal. Rptr. 3d 215 (Cal. Ct. App. 2020) (No. B292448).

posthumous retrieval is different than a case in which a person donates his or her gametes—for instance, to a sperm bank—then dies at a later date. The latter situation brings with it many ethical and legal concerns that are beyond the reach of this Article. This Article will focus only on cases in which a person’s gametes are retrieved posthumously, like Zhu’s. Here, the term posthumously also includes situations where the donor is brain-dead when the gametes are retrieved.

Some of the controversy surrounding posthumous retrieval of gametes stems from the lack of federal or state laws or regulations controlling the retrieval process.<sup>13</sup> Instead, decisions regarding who may request the procedure, or even whether the procedure will be performed, are left to hospitals and hospital systems.<sup>14</sup> This gap in the law presents a problem because it means hospitals and providers have next to no guidance on this issue, and the policies for posthumous retrieval vary greatly from one hospital to the next.<sup>15</sup> Further, many hospitals do not have any policies in place when a request for posthumous retrieval is made.<sup>16</sup> Because policies can vary widely across hospitals and health care systems, this Article will argue for the implementation of a uniform act regulating the posthumous retrieval of gametes.

Another major concern surrounding posthumous retrieval of gametes is the ethical issue of consent.<sup>17</sup> In Zhu’s case, the court considered the fact that Zhu left “no express direction” regarding the retrieval and use of his sperm.<sup>18</sup> The donor’s consent is especially important in cases of posthumous retrieval, because he or she will not be alive for the life of the potential child. When the donor does not leave an advance directive for the use of his or her gametes, hospitals and courts are left to infer consent from the surrounding circumstances.<sup>19</sup> This could lead to a variety of ethical issues, most notably the concern that the decedent only wanted to have children if he or she would be alive to raise them.<sup>20</sup> Because the United States lacks a statute or regulation that governs the use of gametes retrieved posthumously, hospitals have created varying and contrasting policies to fill the void.<sup>21</sup> In order to protect the true interest of the deceased, and in an effort to create uniformity across the states,

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13. Andrew Joseph, *‘They Don’t Want His Story to End’: Efforts to Save the Sperm of the Deceased Come with Heartache and Tough Questions*, STAT NEWS (Mar. 13, 2019), <https://www.statnews.com/2019/03/13/postmortem-sperm-retrieval/>.

14. *Id.*

15. Nicholas J. Waler et al., *Policy on Posthumous Sperm Retrieval: Survey of 75 Major Academic Medical Centers*, 113 UROLOGY 45, 47 (Mar. 2018).

16. *Id.* at 46.

17. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11.

18. *In re Zhu*, 103 N.Y.S.3d 775, 778 (N.Y. Sup. Ct. 2019).

19. *Id.*

20. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11.

21. Waler et al., *supra* note 15, at 45.

the National Conference of Commissioners on Uniform State Laws (NCCUSL) should amend the Uniform Anatomical Gift Act (UAGA) to explicitly allow posthumous gamete retrieval only when the deceased donor has given express consent.

Part II of this Article describes the history and ethical concerns of posthumous retrieval of gametes. Part III explores the recent legal history of posthumous retrieval, as well as the UAGA. Finally, Part IV analyzes the connection of posthumous retrieval to the UAGA and argues for the inclusion of retrieval of gametes under the procedures set by the UAGA.

## II. HISTORY OF POSTHUMOUS RETRIEVAL IN THE UNITED STATES

### A. *Growth of Posthumous Retrieval*

As medical science and technology advance, posthumous retrieval of gametes becomes more common and more readily available.<sup>22</sup> Posthumous retrieval of sperm, first performed in 1980, involves extracting sperm from a recently deceased or brain-dead male.<sup>23</sup> The sperm is retrieved for the purpose of conceiving a child with a woman, most often the deceased male's wife or fiancée.<sup>24</sup> By contrast, posthumous retrieval of gametes from a female is not yet a common practice in the United States.<sup>25</sup> However, as medical technology continues to advance, the practice may soon become a common method to conceive a child.<sup>26</sup> Medical scholars believe that it may soon be possible to stimulate the ovaries of a woman in a vegetative state and retrieve her eggs for fertilization.<sup>27</sup> While the processes of retrieving male sperm and female eggs for posthumous conception are different in terms of the nature of the procedure and the commonality of requests for the procedures to be performed, this Article will group both posthumous retrieval of sperm and posthumous retrieval of eggs into the posthumous retrieval of gametes.

Since the first successful posthumous sperm retrieval procedure in 1980, "requests for the procedure have been increasingly frequent and are expected to grow with each media report of a baby's birth following [posthumous gamete

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22. See Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F., at 289, 295 (discussing the increasing frequency of requests for posthumous gamete retrieval and the expectation that these requests will continue to increase).

23. Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 181 (2011).

24. *Id.*

25. Katz, *supra* note 22, at 289.

26. *Id.* at 289–90.

27. *Id.* at 290.

retrieval].”<sup>28</sup> While many requests come from the wife, fiancée, or girlfriend of a deceased male, there have been cases, such as Zhu’s, where the parents of a deceased male request the retrieval of their son’s sperm.<sup>29</sup> Although the posthumous retrieval of gametes from a deceased female is not yet common, there have been a small number of documented cases where a female’s eggs have been retrieved postmortem.<sup>30</sup> It is reasonable to assume that once a successful procedure is reported, requests for the procedure will grow rapidly, as they did for posthumous retrieval of sperm. As such, hospitals and health care providers must be ready to respond when such requests are made.

### B. *Lack of Uniform Laws or Guidelines*

Although the practice of posthumous gamete retrieval is becoming more common, the United States lacks a set of laws or regulations which allow for, limit, or even guide the practice.<sup>31</sup> The Uniform Probate Code and the Uniform Parentage Act provide rights and restrictions for the practice of posthumous reproduction,<sup>32</sup> but this Article will not discuss these uniform acts. The Uniform Probate Code and the Uniform Parentage Act mainly focus on the rights of a child born through posthumous reproduction,<sup>33</sup> an issue that extends beyond the scope of this Article. Instead, this Article will solely focus on the practice of posthumous retrieval of gametes and the lack of laws governing the procedure.

The void of law surrounding posthumous gamete retrieval is a problem in the United States health care system because it requires hospitals and health care systems to create their own policies when they receive the request for such a procedure.<sup>34</sup> Only a small number of hospitals across the country have a policy in place to respond to such a request.<sup>35</sup> Further, those policies differ greatly from hospital to hospital, leaving no uniform method for handling a request for posthumous gamete retrieval.<sup>36</sup>

Waler and his coauthors conducted a survey of the top seventy-five major academic medical centers in the United States “[t]o evaluate the presence and content of policies on posthumous sperm retrieval.”<sup>37</sup> The authors argued that it

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28. *Id.* at 295.

29. *Id.*; *In re Zhu*, 103 N.Y.S.3d 775, 776 (N.Y. Sup. Ct. 2019). *See also* discussion *infra* Section III.B (explaining Zhu’s parents’ petition for the retrieval of their deceased son’s sperm).

30. Yael Hashiloni-Dolv & Silke Schicktanz, *A Cross-Cultural Analysis of Posthumous Reproduction: The Significance of the Gender and Margins-of-Life Perspectives*, 4 REPROD. BIOMED. & SOC’Y ONLINE 21, 24 (2017).

31. Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased’s Prior Consent?* 5 J.L. & BIOSCIS. 329, 333 (2018).

32. *Id.*

33. *Id.*

34. Waler et al., *supra* note 15, at 45.

35. *Id.* at 49.

36. *Id.* at 47.

37. *Id.* at 45.

is beneficial for medical centers to put policies in place to prepare to respond to requests for posthumous gamete retrieval:

Because of differences in attitudes toward [postmortem sperm retrieval] among couples, coupled with the increase in [postmortem sperm retrieval] requests, it may be useful for a practitioner faced with a [postmortem sperm retrieval] request to have a policy for guidance as the window for [postmortem sperm retrieval] can be as short as 36 hours.<sup>38</sup>

However, the authors found that very few major academic medical centers have established a policy for responding to such requests.<sup>39</sup>

Out of the seventy-five institutions polled for the study, only forty-one responded to the study, and only eleven of those academic medical centers had established some sort of policy for posthumous sperm retrieval.<sup>40</sup> Further, there was significant variation among those eleven established policies.<sup>41</sup> One institution's policy was simply that the practice of posthumous sperm retrieval was not permitted.<sup>42</sup> The other ten policies permitted the practice but differed on who could provide consent to the procedure, who could request the procedure, and how long the bereavement period lasted after the donor's death.<sup>43</sup> Many institutions mandate a bereavement period—which may include a set time limit before the gametes can be used and participation in grief counseling—to ensure that the decision to use the gametes is not made solely because the requester is grieving the loss of a loved one.<sup>44</sup> Four academic medical centers permitted the procedure only if the donor produced prior written consent, while most other medical centers allowed for the donor's consent to be inferred by a surviving spouse or through a court order.<sup>45</sup> Finally, eight of the ten academic medical centers that allowed the procedure required that the donor's surviving wife or partner be the person to request that the procedure be performed.<sup>46</sup> Thus, in cases like Zhu's, the parents of a deceased or dying son could not request the procedure. Without laws or regulations in place to guide hospitals and health care systems, institutions have been left to respond to requests for posthumous gamete retrieval on their own.

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38. *Id.*

39. Waler et al., *supra* note 15, at 45.

40. *Id.* at 46–47.

41. *Id.* at 47.

42. *Id.* at 48 tbl.1.

43. *Id.* It is noteworthy that even among medical institutions that permit the procedure, variances in the requirements and process exist. This demonstrates that the system currently in place is far from uniform and can change drastically depending on the institution the donor visits. See Waler et al., *supra* note 15, at 48 tbl.1.

44. *Id.* at 47.

45. *Id.* at 48 tbl.1.

46. *Id.*

In an attempt to guide the practice of posthumous gamete retrieval, the American Society for Reproductive Medicine (ASRM) has published an ethics opinion detailing when posthumous retrieval may be ethically justifiable.<sup>47</sup> The opinion outlines several possible interests of deceased individuals to be considered before undergoing the procedure.<sup>48</sup> Of note, the ASRM considers whether “a right to reproduce posthumously can be said to exist only if posthumous reproduction implicates the same interests, values, and concerns that reproduction ordinarily entails.”<sup>49</sup> These interests are important to evaluate because an individual who wants to have a child during his or her lifetime may not want to have a child if he or she is not alive to raise it. Although a person may dream about becoming a parent, that dream for many individuals does not stem from the desire to pass on his or her genes or family name.<sup>50</sup> For many, the desire to become a parent arises from the significance of the experience of raising a child.<sup>51</sup> “[T]he interest in not having children after one’s death is more than an interest in avoiding certain experiences (such as rearing or worrying about them). Rather, it is an interest, shared by many people, in avoiding having children that one will not be able to raise and nurture.”<sup>52</sup> Finally, it is also important to consider an individual’s desire to avoid bringing a child into the world without either a mother or a father.<sup>53</sup> If either the deceased or his or her spouse has expressed opposition to the conception of their child after one of their deaths, then it would be unethical to ignore their wishes.<sup>54</sup>

The ASRM argues that posthumous gamete retrieval is ethically justifiable when written consent from the deceased authorizing the procedure is available.<sup>55</sup> An argument in favor of this conclusion is that it is difficult to know what the deceased would have wanted without prior written consent.<sup>56</sup> “In some cases, the only evidence of their wishes will be the testimony of a person bearing an apparent conflict of interest, namely the one who wishes to use the deceased’s sperm or eggs to reproduce.”<sup>57</sup> Written documentation of the deceased’s consent requires the deceased to evaluate the previously mentioned interests prior to his or her death.<sup>58</sup> To give written consent, the deceased should consider whether

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47. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11, at 45.

48. *See id.* at 46.

49. *Id.*

50. Menelaos Apostolou & Maria Hadjimarkou, *Domains of Motivation in Men and Women for Initiating and Terminating Procreation in an Evolutionary Perspective*, 54 MARRIAGE & FAM. REV. 486, 494–95 tbl.1 (2018).

51. *Id.*

52. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11.

53. *Id.*

54. *Id.*

55. *Id.* at 45.

56. *Id.* at 48.

57. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11, at 48.

58. *See id.* at 47.



they would want their gametes to be used to conceive a child even after death.<sup>59</sup> The deceased must consider whether they want another person, most likely their spouse, to experience raising a child without them.<sup>60</sup> Finally, the deceased must also consider whether that person wished to have a child knowing it will grow up without a parent.<sup>61</sup>

Like Waler and his colleagues, the ASRM encourages providers and health care systems to develop policies to respond to requests for posthumous retrieval.<sup>62</sup> However, the ASRM also notes that it may be ethical for providers to refuse a request even if a policy exists permitting the procedure.<sup>63</sup> Because the determination of whether the deceased would have given permission “cannot be made with certainty in the absence of a written directive, it is reasonable to conclude that physicians are not ethically obligated to comply with [a] request from a surviving spouse or partner.”<sup>64</sup> Ultimately, this puts the decision to proceed in the hands of an individual rather than a health care entity, or a state or federal government. Therefore, a lack of laws or regulations on the issue could cause great variety in outcomes for persons seeking the procedure.

Notably, the ASRM distinguishes between requests for posthumous retrieval made by a surviving spouse or partner and those made by parents who survive their child.<sup>65</sup> The ASRM considers it “troubling” when the request for posthumous gamete retrieval is made by the parents of the deceased, and it concludes that the situation is not ethically comparable to one in which the surviving spouse or partner makes the request.<sup>66</sup> The ASRM recommends that without direct written consent otherwise, entities that permit posthumous gamete retrieval should decline all requests made by any person who is not a surviving spouse or partner.<sup>67</sup>

While not law, guidelines published by entities such as the ASRM are important to consider when evaluating the legal and ethical case for posthumous gamete retrieval. Especially considering the fact that no statutes or regulations exist in the United States pertaining to posthumous gamete retrieval, individuals seeking the procedure, as well as providers and health care entities evaluating requests for the procedure, must look somewhere for guidance. Thus, professional societies like the ASRM become vital in issuing guidance to health

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59. *See id.*

60. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11.

61. *Id.* at 47.

62. *Id.* at 48.

63. *Id.* at 48–49.

64. *Id.* at 48.

65. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11, at 48.

66. *Id.*

67. *Id.* at 49.

care providers and courts considering new, ethically and legally ambiguous procedures.<sup>68</sup>

### III. POSTHUMOUS GAMETE RETRIEVAL IN THE COMMON LAW

In lieu of federal or state laws and regulations offering guidance on the permissibility of posthumous gamete retrieval, providers and health care entities are left to develop and establish their own policies. Instead of questioning the legal and ethical nature of the practice, providers and health care entities often require the individual seeking the procedure to obtain a court order acquiescing to the procedure.<sup>69</sup> As such, the common law in the United States has slowly started to develop regarding the legality of posthumous retrieval of gametes. Case law started to develop after a California state court found that postmortem conception was not against public policy.<sup>70</sup> Recently, state courts have begun to analyze posthumous gamete retrieval using the UAGA and have authorized hospitals to perform the procedure.<sup>71</sup>

#### A. Hecht v. Superior Court: *The Seminal Case*

While not directly related to posthumous gamete retrieval, *Hecht* is an important case in the analysis of posthumous reproduction. The case in *Hecht* arose when Deborah Hecht brought a petition before a California state court seeking to take possession of fifteen vials of her deceased boyfriend's sperm which were stored in a California sperm bank.<sup>72</sup> William Kane deposited his sperm in the sperm bank less than a month prior to taking his own life, and he instructed in his will that Hecht should take possession of the sperm and do with it whatever she wished.<sup>73</sup> When depositing the sperm, Kane signed an "Authorization to Release Specimens" form, which authorized the sperm bank to release Kane's sperm to either Hecht or Hecht's physician.<sup>74</sup> In his will, Kane acknowledged that it was his "intention that samples of [his] sperm will be stored at a sperm bank for the use of [Hecht], should she so desire."<sup>75</sup> Further, Kane provided notice that he wished for some of his personal mementoes to be given to Kane and Hecht's future children.<sup>76</sup>

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68. In fact, courts in many jurisdictions traditionally give professional medical standards conclusive weight in determining the standard of care in a given medical malpractice claim. BARRY R. FURROW ET AL., *HEALTH LAW: CASES, MATERIALS, AND PROBLEMS* 218 (8th ed. 2018).

69. Joseph, *supra* note 13.

70. Williams, *supra* note 23, at 185–86. *See also* Hecht v. Sup. Ct., 20 Cal. Rptr. 2d 275, 290–91 (Cal. Ct. App. 1993).

71. *In re Zhu*, 103 N.Y.S.3d 775, 780 (N.Y. Sup. Ct. 2019). *See also* Joseph, *supra* note 13.

72. *Hecht*, 20 Cal. Rptr. 2d at 278.

73. *Id.* at 276–77.

74. *Id.* at 276.

75. *Id.* at 277.

76. *Id.*

Hecht's petition was challenged by Kane's two children from a previous marriage, who argued that by granting the petition: (1) children might be born who will never know their father and "never ever have the slightest hope of being raised in a traditional family"; (2) Kane's family would undergo additional emotional, psychological, and financial stress; and (3) public policy would be violated through the artificial insemination of an unmarried woman with the sperm of a deceased man.<sup>77</sup> Kane's children sought an order for their father's sperm to be destroyed.<sup>78</sup>

The California court made two major findings pertinent to the development of assisted reproductive technologies in the law. First, the court held that Kane possessed an ownership interest in, and decision-making authority over, his stored sperm.<sup>79</sup> In doing so, the court distinguished Hecht's case from *Moore v. Regents of University of California*, which held that individuals do not have a possessory interest in bodily materials after they leave the body.<sup>80</sup> *Hecht* held that Kane had an ownership interest in his sperm to the extent that he had decision-making authority as to its use, which was sufficient to constitute "property" under probate law.<sup>81</sup> This holding is important for posthumous gamete retrieval because it implies that individuals who exercise their decision-making authority over their genetic material have the legal right to decide who may possess it and for what purpose it may be used.

Second, *Hecht* held that posthumous conception (the use of a decedent's sperm to conceive a child) is not against public policy.<sup>82</sup> Kane's children argued that the "court should adopt a state policy against posthumous conception" because it is "in truth, the creation of orphaned children by artificial means with state authorization."<sup>83</sup> However, the court rejected their argument: "[A]ssuming that both Hecht and decedent desired to conceive a child using decedent's sperm, [Kane's children] fail to establish a state interest sufficient to justify interference with that decision."<sup>84</sup> The court noted that California lacked a statute which provided a state interest for interfering on "gamete-providers' decisional authority."<sup>85</sup> This holding allows for other state courts to find that posthumous conception is not against public policy, thereby opening the door for the permissibility of posthumous retrieval.

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77. *Hecht*, 20 Cal. Rptr. 2d at 279, 284.

78. *Id.* at 279.

79. *Id.* at 281.

80. *Id.* at 280–281. *See also* *Moore v. Regents Univ. Cal.*, 793 P.2d 479, 488–89 (Cal. 1990).

81. *Hecht*, 20 Cal. Rptr. 2d at 283.

82. *Id.* at 289.

83. *Id.* at 288.

84. *Id.* at 289.

85. *Id.*

B. *Posthumous Gamete Retrieval and the UAGA: Christy and Zhu*

The legality of posthumous gamete retrieval was expanded even further after an Iowa state court ruled that a hospital may posthumously retrieve the sperm of a deceased patient, even if that patient has not given express consent.<sup>86</sup> The court in *In re Daniel Thomas Christy* held that the term “anatomical gift” under the UAGA also applied to sperm.<sup>87</sup>

Daniel Christy was twenty-three years old when he suffered severe head trauma due to a motorcycle accident.<sup>88</sup> Once it was likely Christy was brain-dead, his parents asked the hospital to retrieve his sperm for Christy’s fiancée, Amy Kruse, to use.<sup>89</sup> The hospital refused to grant the request unless Christy’s parents could obtain a court order.<sup>90</sup> After Christy’s parents filed an emergency court order, Sheldon Kurtz, the principal drafter of the 2006 version of the UAGA, filed an affidavit in support of the use of the UAGA to retrieve Christy’s sperm for Kruse’s use.<sup>91</sup> Kurtz argued that “[h]arvesting Mr. Christy’s semen with the intention to direct donation to his fiancée is legally permissible under the Iowa act” and that this situation was contemplated by the UAGA drafters.<sup>92</sup> The Iowa state court agreed with Christy’s parents and Kruse and ordered that Christy’s sperm be retrieved.<sup>93</sup>

*Christy* held that “under the [UAGA], an anatomical gift, including the gift of sperm, can be made by the donor, or, if the donor did not refuse to make the gift, by the donor’s parents following the donor’s death.”<sup>94</sup> In so ordering, the Iowa court took the permissibility of posthumous gamete retrieval a step further than that recommended by the ASRM. While the ASRM encourages providers to permit posthumous gamete retrieval only when the donor has a written directive assenting to the procedure, *Christy* permits the procedure without any consent made by the donor.<sup>95</sup> In fact, as demonstrated by the *Christy* opinion, retrieval and donation are allowed so long as the donor did not expressly refuse to make the gift.<sup>96</sup> This ruling has the potential to open the door to many people providing “consent” on behalf of the donor.

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86. Simana, *supra* note 31, at 334.

87. *Id.*

88. Spielman, *supra* note 12, at 332.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Spielman, *supra* note 12, at 332.

94. *Id.*

95. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11, at 45; Spielman, *supra* note 12, at 332.

96. Spielman, *supra* note 12, at 333.

The *Zhu* case relied on *Christy* and the UAGA to infer Peter Zhu's consent to the posthumous sperm retrieval procedure through the request of his parents.<sup>97</sup> Zhu was twenty-one years old when he suffered a skiing accident and was airlifted to a hospital.<sup>98</sup> Zhu was declared dead by neurological criteria, but his organs were kept viable for transplantation because he was a registered organ donor.<sup>99</sup> On the morning of the scheduled organ donation, Zhu's parents brought a petition to a New York state court asking for an order requiring the hospital to retrieve Zhu's sperm and for his parents to decide how it would be used.<sup>100</sup> The Westchester County Medical Center stated that it neither objected nor consented to performing the procedure and that it would comply with whatever order the court instructed.<sup>101</sup> After the court granted an emergency order instructing the Medical Center to retrieve Zhu's sperm, the court held a hearing on the ultimate disposition of the sperm.<sup>102</sup>

In making its decision, the court focused on Zhu's intent.<sup>103</sup> Relying on the rule of law established in *Hecht* ("that decedent's estate representative did not have the right to destroy decedent's frozen sperm in light of his expressed written intent that it be stored for possible future use by his longtime girlfriend"),<sup>104</sup> the court sought to determine whether Zhu expressed consent to posthumous gamete retrieval.<sup>105</sup> After determining that Zhu left no express direction as to the posthumous use of his genetic material, the court ruled that his "presumed intent can be gleaned from certain of his prior actions and statements, in conjunction with statutes designed to serve as surrogates for a decedent's intent."<sup>106</sup> The court proceeded to evaluate Zhu's presumed intent through the testimony of his parents, in conjunction with the New York state statute modeled after the UAGA.<sup>107</sup>

The court first noted that Zhu was a registered organ donor.<sup>108</sup> Zhu's parents testified that he signed up to be an organ donor because Zhu "had always been motivated by a desire to help others."<sup>109</sup> They bolstered this testimony by citing Zhu's decision to enter the military and become a military doctor as evidence of

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97. See *In re Zhu*, 103 N.Y.S.3d 775, 778 (N.Y. Sup. Ct. 2019). See also Spielman, *supra* note 12, at 332.

98. *In re Zhu*, 103 N.Y.S.3d at 776.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 776–77.

103. *In re Zhu*, 103 N.Y.S.3d at 777.

104. *Id.*

105. See *id.* at 778.

106. *Id.*

107. *Id.* at 778–79.

108. *In re Zhu*, 103 N.Y.S.3d at 778.

109. *Id.*

his “generosity of spirit.”<sup>110</sup> The court reasoned that such evidence demonstrated that although Zhu did not expressly consent to the posthumous use of his genetic material, the use of his sperm for posthumous reproduction “would not do violence to his memory . . . but would be consistent with his past conduct and statements.”<sup>111</sup>

Next, the court considered whether it was appropriate for Zhu’s parents to make the request for posthumous retrieval for future reproductive use.<sup>112</sup> Once again, the court used Zhu’s past conduct and statements to determine Zhu’s intent.<sup>113</sup>

In seeking to divine Peter’s intent from his past statements and actions, there is a consistent thread running through his short life: the primacy of family and family relationships. In what can be discerned from the Petition, testimony, and documents adduced, one thing is clear: considerations of family—past, present, and future—were vital to Peter. Devotion to family, revealed in various ways, direct and subtle, was evident throughout Peter’s young life.<sup>114</sup>

Zhu’s parents testified as to Zhu’s dream of having several children and his responsibility to carry on his family’s legacy.<sup>115</sup> Zhu’s Tactical Officer at West Point also testified that during mentoring sessions, Zhu shared his desire to have several children.<sup>116</sup> After taking all the evidence into consideration, the court held that there was no “better mechanism for determining the ultimate fate of [Zhu’s] biological legacy than the decision of Peter’s closest kin, his parents.”<sup>117</sup>

The court reasoned that its ruling was proper because the New York state organ donation statutes allowed for the in-depth survey of the decedent’s intent.<sup>118</sup> Like the UAGA, the New York statute provides a “pecking order of consent” of individuals close to the decedent who may provide consent for the organ donation when the decedent has failed to leave specific instructions as to whether he or she is for or against the donation of his or her organs.<sup>119</sup> Because Zhu did not have a health care proxy, a living will, a spouse, or any children, the first available individuals in that pecking order were his parents.<sup>120</sup> Thus, even if Zhu was not a registered organ donor, under the UAGA and the New York state organ donation statute, his parents could have effectuated his organ

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110. *Id.*

111. *Id.*

112. *Id.*

113. *In re Zhu*, 103 N.Y.S.3d at 778.

114. *Id.*

115. *Id.*

116. *Id.* at 778–79.

117. *Id.* at 779.

118. *See In re Zhu*, 103 N.Y.S.3d at 779.

119. *Id.* *See also* REVISED UNIF. ANATOMICAL GIFT ACT § 9 (NAT’L CONF. COMM’RS ON UNIF. STATE LS. 2009).

120. *See In re Zhu*, 103 N.Y.S.3d at 780.

donation.<sup>121</sup> Finally, the court found male gametes to be considered “tissue” under the organ donation statute; thus, the statute applied to the posthumous retrieval of Zhu’s sperm.<sup>122</sup> In so ruling, the court relied on *Christy*, noting that the Iowa court authorized the recovery of the decedent’s sperm by his parents and permitted them to make an “anatomical gift” to the decedent’s fiancée.<sup>123</sup>

*Zhu* and *Christy* pushed the boundaries of posthumous gamete retrieval. The cases permit posthumous retrieval and use of the gametes for reproduction to be effectuated even when the donor does not expressly consent to the procedure. Further, the cases allow for the donor’s intent to be presumed, most notably through the testimony of biased parties. In both cases, the decedent’s parents petitioned the court for an order instructing the hospital to perform the procedure. However, *Zhu* differs from *Christy* in that Zhu was not engaged.<sup>124</sup> While Daniel Christy’s parents were able to make an “anatomical gift” to Christy’s fiancée, Peter Zhu’s parents are left to find a possible surrogate for his sperm.<sup>125</sup> This only complicates an already problematic situation. After jumping through the legal hoops of posthumous gamete retrieval, Zhu’s parents are now left to consider the legal nature of surrogacy in the United States if they intend to use Zhu’s genetic material for reproduction. While the New York court placed no restrictions on the Zhus’ use of their son’s genetic material, they are likely to run into other legal and ethical problems.<sup>126</sup>

### C. Future Development: Robertson

Even after *Christy* and *Zhu*, courts continue to rule inconsistently when deciding cases of posthumous gamete retrieval. In 2018, a California state court dismissed a complaint against a sperm bank, holding that “it would violate public policy to make a ruling which would in any way encourage ‘the taking or harvesting of tissue or organs from someone who has not consented thereto.’”<sup>127</sup> That case, *Robertson v. Saadat*, involved the alleged misuse of stored sperm by a sperm bank after the sperm was posthumously retrieved from Aaron Robertson while he was in a coma with no chance of recovering.<sup>128</sup>

Aaron and his wife, Sarah, had always planned on having children together but were forced to wait until medical technology advanced to a point to effectively eliminate the chances of Aaron passing on his condition of Marfan

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121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Joseph, *supra* note 13.

126. See *In re Zhu*, 103 N.Y.S.3d at 781.

127. Brief for Appellant at \*9, *Robertson v. Saadat*, 48 Cal. App. 5th 630 (2020) (No. B292448).

128. *Id.* at \*13, \*17.

Syndrome to their children.<sup>129</sup> However, Aaron suffered a stroke and fell into a coma before he and Sarah could take steps to have children.<sup>130</sup> Once Sarah learned that Aaron's condition was terminal, she requested that the UCLA Medical Center retrieve reproductive gametes from Aaron so that she could fulfill their dream of having children.<sup>131</sup> The Medical Center agreed, performed the procedure, and handed the retrieved sperm over to a sperm bank for storage.<sup>132</sup> In her complaint, Sarah alleged that the sperm bank lost, destroyed, or misappropriated Aaron's donation.<sup>133</sup> The California court dismissed Sarah's complaint, reasoning, among other arguments, that Aaron did not consent to the withdrawal of his sperm and its use after his death, so the court should not make a ruling which encourages Sarah to recover based on her inability to utilize "illegally" obtained tissue.<sup>134</sup> In finding Aaron's sperm "illegally" obtained, "[t]he court defined an 'illegally' obtained organ or tissue as one 'taken without the donor's consent or otherwise specifically permitted by law.'"<sup>135</sup>

Sarah appealed the decision to the California Court of Appeals,<sup>136</sup> making several arguments, two of which are important for this Article.<sup>137</sup> Sarah first argued that the UAGA permits the spouse of the decedent to make an anatomical gift of the decedent's body for the purpose of transplantation.<sup>138</sup> While "conception" is not defined under the UAGA, Sarah argued that conception reasonably can be considered "transplantation."<sup>139</sup> Further, Sarah argued that sperm is a human tissue, thus falling under the parts of the human body that may be given as an anatomical gift.<sup>140</sup> Second, Sarah argued that it is not the role of the court system to decide whether posthumous retrieval is contrary to public policy because that responsibility lies with the state legislature.<sup>141</sup>

Given the questions surrounding sperm extraction, this is a decision best left to the Legislature to decide if and how to regulate [posthumous sperm retrieval].

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129. *Id.* at \*12–13.

130. *Id.* at \*13.

131. *Id.*

132. Brief for Appellant, *supra* note 127, at \*14–15.

133. *Id.* at \*17.

134. *Id.* at \*9.

135. *Id.*

136. Between drafting this Article and its publishing, the Court of Appeals rendered a decision, and the Supreme Court denied review. *2nd Appellate District Docket*, CAL. CTS. - APP. CT. CASE INFO., [https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc\\_id=2262197&doc\\_no=B292448&request\\_token=NilwLSEmXkw9WyBRSCMtWEIIEw6USxTKil%2BVz5RMCAGcg%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2262197&doc_no=B292448&request_token=NilwLSEmXkw9WyBRSCMtWEIIEw6USxTKil%2BVz5RMCAGcg%3D%3D) (last updated Sept. 24, 2020).

137. Brief for Appellant, *supra* note 127, at \*43, \*46.

138. *Id.* at \*43.

139. *Id.*

140. *Id.*

141. *Id.* at \*47.



Until then, because the Legislature has chosen not to enact any laws prohibiting the act of sperm extraction, the trial court's order is contrary to existing law.<sup>142</sup>

*Robertson* is an important case to analyze because it demonstrates the variation in the common law regarding posthumous gamete retrieval. Not only may the common law differ from state to state, but it may differ within a state as well, as demonstrated by *Robertson* and *Hecht*. The variance of the common law across the United States calls for a uniform law on posthumous gamete retrieval.

#### D. Growth of Posthumous Retrieval

Adopted in 2006 and amended in 2009, the UAGA was drafted and published by the NCCUSL for passage by all fifty state legislatures.<sup>143</sup> The NCCUSL drafted the original UAGA in part to address “the critical organ shortage by providing additional ways for making organ, eye, and tissue donations.”<sup>144</sup> After the original UAGA was promulgated in 1968, all fifty states promptly enacted the statute.<sup>145</sup> However, after multiple revisions of the UAGA and many states adopting non-uniform amendments to their statutes, anatomical gift acts around the United States were no longer uniform and harmonious, prompting the NCCUSL to create a new uniform statute.<sup>146</sup> Since the latest version of the UAGA was published in 2006, forty-six states have adopted it, once more producing near-uniform anatomical gift act laws around the United States.<sup>147</sup> Included in the major revisions for the 2006 UAGA is that the Act “[h]onors the choice of an individual to be or not to be a donor” and “[f]acilitates donations from a deceased individual who made no lifetime choice by adding to the list of persons who can make a gift of the deceased individual's body or parts.”<sup>148</sup>

As relevant background, the UAGA defines anatomical gift as “a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education.”<sup>149</sup> Part of a human body is defined as “an organ, an eye, or tissue of a human being.”<sup>150</sup> Under the UAGA, tissue “means a portion of the human body other than an organ or an

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142. Brief for Appellant, *supra* note 127, at \*49.

143. REVISED UNIF. ANATOMICAL GIFT ACT prefatory n. (amended 2009) (NAT'L CONF. COMM'RS ON UNIF. STATE LS. 2009).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Anatomical Gift Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=015e18ad-4806-4dff-b011-8e1ebc0d1d0f&tab=groupdetails> (last visited Jan. 15, 2019).

148. REVISED UNIF. ANATOMICAL GIFT ACT prefatory n. (NAT'L CONF. COMM'RS ON UNIF. STATE LS. 2009).

149. *Id.* § 2(3).

150. *Id.* § 2(18).

eye.”<sup>151</sup> Of note, the comments to the UAGA state that “part” is intended to include all parts of the human body, including bones and fluids.<sup>152</sup> Thus, because sperm is considered tissue, it falls under the definition of “part.”<sup>153</sup>

The UAGA provides a method for an individual to refuse to make an anatomical gift of his or her body or part<sup>154</sup> and preclude another person from making or revoking the donor’s decision to refuse or make a donation.<sup>155</sup> However, in the absence of any express decision to make or refuse to make a donation by the donor, the UAGA provides a list of persons who may make a gift of the donor’s body or part on behalf of the donor.<sup>156</sup> The UAGA states that an anatomical gift of the donor’s body or part may be made by any member of the following classes of persons, in the order of priority listed: “(1) an agent of the decedent . . . ; (2) the spouse of the decedent; (3) adult children of the decedent; (4) parents of the decedent . . . .”<sup>157</sup> The court in *Zhu* looked to this provision of the New York State anatomical gift statute to hold that *Zhu*’s parents were considered a proper party to decide the use of *Zhu*’s gametes.<sup>158</sup> Therefore, without express consent to or refusal of the anatomical gift donation, the UAGA provides an expansive list of family members who may provide consent for the decedent.

#### IV. ANALYSIS

Throughout the United States, hospital policies and state common law have created great variation in posthumous gamete retrieval procedures. In order to protect the true interest of the deceased and to keep the proposed law consistent with cases like *Christy* and other laws surrounding posthumous retrieval of human tissue and organ, the NCCUSL should amend the UAGA to explicitly include posthumous gamete retrieval.

This Article argues that the most ideal posthumous gamete retrieval law is one that requires the deceased donor to give express consent to both the procedure and the use of their gametes for later reproduction. Human gametes are already covered by the UAGA because they are human tissue and as such, posthumous gamete retrieval should be governed under the UAGA because it is a kind of anatomical gift. The great variance in law created by health care systems and state trial courts across the country requires such a uniform law to protect the interests of the decedent. Special ethical concerns of posthumous gamete retrieval should further require the donor to expressly grant consent to

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151. *Id.* § 2(30).

152. *Id.* § 2 cmt.

153. REVISED UNIF. ANATOMICAL GIFT ACT § 2 cmt.

154. *Id.* § 7.

155. *Id.* § 8.

156. *Id.* § 9.

157. *Id.*

158. *In re Zhu*, 103 N.Y.S.3d 775, 779 (N.Y. Sup. Ct. 2019).

the procedure, thus differentiating it from other anatomical gifts under the UAGA. These considerations require an amendment to the UAGA that explicitly permits posthumous gamete retrieval only with the express consent of the deceased.

A. *Gametes Are Tissue and Are Governed by the UAGA*

The Harvard Medical Dictionary defines tissue as “[a] group of cells that are specialized to do a certain job and are joined together to form a body structure.”<sup>159</sup> Gametes are defined as “a mature male or female germ cell usually possessing a haploid chromosome set and capable of initiative formation of a new diploid individual by fusion with a gamete of the opposite sex.”<sup>160</sup> . Because both male and female gametes are a group of cells that are specialized to do a certain job, reproduction,<sup>161</sup> gametes should rightly be considered human tissue.

The NCCUSL already recognizes male sperm as tissue. When defining what human body parts may be given as an anatomical gift, the writers of the UAGA noted that “part” includes tissue; thus sperm, classified as a tissue, is considered a part under the UAGA.<sup>162</sup> It is a safe assumption that the drafters of the UAGA would also consider female eggs to fall under the UAGA because they too are tissue. Because both sperm and eggs are tissue, they are considered a “part” under the UAGA, meaning that they can be donated as an anatomical gift for the purpose of “transplantation, therapy, research, or education.”<sup>163</sup>

The question remains whether posthumous gamete retrieval for the purpose of future reproduction can be considered an anatomical gift because it meets one of the four purposes defined in the UAGA. The expressed purposes of an anatomical gift under the UAGA are “transplantation, therapy, research, or education.”<sup>164</sup> Retrieval of gametes for reproduction is clearly not for the purpose of therapy, research, or education. Thus, posthumous gamete retrieval is only governed by the UAGA if it is done for the purpose of transplantation.

Transplantation is the “process of removing an organ or other donated body part from one person and implanting it in another person.”<sup>165</sup> Although conception is not the same process as the transplantation of an organ, it reasonably falls under the definition of transplantation, as demonstrated by the

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159. *Medical Dictionary of Health Terms: Q-Z*, HARV. MED. SCH. (Dec. 2011), <https://www.health.harvard.edu/q-through-z>.

160. *Gamete*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gamete> (last visited Feb. 22, 2020).

161. *Gamete*, SCITABLE, <https://www.nature.com/scitable/definition/gamete-gametes-311/> (last visited Aug. 31, 2020).

162. REVISED UNIF. ANATOMICAL GIFT ACT § 2 cmt.

163. *Id.* § 2(3).

164. *Id.*

165. HARV. MED. SCH., *supra* note 159.

plaintiff's argument in *Robertson*.<sup>166</sup> The use of retrieved gametes for conception involves removing a donated body part (gametes are a body part that may be donated) from one person and "implanting" it in another person.<sup>167</sup> While conception does not "implant" the gametes like one may "implant" a removed organ into another individual, it does include implantation in another form. Take, for example, a kidney donation versus gametes used for in vitro fertilization. While the kidney is implanted with the goal of becoming an intrinsic part of the donee's body for their lifetime, the goal of gametic implantation through in vitro fertilization is reproduction. In this way, the implantation of gametes is not intended to become a part of the donee's body forever but rather to produce a new life.

Some legal scholars are not convinced that conception falls under one of the four purposes outlined by the UAGA. While discussing the philosophical and ethical concerns of posthumous conception, Anne Schiff argued that the UAGA does not apply to posthumous reproduction.<sup>168</sup> Schiff reasoned that

[a]lthough the UAGA's definition of human body 'parts' that can be donated is broad enough to include sperm and eggs, the Act does not apply to posthumous procreation since the stated purposes for donation are for 'transplantation, therapy, medical or dental education, research, or advancement of medical or dental science.'<sup>169</sup>

Other scholars who agree with Schiff's conclusion argue that the UAGA should be amended to expressly include posthumous conception.<sup>170</sup>

However, when examining the facts in *Christy*, the Iowa state court found that Christy's situation could be analyzed under the UAGA.<sup>171</sup> The court's opinion "did not explicitly attend to the reproductive potential of gametes, either by stating that conception fell under the purposes of UAGA, or by stating that the purposes of UAGA were not of central importance and could be overlooked."<sup>172</sup> In doing so, the court implied that conception fell under the purposes of the UAGA.<sup>173</sup> Additionally, although the court in *Zhu* analyzed Zhu's case under the New York State anatomical gift statute,<sup>174</sup> the court did not

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166. Brief for Appellant, *supra* note 127, at \*43.

167. G. Bahadur, *Death and Conception*, 17 HUM. REPROD. 2769, 2772 (2002).

168. Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 928 (1997).

169. *Id.*

170. See Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 64–65 (1999).

171. Spielman, *supra* note 12, at 333.

172. *Id.* at 333–34.

173. *Id.* at 334.

174. Although New York has not officially adopted the 2006 UAGA, the statute provision on which *Zhu* relied is modeled after Section 9 of the UAGA. See *In re Zhu*, 103 N.Y.S.3d 775, 779–80 (N.Y. Sup. Ct. 2019).

explicitly consider the purposes of the UAGA or the State statute.<sup>175</sup> Whether or not “conception” is an expressed or implied purpose of the UAGA, *Christy* and *Zhu* demonstrate that courts are using the UAGA to decide cases of posthumous gamete retrieval and use for future reproduction. Therefore, posthumous gamete retrieval for use in future reproduction should be considered an anatomical gift and, as such, is already governed by the UAGA.

*B. Laws Surrounding Posthumous Gamete Retrieval Should be Uniform*

Beyond adoption of the UAGA, federal and state legislatures have failed to enact any statutes pertaining to posthumous gamete retrieval.<sup>176</sup> As such, health care providers and health care systems have relied on ethics opinions and model legislation in order to determine how to respond to a request for posthumous gamete retrieval.<sup>177</sup> However, even though organizations such as the ASRM have called for health care systems to adopt policies regarding posthumous gamete retrieval, most health care systems across the United States have failed to do so.<sup>178</sup> Further, of the few health care systems that have adopted a policy, the policies themselves vary greatly.<sup>179</sup> While some health care systems establish conditions that must be in place before undergoing the procedure, others simply prohibit the procedure outright.<sup>180</sup>

In other words, the system of law surrounding posthumous gamete retrieval has been developed by individuals working in the health care system, not elected lawmakers. As such, the system that has developed is confusing, inconsistent, and leaves little room for oversight or guidance.<sup>181</sup> While ethics opinions are helpful to guide providers, providers are by no means required to follow the advice given by the writer of the opinion.<sup>182</sup> It is very possible for health care systems within the same state, or even the same city, to have drastically different policies on posthumous gamete retrieval. Further, it is even possible for providers within the same hospital to have different policies. The ASRM notes that “it is reasonable to conclude that physicians are not ethically obligated to comply with [a request for posthumous retrieval of gametes or a request for their

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175. *Id.*

176. Fruchtman, *supra* note 7.

177. *Id.*

178. Waler et al., *supra* note 15, at 45.

179. *Id.* at 48.

180. *Id.* Even with an amendment to the UAGA, there is a risk that different hospitals, health care systems, and even states will still have varying requirements to undergo a procedure for posthumous gamete retrieval. While not governed by a uniform act, a good comparison is to abortion procedures in the United States. Like abortion, people seeking the procedure may be forced to travel to a different state if they do not meet the procedure requirements in their home state. *See generally* Christina A. Cassidy, *Women Seek Abortions Out of State Amid Restrictions*, AP NEWS (Sept. 8, 2019), <https://apnews.com/4ced42150e3348328296e28559c2143b>.

181. Waler et al., *supra* note 15.

182. *Id.* at 49.

future use for reproduction].”<sup>183</sup> This means that a spouse’s request for the retrieval of gametes may be approved or denied simply based on which physicians are working that day, provided that the patient is seeking the procedure in a hospital.<sup>184</sup>

This is a troubling concern when dealing with a time-sensitive and emotional procedure like posthumous gamete retrieval. As many requests may be made when the donor is near death or already dead, the gametes need to be retrieved in a timely manner in order to keep them viable.<sup>185</sup> So too, the person making the request may be grieving, which could further complicate matters when the policy for the procedure is decided by a group of health care workers. To make health care system policies across the country uniform and to streamline the process for making a request, the United States should enact a law regulating the practice of posthumous gamete retrieval. The best way to do this would be to amend the UAGA to explicitly cover posthumous gamete retrieval and to outline the additional requirements for a permitted procedure.

*C. Requests for Posthumous Gamete Retrieval Should Include the Donor’s Explicit Consent*

The UAGA should be amended to explicitly permit posthumous gamete retrieval. While it is possible that posthumous retrieval and use for future reproduction falls under the purpose of “transplantation,” the drafters of the UAGA should amend the Act to clarify. The definition for “anatomical gift” should be amended to incorporate the notion that an anatomical gift may be made for the purpose of reproduction. Further, the existing comments to the definition of “part” state that male sperm is considered tissue,<sup>186</sup> but the comments should be clarified to explicitly include female eggs. By such amendments posthumous gamete retrieval will be explicitly permitted under the UAGA.

However, further amendments to the Act are needed to avoid many ethical problems. First, without any additional changes to the UAGA, any person who registers as an organ donor would be in a position to give their gametes as an

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183. Ethics Comm. Am. Soc’y for Reprod. Med., *supra* note 11, at 4.

184. While it is very possible that posthumous gamete retrieval procedures are taking place in various doctor’s offices across the US, this Article focuses on procedures done at the institutional level because various physicians in the private setting may decide to perform the procedure on their own terms. See Simana, *supra* note 31 (noting that decisions regarding posthumous gamete retrieval are made at private fertility clinics). Requests for the procedure are also on the rise in emergency departments. See Andrew R. Zinkel et al., *Postmortem Sperm Retrieval in the Emergency Department: A Case Report and Review of Available Guidelines*, 3 CLINICAL PRAC. & CASES EMERGENCY MED. 405, 406 (2019).

185. Simana, *supra* note 31, at 332.

186. REVISED UNIF. ANATOMICAL GIFT ACT § 2 cmt. (NAT’L CONF. COMM’RS ON UNIF. STATE LS. 2009).

anatomical gift, likely to someone with whom the donor never consented to producing children.<sup>187</sup> To avoid this, every person who registers as an organ donor yet does not wish to give their gametes as an anatomical gift would need to sign a refusal to donate their gametes.<sup>188</sup> This extra step may go against the ultimate purpose of the UAGA, which is to make organ and tissue donation laws uniform and make the entire organ donation process easier.<sup>189</sup> So too, under Section 9 of the UAGA, if a decedent fails to either consent to organ donation or expressly refuse organ donation, a pecking order of individuals will have the right to make an anatomical gift of the decedent's gametes on their behalf.<sup>190</sup> This is the Section that *Zhu* relied on in determining that Peter's parents were the proper party to retrieve Peter's gametes and decide on their future use.<sup>191</sup> By allowing Peter's parents to retrieve and hold Peter's gametes for future use, the *Zhu* court went a step too far in analyzing posthumous gamete retrieval under the UAGA.

Who then is a proper party to receive a decedent's gametes? Because of the ethical considerations of donating one's gametes posthumously, the donor must evaluate whether he or she wishes for the receiver of the gametes to raise a child after his or her death. In this way, the donation of gametes is vastly different from the donation of an organ or other bodily tissue. The donation of gametes will likely bring about offspring, and that offspring will be the child of the donor. Thus, in order to protect the true interests of the donor, any law or policy regulating posthumous gamete retrieval must require the donor to expressly approve of the person who is to be the recipient.

In order to properly give consent, the donor must realize that consent to undergo a procedure for posthumous gamete retrieval is twofold. An individual with a desire to have his or her gametes retrieved posthumously is not just consenting to the procedure. The individual is also consenting to the use of those gametes by another person for future reproduction.<sup>192</sup> Thus, to truly consent to posthumous gamete retrieval, the decedent must consider the future disposition of his or her gametes and evaluate the person to whom they wish to gift their gametes. Not only must the decedent affirm that he or she has chosen a person to have children with, but the decedent must confirm that he or she intends to allow this person to raise the children, knowing that he or she will be deceased.

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187. *Id.* § 11 cmt.

188. *See id.* § 7 cmt.

189. This is due to the fact that the UAGA imposes an "opt in" principle, meaning that anyone who wishes to be an organ donor must register as one. *Id.* prefatory n. This is contrary to many European countries, where all citizens are deemed organ donors unless the individual chooses to opt out. *Id.*

190. REVISED UNIF. ANATOMICAL GIFT ACT § 9.

191. *See In re Zhu*, 103 N.Y.S.3d 775, 285–86 (N.Y. Sup. Ct. 2019).

192. *Id.* at 288.

Therefore, the donation of gametes should be limited to the decedent's spouse, fiancée, or partner. Further, when expressly consenting to the procedure, the donor should also expressly consent to the donation of their gametes to their spouse or fiancée. In this way, the donor's true interests can be reflected in the donation of their gametes and the donor can fully evaluate the consequences of donating their gametes.

By allowing Peter's parents to make up the disposition of his gametes after his death, the *Zhu* court ignored the true interests of the decedent. The court relied on the fact that Peter had a "dream of having several children, and the responsibility he felt to carry on his cultural and family legacy" in determining that Peter would have wanted his gametes retrieved and used posthumously.<sup>193</sup> As evidence of this, the court examined a letter Peter sent to a former professor telling the professor that "[y]ou are the type of teacher who I will share with my children" and a conversation with a military mentor, in which Peter expressed the desire to get married and have children.<sup>194</sup> While it is clear that Peter had a desire to have children and his own family, it will never be known whether Peter wanted his parents to take steps to carry out his family legacy if he was unable to do so. The only evidence of Peter's desire came from testimony and other evidence produced by Peter's parents.<sup>195</sup> However, Peter's parents were a biased party in this case. As the only producers of evidence, it is unlikely that a party, like Peter's parents, will produce evidence in opposition of their desired outcome. In other words, because of the position the Zhus were in, by wanting to retrieve and use Peter's gametes for future reproduction, the Zhus were unlikely to produce any evidence of Peter's intentions to not allow them to carry on his legacy in his place. In fact, the ASRM calls attention to this conflict of interest by commenting that oftentimes, the only evidence of the decedent's intent comes from biased parties.<sup>196</sup> To prevent such a situation from occurring, any potential amendment to the UAGA should include the addition of a section designed specifically for posthumous gamete retrieval.

The most important condition of the posthumous retrieval process which needs to be governed is the decedent's consent. In order to avoid problems such as consenting to gamete retrieval when registering for organ donation or allowing a long list of individuals to give consent on the decedent's behalf, posthumous gamete retrieval should only be permitted with the express consent of the decedent. Thus, any statute governing posthumous gamete retrieval should require the decedent's express consent.

Therefore, to protect the interests of the deceased, any potential statute governing posthumous gamete retrieval must permit the procedure only when

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193. *Id.* at 285.

194. *Id.*

195. *Id.* at 284.

196. Ethics Comm. Am. Soc'y for Reprod. Med., *supra* note 11, at 4.



the deceased has given informed consent to both undergoing the procedure and allowing their gametes to be used for reproduction. The decedent should also specify the person who is to receive the anatomical gift of their gametes and, once again, consent to that person using the gametes for reproduction after their death. Such consent cannot be given by simply registering to be an organ donor but instead should be outlined in an advanced directive or a will.

#### V. CONCLUSION

Posthumous gamete retrieval, like other assisted reproductive technologies, is becoming more common in the United States and other countries. However, the United States lacks statutes or regulations on the federal and state level regulating the practice. As such, health care systems and state trial courts have been left to their own devices to develop policy guidelines. Some state trial courts have begun to analyze the practice of posthumous retrieval under their state's Anatomical Gift Act.

In order to create a uniform system of laws in an emotional area of medicine designed to create life, the NCCUSL should amend the UAGA to explicitly permit posthumous gamete retrieval. In doing so, the new amendment should only permit posthumous retrieval when the donor provides express consent and specifies the person who is to receive the anatomical gift. Through this, the true interests of the deceased can be carried out, and courts will not have to rely on testimony and evidence from biased parties.

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