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DYING TO BE A FATHER:

LEGAL PATERNITY IN CASES OF POSTHUMOUS CONCEPTION

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I. INTRODUCTION

Consider the following case: a baby girl is conceived through artificial insemination of her mother, with sperm from the mother's late spouse, and is born more than a year after the spouse's death. The mother requests that her late spouse, the child's genetic father, be declared the legal father. Should the request be granted? Does it matter whether the sperm was harvested prior to the spouse's death or soon after his unexpected demise? Does it matter if he had specifically expressed his intention that his sperm would—or would not—be so used? And what if the mother has remarried by the time the baby is born? This article seeks to answer these questions.

The literature to date on Post Mortem Conception (PMC) has considered other aspects of the matter, such as the conditions under which sperm may be harvested and used after death[1] or the child's economic rights; namely, her status as heir[2] and her eligibility for

1 Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility and Inheritance*, 33 HOUS. L. REV. 967, 979–82 (1996); Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 544–55 (1993); Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39, 65–68 (1999); Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 37–45 (1996).

2 *See, e.g.*, James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743 (1998); Chester, *supra* note 1; Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L. J. 234 (2005); Joshua Greenfield, *Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8

Social Security survivor's benefits.[3] It has given little, if any, direct consideration to the determination of parenthood per se, an aspect which has been discussed only as an adjunct to the pecuniary elements of the issue. But the determination of paternity affects more than questions of financial rights and obligations. It plays an important role in shaping the child's identity and in fashioning the familial relationship between the child and her relatives, including the husband's parents, his siblings or his other children. This article will therefore put the question of paternity at center stage, and will address the derivative issues of social security, inheritance and the like only to the extent that they may be relevant.

This article proceeds from the premise that PMC is not prohibited by law. It considers neither the propriety of this form of conception nor how (if at all) the use of this sort of assisted reproductive technology should be regulated by the state.[4] The article will also refrain from discussing the various technologies available for harvesting sperm posthumously and the ethical questions each raises.[5] Suffice it to say, for our purposes, that assisted reproductive

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MINN. J. L. SCI. & TECH. 277 (2007); Summer A. Johnson, *Babies with Bucks – Posthumously Conceived Children Receive Inheritance Rights*, 36 MCGEORGE L. REV. 926 (2005); Jamie Rowsell, *Stayin' Alive: Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400 (2003); Cindy L. Steeb, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137 (2000); Kayla VanCannon, *Fathering a Child from the Grave: What Are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent?*, 52 DRAKE L. REV. 331 (2004); Melissa B. Vegter, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from Deceased Parent's Estate*, 38 VAL. U. L. REV. 267 (2003).

3 *See, e.g.*, Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV 251 (1999); John Doroghazi, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597 (2005); Karen Minor, *Posthumously Conceived Children and Social Security Survivor's Benefits: Implications of the Ninth Circuit's Novel Approach for Determining Eligibility in Gillett-Netting v. Barnhart*, 35 GOLDEN GATE U. L. REV. 85 (2005).

4 For an interesting discussion about the "legitimacy" of posthumous parenthood, see Chester, *supra* note 1; Michael H. Shapiro, *Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives*, 47 HASTINGS L. J. 1081, 1127–32 (1996); Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347 (1999).

5 *See* J. Dostal et al., *Post-mortem Sperm Retrieval in New European Countries: Case Report*, 20 HUMAN REPROD. 2359 (2005) (discussing procedures for retrieving sperm post-mortem); Kerr, *supra* note 1, at 45; Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*,

technologies enable conception to take place even after the provider of the gamete has died. Gametes can be harvested and cryopreserved (frozen) prior to the provider's death or retrieved from him post-mortem, and then used, through artificial insemination[6] or, if needed, in vitro fertilization,[7] to impregnate a woman with genetic material (sperm, egg or fertilized egg) whose providers are no longer alive.

This article will advance a conceptual framework with which to approach the determination of parenthood in PMC cases. In Part II, I provide an overview of the typical scenarios in which conception can occur after death. In Part III, I survey the current state of statutory and case law and identify the shortcomings of each in dealing with the issue at hand. Part IV introduces the Intent Model and the Genetic Model suggested in the literature of other assisted reproductive technologies contexts as ways of approaching the matter of legal parenthood. After discussing their appealing characteristics, I demonstrate their inadequacy in cases of PMC. Part V suggests a unique conceptual framework—the Relational Model—that provides a more nuanced basis for the determination of parenthood. I then apply The Relational Model to the various PMC scenarios so as to demonstrate its usefulness in resolving conflicts that may arise. Finally, in Part VI, I touch on some practical questions related to the determination of paternity, such as inheritance and social security benefits, by providing some preliminary thoughts about how these issues should influence our thinking and how they should be decided with regard to PMC children.

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46 Ariz. L. Rev. 91, 94 (2004); Strong, *supra* note 4. *See generally* Banks, *supra* note 3, at 268 (discussing the medical procedures that allow for conception after the death of the gamete provider); Cappy Miles Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 FERTILITY & STERILITY 512 (1980); Rowsell, *supra* note 2; Shai Shefi et al., *Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm*, 21 HUMAN REPRODUCTION 2890 (2006); Carson Strong, Jeffrey R. Gingrich & William H. Kutteh, *Ethics of Postmortem Sperm Retrieval: Ethics of Sperm Retrieval After Death or Persistent Vegetative State*, 15 HUMAN REPROD. 739 (2000).

6 *See* LAWRENCE J. KAPLAN & ROSEMARIE TONG, CONTROLLING OUR REPRODUCTIVE DESTINY: A TECHNOLOGICAL AND PHILOSOPHICAL PERSPECTIVE 220–28 (MIT Press 1994) (discussing artificial insemination in general).

7 *See id*. at 256–66 (discussing In Vitro Fertilization (IVF) in general).

II. CONCEPTION AFTER DEATH—THE POSSIBLE SCENARIOS

PMC can take place after the death of the genetic father, the genetic mother, or both genetic parents.[8] In the most frequently encountered situation, the genetic father has died and conception is requested by the person with whom the deceased had enjoyed a serious romantic relationship—his wife, fiancée, or cohabitating significant other.[9] Any such individual, without regard to formal marital status, will be referred to as a "partner". Accordingly, this paper focuses primarily on those cases.[10]

For purposes of this paper, I define conception as the beginning of (in vivo) pregnancy. In light of this definition, situations in which the pregnancy began before the father's death fall outside the scope of the discussion. The situation of post-mortem birth (as distinct from post-mortem conception) has been known since time immemorial and has long been treated by the law.[11] By and large, when the pregnancy starts before death, parenthood is determined by the usual tests, which need not be altered on account of the death.[12] Accordingly, this situation is considered here only to the limited extent it offers a useful analogy.

In the first cluster of PMC scenarios the woman wishes to use sperm that were frozen and stored in a sperm bank *before* the man's death. Typically, either of two scenarios accounts for the sperm being in storage. First, the couple may have been dealing with fertility problems; in that event, the death may have taken place while the couple was undergoing fertility treatments or after they had

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8 See in detail throughout this part.

9 For different cases, see *infra* note 22 and accompanying text.

10 On the variety of PMC situations, see Dostal, *supra* note 5; Johnson, *supra* note 2, at 929; Strong, *supra* note 4, at 347.

11 In most states, a child born less than three hundred days after the mother's husband's death—an interval suggesting that the pregnancy began while the husband was still alive—will be presumed to be the late husband's son or daughter, just as if the child was born while the husband was still alive. *See* references cited *infra* note 42. For the unique question of post-mortem birth by mothers, see John A. Robertson, *Emerging Paradigms in Bioethics: Posthumous Reproduction*, 69 IND. L. J. 1027, 1050–64 (1994); Daniel Sperling, *Maternal Brain Death*, 30 AM. J. L. & MED. 453 (2004).

12 *See infra* notes 39–42 and accompanying text.

terminated the treatments for one reason or another.[13] Alternatively, the sperm deposit may have taken place prior to the initiation of chemotherapy or radiation treatments for cancer to preserve some sperm unaffected by the treatments.[14] In all of these cases, there could be either an explicit directive regarding use of the sperm in the event of the man's death or else evidence of the deceased's implicit intent. Such evidence, whether explicit or implicit, is more likely to be found in the second scenario, when the man is confronting a life-threatening situation. It is possible that he acted simply to preserve potent sperm in order to be able to choose, after recovery, whether to procreate, but the chances are greater in this scenario that he also contemplated the use of his sperm even in case of death. In the first scenario, when the sperm was deposited as part of fertility treatments, there is usually a clear indication that the man wanted to become a father, but that does not necessarily imply that he intended to become a father after death (or even once the fertility treatments end).

In the second cluster of cases, conception occurs through the use of sperm retrieved soon *after* the man's death.[15] If not forbidden by law or regulation,[16] usable sperm can be retrieved within hours after death.[17] Existing storage techniques allow for the woman to be artificially inseminated immediately or later. It may be presumed that

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13 The fertility problems may have led the couple to use in vitro fertilization, in which case the genetic material may be stored as a frozen fertilized egg rather than as frozen sperm. That factor might bear on whether the woman should be allowed to use the genetic material after the man's death but not necessarily on the issue of parenthood. Robertson, *supra* note 11, at 1045; Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Reproduction*, 75 N.C.L. REV. 901, 954–65 (1997).

14 The Ethics Committee of the American Society for Reproductive Medicine, *Fertility Preservation and Reproduction in Cancer Patients*, 83 FERTILITY AND STERILITY 1622 (2005); Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 292 (2006). Cryopreservation of sperm might also be used by a soldier before going into active duty or by workers who are going to be exposed to toxic substances. Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 995–96 (1996).

15 Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 248–50 (1997); Andrea Corvalan, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L. J. SCI. & TECH. 335, 354 (1997).

16 *See infra* notes 89–92 and accompanying text.

17 In some instances, it can be retrieved even after two or three days. Dostal, *supra* note 5; Sharona Hoffman, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 593 (2004).

in most cases of after-death retrieval, there will be no explicit expression of intent concerning postmortem fathering; evidence of a desire to become a parent does not necessarily encompass becoming a parent after death. As we will see later on, the element of intention has a bearing on the determination of legal paternity.[18]

An additional pertinent variable in all of these cases may be the existence of another person who wishes, as part of his relationship with the mother, to become a parent of the resulting child. Though such cases are uncommon, the woman who conceives by the deceased's sperm may come to be, at the time of the insemination or later during the pregnancy, in a meaningful relationship with a new partner. She may or may not be legally married to that person, but in either event, he may ask (with her concurrence) to be declared the father. The discussion below analyzes the implications of this variable and considers whether the presence of the new partner should affect the conclusion regarding the status of the deceased genetic father.[19]

Notwithstanding the complexity of the multiple scenarios and their distinctive characteristics, they lend themselves to analysis on the basis of two ubiquitous factors: that of *intent*, and that of *affiliation*. The Intent Factor examines the intention of all relevant parties (the mother, the sperm provider, and the mother's new partner, if any) regarding the gamete. It asks what they intended to do with the gamete—in particular, who was intended to become the parent of the child—and what their present intentions are. The factor is not limited to past intention or to overt manifestations; it takes account both of the sperm provider's presumed intention[20] and of the wishes of the mother and her new partner at a later time.[21] The Affiliation Factor explores the precise link between the child born as a result of the PMC and the individuals asking to be declared his or

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18 As the name implies, it is the main factor in the Intent Model; it is also among the factors to be considered in the Relational Model, both discussed later. *See infra* Part IV.C. and Part V. correspondingly.

19 *See infra* Part V.B.3,4.

20 *See infra* Part V.B.2.

21 Here I view intent more broadly than does the Intent Model. I include current intention as well as original; assumed intention as well as overt. Compare to the Intent Model. *See infra* Part IV.C.

her parents. It inquires into the relationships (genetic, care-giving, etc.) between the child and the person asking (or being asked) to be recognized as the parent.

These factors, which organize the factual variables, are useful not only in mapping the scenarios but also in determining legal parenthood. As I demonstrate in Part III, the Intent Factor and the Affiliation Factor (though not necessarily so termed or so defined) figure prominently in the discussion of legal parenthood. Some writers identify them as the principal, or even the exclusive, criteria of legal parenthood. They also play a role, albeit a less prominent one, in the Relational Model I outline here.

Before ending this survey of PMC through sperm donation, it is worth mentioning that post-mortem conception with the deceased's sperm can theoretically occur without the surviving spouse's consent or even where there is no spouse at all.[22] If not proscribed by law or by regulation,[23] the parents of the deceased may ask to retrieve their son's sperm in order to use it to impregnate a surrogate mother or a woman who agrees to become the mother of their grandchild.[24] Although we lack reliable data regarding the prevalence of each of these scenarios, case law and media coverage suggest that the grandparent case just noted is rare. I therefore will not discuss it in detail, though the reasoning presented below would apply to it as well.

PMC may also involve the use of a deceased woman's eggs,[25] either frozen before her death or retrieved soon after.[26] In either case,

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22 *See* Laura A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881 (2000); Cappy Miles Rothman, *Live Sperm, Dead Bodies*, 20 ANDROLOGY 456 (1999). For an example of a case in which the parents of a dead Israeli soldier asked to use his sperm in order to bring a grandchild into the world, see MSNBC.com, Family of Dead Israeli Soldier Can Use His Sperm, http://www.msnbc.msn.com/id/16871062/ (last visited Mar. 8, 2008).

23 At the time of this writing, no state has enacted any such statute or promulgated any such regulation. The matter is therefore left to private ordering by the fertility clinics.

24 The impregnated woman might prefer to use their son's sperm rather than a donation from a sperm bank.

25 Bailey, *supra* note 2, at 788; The Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 FERTILITY AND STERILITY 260 (2004); Evelyne Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. & POL'Y 401, 415–16, 418–19 (1999).

26 The reliability of both techniques remains questionable. The Ethics Committee of the American Society for Reproductive Medicine, *Fertility Preservation and Reproduction in Cancer*

the woman's partner (whether or not her husband) may wish to use the eggs to become a father, with the assistance of another woman.[27] Physiological and cultural considerations make these cases less common than those involving post-mortem use of sperm. Moreover, the technique requires enlisting the services of a surrogate mother, a factor that casts the question of parenthood in a different light. Accordingly, the discussion here, as noted, will focus on PMC using sperm from a deceased man, primarily when requested by the deceased's spouse.

III. DETERMINING PARENTHOOD – COMPLEX ISSUES, INADEQUATE LAW

A. The Complexity of the Issue

Any use of assisted reproduction may pose complex questions of parenthood, and those complexities are compounded in PMC cases by the pre-pregnancy death of one parent. It is not uncommon for assisted reproduction to involve more than two individuals taking part in the process of conception. Two men (the genetic father and the intended-nurturing father)[28] may play fatherhood roles; and two or even three women (the genetic mother, the gestational mother and the intended-nurturing mother)[29] may share motherhood functions. These individuals are potentially competing parents, and they may seek clarification of their status and relationship to the child. In cases of PMC, of course, one of the progenitors is physically absent.

Any PMC poses one of two typical problems. On the one hand,

Patients, 83 FERTILITY AND STERILITY 1622 (2005); Cyrene Grothaus-Day, *Pipette to Cradle, from Immortality to Extinction*, 7 RUTGERS J. LAW & RELIG. 2, n. 37–38 (2005); Hoffman, *supra* note 17, at 597–98; Michael R. Soules, *Posthumous Harvesting of Gametes – A Physician's Perspective*, 27 J. L. MED. & ETHICS 362 (1999). *But see* the latest reports suggesting some positive breakthroughs in this field: *Labs Mature Eggs from Girls with Cancer, available at* http://www.boston.com/yourlife/health/women/articles/2007/07/02/labs_mature_eggs_from_girls_with_cancer/.

27 We also know of a few cases involving the use of fertilized eggs with both genetic parents having died. *See, e.g.*, Steeb, *supra* note 2, at 149 (discussing the dispute over the Rios's fertilized eggs in Australia).

28 In cases of artificial insemination by sperm donation.

29 In cases of in vitro fertilization by egg donation and in cases of surrogacy.

there may be more candidates for paternity (in theory or de-facto) than are needed or than the law can recognize, and these candidates may contest each other's claims to legal fatherhood. On the other hand, there may be fewer candidates for the parenthood task than needed or expected. The difficulties rest upon the common presumption that a child should have two parents – one mother and one father, no more and no less.[30] As I will suggest later on, this is not the only possible presumption, and the law might recognize the possibility of more than two legal parents.[31] Even then, however, similar complications arise, and the law will have to determine the status of the potential parents, frame their formal relationships with the child, and sometimes oversee the ways in which the parents cooperate with one another.

The need, on the one hand, to choose among multiple potential claimants of parental ties and, on the other, to ensure that every child has care-giving legal parent(s) requires consideration of several questions: What are the boundaries of the family? Is parenthood exclusive? Can parent-child relations take a variety of forms (that is, do all parents bear the same roles, duties, responsibilities, and legal status vis-à-vis the child)?[32]

It is self-evident that the determination of parenthood is a matter of vital importance to the individuals directly involved – the potential parents, their relatives, and (especially) the newborn child. But the matter also has broader implications for society as a whole. Its cultural, sociological and philosophical dimensions bear on the meaning of family as a basic social structure and on our fundamental understanding of family relations.

B. The Existing Legal Framework

Despite (or because of) its complexity, the question of

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30 Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984).

31 *See* Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83 (2004); Ilana Hurwitz, *Collaborative Reproduction: Finding the Child in the Maze of Legal Motherhood*, 33 CONN. L. REV. 127 (2000). *See generally* Bartlett, *supra* note 30.

32 Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006).

parenthood in cases of PMC has not been comprehensively addressed by the law. Few states have legislated with specific regard to the matter, though a growing number have legal provisions that bear on some aspects of the issue. Some states have legislated more generally regarding the recognition of parenthood;[33] others have dealt solely with inheritance issues.[34] Social Security benefits, another important fiscal aspect of the issue, are governed by federal law;[35] the pertinent statute does not refer explicitly to PMC children and, accordingly, they are treated pursuant to the general provisions.[36] As explained below, PMC has been discussed in a few court decisions. One of them, detailed here, focuses on the right to use sperm after its provider's death and does not analyze the question of parenthood.[37] Others deal with the child's rights under intestate succession laws and the Social Security Act.[38] Most of the decisions are by lower courts; none are by the Supreme Court of the United States.

In view of the range of legal arrangements regulating the various aspects of PMC, our search for the legal principles that define parenthood in these cases must begin with a review of the law on defining parenthood in general and of its applicability to the cases at hand. We then examine the statutory solutions enacted in the few states that have addressed the matter, as well as the legal consequences of statutes enacted to deal with other aspects raised by PMC children. Finally, we turn to the pertinent case law, which stands to shed light on matters left unregulated by statute and on how the courts have interpreted the relevant statutes.

1. General Principles

Under commonly accepted rules governing parenthood—derived from the common law or established by statute—when a child is conceived during the parents' lives, the genetic father is

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33 *See infra* notes 50–64 and accompanying text.

34 *See infra* notes 66–68 and accompanying text.

35 *See infra* note 70 and accompanying text.

36 *See infra* notes 70–74 and accompanying text.

37 *See infra* notes 79–85 and accompanying text.

38 *See infra* notes 93–121 and accompanying text.

recognized as the legal father.[39] Until relatively recently (a few decades ago) the rule was by and large limited to parents who were married; the biological father was recognized as the legal father by virtue of his status as the mother's husband.[40] Today, prevailing law recognizes the genetic father's paternity even when he was not married to the mother (although not necessarily when the mother is married to someone else).[41] That the child is born after the father's death does not automatically preclude his recognition as the father; typically, if the child is born within three hundred days of the father's death she will be recognized as his child for all purposes.[42]

In most cases of PMC, however, the man will have died more than three hundred days before the child's birth; the exception is the relatively unusual case in which conception occurs only a few days after the man's death. Accordingly, the man's paternity would not be recognized, at least not under the generally applicable law.[43] It is important to mention that under generally applicable law, if the mother had remarried by the time of birth, the current husband is presumed to be the legal father.[44]

Assuming that the law is silent on the relationship between the time of death and the determination of paternity, a posthumously-conceived child filing a paternity suit may come up against strict statute of limitation requirements that preclude establishment of paternity after the man's death.[45] Other limitation provisions may bar

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39 Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity By Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963 (1996); Jacobs, *supra* note 32, at 809–11.

40 Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1 (2004); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29 (2003).

41 Michael H. v. Gerald D., 491 U.S. 110, 125–26 (1989). *See generally* Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246 (2006).

42 Greenfield, *supra* note 2, at 278–80; Knaplund, *supra* note 5, at 97; Vegter, *supra* note 2, at 278–82. Other statutes are stricter and recognize the man as legal father only if the pregnancy began before his demise.

43 Bailey, *supra* note 2, at 781; Minor, *supra* note 3, at 103.

44 *See* Baker, *supra* note 40 (discussing the marital paternity presumption); Laurence J. McDuff, *The "Inconceivable" Case of Tierce v. Ellis*, 46 ALA. L. REV. 231 (1994).

45 Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 KAN. L. REV.

financial claims resulting from the determination of parenthood, such as claims for inheritance[46] or for survivor's Social Security benefits. Still, a child (on her own behalf or through her mother) may ask the court to resolve the parenthood question even when financial claims are barred.[47] Courts may acknowledge the child's interest in knowing and legally resolving her father's identity for "intangible psychological and emotional benefits"[48] and therefore allow her to press a paternity claim even when the time for monetary relief has passed. In most cases the interval for bringing claims against the estate is shorter than that for paternity claims themselves.[49]

2. *State and Federal Legislation*

Several states have enacted legislation dealing specifically with the parenthood of PMC children. The Uniform Status of Children of Assisted Conception Act, approved by the National Conference of Commissioners on Uniform State Laws in 1988, refers to PMC in section 4(b), providing that: "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[50] This provision denies the deceased's status as father,[51] but it has not been explicitly adopted by any state. A similar provision was enacted by North Dakota, but was repealed in 2005.[52] According to the current code in North Dakota, enacted in light of the 2002 version of the Uniform Parentage Act,[53] if an individual dies before placement of his or her eggs, sperm, or

627, 639–42 (2005).

46 *Id*. at 645–47; *see also* Vegter, *supra* note 2, at 294–95.

47 Knaplund, *supra* note 45, at 655.

48 Fazilat v. Feldstein, 848 A.2d 761 (N.J. 2004).

49 Uniform Parentage Act §7 (1973); Helen Bishop Jenkins, *DNA and the Slave-Descendant Nexus: A Theoretical Challenge to Traditional Notions of Heirship Jurisprudence*, 16 HARV. BLACKLETTER J. 211, 217 (2000); *see also Fazilat*, 848 A.2d 761.

50 Uniform Status of Children of Assisted Conception Act § 4(b) (1988).

51 In its comment to section 4(b), the National Conference of Commissioners clarifies that "[o]f course, an individual who wants to explicitly provide for such children in his or her will may do so." *Id*. It is noteworthy that this is the customary law. Steeb, *supra* note 2, at 156–57; VanCannon, *supra* note 2, at 350–51.

52 This provision was enacted also in Virginia but was later repealed. *See infra* note 61.

53 Uniform Parentage Act § 707 (2002).

embryos, the deceased individual is not a parent of the resulting child unless consented specifically otherwise.[54]

The same provision has been enacted in at least six other jurisdictions (Colorado,[55] Delaware,[56] Texas,[57] Utah,[58] Washington,[59] and Wyoming[60]); in all of them, the deceased individual will not be deemed the legal parent unless he or she specifically so consented.

A few states have enacted slightly different provisions. The Virginia statute declares:

> [A]ny person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.[61]

It is evident, according to this section, that the status of a PMC child is not dependent upon the marital status of the parents.

California enacted a detailed provision clarifying the conditions in which a child conceived posthumously could be "deemed to have been born in the lifetime of the decedent."[62] The act imposes several requirements: (1) the decedent must have declared in writing and before a competent witness that his or her genetic material is to be used for posthumous conception; (2) the decedent must have designated a specific person to control the use of the genetic material; (3) a notice must be sent to the person who has the power to control the distribution the decedent's property or death benefits within four months of the death; and (4) the genetic child of the decedent must

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54 N.D. CENT. CODE § 14-20-65 (2007) (also referenced as The Uniform Parentage Act).

55 COLO. REV. STAT. § 19-4-106 (2005).

56 DEL. CODE ANN. tit. 13, § 8-707 (2007). The Delaware statute is distinctive regarding the identity of the person who can use the gamete; unlike the other state statutes, it is not restricted to spouses and refers to an "individual."

57 TEX. FAM. CODE ANN. § 160.707 (Vernon 2007).

58 UTAH CODE ANN. § 78-45g-707 (2005).

59 WASH. REV. CODE ANN. § 26.26.730 (LexisNexis 2007).

60 WYO. STAT. ANN. § 14-2-907 (2007).

61 VA. CODE ANN. § 20-158 (2006).

62 CAL. PROB. CODE § 249.5 (Deering 2007).

have been in utero within two years of the death.[63] Although the California arrangement is restrictive, its provisions are well-equipped to deal with foreseeable difficulties, especially with regard to the distribution of the decedent's estate.[64]

Despite their differences, all the statutory provisions detailed here, drawn from at least nine states, require the deceased's explicit consent to the post-mortem conception. In the absence of such consent, it appears these jurisdictions would not recognize the deceased as the legal father of any genetic offspring conceived after his death.

In the absence of specific provisions to the contrary regarding inheritance or Social Security benefits, the establishment of paternity in a PMC situation (under the provisions just discussed or others) should confer on the offspring the same status, benefits and rights as those enjoyed by offspring conceived during the parents' life. As mentioned earlier and detailed later, some limitations may nevertheless impede the effectuation of these benefits, especially when a prolonged time has elapsed since the death.[65]

Only a few states have enacted provisions dealing specifically with intestate succession in PMC cases. Virginia denies the inheritance entitlements of the PMC child.[66] Louisiana recognizes the child's intestate succession rights, as long as she was born to the surviving spouse within three years of the death and in accord with the decedent's written authorization.[67] Florida denies the child any

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63 *Id*.

64 *See* Johnson, *supra* note 2 (discussing the California statute). *Compare infra* notes 194, 196 and accompanying text.

65 *See supra* notes 45–49 and accompanying text and *infra* text accompanying note 194.

66 According to Virginia law "a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of," inter alia, "intestate succession." VA. CODE ANN. § 20-164 (2007).

67 LA. REV. STAT. ANN. § 9:391.1 (2007):

> Notwithstanding the provisions of any law to the contrary, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.

claims against the decedent's estate unless she has been provided for by the decedent's will.[68]

Also of note is the Restatement's position towards inheritance by PMC children. The Restatement of the Law, Third, Property (Wills and Other Donative Transfers), "takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit."[69] Importantly, there is no requirement here for an explicit statement by the deceased authorizing post-mortem use of his genetic material; all that is needed is circumstantial evidence of his intent that the child inherit.

Survivor's benefits under the Social Security Act[70] [henceforth "the Act"] are, of course, a matter of federal law. To be entitled to survivor's benefits, the offspring must be a "child" as defined in the Act,[71] but most of the Act's definitions of "child" do not suit the PMC situation.[72] According to the Act an applicant is deemed a "child": (1) if the insured and the other parent underwent a marriage ceremony that would have been valid but for certain legal impediments; (2) if the insured had acknowledged paternity in writing; (3) if the insured had been decreed by a court to be the parent; (4) if the insured had been ordered to pay child support; or (5) if there is satisfactory evidence that the insured was the applicant's parent and was living with or supporting the applicant at the time of death.[73] It is clear that

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68 "A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." FLA. STAT. ANN. § 742.17(4) (LexisNexis 2006). Interestingly, Florida has enacted detailed provisions concerning the destiny of eggs, sperm and pre-embryos in events of divorce or death of their providers. The provision declares that "[a]bsent a written agreement, in the case of the death of one member of the commissioning couple, any eggs, sperm, or preembryos shall remain under the control of the surviving member of the commissioning couple." FLA. STAT. ANN. § 742.17 (3) (LexisNexis 2006).

69 RESTATEMENT (THIRD) OF PROPERTY § 2.5 (1999).

70 42 U.S.C.S. § 402.

71 42 U.S.C.S. § 416(e); *see also* Doroghazi, *supra* note 3, at 1606–12.

72 42 U.S.C.S. § 416(h).

73 *Id*.

none of these alternatives for establishing status as a legal "child" of the insured can be used when the insured parent has already died at the time the child was born. Another alternative under the Act relies on state law; it stipulates that:

> In determining whether an applicant is the child . . . [of an] insured individual for purposes of this title, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured is dead . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.[74]

The Act thus allows state intestacy laws to serve as a "back-door" basis for establishing parenthood under the Act. As was shown earlier, these laws, if they deal with the matter at all, take a restrictive view of the PMC child's intestacy rights. As Professor Banks accurately sums it up, "a literal interpretation of the Act provides only one plausible, albeit unlikely, means for most posthumously conceived children to qualify for survivor's benefits."[75] Moreover, by relying on state law in such a manner, the Act raises issues of non-uniform treatment of posthumously conceived children.[76] While diversity is one of federalism's virtues, it is unclear whether a legal scheme that allowed for such differential treatment could be squared either with the federal policy underlying the Social Security Act or with the requirement to provide all children, including those born after their parents' death (regardless of when conceived), the equal protection of the laws.[77]

3. Court Decisions

Given these statutory provisions on both intestacy and Social

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74 42 U.S.C.S. 416(h)(2)(A).

75 Banks, *supra* note 3, at 258–59.

76 The constitutional doctrine of full faith and credit holds that although "credit must be given to the judgment of another state," it stresses that it "does not compel a state to substitute the statutes of other states for its own statutes." Baker v. Gen. Motors Corp., 522 U.S. 222, 232 (1998).

77 *See generally* Pickett v. Brown, 462 U.S. 1 (1983); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna, 406 U.S. 164 (1972). *But cf.* Mathews v. Lucas, 427 U.S. 495 (1976).

Security entitlements and the absence of comprehensive regulation of PMC parenthood, court decisions over the past decade or so have been rather generous towards PMC children.[78] As detailed below, courts have dealt with aspects of PMC in several leading cases, and have shown support for the procedure itself and for the child's right to inherit or to receive social security benefits.

One such example is the *Hecht* case, which has attracted attention because of its unusual circumstances.[79] The case dealt with the legal force of a man's decision that his non-marital partner could use his sperm after his death.[80] More specifically, the dispute revolved around the partner's wish to use the sperm, deposited by the deceased in a sperm bank (explicitly for the partner), before he jumped to his death.[81] The man's two adult offspring from a former marriage objected and asked the court to order the frozen sperm destroyed.[82] The lower court entered an order to that effect, and the deceased's girlfriend, Miss Hecht, sought review.[83] The California Court of Appeal accepted her appeal in principle and remanded the case, paving the way for post-mortem insemination of an unmarried woman.[84]

The *Hecht* court made two noteworthy points, one pertaining to the legal "status" of the sperm and the other to the limits on PMC usage. Regarding the classification of the sperm, the court said that the "decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute 'property' within the meaning of Probate Code. . . ."[85] With respect to

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78 *But see* Stephen v. Barnhart, 386 F. Supp. 2d 1257, 1264–65 (2005).

79 Hecht v. Superior Court, 16 Cal. App. 4th 836 (1993).

80 *Id*.

81 *Id*. at 840.

82 *Id*. at 843–44.

83 *Id*. at 839.

84 An important precedent mentioned by the *Hecht* court and by commentators was *Parpalaix v. CECOS*, a French case from 1984, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction, T.G.I. Creteil, Aug. 1, 1984, Gaz. Pal. 1984, 2, pan. jurispr., 560]. The case was apparently the first to address the right of a widow to the sperm of her deceased husband. Corvalan, *supra* note 15, at 339-41; Gail A. Katz, *Parpalaix c. CECOS: Protecting Intent in Reproductive Technology*, 11 HARV. J. LAW & TECH. 683 (1998).

85 Hecht v. Superior Court, *supra* note 79, at 850; *see* Bailey, *supra* note 2 (discussing the status

the Post-Mortem Conception procedure, the court declared, for the first time, that using the deceased's sperm to inseminate his unmarried partner would not contradict the "public policy of California," a conclusion negated neither by her "status as an unmarried woman[,]"[86] nor by the death of the sperm's "owner," the genetic father.[87] Disputes regarding partners' wishes to use a decedent's sperm came before the courts in at least one other case, but a decision on this specific matter was not reached.[88]

It is difficult to know whether the paucity of PMC cases addressing the question of the legal power to use sperm of the deceased reflects agreement among family members, the small number of instances in which women have wanted to use these procedures, or the accommodating practices of clinics that have allowed harvesting and use of sperm. The partial data that have been assembled suggest that the number of requests to harvest and/or use sperm is not negligible.[89] Clinics differ in their positions on such requests. It appears from their reports that while some readily grant them, others do not.[90] As a practical matter, people working in the area have indicated that, absent binding regulation[91] or explicit prohibition, most physicians would authorize post-mortem harvesting and use of sperm.[92]

The few other cases dealing with PMC discuss the rights and benefits of children who were born through that procedure.[93] In

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of gametes and whether they may be bequeathed).

86 *Id*. at 855.

87 *Id*. at 858.

88 Hall v. Fertility Institute of New Orleans, 647 So. 2d 1348, 1351–53 (1994).

89 Johnson, *supra* note 2, at 929; Knaplund, *supra* note 5, at 93–94; Strong, *supra* note 4, at 347.

90 Johnson, *supra* note 2, at 929; Knaplund, *supra* note 5, at 95.

91 Carson Strong, *Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State*, 14 J. L. & HEALTH 243 (1999/2000).

92 Ronald Chester, *Double Trouble: Legal Solution to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS L. J. 451 (2000).

93 The first case to come before the courts was probably *Hart v. Shalala*, No. 94-3944 (E.D. La. filed 1994), which was eventually resolved out of court. The Social Security Administration, which initially denied a claim for Social Security benefits for Judith Christine Hart, a baby girl born to the late Edward Hart more than a year after his death, announced that the benefits would be granted and the case returned to the Administration without a court ruling. On that case, see Banks, *supra* note 3.

Kolacy, the Superior Court of New Jersey dealt with the status of twins born to their mother using her deceased husband's sperm stored before his death.[94] The court found that the twins were the genetic offspring of their father and declared them the legal heirs of their deceased father under New Jersey intestacy law.[95] The court reached this conclusion on the basis of the legislative intent to enable children to receive the property of a parent after the parent's death.[96] Absent any statute dealing directly with PMC children, and given this general statutory intent, the court granted the decedent's genetic children the legal status of heirs.[97] It is important to note two factual matters stressed by the *Kolacy* court. First, the court found that the deceased's had conveyed his desire that his wife use his sperm after his death to bear their children, and it appears to have relied, at least in part, on his intentional conduct directed toward bringing children into the world after his death.[98] Second, the man left no assets and had no estate at the time of death.[99] Accordingly, recognizing the children as heirs raised no estate administration problems and no conflicts with competing parties; it was significant only insofar as it paved the way to their securing Social Security benefits.[100] The court suggested, however, that when there are assets to be distributed, it would be fair and constitutional to impose limits (such as time limits) on the rights of PMC children to inherit.[101]

In *Woodward* (2002), the Supreme Judicial Court of Massachusetts was asked by the U.S. District Court to offer its opinion on a similar question: Does Massachusett's law on intestate succession confer succession rights on PMC children?[102] After thoroughly analyzing and construing the legislative intent behind the Massachusetts intestacy statute, which does not deal with PMC children explicitly,[103]

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94 *In re* Estate of Kolacy, 332 N.J. Super. 593, 596 (2000).

95 *Id.* at 596.

96 *Id*. at 602.

97 *Id*. at 605.

98 *Id*.

99 *Id*. at 602.

100 *In re* Estate of Kolacy, 332 N.J. Super. at 603.

101 *Id*.

102 Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 537 (2002).

103 *Id*. at 544–45. Although the posthumous children provision of Massachusetts' intestacy

the Court designed the following test: posthumously conceived children may enjoy succession rights under the Massachusetts intestacy law where, as a threshold matter, a genetic relationship between the child and the decedent is demonstrated and where it is established that the decedent affirmatively consented both to posthumous conception and to the support of any resulting child.[104] Even where such circumstances exist, the court clarified, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.[105]

The *Woodward* test was designed in light of an inferred legislative intent to address three substantial state concerns: the best interests of the child; the state's interest in the orderly administration of estates; and the reproductive rights of the genetic parent.[106] The first, an overriding legislative concern, leads (at least in principle) to the recognition of the child's inheritance rights, no less than those of a naturally conceived child.[107] The second interest calls for prompt, accurate and final administration of intestate estates; it requires certainty of filiation between the decedent and his heir and calls for limiting the time within which a claim against the intestate estate may be raised.[108] The third pertains to the decedent's reproductive rights, protecting the individual's freedom from forced parenthood.[109] The intent is to make sure that the father, in the specific case, wanted to have children after death.[110]

A clear and unequivocal decision was handed down by the U.S.

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statute, MASS. GEN. LAWS. ch. 190, § 8 (2007) says: "[p]osthumous children shall be considered as living at the death of their parent," one may assume it did not intend to deal with PMC children, since its year of enactment is 1836.

104 *Woodward*, 435 Mass. at 557.

105 *Id*. In that specific case the court did not have to determine the time limitations.

106 *Id.* at 545.

107 *Id.* at 545–46.

108 *Id*. at 536.

109 For the converse protection (that is, protection of the freedom to become a parent), see Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

110 *Woodward* has been dealt with extensively in the literature. *See* Amy L. Komoroski, *After Woodward v. Commissioner of Social Services: Where do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297 (2002); Susan C. Stevenson-Popp, *"I Have Loved You in My Dreams": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U.L. REV. 727, 743 (2003).

Court of Appeals for the Ninth Circuit in *Gillett-Netting v. Barnhart*.[111] In that case, a man deposited sperm prior to undergoing cancer treatments, and his widow, more than one and a half years after his death, bore children using that sperm; the court held the children to be the legitimate children of the deceased. The court noted that in Arizona (the state of domicile) "every child is the legitimate child of its natural parents and is entitled to support . . . as if born in lawful wedlock."[112] Under Arizona law, then, the genetic father who was married to the mother would be treated as the natural parent and would have a legal obligation to support his child if he were alive, even though the child had been conceived using in vitro fertilization.[113] The Ninth Circuit went on to hold that a child who is legitimate under applicable state law should be treated as a legitimate child for purposes of the Social Security Act as well, and should be granted survivor's benefits like any other child.[114] *Gillett-Netting* is probably the most expansive decision on the status of PMC children,[115] recognizing them as no less legitimate than children conceived when their parents were alive. It passes their father's name on to them, grants them Social Security benefits pursuant to the federal act, and recognizes their ability to inherit from the deceased father under state law.[116] Interestingly, the court disregarded the fact that the father's death in fact dissolved the parents' marriage. It proceeded on the fiction that when the children were conceived and born the marriage was still effective, and it therefore declares the children to be "legitimate."

The most recent PMC case at the time of this writing is *Stephen v. Barnhart*, decided in Florida in 2005.[117] Contrary to the cases previously discussed, this decision denied a PMC child Social Security survivor's benefits. As mentioned, under Florida law, a PMC child may not claim rights against a decedent's estate unless declared

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111 371 F.3d 593 (9th Cir. 2004).

112 *Id*. at 598.

113 *Id*. at 599.

114 *Id*.

115 Not all commentators are satisfied with that decision, especially with its reasoning. *See* Doroghazi, *supra* note 3; Minor, *supra* note 3.

116 *Gillett-Netting*, 371 F. 3d at 599.

117 Stephen v. Barnhart, 386 F. Supp. 2d 1257 (2005).

an heir in the decedent's will.[118] Also, a PMC child's eligibility for Social Security survivor's benefits depends on the child's intestacy rights under state law.[119] On that basis, the magistrate judge in *Stephen v. Barnhart* denied Social Security survivor benefits to the PMC child, who was not mentioned in a will.[120] Alternative mechanisms provided by the Act for establishing entitlement to survivor's benefits were not relevant in that case and, as noted, are rarely relevant to PMC cases in general.[121]

The lack of comprehensive legislation and uniform regulation and the manner in which the issue is now handled all call for reform.[122] They generate uncertainty, to the detriment of both the parent wishing to conceive posthumously and the prospective child. Although courts make an evident effort to afford rights to the PMC child and equate her status to that of "natural" offspring, there is a danger she will nonetheless be considered an "illegitimate child" and denied her rights.[123] Judicial decisions, although relatively accommodating, are narrowly drawn. They fit the specific facts before the court and, *Gillett-Netting* notwithstanding, tend to avoid broad declarations of PMC children's rights. Equally troublesome, when there is a statute that regulates the issue, courts may find themselves compelled by it to deny the child's right or entitlement.

IV. SUGGESTED SOLUTIONS

A. General Assessment of the Suggested Solutions

The models currently appearing in the literature were originally designed to determine parenthood in Assisted Reproductive Technology cases in general. Only later, and to a very limited extent,

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118 *See supra* text accompanying note 68.

119 *See supra* text accompanying note 74.

120 *Barnhart*, 386 F. Supp. 2d 1257, 1258 (2005). I doubt that decision can be reconciled with *Gillett-Netting*. *See* discussion *supra* text accompanying note 94.

121 *See supra* notes 70–74 and accompanying text.

122 Doroghazi, *supra* note 3; Margaret Ward Scott, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproduction Wild*, 52 EMORY L. J. 963 (2003).

123 *See*, *e.g.*, Steeb, *supra* note 2.

were the models applied in the specific context of PMC.[124] In this part, I consider whether these models can be of use to PMC children seeking to have their parentage resolved.

A variety of factors can bear on the parenthood determination, and most of the existing models select one of those factors as the decisive one to focus on.[125] The "Intent Model," for example, suggests that the determination of parenthood should be based primarily on the individual's intention to become or avoid becoming a parent.[126] The "Genetic Model" bases parenthood largely on the genetic connection and favors holding the progenitor to be the parent.[127] Other models give weight to pregnancy;[128] to marital status;[129] to the de-facto relationship between the parent and the child;[130] and to the child's best interests.[131]

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124 *See, e.g.*, Lisa M. Burkdall, *Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875, 897–99 (1995).

125 Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 882 (2000).

126 *See infra* Part IV.C. (discussing the Intent Model).

127 *See infra* Part IV.B. (discussing the Genetic Model).

128 This model, which is relevant in cases of egg donation and surrogacy, favors the gestational mother because of the special bond she develops with the fetus during the pregnancy and as a result of delivery. For that unique bond, see DIANE E. EYER, MOTHER-INFANT BONDING: A SCIENTIFIC FICTION (1992); MARSHEL H. KLAUS & JOHN H. KENNELL, MATERNAL INFANT BONDING (1976); Marie Ashe, *Law-Language of Maternity: Discourse Holding Nature in Contempt*, 22 NEW ENG. L. REV. 521 (1988); John L. Hill, *What Does It Mean to Be a 'Parent'? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 394–400 (1991); Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in American Society*, *in* BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 9 (Dianne M. Bartels ed., 1990).

129 This traditional model stresses the value of marriage and prefers the married spouse over the genetic parent. *See* Phillip Cole, *Biotechnology and the 'Moral' Family*, *in* THE FAMILY IN THE AGE OF BIOTECHNOLOGY 47 (Carole Ulanowsky ed., 1995); Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523 (2000).

130 This model holds the psychological parent to be the legal parent. *See* Jill Handley Andersen, *The Functioning Father: A Unified Approach to Paternity Determination*, 30 J. FAM. L. 847 (1991); Arlene Skolnick, *Solomon's Children: The New Biologism, Psychological Parenthood, Attachment Theory, and the Best Interests Standard*, *in* ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 236 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998).

131 Bartlett, *supra* note 30, at 944–61; Janet L. Dolgin, *Suffer the Children: Nostalgia Contradiction and New Reproductive Technologies*, 28 ARIZ. ST. L. J. 473 (1996); Melinda A. Roberts, *Parent and Child Conflict: Between Liberty and Responsibility*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 485 (1996); Eric P. Salthe, *Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone's Best Interest?*, 29 J. FAM. L. 539 (1990).

By their very nature, single-factor models fail to confront the full complexity of the issue at hand and the multitude of factors that bear on the decision. Parties' legitimate interests may pull in different directions, and the weight each factor is accorded may vary with the circumstances presented. It seems to me almost impossible to adhere to a rigid single-factor model that would resolve the question of parenthood in all cases.

Of the models listed previously, the two leading ones that might be applied in PMC cases are the Intent Model and the Genetic Model. The otherwise attractive De-facto Parent Model is inapposite when determination of parenthood is sought soon after birth. At that point, the child has not (yet) established a meaningful relationship with any father and therefore lacks a true de-facto (psychological) father who can be recognized as a legal parent. As I have argued elsewhere, avoiding delays is important when recognizing parenthood. It promotes certainty and stability in a matter of import to the lives of child and parents alike.[132] A model for determining parenthood therefore would be deficient if it required deferring that determination until after de-facto parenting had been established. In the following sections I examine the Genetic Model and the Intent Model and consider their potential applicability in PMC cases.

B. The Genetic Model

The Genetic Model regards the genetic relation as the main factor determining parenthood.[133] It posits, in principle, that the man whose sperm was used for conception should be declared the legal father and the woman who provided the ovum should be declared the legal mother.[134] In justifying this view, supporters of the model cite the exclusiveness of the genetic material (which originates from one man and one woman) and its importance in the creation and development

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132 Ruth Zafran, *More Than One Mother: Determining Maternity for the Biological Child of a Female Same-Sex Couple – The Israeli View*, GEO. J. GENDER & L. (*forthcoming* 2008).

133 Shoshana L. Gillers, *A Labor Theory of Legal Parenthood*, 110 YALE L.J. 691, 699–701 (2001); Hill, *supra* note 128, at 389–93.

134 Although this model stresses the importance of the genetic relation, it usually requires the genetic provider to be identified (known) in order to be declared a legal parent. Accordingly, it might not recognize anonymous sperm or egg donors as legal parents.

of the child throughout her life.[135] Some proponents emphasize the unique link between the genetic provider and his offspring, the similarities they share, and the sense of continuity that bonds them.[136] Others highlight the ownership element, regarding the genetic provider's ownership of his body parts as affording him the right to "claim" the resulting child.[137] Still others cite the child's best interests; they maintain it is good for the child to know his origins and to establish his identity with reference to his ancestors.[138] Finally, some argue that the singular connection that binds a genetic parent to his offspring will result in the genetic parent providing the child the best possible home.[139] In a way, this argument sees the connection between biological relatives as one that yields instinctive care.

Applying the Genetic Model in a PMC case would point to the deceased sperm provider as the legal parent—sometimes a reasonable solution. But what if the mother (who is both the bio-genetic intended mother and the legal mother) is sharing her life with a new partner at the time of delivery, and she and her new partner want the new partner to be recognized as the legal father? There being no doubt as to the identity of the genetic father, application of the Genetic Model would preclude the latter result.

Whatever the outcome in such a case should be, it seems unconvincing and superficial to declare the dead man to be the father simply because he provided the sperm.[140] It is neither fair nor wise to disregard the wishes of the mother and her current partner, if any, especially when that partner will likely play a significant role in the

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135 Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 276–77 (1995).

136 Hill, *supra* note 128, at 389–90.

137 *See* RUSSELL SCOTT, THE BODY AS PROPERTY (The Viking Press 1981) (discussing gametes as property); William Boulier, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Robert P. S. Jansen, *Sperm and Ova as Property*, 11 J. MED. ETHICS 123, 124 (1985); Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L. & COMP. L. REV. 19 (2002); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000).

138 Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 330 n.30 (2004); Gillers, *supra* note 133, at 700.

139 James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 867 (2003).

140 For a discussion of different contexts, see Bartholet, *supra* note 138.

child's life.

Moreover, some aspects of the rationale for the Genetic Model undercut its applicability in PMC cases. Because the genetic father has died, one can no longer speak of the "instinctive bond" between him and the child or presume that he will provide the best possible care. Beyond that, automatically recognizing the genetic father entails recognizing his family (parents, siblings, offspring) as well. If relations between those family members and the mother were strained—for example, if the deceased's family objected to the use of the sperm and *ipso facto* to the birth of the child—it might be unwise, and even contrary to the best interests of the child, to take the Genetic Model as holy writ.

It should be stressed that I do not mean to discredit the importance of genetics. The bio-genetic relation is an important consideration in defining family relations. It should play a significant role in determining parenthood in cases of coital reproduction and serve as a powerful barrier against state intervention to sever that relationship. But it loses some of its force in those cases of assisted reproduction when more than two parties take part in bringing the child into the world, and in PMC cases where a genetic parent has died. The absence of one of the bio-genetic parents and the possible presence of another person playing a parental role warrant careful examination of whether the strict Genetic Model should be applied.

From a broader perspective, it appears that the Genetic Model is based on the exaggerated importance that Western culture ascribes to biological origins and genetic identity.[141] It invokes the myth of blood relation—"blood is thicker than water"—and considers relation by blood (that is, bio-genetic kinship) to be superior to any other.[142] The

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141 Assigning excessive weight to genetic affiliation may be problematic per se, as it both mirrors and reinforces the power of genes as a major factor in human existence. Genetic essentialism may lead an individual reflecting on his life to downplay the significance of nurture and of life experiences. *See* DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON (W.H. Freeman 1995); Rochelle Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 315–16 (1992).

142 ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (Houghton Mifflin Co. 1993); SUSAN M. KAHN, REPRODUCING JEWS: A CULTURAL ACCOUNT OF ASSISTED CONCEPTION IN ISRAEL 74–77 (Arjun Appadurai et al. eds., Duke Univ. Press 2000); DAVID M. SCHNEIDER, A CRITIQUE OF THE STUDY OF KINSHIP 165–77 (The Univ. of Michigan Press 1984); Brenda Almond, *Family Relationships and Reproductive Technology*, *in* THE FAMILY IN THE AGE OF BIOTECHNOLOGY 13 (Carol Ulanowsky ed., 1995); Hill, *supra* note

traditional belief that "blood matters" has been reinforced by developments in genetic research, which suggest that genotype plays a major role in shaping the life course of human beings. These research developments receive extensive media attention, gain prominence in popular culture and academic writing, and thus come to mold cultural attitudes toward the family and parenthood.[143] Taken to its limit, however, the concept underlying the Genetic Model stands to jeopardize familial relationships in all their richness. Holding genetics to be more important than human relations can lead to the devaluation of care as a key factor in defining and organizing family relations.

C. The Intent Model

The Intent Model was developed primarily to facilitate choosing between competing would-be parents in cases of surrogate motherhood, especially when the surrogate mother, during pregnancy or after delivery, changes her mind and asks to keep the baby. The model ascribes preponderant significance to the intention of the contracting persons at the time the surrogacy agreement was signed.[144] In doing so, it recognizes the importance of reliance, stresses the significance of legally binding agreements, and reflects

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128, at 389–90; Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733 (1994); Marilyn Strathern, *Displacing Knowledge: Technology and its Consequences for Kinship*, *in* LIFE IN THE CONTEXT OF HIGH TECHNOLOGY MEDICINE 65 (Ian Robinson ed. 1995); Brenda Almond, *Family Relationships and Reproductive Technology*, *in* THE FAMILY IN THE AGE OF BIOTECHNOLOGY 13 (Carol Ulanowsky ed., 1995).

143 The importance of the bio-genetic connection is reflected in the heroic efforts of some parents to bear a biological child—sometimes through endless attempts to conceive by assisted reproduction—rather than adopt. For many, adoption is considered a last resort. Even today, many stigmatize an adoptee as inferior to a biological offspring. The lack of blood connection to the adoptive parents is thought not only to make the child less "theirs" but also to call into question the child's own genes, derived from neglectful and accordingly "flawed" ancestors. *See generally* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 16 (Harvard Univ. Press 1998); JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICES AND PRACTICES IN AMERICAN ADOPTION 6, 129 (Berghahn Books 2002).

144 *See* CARMEL SHALEV, BIRTH POWER: THE CASE FOR SURROGACY 120–145 (Yale Univ. Press 1989) (discussing the Intent Model); Schiff, *supra* note 135; Marjorie M. Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV 297 (1990); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 639–48 (2002).

the fundamental freedom of individuals to contract. Not only does such an approach respect the contracting parties; it is mindful as well of the overall societal interest in maintaining the availability of surrogacy as a vital mechanism by which couples with fertility problems can become parents and by which alternative families may be formed by single fathers and homosexual couples.[145] But there is more to the Intent Model than freedom and inviolability of contract. Some proponents view intention as a predictor of good parenting, drawing a link between the desire to become a parent and the willingness to care properly for the child.[146]

Nevertheless, the Intent Model suffers from some drawbacks. For one, its premise has worrisome implications: to determine parenthood on the basis of intent makes the parent-child relationship appear to be a negotiated one that can be conditional and even disposable. It views the child as goods to be traded, as a commodity that can be handed over contractually. Though largely symbolic, these characteristics can influence the parent-child relationship in a manner that has practical consequences.[147]

Beyond these general conceptual difficulties, application of the Intent Model to PMC cases is problematic. Whose intention is determinative, and at which point in time? Is it the deceased's original intention? The intention of the current partner, if any? Of the mother? If the mother's intent is crucial, should it be as manifested at the time of the conception or as updated at the time of birth?

As noted, the Intent Model was devised to deal with surrogacy, and it therefore stresses the intention at the time the contract was signed. In surrogacy cases the original intent is maintained at least until conception takes place, at which time the intent is visibly manifested and confirmed. In PMC cases, the absence of a contract means we cannot point to the moment at which the agreement regarding PMC was crystallized, but we can still attempt to ascertain

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145 Storrow, *supra* note 144, at 641.

146 Susan Golombok, *Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children*, 64 CHILD DEV. 285, 296 (1995); Schiff, *supra* note 135, at 281.

147 Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 272 (2002).

intent—at least of the mother—at the time of conception. It will be difficult, however, to determine the genetic father's intent at that time, and the same may be said of the woman's new partner, who may not yet have entered the scene. But even if these obstacles are overcome and the original intention is ascertained, would it make sense to disregard the intention formed later, at the time of birth? Is there a good reason not to take account of the new circumstances at the time of birth, circumstances that may be critical to the child's life experience in the future?

V. THE RELATIONAL MODEL

A. Defining Parenthood in Light of the Relational Model – General Discussion

The weaknesses of the foregoing models and the associated deficiency in current law warrant introduction of an alternative: the Relational Model. This model has affinities to the relational theory first espoused by Carol Gilligan[148] in the context of developmental psychology. Gilligan's identification of the "Ethic of Care" led to important advances in moral philosophy, and her ideas later influenced other fields, including law.[149] Although some writers have suggested resorting to relational theory to regulate the use of assisted reproduction in general,[150] its use in devising solutions to the parenthood definition problems raised by PMC has thus far been left unexplored.[151]

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148 CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (Harvard Univ. Press 1982).

149 *See generally* SEYLA BENHABIB, SITUATING THE SELF – GENDER, COMMUNITY, AND POSTMODERNISM IN CONTEMPORARY ETHICS 178–202 (Routledge 1993); GRACE CLEMENT, CARE, AUTONOMY, AND JUSTICE – FEMINISM AND THE ETHIC OF CARE (Westview Press 1996); NEL NODDINGS, CARING: A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION (Univ. of California Press 1984); SELMA SEVENHUIJSEN, CITIZENSHIP AND THE ETHIC OF CARE – FEMINIST CONSIDERATION ON JUSTICE, MORALITY, AND POLITICS (Routledge 1998); JOAN C. TRONTO, MORAL BOUNDARIES – A POLITICAL ARGUMENT FOR AN ETHIC OF CARE (Routledge 1993); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

150 *See* Patrick Healy, *Statutory Prohibitions and the Regulation of New, Reproductive Technologies Under Federal Law in Canada*, 40 MCGILL L. J. 905, 910 (1995) (discussing the use of relational theory in the context of assisted reproductive technologies).

151 The regulation of post-mortem conception itself (as distinguished from determining the

The model proposed here subscribes to the premise that the relational theory generates considerations applicable to the resolution of legal disputes and, in particular, family conflicts.[152] The model derived from this premise – The Relational Model – is unique in at least two ways.[153] First, it has at its core the need to maintain and protect nurturing relationships. Second, it steers clear of rigid rules, blindly applied abstract conceptual principles, and sharply defined hierarchal rights. Instead, it offers a nuanced analysis of the facts of each case, thus allowing greater flexibility in analyzing the disputants' unique characteristics and distinctive relationships.

This mode of analysis is well suited to the family context and the complicated issues presented by its regulation.[154] Beyond that, it may be vital for the continuation of the family as a thriving social construct in general.[155] Preserving the family as a place of mutual caring and enduring responsibilities is essential for children and adults alike.[156] The relational perspective puts this type of family—a caring family—at the center. It constructs legal rules in light of these characteristics and strives to apply them in a sensitive way that promotes accomplishment of their purposes.

The Relational Model considers three main factors as governing the determination of parenthood in PMC cases (and, perhaps, in other cases of assisted reproduction in which parenthood is unresolved). First, it looks to ensure that the conditions exist for establishing the relationship in the first place. Second, it is concerned that the relationship, once established, be structured in a way that responds to the needs of all meaningfully involved parties in the best

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paternity of the resulting child) has been dealt with briefly from the relational perspective, Belinda Bennett, *Posthumous Reproductive and the Meaning of Autonomy*, 23 MEL. U. L. REV. 286, 298–307 (1999).

152 Donald P. Judges, *Taking Care Seriously: Relational Feminism, Sexual Difference, and Abortion*, 73 N.C.L. REV. 1323 (1995); Kavanagh, *supra* note 31.

153 SEVENHUIJSEN, *supra* note 149, at 59–60; ROBIN WEST, CARING FOR JUSTICE 50–61 (1997); Philip Alcabes & Ann B. Williams, *Human Rights and the Ethic of Care: A Framework for Health Research and Practice*, 2 YALE J. HEALTH POL'Y L. & ETHICS 229 (2002).

154 For a discussion of this approach in the context of the lawyer/client relationship, see Paul J. Zwier & A. B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383 (1996).

155 *See* Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 574 (1983).

156 Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L. J. 293, 297–98 (1988).

(or most nurturing) way. Third, in the event of clashes between parties' needs and interests, the model aims to afford precedence to the needs and interests of the dependent parties—in our context, the best interests of the child.

The importance of the family, for the daily welfare of human beings and for society at large,[157] underlies the model's First factor, which calls for the laws related to family life to be crafted in a way that facilitates the formation of a family—specifically, a parent-child relationship. This factor will thus evaluate any proposed legal regulation (or any proposed resolution of a conflict) by enquiring into whether it will promote or hinder the formation of a family in a specific case or in general. This factor will favor the legal solution that offers – or at least does not interfere with – the basic conditions necessary for fulfilling the desire to bring a child into the world (with the intention of caring for him or her). Preference will be given to those solutions that facilitate the realization of the wish to become a parent and secure the formation of the parent-child relationship. An important step directed to that end is the legal recognition of parenthood so as to guarantee the full range of legal protections afforded to families and family members.

But securing the formation of families is only the first step toward ensuring meaningful family life. Importantly, the Relational Model strives to make sure that the relations between family members, especially between parents and children, are formed in a way that advances the underlying values of the relationship: stability, nurture and responsibility. This Second factor characterizes much of family law, which must always take account of how legislative and judicial actions affect the family and familial relations. Cases must be resolved in ways that ensure formation of the best possible family relations—lasting, mutual and responsible relations.[158] Since this factor is focused on the quality of the relations, it assigns little or no importance to how those relations are formally framed or to the genetic connection between parent and child; these considerations are of interest only insofar as they may indicate the character of the

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157 Jason Mazzone, *Towards a Social Capital Theory of Law: Lessons from Collaborative Reproduction*, 39 SANTA CLARA L. REV. 1, 8–10 (1998).

158 *Id.*; *see also* Mary Midgley & Judith Hughes, *Are Families Out of Date?, in* FEMINISM AND FAMILIES 55 (Hilde L. Nelson ed., 1997).

relationship itself. It follows that the family promoted by the Relational Model is not necessarily the traditional one. It stresses, instead, the substantive qualities of care, concern, dependability and mutual responsibility. In the context of determining parenthood, this principle suggests that the parent who has (and is expected to have) the most meaningful relationship with the child be declared the legal parent.

The Third factor is focused on the child and her needs,[159] reflecting the Relational Model's commitment to the child's welfare and the struggle to advance her best interests.[160] As Matthew Kavanagh states, "an ethic of care asks that we focus on those who are most vulnerable – the recipients of care. . . .The focus must be moved from parents to their children. . . .Without such a focus, it is impossible to assure that the needs of those most vulnerable, and most often silenced, will be heard and met."[161] The family is the core of the child's being; her life, physical existence, and welfare revolve around it.[162] In light of the significance of family relations for children, the goal is to ensure that the child enjoys the best possible family atmosphere by declaring the legal parents to be those who have the most significant actual and potential relationships with her; that is, those who will, it is hoped, realize her needs in the best possible way. Unlike the other approaches to determining parenthood (in particular the Intent Model), the Relational Model stresses the child's needs and interests rather than the potential parents' "rights."

Focusing on the child's best interests does not mean that the parents' needs and intentions are irrelevant. Realizing the parents' wishes can promote the child's best interests, for the needs of parent

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159 *See* Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child Centered Model for Adoption Policy*, 68 TEMPLE L. REV. 1649 (1995); Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, *Introduction*, *in* ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY 1, 1 (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman eds., 1998).

160 For related ideas see Barbara B. Woodhouse, *'Are You My Mother?' Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER. L. & POL'Y 107 (1995); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

161 Kavanagh, *supra* note 31, at 124.

162 Neil S. Binder, *Taking Relationships Seriously: Children, Autonomy and the Right to a Relationship*, 69 N. Y. U. L. REV. 1150 (1994).

and child are intertwined in their day-to-day experience. Making sure that the parent (as a caregiver) is content can promote the child's welfare as well.[163] Moreover, the parents' needs are of more than instrumental importance; promoting the foundation of families and the quality of the relations among family members serves the interests of adults as well as of children. But it must be stressed that the child and her needs are at the heart of the decision and must be favored in resolving any clash of interests.

Note that the Relational Model is not meant simply to select for the child the best possible parents in every potential case. When the identity of the legal parents is clear—as where the child was born to her biological parents who wish to raise her as their own—there is neither need nor desire to use this model. In such cases it would be a rare exception to declare someone other than the bio-genetic parent to be the legal parent, and that should be done only in accord with the stringent standards of adoption law. The Relational Model is suggested for use only in complicated cases, where parenthood is unclear and there exist multiple candidates, all with parental affinity to the child.

As mentioned earlier, the intention factor and the affiliation factor, which involve factual matters, may figure indirectly in the Relational Model's process of resolving the normative question, that is, determining the legal parent. The intention to bring a child into the world and the effort to carry out that intention—sometimes through unconventional means—may indicate the quality of a relationship that has already been formed or would be built in the future. Similarly, the affiliation factor—taking account of the type of link that exists between the PMC child and the individual who wishes to be declared as his parent—may have a bearing on the relationship between the parties. The affiliation might be genetic, intended (that is, based solely on the desire and effort to become a parent), or psychological (in cases when parent-like bond has already been created).[164] Any of these affiliations (and, especially, combinations of them), may represent the special bond between the child born through PMC and the individual asking to be declared the

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163 Kavanagh, *supra* note 31, at 124.

164 In cases of surrogacy, which are not part of the discussion here, the affiliation can be based on gestation.

parent. In the context of the Relational Model, these factors are used as indicators of the present relationship and predictors of the foreseeable relationship between the child and her (would-be) legal parent.

The Relational Model is a standards-based model; in that sense, it differs from the other two models we have considered. The Genetic Model is rule-based, deploying a firm rule that looks only to genetic identity. The Intent Model, to be sure, turns on individual appraisal, but that appraisal considers only one factor. In contrast, the Relational Model aims for a decision grounded on a varied array of factors and standards, some of them "soft" rather than hard and fast, and it applies those standards in a way that takes account of the circumstances of the individual case. This does not imply, it should be clear, that the court has unfettered discretion in every case that comes before it. First, the model does not preclude legislative guidance; on the contrary, it contemplates legislative formulation of guiding principles.[165] These principles are grounded on various presumptions; at the same time, they embody the model's normative commitment to advancing the considerations described above (that is, promotion of family relations and family responsibility and protection of the child). In other words, the standards on which the model is grounded will contribute to determining the legal result that will be reached. Accordingly, a legal regime that aims to embody the Relational Model will leave considerable discretion to the agency responsible for applying the law—be it a registry official or a court—but the scope of that discretion will be limited by the obligation to promote the standards that are reflected in the model.

B. Defining Parenthood in Post-Mortem Conception – Applying the Relational Model

Because the Relational Model, by definition, is sensitive to the facts and idiosyncrasies of each case, its operation can be illustrated only if the pertinent facts are outlined in some detail. Accordingly, I begin by describing possible scenarios in which the relationships to be considered are played out. The scenarios were chosen to represent the array of conflicts that might arise between the potential

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165 *See supra* text accompanying note 156.

contestants for legal parenthood.

The departure point for the discussion is the basic plot: a child is born to her mother through the use of sperm which was obtained from the mother's late spouse soon after his death.[166] The couple had been married for a few years and enjoyed a normal relationship. They were hoping to have children in the future and were taking actions toward that goal. They had never discussed the possibility of PMC. Accordingly, there was evidence neither of the man's desire to become a father after dying nor of his objection to it.

At this point, the path forks, depending on the presence or absence of another man wishing to be declared the legal father. Consider first the scenario in which there is no such other man. In that event, there are no competing "fathers" to choose between; the only question is whether to declare the deceased genetic father to be the legal father or to rest content with a sole legal parent, the mother.

In the second scenario, which I discuss in detail below, the mother is involved at the time of birth in a new meaningful relationship. The current partner wants to be declared the legal father and intends to care for the new-born and fulfill her needs. The mother, too, wants him to become the legal father. The question then is who should be declared the father: the deceased genetic father, the intended father, neither, or both?

1. The Status of the Deceased in the Absence of Another Paternity Candidate

The rationale underlying the Relational Model would usually favor a result that strengthens the network of familial relationships, providing these relationships reflect and are designed to promote nurturing. In the absence of unusual circumstances, therefore, the Relational Model would suggest that the deceased genetic father be recognized as the legal father. Even when deceased, the genetic father stands to play an important role in the child's personal narrative, in her identity and even in her psycho-social welfare.[167] Declaring the

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166 No question is posed regarding maternity. By all lights and on every model, the legal mother here is the woman who bears the child: she is the genetic mother; she carried the pregnancy; and she intends to be the child's parent throughout life.

167 This assumes that personal characteristics of the father (or his family) were not ones that would harm the psychological development of the child, and that recognition would not

genetic parent to be the legal parent can also enhance the child's financial condition and reinforce her economic safety net by adding support from the genetic parent's estate or from his extended family.[168] Even more importantly, declaring the deceased to be the parent may open the door to meaningful relationships with the deceased's family members[169]–grandparents, uncles, aunts, cousins and sometimes even half-siblings from a previous relationship.

The foregoing conclusion is supported by the three factors central to the Relational Model, noted above. With reference to the first—facilitating the establishment of families—the claim pressed here pertains, admittedly, not to the use of the deceased's sperm (since it already took place) but to the legal recognition of paternity. Therefore, it does not affect directly the very formation of the family or the legal conditions necessary for bringing a child into the world. Nevertheless, that legal recognition is far from meaningless. First, the expectation that the deceased's paternity will be recognized after-the-fact may bolster *ab initio* the mother's decision to use the sperm to bring a child into the world—that is, to endeavor to expand the family. Second, and more abstractly, legal recognition of paternity has both symbolic and substantive importance.[170] To a substantial extent, it has the capacity to establish the family as a recognized entity. Clearly, the first substantive step in establishing the family is the act of bearing the child; but an additional important step is the one that grants legal recognition as a family to the biological-psychological unit. That recognition promotes the family's social acceptance and ensures it various types of economic support and legal protection. Beyond that, it can well be argued that post-mortem birth through the use of the deceased spouse's sperm constitutes the direct continuation of an existing family (his and his wife's) and a realization of their family relationships. That aspect bears as well on the second factor of the Relational Model, next discussed—the

generate severe psychologically harmful disputes.

168 That may not always be the case. *See supra* Part III.B.2. and *infra* Part VI. The discussion assumes that it is unlikely that the child will suffer adverse economic consequences from the recognition, although reality may produce unusual circumstances when that assumption does not apply.

169 Such relationships may develop even if their status as family relationships is not legally recognized. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 60–61 (2000).

170 Strong, *supra* note 91, at 256–57.

fostering of family relations.

As just noted, recognizing the biological father's legal paternity affords continuity to the family that had been formed by the mother and her late husband. The birth and legal recognition can bolster, both *ab initio* and after the fact, that family's relationships as they existed at the time of the husband's death and as they exist at the time of the paternity decision. Looking beyond the continuity of that nuclear family, recognition of the father's paternity may strengthen ties within the child's extended family. Assuming the deceased father's family favors the birth and that the mother wishes its involvement, recognition of legal paternity may promote recognition of the extended family's ties to the child and enhance the part they play in her life. In some cases, of course, the father's extended family or the mother herself may oppose that recognition and involvement, and the father's family may even object to the bearing of the child. That might be the case, for example, if the mother and her late husband's family are embroiled in some conflict or if the deceased has children from a previous marriage who oppose the birth on financial or other grounds. Nevertheless, depending on the intensity of the objection, it is possible that legal recognition may provide, in the long term, a basis for the formation of emotional ties between the child and her grandparents, aunts and uncles, and paternal half-siblings. Moreover, to the extent it is the father-child relationship that is at issue, legal recognition can ultimately provide it a substantive and symbolic grounding. Although we are obviously not speaking here of a parental relationship in its full significance, for the father has died and cannot play a tangible, physical part in the child's life,[171] recognition of the relationship is not thereby divested of all meaning. Formal registration of the genetic father's parenthood with the government's vital statistics agency will simplify the child's future interactions with administrative agencies, from the school board to the motor vehicle regulators. It will spare her the dissonance and embarrassment of being labeled "father unknown" when she knows the label is inaccurate. It will also reinforce the life narrative sketched for her by her mother and, on occasion, enhance her economic condition by conferring on her rights as an heir and other insurance benefits as well.

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171 Robertson, *supra* note 11, at 1032 (1994).

It thus appears that recognizing the genetic father's legal parenthood can bolster relationships between the genetic parents, between the father and child, and between the child and the father's extended family. It is important to note, of course, that this general conclusion may be negated in some sets of circumstances; in those cases, recognizing legal parenthood may fail to strengthen nurturing family relationships and may even impair them. Where one or another party's objection to the birth or recognition of the genetic father's legal paternity is sufficiently strong, the interest in promoting family relationships might well suggest declining recognition of that paternity. That result seems particularly appropriate where it is the mother herself who objects to recognizing the genetic father's legal paternity. In these circumstances, and in view of her serving as the primary caregiver, her strong objection may well be the decisive factor that tips the balance against recognizing the genetic father's formal paternity.

Finally, the third factor—the best interests of the child—will also favor recognizing the late father's paternity in most (though, again, not all) cases. Whatever one thinks of the claim raised by some that a child might be better off not having been born at all into a fatherless situation[172] – a claim I believe entirely unfounded[173] – once the child is born, his or her welfare must serve as the paramount consideration in determining parenthood. As noted earlier, recognizing the genetic father as the legal father will give the child a name; round out her life narrative; enable her to respond with certainty to her own and others' questions regarding her origins; provide a basis for economic support; and open the door to the formation of family relationships

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172 A situation called by Ruth Landau "planned orphanhood." Ruth Landau, *Planned Orphanhood*, 49 SOCIAL SCIENCE AND MEDICINE 185, 185–87 (1999); *see also* Shuster, *supra* note 25, at 414.

173 Even if it is maintained (or demonstrated) that birth into a fatherless situation will harm a child emotionally, this harm is a far cry from the harm that could support a morally defensible claim to non-existence. Moreover, the harm discussed here is speculative: it is not clear that all children born to a single mother under such circumstances will suffer. It is therefore difficult to argue on behalf of a particular child before he or she is born that he or she would be better off not being born at all. Lastly, as a matter of logic, the "best interests of the child" are relevant only when there is a child; but here, the thrust of the claim is that there should not be a child at all. This ethical conundrum is called "the non-identity problem." John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J. L. & MED. 7, 13–14 (2004).

with her late father's extended family. In short, in most cases, such recognition will serve as a meaningful step to promote her emotional and economic wellbeing.

Of course, the child whose paternity is being determined is not the only one whose best interests must be taken into account. Application of the Relational Model requires consideration of any other children who will be affected by the decision, as well. Where additional children are involved—children born to the deceased during his lifetime—their best interests may dictate that their father will not be recognized as the legal father of the child conceived after his death. As a practical matter, opposition can be expected to arise, by the nature of things, when there are other children who were born to the father by a different woman. These children could argue (on their own initiative or urged on by their mother) that recognizing the post-mortem child could impair their standing as heirs or as social security beneficiaries, diminishing their shares in their father's estate or in the maximum per-family social security benefit. These arguments deserve to be taken into account, but they do not generally overcome the interest in recognizing the genetic father's paternity. From the moment the PMC child comes into the world, it seems to me, we should strive to recognize her as her genetic father's child and she should enjoy the associated rights as heir or beneficiary—even if that impairs, her half-siblings' legacies. With regard to non-financial matters, there may be intangible concerns about recognizing the PMC child as the sister of her father's previous offspring, but I doubt one could persuasively argue that her siblings would be harmed in an emotional or a symbolic sense by recognition of her status. While the child's siblings may prefer to ignore her existence or may even ask to impede her realization of her economic rights, viewing the matter through the lens of the Relational Model will show that recognizing the PMC child can potentially lead to the formation of family relationships—a potential that will warrant, in most cases, affording that recognition.

Before concluding this part, I must stress that my proposal here with regard to PMC cases should not be seen as having any bearing on the status of sperm donors vis-à-vis single-mothers and same sex families. I do not at all mean to suggest that a single-parent family is inherently incomplete, that in every case a child must have a legal father, or that single-parent families should be discouraged. As

mentioned earlier, a leading principle underlying the Relational Model is the importance of facilitating the creation of families. If the family chosen by the mother(s) is a single-mother family or a female same-sex family, this is, in principle, the family that should be recognized by law. A contrary position might impede the creation of families in the first place, deterring not only mothers but also potential sperm donors and thereby constraining the mother's opportunity for family life. That would be a harmful and intolerable result.

2. The Deceased's Assumed Intention to Father His Child

Before proceeding to the second scenario, the deceased's intentions and desires regarding fatherhood warrant some further discussion. In the scenario described above, it has been assumed that the late husband intended, or at least wanted, to father a child of his own. But it is not always evident that that is so. Furthermore, the scenario described above portrayed the couple as having had a good lasting relationship and having planned to have children in the foreseeable future. Again, this may not always be the case. However, if these assumptions are met, we can conclude that the man had a "general" intention to become a parent and father a child with his wife. Nonetheless, we have no specific indication of his views regarding posthumous parenthood. In cases where the sperm is retrieved before the man's death, we may have clearer evidence of his intentions,[174] but in the majority of posthumous sperm retrieval cases, we likely will have no concrete information. Under these circumstances, it is suggested to establish a rebuttable presumption that the genetic father intended to bring a child into the world even after his death.[175] This rebuttable presumption rests on some generalized value judgments – outlined in the next paragraph – which may be refuted in some cases but which nonetheless hold in most others, and therefore may ground this presumption as a matter of default.

All other things being equal, we can assume that most people

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[174] We can draw inferences about his intention from the very fact of the deposit or from its circumstances; there may also be an explicit statement of intent in a declaration or record signed before or soon after the deposit.

[175] For an opposite position, see Bennett, *supra* note 151, at 304–05; Schiff, *supra* note 13, at 963.

who saw their future as including birthing children and raising them will be consoled by the knowledge that, should they die, their memory, if not their genetic line, will be maintained and preserved through their descendants. It is legitimate to assume that if faced with death a person would seek ways to ensure continuity (of his genes and the memory of his persona), and should this person be in a stable and long lasting relationship, such ways will include fathering a child.[176] While it might be too strong a claim to suggest that most people would prefer to procreate, it is still the case that a large percentage of married people of the relevant ages do.[177] Whereas the desire to procreate includes, in ordinary circumstances, the wish to become an active parent, it is not far fetched to assume that the desire to procreate realized by most couples of the relevant age does not evaporate upon knowledge that active parenting will be denied on account of death. Therefore, it seems legitimate to adopt, as a default position, the presumption that the wish to procreate includes the wish to bring a child to the world even after death. This conclusion is consistent with the premise underlying the spousal relationship. After all, spousal relationship – or at least the ideal type thereof – relies on mutual love, responsibility and respect. If this is indeed the case, we may assume that the deceased man would have trusted his partner with the decision whether or not to pursue with the conception and pregnancy; should her deep wish would be to give birth to and mother his child after his demise, we may assume that the man would have wanted his partner to be in a position to do so.[178]

As noted, the presumption would be a rebuttable one, yielding in the face of evidence to the contrary. Indeed, the same relational perspective that gives rise to the presumption also calls for its refutability: it respects the man's wish not to father a child without

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176 From this perspective, the weight of the presumption may be diminished where the father already has children who were born during the course of his life, whether from the same woman or from previous partners.

177 JASON FIELDS, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003 4 (2004), http://www.census.gov/prod/2004pubs/p20-553.pdf.

178 Carson Strong, who supports the idea of "inferred wishes" to retrieve sperm after death, reasons by analogy to the case of post-mortem organ donation, Strong, *supra* note 4, at 348, and to decisions regarding patients in a persistent vegetative state, Strong, *supra* note 91, at 259. *See also* Rothman, *supra* note 22.

being able to realize a full parental relationship with her.[179] Accordingly, despite the general conclusion that the deceased sperm provider should be recognized as a father, there may be cases in which the model implies the contrary result. The propriety of going forward with the posthumous conception when it is known that the sperm provider would object is a matter beyond the scope of this article; my own view is that the conception should not take place. But, if a child is nevertheless conceived and born despite the sperm provider's evident objection, declaring him to be the legal father would appear to be unjustified and incompatible with the Relational Model, which calls for bolstering meaningful relationships. Imposing parenthood against the will of the deceased father in a PMC case would contravene the interest in creating and strengthening flourishing familial relations[180] and might well have the opposite effect by seeming to trivialize those relationships. The deceased sperm provider should be recognized as a legal father when the birth is a manifestation of the relationship between him and the mother and when it is the continuation of the family they would have raised together had he not died. The rebuttable presumption obviates direct evidence of that intention in every case, but where there is evidence to the contrary, recognizing his legal paternity would be inconsistent with the premises of the Relational Model.

3. Determining Fatherhood When the Mother Has a New Partner

Applying the Relational Model to the second scenario—in which the mother is living with a new partner—suggests, in my view, a clear conclusion regarding the new partner's status. On the premise that he participated in the decision to conceive, or at the very least accompanied and supported the mother during the pregnancy, he is the intended father and should be declared the legal father. As explained later, his status as such may be acknowledged along with that of the genetic father.

Looking for guidance to the factors underlying the Relational Model—securing the conditions for establishing families, promoting

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179 This rationale also dictates a presumption that the decedent would not have wanted to beget a child when circumstances do not allow him to ensure her minimal financial needs even—or, perhaps, especially—when he is no longer alive.

180 Mazzone, *supra* note 157.

intra-family relationships based on mutual responsibility, stability and nurture, and securing the best interests of the child—we may say it is better for a child to have two parents than one; it is better for her to have a parent who wants to function as such; and surely it is better to have that parent be alive. Although the intended father (that is, the mother's new partner) is not the genetic father, under this scenario he supported the birth of the child and wanted to take part in her care and nurturing. He is the bio-genetic mother's partner,[181] he has accompanied her through the pregnancy and delivery, and he is there to stay. It is he who will be viewed by society as the father; more importantly, it is he who will be regarded as the father by the child herself. Clarifying his status as a legal parent reinforces that reality, thereby nurturing family relationships and advancing the best interests of the child. Resembling in some ways the recognition of the mother's husband as father in cases of sperm donation,[182] recognition of the current spouse as legal father is not just best for the child—it is right for the parents.

Having decided that formal recognition of the mother's new partner may well be necessary and desirable, we face another question: must that recognition be provided automatically and as soon as the child is born? And, must it be done through some unique mechanism, or can we rely on the adoption process and recognize paternity once that process has run its course?

Although parenthood could be established through the adoption procedure, that is not an optimal solution from the perspective advanced here. The purpose of this paper is to consider postmortem conception and suggest, *ab initio*, the ideal scheme for resolving the associated paternity issues, both procedural and substantive. The laws that govern adoption were not drafted with postmortem conception in mind, and it is no surprise that the mechanism they establish is far from optimal for cases involving PMC. I have

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181 For the purpose of paternity recognition, the marital status of the couple should not be of great significance. The focus should be on the actual relationships involved, both between the mother and the man who wishes to become the father and between that man and the child. A legal framework for the couple's relationship may facilitate the process, enabling a faster determination of the partner's relationship with the mother, but it should not change his status at the end of the day.

182 William Joseph Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 89 (1990).

suggested, for reasons presented earlier, that the mother's partner should be recognized as the legal father at the time of birth, and the adoption procedure is too ponderous to allow for that result. It entails temporary, monetary, and emotional costs, and it could result in complications in cases of change of mind. It subjects the recognition of parenthood to a court's discretion and interferes with the family's autonomy. Moreover, in a social-cultural atmosphere that perceives adoption as somehow a "second-rate" form of parenthood, reliance on that mechanism will needlessly stigmatize both child and parent. As we will see, there exist some PMC cases in which the father's status ought to be declared by court. Where the man "joins" the family after the birth of the child, for example, a court might find it proper to use the adoption procedure, with the discretion it affords the court, to decide whether the man should be acknowledged as a parent. But in the other cases discussed here, the father's status should be declared by law and acknowledged formally and routinely, without court intervention, at the time of birth.[183]

As just suggested, the general rule that the mother's partner should be declared the father may need to be tempered in certain cases, depending on when the man came into the picture. Recognizing the new partner as the father when he agreed to the conception from the outset is straightforward and intuitive. His intention at the time of conception and of birth, his support during the pregnancy, his emotional investment, and his own expectations all warrant declaring him to be the father for the reasons described earlier. The same conclusion is valid, I believe, when he becomes the mother's partner after conception but before the child's birth. Although he did not take part in the decision to conceive, his intention and actions through the pregnancy and at the time of birth can ground his status as parent.

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183 A clear legal determination enhances the stability of the unit into which the child is born and should be useful in resolving any disputes that might arise. Whatever one's view on the substantive issues, all might agree that the matter should be legally resolved. The desire for legal regularization is consistent with the desire to ease, to the extent possible, the need to resolve family disputes. A lack of regularization could open the door to conflict among those competing for parental status, lead to increased litigation, and threaten the welfare of the child, who would be born into a state of legal, if not familial, uncertainty. Regularization cannot preclude a family crisis, but it can ease its prompt resolution and may avoid litigation by encouraging settlement.

When the man joins the family following the child's birth, however, his status becomes less certain, and it is doubtful that he can categorically be deemed the legal father. In these circumstances, the court should be asked to consider the circumstances of the particular case. The court will have to examine the nature of the parties' relationships, the motivations underlying the request to recognize the new spouse's paternity, and the child's relationships to the significant figures in his life. The older the child, the greater the likelihood that he has formed parent-child relationships with other individuals. In such circumstances, the court must be certain that recognizing the mother's new partner as legal father will not impair the significant relationships already formed by the child. As already mentioned, the best course in these cases may be to pursue adoption as the mechanism for recognizing the new partner's paternity. The court will have to be satisfied that the adoption itself and the form it takes (for example, open adoption that preserves family relationships with the genetic father's family) are for the best interests of the child.

More complicated questions might arise where the mother and her new partner have separated by the time of the child's birth, or where at least one of them objects to the new partner's recognition as the father. If they both object and he is no longer part of the family, he clearly should not be declared the legal father. In these circumstances, their joint objection to recognition is, as a practical matter, self-executing; unless otherwise determined by law,[184] when neither he or the mother approach the relevant state agency or the court and ask for declaration or recognition, no such recognition will ensue. When the mother and her partner disagree, the court should rule on the basis of the considerations identified above and weigh the pros and cons of declaring the man to be the legal father.

Although it takes into account the intentions and desires of the parties, the Relational Model looks to other considerations as well. The decision must assign decisive weight to the child's needs and examine the effect of the fatherhood determination on overall family relationships. Declaring the former partner to be the legal father might be the only means of establishing a tangible father-child relationship, but it might have ill effects on the mother-child

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184 For instance, if the mother and the intended father married prior to birth, the child may be considered the husband's legal child.

relationship or on the family's harmony as a whole. The decision must consider whether it is the (former) partner himself or the mother who objects to his recognition, the reasons for the objection, and its intensity. A family divided into two hostile households is unlikely to offer a good atmosphere for the development of sound family relations, and when there is no significant relationship between the child and the former partner, the price of recognizing him is unlikely to be worth paying.

The status granted the deceased genetic father may also bear on the decision regarding the former partner. Declaring the deceased to be a father (as I have already suggested would be proper in the first scenario and suggest below would be proper in the second scenario as well) might tip the balance against recognizing the former partner in a disputed case. Recognizing the genetic provider as a father in the second scenario might satisfy the child's needs for a life story, for emotional support (especially by the members of the father's extended family, if they will be playing a role in her life) and for financial resources. It is important to recall that as much as we try to portray the possible scenarios in advance, reality is much more varied. Similarly, real-life conclusions must be tailored carefully case by case and adjusted to suit the specific circumstances.

Finally, let me clarify the need for formal, legal recognition of the mother's partner's paternity. Why is de-facto, functional fatherhood insufficient?

It seems to me that de-facto parenthood fulfills neither the child's needs nor those of the de-facto parent—at least not entirely. Even in a smoothly functioning family, (the contrary situation is discussed below) formal, legally recognized parenthood has practical and symbolic importance. As a practical matter, the father's formal recognition gives him the ability to discharge in full his obligations and rights with respect to the child, vis-à-vis both the state and other individuals. He will not need court approval or authorization for his actions and he will be able to act independently of the other parent, as in every legally recognized family. From a symbolic point of view, formal recognition would afford public approval to the parent-child relationship, thereby offering emotional reassurance to all parties.

When the family is in crisis, however, formal recognition becomes crucial, not merely important. If the parents separate or one of them dies, formal recognition is necessary to ensure continuity of

the parent-child relation and protect the child's rights. For example, if a de-facto (that is, not legally recognized) father dies intestate, the child may find it difficult to claim status as an heir.[185] If it is the mother who dies, the de-facto father may find himself forced to prove his status to the state or to third parties seeking to oust him from the family. If the mother and the de-facto father separate, the mother may try to sever his connection with the child and take the child away from the only father she knows.[186] The former partner will then find himself fighting for his status and his rights. The legal battle can be expected to take some time, during which the de-facto father and (more importantly) the child will be unable to maintain their relationship. The harm occasioned by such a forced and unjustified separation is self-evident. Naturally, the argument in favor of formal recognition of legal parenthood is relevant in other family contexts as well, whether heterosexual or alternative.[187] It is possible as well that the matter may be resolved within the context of legislation that comprehensively and satisfactorily addresses the status of step-parents within a family. Recognizing a step-father as the legal father in circumstances paralleling those described here (that is, automatically and immediately upon the child's birth) in a way that would afford him legal standing identical to that of any other legal father, could also provide a satisfactory resolution in cases of post-mortem birth.

4. Are Two Fathers Too Many?

As has been shown, application of the Relational Model calls for (1) recognition of the genetic father as legal father where there is no other candidate; and (2) recognition of the intended father as a legal father at time of birth, when both he and the mother favor doing so. What is much less clear is the proper status of the deceased genetic father when the mother's current partner is declared to be the legal father. Should one of these fathers take precedence over the other?

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185 The problem might arise as well where the father in his will leaves a bequest to "my surviving children" without naming them.

186 In the opposite case, the de-facto father might want to step out of the child's life. He may ask to avoid responsibility for the child and leave the child without the financial support she is accustomed to.

187 See, for example, the case of same-sex motherhood, as discussed in Zafran, *supra* note 132.

Should we favor the relationship with the intended father – who stands to be the social father and plays the paternal role in the child's life – over the relationship that could have existed with the deceased father, even though his genetic contribution, image and emotional pull also stand to play a role in writing the child's life story?

On the premise that parenthood is not an exclusive status, this competition could be avoided by concluding that both men should be recognized as legal fathers. I see no persuasive reason to preclude such shared parenthood in our context (and, for that matter, in other contexts as well[188]). As already explained, acknowledging the genetic father's status, especially when doing so is supported by the mother and the intended father (her new partner), is the appropriate course of action; but so is recognition of the intended father. Most of the difficulties that arise from the recognition of three parents who are all alive would not be posed in our case, when the genetic father is dead. Because the genetic father is not physically present and is not part of day-to-day life, his recognition imposes little burden on family life. The child will not be faced with demands to divide her emotions or loyalty, and she can actually enjoy both worlds. This conclusion might change, of course, in the event of strained relations between the mother (and her new partner) and the extended family of the deceased.

Contrasting our case with that of anonymous sperm donation is helpful. Unlike the case of sperm donation, the deceased man here had a meaningful relationship with the mother. In most cases (ideally, in all cases), use of the sperm would have been in accord with his explicit or implicit wish. Moreover, the sperm was provided under the assumption that the man (now deceased) will father his descendants and give them his name. Consequently, it is not far fetched to assume that the deceased's family might want to be present in the child's life. In some cases they might have also been involved in the decision to bring the child into the world, and have assisted in the procedure or provided support during the pregnancy. There is a clear difference between the deceased father in our case

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188 *See* Bartlett, *supra* note 30 (discussing different contexts); Jacobs, *supra* note 32; Kavanagh, *supra* note 31; John C. Sheldon, *Surrogate Mothers, Gestational Carriers and a Pragmatic Adaptation of the Uniform Parentage Act of 2000*, 53 MAINE L. REV. 523, 547 (2001); Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N.D. L. REV. 497 (1993).

and the anonymous sperm donor, and this difference supports the conclusion that the former should be recognized as a legal father along with the intended father, while the latter should not be. While it is the child's best interests that should predominate, we can see that recognition of the deceased genetic father is warranted in its own right.

VI. LEGAL AND FINANCIAL CONSEQUENCES

Most of the literature on PMC has considered the child's economic rights—her status as heir, and her eligibility for Social Security survivor's benefits. It has given little if any direct consideration to the determination of parenthood per se; that has been discussed only as an adjunct to the financial aspects of the issue. As is evident in the preceding pages, I have taken a different course here by focusing primarily on the determination of parenthood. Having sketched what I believe to be the proper outcomes regarding legal paternity in various PMC situations, the need arises to confront some practical aspects regarding the child's status and rights vis-à-vis both the person(s) determined to be her legal father and the pertinent state agencies.

The determination of legal parenthood entails the full panoply of rights and obligations associated with paternity and affects the child's relationship with state agencies and third parties. Recall that the solution proposed above calls for recognizing the willing mother's partner (that is, the de-facto parent) as the legal father without requiring a formal process of adoption. This proposal goes beyond the current law which recognizes the husband at the time of birth as the legal father;[189] it would recognize the mother's cohabitating partner even in the absence of marriage and when no genetic connection between father and child exists. As the result of such recognition, the mother's partner assumes full paternal status, equal to that of any other legal father. He bears the duty to support the child and has the rights and obligations of legal guardianship. Likewise, the child's standing, with regard to future inheritance or social security benefits, is recognized as it would be had the father

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189 *See supra* notes 39–41.

been the biological or adoptive father.

Recognizing the paternity of the deceased father—as sole father if no new partner entered the picture prior to birth; otherwise as co-father—poses more complicated questions. First, such recognition requires that statutes be amended or that courts and administrative agencies take the position that it is legally available and advisable. Furthermore, the fact that the genetic father is no longer alive obviously limits the scope of the parental rights and responsibilities to be examined; given the father's physical absence, no issues need be resolved with respect to such matters as his visitation rights or involvement in child rearing decisions. But that does not mean that recognizing his paternity will be a matter of symbolism only, having no substantive consequences. First, in jurisdictions that recognize the rights and obligations of extended family members, the paternity determination will affect those rights and obligations, and procedures will have to be devised to grant extended family members standing in the case. Beyond these matters, two of the issues that remain pertinent—the child's rights to intestate succession and Social Security benefits—were referred to earlier in the article and have been the subject of initial regulation in some states.[190] These two issues, which are likely to generate future debate and conflict, warrant some further consideration here in light of the substantive proposal being advanced.

Once paternity is recognized—even if post-mortem—the child should enjoy equal rights as an heir.[191] Clearly, where the father refers to the child in his will, his express directive must be honored and the child granted whatever bequest is specified.[192] In the absence of a will, the child should be treated the same as any other descendant.[193] That equality, however, is not without some reservation. Allowing for inheritance or intestate succession by one who has not yet been born complicates or may even preclude distribution of the estate. It is possible, for example, that the potential child may remain unborn, mere frozen sperm, for a prolonged or

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190 *See supra* Part III.B.2.

191 *See* Bailey, *supra* note 2 (providing extensive discussion on the inheritance aspects).

192 This is already the case today. *See supra* note 51.

193 Banks, *supra* note 3.

indefinite time because the mother has not yet proceeded with the conception and the pregnancy. If that is the situation at the time the estate is distributed, be it by will or by statute, will the frozen sperm be deemed legally capable of inheriting? And if the child is born after the estate has been distributed, will she have a claim for her equal share from the various heirs? Such questions threaten the certainty of estate dispositions and may impair society's interest in rapid, effective settlement of estates as well as the potential heirs' economic interests. Leaving the matter unregulated may also frustrate the wishes of the deceased.

It seems to me—though this is by no means the last word on the subject—that the default rule should be to set a portion of the estate aside for the PMC child, subject to certain preconditions designed to minimize the host of difficulties that might arise. First, the mother (that is, the deceased's widow or surviving partner), should be obligated to inform the executor or administrator of the estate, at the first possible opportunity,[194] that she is considering using the deceased's sperm. That condition will substantially limit the number of cases in which distribution of the estate is affected, since in most cases no such intention will exist. In the very few cases where such notice is given, the administrator or executor would be required to plan accordingly. The second condition would limit the time during which a PMC child's inheritance rights would be assured. Without attempting here to define that time precisely, I would suggest it be no longer than four to five years from the time of death.[195] If, during that time, the woman failed to inform the executor that she was pregnant by the deceased's sperm, the executor would be free to distribute the portion of the estate set aside for the PMC child.[196] During that interval, the court or the executor would have to ensure that the other

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194 A somewhat similar condition was set in California, which imposed a four-month deadline for sending the notice. *See supra* notes 62–64 and accompanying text.

195 In setting the deadline to be imposed, two conflicting interests must be kept in mind: the allotted time should be short enough to avoid excessive interference with the efficient settlement of estates, but also long enough to avoid undue pressure on the mother to become pregnant too soon. She must be allowed a reasonable time to move beyond her intense mourning for her deceased partner and to come to as well-reasoned a decision as possible with regard to bearing the child.

196 Compare to the condition that was set in California. *See* CAL. PROB. CODE § 249.5 (Deering 2007) and *supra* text accompanying note 62.

heirs received the portions of their legacies not subject to potential challenge from the PMC child and that the value of the estate was preserved. Under this proposal, a child born without notice of pregnancy having been given within the prescribed time would be unable to share in the genetic father's estate, if the estate had already been distributed.

The child's eligibility for Social Security benefits should likewise be no different from that of any other child of the deceased. The law should provide that offspring born from the deceased's sperm (assuming, of course, the genealogy can be so demonstrated) should be eligible for support to the same extent as any other child orphaned of his or her father. In this context, moreover, I see no need for as rigid a time limit as in the case of inheritance rights; indeed, it may be that no time limit at all is necessary. Separate inquiry is needed, of course, into the economic consequences of imposing another group of eligible claimants, however small, on an already stressed Social Security system seen by some as approaching collapse.[197] That study will require data on the incidence of PMC, the likely number of claimants under the rule I am suggesting, and the fiscal strength of the Social Security System. The last factor, however, should bear not on the offspring's eligibility itself, but only on whether and how to limit the eligibility period in a manner that treats all survivors equally.

One interesting suggestion in the literature calls for the eligibility of a PMC child to be determined case by case.[198] According to this suggestion, if the benefit-allocating agency determined, on the facts of the particular case, that the deceased, had he lived, would have wanted to support the child in question, it would find her eligible for survivor's benefits. This "constructive support" would appear to be recommended by the Relational Model for determining parenthood, for it well suits two of that model's principles: deciding each case on the basis of its particular circumstances and emphasizing the obligations that flow from family relationships. That said, I still favor treating eligibility for Social Security benefits on a class basis: once

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197 *See* Banks, *supra* note 3, at 308. For an updated estimation, see *The Future of Social Security, Testimony Before the S. Comm. on Aging*, 109th Cong. (2005) (statement of Douglas Holtz-Eakin, Dir., Cong. Budget Ofc.), http://www.cbo.gov/doc.cfm?index=6068&type=0.

198 Banks, *supra* note 3, at 372.

their paternity has been legally determined, PMC children should be treated as belonging to the same class as other children. I consider this preferable because, for one thing, the Relational Model will have already been deployed at an earlier stage, in the course of determining paternity itself. Second, it would be burdensome and perhaps unfair to require, in each instance, a difficult evidentiary proceeding to establish a child's eligibility for benefits or inheritance. Finally, application of the Relational Model itself dictates that a man recognized as legal father in a PMC situation bears, in principle, all the obligations of any other father—even if his demise results in some of these obligations being carried out by the state. To put it differently, the recognition of paternity means that society—like third parties or family members whose inheritance might be affected—must act in a manner that respects that paternity.

Finally, attention should be paid to the consequences of recognizing both the deceased genetic father and the mother's new partner as legal parents. Is the child entitled to dual sets of rights? If not, what is the standard for determining whom she inherits from and on whose account she is eligible for Social Security survivor's benefits? Without exhausting the discussion, I believe it possible to recognize the child as the heir of both men. Dual inheritance is not unprecedented, having been recognized in adoption situations;[199] and it seems even more justified here,[200] given the legal recognition of both men's paternity.[201] As for Social Security survivor's benefits, an analogy can be drawn from the case of adoption by a stepparent. A child adopted by her stepfather (that is, her mother's second husband) does not thereby lose eligibility for benefits as her deceased father's survivor; that is the case even if she receives child-support from the stepfather, whether as a member of his household or as the recipient of court-ordered child-support payments.[202] The same rule should apply in our case.

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199 Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family,* 1996 UTAH L. REV. 93, 152–53 (1996); Vegter, *supra* note 2, at 273–74.

200 For a critical perspective, see Brashier, *supra* note 199, at 144–45.

201 Goodwin, *supra* note 2, at 276.

202 42 U.S.C.S. § 402(d); Stephen D. Sugarman, *Reforming Welfare Through Social Security*, 26 U. MICH. J.L. REFORM 817, 847–48 (1993).

VII. CONCLUSION

Scientific developments and increased social acceptance have made possible the use of assisted reproductive technologies to create alternative families. Although this is a positive change—a change that enhances the individual's capacity to fulfill herself, promotes happiness, and promises greater social equality—it is a change accompanied by complex challenges. One of the most significant of those challenges is determining parenthood in cases of post-mortem conception. In these situations, one of the genetic parents is dead and, as a further complication, an additional person (the new partner) may participate in the creation of the family and wish to be recognized as a legal parent. Also involved may be the extended family, which may support the arrangement enthusiastically or object strenuously to it. The situation will clearly be an emotional one for the widow who wishes to become a mother (or has already become one) and will be extremely important for the child and her well being.

The techniques for PMC have been available and used for almost thirty years. Nevertheless, PMC has not yet been the subject of comprehensive legislation or regulation, in part because defining parenthood in these situations is a complex and controversial matter.[203] But these difficulties make a clear and definitive regulatory regime even more essential. The absence of such a scheme will promote inconsistency and uncertainty, leading, in turn, to excessive litigation and the associated emotional costs, which can run especially high in family disputes. Leaving controversial decisions in policy matters to the courts, without proper statutory guidelines, may undermine the courts' standing in the public eye. It is the legislature's role, as an elected body with the capacity to devise comprehensive societal solutions, to resolve issues such as these. Courts are able to tailor the application of enacted policies to the particular cases at hand, but effective court action requires the enactment of a comprehensive legislative scheme.

I have sought here to outline such a scheme and have proposed use of a Relational Model to guide the difficult decisions expected down the road. In contrast to the other models currently prevailing, the Relational Model is multi-dimensional enough to reflect the

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[203] Lorio, *supra* note 1, at 28–29.

complexity of the issue while lending itself to flexible implementation in a manner that can better realize the needs and interests of all concerned.