CRYOPRESERVED SPERM AND THE SHORTCOMINGS OF PROBATE LAW

I. INTRODUCTION

In 2002, Brendan Gaites, a wealthy North Carolina entrepreneur, received the most troubling news any twenty-seven year old could possibly imagine—a diagnosis of metastasized cancer originating in his pancreas. The next week resembled the tornado scene in the Wizard of Oz—a whirlwind experience complete with racing around, crying visitors, and preparing for the upcoming medical battle.[1] Though Brendan knew his cancer was terminal, his hopes remained high that the doctors could achieve the impossible and cure him. Brendan's oncologist informed him that the chemotherapy regimen would likely make Brendan sterile.[2] Brendan, however, stood determined to start a family with his wife, Linda, following his battle with cancer. He decided to bank several vials of sperm at a local university hospital cryobank. Assuming that Linda would use the sperm, Brendan signed a gestational agreement expressing a desire for any children created by use of the sperm to be deemed his children. The physician filed the original agreement. Familial affection softened the pain and sickness that Brendan suffered throughout the treatment. Brendan's wife, mother, and sister provided support and prayers until

1. *See* THE WIZARD OF OZ (MGM 1939).

2. Shelly Sarig & Nili Tabak, *An Unusual Petition for Posthumous Sperm Retrieval? What Does It Add to the Debate?* 27 MED. & L. 463, 464 (2008).

Brendan's last breath on December 27, 2002. Brendan's father had similarly died of cancer years before.

Brendan's will, for the most part, disposed his property in a predictable fashion. Though he left the bulk of his wealth and property to Linda, he also provided for his mother, Mary. His will created a testamentary trust that provided for his wife and his issue, if any. In a holographic codicil, however, Brendan made a peculiar gift regarding his vials of cryopreserved sperm. He left ten vials of cryopreserved sperm for Linda and ten vials of his cryopreserved sperm for his lesbian sister, Jodie. Jodie and her life partner, Allison, had recently considered adoption. To their dismay, the process proved to be an improbable—if not impossible—means by which the couple could have a child. Brendan always respected Jodie's lifestyle and supported her efforts to adopt. During one of Brendan's chemotherapy treatments, Jodie had confided in Brendan her regret that she and her life partner could never have a child. Brendan's will provided sperm for the insemination of Allison if the couple so chose to use it. Jodie first learned of Brendan's gift upon probation of the will. Jodie and Allison decided to use Brendan's sperm to conceive a baby of their own.

Linda challenged the will provision regarding the vials of cryopreserved sperm on several grounds. Though Brendan never knew it, Linda detested Jodie because of her sexual orientation and lifestyle. Linda's moral code did not approve of two lesbians raising a child. Linda also harbored concerns regarding Brendan's estate and the claims that Allison's children might have to Brendan's wealth. As such, she stood determined to challenge the will and to litigate the issue until she gained peace of mind.[3] Although I would like to state that this Comment provides a prediction of the outcome of this challenge, I cannot. The current state of the law in this area does not permit such bold predictions.

Because of the unpredictability regarding the disposal of a decedent's cryopreserved sperm, states must clarify the law controlling the issue to permit predictable results and to allow reliable estate planning techniques to guard against unintended results.[4] Seemingly, the most frequent scenario giving rise to these concerns is when a male cancer patient, in preparation for chemotherapy, cryopreserves sperm in case the chemotherapy temporarily or

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3. Although the preceding set of facts is fictional, it represents a distinct possibility considering the current trend toward validation of homosexuality in terms of a family unit. *See* GARY J. GATES, THE WILLIAMS INSTITUTE, GEOGRAPHIC TRENDS AMONG SAME-SEX COUPLES IN THE U.S. CENSUS AND THE AMERICAN COMMUNITY SURVEY, (2007), http://www.law.ucla.edu/williamsinstitute/publications/ACSBrief Final.pdf. Though this set of facts involved terminal cancer, modern advances in cancer treatment provide male cancer patients with hope of continuing a normal life following a bout with cancer. *See* American Cancer Society, http://www.cancer.org (last visited Jan. 15, 2009). For this reason, the number of men who cryopreserve sperm will likely rise. *See* American Cancer Society, *Cancer Treatment and Fertility in Men*, http://www.cancer.org/docroot/MBC/content/MBC_2_3X_cancer_treatment_and_fertility_in_men.asp?site area=MBC (last visited Jan. 15, 2009) [hereinafter Cancer Treatment and Fertility in Men].

4. *See* discussion *infra* Parts II-VI.

permanently sterilizes him.[5] This Comment addresses the confusion that the current state of the law causes when a sperm donor dies. In such a scenario, the following questions arise: What happens when a donor wants his sperm destroyed upon his death in order to preserve his children's inheritance?[6] What happens if the donor chooses to devise his sperm to someone other than his current wife—whether for personal reasons or for scientific discovery?[7] What happens to the cryopreserved sperm when a donor dies intestate?[8]

These represent only a few of the potential issues that state laws need to address. This Comment introduces a legal history of cryopreserved sperm, its status as property, the current state of jurisprudence regarding these issues, and the potential effects of community property laws. The issue of whether a man's devise of cryopreserved sperm can withstand a judicial challenge gives rise to several other issues. Because those ancillary issues fall outside the narrow scope of this Comment, they will be addressed only topically. As we proceed, expect to revisit the Brendan Gaites hypothetical in order to predict how the situation might play out in a number of jurisdictions and if certain hypothetical statutes were enacted. After exploring the current state of the law on whether a man can devise his cryopreserved sperm in the manner he chooses, this Comment will propose statutory language that, if implemented, would facilitate more consistent treatment of the issue while remaining true to each state's social policies.

II. HISTORY OF HUMAN TISSUE TREATED AS PROPERTY

Historically, a surviving family possessed no property rights in the decedent's corpse, as a whole or its individual body parts.[9] The common law treatment of property rights in a corpse places strict limits on those rights.[10] At first, American courts routinely held that there were no property rights in human body parts.[11] Later court decisions held that a family's property right in a decedent's corpse is limited to the family's quasi-property right to bury.[12] Recently, courts expanded the concept of property rights in body parts and tissues to protect the rights of commercial entities who sell or distribute human

5. *See* Cancer Treatment and Fertility in Men, *supra* note 3.

6. *See infra* notes 41-51 and accompanying text.

7. *See infra* notes 32-40 and accompanying text.

8. *See* discussion *infra* Parts II-V.

9. *See* William Boulier, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693, 706 (1995).

10. *Id.*

11. *See id.* at 707-09.

12. *Id.* at 708. This "quasi-property rights" characterization of the corpse still exists today as evidenced by a recent case where the court denied a widow's argument that the defendant was liable for the conversion of the widow's dead husband's liver. *See* Colavito v. N.Y. Organ Donor Network, Inc., 860 N.E.2d 713, 718 (N.Y. 2006). The court limited the widow's rights to her husband's corpse to the right to bury and provide funeral rites. *Id.*

hair, sperm, or plasma.[13] However, in terms of one's property rights concerning his or her own body tissues, American jurisprudence can best be described as "a patch work . . . [that] continues to be influenced by an ancient declaration without much of a basis."[14]

III. JUDICIAL TREATMENT OF CRYOPRESERVED SPERM AND THE ISSUE OF WHETHER IT CONSTITUTES PROPERTY

Just as courts are hesitant about declaring property rights in corpses and body parts, a general judicial hesitance makes determining whether cryopreserved sperm is a man's property unpredictable at best.[15] Some courts facing the question of whether sperm gives rise to property rights simply narrow the issue or find some other method of side-stepping the issue.[16] Other courts refuse to assign property rights to body parts while not foreclosing property rights in all circumstances.[17]

Though historically jurisdictions refused to assign property rights to sperm, in recent cases courts have held (usually in narrow terms) that sperm outside a man's body is property that confers rights to the possessor.[18] Many factors gave rise to these recent decisions and forced courts to define the protections offered to body tissue in areas of law outside of property law.[19] In *United States v. Garber*, the court addressed whether to define a plasma donation as either property or service under the Internal Revenue Code.[20] The court determined that plasma constituted property under the Internal Revenue Code and applied the code provisions accordingly.[21] In *Kurchner v. State Farm Fire and Casualty Company*, the plaintiffs sued the insured for accidental destruction of cryopreserved sperm.[22] The issue in *Kurchner* was whether, under the sperm bank's insurance policy, cryopreserved sperm should be classified as bodily injury or property damage.[23] The court concluded that the cryopreserved sperm constituted property as contemplated by the insurance

13. *See* Boulier, *supra* note 9, at 708.

14. *Id.* at 715.

15. *See infra* Parts IV-VI.

16. *See* Baskette v. Atlanta Ctr. for Reprod. Med., LLC, 648 S.E.2d 100, 105 (Ga. App. Ct. 2007) (limiting the holding to the malpractice claim). In *Baskette*, the plaintiffs sued to recover for lost sperm in a botched in vitro fertilization attempt, but the court refused to determine whether negligent destruction of cryopreserved sperm gives rise to property damages. *Id*. at 101-02, 105.

17. *See Colavito*, 860 N.E.2d at 719 (refusing to recognize property interest in decedent's kidney but concluding, "we need not identify or forecast the circumstances in which someone may conceivably have actionable rights in the body or organ of a deceased person.").

18. *See infra* notes 26-51 and accompanying text.

19. United States v. Garber, 607 F.2d 92 (5th Cir. 1979) (discussing the taxation of money earned from plasma donation as income under the Internal Revenue Code).

20. *Id.* at 95.

21. *Id.* at 97.

22. Kurchner v. State Farm Fire & Cas. Co., 858 So.2d 1220, 1220-21 (Fla. Dist. Ct. App. 2003).

23. *See id.* at 1221.

contract.[24] The court, however, expressed the intent that the holding be construed narrowly.[25] In *Phillips v. Irons*, the court addressed a conversion claim involving sperm that the defendant used to impregnate herself without the donor's consent.[26] In *Phillips*, the male plaintiff became intimately involved with the defendant, a female doctor.[27] Following oral intercourse, the defendant, utilizing a method of self-insemination, used the plaintiff's sperm to impregnate herself.[28] She later served him with paternity claims, and he sued her for conversion of his sperm.[29] The court held that the conversion claim failed because once the plaintiff delivered the sperm to the defendant, he no longer had a right to possession.[30] Surprisingly, the court held that the defendant, upon the delivery of the sperm, enjoyed title to the sperm and could dispose of it how she wished.[31]

Although *Phillips* clearly stated that the possessor of sperm can hold title to it, one cannot research this topic without overlooking the holding in *Hecht v. Superior Court*, a 1993 California case.[32] In *Hecht*, a man with adult children devised his cryopreserved sperm to his girlfriend.[33] After his death, his adult children contested the will, arguing that public policy stood against posthumously conceived children.[34] The court disagreed with that assertion and, guided by the California Probate Code defining "property" in very broad terms, held that the decedent's interest in his cryogenically preserved sperm was property over which the probate court had jurisdiction.[35] The court's analysis emphasized that the sperm had value, lending itself to being classified as property: "[s]perm which is stored by its provider with the intent that it be used for artificial insemination is thus unlike other human tissue because it is 'gametic material' . . . that can be used for reproduction."[36] Although the court distinguished between sperm and an embryo, it still opined that the "value of sperm lies in its potential to create a child after fertilization, growth, and

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24. *Id.*

25. *Id.* (holding that damage to sperm outside of a body was not "bodily injury" as defined in the insurance policy).

26. Phillips v. Irons, No. 1-03-2992, 2005 WL 4694579, at *1 (Ill. App. Ct. Feb 22, 2005).

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.* at *6.

31. *See id.*

32. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993). In researching this topic, I found that every article touching the subject of cryopreserved sperm discussed this case in support of one point or another.

33. *See id.*

34. *See id.* at 278.

35. *See id.* at 283. "'Property' means anything that may be the subject of ownership and includes both real and personal property and any interest therein." CAL. PROB. CODE § 62 (West 2002).

36. *Hecht*, 20 Cal. Rptr. 2d at 283. "Gamete" is defined as: "a reproductive cell that is haploid and can unite with another gamete to form the cell (*zygote*) that develops into a new individual." MERRIAM WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 583 (4th ed. 2000).

birth."[37] Once the court held that public policy did not preclude the posthumous conception of children, it concluded that at the time of the testator's death, he had an interest similar to that of the ownership of property.[38] The decedent had the right to use his sperm for conception and the right to determine who could utilize his sperm for such a purpose.[39] Because the court found the testator's interest in his sperm to qualify as property under the probate code, it deferred to the probate court's decision to release the testator's sperm to his girlfriend, the intended beneficiary under the will.[40]

More recently, a California court affirmed the state's stance that cryopreserved sperm constitutes property when it determined that a widow cannot use her deceased husband's frozen sperm to conceive a child.[41] In *In re Kievernagel*, Joseph and Iris Kievernagel were married for ten years prior to Joseph Kievernagel's death.[42] The *Kievernagel* court recognized that Joseph Kievernagel "was opposed to having children, but agreed to the fertility procedures due to Iris's strong desire for children."[43] The couple contracted with Northern California Fertility Medical Center to perform the in vitro fertilization.[44] The center's policy required a reserve of sperm for future insemination procedures if they were necessary.[45] Joseph Kievernagel signed the center's consent agreement, which stated that the sperm was his property alone.[46] The agreement provided two options in the event Joseph Kievernagel were to die: donate the sperm to his wife or discard the sperm upon death.[47] Joseph Kievernagel initialed the box indicating that the sperm should be discarded upon his death.[48] The trial court held that Joseph Kievernagel's intent was to have his frozen sperm destroyed upon his death.[49] The widow appealed, arguing that the deceased husband's intent was not clear because he had not read the agreement or assented to its contents.[50] The appellate court disagreed with the widow stating that "[t]he material at issue is Joseph's sperm, not a preembryo" and only Joseph has ownership to it.[51] The operative word for purposes of this comment is "ownership," a word that indicates the involvement of property rights in sperm.

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37. *Hecht*, 20 Cal. Rptr. at 283.
38. *See id.* at 290.
39. *See id.*
40. *See id.* at 291.
41. *See* In re Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 317-18 (Cal. Ct. App. 2008).
42. *Id.* at 312.
43. *Id.* at 313.
44. *Id.* at 312.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 317.
50. *See id.* at 316-17.
51. *Id.* at 317.

IV. MARITAL PROPERTY LAW AND ITS EFFECTS ON DISPOSAL OF A DECEDENT'S CRYOPRESERVED SPERM

Despite the confusion surrounding the issue of whether cryopreserved sperm constitutes property, sperm might nevertheless be treated as community property in community property jurisdictions.[52] Generally, community property is any asset owned in common by a husband and wife that is acquired during the marriage by means other than an inheritance or by gift to one spouse.[53] In community property jurisdictions, each spouse holds a one-half interest in marital property.[54] In the context of cryopreserved sperm, the nature of a community property jurisdiction gives rise to many concerns. For example, the intestacy statutes in community property jurisdictions might permit distribution of portions of the decedent's community property to his children—especially if the decedent had children and subsequently married a woman other than the mother of those children.[55] Whether sperm is classified as community property or separate property becomes relevant in the intestacy context. An intestacy statute could potentially distribute cryopreserved sperm to a decedent's current wife and to the children of his former wife, giving the previous wife indirect access to the cryopreserved sperm.[56]

The states facing this policy disagreement include Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.[57] In these states, the courts presume that property acquired by a married person while married constitutes community property.[58] In community property jurisdictions, separate property is generally defined as any property owned by either spouse before marriage or any property acquired during marriage by gift, devise, or descent.[59] In turn, community property under these jurisdictions is generally defined negatively by court or statute with language such as "any property acquired during marriage that is not 'separate property.'"[60] For example, Texas defines community property as "property, other than separate property, acquired by either spouse during marriage," and separate property as "(1) the property owned or claimed by the spouse before marriage; (2) the property acquired by the spouse during marriage by gift, devise, or descent; and (3) the recovery for personal injuries sustained by the

52. *See* Roman v. Roman, 193 S.W.3d 40, 43-44 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

53. *See* BLACK'S LAW DICTIONARY 297 (8th ed. 2004).

54. *Id.*

55. *See* TEX. PROB. CODE ANN. § 38 (Vernon 2003).

56. *See id*. It is possible that the minor children of a deceased man would inherit his cryopreserved sperm, assuming it is classified as property. *See id*. This would give the mother of those children, possibly and ex-wife, indirect access to those vials of sperm. *See id*.

57. Joseph D. Seckelman, *Community Property*, 3 Mertens Law of Fed. Income Tax'n § 19:01 (2004).

58. *Id.*

59. George A. Wilson, *Domicile and Avoiding Ancillary Administrations*, 2 EST. & PERS. FIN. PLAN. § 20:13 (2008).

60. *Id.*

spouse during marriage, except any recovery for loss of earning capacity during marriage."[61]

Although little case law exists in community property jurisdictions regarding what happens to gametic tissues upon a couple's divorce or upon the male spouse's death, a recent Texas case indicates that gametic material may be treated as community property.[62] In *Roman v. Roman*, the trial court determined that frozen embryos, upon divorce, should be treated like community property.[63] Apparently the trial court either overlooked or disregarded a contract under which the couple had agreed to destroy the embryos upon divorce.[64] On appeal, the court enforced the contract, thereby successfully delaying the tougher question that the trial court had decided.[65] Today, Texas still has no case law or statute that sheds light on whether cryopreserved sperm will be treated as community property or separate property.[66]

The trial court's holding in *Roman* would permit a wife to possess the embryo and potentially use it to have a child.[67] This would give rise to many other issues that are beyond the scope of this comment. Would children stemming from those embryos permit the pursuit of child support from the ex-spouse? If the husband had later used his share of the embryos to have a child with a subsequent wife, then would the subsequent wife have to answer to custody contests by the ex-wife? Although any judge or jury would probably cringe at the thought of deciding those issues, a Louisiana statute regarding embryos seems to favor the odd circumstances created in a situation similar to that addressed in *Roman*.[68]

In community property states, it appears that the nature of sperm production will make cryopreserved sperm more likely to receive treatment as community property than an embryo or a female's eggs.[69] If sperm were to be treated as property once outside a man's body, then it is likely to fall under the definition of community property because it is something that can be acquired during marriage by way other than gift or inheritance.[70] However, *Kievernagel* indicates that courts will not always treat cryopreserved sperm as community property.[71]

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61. TEX. FAM. CODE ANN. §§ 3.001-3.002 (Vernon 2006).

62. *See* Roman v. Roman, 193 S.W.3d 40, 43-44 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

63. *Id.*

64. *See id.* at 45.

65. *See id.* at 54.

66. *See id.* at 46 (discussing the lack of Texas precedent on the issue).

67. *See id.* at 43-44.

68. *See* LA. REV. STAT. ANN. §§ 9:121-9:133 (2008) (considering a pre-zygote a "juridical person" that must be implanted).

69. Healthy Sperm: Improving Your Fertility, http://www.mayoclinic.com/health/fertility/MC0002 (last visited Jan. 15, 2009).

70. *See* Wilson, *supra* note 59, at § 20:13.

71. *See* In re Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 311-18 (Cal. Ct. App. 2008); *supra* notes 41-51; *see also* Seckelman, *supra* note 57, at § 19:01.

Designating a married man's cryopreserved sperm as community property inevitably creates a host of problems. Community property jurisdictions should cure the issue by passing legislation rather than waiting for the issues to arise in court.[72]

V. STATUTORY DEFINITIONS OF PROPERTY

The definition of "property" in a state's probate code can be dispositive in a will contest or intestacy dispute arising out of the disposal of the decedent's cryopreserved sperm.[73] Although many people do not concern themselves with the probate code's definition of property, the definition exerts much influence over the validity of a will provision.[74] The California Probate Code defines property as anything that "may be the subject of ownership."[75] This broad definition gave a will's beneficiary the opportunity to successfully claim property rights over the decedent's sperm.[76] The New York definition of property is similarly broad, stating that "property is anything that may be the subject of ownership, and is real or personal property."[77] On the other hand, the Texas definition of property is much more narrow.[78] It defines property as including both real and personal property.[79] Personal property is limited to "interests in goods, money, choses in action, evidence of debts, and chattels real" while "'[r]eal property' includes estates and interests in lands, corporeal or incorporeal, legal or equitable, other than chattels real."[80] Although some jurisdictions' probate codes assign broad definitions to property, the award for most circular and vague goes to the Uniform Probate Code (UPC).[81] The UPC defines property as "values subject to a beneficiary designation."[82]

Although one can draw distinctions between these definitions based on scope, the statutes do not unequivocally refer to gametic material such as sperm to constitute property. So long as the definitions of property remain vague, doubt will loom over the fate of cryopreserved sperm when a sperm donor dies.

VI. WHOSE CHILD IS IT AND WHY DOES IT MATTER?

The Brendan Gaites hypothetical introduced at the beginning of this comment poses the issue of whether the law treats the decedent as the father of

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72. *See* discussion *infra* Part V.
73. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993).
74. *See id*.
75. CAL. PROB. CODE § 62 (West 2002).
76. *Hecht*, 20 Cal. Rptr. 2d at 281.
77. N.Y. EST. POWERS & TRUSTS LAW § 1-2.15 (McKinney 1998).
78. *See* TEX. PROB. CODE ANN. § 3(cc) (Vernon 2003 & Supp. 2008).
79. *Id.*
80. *Id.* § 3(z),(dd).
81. *See* UNIF. PROB. CODE § 2-201(8) (1998).
82. *See id*.

any children resulting from the use of his sperm.[83] Some problems presented in the hypothetical include: (i) Linda's right to visit Allison's children conceived using Brendan's sperm; (ii) Mary's visitation rights of any children resulting from the use of Brendan's sperm; (iii) Jodie's or Allison's standing or right to seek support for the children conceived with Brendan's sperm; (iv) Jodie's right to adopt the children born to Allison using Brendan's sperm; and (v) whether those children will possess standing to seek part of Brendan's estate.[84]

A. Standing to Obtain Visitation Rights

The issue of whether Linda or Mary have standing to seek visitation or to block an adoption by Jodie based on Brendan's paternity of Jodie's children may turn on a sperm donor's right to do the same.[85] The *In re Sullivan* court addressed the issue of whether an unmarried man had standing to adjudicate parentage when an unmarried woman used his sperm to conceive a child.[86] The unmarried biological parents, Sharon Sullivan and Brian Russell, agreed to have a child through insemination using Russell's sperm.[87] The couple signed a parentage agreement on February 6, 2003.[88] Insemination and conception were successful, and the resulting child, L.J.S., was born on March 2, 2004.[89] Prior to the child's birth, a dispute arose between the two and, on March 31, 2004, Russell filed a petition to adjudicate parentage, a suit affecting the parent-child relationship, and a suit for breach of contract.[90] He requested that the court grant a decree establishing a parent-child relationship, a joint managing conservatorship, an order for genetic testing, a standard possession order, an injunctive relief order, and attorney's fees.[91] Sullivan argued that Russell was a sperm donor with no legal rights.[92] The trial court found Russell to have standing, and Sullivan filed a petition for writ of mandamus with the appellate court.[93]

Russell asserted that he had standing under a statute that permits a man to maintain a parentage proceeding.[94] Sullivan attacked Russell's standing by arguing that he was a donor who lacked parental rights and standing to bring a parentage proceeding under the Texas Family Code § 160.102(6).[95] Sullivan also attacked Russell's standing under § 160.702 of the Texas Family Code

83. *See* discussion *supra* Part I.
84. *See* discussion *supra* Part I.
85. *See* In re Sullivan, 157 S.W.3d 911, 922 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).
86. *Id.* at 914.
87. *Id.* at 912-13.
88. *Id.* at 913.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 914.
93. *Id.*
94. *See* TEX. FAM. CODE ANN. § 160.602 (Vernon 2009); *Sullivan*, 157 S.W.3d at 915.
95. §160.102(6); *see Sullivan*, 157 S.W.3d at 915.

because "a donor is not a parent of a child conceived by means of assisted reproduction."[96] Russell countered with evidence of a contract and argued that the statute did not apply when there was an executed co-parenting agreement under which the sperm donor expressed an intention to serve as the active father of the child.[97] He further argued that to deprive him of those rights would be unconstitutional under several theories.[98] The appellate court, following a lengthy discussion on the issues, side-stepped the constitutional issue by concluding as follows:

> [A]t a minimum, section 160.602(3) confers standing on a man alleging himself to be the biological father of the child in question and seeking an adjudication that he is the father of that child. We further conclude that under the statute, as drafted, the issue of the man's status as a donor under section 160.702 is to be decided at the merits stage of the litigation rather than as part of the threshold issue of standing. It is undisputed that Russell alleges himself to be L.J.S.'s biological father and that he has filed a parentage proceeding seeking an adjudication that he is L.J.S.'s father. Based on our interpretation of the relevant statutes and the undisputed facts germane to the issue of Russell's standing, we conclude that, as a matter of law, Russell has standing to maintain a proceeding to adjudicate his parentage of L.J.S.[99]

Following *Sullivan*, Brendan might have standing to sue for visitation and other parental rights had he lived.

Browne v. D'Alleva involved the issue of standing of a known sperm donor to effectuate the terms of the gestation agreement.[100] In this case, the parties executed an acknowledgement of paternity.[101] The court analyzed different states' case law regarding standing of sperm donors—both known and unknown—in paternity suits.[102] The court granted standing to the known sperm donor to seek custody and visitation based on the voluntariness of the arrangement, the preconception intent, the acknowledgment of paternity, and the donor's name being on the birth certificate.[103]

Applied to the Brendan Gaites hypothetical, these holdings would likely permit Brendan, if he had survived, to pursue parental rights of Jodie's child. If Brendan would have enjoyed standing, then it follows that Mary would have standing to seek visitation based on her status as a grandmother, assuming that the jurisdiction grants standing to grandparents. Because Brendan is not alive,

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96. *See* § 160.702; *Sullivan*, 157 S.W.3d at 915.
97. *Sullivan*, 157 S.W.3d at 915.
98. *See id.* at 919.
99. *Id.* at 920.
100. *See* Browne v. D'Alleva, No. FA064004782S, 2007 WL 4636692, at *1 (Conn. Super. Ct. Dec. 7, 2007).
101. *Id.*
102. *See id.* at *7-9.
103. *See id.* at *13.

however, the court may refuse to recognize paternity due to statutory constraints.[104] Contract law did not serve as the basis of this holding.[105]

B. Standing to Block Adoption

If Linda, Mary, or both establish Brendan's paternity rights to Allison's child and state law grants one or both of them standing to block adoption by Allison, then it is well settled that they would possess the same amount of power to block the adoption as Allison if they were in Brendan's shoes.[106] The irony in this hypothetical lies in the fact that Allison and Jodie comprise a same sex couple.

A Canadian court dealt with the issue as it relates to a lesbian couple's use of donated sperm to have a child and the mother's same sex partner's right to adopt.[107] A lesbian woman became pregnant utilizing sperm from a known donor.[108] Post birth, the partner petitioned the court to become a legal parent to the child.[109] The trial court denied the petition, stating that both the birth mother and the known sperm donor had retained parental rights; therefore, the non-biological partner did not have standing.[110] The partner appealed.[111] The appellate court disregarded the statute and, using the *parens patriae* powers of the court, ruled that the child had three legal parents.[112] Because *parens patriae* exists in the United States, Jodie may succeed in adoption, making the issue of standing to contest adoption moot.[113]

The issues of equal protection and due process in the context of gender distinctions in adoption proceedings were addressed in *Caban v. Mohammed*.[114] In a 5-4 decision, the United States Supreme Court reversed the New York Supreme Court's affirmation of a statute which permitted an unwed mother—but not the father—to block an adoption simply by withholding consent.[115] In *Caban*, the unmarried biological parents of two children had lived together as a family for many years.[116] The parents subsequently separated, married other people, and continued to have contact with the children.[117] In 1976, the mother, Maria Mohammed, and her new husband petitioned the court for

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104. *See infra* notes 129-50 and accompanying text.
105. *See Browne*, 2007 WL 4636692, at *13.
106. *See* Caban v. Mohammed, 441 U.S. 380 (1979).
107. A.A. v. B.B., O.J. No. 2, C39998, 2007 ON. C. Lexis 2, at *5 (Ont. Ct. App. Jan 2, 2007).
108. *Id.* at *2.
109. *Id.* at *5.
110. *See id*.
111. *Id.*
112. *See id*. at *28.
113. *See* James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 411 (2008).
114. Caban v. Mohammed, 441 U.S. 380, 385 (1979).
115. *See id*. at 394.
116. *Id.* at 389.
117. *Id.* at 384.

adoption.[118] The father, Abdiel Caban, and his new wife filed a cross-action for adoption.[119] While the New York Surrogate Court acknowledged that fathers, under state law, can demand a hearing in opposition to the adoption of a child by a stepfather, the court barred the unwed biological father's suit to adopt pursuant to the statute because the natural mother withheld consent to his suit.[120] In other words, "[a]doption by Abdiel was held to be impermissible in the absence of Maria's consent, whereas adoption by Maria could be prevented by Abdiel only if he could show that the Mohammeds' adoption of the children would not be in the children's best interests."[121] The United States Supreme Court held "the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers has not been shown to be substantially related to an important state interest."[122] The Court dismissed the notion that a fundamental difference exists between maternal and paternal relations and held that maternal and paternal roles are relatively equal in importance.[123] If these cases control the situation in the hypothetical, then it is unlikely that it would be constitutional to block Jodie's adoption based on gender, marital, or sexual orientation grounds.

C. Can Allison's Child Seek Trust Distributions?

A second issue arising from the Brendan Gaites hypothetical and applicable in other circumstances is whether Jodie's child would have standing to seek distributions from the trust created by Brendan's will. Because Jodie's child would have to prove that she is Brendan's "issue" and because she was arguably not adopted to two parents, Allison's child might have to prove illegitimacy before she has standing.[124] The issue then turns to legislative and judicial treatment of whether sperm donors are fathers.[125]

Some states express strong disapproval against a child challenging her own legitimacy.[126] In such a jurisdiction, the constitution will likely give no assistance to the child's cause.[127] In *Michael H.*, the Court held that a child's

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118. *Id.* at 383.
119. *Id.*
120. *See id.* at 383-84.
121. *Id.* at 388.
122. *Id.* at 381.
123. *See id.* at 389.
124. *See* Michael H. v. Gerald D., 491 U.S. 110, 128 (1989). The following discussion proceeds under the assumption that the jurisdiction in which Jodie and Allison reside permit some form of civil union for same sex couples. Connecticut, New Jersey, Vermont, and New Hampshire are the only jurisdictions in the United States that recognize civil unions between same sex partners. *See* Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist View of Marriage*, 64 WASH. & LEE L. REV. 393, 416 n.87 (2007).
125. *See* Ellen A. Yarrell, *Looking for Mr. Good Sperm: Sperm Donation—Are Donors In Or Out?* State Bar of Texas 34th Annual Advanced Family Law Course, ch. 35, at 10 (Aug. 2008).
126. *See Michael H.*, 491 U.S. at 113.
127. *See id.* at 116.

rights pursuant to the Equal Protection Clause were not violated by a California statute that created a presumption that a child born to a married woman living with her husband is a child of the marriage.[128] This same statutory scheme allowed the presumption of legitimacy to be rebutted only by the mother and her husband and only if certain circumstances were present.[129] Confronted with the issue of the child's right to contest her own presumption of legitimacy, the Court held that "[w]hen the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken. In contrast, allowing a claim of illegitimacy to be pressed by the child-or, more accurately, by a court-appointed guardian ad litem-may well disrupt an otherwise peaceful union."[130] Holding against constitutional arguments, the Court reasoned that "[i]t is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."[131]

Although the Brendan Gaites hypothetical deals with sperm donation to a same sex couple, a real problem arises when, in a situation like in *Michael H.*, the couple having the baby are married and the jurisdiction in which the couple resides enforces a presumption of legitimacy while precluding the child from enjoying standing to challenge the presumption.[132] Though Jodie's child may successfully challenge her own legitimacy, she will also be subject to the specific jurisdiction's treatment of sperm donors on the issue of paternity.[133]

In Texas, the rules favor protection of children and provide for parentage whenever possible.[134] The Texas legislature enacted a group of statutes to assist and protect children conceived from the use of modern medical procedures.[135] The Texas definition of sperm donor requires that a donor donate his sperm to a licensed physician in order to avoid parentage actions.[136] Exceptions exist for a husband who provides sperm for insemination in his wife or an unmarried man who, intending to be father, donates sperm for insemination of an unmarried woman.[137] Texas clearly intends to protect children's rights and to support persons who desire to be parents. However, § 160.707 of the Texas Family Code provides that "[i]f a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record kept by a licensed physician that if assisted reproduction were to occur after death the

128. *See id.* at 131.
129. *See id.* at 113.
130. *Id.* at 131.
131. *Id.* at 129-30.
132. *See id.* at 113.
133. *See* Yarrell, *supra* note 125, at 10.
134. *See id.*
135. *See id.*
136. *See id.* (discussing the adoption of the Uniform Parentage Act).
137. *See* TEX. FAM. CODE ANN. § 160.703 (Vernon 2009); Yarrell, *supra* note 125, at 10.

deceased spouse would be a parent of the child."[138] The statute may determine that Jodie possesses no claim, but it would turn on whether "a spouse" is limited only to the mother's spouse within the meaning of the statute.

Other states passing statutes dealing with paternity of children conceived after the sperm donor's death tend to agree with Texas on the matter.[139] Although these statutes control the issue of intestate distribution and posthumously conceived children, they still do not directly address whether the law permits or should permit a man to bequest his sperm to whomever he wants through his will.[140] Nevertheless, based on these statutes, one could draw a logical conclusion that the law expresses disfavor toward the idea of posthumously conceived children. Because the ultimate outcome of a gift of cryopreserved sperm is the conception of a child, it seems to follow that Brendan's actions, from our hypothetical, run retrograde to general public policy.

D. Rule Against Perpetuities

Gifts to a testator's children might be nullified by the Rule Against Perpetuities (RAP) if there is a chance of a posthumously conceived child, a circumstance that highlights the issue of whether a man may devise his cryopreserved sperm.[141] RAP aims to prevent a testator from controlling assets from beyond the grave, stating that "'[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'"[142] Linda, would be interested in whether her jurisdiction voids

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138. § 160.707.

139. *See id*. Among these states are Colorado, Delaware, Virginia, and Washington. The Colorado statute states that "[i]f a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child." COLO. REV. STAT. § 19-4-106(8) (2008). The Delaware statute states that "[i]f an individual who consented in a record to be a parent by assisted reproduction dies before the placement of the eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child." DEL. CODE ANN. tit. 13, § 8-707 (1999 & Supp. 2008). The Virginia statute states that "any 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." VA. CODE ANN. § 20-158 (2008). The Washington statute states that "[i]f a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child." WASH. REV. CODE ANN. § 26.26.730 (West 2006).

140. *See* sources cited *supra* note 139.

141. *See* Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 652 (2005).

142. Joshua Greenfield, Note, *Dad Was Born a Thousand Years Ago? An Examination of Post-Morten Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN. J. L. SCI. & TECH. 277, 287 (2007) (quoting JESSE DUKEMINER & JAMES E. KRIER, PROPERTY 302 (5th ed. 2002)).

Brendan's gift to his "issue" for violation of RAP.[143] Unfortunately, jurisdictions are not in agreement, and it is unclear what a court would hold.[144]

If a jurisdiction strictly enforces RAP, then the class gift to Brendan Gaites' "issue" would fail because all the lives in being could potentially pass away and then twenty-two years later someone could use Brendan's sperm to form a new child, whose interest would not have vested within the bounds of RAP.[145] However, some jurisdictions apply the "wait-and-see" approach to RAP, waiting through the perpetuities period and then determining if an interest violates RAP.[146] Another manner through which some jurisdictions handle RAP issues is the cy pres, or reformation, approach.[147] Using this statutory mechanism, a court can reform a future interest to prevent violation of RAP while preserving the intent of the donor.[148]

Another suggested remedy to the problems caused by strict adherence with RAP is the Uniform Statutory Rule Against Perpetuities (USRAP).[149] USRAP employs a combination of the common law RAP, a ninety-year wait-and-see period, the reformation power discussed above, and an order that the court disregard any chance of a posthumously conceived child.[150]

The potential drawbacks to these relaxed versions of RAP are threefold: (1) other members of a class gift will not know the full extent of their interest nor will they know if the interest is even valid; (2) dead-hand control by the testator will increase if the wait-and-see period employed exceeds twenty-one years; and (3) the courts' attempting to determine the testator's intent based only on the words in the testamentary instrument may "craft a substitute interest."[151] Obviously, Linda would hope for strict adherence to RAP, which would invalidate the testamentary trust made benefitting Brendan's issue and allow her to retain all of Brendan's fortune.[152] Considering Brendan's vast wealth, the child conceived by Allison would likely hope for a relaxed approach to RAP considering the fact that Jodie will likely conceive a child within the RAP period.[153] Regardless of the approach applied by the courts, the aim of this comment is simply to direct the reader's attention to the potential problems of permitting men to devise their cryopreserved sperm to anyone they wish. Permitting a man to devise cryopreserved sperm could potentially invalidate other gifts intended by the testator to benefit the

143. *See* Knaplund, *supra* note 141, at 652.

144. *See id*.

145. *Id.*

146. *See* Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 582 (2004).

147. *See id*. at 584.

148. *See id*. (quoting Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. Rev. 545, 556 (1988)).

149. *See id*. at 586.

150. *See id*.

151. *See* Hoffman & Morriss, *supra* note 146, at 587.

152. *See* Knaplund, *supra* note 141, at 652.

153. *See* Hoffman & Morriss, *supra* note 141, at 586.

posthumously conceived child.[154] Accordingly, a jurisdiction must reflect on its version of RAP when it addresses the issue of devising cryopreserved sperm.[155]

VII. SUGGESTED STATUTORY LANGUAGE[156]

The current definitions of property in the various states' probate codes fall short of determining whether sperm constitutes property.[157] Currently, a testator cannot look to case law in deciding whether his cryopreserved sperm is property permitted to pass through probate.[158] For these reasons, this comment attempts to suggest some statutory language that would hopefully clarify uncertainties for probate courts, probate attorneys, and lay people.

States could piece together the jurisprudence regarding the disposal of a decedent's body parts and human tissues, and the legislatures could promulgate a probate statute that could provide predictability. States express their respective policies regarding gametic materials through their statutes. For example, New Hampshire enacted a statute to guard against the situation that arose in *Roman*.[159] New Hampshire requires that pre-zygotes be used or be destroyed within fourteen days.[160] On the other end of the spectrum, Louisiana categorizes pre-zygotes as judicial persons and requires implantation of them.[161]

Though most of the statutes addressed herein do not address cryopreserved sperm, they serve as a window into the public policy stance of each jurisdiction. The language of the pertinent statute should balance the policy of protecting the child's interest, who obviously has no say when he or she is born, against the interest of the heirs, beneficiaries, and decedents, who should have no need to worry that the estate will remain open for years until the cryopreserved sperm is used or destroyed. Furthermore, the statute must take into account the effects of the relevant community property laws, if applicable. Also, in some jurisdictions, the intent of the sperm donor should be taken into consideration.[162]

A state favoring a tidy estate distribution might employ the following language in its probate code: "cryopreserved sperm, unless owned and

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154. *See supra* notes 136-43 and accompanying text.

155. *See supra* notes 136-49 and accompanying text.

156. The following suggested language will not address potential RAP issues because the issues fall outside the narrow scope of this comment.

157. *See* discussion *supra* Part V.

158. *See* discussion *supra* Part IV.

159. *See* N.H. REV. STAT. ANN. §§ 168-B:13 to 15, 168-B:18 (2006); Roman v. Roman, 193 S.W.3d 40, 43-44 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

160. *See* §§ 168-B:13 to 15, 168-B:18.

161. *See* LA. REV. STAT. ANN. §§ 9:121-9:133 (2008); *see also* Hall v. Fertility Inst. of New Orleans, 647 So. 2d 1348, 1351 (La. Ct. App. 1994) (holding that public policy does not discourage the use of sperm to posthumously conceive children).

162. In re Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 317-18 (Cal. Ct. App. 2008); *see also* Yarrell, *supra* note 121, at 10.

possessed as property by a licensed medical facility, is not property as defined in any of this state's statutory code. Nor may cryopreserved sperm be disposed of as property in a will, trust, contract, or any other instrument used to convey property."[163] Notice that the language expresses a disregard for a sperm donor's intent and disregards any posthumously born child's right to property. This language would work regardless of the marital property laws of the given state. Applied to our hypothetical situation, Brendan Gaites's gift to his sister would fail if such a statute were in place.

For states like Louisiana that place great importance on the intent of the sperm donor while maintaining a desire for efficient estate distributions, the state might employ language in its probate code stating that:

> A person may devise cryopreserved sperm to another. Any child resulting from the posthumous use of such sperm will not be a child of the sperm donor unless such intent is expressed by the sperm donor in his last will and testament or in documents possessed by a licensed physician or medical facility in this state. A posthumously conceived child of the sperm donor shall not inherit or benefit from the sperm donor's last will and testament unless the posthumously conceived child is born within two years of the sperm donor's death.[164]

A community property state may add to this statutory language. Texas, for example, may add that "cryopreserved sperm stored during marriage is community property and, upon death of either spouse, shall pass to the heirs according to the community property laws of this state."[165] California, due to the policy voiced in *Kievernagel*, may add the following: "unless the sperm donor expresses a desire to destroy the cryopreserved sperm upon death, cryopreserved sperm stored during marriage is community property and, upon death of either spouse, shall pass to the heirs according to the community property laws of this state."[166] Under any of these proposed statutes, Brendan's

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163. The language in quotation marks is the proposed statutory language by the author.

164. In *Hall v. Fertility Inst. of New Orleans*, the executor of a decedent's will requested the court to order the destruction of the decedent's cryopreserved sperm, which was donated to decedent's girlfriend while the decedent was still alive. *Hall*, 647 So. 2d at 1350. The trial court refused, holding that the issue turned on the decedent's intent and not society's opinion of the moral consequences of posthumously conceived children. *Id*. The language in the block quote is the proposed statutory language by the author.

165. *See* Roman v. Roman, 193 S.W.3d 40, 43-44 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (where the lower court treated the cryopreserved gametic material as community property). The language in quotation marks is the proposed statutory language by the author.

166. *See supra* notes 41-51 and accompanying text (highlighting the importance of the deceased sperm donor). Although not emphasized in the *Hecht* case, the California appellate court expressed in its holding in *Hecht* that the intent of the testator is important. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993). Considering that Mr. Kane, the testator in *Hecht*, expressed a desire for Hecht to bear and raise his posthumously born children, he expressed this (i) in his contract with the cryobank; (ii) in his will; (iii) in a suicide note to Ms. Hecht; and (iv) in his final letter written to his adult children. *See id*.; David Margolick, *15 Vials of Sperm: The Unusual Bequest of an Even More Unusual Man*, N.Y. TIMES, Apr. 29, 1994, B18 *available at* http://query.nytimes.com/gst/fullpage.html?sec=health&res=9F06E4D81430F93AA15757C0A962958260. The language in quotation marks is the proposed statutory language by the author.

gift of the cryopreserved sperm may pass muster as a valid testamentary gift. In the proposed Texas statute, Brendan's gift would likely be valid because he only devised one half of his cryopreserved sperm to someone other than his wife.[167] If the proposed California statute controlled Brendan's gift, then it would motivate Linda to search for all the paperwork that Brendan signed in connection with the sperm donation. If Brendan expressed, even accidentally, an intention to destroy the sperm upon his death, then the gift would fail under the proposed California statute.

Any of these proposed statutes would, at the very least, create predictability for testamentary gifts of cryopreserved sperm. However helpful these statutes may be to testators, it remains important—if not imperative—that each jurisdiction address the other issues that result from the testamentary gift of cryopreserved sperm.[168] Without careful treatment of those issues by the respective jurisdictions, the uncertainty caused by these testamentary gifts will be covered by other areas of the law such as family law and property law.[169]

VIII. CONCLUSION

For Allison and Jodie, many unanswered questions exist. Does Jodie have a right to possess and use the cryopreserved sperm? Will Brendan be the child's father? Will the child qualify as an "issue" of Brendan's under the testamentary trust? The short answer to all these questions is, of course, "it depends." It appears that the resulting litigation initiated by Linda would conclude with wildly varying results depending upon the jurisdiction.

From this comment, we can see that it is important for the modern testator, or his attorney for that matter, to consider the potential chain of events spurred by a testamentary gift of cryopreserved sperm. First, the testator should determine whether the gift of the cryopreserved sperm itself is valid according to the laws of his state.[170] Second, it is important for the testator to read any agreements and conditions that he signed when he banked his sperm. Those terms may invalidate his testamentary gift regardless of the relevant statute.[171] Third, a jurisdiction's marital property laws will have a great effect on a testamentary gift of cryopreserved sperm by a married man.[172] Fourth, the testator should gauge the potential problems caused by the testamentary gift of cryopreserved sperm if it is in fact later used. A few of these potential problems are (i) the potential custody and visitation disputes; (ii) the basic social problems of a child born without a father; (iii) the potential child support issues associated with the posthumously conceived child; (iv) the potential adoption

167. TEX. PROB. CODE ANN. § 38 (Vernon 2003).
168. *See* discussion *supra* Part VI.
169. *See* discussion *supra* Parts IV-VI.
170. *See* Boulier, *supra* note 9, at 715.
171. *See* In re Estate of Kievernagel, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).
172. *See* discussion *supra* Part V.

issues; and (v) the possible invalidation of class gifts made to the testator's "children" or "issue" under the state's RAP jurisprudence.[173] In most jurisdictions, it seems unlikely that a testator, devising cryopreserved sperm, could be confident that his exact wishes will be carried out. For that reason, states should pass statutes that effectively address the multitude of issues raised and discussed in this comment.

by Benjamin Major

173. *See* discussion *supra* Part VI.