

FROM THE GRAVE TO THE CRADLE: LOOKING FOR ANSWERS TO THE QUESTION OF CONSENT TO REPRODUCE POSTHUMOUSLY IN NEW ZEALAND

*Martha Ceballos**

*In New Zealand, posthumous reproduction is regulated by the Human Assisted Reproductive Technology Act 2004 (HART Act), which established two bodies, the Advisory Committee on Assisted Reproductive Technology (ACART) and the Ethics Committee on Assisted Reproductive Technology (ECART). In 2000, the predecessor of ECART, the National Ethics Committee on Assisted Human Reproduction (NECAHR), issued "Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man" designed to provide a legal framework for this technology. However, a recent application to the High Court by the partner of a man who unexpectedly died, requesting permission to have sperm retrieved from the deceased and the subsequent judgment handed down by the High Court in 2017,¹ have highlighted the shortcomings of the current posthumous reproduction regulations. This has led to a recent consultation process by ACART to review and revise the guidelines. Relying on *Re Lee*, the landmark judgment of the High Court that found in favour of granting the permission sought and which sheds light on the legal aspects of posthumous reproduction in New Zealand, the current article discusses the approach endorsed by the HART Act regarding consent for posthumous retrieval and use of gametes.*

* University of Canterbury. I am indebted to my PhD supervisors, Associate Professor Debra Wilson, Professor Annick Masselot and Dr Rhonda Powell. I am very grateful to the New Zealand Law Society for their scholarship funding while I was working on this article. The article has benefitted greatly from the comments of an anonymous referee, to whom I am most grateful.

1 *Re Lee* [2017] NZHC 3263, [2018] 2 NZLR 731.

I INTRODUCTION

Posthumously conceived children are one possible avenue for those unfortunate people who die young, and sometimes unexpectedly, to have the opportunity to fulfil their desire of having descendants, even if it is after death. An increasing number of men are storing their sperm, especially soldiers, astronauts and cancer patients; the second Gulf War triggered a notable demand from military personnel for cryopreservation.² It is now also possible to retrieve immature eggs from the follicles of a deceased woman's surgically removed ovaries. Oocyte cryopreservation by vitrification has a similar rate of pregnancy as fresh eggs. The successful outcomes for pregnancy, and the fact that the procedure is considered a standard procedure, has sparked increasing requests to store female procreative material as an elective procedure.³ It is also possible to conceive children posthumously using gametes stored prior to the death of one or both parents, or to gestate an embryo after the death of one or both of the genetic parents.

Posthumous reproduction raises "ethical, moral, cultural and spiritual considerations about the use of sperm from a person who did not give express consent to its use after death".⁴ In particular, the retrieval and posthumous use of female procreative material has not yet been considered in some jurisdictions, specifically in New Zealand, due to the novelty of the technique. However, the posthumous use of female procreative material elicits greater ethical and moral dilemmas than the posthumous use of male gametes since it requires a second woman to gestate the embryo.

The legal situation of posthumous reproduction in New Zealand is, to a certain degree, uncertain, mainly to the fact that the "Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man" (the 2000 Guidelines) were issued by the National Ethics Committee on Assisted Human Reproduction (NECAHR) in 2000.⁵ Therefore, the 2000 Guidelines were issued both prior to the enactment of the Human Assisted Reproductive Technology Act 2004 (HART Act) and were issued by a body other than ACART. A recent application to the High Court by the partner of a man who unexpectedly died, requesting permission to have sperm retrieved from the deceased man, and the subsequent judgment handed down by the High Court in 2017,⁶ have highlighted the shortcomings of the current posthumous reproduction regulations. Both the High Court finding that there are no

2 Amy Lai "A Critique of the 2008 Model Act Governing Assisted Reproductive Technology" (2011) 24 Am J Fam L 218 at 218.

3 Catrin E Argyle and others "Oocyte cryopreservation: where are we now?" (2016) 22 Human Reproduction Update 440.

4 *Re Lee*, above n 1, at [97].

5 See National Ethics Committee on Assisted Human Reproduction *Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man* (February 2000) [The Guidelines].

6 *Re Lee*, above n 1.

express provisions concerning the retrieval and subsequent use of sperm from a deceased man,⁷ as well as the application to the Ethics Committee on Assisted Reproductive Technology (ECART) to use the deceased man's sperm to conceive a child, have triggered the launch of a consultation process by the Advisory Committee on Assisted Reproduction Technology (ACART) with the objective of reviewing the 2000 Guidelines.⁸

This article will first analyse the current framework regulating posthumous assisted reproduction, including an examination of the meaning of the expression "specific use" in cl 5 of the Human Assisted Reproductive Technology Order of 2005 schedule (HART Order). Second, it will examine the literature concerning the requirement of consent to posthumous use of gametes, which ranges from express written consent through to inferred consent, including presumed consent. The form of consent will have the effect of either restricting or facilitating reproduction after a death that eventuates in unexpected circumstances. Regarding consent, the article argues that New Zealand's law has adopted an intermediary stance concerning the requirement of consent by the deceased for the use of their procreative material (female and male), by not restricting the consent to be in the form of a written document. Consequently, in the consultation process launched by ACART to review the 2000 Guidelines, it is also suggested that the post-mortem use of the sperm by a partner with proven consent, although not necessarily in written form, might be deemed to be an "established procedure" and so would not require approval by ECART according to s 4 of the HART Act and the HART Order.

Last but not least, this article analyses the case of *Re Lee*, a landmark case where the High Court dealt with an application by the partner of a man who unexpectedly died, requesting permission to have sperm collected from the deceased man. The Court was confronted with the problem of a lack of statutory provisions or guidelines regulating the extraction of sperm from a deceased man, or "the way in which consent might be given for the posthumous collection of sperm",⁹ despite being a lawful procedure that is not excluded from the HART Act. Consequently, the Court analysed whether or not it was possible to rely on the Court's inherent jurisdiction to fill a gap in the law. The judgment granted permission to collect and store the sperm while the application to ECART to use the sperm was resolved.¹⁰ The sperm is cryopreserved by Fertility Associates and is under control of the Court which will decide the fate of the sperm if permission to use it is denied by ECART. This includes the option to export the sperm to another country.¹¹ If ECART permission to use the sperm is approved, the

7 At [2].

8 Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction: A Review of the Current Guidelines for the Use, Storage, and Disposal of Sperm from a Deceased Man to Take Into Account Gametes and Embryos* (July 2018) [ACART Consultation Document]. The review was part of the Advisory Committee on Assisted Reproductive Technology's [ACART's] agenda since 2016.

9 *Re Lee*, above n 1, at [56].

10 At [100].

11 At [120].

sperm will be released to the deceased's partner. That would mean that Mrs Long would have control, although the fertility clinic has the possession of the sperm. Although this is not explicitly stated, it is a logical inference, given that once Mrs Long has authorisation is up to her to use the sperm or not.¹² The judgment of the High Court constitutes a landmark case which sheds light on the legal aspects of posthumous reproduction in New Zealand, including the meaning of the words "specific use" as set out in cl 5 of the HART Order schedule, and whether or not there can be property rights in dead human body parts under domestic law. Given the importance of this judgment, recourse to it is given to underpin some of the arguments in the article.

II THE LAW AND GUIDING PRINCIPLES OF POSTHUMOUS REPRODUCTION IN NEW ZEALAND

To begin with, it is observed that in New Zealand, and also in Australia, the procedure of retrieval of procreative material differs from the use of the gametes once retrieved. That is, the extraction of procreative material is independent from the subsequent use. In general, in exercising their inherent jurisdiction, courts may authorise the retrieval of sperm independently of whether or not the use of the extracted material to procreate might be authorised, on the grounds that otherwise the very opportunity to reproduce would be hampered. For example, in *Re Lee*, the Court asserts:¹³

If an order were not made, no sperm would have been preserved, and Ms Long would have lost her opportunity to persuade a Court, after full argument, that authority for the procedure should be given.

Sperm and ovarian tissue extraction from a deceased, or soon to be deceased, person is carried out with urgency, because the viability of all procreative material to reproduce is limited. While it is possible to retrieve sperm up to 36 hours, the standard time of retrieval is up to 24 hours after death.¹⁴

The HART Act, which regulates posthumous reproduction in New Zealand, is an attempt to balance the social and individual benefits that can be found in assisted reproductive techniques, specifically the ethical concerns, and certain legal issues, that impinge upon unfettered use of such techniques. The Act is concerned with the regulation of the supply and use of gametes by living persons, and the development and interpretation of the Act has been left in the hands of a parliamentary approved advisory committee, ACART.¹⁵ ACART's functions are laid down in s 35 of the HART Act, which makes specific mention of issues related to assisted reproductive procedures

¹² At [115].

¹³ At [16].

¹⁴ Shai Shefi and others "Posthumous sperm retrieval: analysis of time interval to harvest sperm" (2006) 21 *Human Reproduction* 2890 at 2892. The authors affirm: "[i]t is advisable that PSM [posthumous sperm retrieval] be permitted within 24 hours of death." They add further: "[o]ur experience shows that successful sperm retrieval can be performed 36 h post-mortem."

¹⁵ Section 32 sets out: "[t]he Minister must establish a committee to be known as the Advisory Committee on Assisted Reproductive Procedures and Human Reproductive Research."

and research. ACART's main tasks include, among others, to (a) issue guidelines and advice to the ethics committee and to keep such guidelines and advice under review; and (b) to provide the Minister with advice in the same matters. While not exhaustive, the advice refers to concerns around whether the Act, or any other enactment, should be amended to either prohibit or provide for any particular kind of assisted reproductive procedure or human reproductive research, or whether any given kind of procedure or treatment should be declared to be an established procedure.¹⁶

ECART's functions are set out in s 27 of the HART Act. Among other functions, it is in charge of receiving applications on matters concerning assisted reproductive procedures or human reproductive research, and approving them, provided it is in the established form and meets the requirements set out by ACART's guidelines and advice. When the application for approval refers to an activity not covered by the 2000 Guidelines, the ECART must "decline the application" and refer it to ACART.¹⁷ ECART also reviews approvals, and monitors the progress of assisted reproduction technologies (ARTs) and research in ARTs. It also coordinates with ACART.

Section 4 of the HART Act sets out the principles which should guide "[a]ll persons exercising powers or performing functions under [the] Act". It lists seven fundamental principles for the exercise of actions that are of relevance to the Act. Those principles include the requirement to take into account the health and well-being of children born as a result of the procedure, the health, safety and dignity of present and future generations (above all the well-being of women is primordial), the necessity of informed consent by donors and recipients, the necessity for offspring to be informed of their genetic origins and the respect for beliefs and values of Māori and other cultural perspectives.¹⁸

According to the regime implemented by the HART Act, all assisted reproductive procedures¹⁹ require approval by ECART unless the procedure in question has previously been declared to be an established procedure by an Order in Council from the Governor General.²⁰ The HART Order sets out the assisted reproduction procedures which are deemed to be established procedures and which are therefore excluded from approval by ECART. Certain procedures that are defined as being "established procedures" (procedures which are routinely carried out as clinical practice and are broadly acceptable to society) are exempted from regulation by the HART Act, and therefore they can be carried out without ECART approval.²¹ For example, artificial insemination is an established

16 Section 35.

17 Section 18(2).

18 Section 4.

19 See s 5 definition of "assisted reproductive procedure".

20 Section 6.

21 Debra Wilson "Surrogacy in New Zealand" [2016] NZLJ 401 at 402. The article explains in detail the Human Assisted Reproductive Technology Act 2004 [HART Act] and in particular surrogacy in New Zealand.

procedure, so long as the donor is the woman's husband, the husband's brother or cousin, or an anonymous donor, and all participants in the procedure are at least 20 years old.²²

III USE OF GAMETES

There exists a stark difference between living and deceased persons when it comes to the use of retrieved sperm, which may have some implications.

The HART Order declares certain medical procedures to be established procedures in pt 1 of the schedule.²³ These include collection of eggs and sperm for purposes such as donation, artificial insemination, egg cryopreservation and IVF. Part 2 of the schedule is dedicated to setting boundaries and certain exceptions. For instance, cl 7 states:

Despite the descriptions of established procedures in Part 1, a procedure is not an established procedure if it involves the use of eggs collected from a person who is dead when the eggs are collected or who dies before the procedure is carried out.

Thus, the use of a deceased female gametes requires approval by ECART because it is not classified as an established procedure.

As outlined in cl 5 of the HART Order schedule, if, while alive and capacitated, the man in question gave express consent and instructions as to the specific use of extracted sperm, then any use of his sperm that respects the particular consent given will be considered an established procedure and therefore will not require approval by ECART. Clause 5 asserts:

Despite the descriptions of established procedures in Part 1, a procedure is not an established procedure if it involves the use of sperm that was collected from a person, who has since died, who did not give consent to the specific use of the sperm before that person's death.

It is noted that in pt 2 of the HART Order schedule the exceptions set out in cls 5 and 7 refer to the use of both female and male gametes, but the HART Order does not mention retrieval from a deceased person. Thus, posthumous retrieval might be considered to be an established procedure. The retrieval of semen and eggs is listed in pt 1 of the HART Order as an established procedure "without limiting it to living persons".²⁴ Regarding this aspect, the High Court in *Re Lee* affirmed that there exists a gap in the law.²⁵ Indeed, there is no provision indicating who should authorise sperm retrieval.

22 Advisory Committee on Assisted Reproductive Technology *Guidelines on Donations of Eggs and Sperm between Certain Family Members* (12 December 2013).

23 Human Assisted Reproductive Technology Order 2005, sch, cl 4.

24 For a complete and thoughtful discussion of this point see Nicola Peart "Life Beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 VUWLR 725 at 732.

25 *Re Lee*, above n 1, at [100].

The use of the sperm of a deceased man who gave consent during his life to the specific use of the sperm is considered an established procedure. The HART Order supersedes cl 2.2 (b) of the 2000 Guidelines, which states "that sperm be available for use only by a specified person within a specified timeframe; if that person dies, (a) applies".²⁶ It is also considered an established procedure if the man authorised his sperm to be retrieved either after his death or if he is in a comatose state, with the intention of using the sperm posthumously.²⁷

Classifying the use of the sperm of a deceased man who, while alive, had authorised a specific post-mortem use, as an established procedure might be justified. It would be, after all, the mere execution of the deceased's will, and the terms of the consent will determine the fate of the sperm.

IV MEANING OF THE SPECIFIC USE OF THE SPERM

The difficulty with the exception related to posthumous use of the sperm is the meaning of the expression "the specific use of the sperm".²⁸ Specific use can refer to a series of elements such as a specific person, the timeframe for using the sperm, the number of times it may be used, or it could be understood as referring to the specific posthumous use. This last interpretation seems to be in accordance with the text and the purpose of the HART Order,²⁹ which was aimed at declaring some procedures to be established procedures; its purpose was not to regulate any particular procedure or the guidelines – a function assigned to ACART. Specific persons, timeframes and numbers of time are matters of regulation, and so are not included within the purpose of the HART Order.

As to the context, cl 5 mentions "use of sperm that was collected from a person, who has since died", that is, the extraction took place when the person was still alive. Hence, by necessity, a fertility clinic or provider would have required the donor's consent prior to the extraction. However, in that case, both the consent and the extraction would have been carried out while the man was alive. Consequently, when the provision continues to say "who did not give consent to the specific use of the sperm before that person's death", it is most probably referring to consent to the specific use of the sperm after his death, because consent for the general use while the man was living would have already been given when the sperm was retrieved. This is so because consent to general use while the donor is alive is always required at the moment of donation, and the majority of people donate and store their gametes because they expect to procreate in life. Posthumous reproduction is almost entirely restricted to people who died unexpectedly while young, without descendants or without having completed their family.

26 The Guidelines, above n 5, at [2.2].

27 Peart, above n 24, at 738.

28 At 738.

29 Interpretation Act 1999, s 5.

Therefore, reading down the phrase "specific use" as referring to the fact that the sperm can be used after a man is dead is aligned with the purpose of the 2000 Guidelines. Then, the most plausible meaning of "specific use" in cl 5 is as a reference to the specific use of the sperm after death. In fact, in *Re Lee*, it could be argued that the Judge understood the term as referring to the posthumous use of the sperm when he stated:³⁰

Clause 5 of pt 2 to the Schedule to the Order does not only apply to sperm taken from a person who has died. It applies equally to sperm taken from a male, while living, who did not give consent to its use after his death.

Likewise, any ethical objections to the posthumous use of the sperm may be overridden by the deceased having given prior consent to the use of the sperm posthumously.

The 2000 Guidelines only consider the case of usage of sperm extracted with consent while the man was alive, asserting in cl 2: "[c]onsent forms must include specifications as to what is to happen should the sperm donor die leaving sperm in storage at a clinic/service." It does not consider the use of the sperm extracted after the death of the semen provider.

When sperm is stored prior to undertaking a medical procedure, such as IVF or chemotherapy, the 2000 Guidelines establish that the consent form should have two options for the semen provider to choose regarding what would happen if his death occurs. The two options are: (a) "sperm should be disposed of in a culturally appropriate and respectful manner" or (b) "sperm be available for use only by a specified person within a specified timeframe".³¹

Consequently, the 2000 Guidelines restrict the meaning of "specific use" to the use by a specific person within a specific framework,³² whereas the HART Order does not impose any such restriction, rendering the 2000 Guidelines inconsistent with the HART Order. In short, the words "specific use" in cl 5 of the HART Order schedule might be understood as referring to authorisation by the deceased to use the stored sperm posthumously.

Clause 2 of the 2000 Guidelines continues with: "[f]or Māori, there should be the opportunity to discuss the use or disposal of sperm with partner and whanau. Iwi/hapu/kaumatua may provide support counselling and whakaritenga."³³ Much of the 2000 Guidelines is conditioned by ethical and bicultural aspects and giving full due respect to the "diversity of opinion within and between

³⁰ *Re Lee*, above n 1, at [95] (footnotes omitted).

³¹ The Guidelines, above n 5, at [2.2].

³² ACART Consultation Document, above n 8, at [43].

³³ The Guidelines, above n 5, at [2.0].

cultures".³⁴ The background set out in the 2000 Guidelines is essentially similar to the principles set out in s 4 of the HART Act.

The 2000 Guidelines establish what should occur in three specific situations: (a) the case of a donor who voluntarily gave an anonymous donation and who dies before use is made of the donation; (b) the case of a man storing sperm before undertaking specific medical treatment that might result in either sterility or death; and (c) the case of extraction of sperm from a deceased or comatose man.

When a man has voluntarily and anonymously donated sperm, but then dies before that stored sperm is used, the 2000 Guidelines only allow for two options:³⁵

- (1) The stored sperm may be used by any person or persons who have, in the past, conceived a child (or children) by insemination from that same sperm.
- (2) If the above does not apply, the sperm should be disposed of in a culturally appropriate manner.

Option (1) could lead to an application to use the sperm, in which case the 2000 Guidelines require that any woman intending to use the sperm should receive appropriate counselling, including advice on the option to wait a certain time for proper consideration before proceeding with the treatment.

Prior to his death, the man may have authorised the use of his sperm by a specified person within a specified timeframe, and if not, the 2000 Guidelines clearly restrict the post-mortem use of voluntarily and anonymously donated sperm, to only women who have already conceived a child using the donated sperm.³⁶ As to the posthumous use of female gametes – ovarian tissue or embryos created with female procreative material – the 2000 Guidelines are silent.

Section 7 of the Human Tissue Act 2008 expressly excludes human embryos or human gametes from the definition of "tissue", thereby giving no authority for extraction of such material from a deceased person. However, as noted by ACART in the 2018 consultation process,³⁷ it does not exclude ovarian or testicular tissue. The omission is likely due to the fact that ovarian and testicular tissue are used in medical practice for other purposes, and at the time the law was enacted ovarian tissue was not used for reproductive purposes. The technological advances in assisted reproduction will create an overlap in the law, taking into account that gametes can be derived in vitro from other cells.³⁸

34 At [1.0].

35 At [2.1].

36 At [2.1].

37 At 8, n 18.

38 Deepa Bhartiya and others "Making gametes from alternate sources of stem cells: past, present and future" (2017) 15 *Reproductive Biology and Endocrinology* 89 at 89:

V CONSENT

The issue of the form of consent has great relevance for posthumous reproduction on account of the fact that the retrieval and use of procreative material, in most cases, takes place in unexpected circumstances. In fact, posthumous reproduction is an answer to those people who unfortunately die young without descendants, or not having had the number of children they wanted to procreate. It is really a consequence of the uncertainty of life and the hope that young people do not die without fulfilling their destiny in life. Autonomy is at the core of the necessity that a person should provide informed consent to any procedure. The issue arises that, in the case of a deceased person, he or she no longer has the autonomy to give informed consent. In so far as reproductive material has the potential to be used after death, the reproductive interest of the deceased also remains.³⁹ It then follows that, in order to appreciate whether or not the deceased's reproductive interest is respected, each case needs to be considered individually. The simplest reason to oppose the use of the sperm posthumously without consent is the possibility that the deceased would have not consented to becoming a parent after death.⁴⁰ Any initial concerns that the deceased could have had against reproducing posthumously would likely have been dismissed and replaced with the desire of both upholding "his loved one's happiness" and the "perpetuation [of] one's genes".⁴¹ The instinct of genetic continuity has been argued as a justification for a more lenient approach to the requirement of consent as a condition for permitting the retrieval of procreative material from a suddenly deceased person.⁴² The requirement of written consent in an emergency situation would preclude the extraction of the procreative material in most situations. In an unexpected death, by necessity consent needs to be proved by other means, or inferred from facts and circumstances prior to death. This stance is supported by some scholars such as Rebecca Collins⁴³ and Merle Spriggs and Justin Oakley.⁴⁴ Commenting on a case in which the Supreme Court of Brisbane denied a girlfriend's application to retrieve her boyfriend's sperm, Spriggs and Oakley contended that it was sufficient to infer that the

Pluripotent, very small embryonic-like stem cells (VSELs) have been reported in adult tissues including gonads, are relatively quiescent in nature, survive oncotherapy and can be detected in aged, non-functional gonads. Being developmentally equivalent to PGCs (natural precursors to gametes), VSELs spontaneously differentiate into gametes in vitro.

- 39 Belinda Bennett "Posthumous Reproduction and the Meanings of Autonomy" (1999) 23 MULR 286.
- 40 Rebecca Collins "Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma" (2005) 30 *Journal of Medicine and Philosophy* 431 at 434.
- 41 At 435.
- 42 Shelly Simana "Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?" (2018) 5 *Journal of Law and the Biosciences* 329 at 341.
- 43 Collins, above n 40.
- 44 Merle Spriggs and Justin Oakley "Woman wants dead fiancé's baby: who owns a dead man's sperm?" (2004) 30 *J Medical Ethics* 384.

deceased would have consented to the extraction and would have accepted the idea of having children even if he would not be able to fulfil the role of father.⁴⁵ Accordingly, consent could be inferred from actions of the deceased such as past sperm donation and consent to organ donation. The authors argued that the deceased's prior donation of sperm reveals or entails that his permission to use the sperm "included giving up any interest in or control over its future use".⁴⁶

In fact, other scholars have also argued in favour of the presumption of consent in order to preserve the possibility of a partner to procreate, to give a sibling to a child, or not to deprive parents from having grandchildren.⁴⁷ The presumption of consent can be grounded on the interest of the partner to reproduce, maintaining that the partner of a deceased man can appeal to the "strong expectation" of procreation when asking for extracting her partner's gametes.⁴⁸

Kelton Tremellen and Julian Savulescu have proposed presumed consent for posthumous reproduction in order to allow the deceased's partner to procreate if she so desires, as long as there is no express objection from the deceased, contending that:⁴⁹

... the welfare of the living is a far more important consideration than splitting hairs over degrees of consent and infringement of alleged autonomous rights of a deceased person. It is important to remember that the dead person no longer exists, so at that time cannot have interests or be autonomous.

Therefore, in cases of sudden and unexpected death it cannot be claimed that most people would not have consented to the retrieval and use of the procreative material. On the contrary, the very fact that there has been an increase in the number of men storing sperm, together with surveys of men's opinions which have been carried out, suggests that most men are in favour of posthumous conception.⁵⁰ This is assuming that there is no clear objection from people who act in the interests of the deceased persons such as immediate family members, including the partner and parents. Those people are, in the majority of cases, the ones who require judicial authorisation for gamete retrieval.

45 At 384.

46 At 384.

47 Collins, above n 40.

48 Simana, above n 42, at 350. When a relationship generates a strong expectation of procreation, partners may rely on such expectations, and therefore should be entitled to use the deceased's gametes. It further claims that the interest of the deceased's parents in grandparenthood should be legally recognised.

49 Kelton Tremellen and Julian Savulescu "A discussion supporting presumed consent for posthumous sperm procurement and conception" (2015) 30 *Reproductive BioMedicine Online* 6 at 9.

50 At 12. Tremellen and Savulescu state:

... "presumed consent" should become the default for allowing posthumous conception, with posthumous conception only being prohibited if a man has actually recorded his wishes not be involved in an advance directive or a donor opt-out registry.

The requirement of consent in writing, together with the presumption of objection, frustrates the desires of the deceased's loved ones on the grounds of a legal presumption or a condition, which might not be in accordance with the true will of the deceased person concerned. In that sense, both stances might violate the deceased's autonomy rather than protect it, because the deceased could have expressed his or her thoughts about reproduction after death to the immediate family or could have shown consent by other facts or circumstances not necessarily in written form. Thereby, the position which best upholds and respects the deceased's autonomy, when sudden death has occurred, is the middle ground of allowing consent to be proved or inferred through any legal means permitted in law. When some facts cannot be proven using definite evidence, legal mechanisms exist for deducing or inferring the facts: posthumous reproduction as an outcome of an unexpected event should rely on those means in order to ascertain the deceased's consent to retrieval of gametes. This middle ground approach reflects the New Zealand position and is respectful of the deceased's autonomy but at the same time is mindful of the partner's prospects of having children with the deceased that would otherwise be frustrated by the sudden death.

Section 4(d) of the HART Act states:

[N]o assisted reproductive procedure should be performed on an individual and no human reproductive research should be conducted on an individual unless the individual has made an informed choice and given informed consent[.]

However, the provision is silent on the exact form of consent. Certainly then, the law does not restrict the consent to be in written form, as is the case in the United Kingdom.⁵¹ Therefore, in theory, it would be possible to establish consent through other means admitted in law. In short, in New Zealand the extraction of gametes from a dead person does not require written consent.

In the case of a recently deceased or comatose person, the 2000 Guidelines are limited to the following statement: "[t]he Committee considers that collection of sperm from a comatose or recently deceased person without that person's prior written consent is ethically unacceptable."⁵² This statement emphasises that, the legal right to extract gametes from men who, at the time of proposed extraction, are deceased or otherwise incapacitated, rests heavily on prior written consent by that person, rather than consent in any form. It is thus inconsistent with s 4 of the HART Act and, as such, is overridden by the later legislation.

The meaning of informed consent is considered to be consent for posthumous procreation, given in knowledge of the consequences of the procedure and the risks it entails to one's health. For the case of posthumous reproduction, clearly a deceased person can assume no risk relating to his or her health, so consent can only refer to procreation after death.

51 Human Fertilisation and Embryology Act 1990 (UK), sch 3, cls 1 and 2.

52 The Guidelines, above n 5, at [2.3].

Summing up, requiring written consent for posthumous reproduction goes beyond the scope of the HART Act and in addition, precludes in practical terms the retrieval or use of gametes in emergency situations, where the casualty occurred unexpectedly. The Human Tissue Act offers an approach to deal with post-mortem consent, albeit gametes are not considered tissue.⁵³ However, the stance implemented in that legislation would be useful guidance in the case of retrieval and use of gametes from a deceased person.⁵⁴ For instance, ss 31 and 32 admit that posthumous consent can be given by successive substitutes when the individual had not consented prior to death or raised an informed objection. The persons entitled to give consent on behalf of the deceased are, per s 31(2), in the first instance, the individual's nominee or nominees. In the second instance, a member of that individual's immediate family can provide consent. Finally, if the immediate family fails to provide consent, a close available relative of the deceased individual may do so. In all cases, there must not be any objection raised by the substitutes that have precedence in the ordering.⁵⁵

Drawing from the previous approach, the absence of the deceased's consent would entitle the immediate family to grant consent in substitution on two grounds. First, as witnesses, they are the persons who are assumed to have the best knowledge of the deceased's feelings and desires. Second, they are the best placed individuals to act on behalf of the deceased. In particular, one should consider that the immediate family or close relatives might be best suited to ascertain what the deceased person him or herself would have done in the specific situation.

Considering that the HART Act does not restrict consent to an assisted reproductive procedure to a written form, and given the terms of the HART Order concerning posthumous use of sperm,⁵⁶ the question arises whether or not sperm collected from a man while alive, but who has since died, can be used posthumously without ECART approval when there is no written consent, but when there is another form of consent. In other words, can the deceased's partner make post-mortem use of the deceased's stored semen, without first obtaining ECART approval, on the grounds that the deceased had consented to use of his sperm, although not in writing?

The answer to the first question is positive, bearing in mind that consent to use the semen posthumously is not restricted by the HART Act to being in a written form. The next question entails

53 Section 7(2).

54 Bill Atkin and Paparangi Reid *Assisted Human Reproduction: Navigating our Future* (July 1994) at 96–97. This proposition is not new. Professor Bill Atkin proposed an analogy to the Human Tissue Act 1964 in the issue of gametes and embryos.

55 Human Tissue Act 2008, ss 31–32.

56 Schedule, cl 5:

Despite the descriptions of established procedures in Part 1, a procedure is not an established procedure if it involves the use of sperm that was collected from a person who has since died, who did not give consent to the specific use of the sperm before that person's death.

how to implement a legal mechanism to prove consent, or to set out which persons can make decisions on behalf of the deceased.

VI *ADVISORY COMMITTEE ON ASSISTED REPRODUCTIVE TECHNOLOGY (ACART) GUIDELINE CONSULTATIONS*

In view of the lack of a framework to regulate posthumous reproduction in a consistent manner, ACART is undertaking a review of the 2000 Guidelines concerning posthumous reproduction. In the consultation process, ACART admitted that the 2000 Guidelines were restricted to the use of sperm retrieved from a man while alive with his written consent. Consequently, the following matters are being considered by ACART in the consultation process, which was open for submissions until 19 October 2018:⁵⁷ the posthumous retrieval, of both male and female gametes and reproductive tissue; the post-mortem use of eggs and reproductive tissue retrieved from a deceased woman, as well as the use of reproductive tissue retrieved from a deceased man; and the use of stored eggs or stored embryos after the death of one or both of the gamete donors.⁵⁸ Also being considered is the "use of gametes ... taken from a deceased or permanently incapacitated person".⁵⁹

Where prior written consent exists, the terms of the consent will determine the fate of the procreative material; in that case, it merely implies the execution of the deceased's will. However, where written consent is missing it is necessary to consider whether it is admissible to prove consent through other legal means or evidence that are generally admitted in law, or whether the consent can be inferred or deduced from the circumstances or facts.

In the consultation process, ACART posed the following:⁶⁰

Do you agree that posthumous use of gametes taken or embryos created when the deceased was alive and competent should only be permitted with the written consent of the deceased?

If you do not think explicit written consent is always required, do you agree that posthumous use of gametes or embryos should be permitted without written consent from the deceased where:

- there is evidence that the deceased gave verbal consent?
- there is no evidence of consent from the deceased, but there is evidence that use is consistent with his or her wishes, feelings and beliefs prior to death? (inferred consent)

⁵⁷ ACART Consultation Document, above n 8, at [2].

⁵⁸ At [2].

⁵⁹ At [Consultation Question 5].

⁶⁰ At [Consultation Question 4].

- there is no evidence of consent from the deceased, but there is no reason to think use is inconsistent with their wishes, feelings and beliefs prior to death? (no consent but no objection)

The first three scenarios are cases of "opt in", while the fourth is a case of "opt out". The questions apply to collection of semen, ovum, reproductive tissues or embryos.

Taking into account the fact that s 4 of the HART Act does not restrict consent to the written form and considering that retrieving procreative material in cases of emergency often entails a lack of written consent, admission of other forms of evidence is imperative. This being so, the issue at stake is which kinds of evidence should be permitted in considering whether consent has been given or can be inferred. It is assumed that the person asking permission is entitled to use the material, either because that person was the permanent partner of the deceased with an interest in reproducing, or that person is a parent of the deceased in cases in which there is no partner.

In answering the question of consent, special attention and relevance should be paid to consider and respect "the needs, values, and beliefs of Māori", since it is mandated by s 4 of the HART Act and constitutes an expression of the Crown obligation under the Treaty of Waitangi. Therefore, Māori views need to be considered by ACART in the formulation of the guidelines concerning posthumous reproduction.

Central to Māori customs, according to one scholar in a discussion on the views held by Māori chiefs in 1840, is the ethical position that "the dead had considerable moral status, and their interests were to be counted alongside those of the living".⁶¹ The author pointed out that supporters of this position can draw an analogy with small children, whose interests count but who depend on adults.⁶² Thus, in the case at hand, living persons can undertake to represent the interests of the deceased, or grant consent on behalf of the deceased.

It has also been put forward that, in Māori tradition, death is thought of as a journey rather than an instantaneous incident.⁶³ The wairua, or spirit, starts the excursion to the next world at the moment of physical death. However, it requires time to adapt and become part of the next world, and in the process of exploration the wairua returns to the body. This belief is manifest in Māori tangihanga, or funerals, that last for two or three days. "The wairua of a deceased donor may be affected by actions taken after death, for example organ donations."⁶⁴ Likewise referring to organ donations, the authors

61 Tim Mulgan "The Place of the Dead in Liberal Political Philosophy" (1999) 7 *The Journal of Political Philosophy* 52 at 52.

62 At 63.

63 Greg Lewis and Neil Pickering "Māori Spiritual Beliefs and Attitudes to Organ Donation" (2003) 4 *NZBioeth J* 31.

64 At 33.

affirm that not burying a complete corpse "would be disrespectful, and have ramifications for the ancestral line".⁶⁵

Given these beliefs and cultural understandings and the potential implications they would have for retrieval or use of gametes, it is clear that a presumption of consent for the retrieval or use of procreative material, as well as a presumption of objection, do not respect the deceased's interests and is contrary to the notion that the deceased has moral status. The presumptions are mere general assumptions which disregard the deceased's true intentions regarding posthumous reproduction and deny any voice to the deceased.

Furthermore, the concept of death as a continuum, rather than as a static and unique moment, might give rise to a rejection of certain posthumous reproduction techniques by some Māori when the method of extraction is invasive. One should bear in mind that the extraction of female procreative material, at least up to now, requires undergoing surgery. Nevertheless, the point is that the circumstances of each case could condition the consent. Above all, it illustrates the importance of ruling out presumption in order to respect individual Māori decisions.

Presumed consent is also beyond the wording of the s 4 of the HART Act, since the provision requires "informed" consent. In conclusion, the HART Act establishes a middle-of-the-road approach to the issue of consent by discarding the two extreme positions, although it is still possible to infer consent from specific acts.

Written consent is a stance that is more restrictive than the current law. Hence, the first question formulated by ACART is not pertinent or in conformity with the HART Act, since the Act calls for consent without any specification of its form.

The presumption of consent (or the "opt out" option) might not actually imply consent, as it prioritises reproduction over autonomy, or at least the certainty of what the deceased wanted. Likewise, the presumption of consent regarding the use of sperm, if it applies, would make an application for ECART approval redundant because, according to the HART Order, the use of semen from a man who gave consent to the "specific use" and then died, renders the procedure as "established". Nevertheless, as has already been affirmed, the HART Act does not require written consent. That being so, it is possible to give consent to the "specific use", whatever may be the reading down of the expression, through other means of evidence. Then the question arises of who is entitled to give authorisation, and to consider whether or not consent has been given to the "specific use" of the sperm posthumously. The answers to these questions point towards the need to implement a legal mechanism to prove consent, to set out who is authorised to decide if consent has been given, and which other means are acceptable for proving consent. The fertility provider or clinic which harvested the sperm and which would perform the in vitro fertilisation procedure could be the most appropriate

65 At 33.

authority to decide when the consent requirement is satisfied. In the actual framework, cl 2 of the HART Order schedule is ineffective because it lacks legal provisions regarding which other legal means, in addition to written consent, are deemed sufficient to prove consent. The realisation of cl 2 of the HART Order requires a further step so as to render possible the use of stored sperm when there is consent to the specific use, although not in written form.

In the consultation process, ACART is taking this issue into account, although it refers in general to the use of gametes and embryos without distinction.⁶⁶

It could be considered that a different mechanism is appropriate for authorisation of the posthumous use of reproductive material. The Human Tissue Act's hierarchy of consent, discussed above, could be one alternative mechanism we could use in determining who should authorise the use of reproductive material.

ECART might be excluded as a body in charge of deciding whether or not consent to the posthumous use of the sperm has been proven, taking into account that, when consent to the use of the sperm posthumously exists (whether or not in writing), it is classified as an established procedure, and therefore does not require ECART intervention. If ECART were to undertake this task, in practical terms, it would amount to a blurring of the line between a general assisted reproductive procedure and an established procedure concerning posthumous use of the stored sperm, because both cases would require ECART intervention.

The direct consequence of declaring a procedure to be "established" is to remove it from the need to seek ECART approval; as such, an alternative body ought to be authorised to decide whether or not consent has been given.

Likewise, in the review consultation ACART asks: "[w]ho should authorise the posthumous use of gametes, tissue or embryos?"⁶⁷ The question is a general one, without drawing any distinction between the posthumous use of sperm stored with or without consent. ACART is an advisory committee and as such is entitled to confine the terms of the consultation, yet it is clear that it implies changing the actual framework.

The presumption of consent as proposed by ACART could be useful. However, the terms of s 4 of the HART Act and the Māori notion of the dead person as having moral standing rule out the presumption of consent, since consent is required. Therefore, the current default is that there is no presumption. Nevertheless, it would be possible to establish inferred consent from the facts, such as, for instance, if the man already had a child with his partner's consent, from which a desire to give a sibling to the child could be inferred.⁶⁸ Where the man was trying to have a child with his partner and

66 ACART Consultation Document, above n 8, at [126].

67 At [Consultation Question 6].

68 At [99]. This is one of the possible policy options offered by ACART.

died prematurely, consent could be proven or inferred from the partner and the deceased's parents' affirmations regarding the deceased's will. In general, where the deceased's partner and parents agree and affirm that the deceased would have consented to posthumous reproduction, consent could be deduced. However, if there is opposition or different points of view concerning the deceased's consent, then consent cannot be inferred because the basis which would underpin the inference is not sufficiently strong and most likely it would be difficult to prove consent, unless there is some tangible and uncontroversial means to prove that the deceased consented to reproduce posthumously.

Kelton Tremellen and Julian Savulescu have suggested that presumed consent is a better option than "implied (proxy)" consent, since the latter is prone to bias from the widow regarding the deceased's views and implies a high probability of conflicting declarations among family members.⁶⁹ However, in other family civil proceedings, the law relies on affirmations of family members, despite the risk of lack of objectivity.⁷⁰

It also could be argued that the outcome when inferred consent is proven is the same as if there had been a default of presumption, although there is a clear difference. The burden of proof in an environment of inferred consent lies with those wanting to carry out the reproductive procedure, while in an environment of presumption the burden of proof lies with those wanting to impede the reproductive procedure. Also, inferred consent upholds the principle of autonomy, whereas presumed consent may not because the deceased might have objected.

Inferring consent is appropriate in a multicultural society, since it can accommodate different perspectives regarding posthumous reproduction. In particular it respects the moral and ethical views of Māori, which must be taken into account as mandated by the Hart Act.⁷¹ As ACART put forward, "[t]he body of an individual can be seen as a physical manifestation of whakapapa."⁷² This might have implications concerning posthumous retrieval of gametes or procreative tissue.⁷³ In particular, the holistic approach of Māori culture might regard presumption of consent as inappropriate. The same can be said regarding presumption of objection to reproduce posthumously since it does not take into account the deceased's true interests concerning posthumous reproduction. Furthermore, in practical terms the presumption of objection entails the preclusion of an authorisation that is not accompanied by written consent, because in such a case it would be difficult to rebut the presumption.

Overall, the current legal framework in New Zealand has the effect of boiling down the question formulated by ACART to only two scenarios: proof of informed consent through non-written means

69 Tremellen and Savulescu, above n 49, at 9.

70 See Evidence Act 2006, s 71(1)(a).

71 Section 4(f).

72 ACART Consultation Document, above n 8, at [82].

73 At [82].

and inferred consent. In particular, it is observed that in the consultation process, ACART has not considered the presumption of objection as an option.

The authorisation to use a woman's procreative material or implant an embryo created by a deceased woman's gametes would require another woman to gestate the embryo. Hence, in the actual framework it would be better to consider both authorisation to use female procreative material and surrogacy in conjunction, rather than as individual issues. After all, it makes no sense to authorise the use of procreative material if the surrogacy agreement would be rejected.

Posthumous use of female procreative material is more complicated because it requires the additional step of maturation of the eggs. In fact, the only known case of posthumous maternity is Nissim and Keren Ayash of Israel, whose baby was born to a surrogate mother who gestated the embryo created by both parents before Keren died from cancer.⁷⁴

VII THE CASE OF RE LEE

In 2017 Mr Lee died unexpectedly. His partner, Ms Long, who was pregnant with her first baby, applied to the High Court for an authorisation to retrieve and store Mr Lee's semen within 36 hours after his death, given that sperm is only viable for reproduction for a limited number of hours after death. In the affidavit, Ms Long affirmed that: "I wanted to retain the ability for our unborn child to have the benefit of a sibling."⁷⁵

The issue before the Court was whether or not the deceased man's partner ought to have the right to "harvest" her deceased husband's sperm. The subsequent gamete use after their retrieval was not a matter before the Court. The Court handed down a judgment which analysed in depth the Court's power to grant the order sought by Ms Long, the other legal alternatives that would have entitled her the right to control the procreative material, such as property rights in her partner's semen and the overall legal framework concerning posthumous reproduction.

The Court pointed out the absence of evidence regarding Mr Lee's express consent to the use of his sperm post-mortem, and noted that it "raises some important public policy considerations".⁷⁶ However, there were three elements in the case which were taken into consideration by the Judge: (1) that the man had been subjected to fertility treatment prior to his death and had given sperm samples, although the samples were not stored; (2) that he had expressed during his life the desire to give a sibling to his child, as was contended by Mr Lee's parents; and (3) that all of the members of Mr Lee's family (parents, sister, and brother) agreed with Ms Long's application.

74 Irit Rosenblum "Being Fruitful and Multiplying: Legal, Philosophical, Religious and Medical Perspectives on Assisted Reproductive Technologies in Israel and Internationally" (2013) 36 Suffolk Transnat'l L Rev 627.

75 *Re Lee*, above n 1, at [8].

76 At [9].

Before examining the jurisdiction of the Court, the Judge asserted:⁷⁷

... there are no statutory or regulatory provisions that deal explicitly with the ability (or otherwise) for a person in the position of Ms Long to collect and use sperm from a deceased spouse or partner.

It was also noted that the HART Act was silent on the authorisation to retrieve or use sperm posthumously. However, the possible use of sperm retrieved from a deceased man is not barred by the Act.

Heath J handed down a remarkable judgment considering the extensive analysis of all legal aspects surrounding the case at hand. In particular, the examination of the legal scheme underpinning the authorisation of human assisted reproduction procedures, specifically posthumous reproduction, constitutes the first judicial decision on this issue, thereby shedding some light on the matter.

Notwithstanding the lack of a legal provision governing the application to retrieve sperm, in order to exercise the inherent jurisdiction the Judge gave due consideration to the framework regulating assisted reproduction. The exercise of the inherent jurisdiction must be in accordance with the law, and the framework serves to identify the scope of the jurisdiction.⁷⁸

Relying on s 12 of the Senior Courts Act 2016, the Court went on to analyse the case law concerning the inherent jurisdiction, noting two judgments of the Supreme Court: *Mafart v Television New Zealand*⁷⁹ and *Siemer v Solicitor-General*.⁸⁰ According to the judgment:⁸¹

... the Supreme Court held that the inherent jurisdiction may be exercised by any superior court of record to fill a void when what the Court is being asked to do does not conflict with any statutory or regulatory requirements.

In considering the scope of the inherent jurisdiction the Judge found support in the *Mafart v Television New Zealand* decision which noted that: "[t]o the extent that the rules do not cover a situation, the inherent jurisdiction supplies the deficiency."⁸² Regarding the nature of the inherent jurisdiction the court cited *Re JSB (A Child)* which considered that:⁸³

77 At [26].

78 At [27].

79 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18.

80 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767.

81 *Re Lee*, above n 1, at [31].

82 *Mafart*, above n 79 at [16], as cited in *Re Lee*, above n 1, at [34], relying on IH Jacob "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23 at 27–28; and *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 682 per Richmond J and 689 per Woodhouse J.

83 *Re JSB (A Child)* [2010] 2 NZLR 236 (HC) at [55].

Parens patriae and administration are two manifestations of the inherent jurisdiction. Together, they demonstrate the existence of jurisdiction applying to a continuum, from the beginning of life until after its end.

Finally, the Judge listed a series of cases using the inherent jurisdiction, which reflected its nature as a continuum.

The Judge was of the view that the Court could exercise its inherent jurisdiction to fill a gap in the law. Specifically, this decision was taken due to the lack of an explicit provision dealing with the issue of sperm extraction from a deceased man. Otherwise, the wife's ability to apply to ECART for an authorisation to use the sperm would have been frustrated.⁸⁴

VIII ARE THERE PROPERTY RIGHTS IN GAMETES OF A DECEASED PERSON?

A second matter examined by the Court in *Re Lee* was whether or not Ms Long had property rights in relation to the semen. The Judge went on to analyse Australian and English case law on the matter and found that, in the Australia case of *Doodeward v Spence*,⁸⁵ it was held that property rights in parts of a human body could be recognised, as long as additional work or skills were applied to the body, transforming the body into something other than a mere corpse. In the words of the Court, property in the human body may be recognised where:⁸⁶

... when a person has by the lawful exercise of work or skill so dealt with a human body ... that it has acquired some attributes differentiating it from a mere corpse awaiting burial ...

The Court asserted that the property stance stated in *Doodeward v Spence* has been followed in Australia in applications made by widows to obtain authorisation to collect the sperm of their deceased husbands in order to conceive a child. The Court cited *Re H, AE (No 2)*, where it was held that: "[t]he deceased's sperm may be treated as property, at least to the extent that there is an entitlement to possession."⁸⁷

Nevertheless, citing the Supreme Court in *Takamore v Clarke*⁸⁸ the Court held that: "the New Zealand common law position" is that "there can be no property in the dead body of a human being."⁸⁹

84 *Re Lee*, above n 1, at [100].

85 *Doodeward v Spence* (1908) 6 CLR 406 at 411 and 414.

86 At 414.

87 *Re H, AE (No 2)* [2012] SASC 177 at [58], as cited in *Re Lee*, above n 1, at [80].

88 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [117].

89 *Williams v Williams* (1882) 20 ChD 659 at 644, as cited in *Takamore v Clarke*, above n 88, at [113], as cited in *Re Lee*, above n 1, at [78].

The Judge concluded that this precedent was binding on him and consequently he deemed the partner had no property rights over her partner's semen.⁹⁰

In *Yearworth v North Bristol NHS Trust* the Court recognised the existence of property interests in preserved sperm samples and held: "[i]n our judgment, for the purposes of their claims in negligence, the men had ownership of the sperm which they ejaculated."⁹¹ The England and Welsh Court of Appeal dismissed the argument that the men lack the ability to "direct" their sperm usage separately from its ownership and pointed out that "their negative control over its use remains absolute".⁹²

Despite the position of *Yearworth* that men could have ownership over their sperm, the High Court deviated from this approach, pointing out that *Yearworth* dealt with living men who sued the bailee who had failed to uphold the duty of care causing the sperm to perish, whereas the case at hand concerned a deceased man. The express contraposition between sperm from dead and living persons seemed to suggest that it could be possible to argue in favour of property rights in a similar case of breach of bailment. Nevertheless, the Court affirmed: "I leave open the question whether, as a matter of New Zealand law, an action for breach of bailment could be maintained in the circumstances disclosed in that case."⁹³

The Court found that despite the fact that sperm retrieval from the deceased man was not unlawful and the partner was entitled to apply to ECART requesting permission to use the sperm for reproductive purposes, there was no legal indication concerning the extraction process. Heath J remarked:⁹⁴

...the inherent jurisdiction may be invoked where it is thought necessary to preserve a partner's ability to apply to the Ethics Committee for permission to use an assisted reproductive procedure to bear a child through the use of her late partner's sperm extracted after his death.

The upshot of the case was that the Court granted permission to the applicant to have the sperm extracted from the husband's dead body.

The High Court made it clear that New Zealand courts have the jurisdiction to make an order to retrieve sperm from a deceased man at the request of the deceased's partner. However, the Judge affirmed: "I leave open the question whether the High Court could exercise similar jurisdiction to

90 *Re Lee*, above n 1, at [78].

91 *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1 at [45(f)].

92 At [45(f)].

93 *Re Lee*, above n 1, at [91].

94 At [102].

enable sperm to be taken from a comatose man."⁹⁵ In spite of this affirmation, in reliance on the judgment in *Re M* as handed down by Woodhouse J in 2014,⁹⁶ Heath J stated:⁹⁷

In that case, a wife had applied for "the removal, transfer and storage of testicular tissue" from her husband, at a time when he was in a comatose state and was on artificial life support. A declaration was made that it "will be and is lawful" for such a procedure to be undertaken.

Although Heath J did not go into the reasons for his decision, and the circumstances of the case are not completely known, at least this case might stand as a precedent for exercising the inherent jurisdiction in the case of a comatose man.

After asserting the jurisdiction of the Court, the Judge resolved that the Court should have control of the sperm during and after the ECART decision, including giving effect to any measure adopted by ECART, whether positive or negative, to determine whether the gametes samples should be destroyed or used "in some other way".⁹⁸ The other way to use the sperm, which should be decided by the Court upon application from Ms Long, would be to export the sperm to another jurisdiction should the application to ECART fail. According to the judgment, in deciding such an application, due regard must be given to the reasons expressed by ECART in a decision rejecting Ms Long's use of the sperm.⁹⁹

VIX OTHER HURDLES AND CHILDREN RIGHTS

The answer to the question of whether or not the Court might exercise the inherent jurisdiction to order the retrieval of ovarian tissue or female procreative material from a deceased woman at the request of her partner is in suspense. At first blush, the answer to the question might be positive, giving equal footing to the extraction of procreative material from men and women. However, the fact that the partner of a deceased woman would need to have recourse to a surrogate to have a child complicates the authorisation to use female gametes. New Zealand has implemented a restricted surrogacy scheme where only altruistic surrogacy is permitted and the agreement is unenforceable.¹⁰⁰ Further, the surrogacy arrangement must meet the requirements set out in the "Guidelines on Surrogacy involving Assisted Reproductive Procedures".¹⁰¹ For instance, cl 2(a) requires that at least

95 At [103].

96 *Re M* [2014] NZHC 757.

97 *Re Lee*, above n 1, at [15].

98 At [120], referring to the case of *Re M*, above n 96.

99 At [123].

100 HART Act, s 14.

101 Advisory Committee on Assisted Reproductive Technology *Guidelines on Surrogacy involving Assisted Reproductive Procedures* (12 December 2013).

one of the intending parents must be genetically related to the child, which implies that the man must be fertile. In general, the guidelines set out a stringent regime concerning authorisation.

As far as female procreative material is concerned, the current definition of mother and father in ss 17 and 18 of the Status of Children Act 2004 will hinder a deceased woman to be considered a legal mother, and it will also preclude the man from being considered the legal father. The surrogate and her partner would be deemed to be the parents of the child conceived using the deceased woman's gametes. Of course, once born the child can be adopted by the father.

Posthumous reproduction has further effects on children's rights which need to be addressed by Parliament due to the fact that children's rights are outside of the scope of ACART's functions. For instance, important questions arise relating to issues such as parentage of children born from posthumous reproduction, their registration, their inheritance rights and other social rights. The regulation of this technology and its consequences as a whole requires parliamentary intervention in respect of legal parenthood and the rights bestowed upon legal parents. Nevertheless, children's and parents' rights are beyond the scope of this article.

X CONCLUSION

The form of consent in posthumous reproduction is of utmost importance both to permit procreation in unexpected circumstances and at the same time protect autonomy. This article argues that s 4 the HART Act endorses a middle-of-the-road approach to consent in posthumous reproduction. That is, it is feasible to provide consent through other evidence besides written form, since this position upholds the principle of autonomy and respects different perspectives in a pluralistic and multicultural society. Furthermore, in analysing the word "specific use" as set out in cl 5 of the HART Order schedule the article argues that the High Court in *Re Lee* understood the term as referring to the posthumous use of sperm and that this interpretation is more accurate for the purpose and context of the HART Act. Consequently, the article also contends that the use of stored sperm with the deceased's consent to use it posthumously might be deemed to be an established procedure, even though the consent is not in writing. Finally, in analysing *Re Lee*, the present article has shown that the High Court maintained the doctrine of lack of property rights in sperm taken from a deceased body. The article has also highlighted the need for ACART to regulate the extraction of gametes from a deceased person