

## **LEGAL ASPECTS OF POST-MORTEM REPRODUCTION: A COMPARATIVE PERSPECTIVE OF FRENCH, BRAZILIAN AND PORTUGUESE LEGAL SYSTEMS**

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**Abstract:** Death arrives always too soon, and most often unexpectedly, destroying our plans and the plans of the ones who love us. Medically assisted reproduction offers nowadays a technique that makes possible to have children from someone that recently passed away. Post mortem reproduction is not the satisfaction of a mere whim, but the continuity of strong love affections, and frequently provides some kind of fulfillment to the common aspiration of the couple in constituting a family. All around the world courts and law makers are profoundly divided in the legitimacy of this practice. The well being of the child to be and the respect for the dead person seem to be the strongest arguments against. But, as this study will show, none of them resist to a more careful scrutiny. Therefore, not only post mortem embryo transfer should be allowed, but post mortem insemination and fertilization should also be permitted.

**Keywords:** Medically Assisted Reproduction; Post-Mortem Reproduction; Consent; Right to Constitute a Family.

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## 1. INTRODUCTION

The last five decades have witnessed an extremely fast development in the field of medical sciences, with effects that have not yet been properly measured. The scientists' achievements undoubtedly prove to be important for the development of society, generating behavioral changes in the social fabric, and in society as a whole.

These changes, of course, demand for adjustments in the legal system, and the law is necessarily slower on its way to provide solutions, or even regulate certain acts and procedures, thus causing conflicts and doubts arising from the evolution of the way we face the world.

The lack of adequate legal means to respond to these emerging conflicts leaves to bioethics, and to the systemic interpretation of the sources of law, the task of pointing out the new paths to be followed, strengthening the communication of such different sciences, and yet so interrelated as law and medicine.

One of the situations that well illustrate the difficulty in finding the correct path between the alternatives is well defined by the ethical-legal conflicts arising from the possibility of post-mortem assisted reproduction.

Recently, two cases involving post-mortem reproduction caught the attention of the Brazilian press. The first case<sup>1</sup> reported a judicial pilgrimage of a woman - Nara Azzolini - who lost her fiancé - Bruno Leite - because of an aneurysm that killed him within a few hours. On receiving the news of impending death, Nara and Bruno's parents decided in mutual agreement, to seek for the services of a fertility center to harvest sperm from Bruno, in order to follow up the future marrying couple's plans to generate children from their union.

Guided by the clinic's staff, they sought - and obtained - a court order (in less than 12 hours) to perform surgical procedure that removed tissue from Bruno's testicles, which was then frozen, a technique that can make them viable for about 20 years, according to scientific estimates.

The next step, described the newspaper the report, would be to get permission to conceive a child through *in vitro* fertilization with the use of the dead groom's genetic material. This situation, in addition to bioethical dilemmas,

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1 Available at Portal G1 ([www.g1.com.br](http://www.g1.com.br)) and reproduced on the website Espaço Vital ([www.espacovital.com.br](http://www.espacovital.com.br)) on April 26, 2010.

raised other legal issues because of the absence of an specific legislation on the subject, raising further doubts about which way to go because of the consequences of inheritance, equity, and psychological matters.

We must take into consideration the fact there is no living will or any kind of anticipated declaration of intent or similar document, recording in writing the desire of the late groom to see a child conceived after his death.

A few days later, the newspaper *Folha de São Paulo*<sup>2</sup> reported the injunction granted by the 13th Civil Court of Curitiba / PR - Case No. 0027862-73.2010.8.16.0001 - authorizing a school teacher, Katia Lenemeier, to go through a fertilization procedure, trying to get pregnant with the frozen sperm of her late husband, who died three months before, due to melanoma. Having been surprised by the appearance and fast development of the disease, the couple – married for five years – decided to seek expert medical help to freeze the semen of the husband before the start of chemotherapy, which could lead him to infertility as a side-effect.

Seeking to continue the project that they shared, Mrs. Lenemeier sought the laboratory where the harvesting and storage had been carried out for the insemination procedures to begin, on which occasion she was informed by that institution that she could not use it, since there was no prior consent of the deceased husband, releasing the use after his death.

Because of the refusal, she filed a lawsuit, obtaining a court order that authorized the use of the frozen material, filling a legal void.

These and other cases, until a few years ago, would be considered science fiction, but they are becoming ordinary, requiring a clear legislative position in order to dispel doubts and normalize the situation, establishing what legal parameters and ethical limits should be followed in similar situations.

The purpose of this brief study is therefore to determine the legal aspects surrounding the concepts of *in vitro* fertilization *post-mortem*, placing them in historical perspective, and analyzing them under French, Brazilian and Portuguese laws, seeking to identify solutions and proposals of path to be followed.

For that to be achieved, it is necessary to clarify some technical aspects.

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2 Edition of May 25, 2010.

## **2. *POST-MORTEM* REPRODUCTION**

Reproduction *post-mortem* may take the form of insemination, fertilization or embryo transfer.

The first and second hypotheses are particularly controversial, especially when there is no authorization of the male element for his sperm to be used for reproductive purposes.

In the third case there was necessarily consent of the male element, which first allowed the use of his sperm for fertilization of oocytes from the wife or partner. However, this consent was given, as a rule, in case the process was conducted while he was alive, so the question is whether it would remain valid if the man knew that he would die soon, and his child were to be born after that time.

In fact, all cases that come before us relate to the death of the male partner, and the female's subsequent desire to use his sperm or embryos created from it. But theoretically, it can also arise in the opposite situation, and be the man who wants to use the oocytes of the deceased, or embryos generated with her oocytes, using a surrogate mother's womb or even his new companion's womb. But here, we will not look into this situation of *post-mortem* reproduction.

Not only because the complications relating to this hypothesis are much more intricate (remember, first, that it will always be the need for a surrogate mother, at least, to transfer the embryos into the uterus of the new partner of the surviving male, which will always hurt some sensibilities), but also because the statutory regimes which allow, to some extent, *post-mortem* reproduction appear to have only envisaged the death of the male.

There is no social consensus, nor religious, nor legally, on this practice, because there are laws that allow on certain conditions (Netherlands, Greece, United Kingdom or Belgium), others that strictly prohibit it (Italy, France), and many others saying nothing in this respect (Brazil).

In addition to the many ethical problems that arise, and that will be addressed here, two more practical issues arise right before our eyes: in one hand, the establishment of parentage, on the other, the issues of hereditary succession.

With regard to the hereditary issue<sup>3</sup>, especially in Portugal, the problem arises because the related laws were written assuming that the successors were alive, or about to be born by the time of death of the deceased, and could be identifiable at that moment, especially by medicine, with the time of uterine implantation, not fertilization. The admittance of inheritance rights of these newly created (and unexpected) would-be-heirs could introduce here a breach for legal uncertainty, which would be extremely dangerous. But on the other hand, denying them succession rights would imply discrimination against children based on the conditions of birth, which is legally forbidden in Portugal and Brazil.

Regarding the issue of paternity, with a prior consent of the father - and that serves as recognition of paternity - the child would be considered, for all legal purposes, as his son or daughter. And it seems that even without such consent the solution might not be different (at least considering Portuguese laws), lest the child be deprived of legal father.

### ***2.1. Insemination/Fertiliation Ipost-Mortem***

Let's talk first of the situations in which the woman is inseminated or fertilized with semen from a man already dead, as a rule, her husband.

This practice is usually banned in legal systems because it is considered interference in the dignity of the deceased<sup>4</sup>, by tampering with his genetic material without a living will that could serve as a support. Cumulatively, the "greed factor" of the widow should be taken into account. The possibility of trying to generate an additional source of livelihood derived from the assets of the deceased spouse by giving birth to a son as an ultimate source of income, given the central role it can play in terms of distribution of assets and goods<sup>5</sup>.

However, we believe that - in the overwhelming majority of cases - what drives these women is a sense totally opposed to this: it is the love for the deceased, who hoped to share his life. What remains is the possibility to try to overcome his absence with the birth of a much-desired son.

Admitting the *post-mortem* insemination - and it seems that this is a good solution - it will need, however, to meet certain requirements, parallel to the

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3 ZANELATTO, Marco Antonio, "Fertilização Artificial...", pp. 53-59.

4 FERRAZ, Sérgio. "Manipulações biológicas...", p. 29.

5 CARCABA FERNÁNDEZ, Maria. "Problemas jurídicos planteados...", p. 82.

taxes for the living will<sup>6</sup>: i) based upon the wishes of the deceased, which should be expressed in writing; ii) to perform within a specified period after the death of a spouse or partner.

The trend of national laws and international diplomas is to prohibit this practice<sup>7</sup>. However, the fundamental right to a family will always be invoked in order to allow it, because, somehow, it is the woman's desire to extend the family lost with the death of her husband (although not all authors accept the argument in these terms<sup>8</sup>).

As in many other medical issues of law, it is whether we should stick to the strict rule of consent, seeking for a greater security, or, rather, it is preferable to choose the solution that best meets the supposed interest of the one that is unable to consent, despite all the risks that this implies. Does the marriage contract imply a concomitant commitment to breed, whatever the future circumstances, even if they involve the disappearance of the alleged father?

### 2.1.1. *The Leading Cases*

It is in France that we find most of the judicial rulings on this issue, and these rulings have defined the European trends in this field.

In the 80's famous Parpalaix Case<sup>9</sup>, the High Court of Créteil was called upon to decide the claim of a widow who, coupled with her in-laws, demanded the sperm bank where her late husband had previously stored his semen, in order to be inseminated. Since her husband had taken this decision after being informed that he suffered a testicular cancer, the court found that such behavior could be taken as tacit consent to its use *post-mortem*. This presumption was supported by the fact that the bank sperm never have informed her that their practice was to not return the genetic material after the death of the depositor.

6 About living wills, see Roberto ANDORNO, Nikola BILLER-ANDORNO, Susanne BRAUER, "Advance Health Care Directives...", p. 207/227; André PEREIRA, *O Consentimento Informado...*, p. 240 ss.; André PEREIRA, "Advance Directives...", p. 165/171.

7 However, article 9/2 of the Spanish Law (Law 14/2006, May 26) admits *post mortem* insemination, if preceded by the husband's written consent.

8 Rejecting it, for inadequacy, Cristina CAMPIGLIO, "*Procreazione Assistita e Famiglia...*", p. 149.

9 Court ruling from August 1st, 1984, High Court of Creteil. Cfr. Nathalie MASSAGER, *Les Droits de l'Enfant à Naitre*, p. 433 ss.

Another interesting issue discussed here relates to the legal status of the contract in question. The Court held that it was not a deposit contract (because the sperm was not a response that could be the subject of such agreement), nor with the contract of organ donation, but a *sui generis* contract, for therapeutic purposes.

Some years later the High Court of Toulouse<sup>10</sup> – ruling over a decision on the appeal of a woman at the center where the deceased husband’s sperm was deposited to be returned to him - concentrated on the contract classification that had been proposed by the Court of Creteil. The difference, compared to the previous case here, is the fact that the man had signed a document which expressly stipulated that the sperm could only be used in his presence and with his consent, and therefore the court of Toulouse disregarded the request of the applicant and ordered the destruction of the sperm, considered “une sécrétion contenant le germe de la vie est destinée à la procréation d’un être humain”.

Note that the court’s decision was not based on the general condemnation of this practice (although it revealed concerns about the paternity of children born that way), but the existence of that clause, which could even have been revoked by the implied will of the deceased, to the extent that the content of contracts can not be unilaterally amended or repealed, based on the principles of contract law. Still, the question remains whether one could not apply the rules of inheritance and consider the widow the heir of the deceased husband’s sperm, as some years later a U.S. court in California came to understand in the case *Hecht v. Superior Court*<sup>11</sup>.

Still in France, the same court of Creteil ruled again on a *post-mortem* insemination case<sup>12</sup>. This time, although it has classified the contract as a deposit (concurrently, the sperm was legally qualified as a “thing”), the court paradoxically refused to surrender it to the wife, as would happen if it were a genuine contract of deposit. We assume that the reason is that, to date, it had effect in article 152.-L 2 of the *Code de la Santé Publique*, in the formulation given by Law 94-654, which stipulates, among the requirements for those who want to be beneficiaries of assisted reproductive techniques, that both parents are alive at the time of the procedure.

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10 Court ruling from March 26, 1991, High Court of Toulouse.

11 Case *Hecht v. Superior Court* 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

12 Court ruling from April 4, 1995, High Court of Creteil.

But *Blood*<sup>13</sup> is the case that serves as one of the leading cases in this regard so far. The story is summarized as follows: Mr. Blood had initiated a reproductive treatment with his wife when he suddenly fell into a coma before he could even leave some written document. Never came out of it, but before he died his wife gave orders for his semen to be extracted for insemination, already anticipating the dream of having children that they shared in common. The process was carried out, but with the opposition of the Human Fertilization Embryology Authority, the entity responsible for overseeing the British reproductive procedures ethically complex. Because this collection of sperm did not meet the legal requirements, in particular, it lacked the prior consent of Mr. Blood. Therefore, not only the realization of *post-mortem* insemination at an English clinic was denied, but it was also refused to allow the sperm to be taken to another country where the procedure was permitted.

The query appeared before the English High Court, where Mrs. Blood invoked the Communitarian regime for the freedom to provide services (Articles 49 et seq. of the Treaty of Rome) to justify the application of this reproductive treatment in another country which authorized it. Their reasoning was based on the jurisprudence of the Court of Justice according to which the freedom to provide services not only takes advantage of those providing them, but also those who want to receive, guidance also applies to medical services (*Luisi and Carbone* Case<sup>14</sup>). Although it could always be argued based on the free movement of goods (Article 28 et seq. of the Treaty of Rome), as the animal semen had been considered for the purposes of Communitarian law, as a commodity<sup>15</sup>, although it is arguable that human semen can meet the Community definition of “biens appréciables en argent et susceptibles comme tels d’être l’objet de transactions commerciales” (Case *Community v. Italie*<sup>16</sup>). But the issue was not even raised since the thesis of freedom to provide services prevailed.

13 Case *Regina v. Human Fertilisation and Embriology Authority, ex parte Blood* [1997] 2 All ER 687, *Court of Appeal*, commented by Jean-Sylvestre BERGÉ, “Tourisme Procréatif et Droit Communautaire...”, p. 599 ss.; Ruth DEECH, “Losing Control...”, p. 582 ss; John HARRIS, “Rights and Reproductive Choice”, p. 16 ss; Brigitta LURGER, “Fortpflanzungsmedizin und Abstammungsrecht”, p. 113, 114; J. K. MASON, R.A. SMITH, G. T. LAURIE, *Law and Medical Ethics*, p. 72/74; Tony McGLEENAN, “Reproductive Technology...”, p. 277/280; Françoise SHENFIELD, “Panorama de la Reproducción...”, p. 281/283.

14 Case *Luisi and Carbone*, decisions 286/82 and 26/83, from January 31, 1984, Communitarian Court of Justice.

15 About sperm importation/exportation, Ruth DEECH, “Losing Control...”, p. 588 ss.

16 Case *Community v. Italie*, decision 7/68, from December 10, 1968, Communitarian Court of Justice.



It is true that the High Court expressed some misgivings over the possibility of the Community legal system thereby allow the violation of a prohibition in English law. In contrast, the Court of Appeal had no such qualms, giving primacy to Community freedoms and therefore the claim of Mrs. Blood, who was so authorized to carry the husband's sperm to Belgium, where she was successfully inseminated. She has now two children resulting from this process.

### 2.1.2. *Issues Relating to Consent*

Several questions are raised concerning the consent left by the deceased for the use of his sperm:

- i) To what extent is that the death should prevent the reproduction process to a greater extent than when it occurs within a sexual reproduction? If in the latter the “disappearance” of the father after fertilization becomes irrelevant, it is appropriate that their presence is seen as decisive in assisted reproduction?
- ii) There shall be implied consent to admit here, for example, in the form of prior treatment *in vitro* fertilization, or “deposit” in a sperm bank under the same conditions, although in either case the patient had been previously informed of his lethal disease? Could be used here the same criterion of presumed consent as it is in criminal law<sup>17</sup>?
- iii) And what if it is the case of heterologous reproduction? Must it still be prevented if the sperm donation had previously been agreed by the couple?
- iv) In the case of consent, what are their requirements of validity? Are particular formalities required for public recognition?
- v) Is the consent subjected to the same specified period of validity as a living will? May this period be extended by the consent form?
- vi) Existing expiry date, this means that if fertilization is performed after that date, paternity can not be declared, leaving the child without a father.

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17 Article 39/2, of the Portuguese Criminal Code: “Há consentimento presumido quando a situação em que o agente actua permitir razoavelmente supor que o titular do interesse juridicamente protegido teria eficazmente consentido no facto, se conhecesse as circunstâncias em que este é praticado.”

## 2.2. Transfer *Post-Mortem*

This hypothesis<sup>18</sup> is less controversial, because in this case the embryos are already fertilized, being transferred to the mother's womb after the physical disappearance of the father.

Still, it is not free from controversy. In a case that became known as the case of the "widow of Toulouse," a woman whose husband had died claimed the hospital where they had both agreed to cryopreserve their embryos to deliver them for subsequent embryo transfer. Through two controversial decisions<sup>19</sup> the French judicial authorities decided that the embryos should be destroyed, arguing that after the death of her husband the woman failed to meet the requirements stipulated by the French legal system to authorize access to reproductive technologies, in particular, the presence of a father. This is because, according to the French regime regarding assisted reproductive techniques, these can not be used to overcome reproductive obstacles resulting from family backgrounds that do not correspond to the traditional model consisting of a father and a mother, but, rather, its use is admissible only to deal with problems of infertility or risk of disease transmission hereditarily transmitted. This means that the base will always be a therapeutic purpose, which seemed nonexistent here (although it is certain that at the time the couple had decided to use these techniques, such requirement was actually present).

To enhance this decision was the agreement between the couple and the hospital, which included a clause stipulating that embryos could be transferred only with the consent and presence of both members of the couple. Finally, it was invoked the emotional fragility that the widow was under, due to her husband's death, which could make her less able to raise and educate a child.

Again in France, but this time by decision of the *Tribunal de Grande Instance* of Rennes<sup>20</sup>, the *post-mortem* embryo transfer was rejected one more time due to the absence of consent of the deceased father.

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18 Judit SÁNDOR ("Reproduction and Genetics... p. 117) refers to this possibility as the "right to a continuation of a reproductive treatment". Yet about this issue, it is recommended reading, Judit SÁNDOR, "Reproductive Rights in the Hungarian Law...", p. 196 ss.

19 Ruling from May 11, 1993, High Court of Toulouse, first chamber; Ruling from April 18, 1994, Appellation Court of Toulouse, commented in Nathalie MASSAGER, *Les Droits de l'Enfant à Naitre*, p. 702 ss.

20 Ruling from June 30, 1993.

To demonstrate that there is no sufficient consensus regarding this matter, there is a decision ruled by the Court of Angers<sup>21</sup>, authorizing the transfer of embryos in a similar situation, and also allowing the child to be legally recognized as the child of the deceased and allowing him to adopt the family surname.

However, a couple of years later this practice was considered unacceptable again, this time by a higher court, the *Cour de Cassation*<sup>22</sup>. Between this decision and those others mentioned above was issued an opinion from the French National Ethics Council<sup>23</sup> in order to allow the transfer *post-mortem*, but in the meantime came the above-mentioned Law 94-654<sup>24</sup>, which expressly forbade it, so and instead of the earlier trials, based on a mere judicial review, here the Court of Cassation was already subjected to a legal prohibition<sup>25</sup>.

The legal admissibility of *post-mortem* transfer of embryos is to be based essentially on two reasons. First, because otherwise the solution will lead to the destruction of embryos (unless the donation / adoption of embryos enters the scene), so enabling its transfer is the solution that allows birth and thus most respects life<sup>26</sup>. Incidentally, a similar argument was invoked by the applicant in presenting the case before the *Cour de Cassation*, mentioning the provisions contained in the law of January 17, 1975, which regulates the status of pregnancy termination in French law, establishing the assumptions on what is and what is not legitimate.

In this case, it was alleged that the refusal to transfer the embryos would constitute an unlawful termination of pregnancy. But it lacks grounding to this argument because, strictly speaking, the opposition to embryo transfer did not prevent the continuation of a pregnancy, but its beginning. Even the argument of "*infant conceptus*", close to this and also called into question by

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21 Ruling from November 10, 1992, Tribunal de Grande Instance d'Angers, First Chamber.

22 Ruling from January 9, 1996, Cour de Cassation.

23 Opinion dated December 17, 1993, issued by the French National Ethics Council.

24 Lei 94-654, from July 29, 1994, regulating the use and donation of elements and parts of the human body, pre-natal diagnosis and medically assisted procreation.

25 Nathalie MASSAGER, *Les Droits de l'Enfant à Naître*, p. 794 ss.

26 The Court of Palermo decided that the damage of growing up without a father cannot be compared to the damage of not being born (ruling from January 8, 1999). The same idea can be seen in the Italian Law (Law 40, of February 19, 2004, article 14/1), about assisted reproduction, which forbids the destruction of the embryos. This argument can lead to a great deal of discussions and raise some other relevant doubts, but this is not the adequate moment or place to bring them up.

the applicant, could bring some benefit, because it only aims at the protection of human heritage that actually comes to birth, allowing it to benefit from effects property previously set, giving retroactive effect to the birth,

But besides those, there are other reasons that emerge in favor of the legitimacy of this practice, including legal protection of the reproductive rights of the mother who still lives. In fact, the death of her husband or partner does not destroy the expectations that the woman had on those embryos nor her desire to be a mother, and may even strengthen it.

### 3. THE SOLUTION UNDER THE PORTUGUESE LAW

In Portugal this matter is regulated by article 22 of Law 32/2006 of 26 July. The epigraph of the act is called “post-mortem insemination,” when strictly speaking it should be called “post-mortem embryo transfer,” since only the latter practice is allowed, with everything else being forbidden (despite the fact that article 23 explains that any child born from a fertilization or post-mortem insemination - thereby circumventing the legal prohibition - will still be the son or daughter of the deceased).

In short, the Portuguese legislators defined the legal regime at the time of fertilization: should it occur before the death of the father allows the embryos to be transferred, but if it has not occurred by that date, it can no longer take place, even in spite of the evidences related to the wishes of the deceased. Nor is it expected that any document asking for a *post-mortem* fertilization will be considered valid by the courts.

All rules present on the Law 32/2006 assume that the one who dies is the male element, which suggests that *post mortem* transfer of embryos is always prohibited when it is the woman who dies, perhaps on the assumption that this procedure would require recourse to surrogacy. However, it is not necessarily so, since the biological father may want to use their embryos with his new partner.

However, this possibility raises some doubts, regarding to the respect for reproductive rights of women who died. But on the other hand, its prohibition does not imply, by way of congruence, in a concomitant ban on marrying a widower and his new wife adopted the children of previous marriage? That is, to what extent is that the embryo transfer made after the death of the biological

mother affects to a greater extent the rights of the parallel situation in which their children are orphans adopted by her husband's new wife?

#### 4. THE SOLUTION IN THE LIGHT OF BRAZILIAN LAW

In the absence of a specific legislation, whether constitutional or derived from other sources, we must make decisions based on the interpretation of various existing elements in Brazilian law.

Historically, one of these sources, Resolution 1.358/92 of the Federal Council of Medicine, which established ethical standards for the use of assisted reproduction techniques, has recently been repealed and replaced by Resolution 1.957/10.

In its general principles, the revoked resolution emphasized the importance – and obligation – of informed consent to the adoption of any measures or treatments with reproductive purposes. By establishing specific standards for the cryopreservation of gametes or pre-embryos, which stated that “at the time of cryopreservation, spouses or partners should express their willingness in writing as to the destination that will be given to pre-embryos cryopreserved in the event of divorce, serious illness or death of one or both of them, and when they wish to donate them.”

Resolution 1.957/10, establishing new regulatory and ethical standards for the use of assisted reproduction techniques, do not skirt around the issue of *post mortem* assisted reproduction, setting in its item VIII that “*post mortem* assisted reproduction does not constitute an ethical fault if there is a specific and prior authorization of the deceased for the use of cryopreserved biological material, in accordance with current legislation.”

From the ethical point of view, therefore, the question emerges to recognize the autonomy of the will of the couple, in respect to matters of family planning, with assisted reproduction, and providing for the use of these techniques even after the eventual death of a member of the couple.

The Federal Constitution, on the other hand establishes “special state protection” for the family in its article 226, and pontificates on its paragraph 7 that “Based on the principles of human dignity and responsible parenthood, family planning is a free choice of the couple, and the State shall provide educational and scientific resources to exercise this right, without any form of

coercion by official or private institutions.”

The Brazilian Civil Code, in turn, faces the issue on its article 1597, by stating that:

Article 1597. They are presumed to be conceived during the marriage the children:

(Suggestion) The children:

I - born one hundred eighty days, at least, after established the conjugal life;

II - born three hundred days after the dissolution of marriage, death, legal separation, nullity and annulment of marriage;

III – born through the use of homologous artificial fertilization, even though the husband is dead;

IV - born at any time, in the case of excedentary embryos resulting from homologous artificial conception;

V – born through the use of heterologous artificial insemination, provided the existence of prior permission from the husband;

are presumed to be conceived during the marriage

Still, the question that remains of inheritance.

There is an obvious conflict between the Brazilian Civil Code and the Federal Constitution. The Code, in its article 1798, states that “The persons born or conceived at the time of the opening of the succession are legitimate to succeed.”

The following article adds that “In inheritance can still be called to succeed: the children not yet conceived of persons nominated by the testator, as long as they live at the opening of the succession.”

It happens that with the advances already seen in assisted reproduction techniques, the birth of these children can be protracted in time, leaving, therefore, the testamentary law dissociated from reality.

Eduardo de Oliveira Leite argues that “a child born after the death of biological parents, by the use of frozen semen, is an anomalous situation, both in terms of affiliation, or succession rights. In this case the child does not inherit from his father because he was not conceived at the opening of succession<sup>27</sup>”.

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27 In *Comentários ao Novo Código Civil*, vol. XXI, p. 110.

This position, however, should not prosper. You cannot, on behalf of an alleged legal, trample constitutionally guaranteed rights, because of the ineptitude of the legislators to adapt the rules to the reality. Yet, when by virtue of the Civil Code, which establishes the possibility of action of heritage petition in its article 1824, one sees that the condition of being a heir is not lost, and is therefore imprescriptible.

With regard to inheritance and succession rights (a right that is constitutionally regarded as fundamental, and embodied in article 5 of the Constitution), it should be noted that the Constitution also determines (Article 227, paragraph 6) that there is not how to establish different rules, or distinction between the children with regard to rights and qualifications. This is, by the way, the same orientation contained in article 1596<sup>28</sup> of the Brazilian Civil Code.

Thus, it is necessary in the light of new scientific techniques and possibilities, fill in the legislative void, establishing ways to ensure that these children may be generated after the death of a parent, reassuring the inheritance rights that the constitution grants them.

There are those who argue it is impossible to hold any inheritance to children conceived by assisted reproductive techniques *post mortem*, invoking the principle of legal security in relationships. Constitutionally, however, the issue is deeper. The main issue here is dignity, as stated in article 226 of the Constitution, mentioned earlier. Dignity of the person, which is not “just” a constitutional principle, but the foundation of the Republic, as set out in article 1, III, of the Federal Constitution.

This being the basis, takes precedence over any principles that may be invoked, and legislation must conform to it, and not vice versa.

## 5. CRITICAL CONSIDRATIONS

It seems that the case raises no greater obstacle to the admissibility of the *post mortem* reproduction, even in their way of insemination or fertilization, specially when the father has left a prior informed consent authorizing the procedure<sup>29</sup>.

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28 Article 1.596. “Os filhos, havidos ou não da relação de casamento, ou por adoção, terão os mesmos direitos e qualificações, proibidas quaisquer designações discriminatórias relativas à filiação”.

29 In favor of *post mortem* reproduction, Mary WARNOCK, “Reproductive Technologies...”,

In favor of this solution there are the following arguments:

- i) First of all, respect for the wishes of deceased persons who expressed this desire in life;
- ii) Then, the parallelism between the *post mortem* reproduction and cases of pregnancies that continue despite the death of parents. It is true that the analogy is not complete, since, in the case of a natural pregnancy, the child will be born, at the very limit, nine months after his father's death, while using *post mortem* reproduction techniques, the child could be born much later, and this delay time (which may continue for years) is likely to disrupt the family structure, not only in terms of affection, but also in issues such as property (inheritance law). Therefore we advocate that the process should be carried out within a delimited time frame. In any situation, however, it is necessary to draw up legislation to regulate the procedure, bringing stability and safety to the legal relationship.

It seems that the Portuguese legislators did well by allowing the embryo transfer, and they could do much better if they decide to follow Spain's example, authorizing fertilization *post mortem* based on a consent document, as defined in the first part of article 2, section 2 of the Spanish law<sup>30</sup>.

We suggest that this should also be the option for the Brazilian legislators, creating objective conditions to respect and enforce the autonomy and the will of people who may have left genetic material to allow post mortem reproduction, adapting the legal rules to new times and behaviors, ensuring legal safety and social peace.

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p 364 ("I, for one do not see anything intrinsically harmful or wrong in the birth of a posthumous child, and therefore see no moral objection, in general, to the taking of steps to enable such a child to be born").

30 "No obstante lo dispuesto en el apartado anterior, el marido podrá prestar su consentimiento, en el documento a que se hace referencia en el artículo 6.3, en escritura pública, en testamento o documento de instrucciones previas, para que su material reproductor pueda ser utilizado en los 12 meses siguientes a su fallecimiento para fecundar a su mujer. Tal generación producirá los efectos legales que se derivan de la filiación matrimonial. El consentimiento para la aplicación de las técnicas en dichas circunstancias podrá ser revocado en cualquier momento anterior a la realización de aquéllas".  
Mais dúvidas nos desperta a segunda parte da norma ao estipular: "Se presume otorgado el consentimiento a que se refiere el párrafo anterior cuando el cónyuge supérstite hubiera estado sometido a un proceso de reproducción asistida ya iniciado para la transferencia de preembriones constituidos con anterioridad al fallecimiento del marido".



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