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# POSTHUMOUS ASSISTED REPRODUCTION IN SPAIN AND OTHER EUROPEAN COUNTRIES

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**Abstract**

This study focuses on examining the legal framework surrounding Posthumous Assisted Reproduction (PAR) in Spain, particularly in the Spanish Law 14/2006, of 26 May, on Human Assisted Reproduction Techniques (LHART 2006) and the Second Book of the Catalan Civil Code. Additionally, it conducts a comparative analysis of PAR regulations in several European countries like the United Kingdom, the Netherlands, Belgium, Greece, Portugal, France, Italy, and Germany.

This work aims to provide a general understanding of the relevant aspects of PAR regulation, its requirements and to establish a comparative study in different countries of Europe.

Spain stands out among the countries with more permissive legislation regarding PAR, regulated in article 9 LHART 2006. In Catalonia, it is regulated in articles 235-8.2 and 235-13.2 of the Civil Code of Catalonia.

PAR implies complex legal effects that require careful consideration, such as inheritance rights and the determination of filiation. This work explores the legislative and jurisprudential reactions in several countries, highlighting the role of consent.

Finally, it aims to establish a better understanding of PAR in Europe and its effects considering the technological advancements as well as the societal attitudes towards it.

**Key Words:** Article 9 LHART 2006, artificial insemination, Assisted Reproductive Technology (ART), fertilization, embryo transfer, inheritance rights, *in vitro* fertilization, filiation, Posthumous Assisted Reproduction (PAR), *post mortem*.

**Resum**

Aquest estudi se centra en examinar el marc legal de la reproducció assistida *post mortem* a Espanya, especialment en la Llei 14/2006, de 26 de maig, sobre Tècniques de Reproducció Humana Assistida (LTRHA 2006) i el Llibre Segon del Codi Civil de Catalunya. A més, una anàlisi comparativa de les regulacions de la reproducció assistida *post mortem* en diversos països europeus com el Regne Unit, els Països Baixos, Bèlgica, Grècia, Portugal, França, Itàlia i Alemanya.

Aquest treball pretén proporcionar una comprensió general dels aspectes rellevants de la regulació de la reproducció assistida *post mortem*, els seus requisits i establir un estudi comparatiu en diferents països d'Europa.

Espanya destaca entre els països amb una legislació més permissiva respecte a la reproducció assistida *post mortem*, regulada a l'article 9 LTRHA 2006. A Catalunya, està regulada als articles 235-8.2 i 235-13.2 del Codi Civil de Catalunya.

La reproducció assistida *post mortem* implica uns efectes legals complexos que requereixen una consideració minuciosa, com ara els drets d'herència i la determinació de la filiació. Aquest treball explora les reaccions legislatives i jurisprudencials en diversos països, destacant el paper del consentiment.

Finalment, té com a objectiu establir una millor comprensió de la reproducció assistida *post mortem* a Europa i els seus efectes a la llum dels avanços tecnològics, així com les actituds socials envers ella.

**Paraules clau:** Article 9 LHART 2006, inseminació artificial, fecundació, tècniques de reproducció assistida, transferència d'embrions, drets d'herència, fecundació *in vitro*, filiació, reproducció assistida *post mortem*.

**ABBREVIATIONS**

| Abbreviation | Definition |
|---|---|
| Art. | Article |
| ART | Assisted Reproductive Technology |
| CC | Spanish Civil Code |
| CCCat | Civil Code of Catalonia |
| HFEA | Human Fertilisation and Embryology Act |
| IVF | *In Vitro* Fertilization |
| LART 1988 | Spanish Law 35/1988, of 22 November, on Assisted Reproduction Techniques |
| LHART 2006 | Spanish Law 14/2006, of 26 May, on Human Assisted Reproduction Techniques |
| PAR | Posthumous Assisted Reproduction |
| DGRN | General Directorate of Registries and Notaries |

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## 1. INTRODUCTION

This work deals with an analysis of Posthumous Assisted Reproduction (PAR) in the Spanish legal system, concretely in the Spanish Law 14/2006, of 26 May, on Human Assisted Reproduction Techniques and the Civil Code of Catalonia, as well as in several European countries. It makes a comparative study of the different types of posthumous reproduction regulations in relation to the Spanish one, across the United Kingdom, the Netherlands, Belgium, Greece, Portugal, France, Italy, and Germany.

The introduction of Assisted Reproductive Technology (ART) methods for solving the problems of infertility among the population led to an expansion of parenthood possibilities beyond natural conception. It was in 1978 when Louise Brown was the first child born using *In Vitro* Fertilization (IVF) in the United Kingdom. Then, in 1984, Victoria Anna was the first child born in Spain as a result of IVF. From then onwards, reproductive medicine has endured many scientific and technological advances.

While ART has enabled many people to conceive a child, one potential issue which may arise is the death of one of the parties involved. Still, it is possible to conceive children after someone's death through Posthumous Assisted Reproduction (PAR) (or *post mortem* assisted reproduction). It consists of Assisted Human Reproduction using the gametes or embryos from a deceased person. Specifically, the development of cryopreservation (the technology of freezing used to preserve individual gametes and embryos) has allowed for the non-coital posthumous conception of children. Nonetheless, conceiving a child or implanting a preexisting embryo after the death of the person causes several legal issues which are dealt with differently depending on the country's legislation.

The main legal and practical issues of PAR involve the topic of consent, filiation and inheritance rights of children born after the death of a genetic parent. In addition, the ethical considerations surrounding the gamete retrieval, storage and use after the death of one person affects the interests of the parties involved: the deceased person, the requesting party, the best interest of the future child and the interests of the society.

Because many countries do not have regulations for PAR, and those countries that do may have legal gaps and imprecisions, this can lead to conflicting interpretations of the law and issues in matters of consent, filiation, and inheritance rights.

European countries have different approaches to PAR due to the complex interactions between religious, cultural, and legal traditions. This work provides an overview of how Posthumous Assisted Reproduction is regulated across several European countries. It aims to compare and classify the regulation of each country into two groups based on their approach to PAR: countries that allow PAR –a more liberal approach– and countries that prohibit it –more conservative–. Another group would consist of countries in which it is not regulated, but this group will not be an object of the present study.

The countries that currently allow PAR in Europe include Spain, the United Kingdom, Belgium, the Netherlands, Greece, and Portugal. On the other hand, the countries that prohibit it are France, Italy, and Germany.

This work will also study the challenges and aspects to be improved in each regulation, especially in the Spanish framework (Article 9 of the Spanish law 14/2006 of 26th May, on Human Assisted Reproduction Techniques).

The work is divided into two parts. The first part will study article 9 and its objective and subjective scope, the legislative background, and the differences in respect with the past law of 1988, as well as the doctrine of the Spanish Constitutional Court. In addition, it will examine the legal requirements of PAR (consent, temporal delimitations, etc.) and its legal effects (inheritance rights and filiation), as well as some related problems. Finally, it will examine the regulation in the Civil Code of Catalonia.

In the second part, a classification of the models of regulation applicable to PAR in some European countries is made. Starting with the countries in which it is allowed such as the United Kingdom, Belgium, the Netherlands, Greece and –now– Portugal. And then, the countries in which PAR is prohibited like France, Italy and Germany.

The methodology of the present work is a comparative study conducted through the analysis of existing legal and regulatory frameworks, the use of bibliography and case law. By making a comparative study of the European regulations, this study expects to identify the differences and similarities among the countries in Europe and suggest areas of improvement for each regulation, thus widening the knowledge of this topic and making proposals for the future regulation of PAR in several countries of Europe.

## 2. CONCEPT AND TYPOLOGY OF POSTHUMOUS ASSISTED REPRODUCTION

Assisted reproductive technology (ART) is defined as all interventions that include the *in vitro* handling of both human oocytes and sperm or of embryos for the purpose of reproduction.[1] The techniques considered under the Spanish Law 14/2006, of 26 May, on Human Assisted Reproduction Techniques (Annex) are, specifically, a) artificial insemination (AI), b) *in vitro* fertilization (IVF) and intracytoplasmatic sperm injection (ICSI) with own or donor gametes and with pre-embryo transfer, and c) gamete intrafallopian transfer (GIFT)[2]. Concerning the types of fertilization in ART techniques, they can be homologous or heterologous. Homologous fertilization refers to the use of male gametes from the husband or, if applicable, from the domestic partner who consents to fertilization and thus assumes paternity. Heterologous fertilization, on the other hand, refers to the use of male gametes from a donor.

Posthumous Assisted Reproduction (PAR) consists of the conception of a child through assisted reproduction techniques, with the singularity that they are performed when the male progenitor has passed away. It includes both the implantation in the uterus of a woman of an embryo fertilized *in vitro* with the deceased's semen (posthumous embryo transfer), or her insemination with the genetic material of the deceased husband or partner (posthumous fertilization).[3]

## 3. REGULATION IN THE SPANISH LEGAL SYSTEM

### 3.1. Regulation in the Spanish Law 14/2006 of 26 May, on Human Assisted Reproduction Techniques

Spain constitutes one of the countries in which PAR is regulated. PAR is allowed in the Spanish regulation, and it is one of the most liberal regulations across Europe, making Spain a perfect destination for people from countries in which PAR is prohibited.

[1] Glossary on Infertility and Fertility Care from the International Committee for Monitoring Assisted Reproductive Technologies (ICMART) (2017) (https://www.icmartivf.org/wp-content/uploads/2017-HR-Glossary.pdf)
[2] Annex of the Spanish Law 14/2006, of 26 May, on Human Assisted Reproduction Techniques
[3] Navarro Pastor, M. (2022). Fecundación Asistida postmortem y su tratamiento en derecho civil. *Revista Médico-Jurídica*, *VI. https://revistamedicojuridica.com/blog/2022/04/20/fecundacion-asistida-postmortem-y-su-tratamiento-en-derecho-civil/*

PAR has been allowed in Spain since the first Law 35/1988 of 22 November, on Human Assisted Reproduction and it is currently regulated both in Article 9 of Law 14/2006 of 26 May, on Human Assisted Reproduction.

In the Spanish legal system, Posthumous Assisted Reproduction (PAR) is regulated in article 9 of the Spanish Law 14/2006 of 26 May, on Human Assisted Reproduction Techniques (hereinafter LHART 2006) under the heading "Predecease of the husband"[4].

The first section of art. 9 in the LHART established that filiation cannot be determined, nor any legal effects can be recognized a child conceived through assisted reproductions and the deceased husband if his reproductive material was not present in the woman's uterus at the time of his death. This implies that this possibility is not allowed initially.

However, the second section clarifies that the deceased husband can give consent in the document specified in Article 6.3 of this law: through a public deed, a will, or a document of anticipated wills, to allow his reproductive material to be used to fertilize his wife within 12 months after his death. If the husband's consent is properly documented, art. 9 acknowledges that the legal effects of marital filiation will arise, but also allows the possibility of revocation of consent prior to implementation.

In addition, the second paragraph of art. 9.2 contains a presumption that consent has been given if the surviving spouse has already started an assisted reproduction process for the transfer of pre-embryos formed before the husband's death.

[4] Article 9: Predecease of the husband
1. Filiation cannot be established nor can any legal effect or relationship be recognized between a child born through the application of the techniques regulated in this Law and the deceased husband when his reproductive material is not found in the woman's uterus at the time of the man's death.
2. Notwithstanding the provisions of the preceding paragraph, the husband may give his consent, in the document referred to in Article 6.3, in a public deed, will, or advance directives, for his reproductive material to be used within 12 months following his death to fertilize his wife. Such generation shall produce the legal effects arising from marital filiation. The consent for the application of the techniques under these circumstances may be revoked at any time prior to their implementation.
The consent referred to in the previous paragraph is presumed to have been given when the surviving spouse had already undergone an assisted reproduction process initiated for the transfer of pre-embryos formed prior to the husband's death.
3. The man not united by marital bond may use the possibility provided for in the preceding paragraph, with such consent serving as a title to initiate the proceedings under Section 8 of Article 44 of Law 20/2011, of July 21, on the Civil Registry, without prejudice to any legal action for paternity.

### 3.1.1. Scope of application

According to Rodríguez Guitián[5], there are two different hypotheses regulated in article 9, both encompassed under the term posthumous assisted reproduction: posthumous artificial fertilization in the strict sense and the posthumous transfer of pre-embryos.[6]

First, posthumous artificial fertilization in the strict sense is understood as the introduction of the sperm of the deceased male into the female genital organs by means other than sexual contact. Secondly, the posthumous transfer of pre-embryos is the transfer of pre-embryos constituted through *in vitro* fertilization before the death of the male. In this case, the fertilization has not been posthumous per se.

In the first hypothesis, the widow or partner is fertilized with semen from the deceased man. On the other hand, in the transfer of pre-embryos, the child is conceived during the life of both parents (*in vitro*), although its implantation, gestation, and birth occur after the man's death.

Article 9 does not differentiate the legal regime of these situations and regulates them together.

The first requirement of article 9 of the Law on Assisted Human Reproduction Techniques (LHART) of 2006 is that consent must be given by both the husband or the man who is not married to the woman who will undergo the procedure. The provision itself does not make any reference to cohabitation between them. However, it seems logical to understand that this provision refers to married or unmarried couples who live together. According to Rodríguez Guitián[7], art. 235-13 of the Second Book of the Civil Code of Catalonia, is more rigorous, since it established "the death of the man who lived with the mother".

Since it only talks about the death of the husband or an unmarried man, or of the man not united by marital bond, it must be ruled out that Spanish law contemplates the case in which the man survives, and it is him who requests that implant the pre-embryo formed during their lifetime in the uterus of another woman. This interpretation is supported by article 10 of the same Law, which establishes the nullity of any contract that has as its object surrogacy[8]. For this reason,

[5] Rodríguez Guitián, A. M. (2015). La reproducción artificial post mortem en España: Estudio ante un nuevo dilema jurídico. *Iuris Tantum Revista Boliviana de Derecho*, (20), pp. 292-322.
[6] In the Spanish Law, pre-embryo is defined as the *in vitro* embryo consisting of the group of cells resulting from the progressive division of the oocyte from the time it is fertilized until 14 days later.
[7] Rodríguez Guitián (2015), op. cit. p.7.
[8] 1. The contract by which the gestation is agreed, with or without a price, by a woman who renounces maternal filiation in favor of the contracting party or a third party, shall be null and void.

and because the Law refers to a "surviving spouse," it also excludes the possibility that both parents have died, and the embryo is transferred to another woman.

This is not the only area left unregulated by the LHART of 2006 regarding assisted reproduction. Firstly, it excludes the possibility of the deceased man consenting to insemination with the genetic material of another man, i.e., the posthumous use of gametes donated by a third party during the lifetime of the couple is not allowed. Secondly, and because of the above, there are doubts about transferring a pre-embryo to the mother's uterus after the death of the husband or partner, when such pre-embryo, although conceived during their lifetime, has been obtained from gametes donated by a third party. It is not clear whether it should be included if this possibility of gamete donation has been excluded in the case of posthumous artificial fertilization in the strict sense.[9]

On the other hand, article 9 of the LTRHA of 2006 only regulates posthumous artificial reproduction in heterosexual couples. This is because if a homosexual male couple in a domestic partnership or marriage wanted to use this method of reproduction, it would fall within the scope of the express prohibition of surrogacy in art. 10. Likewise, in the case of women, this possibility would clash with the prohibition of posthumous assisted reproduction using semen from a donor or third party with respect to the relationship established between them –which is strictly necessary in the case of two women–.

This differs from the case of the United Kingdom, in which the Human Fertilisation and Embryology Act 2008 (c.22) extends posthumous reproduction to the female domestic partner of the woman to whom the embryo created before the death of her domestic partner is being transferred with sperm donated from a third party. She can have the status of legal parent of a child that she has not known because she died before the birth of the child (HFEA s 46).

### 3.1.2. Legislative background

After the Parpalaix case[10], which will be further explained later, many countries' doctrine, including the Spanish doctrine, claimed the necessity of making legislation about posthumous assisted reproduction.[11]

[9] Ibid.
[10] Tribunal de Grande Instance de Creteil. (1984, August 1). Jugement 4225/84.
[11] Rivero Hernández, F. (1987). La fecundación artificial "post mortem". *Revista Jurídica de Cataluña*, 871-904.

There was controversy about Spanish Law 35/1988, of 22 November, on Assisted Reproduction Techniques (hereinafter LART 1988), while many standing in favor of the law, others believed that it was better to let social phenomena develop first.[12] However, it is important to note that the fact that an assisted reproduction law did not exist, it did not impede the births using these techniques.[13]

The history of the making of LART 1988 has important milestones. On November 2, 1984, a "Special Commission for the Study of *In Vitro* Fertilization and Human Artificial Insemination" was created in Congress, chaired by the deputy of the socialist parliamentary group Dr. Palacios. Said commission prepared a report that was later approved by the Plenary Session of the Congress of Deputies on April 10, 1986, known as the "Palacios Report"[14], which was inspired by the Warnock Report[15].The Report of this Commission was the precedent of two laws (which would become future LART 1988 and Law 42/1988, of December 28, on the donation and use of human embryos and fetuses or their cells, tissues or organs).

The final approval in Congress of the LART 1988, took place on October 31 of 1988. LART 1988 under the official title of Law on Assisted Reproduction Techniques, was published in the Official State Gazette on November 24.

LART 1988 was not the first law on assisted human reproduction in the world, but it was the first to include among the admitted techniques both artificial insemination (homologous –i.e. the sperm comes from the woman's partner: Conjugal Artificial Insemination or CAI– and heterologous –i.e. the sperm comes from a sperm bank: Donor Artificial Insemination or DAI–), as well as *In Vitro* Fertilization and subsequent embryo Transfer (IVF-ET), since the Swedish law of 1984[16] and the legislation of some Australian states, prior to the Spanish law, only regulated artificial insemination.

[12] Roca Trías, E. (1988). La incidencia de la inseminación-fecundación artificial en los derechos fundamentales y su protección jurisdiccional. In *La filiación a finales del siglo XX. Problemática planteada por los avances científicos en materia de reproducción humana* (pp. 19, 35). Trivium.
[13] Hernández Ibáñez, C. (1988). La Ley de 22 de noviembre de 1988 sobre Técnicas de Reproducción Asistida: consideraciones en torno a la fecundación post mortem y a la maternidad subrogada. *Actualidad Civil*, (2), 3027-3046.
[14] Pantaleón Prieto, F. (1989). Contra la Ley sobre Técnicas de Reproducción Asistida. In *Homenaje al Profesor Juan Roca Juan* (pp. 642). Universidad de Murcia.
[15] Lledó Yagüe, F., Ochoa Marieta, C. and Monje Balmaseda, O. (2007) *Comentarios científico-jurídicos a la ley sobre técnicas de reproducción humana asistida, Ley 14/2006, de 26 de mayo*. Librería-Editorial Dykinson.
[16] Lag (1984:1140) om insemination

The "Palacios Report"[17] urged the widow to authorize the use of frozen gametes from her deceased husband, without implying the establishment of a filiation relationship between the newborn and the deceased man (recommendation 13[18]). In recommendation 11, there is an explicit authorization for the use of the other's frozen gametes, both the male and female gametes, whether the couple is married or not.

The Legislative Proposal presented by the socialist group in May 1987[19], collecting the recommendations of the "Palacios Report", authorizes the use of reproductive material from the deceased if he had consented to it (that is, it admits in our Law *post mortem* assisted reproduction in article 9.1.)[20] but does not allow establishing filiation or inheritance rights (art. 9.2).[21]

In the end, the final text approved by Congress improved the inheritance rights of the newborns because of the posthumous use of assisted reproduction techniques, thanks to the changes introduced by amendment 371 presented by the socialist group to the initial proposal. The amendments include that the new text will allow the filiation to be determined; the suppression of art. 9.3 of the proposition that allowed the husband to use the woman's gametes, which would have led to surrogacy –that the law itself prohibited–; and the fact that the authorization to the technique is not made explicit.[22]

#### 3.1.2.1. Differences from the past law

There are some differences between article 9 of the LART 1988 and the same article from LHART 2006.

First, the main difference is the temporality. In the 1988 law, the reproductive material can be used within six months following the death of the man. In the actual law, it can be used for

[17] Palacios Alonso, M. (1986) *Informe de la Comisión Especial de Estudio de la Fecundación 'In Vitro' y la Inseminación Artificial Humanas*. rep. Cortes Generales. Spain.
[18] "It must be legislated that the child born by AI with semen from the husband or man of the stable couple, or by FIVTE with a frozen embryo originated with their semen, when the reproductive material is not in the uterus of the woman of the marriage or stable couple on the date of their death, is not taken into consideration for the purposes of the succession or inheritance of the deceased".
[19] Spain. Law Proposal 122/000062, on Assisted Reproduction Techniques. Presented by the Socialist Parliamentary Group, 9 May 1987.
[20] "Members of a married couple or stable couple must express in writing if the reproduced material cryopreserved may be used by the other member of the couple, when they have died, and with reproductive aims."
[21] "Children born by these techniques with male reproductive material, when this material is not in the uterus of the woman with whom he is linked by marriage or stable partnership on the date of the man's death, will not be taken into consideration for purposes of succession or inheritance of the deceased."
[22] Alkorta Idiakez, I. (2003). *Regulación Jurídica de la Medicina Reproductiva: Derecho Español y Comparado*. Cizur Menor (Navarra): Thomson-Aranzadi.

fertilization (or embryo transfer) within 1 year. Therefore, it is an important change which gives 6 more months to the woman to use the material.[23]

Secondly, the consent of the man can be given, in addition to a will or public deed, in the prior instructions document (regulated in article 11 of the Law 41/2002, of November 14, basic regulatory of patient autonomy and rights and obligations regarding information and clinical documentation) and in the "clinical" document used for the authorization of assisted reproduction practices (from art. 6.3 of the LHART 2006).

Finally, a new paragraph is added in the section 2 of art. 9, in which consent is presumed when the surviving spouse would have been subject to an assisted reproduction process already initiated for the transfer of pre-embryos constituted prior to the death of the husband.

### 3.1.2.2. Doctrine of the Spanish Constitutional Court

Nowadays, the debate over posthumous assisted reproduction is not as strong as it was before. With LART 1988, PAR is admitted under some conditions, which are maintained in the LHART 2006 –with the modifications already mentioned–. However, the main stances of the doctrine on PAR have been the following.

Firstly, some argued a radical prohibition of the *postmortem* procreation since it entails filiation and inheritance problems, and state that the newborn is condemned to be fatherless.[24] Another stance is admitting the practice but not giving to the child inheritance rights, as the Report of the Special Commission for the Study of *In Vitro* Fertilization and Human Artificial Insemination stated. However, this stance contravenes the constitutional principle of equality of all filiation, enshrined in arts. 14 and 39 of the Spanish Constitution.[25] And finally, those who approve PAR under certain conditions such as consent and temporal requirements, in line with the judgment of the *Parpalaix* affair and the report prepared by the Working Group set up in the General Directorate of Registries and Notaries published in 1986, who defend that if the practice of PAR is admitted, the child thus born must be marital.[26]

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[23] "Notwithstanding the provisions of the preceding section, the husband may consent, in a public deed or will, to his reproductive material being used, within six months following his death, to fertilize his wife, with such offspring having the legal effects derived from marital filiation."

[24] This argument is also alleged against assisted reproduction in single women, although as the doctrine has shown, in *postmortem* reproduction the child would have a known father, even if he is deceased, and would not lack a paternal family (Rivero Hernández, op. cit. p.8.)

[25] Roca Trías, op. cit. p.9.

[26] Grupo de Trabajo constituido en la Dirección General de Registros y del Notariado (1986). Problemas civiles que plantea la inseminación artificial y la fecundación *in vitro*. (*(Resumen de las sesiones celebradas por el Grupo*

For most parts of the doctrine, the first stance is the most relevant one. However, rights of the child do not entail having two parents, but whether the parents give the child a good environment –as it is also required in adoption–.[27]

The Spanish Constitutional Court has only pronounced on the issue in the Judgment 116/1999, of June 17, 1999.[28] The judgment rejected the appeal against the entire law but did not fail to analyze art. 9 for infringement of the "institutional guarantee of the family", indicating that "the constitutional concept of family has notoriously broader profiles than those considered by the appellant deputies (...)" (legal basis 13). The Constitution is not contemplating, in section 3 of article 39, any specific family model (two-parent, single-parent, etc.) but is establishing the more general principle that adults must take material responsibility for the minors in their care.

Therefore, there is no unconstitutionality of *post mortem* reproduction due to violation of section 3 of article 39, since the duty of assistance can come from a single parent.

Unlike the previous law of 1988, article 1 of the LHART 2006 does not establish that the purpose of these techniques is the elimination of sterility.[29] However, if the legislator decided to base these techniques on the right to health and limit their use to specific medical cases, such as irreversible sterility or the possibility of transmitting hereditary diseases to their children, then it would not be possible for single women or widows to access them. This option has been chosen in other countries, such as France, Italy, and Germany.[30]

### 3.1.3. Legal requirements for carrying out PAR

There are several requirements for carrying out PAR: a) the death or declaration of death of the man b) the consent of the deceased man and the way in which the consent is given c) that the reproductive material of the deceased couple is used in the 12 following months after his death.

In the case of posthumous artificial fertilization in the strict sense, as regulated by art. 9 LHART 2006, the consent of the deceased husband or partner is intended to authorize the use of his reproductive material to inseminate the woman with it. From the literal wording of the precept, it is inferred that the consent must have a series of characteristics: it must be specific for

*de Trabajo constituido en la Dirección General de Registros y del Notariado)*, en *Boletín de Información del Ministerio de Justicia*, suplemento num. 3/1986).

[27] Rivero Hernández, op. cit. p.8.

[28] Judgment 116/1999, of June 17, 1999. Appeal of unconstitutionality 376/1989. Promoted by Deputies of the Popular Parliamentary Group against Law 35/1988, of November 22, on Assisted Reproduction Techniques.

[29] Rodríguez Guitián (2015), op. cit. p.7.

[30] Roca Trías, op. cit. p.9.

insemination after death, for the benefit of a specific woman, express, formal, of a very personal nature and revocable.

Likewise, posthumous transfer of pre-embryos requires the explicit and formal consent of the husband for such insemination, along with the time frame for carrying it out (paragraph 1 of art. 9). In this case, it only refers to the consent of the deceased, without mentioning the requirement of a time frame. Moreover, the deceased's consent can be presumed.[31]

#### 3.1.3.1. Consent

The most important requirement is the male's consent in the stipulated time for using the genetic material.

Consent can be granted by various means allowed by article 9.2 LHART 2006: the document that regulates article 6.3 of the law, by will, public deed, or the prior instructions document.[32]

Regarding the characteristics of consent, art. 6.3 provides the following: if the woman is married, her husband's consent will also be required, unless they are legally or *de facto* separated and thus it is clearly stated. The consent of the spouse, given before the use of the techniques, must meet the same requirements of free, conscious, and formal expression. Therefore, the consent granted by the man, authorizing the use of his reproductive material after his death must be voluntary, conscious, and formal, that is, it must be reflected in the aforementioned documents, with all the legal formalities that are required for the case.

##### 3.1.3.1.1. In case of marriage

In case of marriage, art. 6.3 of the LHART requires the consent of the husband and the wife. It must be prior to the use of these techniques, free, conscious, and formal.
If the required consent is not given, criminal offenses will be committed, such as that provided for in art. 162.1 Criminal Code regarding the lack of consent of the woman[33]; or administrative offenses, since art. 26.2.b) section 3 of the LHART 2006 would be violated, which considers "serious infractions: the omission of data, consequences and references required by this law".

[31] "Consent referred to in the previous paragraph is presumed to have been granted when the surviving spouse had been undergoing an assisted reproduction process already initiated for the transfer of pre-embryos formed before the husband's death".
[32] Farnós Amorós, E. (2011). *Consentimiento a la reproducción Asistida: Crisis de Pareja Y Disposición de Embriones*. Barcelona: Atelier.
[33] 1. Whoever performs assisted reproduction on a woman, without her consent, will be punished with a prison sentence of two to six years, and special disqualification for employment or public office, profession or trade for a period of one to four years.

The express nature of the consent is exempted if the surviving spouse had been subjected to this technique prior to the death of the other spouse and its results had not become effective.

#### 3.1.3.1.2. In case of the man not united by marriage

In this case, art. 9.3 LHART foresees that the male who does not have such a marital relationship with the female user of the treatment can have the possibility of his genetic material being used posthumously.

The article does not expressly foresee consent as an essential requirement but considers it to initiate the file of art. 44.8 of Law 20/2011. This is because if the child is born posthumously, no presumption of paternity can be applied as the one between a married man and woman. Therefore, it is necessary for the legislator to clarify that consent must be the recognition of filiation and from the same consent, the determination of filiation. Thus, the woman is allowed to be inseminated and at the same time grant the recognition of filiation in advance.

#### 3.1.3.1.3. Withdrawal of consent

Article 3.5 LHART 2006 refers to the moment to carry out the revocation of consent. It states that "the woman receiving these techniques may request that their application be suspended at any time before the embryo transfer and said request must be met." This was improved compared to the previous law, which did not establish any specific moment to be able to carry out the revocation.

In addition, art. 9.2 LHART 2006 includes the possibility of revoking consent at any time prior to carrying out the treatment. The law does not establish a specific form of revocation. However, doctrine discusses whether it should be done in the same way in which it was issued, or if, on the contrary, tacit revocation is possible. Most of the authors consider that it should be done in writing if there is enough time for it unless this is not possible.[34] Moreover, although art. 3.5 LHART only refers to the revocation of the woman, doctrine admits that this precept can be extended to the husband, or to the domestic partner.

[34] Fernández Campos, A. J. (2015). La reproducción humana asistida post mortem. In Chieffi, L., & Salcedo Hernández, J. R. (Eds.), *Questioni di inizio vita: Italia e Spagna: esperienze in dialogo* (pp. 163-172). Milano: Mimesis Edizioni. doi:10.4000/books.mimesis.1638

### 3.1.3.1.4. Problems with consent

There can exist some problems in the field of consent of the deceased husband if the document is private and different from the one in art. 6.3 LHART 2006 and the one in the prior instructions document.

The Court Order of the Audiencia Provincial[35] of Santa Cruz de Tenerife of June 2, 2010 dismissed the appeal filed by Mrs. Flor. The applicant wanted to appeal the court order of Voluntary Jurisdiction which denied the petitioner's request for insemination with reproductive material from her deceased husband Don Ignacio. This court order states that "the letter dated May 15, 2008, typed and signed by the deceased husband of the promoter, his mother and his sister, are not considered a public document, nor a will or prior instructions document" (legal reasoning 3, paragraph 2).[36] Therefore, it seems that another type of private document is not allowed since art. 9 LHART 2006 constitutes a *numerus clausus* and only refers to two types of private document.

On the other hand, consent must be express. The problem arises when the death of a male without making any explicit statement about the potential posthumous use of cryopreserved genetic material that had been stored previously and after his death. So, can consent to PAR be inferred from the fact that a person had gametes cryopreserved?

There are various opinions. Robertson[37] assumes that the absence of written consent means that the person did not feel strongly about the possibility of posthumous reproduction. Nevertheless, in the judgment of the Tribunal de Grande Instance de Creteil of 1 August 1984 (4225/84) in France, a sperm donor's wife can, after his death, claim restitution of the cryopreserved sperm. It can be understood that, given the notoriety of depositing gametes in a specialized center, such action reveals the possibility and belief of the male that the biological material should be used in the future. Other authors like Schiff[38] state that this tacit authorization does not constitute a true and authentic proof from a legal point of view.

[35] Literal translation in English would be "Provincial Court".
[36] Court Order of the Audiencia Provincial of Santa Cruz de Tenerife 160/2010 (Section 3), of June 2, 2010. Available at: ECLI:ES:APTF:2010:801A.
[37] Robertson, J. A. (1994). Posthumous Reproduction. *Indiana Law Journal*, *69*(4).
[38] Reichman Schiff, A. (1996-1997): *Arising from the Dead: Challenges of Posthumous Procreation*, North Carolina Law Review, num. 75°, pp. 948-95.

Consent must be formal. The current art. 9 LHART 2006 expands the ways to give consent. In LART 1988, it only considered giving consent in a public deed or will.[39] However, in LHART 2006 there are two new private documents: the prior instructions document and the one stated in art. 6.3 LHART 2006. Art. 6.3 states that if the woman is married, the consent of her husband is also required, unless they were legally or de facto separated and this is clearly stated. Art. 3.4 LHART 2006 emphasizes that the acceptance of assisted reproductive techniques by each woman receiving them will be carried out in an informed consent form. Therefore, interpreting the previous articles together, it seems that the husband may consent in said form to the use of his reproductive material for posthumous insemination of his wife.[40]

It is important to note that through the will, consent can be reflected, and filiation can be recognized. The holographic will also be included (art. 689 to 693 of the Civil Code), with the peculiarities related to its notarization, according to Law 15/2015, of July 2, on Voluntary Jurisdiction, so that it will have legal effects.

Since the new law LHART 2006, the presumption of consent was established. This presumption consists of assuming the man's intention to use his gametes for reproduction after his death when the surviving wife or partner demonstrates that before the death of her husband or partner, they were undergoing artificial insemination treatment, or that an embryo was cryopreserved. In both cases, consent is presumed, and therefore, the child born from PAR is given marital paternity –depending on the bond of the parents– and all the effects derived.

#### 3.1.3.2. Temporal delimitation for the use of the reproductive material

Article 9.2 of the LHART 2006 states that there is a maximum period of 12 months for the woman to make use of the genetic material of her husband or partner, from the moment he dies. As it was already mentioned, it doubles the time limit from the past law.

However, both doctrine and the General Directorate of Registries and Notaries (DGRN) have considered that this timeframe could be insufficient in certain cases, such as sudden illness followed by death. Therefore, the judge could extend the period if there is a justified cause,

[39] "2. However, despite what is stipulated in the preceding section, the husband may consent, in a public deed or will, to allow his reproductive material to be used, within six months following his death, to fertilize his wife, resulting in such offspring having the legal effects derived from marital filiation."

[40] Rodriguez Guitian, A. M. Reflexiones Acerca del Papel de la Mujer en la Reproducción Artificial *Post Mortem* (Analysis of the Role of Women in the Posthumous Reproduction) (February 22, 2017). Oñati Socio-Legal Series, Vol. 7, No. 1, 2017, Available at SSRN: https://ssrn.com/abstract=2921870

considering article 7 of Royal Decree 413/1996[41], which establishes that men's reproductive material can only be cryopreserved for a maximum of five years.[42]

On the other hand, the regulations do not refer to the number of fertilization attempts, nor the pregnancies that can be carried to term. The question is whether multiple births are allowed. The question is not clear, since the only thing that the norm indicates is that the reproduction material be used during the twelve months, but it does not limit the times of its use. In addition, the law does not specify whether the time limit concerns the actual commencement of the treatment or merely the decision to undergo treatment.

### 3.1.4. Legal effects

The legal effects derived from posthumous assisted reproduction consist of the inheritance rights related to the posthumous child and the determination of filiation.

The Spanish Civil Code includes the rules for determining filiation in cases of natural filiation and adoption, but it does not provide any provisions regarding assisted reproduction techniques. To determine filiation derived from these techniques, LHART 2006, establishes specific rules. However, for matters not covered by this law, it refers generally to the provisions of the Civil Laws.

On the other hand, the Civil Code of Catalonia has its own regulation and provides a different legal treatment in cases involving assisted reproduction techniques.

#### 3.1.4.1. Inheritance rights

Regarding posthumous assisted reproduction, with art. 29 CC we can deduce that the person conceived has inheritance capacity[43], since he/she is considered born for all the effects that are favorable to him/her, as long as he/she is born with the conditions expressed in art. 30.[44]

Art. 9 of the LHART denies recognition of the filiation of a child conceived through ART after the death of the parent (deceased male), meaning that a child born because of posthumous

[41] Royal Decree 413/1996, of March 1, which establishes the precise technical and functional requirements for the authorization and approval of health centers and services related to assisted human reproduction techniques.
[42] Navarro Pastor, op. cit. p.5.
[43] "Birth determines personality; but the conceived one is considered born for all the effects that are favorable to him, as long as he is born with the conditions expressed in the following article."
[44] "Personality is acquired at the moment of birth alive, once the entire detachment from the maternal womb has occurred."

artificial fertilization would not have filiation or inheritance rights with respect to their deceased biological father. This provision was inspired by the Warnock Report.

However, subsection 2 of art. 9 establishes exceptions to this rule. If the deceased man gives express consent for his wife to use his reproductive material after his death, the child will be granted matrimonial affiliation and all the associated effects, including inheritance rights.

Moreover, subsection 3 allows a man who is not married to a woman to leave his consent for his partner to use his reproductive material after his death. This consent serves as the initial test to initiate the registration process of the child's birth in the Civil Registry, in accordance with the provisions of Article 44 of Law 20/2011 on the Civil Registry.

Article 9 of the LHART 2006 does not explicitly attribute inheritance rights to those born because of these techniques. However, it can be inferred when determining or facilitating the determination of the child's filiation with respect to the deceased male. After the death of the husband, the fertilization or the embryo transfer to the widow will be carried out and the legal result will be that the newborn will participate in the inheritance of the deceased with the rest of the siblings –if any–.[45]

#### 3.1.4.1.1. Problems with inheritance rights

*First problem: Inheritance Law of the Spanish Civil Code*

The main issue is whether a descendant born after posthumous reproduction is the heir of the deceased man. Doctrinal positions have oscillated between denying inheritance rights and granting them, since the child is considered equal to a naturally conceived descendant.[46]

First, according to article 758 of the CC: "In order to qualify the capacity of the heir or legatee, the time of death of the person whose succession is involved shall be taken into account." Therefore, the death of the testator must first occur. Such capacity to inherit begins at the time of birth regulated by art. 29 CC.[47] Thus, according to this provision, a non-conceived child would not have the legal personality and could not be an heir.

[45] Fernández Campos, op. cit. p.14.
[46] Rivero Hernández, op. cit. p.8.
[47] "The birth determines the personality; but the conceived is considered as born for all the effects that are favorable to him, as long as he is born with the conditions expressed in the following article."

However, art. 745.1º CC interprets the inheritance rights of the pre-embryo. This article states that only a creature born alive and fulfilling the requirements of art. 30 CC can inherit.[48] Thus, a conceived but unborn child can inherit if fulfilling the requirements of art. 30 CC.[49]

Although the CC at the time of its promulgation did not think of *in vitro* conception, there is no objection to applying art. 29 CC. The concept of "conceived" is broad enough to include the embryo conceived *in vitro*, by virtue of what is established in art. 3.1 CC, which interprets the Code's norms based on the social norms of the moment in which they must be applied.[50]

It is worth noting that depending on the technique used, the inheritance capacity differs.

Firstly, in the case of the transfer of pre-embryos, the only requirement for the conceived minor to be a subject of inheritance lies in articles 29 and 30 CC insofar as a conceived child is understood to be born for all the effects that are favorable to it and will be considered to be born once the child is born from the mother's womb.

Secondly, the case of the posthumous artificial insemination is more difficult, since we are in the presence of a *concepturus*[51] and not a *nasciturus*[52] as established by art. 29 CC. Many defend that both should enjoy the same legal treatment and to accept that within the testate succession the deceased can grant to the future born the concept of heir or legatee, either through the classic procedure of trustee substitution, or directly, considering then that the institution is subject to the suspensive condition of the child's birth. The *concepturus* is usually recognized in testate succession but not in intestate succession.[53]

According to Rodríguez Guitián[54], amending the legislation is a solution to the problem of the inheritance effects of the conceived by posthumous artificial reproduction, either by presuming that the child resulting from this method will have the capacity to inherit or by considering them conceived at the time of succession.

[48] "They are incapable to succeed:
1. Abortive children, being understood as such those that do not meet the circumstances expressed in article 30."
[49] "Personality is acquired at the moment of live birth, once the entire detachment from the mother's womb has taken place."
[50] Femenía López , P.J. (1997) *"Status" jurídico del embrión humano, con especial consideración al concebido "in vitro"*. thesis.
[51] That who is to be conceived.
[52] That who has been conceived but not yet born.
[53] Rodríguez Guitián (2105), op. cit. p.7.
[54] Ibid.

All in all, children born from posthumous reproduction cannot be denied the inheritance rights that the law recognizes for all children, as this would entail discrimination contrary to art. 14 of the Spanish Constitution.

*Second problem: harming third parties*

To solve the problem of harming third parties, specifically the possible deprivation or reduction of their inheritance, there are two mitigating measures: a temporary period for carrying out assisted reproduction techniques or for embryo transfer and taking the precautions established in the CC when the widow is pregnant (arts. 959 to 967 CC).[55]

In order to protect third parties, the obligation of notice from the widow or partner must extend to her intention to proceed with the posthumous insemination or the embryo transfer, within the term established by law, since the interested parties have the right to know, not only the pregnancy itself, but also the possibility of such.[56] This obligation of notification shall be with the precise moment and place at which posthumous fertilization or transfer will take place.

Article 959 CC[57] requires a generic communication without specifying to whom, although it would be logical and appropriate to communicate with the ascendants and descendants of the deceased. Additionally, the widow's notice should also extend to the intention of procreation through posthumous fertilization or embryo transfer within the time frame specified by law.[58]

The descendant born through posthumous reproduction has hereditary rights in the same condition as children born by natural conception if their affiliation as a descendant is determined. This is much clearer in the case of the existence of a will, but more complex is if there is an omission or preterition in it, or if the will has been made previously and a later one has not been granted, and also in cases where the intestate succession is opened in the absence of a will.

In the latter case, the determination of filiation will be applied for inheritance rights and considering the twelve-month period established by law. Even the doctrine considers that by

[55] Ibid.
[56] Ibid.
[57] "when the widow believes that she has become pregnant, she must inform those who have a right to the inheritance of such a nature that it should disappear or diminish by the birth of the posthumous child."
[58] Femenía López, op. cit. p.19.

application of art. 741 CC "the recognition of a child does not lose its legal force even if the will is revoked", so the child would have inheritance rights.[59]

If PAR is contemplated in the will, the distribution of the inheritance would be postponed until the birth of the future child conceived by *post mortem* fertilization. One would have to wait for the pregnancy within the terms established by the legislation and for the birth, for which reason Articles 808 and the following ones of the Civil Code would apply. If the deadlines are not met, or they have passed without fertilization and birth taking place, the inheritance would be shared with the heirs.[60]

On the other hand, if consent has been given in another document not contemplated by LHART 2006 nor a will, it may lead to a distribution of the inheritance. Therefore, if the woman knew of the consent given by the man, she must communicate her decision to be posthumously fertilized. It would also be appropriate for healthcare centers to communicate the existence of the documents, as well as the notary, if applicable.[61]

If it did not grant inheritance rights, the precept would infringe art. 14 of the Spanish Constitution, since it would treat genetic children from the same father and mother in a different way for inheritance rights.[62]

In the English legal system, the registration of paternity of the deceased man is only symbolic and does not grant rights to the child.[63]

#### 3.1.4.2. Determination of filiation

Article 7.1 LHART 2006 states that the filiation of children born from assisted reproduction techniques will be regulated by civil laws, except for the specifications established in the following three articles of the law. However, there exists a specific regulation for filiation in article 9, since it is difficult to apply to PAR the Civil Code's norms about filiation.

[59] Femenía López, op. cit. p.19.
[60] Baig, I., & Fernández, F. (1970, January 01). La Fecundación "post mortem" en España: Problemas y límites jurídicos y bioéticos. Retrieved from https://dialnet.unirioja.es/servlet/articulo?codigo=7533442
[61] Ibid.
[62] Roca Trías, op. cit. p.9.
[63] Vonk, M. M. (2007). Children and their parents: A comparative study of the legal position of children with regard to their intentional and biological parents in English and Dutch law. *SSRN Electronic Journal*. doi:10.2139/ssrn.2696032

The treatment in art. 9 LHART on filiation issues differs depending on whether the deceased man is the woman's husband or domestic partner.

If the woman is inseminated after the death of her husband, the problem lies in the type of filiation, since with the regulations of the Civil Code it is hard to estimate that the newborn's filiation is marital. It is difficult to apply the presumption of paternity of art. 116 of the Civil Code[64], insofar as it presumes that the husband's children are those born after the celebration of the marriage and before three hundred days following its dissolution or the legal or *de facto* separation of the spouses.

In practically all cases of artificial insemination after the death of the husband or posthumous transfer of pre-embryos, such legal deadlines would not be met, unless the insemination and transfer were carried out almost simultaneously with the death of the husband. Nor does it seem that art can be applied. 118 of the Civil Code[65], since the article only speaks of legal or de facto separation and not of dissolution –as is the case of death–. It is also not clear if it is only the woman who gives consent at the time of registration, since the husband gives consent when expressing it to PAR through one of the means of art 9 LHART 2006.[66]

For this reason, the 2006 legislator introduced in art. 9 a special rule of filiation, considering that filiation is of marital nature. According to Rodríguez Guitián[67], the marital nature of filiation is a correct decision: the husband provides the semen and the decision of fertilization comes from two married people. If the mother is inseminated with the sperm of her deceased partner, it is easy to determine the type of filiation.

On the other hand, there is extramarital filiation when the child is procreated *post mortem* with gametes from individuals who were not united in marriage (art. 9.3 LHART 2006).

#### 3.1.4.2.1. Problems with the determination of filiation

It would be more accurate to have equated the determination of filiation in LHART 2006 both in the case of husband and the domestic partner, because since the Law 20/2011 of July 21 of the Civil Registry –which replaced the Civil Registry Law of June 8, 1957– eliminates all reference to non-marital filiation and equates it to marital filiation. This is already made in the

[64] "The husband's children are presumed to be those born after the celebration of the marriage and before three hundred days following its dissolution or the legal or de facto separation of the spouses."
[65] "Even lacking the presumption of paternity of the husband due to the legal or de facto separation of the spouses, the filiation is matrimonial if the consent of both concurs".
[66] Rivero Hernández, op. cit. p.12.
[67] Rodríguez Guitián (2015), op. cit. p.10.

Second Book of the Civil Code of Catalonia, in articles 235-8.2 and 235-13.2, which equates the marital and non-marital filiation.

Nevertheless, the consent of the domestic partner does not automatically imply, compared to the case of the husband, the determination of filiation, but rather it is established that said consent, granted in the manner and within the term established by art. 9.3[68], serves as a title to initiate a file of section 8 of article 44 of Law 20/2011, of July 21, of the Civil Registry[69], and thus be able to declare the filiation of the male cohabitant through a decision issued in said file. If the interested party or the Public Prosecutor manifests opposition in the file, the child will have the action of judicial paternity claim (final part of art. 9.3 LHART 2006).

To respect art. 14 of the Spanish Constitution as well as dignity as the foundation of political order and social peace of art. 10 of the same legal text, the legal situation of those born by PAR must be, if not identical, at least as close as possible to that of the person born by natural procreation. In this way, once the birth has occurred, and the filiation with respect to the deceased has been determined, there should be no differences in rights and obligations due to the type of filiation, whether it is considered marital or nonmarital.[70]

It is interesting to note, however, that there is a legal loophole if a marriage occurs between the widow subjected to PAR and a third party, within the 12-month period that the law considers as the term for carrying out posthumous fertilization. The problem lies in the marital affiliation that would correspond to the deceased man, according to art. 9.2 LHART, which would face the presumption of art. 116 of the CC.[71]

One doctrinal sector believes that, if the legal requirements are not met, the child will not have recognition of his paternal affiliation. Nevertheless, a broader sector advocates for the interest of the minor and the doctrine of *favor filii* (opting for the most favorable solution for the minor).

In some legal systems, the use of genetic material is allowed, even without complying with the requirements regarding terms and form. That way, the posthumous child will only have maternal affiliation, without having any type of link with the paternal parent. Nonetheless, this

[68] Section 3 is modified by final provision 5.3 of Law 19/2015, of July 13. Ref. BOE-A-2015-7851.
[69] "8. Once the registration has been completed, the Person in Charge will issue a literal electronic certification of the birth registration and will make it available to the declarant or declarants."
[70] Escribano Tortajada, op. cit. p.28.
[71] Article 116: "Children born after the wedlock is solemnised and before three hundred days after the dissolution thereof, or after the de iure or de facto separation of the spouses, shall be presumed to be children of the husband."

solution does not seem viable in the Spanish legal system if we look in the interest of the child.

### 3.2. Regulation in the Civil Code of Catalonia: articles 235-8.2 and 235-13.2

Posthumous assisted reproduction is regulated in Catalonia in articles 235-8.2 and 235-13.2 of the Second Book of the Civil Code of Catalonia.

The autonomous communities have competence over the right of filiation, according to article 149.1.8ª of the Constitution. The LHART 2006, in its first final provision, states "This Law, which has a basic nature, is enacted under the protection of article 149.1.16.ª of the Constitution. Chapter IV is exempted from the above, which is enacted under the protection of article 149.1.15.ª of the Constitution, and articles 7 to 10, which are enacted under the protection of article 149.1.8.ª".

Article 7.1 LHART 2006 states that the filiation of children born from assisted reproduction techniques will be regulated by civil laws, except for the specifications established in the following three articles of the law. On one hand, the Civil Code regulates filiation in Title V, Book I (arts. 108 and following). On the other hand, the Civil Code of Catalonia –hereinafter CCCat– comprises it in Chapter V, Title III of Law 25/2010, of July 29, of the Second Book of the C, relating to the person and the family (arts. 235-1 and following).

Articles 235-1 to 235-52 CCCat are dedicated to regulating filiation, which is divided, according to the first article, into two categories: natural filiation –distinguishing between marital or nonmarital– and adoptive filiation.

It is important to note that the CCCat, unlike the Spanish Civil Code, regulates filiation of those born through assisted reproduction in an identical manner in articles 235-8 and 235-13, with the only difference being the mention of "spouse" in the former and "man or woman" in the latter, as it is possible for the spouse or stable partner to be a woman as well.[72] More concretely, these two articles regulate posthumous assisted reproduction in section 2 (235-8.2 and 235-13.2). The articles regulate two situations. The first scenario involves assisted fertilization when the spouse or the man or woman who consented to it is alive at the time of the procedure (art. 235-8.1 and 235-13.1). The second scenario deals with *post mortem* fertilization with the

[72] Egea Fernández J, Ferrer Riba J, Farnós Amorós E. (2014). Comentari al llibre segon del Codi civil de Catalunya. Família i relacions convivencials d'ajuda mútua. Barcelona: Atelier.

gametes of the husband or the man who lived with the mother, allowing, under specific requirements, the determination of paternity of the child in relation to the deceased (also, Art. 412-1.2 and 464-2, letter d), which is also based on their consent. This latter scenario is the one we will be focusing on.

In addition, article 235-3 CCCat on the determination of filiation, includes consent to assisted fertilization of the woman as a new apparently autonomous title.[73] Consequently, the Spanish legislator forgets in the filiation regime (in Law 11/1981, of May 13, amending the Civil Code on filiation, parental authority, and the economic regime of marriage) the incidence of ART: none of them refers to it in the text and only natural procreation is contemplated.

In addition, articles 235-8.2 and 235-13.2 of the CCCat, following art. 9 LHART 2006, allows posthumous reproduction only in the case of marriage or heterosexual couples -using gametes from the husband or partner "after" their death. Therefore, posthumous reproduction using female gametes from the spouse or female partner of the woman undergoing fertilization is not allowed.[74]

### 3.2.1. Legal requirements and filiation

The main requirement for PAR is the explicit consent of the husband or man. It is not enough for him to consent to the use of reproductive techniques by his wife or partner, he must specifically address the possibility of posthumous conception of a child and express consent for it.

The following requirements must be fulfilled (Art. 235-8.2, referred to in Art. 235-13.2, where the exception "insofar as they are applicable" has no independent significance).

The first requirement is the husband or man's express and well-documented intention. The express consent should clearly indicate or acknowledge the *post mortem* fertilization and must be documented in a way that leaves no doubt about the husband's or partner's declaration. The formal requirement of consent does not mention on what document exactly should be recorded but requires that the husband's express consent be recorded in a reliable way. However, this could be done through a public deed, a clinical or health document consenting to the use of

[73] "Natural filiation, with respect to the mother, results from birth; with respect to the father and mother, it can be established by recognition, by consent to assisted fertilization of the woman, by the registration process or by judgment, and, only with respect to the father, by marriage to the mother".
[74] Ibid.

these reproductive techniques, an advance directive document, and a will or codicil (in the latter case, once it becomes legally effective, as per Articles 421-5, 421-18, and 421-20.3 CCCat).

Secondly, the procedure should be limited to a single instance, even if it results in multiple births. While the fertilization technique allows for successive pregnancies through cryopreservation, it is intended for a single occurrence. This is different from LHART 2006, since there is not a limitation of cases in art. 9 LHART.[75]

Finally, the fertilization process must start within 270 days after the husband's death. In exceptional cases, the judicial authority may grant a justifiable extension of up to 90 days. These rules serve the purpose of ensuring that fertilization does not occur too close to the husband's death and accommodating any potential challenges that may arise during the process. This is also different from the Spanish law.

If these conditions are not met, it is still possible to initiate a successful legal action to establish marital or nonmarital paternity, since this action is based on biological truth and the genetic material belongs to the deceased husband or partner (art. 235-28.2 *in fine*), which prevents it from being challenged even in the absence of consent when a biological relationship is established. However, the non-compliance with the requirements may have consequences in terms of inheritance, and there may also be compensation claims from "other" descendants or successors of the deceased husband or partner against the woman and the assisted fertilization center. The center may also face severe penalties for such violations as art. 26.2, letter b, 3rd LHART 2006 states.[76]

Regarding inheritance, it is important to reiterate that article 412-1.2 CCCat establishes that “children born as a result of assisted fertilization performed in accordance with the law after the death of one of the parents have the capacity to inherit from the deceased parent”. In addition, art. 464-2, letter d, established that the division of the inheritance is suspended if the deceased expressed the will to allow assisted fertilization after death, until the birth occurs or the legal deadline for its practice expires.

In addition, art. 9 of the LHART 2006 states that both husband and the man not united by marriage can provide consent for the use of their reproductive material after their death, as well

[75] Rodríguez Guitián (2015), op. cit. p.7.
[76] Egea Fernández, Ferrer Riba, Farnós Amorós (2014), op. cit. p.24.

as for the transfer of pre-formed embryos. It does not require cohabitation or the need for a domestic partnership, which may lead to some vagueness in interpretation. As highlighted by Rodríguez Guitián[77], this vagueness may result in any man's consent for posthumous reproduction with any woman being deemed acceptable. Therefore, article 235-13 CCCat has greater technical accuracy since it requires cohabitation.

## 4. MODELS OF REGULATION APPLICABLE TO POSTHUMOUS ASSISTED REPRODUCTION IN SOME EUROPEAN COUNTRIES

European countries have different regulations regarding posthumous assisted reproduction. In this section, the countries will be divided into countries in which PAR is allowed and countries in which it is prohibited.

While EU law does have some competence over bio-law, it often relies on the competences in EU's Member States, leaving the matter on a domestic level. Moreover, national measures that permit or forbid fertility treatments may be under the scrutiny of the European Court of Human Rights, specifically if they exceed the margin of appreciation granted to them.[78]

The freedom of movement within the EU provides its citizens with the option to travel conveniently to a Member State where PAR is legally allowed. This is particularly relevant since different EU countries have varying regulations regarding *post mortem* fertilization, with some having restrictions while others don't, as in the case of Ireland which refrains from regulating the practice yet doesn't prohibit it.[79]

### 4.1. Countries in which posthumous assisted reproduction is allowed

The countries that authorize posthumous reproduction in Europe like Spain, the United Kingdom, Belgium, and the Netherlands do not distinguish between the use of frozen sperm and embryo transfer.[80]

[77] Rodríguez Guitián (2015), op. cit. p.7.
[78] Grasso, E. (2021). The unbearable lightness of informed consent in post mortem fertilization. *European Review of Private Law*, *29*(6), 945–968. https://doi.org/10.54648/erpl2021049
[79] Ibid.
[80] Parizer-Krief, K. (n.d.). *Post mortem procreation in French and British law*. Culture and Research. Retrieved from https://doi.org/10.26262/culres.v5i0.4955

### 4.1.1. The United Kingdom

The United Kingdom has regulated assisted reproductive technologies more extensively than other countries, and the basic legal text is the Human Fertilisation and Embryology Act of 2008 (hereinafter HFEA 2008), which has been modified several times.[81] The HFEA 2008 legislation does not include the collection of gametes but rather concerns preservation, storage, use and disposal of gametes and embryos.[82]

#### 4.1.1.1. Legislative background

The HFEA 2008 was enacted to amend the Human Fertilisation and Embryology Act 1990 (HFEA 1990) and the Surrogacy Arrangements Act 1985. The HFEA 1990 allowed artificial insemination, *in vitro* fertilization, and embryo implantation posthumously. However, the child born because of these practices was not given the status of a legal child due to the problems of inheritance that it could cause.

The HFEA 1990 underwent several reforms. In 2003, the law was modified. The Act on Human Fertilisation and Embryology (Deceased Fathers Act)[83] was adopted and with this act, it granted paternal filiation to the man, whose sperm was used after his death to conceive a child, if the deceased man had given consent to the posthumous use of his reproductive material, and if the mother registered the father within 42 days of the child's birth.[84]

Although the newborn was recognized, the rights of filiation did not grant inheritance rights with respect to his legal father, limiting the effects that derive from the declaration of filiation.[85] Thus, the registration of the male as a father of the child only has a symbolic value and not legal consequences nor rights.[86] The explanatory note to the HFE (Deceased Fathers) Act 2003 states that this "registration will not confer upon the child any legal status or rights as a consequence of that registration".

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[81] Escribano Tortajada, P. (2016). Algunas cuestiones que plantea la reproducción asistida post mortem en la actualidad. *Anuario De Derecho Civil*, *69*(4), 1259–1320.
[82] Baird, K. (2018, October). Dead body, surviving interests: The Role of Consent in the Posthumous Use of Sperm. University of Otago. Retrieved from https://www.otago.ac.nz/law/otago710999.pdf
[83] Human Fertilisation And Embryology (Deceased Fathers) Act dated 2003. http://www.legislation.gov.uk/ukpga/2003/24/introduction.
[84] Moskalenko, K. (2022). Posthumous Reproduction: Comparative Review of legislation and court practice. *European Union and Its Neighbours in a Globalized World*, 173–186. https://doi.org/10.1007/978-3-031-05690-1_10
[85] According to the 2003 amendment to the HFEA, section 28 (5A) - (5I).
[86] (Deceased Fathers) Act 2003 (HFEA 1990 s28 (5A) (5B) (5C) (5I) and s29].

Finally, the law underwent further revision in 2006, resulting in the HFEA Act of 2008, which included provisions like those of 2003, and the registration of a deceased man as the father of a child continued to have only symbolic effects.[87]

#### 4.1.1.2. Human Fertilisation and Embryology Act 2008

In the UK, PAR is allowed but it requires explicit written consent. Without such consent, medical care guidelines apply, and decisions regarding incapacitated patients must be made in their best interest by their next of kin. While gametes are organic material, they are not covered under the Human Tissue Act 2004, and the deceased's next of kin, friends, or close relatives cannot give consent to use them as they would with other organs or tissues.[88]

We must attend to sections 39 and 40 of this legal text, in addition to section 46. Sections 39 and 40 of the HFEA outline the use of sperm and embryo transfer after the man's death, and the transfer of the embryo after the husband or partner's death who did not provide the sperm.

In the HFEA 2008, filiation can be attributed to a certain man, the husband or cohabitant of the mother of the child, even if the fertilization occurs later of the latter's death, in accordance with section 40 (2). However, the deceased is not regarded as the legal parent of the child who is still excluded from claims in intestacy and under the UK's Inheritance (Provision for Family and Dependents) Act 1975.[89]

On the other hand, heterosexual and homosexual couples are allowed to resort to ART, including posthumous artificial fertilization, according to section 46 of the HFEA 2008, which refers to "embryo transferred after death of female spouse, civil partner or intended parent".

It is important to note that in the United Kingdom it is possible for the sperm donor to be considered the father, when the embryo was established before death, if a series of requirements are met. The requirement is that he has given consent and has not revoked it, and that the mother requests it within a maximum period of 42 days.

It is remarkable that posthumous fertility with the help of the deceased wife's (or woman's) egg, as well as the request for posthumous fertility by other relatives, especially parents, exists in

[87] Hyder-Rahman (2020). Regulating posthumous reproduction in the Netherlands and the UK. *The Family in Law.* Retrieved from https://www.familyandlaw.eu/tijdschrift/fenr/2020/04/FENR-D-19-00008
[88] Grasso, op. cit. p.27.
[89] Inheritance (Provision for Family and Dependants) Act 1975: "An Act to make fresh provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for the spouse, former spouse, child, child of the family or dependant of that person; and for matters connected therewith."

the United Kingdom (as established in the decision of the British Court of Appeal of September 9, 2016). The reason for the few requests for posthumous fertility with the deceased woman's egg is that it is much more difficult to extract eggs from a woman compared to sperm, and also because technology for egg freezing and the birth of a baby several decades later than sperm freezing has emerged and expanded.[90]

Posthumous conception is possible only if there is a written signed consent. According to the HFEA 2008, the use of someone's gametes for treatment services requires their effective consent. However, even though the law prohibits the use of gametes without consent, some courts have allowed the export of gametes outside the country, effectively bypassing this requirement (like in the Diane Blood case, which will be later explained).[91]

Moreover, both married and unmarried fathers can be registered on the child's birth certificate if they gave consent to the use of their sperm or embryo and their registration. This registration has no further legal consequences.

No period has been established as a reflection period, but the law has established periods as the time allowed for the storage of frozen gametes and embryos, which is 10 years for gametes and 5 years for frozen embryos. Likewise, the Center for Embryology and Human Fertility has advised mothers to consult with a psychologist and health experts to make decisions about *post mortem* fertility.[92]

#### 4.1.1.3. The Diane Blood case

In the United Kingdom, there was a famous case related to posthumous assisted reproduction, the R v. HFEA ex parte Blood, commonly known as the Diane Blood case.

Stephen Blood and Diane Blood were married in 1991 and wanted to start a family, but Stephen fell ill with meningitis in 1995 before Diane became pregnant. While Stephen was in a coma, Diane explored the possibility of extracting his sperm and had two samples deposited in the Infertility Research Trust, one of them after his death. Diane then requested authorization for insemination with her deceased husband's sperm, but the Human Fertilisation and Embryology Authority denied her request because Stephen had not given his consent for posthumous

[90] Mohseni, E. (2021). Posthumous reproduction in comparative law. *Medical Law Journal, 15*(56), 383-401. Retrieved from http://ijmedicallaw.ir/article-1-1121-en.html

[91] Simana, S. (2018). Creating life after death: Should posthumous reproduction be legally permissible without the deceased's prior consent? *Journal of Law and the Biosciences*, *5*(2), 329–354. https://doi.org/10.1093/jlb/lsy017

[92] Ibid.

fertilization. Diane took legal action and the Court of Appeal (Civil Division) ruled on February 6, 1997, that the consent of the person donating their gametes is essential for deposit and use. Therefore, the semen of Mr. Blood should not have been deposited since he had not given his consent, and the authorization for insemination was denied. However, on February 27, 1997, the British Court of Appeal in the Civil Division ruled that under European law, Diane Blood had the right to use her husband's extracted sperm. She underwent treatment in Belgium in 2002, where it was legal, and has two children resulting from the sperm extraction procedure.

As a result, legislation was enacted to allow for the registration of a deceased father in cases of posthumous conception. The issue arose as to how the father could be named on the child's birth certificate. To address this, the Human Fertilisation and Embryology (Deceased Fathers) Act 2003 was passed, which amended the HFEA 1990 to permit the mother of the child to register the deceased father on the birth certificate, subject to the conditions mentioned earlier.

On the other hand, Y v. A Healthcare NHS Trust & Ors is a case in which the consent of an incapacitated person's wife was deemed enough to permit the extraction of sperm for reproductive purposes. Despite the HFEA 1990's prohibition on using gametes without consent, courts have overcome this restriction by allowing gametes to be exported outside the UK. However, there remains ambiguity about individuals who lack capacity. While patients must be treated in their best interests prior to death, the rules become less clear after death.[93]

In addition, it is important to mention that in 2022, the family division of the High Court of England and Wales allowed a husband to use an embryo created by *in vitro* fertilization with his wife for birth by surrogacy, even though the wife (who died after creation of the embryo by IVF) did not provide written consent for this use. The decision has attracted media attention in the United Kingdom as "a landmark legal case," which "could be the UK's first case of posthumous surrogacy."[94]

#### 4.1.1.4. Considerations related to lesbian couples or marriages

The Human Fertilisation and Embryology Act (HFEA) of the UK, in its update of 2008, allows posthumous reproduction to the female partner of a woman, regardless of whether they are registered as a domestic union or not, if an embryo created with donor sperm is transferred before the spouse's death. After the approval of the Marriage (Same Sex Couples) Act in 2013,

[93] Grasso, op. cit. p.27.
[94] Judgment Jennings v Human Fertilisation And Embryology Authority, FD21F00088 (England and Wales High Court of Justice (Family Division) June 22, 2022).

which allows marriage between same-sex couples, some modifications have been made to section 46 of the HFEA. Now, in addition to allowing posthumous assisted reproduction for female couples, it is also admitted for women who are married with the same requirements that were established in 2008 for unmarried homosexual couples.[95]

The partner can be recognized as the legal mother of the child even if she was not present at the birth due to her spouse's death. However, this does not apply if donor sperm is used after the spouse's death. The partner must give written consent for the embryo to be transferred after their death and be recognized as the legal parent of the child. In addition, the birth mother must agree to her partner being recognized as the child's mother within 42 days after the birth. It should be noted that the birth registration only has symbolic value, and the deceased person is not recognized as a legal parent in any other aspect (e.g., inheritance).

#### 4.1.1.5. Differences from the Spanish legislation

Unlike the Spanish and Catalan legislation, the HFEA 2008 provides for the possibility of consenting to the posthumous transfer of an embryo generated with third-party genetic material (although the embryo must have been created before the person's death). As a result, whoever consents will be considered a parent only by virtue of their consent, without the requirement of a genetic contribution. Thus, cases of *post mortem* heterologous fertilization in relation to the deceased are allowed.[96]

All in all, in the UK, paternal filiation is granted to a child conceived after the father's death, but they are denied the right to inherit, due to the insecurity and legal vulnerability of the other heirs of the deceased, who do exist at the time of death and therefore meet the requirement of existence at the time of death of the deceased. Additionally, the established inheritance rules do not adapt to such a scenario. This is different from the Spanish regulation which does give inheritance rights to the newborn.

### 4.1.2. Belgium

Posthumous fertilization is permitted under the *Loi relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamète,* of 6 July 2007,

[95] Rodríguez Guitián (2015), op. cit. p.7.
[96] Geri, L. (2022). Una aproximación a las dimensiones estática y dinámica de la voluntad procreacional a partir de la reproducción ASISTIDA post mortem. *Revista de Bioética y Derecho*, 47–64. https://doi.org/10.1344/rbd2021.54.36126

specifically in Articles 2, 15, 16, 44, and 45.[97] This law permits both the use of gametes as well as the implantation of embryos over a period of between six months and two years after death.

Article 2 contains a list of definitions which includes "posthumous implantation" and "posthumous insemination". Articles 15 and 16[98] regulate the posthumous implantation of cryopreserved embryos, while for gametes, we must refer to Articles 44[99] and 45 of the law. They are both allowed, as stated in these articles.

Before undergoing fertilization, it is required to sign an agreement that outlines the provisions for access to fertilization and details the course of action in case of separation, divorce, or death of one of the parents.[100]

Regarding the inheritance effects resulting from the use of such techniques, Article 325/4, Section 4 of the Belgian Civil Code recognizes that the request to contest the presumption of paternity is not admissible if the husband has consented to artificial insemination or any other act aimed at procreation.

Compared to Spanish law, the Belgian law gives a kind of "reflection period", in the sense that posthumous fertilization can be performed from the sixth month after the death of the couple, and at the latest up to the second year from the date of death.[101]

### 4.1.3. The Netherlands

Posthumous assisted reproduction is allowed in the Netherlands in both article 1:207 of the Book I of the Dutch Civil Code and art. 7 of the 20 June 2002 Embryowet, as well as the guidelines issued by the Dutch Association for Obstetrics and Gynaecology with the Model

[97] Belgium. *Loi relative à la procréation médicalement assistée et à la destination des embryons surnuméraires et des gamètes,* of July 6, 2007.
[98] Art. 15: "In the event that the authors of the parental project had cryopreserved supernumerary embryos with a view to a subsequent parental project and insofar as they expressly provided for this in the agreement referred to in Articles 7 and 13 of this law, posthumous implantation of supernumerary embryos is possible."
Art. 16: "posthumous implantation may only be carried out after a period of six months commencing on the death of the author of the parental project and, at the latest, within two years following the death of the said author. Any contractual provision contrary to paragraph 1 of this article shall be null and void."
[99] Art. 44: "In the event or the case where the person who requested the cryopreservation had preserved supernumerary gametes with a view to a subsequent parental project and insofar as he expressly provided for this in the agreement referred to in Articles 7 and 42, post mortem insemination of supernumerary gametes is legal."
[100] Grasso, op. cit. p.27.
[101] "Article 45: posthumous insemination may only be carried out after a period of six months starting on the death of the person who requested cryopreservation and, at the latest, within two years following the death of this person. Any contractual provision contrary to paragraph 1 of this article shall be null and void."

Regulation Embryo Act (referred to "Modelreglement"), chapter 5, which complements the Embryowet 2002. This later document is not legally binding but is followed by practitioners. Article 1:207 of Book I of the Dutch Civil Code, which applies according to doctrine to the use of assisted reproductive techniques after the death of the husband or unmarried partner (both registered and unregistered), with his sperm or through the transfer of an embryo created with his sperm or that of a donor, states that the mother and/or the child may establish paternity based on the fact that he, as the mother's life companion, consented to an act that may have resulted in the birth of the child.[102]

In addition, art. 7 of the Embryo Act establishes that the man must have consented to the use of his sperm/embryo after his death.[103] In case of a person's death, his/her preserved gametes must be destroyed, unless the person, during his/her lifetime, consented to the use of his/her reproductive material posthumously.[104]

In cases of posthumous procreation, the status of the parents' relationship is not relevant, since paternity in such cases is established by judicial establishment of paternity provided the man, as the mother's life companion, consented to the use of his sperm or embryo after his death.

In the Dutch legal system, unlike the English legal system, the judicial determination of paternity may have legal consequences not only regarding the child's status as the father's child (although he/she does not have inheritance rights from the father), but also regarding certain ties with the father's family, for example, in terms of surname, nationality, and inheritance rights that correspond to the father in the grandparents' inheritance[105]. That is, the establishment of paternity has no consequences regarding the man's estate since he was already deceased before the mother became pregnant with the child. However, the judicial establishment of paternity will create legal familial ties with the father's family, which means that the child may inherit from his/her paternal grandparents in his/her father's stead (Article 4:10(2) of the Dutch Civil Code[106]).

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[102] Vonk, op. cit. p.21.

[103] "Article 7: The germ cells will in any case be destroyed if they are not made available for other purposes, after the expiry of the period for which they were made available, and after the provision has been revoked. The germ cells are also hyderdestroyed after the person who keeps them has become aware that the person concerned has died, unless he has given explicit written permission for use after his death."

[104] Hyder-Rahman, op. cit. p.29.

[105] Rodríguez Guitián (2105), op. cit. p.7.

[106] "Article 4:10 Order of inheritance of intestate heirs: (..) - 2. The descendents of a child, brother, sister, grandparent or great-grandparent of the deceased may be called to the deceased's estate in order to inherit by right of representation as meant in Article 4:12. (...)"

The Modelreglement suggests that explicit, written (prior) consent of the deceased is required for the use of his or her gametes and embryos after death. Although courts have some discretion, consent remains a crucial issue, especially in cases where death is sudden. Additionally, healthcare professionals are given some discretion too to refuse to perform treatments, even though conscientious objection is not explicitly listed as a reason for doing so. The Modelreglement 2018 considers current advances in fertility preservation treatments, such as cryopreservation of female gametes, and removes gender-based distinctions that existed in the previous Modelreglement from 2004. However, the Modelreglement 2018 reduces to one year the period during which it is possible to use the gametes of the deceased and discourages their use within surrogacy.[107]

On the other hand, on April 1, 2014, two laws (the Lesbian Parenthood Act of November 25, 2013, and the Act to Eliminate Several Differences between Registered Civil Partnership and Marriage of November 27, 2013) were combined to allow the spouse or registered partner of the biological mother to become the child's legal mother if both present a declaration from the Donor Data Foundation to the birth register within three days of the child's birth.[108]

This declaration must affirm that the biological mother received assisted reproduction treatment at an authorized clinic and that the identity of the sperm donor is unknown. However, if the spouse or registered partner dies before the birth of the child, she cannot be recognized as the child's legal mother, as the declaration must be made at the time of birth registration.

Nevertheless, the legal maternity of the deceased spouse who consented to the conception of the child by her spouse or partner could be determined judicially at the request of the biological mother and/or the child, under Article 1:207 of the Dutch Civil Code. This provision, which traditionally applied to the use of assisted reproduction techniques after the death of the male or partner, states that the mother and/or the child may request, after the death, that paternity be judicially determined based on the biological paternity of the man or on the basis that the man lived with the mother and consented to an act that could result in the birth of a child.[109]

### 4.1.4. Greece

Law 3089/2002 and Law 3305/2005 establish the legal framework for assisted reproduction techniques in Greece, despite the country's generally conservative attitudes. ART treatments

[107] Grasso, op. cit. p.27.
[108] Vonk, op. cit. p.21.
[109] Ibid.

are deemed necessary in cases where natural procreation is limited. Like in Belgium, artificial fertilization is permitted between six months and two years after the donor's death.

Article 1457 of the Greek Civil Code of 1946[110] allows posthumous fertilization of a woman by her deceased spouse or partner, provided that the spouse or partner suffered from a condition that caused sterility or death. A judicial permit is required for this procedure, or a notarial document authorizing the use of the deceased's sperm for artificial insemination. If the requirements are met, the child conceived and born after the death of the progenitor is granted paternity and the child is recognized as an heir of the deceased parent. So, express consent is a rigid form of consent in Greece and must be given before a notary public making any consent expressed by a will invalid.[111]

The authorization is granted within 6 months of the application, and the woman has a period of 2 years to undergo the artificial insemination. This period is established to suspend the inheritance process of the deceased progenitor until the existence of the future child is determined. Additionally, this period allows the widow the possibility of conceiving the child, so that her inheritance rights are not affected or limited by the distribution of the estate.

#### 4.1.5. Portugal

The *Lei n.º 32/2006 de 26 de Julho Procriação medicamente assistida* was the first regulation promulgated in Portugal on assisted reproduction. Before this, the regulation of ART was carried out by private clinics, which only had to respect Portuguese law.

Article 22 refers to posthumous insemination, and it was amended by Law No. 72/2021 of 12 November. Previously, art. 22 prohibited insemination with the semen of the deceased, even if there was consent involved. The case of Portugal is very relevant since it was in 2021 when it was established that posthumous insemination in cases of expressly consented parental projects within a period of six months to three years after death would be allowed.

[110] Article 1457: "Artificial insemination after the death of the husband or the man with whom the woman lived in free association is permitted with judicial permission only if the following are cumulatively present conditions:
a. The woman's husband or permanent partner suffered from an illness associated with possible risk of sterility or there was a risk of his death.
b. The husband or permanent partner of the woman had consented with a notarized document and in postmortem artificial insemination.
Artificial insemination is carried out after six months and before the completion of two years since the man's death."

[111] Grasso, op. cit. p.33.

ART are considered a subsidiary (and not alternative) method of reproduction according to article 4, and can only be used in cases of infertility, the treatment of serious illness, or the risk of transmission of genetic, infectious, or similar diseases. Therefore, the use of these techniques outside of legally established cases is considered a violation of human dignity.

The situation changed in 2021 thanks to Ángela Ferreira, a woman who became pregnant with her deceased husband's semen in 2019. Her late husband had expressed his wish for her to have a child with him and had cryopreserved his semen during his lifetime. However, it was not legal at the time. Angela consulted with her lawyers, and they suggested her going to Spain. She appealed to television and obtained 100,000 signatures to bring the law to Parliament.[112] She is the first woman to achieve a posthumous insemination pregnancy in the country.

According to article 22, it is legal to use the sperm of a deceased husband or partner to perform insemination or transfer an embryo, if it is in accordance with a clearly established and consented parental project.

However, sperm collected for insemination based on a reasonable fear of future infertility, without consent for posthumous insemination, must be destroyed if the person dies during the period established for its conservation. The article also stipulates that the decision-making process for posthumous insemination must take at least six months, except in cases of compelling clinical reasons. Procedures must be initiated within three years of the husband or partner's death, and a maximum number of attempts identical to that fixed for public centers may be made. Insemination and embryo implantation can only result in a single pregnancy leading to a live birth. Finally, the article notes that psychological support is available upon request during the decision-making process, as well as during and after the procedure.

Compared to Spain, the Portuguese regulation establishes a longer period for PAR. In addition, it provides support upon request, in the context of the decision-making process. Finally, Spanish law does not provide for a maximum number of attempts for pregnancy, which the Civil Code of Catalonia also provides for in art. 235-8.2.b) CCCat.

[112] Lorente, B. (2023, March 1). La primera mujer embarazada por inseminación postmortem en Portugal: "si no fuese por el amor, no habría seguido." *RTVE*. Retrieved from https://www.rtve.es/noticias/20230301/angela-ferreira-primera-mujer-embarazada-marido-fallecido/2428409.shtml#:~:text=La%20norma%20aprobada%20en%20Portugal,a%C3%B1os%20despu%C3%A9s%20de%20la%20muerte.

### 4.2. Countries in which posthumous assisted reproduction is prohibited

On the other hand, there are European countries in which PAR is prohibited, as is the case in France, Italy, or Germany (although in the latter country there is an important nuance regarding the transfer of pre-existing embryos).

#### 4.2.1. France

In France, both posthumous insemination and embryo transfer are prohibited. Article 2141-2 of the *Code de la Santé Publique* requires that the users of such techniques are alive, and secondly, it is expressly stated that the death of one of the members of the couple prevents insemination and embryo transfer. This prohibition dates back to 1994.

##### 4.2.1.1. Legislative background

The legislative ban on posthumous reproduction dates to the 1994 law, which initially –from the very first draft bill (Law n°94-654)– prohibited posthumous procreation unless both members of the couple were alive during insemination or embryo transfer. The wording was later changed to clarify that it referred to the man and woman forming the couple and to exclude homosexual couples.

An amendment supporting posthumous transfer was suggested by the Communist Party caucus at the first Senate review of the bill (amendment 177 JO Sénat 18 January 1994, p. 239), to preserve individual freedom, if a certain time frame was imposed, but was rejected.

However, the second time the French National Assembly reviewed the bill, an amendment suggested by the committee was adopted, according to which "should one of the members of the couple die, embryo conservation shall be terminated". On this subject, differences of opinion appeared during parliamentary debates, but finally, the first option is the one stipulated in the text of the law that was passed. The second draft bill (n° 94-653) strengthened the prohibition established by the first, because it added a requirement for the couple's prior consent and asserted that the consent was null and void in case a death occurred before ART had been carried out.[113]

The French Parliament, during the reform of the Bioethics Law in 2004 and 2011, opposed the legal proposal to prescribe posthumous fertility, and the reason for this opposition was the

[113] Parizer-Krief, K., op. cit. p.27.

existence of moral and psychological objections to the creation of an orphaned child, the emergence of complex inheritance-related demands, and the existence of related problems.[114]

#### 4.2.1.2. Article 2141-2 of the *Code de la Santé Publique*

Article 2141-2 of the *Code de la Santé Publique* states that the prospective parents must be alive and must give prior consent to embryo transfer or insemination. These two conditions rule out any possibility of posthumous reproduction.[115]

In France, the use of *post mortem* embryo transfer and insemination is not considered a valid purpose of assisted reproductive technology, which is meant to help couples with diagnosed infertility.

While French criminal law does not have specific charges for posthumous reproduction, physicians who engage in ART procedures for non-lawful purposes may face criminal penalties. According to article 511-24 of the French Criminal Code, artificial insemination without complying with the provisions of article 2141-2 of the Criminal Code (including posthumous insemination) carries a criminal penalty of 5 years in prison and a fine of 75,000 euros.[116] The Guide to Good Practices[117] stipulates that frozen sperm may only be delivered to the patient himself for gamete conversation.

On the other hand, article L.2141-11-1 of the *Code de la Santé Publique* also prohibits the export of gametes for the purpose of posthumous procreation.[118] In 2014, the Conseil d'État acknowledged that the law of the country where the surviving person resides takes precedence over the more rigid French law. However, the export of gametes is only allowed in special circumstances, such as a genuine connection with the importing country and the absence of fraudulent intent. The judges applied this exception in a case where a Spanish citizen was permitted to take her deceased French husband's gametes to Spain for *post mortem* fertilization.[119]

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[114] Herrera, M. (2017). Un debate Complejo: La Técnica de Reproducción Humana asistida post Mortem Desde La perspectiva comparada*. *REVISTA IUS, 11*(39). doi:10.35487/rius.v11i39.2017.304

[115] "The man and woman forming the couple must be alive, of reproductive age, and give prior consent to the transfer of embryos or insemination. Obstacles to insemination or embryo transfer include the death of one of the members of the couple, filing for divorce or legal separation, cessation of cohabitation, as well as written revocation of consent by the man or woman to the physician in charge of implementing medical assistance to procreation."

[116] Mohseni, op. cit. p.30.

[117] Ministerial decree dated 3 August 2010 regarding rules for good clinical and biological practices in MAP (French Ministry of Health and Sports, published in the Journal Officiel dated 11 September 2010).

[118] Grasso, op. cit. p.27.

[119] Conseil d'État, Juge des référés, 24/01/2020, 437328, Inédit au recueil Lebon.

#### 4.2.1.3. Parpalaix v. CECOS

The first case concerning posthumous assisted reproduction was the Parpalaix v. CECOS case in 1984 in France. The central issue of the case did not revolve so much around the possibility of allowing the widow to be inseminated with her deceased husband's semen, but rather on the fact that the center where it was deposited refused to deliver it to the surviving spouse.

In 1981, Alain Parpalaix decided to store his sperm at the French Research Center and Sperm Bank, CECOS, after being diagnosed with cancer. However, he did not leave any instructions regarding its fate in case of his death. In 1983, Alain married Corinne but died shortly thereafter. Corinne requested the return of her husband's sperm from CECOS to undergo assisted reproduction treatment, but her request was denied as illegal according to French legislation. Corinne appealed to the Ministry of Health, but the authorities held that the law required express consent from both spouses, and that the treatment should be performed while both were still alive.

Corinne then argued in Court that the sperm was a separate part of the body and, therefore, a movable object with which a deposit contract could be made (according to Article 1939 of the French Civil Code). If it is understood, therefore, that it is a movable object, in case of death it will be returned to its heirs. Therefore, in this case, the sperm should be returned by CECOS to his wife, as she was his heir. She also provided evidence that Alain wanted to have offspring through sperm storage. On the other hand, CECOS argued that the sperm would only be returned if Alain had requested it and that if it were considered an indivisible part of the body instead of divisible, it would not be subject to inheritance effects. Additionally, it argued that reproduction was not the only goal of the Sperm Bank, which also had a therapeutic character as a remedy for infertility resulting from certain diseases such as cancer.

The Créteil Grande Instance Court, in the ruling of August 1, 1984, ruled that sperm was neither a divisible nor an indivisible object, and therefore, it did not have inheritance effects, nor could it be the subject of a deposit contract. The only characteristic attributed to sperm was that it was subject to preservation and that it should be returned to the donor or heirs by CECOS.

Consequently, it ruled in favor of Corinne's request as there was no legal rule prohibiting posthumous *in vitro* fertilization. Thus, it ordered CECOS to return the sperm to Corinne. Due to this legal void, the Bioethics Law was promulgated in 1994, which was modified in 2004, expressly prohibiting posthumous assisted reproduction.

### 4.2.2. Italy

In Italy, article 5 of the Law num. 40 *about Norme in materia di procreazione medicalmente assistita* of 19 February 2004[120] (Law 40/2004) prohibits posthumous artificial fertilization.

According to article 1 of the Italian law, the use of these techniques is only allowed to people who meet the requirements of article 5[121], i.e., people over the age of majority, married or cohabiting (heterosexual in both cases), and both living, in case of sterility or infertility. With these legal impositions, especially the last requirement that both parents must be alive, closes all possibility of posthumous artificial fertilization.[122]

The reason for this prohibition is the need to guarantee a father and a mother to the child, thus reducing the freedom of self-determination regarding the transmission of human life.

However, article 5 generates interpretative doubts that, in a certain sense, would legitimize posthumous insemination, according to Rodríguez Guitián.[123]

Death can lead to different consequences depending on whether it happens before or after medical treatment. In the first scenario, the embryo has not yet been formed, and thus continuing with the practice is not allowed. This means that taking semen from the deceased, live posthumous fertilization, and posthumous *in vitro* insemination must be considered illegal.

On the other hand, if the embryo has already been formed, articles 1 and 4 prohibit the destruction of already formed embryos. In this case, the principle of the common existence of the members of the couple and the safeguarding of the life of the embryo inevitably converge. Italian jurisprudence tends to give preference to the latter, following the *in dubio pro vita.*

### 4.2.3. Germany

In Germany, fertilization with sperm from a deceased man is expressly prohibited, as well as the fertilization of an egg from a deceased woman. It is prohibited in article 4[124] of the Embryo

[120] LEGGE 19 febbraio 2004, n. 40. *Norme in materia di procreazione medicalmente assistita*. (GU Serie Generale n.45 del 24-02-2004).
[121] "ART. 5. (Subjective requirements): 1. Without prejudice to the provisions of article 4, paragraph 1, adult couples of different sexes, married or cohabiting, of potentially childbearing age, both living, may access medically assisted procreation techniques."
[122] Escribano Tortajada, op. cit. p.28.
[123] Rodríguez Guitián, A. M. (2022) Las Fecundaciones "Póstumas": Una Realidad A Veces Perjudicial (Posthumous Fertilisations: Sometimes A Damaging Reality). *Actualidad Jurídica Iberoamericana* Nº 17 bis, ISSN: 2386-4567, pp 526-549.
[124] § 4 Unauthorized Fertilization, Unauthorized Embryo Transfer and Artificial Fertilization After Death
(1) Anyone who

Protection Act of December 13, 1990[125] (the *Embryonenschutzgesetz*), provides that anyone who knowingly fertilizes an egg with the semen of a deceased man will be punished with imprisonment of up to three years or a fine.[126] However, the prohibition does not extend to the implantation of the ovum if fertilized before the death of the man.[127] Thus, if death occurs after fertilization, the prohibition does not apply, and the destruction of any embryos depends on the degree of their development.

In 2016, a man requested permission to transfer embryos conceived with his first wife, who had died, into the uterus of his second wife. The Higher Regional Court of Karlsruhe dismissed the case against the University Hospital of Freiburg because they were not permitted to release the 15 fertilized oocytes that were in the pronuclear stage. The German Embryo Protection Act prohibited the release of oocytes as requested by the plaintiff.[128]

1. attempts to artificially fertilize an egg without the consent of the woman whose egg is fertilized and the man whose sperm is used for fertilization,
2. attempts to transfer an embryo to a woman without her consent, or
3. knowingly artificially fertilizes an egg with the sperm of a man after his death

shall be punished with imprisonment of up to three years or a fine.
(2) The woman who undergoes artificial fertilization in the case of paragraph 1 no. 3 shall not be punished.

[125] Germany. *Embryonenschutzgesetz* vom. 13. Dezember 1990. Retrieved from https://www.gesetze-im-internet.de/eschg

[126] Krüger, M. (2011). The prohibition of posthumous-fertilization, legal situation in Germany and European Convention on Human Rights. *Revue Internationale De Droit Pénal, 82*(1), 41. doi:10.3917/ridp.821.0041.

[127] Roche, I. (n.d.). *Enciclopedia de Bioderecho y bioética*. Voces - fecundación postmortem. Retrieved from https://enciclopedia-bioderecho.com/voces/158.

[128] Grasso, op. cit. p.27.

## 5. CONCLUSIONS

1. Posthumous Assisted Reproduction (PAR), which consists of conceiving a child using the gametes or embryo from a deceased person, specifically the male progenitor, by means of Assisted Reproduction Techniques (ART), raises several legal issues which are dealt with differently depending on the country's legislation. PAR includes both the implantation in the uterus of a woman of an embryo fertilized *in vitro* with the deceased's semen (posthumous embryo transfer), or her insemination with the genetic material of the deceased husband or partner (posthumous fertilization).

2. PAR is regulated in the article 9 of the Spanish Law 14/2006, of 26 May, on Human Assisted Reproduction Techniques (LHART 2006). This article allows the deceased husband or man not united by marriage to allow his reproductive material to be used to fertilize the woman within 12 months after his death –a temporal delimitation which some doctrine finds insufficient–.

3. Previously, PAR was regulated in Spanish Law 35/1988, of 22 November, on Assisted Reproduction Techniques (LART 1988), which established a temporal limit of 6 months instead of 12 and did not include presumed consent.

4. There are several requirements for carrying out PAR in Spain: a) the death or declaration of death of the man, b) the consent of the deceased man and the way in which the consent is given, and c) that the reproductive material of the deceased couple is used in the 12 following months after his death.

5. The issue of consent is very relevant in this topic. In the case of the husband, consent can be given in the document that regulates article 6.3 of the aforementioned law, by will, public deed or the prior instructions document. In the case of the man not united by marriage, the article does not expressly foresee consent as an essential requirement but considers it as a means to initiate the file of art. 44.8 of Law 20/2011. Moreover, art. 9.2 contains a presumption that consent has been given if the surviving spouse has already started an assisted reproduction process for the transfer of pre-embryos formed before the husband's death. The article also includes the possibility of revoking consent at any time prior to carrying out the treatment. The law does not establish a specific form of revocation. Most of the authors consider that it should be done in writing if there is enough time for it unless this is not possible.

6. There can exist some problems in the field of consent of the deceased husband if the document is private and different from the one in art. 6.3 LHART 2006 and the one in the prior instructions document.

7. Most importantly, the legal effects of PAR include inheritance rights and determination of filiation which entail some problems like the lack of adaptation of the Inheritance Law of the Spanish Civil Code in the field of ART and the uncertainty experienced by third parties due to a decrease or total deprivation of their inheritance.

8. Spanish regulation gives inheritance rights to the children born with these techniques. If not, the precept would infringe art. 14 of the Spanish Constitution. However, in order to ensure the rights of third parties who may have an interest or right in the deceased's inheritance, certain precautions must be taken when opening the succession and distributing the inheritance.

9. Article 9.2 LHART 2006 contains a special rule of filiation, considering that the filiation is of marital nature, if the husband gives his express consent, the legal effects derived from marital filiation will occur. In the case of extramarital filiation, consent will serve to initiate the relevant procedure in the Civil Registry, so it must be understood as equivalent to a kind of posthumous recognition that results in the determination of filiation. However, there is a legal loophole if a marriage occurs between the widow subjected to PAR and a third party, within the 12-month period that the law considers as the term for carrying out posthumous fertilization. The problem could be solved by considering art. 116 of the Spanish Civil Code fully applicable, and therefore understanding that the child is the marital child of the second man, without prejudice to the exercise of the corresponding challenge actions.

10. In Catalonia, PAR is regulated in articles 235-8.2 and 235-13.2 of the Second Book of the Civil Code of Catalonia. It has some differences with the LHART 2006: there is a limitation of cases to a single pregnancy, the fertilization process begins within 270 days after the husband's death -but the judicial authority may extend this period for a justifiable reason for a maximum of 90 days-, and the formal requirement of consent does not mention on what document exactly should be recorded, but requires that the husband's express consent is recorded in a reliable way. Regarding inheritance, it is regulated in article 412-1.2 CCCat, which establishes that children born as a result of PAR in accordance with the law have the capacity to inherit from the deceased parent.

11. European countries show a diverse panorama in the treatment of posthumous assisted reproduction. There are countries in which PAR is allowed like the United Kingdom, Belgium, The Netherlands, Greece and Portugal, and there are countries in which it is prohibited such as France, Germany, and Italy.

12. The preservation of gametes or embryos frozen after a person's death and their use for posthumous reproduction in the laws of most countries that prescribe it, such as the United Kingdom, Belgium, the Netherlands, Greece, and Portugal is subject to the deceased person having expressed their consent to this act before their death.

13. Assisted reproduction technologies have been extensively regulated in the United Kingdom, with the Human Fertilisation and Embryology Act (HFEA) of 2008 serving as the basic legal text. The HFEA allows artificial insemination, *in vitro* fertilization, and embryo implantation after the death of the husband or partner, provided certain requirements are met such as explicit written consent, although the registration of paternity of the deceased man is only symbolic and does not grant rights to the child.

14. In Spain, article 9 only allows for posthumous fertilization using the genetic material of the deceased husband or man not united by marriage, so cases of posthumous heterologous fertilization are excluded. Whereas, in the United Kingdom, sperm donors may be considered the legal father of the child if the embryo was formed before their death and certain requirements were met.

15. In the United Kingdom, in contrast to Spain, even if paternal filiation is recognized, children conceived after their father's death are not granted the right to inherit. This is due to the legal vulnerability of the other heirs and the fact that they already existed at the time of the father's death. This, I believe, would go against equality of all children.

16. In Belgium, the legislation is permissive and recognizes that the request to contest the presumption of paternity is not admissible if the husband has consented to artificial insemination or any other act aimed at procreation.

17. In the Netherlands, even though PAR is allowed, no inheritance rights are established towards the newborn. However, the judicial establishment of paternity will create legal familial ties with the father's family, which means that the child may inherit from his/her paternal grandparents in his/her father's stead. In Greece, on the other hand, the child is recognized as an heir of the deceased parent.

18. It is important to mention that Portugal, in 2021, changed its law to allow posthumous insemination in cases of expressly consented parental projects within 6 months to 3 years after death. In the Portuguese and Belgian legislation there is a reflection period up to two years for the widow. It is interesting to see how, even though the Spanish regulation is quite permissive, the Portuguese law –which is quite new– allows for a longer period for PAR and provides support in the decision-making process.

19. In France, posthumous insemination and embryo transfer are prohibited by law. The legislative ban on posthumous reproduction dates to the 1994 law, which requires that both members of a couple must be alive during insemination or embryo transfer. The Parpalaix v. CECOS case in 1984 was the first case concerning PAR, and it revolved around the refusal of the center to deliver the sperm of a deceased man to his surviving spouse.

20. In Italy and Germany, the laws surrounding posthumous artificial fertilization are strict. In Italy, PAR is prohibited. Meanwhile, in Germany, anyone who fertilizes an egg with the semen of a deceased man is subject to imprisonment or a fine (art. 4 of the *Embryonenschutzgesetz).* However, in Germany, posthumous transfer of the fertilized egg is allowed.

21. After analyzing the Spanish regulation, as well as some other countries in Europe, we can conclude that Spain has one of the most liberal regulations regarding PAR in Europe. However, there are also some drawbacks in the Spanish regulation, such as the fact that lesbian couples and marriages cannot access PAR –in the Civil Code of Catalonia it is also excluded–, while in the United Kingdom and the Netherlands they are able to access it.

22. Countries that regulate posthumous assisted reproduction experience fewer conflicts. In countries without any regulation, the courts are responsible for addressing gaps in the law and dealing with cases where citizens have acted unlawfully.

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| Judgment R v Human Fertilisation & Embryology Authority, ex parte Blood | February 6, 1997 | Court of Appeal, United Kingdom |
| Court Order 160/2010, Available at: ECLI:ES:APTF:2010:801A | June 2, 2010 | Audiencia Provincial of Santa Cruz de Tenerife, Spain (Section 3) |
| Judgment 437328 | January 24, 2020 | Conseil d'État, Juge des référés, Inédit au recueil Lebon |
| Judgment Y v A Healthcare NHS Trust & Ors | [2018] EWCOP 18 | United Kingdom, Court of Protection |
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