ARTIFICIAL REPRODUCTIVE TECHNIQUES AND FINALITY IN PARTITION AND SUCCESSION

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ABSTRACT

This article mainly deals with the effects of using Artificial Reproductive Techniques on the inheritance rights of the children conceived through these methods. The analysis is largely comparative between laws of jurisdictions like the various states of US, Canada, Australia and United Kingdom and comparing them to the laws made in India. It was noted that the laws in India have not dealt with this issue at all, and it is a glaring lacuna remaining in Indian inheritance law. Further it was noted that the various personal laws existing in India make it much more difficult to deal with this issue in the first place, because of their overwhelming influence over the inheritance law in India.

Introduction

Artificial Reproductive Techniques (ART) are improving rapidly and it is difficult for law to keep pace with it. This gap can have an adverse consequence and needs to be filled. One of the technologies included within the ARTs is cryopreservation. It enables people to preserve their sperms and eggs for a long period of time, which then can be used to conceive a child. These frozen eggs or sperms can be used even for posthumous conception of children. The possibility of having children even after someone's death creates problems with respect to finality of succession.

Would the child born through this process be eligible to succeed property from their parents? How would their share in the property be determined? And because the parent would be already dead in this circumstance, how will the birth of a child later on affect the succession that already had happened to the other relatives? These are some of the most pertinent issues associated with ART which need to be addressed.

India has not formulated any policy to regulate ART and has left these problems open. Therefore, there is a pertinent need to take a look at other jurisdictions to understand how they have dealt with this issue and how they would work in the Indian context, with differing personal laws. In light of this, this paper seeks to highlight the problems faced in matters of succession because of ARTs and explore the different policies adopted by various countries to address this problem and which policy can be adopted in India.

Contemporary Arguments and Concerns for providing inheritance rights to posthumous children

One of the eminent issues posed by ARTs for succession laws is that whether a posthumously conceived child should enjoy the succession rights in their parents' estate, especially in cases where the parents die intestate. This issue has been the topic of significant discussion and several arguments have been posed to either allow intestate succession to the posthumous child or disallow it. Arguments put forward to recognize succession rights are that firstly, doing so would be in tune with the purpose why intestate succession laws are made, that is of transmission of wealth of the intestates to their families, including spouses and blood relatives. Posthumous children are also blood relatives only and denying them succession would be against the purpose of the laws itself.[1] Secondly, providing succession to the posthumous child

[1] Kathryn O'Sullivan, *Posthumously Conceived Children and Succession Law: A View from Ireland*, 33 International Journal of Law, Policy and the Family , 380–402 (2019).

would ease the burden on the state to financially support the child as the estate of the parents would ensure the financial security. And thirdly, to not provide succession would be to treat such children unequally, on the basis of method of conception which would be similar to the treatment formerly meted to an illegitimate child.[2]

On the other hand, several arguments against providing succession rights have also been identified. A major issue identified to disallow succession is that it would obstruct orderly administration of estates. Usually, intestate estates are distributed within reasonable time, and if posthumously conceived children are also provided with succession, this process of distribution of the estate would be disrupted and would possibly be suspended for a long time. This is certainly undesirable for anyone benefitting from the succession.[3] Secondly, it would a huge reform if posthumous children are considered and it is argued that it would be disproportionate response to a small problem. ART was introduced in India in 1985 and since then there have been no issues related to succession complained to the courts.[4] So, perhaps calling it a small problem is justified. Based on these arguments for both sides, few jurisdictions have completely disallowed succession rights to posthumously conceived children meanwhile some have allowed it.

There are various concerns legislatures should keep in mind while formulating a policy on this issue. Firstly, there needs to be a careful consideration of the interests of a child and interests of the state. Even if the legislature decides that posthumously conceived children should not be included for succession, there is still a need for reforms. Until reforms are not made, these issues would keep coming up. Secondly, whether to grant succession rights to posthumous children should be decided on the basis of intention of the deceased. But then comes the competing concern of the best interest of the child. Balancing these two concerns would be complicated and considerable thought is needed.[5] These concerns should be thought over additionally to the already mentioned arguments for and against the inclusion of such children for succession. Understanding all these concerns would help in better appreciating why certain jurisdictions have opted for inclusion and some have not.

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[2] Ibid.
[3] Ibid.
[4] RS Sharma, R Saxena, R Singh, *Infertility and Assisted Reproduction: A historical and modern scientific perspective.* <https://www.ijmr.org.in/text.asp?2018/148/7/10/255411> .
[5] Alberta Law Reform Institute, *Succession and Posthumously Conceived Children, Report for Discussion 23, https://www.alri.ualberta.ca/2012/02/succession-and-posthumously-conceived-children-report-for-discussion-23/.*

Current Indian Scenario

Currently, the statues and personal laws in India seem to exclude posthumously conceived children from succession and naturally puts them in a disadvantaged position. Section 112 of Indian Evidence Act is used to determine the legitimacy of a child. Any child born within 280 days of dissolution of marriage either through death or divorce would be considered legitimate.[6] In the use of cryopreservation, a child can even be born after a decade of death of the parent.[7] Such child would be illegitimate then. Moreover, while Indian Succession Act covers the succession rights of a person being in the womb during the death in Section 27, it is silent on children born through ART methods.[8] Therefore, a clear policy is needed to include children born through such ART methods.

Bills have been introduced in India which could help here, but they have been several times been delayed and re-introduced in the Parliament. ART Regulation Bill of 2020 in Section 22(2), provides that ART banks should not cryopreserve anyone's sperms or eggs without an explicit written informed consent form with specific instructions as to what should be done with it in case of death of that person. Section 31 of the same bill states that a child born through an ART process will be deemed to be a biological child of the couple and that child would be entitled to all rights and privileges available to a naturally conceived child.[9] These bills aren't enforceable but at least they indicate that India is amicable to include children conceived through ART. Still, even if ART is considered, there is no clear indication about ART methods used to conceive posthumously. Posthumous conceiving a child has larger implications than just using ART and therefore there should be a mention of it.

Policies Adopted in various jurisdictions

United Kingdom considered the issue of succession rights for posthumously conceived children as early as 1984, when it created the Warnock Commission.[10] The committee decided that posthumous conception should be actively discouraged and they did this by not giving such children any inheritance rights.[11] So, they did not ban posthumous conception itself, but strictly

[6] Indian Evidence Act, 1872, Section 112.
[7] E. Donald Shapiro & Benedene Sonnenblick, *Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & Health 229 (1985-1987).
[8] Indian Succession Act, Section 27.
[9] Assisted Reproductive Technology (Regulation) Bill, 2020, Sections 22 and 31.
[10] Report of the Committee of Inquiry into Human Fertilisation and Embryology, 24 June 2008. https://www.hfea.gov.uk/media/2608/warnock-report-of-the-committee-of-inquiry-into-human-fertilisation-and-embryology-1984.pdf.
[11] Jacqueline Priest, *The Report of the Warnock Committee on Human Fertilisation and Embryology*, https://www.jstor.org/stable/1095849.

prohibited inheritance to those children on any condition, even if written consent is provided. The main rationale for their decision was that it would obstruct normal distribution of the estate through succession. This recommendation then was adopted in the Human Fertilisation and Embryology Act 1990.[12]

In Australia, the state legislatures deal with these matters because of which we can see different ways the same issue is handled in the same country. In the state of Victoria, the Status of Children Act 1974[13] provides that the deceased partner whose sperms were used to conceive would be considered the father of the child only for the purpose of mentioning their name as a parent and for no other purpose like succession. In the state of New South Wales, without prior consent of the deceased partner, his sperms cannot be used. The state of Western Australia has completely banned posthumous use of sperms or eggs. [14]

In Canada, the Ontario Law Reform Commission as early as 1985 recommended succession rights to posthumous children. They highly favoured the best interest of the child and considered exclusion from succession to be contrary to that. It suggested that to avoid obstructing administration of estates, any undistributed estate of the deceased parent should be inherited by the posthumous child.[15] The Manitoba Law Reform Commission in 2008 on the same basis argued for inclusion as well. The commission formulated several provisions to ensure finality in succession and that the process of succession was not obstructed. The deceased must give their consent for inheritance rights to any resulting offspring. Also, the law commission recommended that to avail inheritance rights the child must be conceived within two years from the date of death which would ensure finality in the administration of estate.[16] On this basis then Canada adopted laws which on an application by the deceased's partner or spouse the courts declare that partner to be a parent of a posthumous child only when the deceased has prior to his death given his written consent to be considered as the child's parent.

Based on the various laws adopted by different jurisdictions it is clear that there are lots of variations available to the legislature. However, two policy alternatives can be seen. Either posthumous children inherit from an intestate parent only when he is already conceived before the death of a parent, which is the conventional method. Or the posthumous child should be

[12] Human Fertilisation and Embryology Act 1990.
[13] Status of Children Act 1974.
[14] Alberta Law Reform Institute (n5).
[15] Ibid.
[16] Manitoba Law Reform Commission Report 118, 2008 < http://www.manitobalawreform.ca/pubs/pdf/118-full_report.pdf>

able to inherit from an intestate parent when the child is born within a certain time period after the death of the parent.

Jurisdictions who do not include posthumous children for succession keep the certainty and efficiency in distribution of the estate as the overriding value, over the interest of the child and the intention of the deceased parent. This option does not completely ban usage of ART methods to conceive children, only the posthumous conception is problematic and curbed. This has been applied as we have seen, in the United Kingdom and the state of New South Wales in Australia.

Jurisdictions which have allowed succession to a posthumous child have strongly argued for the best interest of the child. The posthumous child should inherit from the deceased parent if he is born within a defined time period after the death. The main motive behind such a provision would be to ensure that estates are not in limbo for prolonged periods of time while waiting for the child to be born posthumously. Several jurisdictions have even adopted this provision. In California, the posthumous child should be in the womb within two years of death of the deceased. Similarly, in Louisiana, child should be in the womb within three years from the death of the deceased. Manitoba Law Reform Commission recommended that the child must be conceived within two years as well. Furthermore, there is need to ensure that there is no fraud and therefore creating a genetic link between the child and deceased would be desirable.

This is the international scenario with respect to intestate succession to a posthumously conceived child. Out of these options, India can choose whichever it deems fit. We already have an idea of the direction it is taking by taking a look at all the previous ART Bills. However, what is different in India than all the other jurisdictions is the role which personal law plays in succession and inheritance.

Role of Personal Laws in succession of a posthumous child

According to Hindu Law, the right to succession vests in the heirs as soon as the death of the owner of the property. Succession, under no circumstance, can remain suspended for birth of a suitable heir, if the heir was not conceived during the death of the owner. By applying a legal fiction, the rights of a child born after the death is regarded by referencing the moment of conception, rather than birth for conferring the benefits of inheritance. This is how rights of a child in the womb of the mother during the death of the owner are protected. This is not derived from ancient Hindu Law. Section 20 of Hindu Succession Act 1956 provides for this rule of legal fiction for the benefit of the child in utero and even though the child is born after the death

of the owner of the estate, he is considered to be born before it.[17] Taking this view on what we already know about cryopreservation and posthumous conception of children, if the child is born after 280 days of dissolution of marriage as stipulated in Section 112 of IEA, that child will only be legitimate child of the surviving mother and not of the father and therefore will not be eligible to become his heir. Even provisions for in utero children cannot be applied in these circumstances. The child will not be able inherit his genetic father's estate.

Amongst Muslims, under Hanafi law, a child born within two years of dissolution of marriage is considered to be legitimate. An illegitimate child according to this rule is considered legitimate of their mother only and would inherit from there. But under Shia law, an illegitimate child cannot even inherit from their mother's estate. The child is completely excluded. However, this two year limit is reduced in India to 280 days because Section 112 of IEA[18] supersedes Muslim Law as given in the case of *Sibt Mohammad vs Mohammad Hameed And Ors.*[19]

Indian Succession Act, which governs succession for Christians and Parsis would also consider posthumous children to be illegitimate because death of the spouse would lead to dissolution of marriage and being born after this would mean it is a non-marital child and therefore illegitimate.[20]

Thus, as per personal laws, posthumously conceived children are not entitled to any inheritance rights. If India is formulating a policy for ART and posthumous conception, it should take note of the influence of personal laws and find a way to nullify those laws for those children to be able to succeed.

Conclusion

Artificial Reproductive Techniques are galloping forward, the day is not far away when people start using cryopreservation and other methods to conceive children. Therefore, India needs to adopt a policy sooner rather than later for better regulation of the same. A policy on this issue has been in limbo for a long time, with the first bill introduced in 2005. A brief examination of the latest ART Bill revealed that it is still inadequate and is silent on posthumous succession. Examining policies adopted by various jurisdictions, it revealed that few have prohibited succession to a posthumous child because it impeded finality in succession and kept it in limbo.

[17] Hindu Succession Act, 1956, Section 20.
[18] Indian Evidence Act, 1872, Section 112.
[19] AIR 1926 All 589.
[20] Indian Succession Act, 1925, Section 27(c).

Other jurisdictions found a way out of this predicament by applying a time frame within which the child must be born or conceived to claim inheritance from the deceased parent. Some opted for two years and some for three. This seems to be the most amicable solution to the problem of finality of succession. Considering these policies in the Indian context, personal laws are rigid and do not accommodate ART and posthumous conception. If India wants to include posthumous children for succession, it needs to reform personal laws to be more flexible.

It is necessary to hold the child's best interest at a pedestal and enabling posthumous children conceived through ART to inherit would do exactly the same. Therefore, the researcher is of the opinion that India should adopt a policy which would accommodate them and would do the necessary changes required in the current laws.

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