1. Introduction: background to the case of Baby X
In Japan, there is as yet no law on Human Assisted Reproduction other than the Guidelines of the Japan Society of Obstetrics and Gynecology (JSOG). Into this vacuum, however, about 20,000 children have been born through AID and, as of January 2005, over 100,000 have been born using IVF.\(^1\)

Initially, the current Japanese Civil Code on natural insemination was used; however, in addition to this, other current laws and the JSOG Guidelines, Japan also has a heritage of social norms, legal precedent and practice deriving from its previous household and inheritance laws. Although the older Civil Code and Household laws were amended following World War II, they continue to influence both social practice and the way in which the current laws are interpreted. Thus Japan is still very much in the process of working towards an adequate body of modern law to deal with scientific and medical developments in the area of Assisted Reproduction (AI).

The case of Baby X, born in 2001 in Japan using the frozen sperm of a deceased husband, is particularly interesting, since it raises many questions in this difficult area. The case, brought by the baby’s mother to have her deceased husband, the child’s biological father, recognized as his legal father, is currently under appeal in the Supreme Court. This paper focuses specifically on the related problems of legitimacy and inheritance in the case of an IVF birth occurring about two years after the death of the biological father.

1. Introduction: background to the case of Baby X
1.1 The case of Baby X
1.2 Japanese household and inheritance laws: implications for legitimacy
2. The outcome of the case

\(^1\) The figure for AID births is an estimate. Exact figures are not made available by many clinics in Japan and no official figures have been issued recently. The figure for IVF births was reported by the Mainichi Shimbun newspaper, 27 January 2005, [http://square.umin.ac.jp/CBEL/bioethics_data/aih_aid_ih_ird.html](http://square.umin.ac.jp/CBEL/bioethics_data/aih_aid_ih_ird.html)
2.1 The District Court decision
2.2 The High Court decision
3. Legal implications
   3.1 Hereditary succession in Japan today
   3.2 Hereditary succession under the pre-1947 Civil Law
   3.3 Assisted Reproduction in Japan
   3.4 The child's legal position
4. Ethical implications: balancing interests
   4.1 Implications for the child
   4.2 Implications for the father
5. Conclusion
   5.1 Precedents outside Japan
      5.1.1 France
      5.1.2 The United States of America
      5.1.3 The United Kingdom
   5.2 Recommendations

1.1 The case of Baby X
In brief, two years after her husband’s death, the mother of Baby X used her husband’s frozen sperm to conceive by IVF, and gave birth to Baby X in 2001. She applied to register his birth as her deceased husband’s legitimate child. However, the birth was not recognized because it occurred two years after the husband’s death.

The events leading up to the birth are of key importance for later developments. In 1997, Baby X’s mother married his biological father, who had suffered from leukaemia since 1990. Six months later, the husband found a marrow transplant donor. As the couple was afraid of his suffering from aspermia, the husband decided to preserve his sperm. In 1998, some of his sperm was frozen, after he agreed to sign a consent including the condition that, should he die, the sperm would be destroyed, and not used after his death. Subsequently, he received a successful marrow transplant and appeared to have recovered well.

In 1999, he returned to work. The couple decided to resume the treatment against sterility, and they looked around for a hospital to carry out IVF. However, the husband became feverish and was eventually readmitted to hospital. He was diagnosed with chicken pox, and later died.

His wife then moved his sperm from the hospital where it had been frozen to another hospital, without informing either hospital of her husband’s death. The second hospital carried out IVF and in 2001, she gave birth to a baby (X). She then asked the original hospital which had preserved the sperm to certify in writing that the sperm was her husband’s. At no point did she tell the hospital
that her husband already died. She later told the court that this was simply because she had not been asked. However, had she told them, they would presumably have invoked the condition in the consent which the husband had signed, and would have destroyed the sperm.

She then applied to register the birth of Baby X as the legitimate child of her husband. However, the application was rejected on the basis of the definition of legitimacy in the Japanese Civil Code S.772 (2): only a child born more than 200 days after the parents’ marriage, or within 300 days of its dissolution, is presumed to have been conceived during the marriage. The birth of Baby X occurred more than 300 days after his father’s death i.e. after the end of the marriage. In 2002, the mother applied to register the boy’s birth again. This time, the birth was registered, but the father’s name was left blank. The mother then brought a suit against the Government, in the local Matsuyama District Court, to have her husband recognized as the legitimate father. The plaintiff in the suit was Baby X, with herself and her lawyer acting as the child’s guardians 2.

1.2 Japanese household and inheritance laws: implications for legitimacy

Although this is speculation, it can be assumed that a key reason for the mother’s suit was to establish Baby X as the legal heir of his paternal grandparents. To fully understand the reasons behind this, it is necessary to summarise some of the old Japanese household law and the current laws of inheritance.

In Japan, up to the end of World War II, the primary unit of social organization was the household (ie in Japanese). The head of the household was always a man (unless there was no male in the direct line of succession), and successive generations had clearly understood social obligations to each other. In 1947, the main focus of the Occupation General Headquarters was to demilitarize and democratize. Family law was amended first of all and the new Civil Code gave equality to all family members. Despite the decline of the household system, the fundamental concept of male supremacy has nevertheless survived as the basic structure of modern Japanese society; it is still adhered to in spirit, particularly in country areas, such as Matsuyama, where Baby X was born.

According to his wife, the husband agreed verbally with her on the day before his marrow transplant operation that, should he die and she did not wish to remarry, she could use his frozen sperm to have a child. Unfortunately, no consent for the posthumous use of his sperm was ever put into writing. However, under the Japanese household system, the eldest son and his wife are responsible for his parents, and the resulting child would, with his mother, be expected to take responsibility for the care of the husband’s parents. It seems reasonable that the husband in this

case, as an eldest son, would have agreed to this arrangement, since he would have felt that the
birth of a child would guarantee that his obligations to his parents would continue to be met after
his death.

Under Japanese laws of inheritance, a wife cannot inherit from her deceased husband’s parents.
However, a grandchild can inherit from his father’s parents, and Baby X’s mother would assume
that Baby X, as a legitimate son, would be able to inherit the property of his paternal grandparents
as the heir per stirpes, and thus would receive whatever would have been his deceased father’s
share. Again, this arrangement would echo the traditional pattern of obligations: the child (and
through him, his guardian/mother) could inherit both property and obligations. However, in the
absence of any new law covering the case of a child born after the father’s death, two
interpretations appear possible: first, the child may inherit provided the father left written consent
that his sperm could be used; second, the child may not inherit even though the father’s written
consent exists. Written consent has become a key issue in the case.

2. The outcome of the case

2.1 The District Court decision

On 2 November 2003, the mother’s suit on behalf of her child was rejected for the following
reasons. According to the Court, the recognition of Baby X’s legitimacy should be judged by
considering three factors: the child’s best interests, the social order resulting from family law and
inheritance law, and finally, harmonious resolution of differences between natural and artificial
insemination (AI). This last is taken to mean the point to which AI can be accepted by society. For
example, a two-year gap between the death of the husband and the birth of the baby is not
generally regarded as natural.

In this case, the mother conceived Baby X with her deceased husband’s sperm, and the father had,
according to his wife, given his verbal consent. However, the Court ruled that reported verbal
consent was not sufficient without some written evidence to support the wife’s claim. In addition,
although the wife, as Baby X’s guardian, argued that recognition of his legitimacy was in the
child’s best interests, the Court ruled that, since the father was no longer alive to have custody of
the child, or support him, then recognition of the husband as the child’s legal father was not in the
child’s best interests.

The mother then appealed to the Takamatsu High Court.

---

3 Matsuyama District Court 2002 (ta) No.25, Civil 1d, 2 November 2003.
2.2 The High Court decision

In the Takamatsu High Court, the conditions of legitimacy were again contested. This time, the High Court judged that the reported verbal consent of X’s father was valid and, on 16 July 2004, the Court recognized the deceased husband as the legitimate father.4

X’s mother didn’t tell either of the two hospitals involved of her husband’s death. Nevertheless, the High Court judged she had no intention to conceal her husband’s death. It is, of course, impossible to know whether she acted in good or bad faith. However, in a sense this is irrelevant. What is more important is the fact that there was no written consent for the posthumous insemination, and her husband was not alive when she conceived. There is also the matter of what is in the child’s best interest. (These points will be dealt with at more length in later sections).

However, the case did not end here. On July 29, the Takamatsu High Court Public Prosecutor’s Office appealed against the decision in the Supreme Court. At the time of writing, judgment is still pending.

3. Legal implications

3.1 Hereditary succession in Japan today

In Japan, monogamous marriage is the legal norm. However, as is generally the case in such a system, a logical consequence is that an illegitimate child may be discriminated against and the Japanese inheritance law has been challenged on this point. Any person with property can leave a written will, or bestow part or all of the property on others whilst still alive, except that by law the heir’s legal portion (as defined below) must go to the next of kin, should they wish to claim it. However, if the deceased dies intestate, all property automatically goes to the next of kin, shared proportionally as laid down by law. The joint beneficiaries can then decide whether to share the property further and anyone can give up his or her inheritance. However, no one can decide the proportions of the bequests themselves; the property must be divided according to the Civil Code Article 900, which stipulates the following proportions.

<table>
<thead>
<tr>
<th>Heirs</th>
<th>Proportional inheritance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Spouse + Legitimate Children</td>
<td>1/2:1/2</td>
</tr>
<tr>
<td>(a nonmarital child recognized by the father can inherit half a marital child’s entitlement5)</td>
<td></td>
</tr>
</tbody>
</table>

   Hanrei Times No.1160, 2004,p.87.
If the children predecease the parent, the grandchildren, if there are any, can inherit the children’s portion.

Spouse + Deceased’s Ascendants 2/3:1/3
(if there are no children of the marriage)
Spouse + Deceased’s Brothers /Sisters 3/4:1/4
(if there are no children or ascendants)

If the deceased leaves a will, the spouse and/or all the direct descendants (i.e. not the deceased’s siblings) can contest it. Direct descendants can claim up to one third of the total property. In the case of the spouse or ascendants, up to half of the property can be claimed (Civil Code Articles 1028, 1029).

3.2 Hereditary succession under the pre-1947 Civil Law

As already mentioned in the Introduction, in spite of the 1947 amendment⁶, the traditional Japanese household system remains in operation in many parts of Japan even now. Therefore it is necessary to look at the historical context.

The preceding system of inheritance was, in fact, much more complex. Under the old Civil Law, there were two kinds of hereditary succession: succession to title and succession to property. Succession to title meant becoming the head of the household, in other words inheriting the status of the householder in that household. (This included inheriting all the property of the deceased householder.) Succession to property was the entitlement to inherit other family member’s property, in addition to that of the deceased.

The causes leading to a change of householder were as follows:

- the death of the incumbent
- resignation of the incumbent from the headship of the family

---

⁵ This has been challenged as unfair, but the latest Supreme Court finding stated that the article in question, Civil Code Article 900, is constitutional (2004 (o) 992, 14 October 2004), although two of the five judges dissented.

⁶ The Civil Code 1898, Law 9. In 1896, General Rules, Real Rights, Obligatory Rights was enacted as Civil Code Law 89. The Family and Inheritance Laws were enacted in 1898. Laws 89 and 9 both came into effect on 16 July 1898.
• forfeiture of the incumbent’s nationality

• the incumbent’s departure from the house in order to marry, or, in the case of an adopted incumbent, to revoke the adoption

• the marriage of a woman who was head of the family in default of male heirs (the status would automatically transfer to her husband)

• the divorce of a husband who had assumed his wife’s surname in order to become the householder (the wife resumed the title in the reverse of the previous case).

There were three kinds of successor to a household: (1) householder by law, (2) householder by appointment, and (3) householder by selection. The method of establishing the succession to head of household followed certain steps, again laid down by law.

(1) *Householder by law*

The first method to decide a new householder was to follow the law as set down in the old Civil Code S.970, which said that the next of kin is the direct successor. If there is a man and woman in the same degree of kinship, the man takes precedence, even if born outside wedlock, providing the father has acknowledged him. However, if otherwise equal within the same degree of kinship, a legitimate child takes precedence.

(2) *Householder by appointment*

A second method of deciding a new householder is by appointment (Civil Code S.979-). The appointment may be made by the deceased’s will or on application to the mayor of the city, town or village, on the householder’s death or resignation.

(3) *Householder by selection*

If a new householder cannot be arrived at by either of these methods, the successor can be selected (Civil Code S.982) by the previous householder’s father or, after that, mother or, failing that, by a meeting of the immediate family. If, however, there are no descendants, the ascendant automatically becomes the title-holder. If there are no ascendants, selection may be made by relatives other than the immediate relatives or by another branch of the family (e.g. the second son’s family, which under the *ie* system would be recorded in a separate Family Register on his marriage).

As stated earlier, people in Japan still tend to follow the traditions of the old laws, for instance, the eldest son’s family takes precedence. In the case of Baby X, the deceased husband was the eldest
son. It is therefore possible that both he and his wife were thinking of keeping the succession within his immediate family, rather than allowing it to devolve to his brother. The only way to do this would be through Baby X, since his wife could not inherit from her husband’s parents. However, this motivation is purely speculative; there is no evidence to throw light on the couple’s motivation.

3.3 Assisted Reproduction in Japan

To set Baby X’s legal position in context, I’d like to give you some background on developments in assisted medical reproduction and law in Japan.

The first birth in Japan resulting from artificial insemination with donor sperm (AID) was in August 1949. There have been numerous developments in the half-century since. In 1983 the media reported the birth of the first in-vitro fertilization (IVF) baby. In 1986, selective reduction of a multiple pregnancy was carried out. In 1989, a child was born following frozen embryo transfer. In 1991, a Japanese couple registered a child born by surrogacy in the US as their legitimate child. 1992 witnessed the first child to be born from microscopic fertilization.

Despite such rapid medical progress in the field of human reproduction, legal change has been slow. As stated in the Introduction, there is still no legislation in Japan covering this topic other than the official medical guidelines for Assisted Reproduction (AR) published by the Japan Society of Obstetrics and Gynaecology. It took half a century (until 1997) for the JSOG Guidelines to approve AID. More than 10,000 AID children were born before any legal guidelines existed. Indeed, JSOG finally approved IVF and Embryo Transfer (ET) in 1983, because only married couples’ gametes can be used. The first symposium by the Society of Private Law took place in 1956 and included a debate on the question of parentage, but no agreement was reached. Conferences held by a committee of the Science and Technology Agency involving research associations have failed to provide opportunities for drafting legislation, although the necessity to do so has been pointed out.

A working party on the Department of Education Research Project finally published recommendations for legislation in 1994. As a result, in 1997 the Department of Health set up the Committee for Advanced Medical Technology Assessment and, in 1998, established ad hoc committees (which have conducted opinion surveys) on Assisted Reproductive Technology, and on Pre-implantation Genetic Diagnosis. In 2000, a Subcommittee for Advanced Medical Care, set up by the Health Science Council’s Special Committee on Medical Technology for Reproductive Treatment Assessment, announced its findings in a Report on Ideal Reproductive Treatment Using
donor Sperm, Eggs and Embryos\textsuperscript{7}. In 2003, another subcommittee of the Health Science Council, the Subcommittee on Medical Assisted Reproductive Technology for Advanced Medical Care, announced its findings in a Report on Methods of Assisted Medical Reproduction Using Donor Sperm, Eggs and Embryos (the abbreviated Report was published in 2003\textsuperscript{8}). However, Japan is still working towards a law; no Act on Medical Assisted Reproduction has been passed as yet.

3.4 The child’s legal position
The first IVF child was born in Japan in October 1983. As a result, in June 1983, the JSOG decided to recommend to all its members a set of guidelines on IVF and ET, and these were published that October\textsuperscript{9}. The Guidelines interpreted the law to mean that cases in which IVF is legitimate include (among other conditions) only cases where there is no other way to conceive, and where written consent to the procedure has been given by the client couple, who have been fully informed of all the implications.

When X’s mother conceived him by IVF, his father had already died. In the case of IVF, consent is a crucial condition, as seen in the guideline above. In this case, X’s father left no written consent for IVF to be carried out after his death, so it is difficult to say that the husband of X’s mother is legally his father. However, this point will be developed further in Sections 4 and 5.

4. Ethical implications: balancing interests

4.1 Implications for the child
Baby X’s guardians, his mother and his lawyer, hinged their case on the following assertions.

i. X was born by IVF using the father’s sperm and the mother’s egg. So, it is clear that X is biologically the father’s child.


\textsuperscript{8} \textit{Report on Methods of Assisted Medical Reproduction Using Donor Sperm, Eggs and Embryos}, Health Science Council Subcommittee on Medical Assisted Reproductive Technology for Advanced Medical Care, 2003.

ii. X’s birth is in accord with the father’s intention.

iii. X has the right to request his legitimacy in accordance with Article 13 of the Japanese Constitution, ‘the right to the pursuit of happiness’, the International Covenant on Civil and Political Rights and the Covenant on the Rights of the Child.

iv. There is no requirement in the Civil Law that, in order to recognize legitimacy, the child must be conceived using frozen sperm, while the father is still alive. This refers to the rule of simultaneous existence, an interpretive principle that may be used in Japan, but is nowhere enshrined in the law.

v. It is against the child’s best interest that the father’s name column should be left blank in the Family Register.

vi. If X’s legitimacy is recognized, X can inherit the property of X’s grand parents as the heir per stirpes.

I’d like to discuss the above assertions in turn.

i. There is no real doubt in anyone’s mind that Baby X’s genetic father is the mother’s husband because, although she moved the sperm to a new hospital, she has a document from the original hospital certifying that it was her husband’s sperm.

ii. The father’s intention is not so clear. When his sperm was taken, and when his wife first began the artificial insemination treatment, he was alive and it is clear he shared his wife’s intentions. However, he signed the consent including the clause to abandon the sperm when he died. Further, he never withdrew this officially by leaving a written directive for the sperm to be used after his death.

iii. What is the child’s happiness? There are various problems in defining this. We will restrict the discussion here to his right to know his own identity. The International Covenant on Civil and Political Rights and the Covenant on the Rights of the Child state that every child has the right to know his/her identity i.e. parentage. In the case of Baby X, however, his biological parentage is not the issue. The problem in Japan is the legal registration of it in the Family Register, maintained by the local authority as the official record of births, deaths and marriages. When a Japanese person dies, the name of the deceased is removed from the Family Register, (Family Register Act
S.23). X was born two years after his father’s death; legally therefore, his father was non-existent at the time of his birth.

iv. The claimants are correct that there is no law stipulating simultaneous existence of the fetus/child and the father as a necessary condition of legitimacy. Nevertheless, the lack of consent remains an obstacle. As mentioned in Section 3.4, when AI is carried out in Japan, both parties’ consent is needed, because AI is not natural insemination. Without it, recognition of legitimacy remains problematic. The rule of simultaneous existence may pose more of a problem for inheritance than for legitimacy, as the following paragraphs show.

v. and vi. These two claims are related since it can be argued that a large part of the child’s best interest is his right to support. What is in the child’s best interests is not clear in this situation. The claimants argue that recognition of X’s legitimacy would clear the way to his right to inherit. However, the rule of simultaneous existence could still prevent this.

According to the law of intestate succession, the only way X can inherit from his paternal grandparents is through his father. X’s mother has no blood relation-ship with her husband’s ascendants. This means that on her husband’s death, her rights and duties vis a vis her husband’s ascendants are dissolved. The claimants are right in that, if X’s had been a natural birth, as the legitimate son of his biological father, he would inherit rights and duties towards his paternal grandparents, and could inherit their property etc. as the heir per stirpes. Thus X’s guardians insist that, if the legitimacy is recognized, X can succeed to the ascendant’s property.

However, his mother had not conceived him when her husband died. Thus the baby did not exist, even as a fetus. According to the Japanese Civil Code, a fetus can inherit, once it is born, but only if it existed before the father’s death. Therefore under current Japanese law, the guardians have a very weak claim here. If X’s mother wants him to be his paternal grandparents beneficiary, she should consider other means, such as adoption by them, or having them include X in their wills. This would be the clearest way to solve the succession problem.

4.2 Implications for the father
In 1998, the father’s sperm was preserved with his consent. However, since a death clause was a standard inclusion on the hospital consent form, he also, possibly inadvertently or without due consideration, consented that the sperm should not be used after his death. In addition, he failed to counteract this at any point by leaving written consent to use his sperm after his death.
On his death in 1999, as mentioned in Section 4.1, his name was removed from the Family Register in accord with the Family Register Act S.23. Prior to World War II, this would have made it impossible for his posthumous child to be recognised as legitimate, since the Civil Code did not recognise legitimacy after the father’s death. However, during the war, many young men died on the battlefield or were missing in action. If a man was listed as Missing in Action, it might be impossible to ascertain his death within the following three years (after which period he would be legally presumed dead). Hence the judicial judgment was made to accept a time of up to three years as the objective definition of the father’s death \(^\text{10}\). As a result, in 1942 the Civil Code was amended to recognize legitimacy within three years of the father’s death (A 787). The crucial difference between now and then is that, at the time of that decision, a child would already have been a fetus while the father was alive. Again, the rule of simultaneous existence complicates X’s posthumous legitimacy.

As a preliminary to drawing some conclusions from this case, the next section will summarise some precedents in other countries.

5 Conclusion

5.1 Precedents outside Japan

The following cases all resemble that of Baby X in that the widow tried to give or succeeded in giving birth to a posthumous child, using her deceased husband’s sperm. All ran into one or more of the following problems: the necessity to establish the consent of the deceased for the procedure; the problems associated with establishing the legitimacy of the child/children and therefore their inheritance rights; and finally the problem that the children were not ‘in being’ at the date of the father’s death (the rule of simultaneous existence). The brief outlines of the cases below serve to highlight some of these complexities in three different legal contexts.

5.1.1. France

In France, a similar case was that of Parpalaix, who died of cancer. His widow, Corinne, requested the CECOM (National Sperm Bank) to release his sperm to her for use in AI. They refused and eventually the matter reached the Supreme Court. It was finally accepted that Parpalaix had given his consent, so the widow received AI, but did not conceive\(^\text{11}\). In this case, although the Supreme

\(^{10}\) Supreme Civil Law Report, Vol.9 No.9, p1122, 1982.

\(^{11}\) Atushi Omura, *Artificial Insemination In France*, Hougaku Kyokai Zasshi Vol.109, No.4, p 467.
Court allowed the release of the sperm for use in AI, the judgment included a strict interpretation of the rule of simultaneous existence: if a baby was born 300 days after the father’s death, its legitimacy and beneficiary rights could not be recognized. Thus, had Mrs Parpalaix been able to conceive, she would have faced similar problems to X’s mother in proving her child’s legitimacy and right to inherit. After the case, CECOM changed the consent conditions so that frozen sperm can only be used while the couple are alive. The French Civil Code was also amended (Civil Code 311-20(3)).

5.1.2. The United States of America

In the following American case, Woodward v. Commissioner of Social Security, a key question was again whether a child who was the result of posthumous AI could enjoy the same inheritance rights as natural children, under the Massachusetts law of intestate succession. Again the detailed consent of the deceased to the procedure and, in addition, his consent to support the resulting child, was deemed crucial.

In October 1995, 2 years after Warren Woodward’s death, his wife, Lauren, gave birth to twin girls, through artificial insemination, using the husband’s preserved sperm. In February 1996, the wife applied for two types of Social Security survivor benefits: the child’s benefits and the mother’s benefits. The Social Security Administration (SSA) rejected the claims, on the basis she had not established that the twins were the husband’s children. In a parallel process to X’s mother, Mrs Woodward then filed a ‘complaint for correction of birth record’ against the clerk of the city, seeking to add her deceased husband’s name onto the children’s birth certificates. The Probate Court judge ruled in her favour but with insufficient findings of fact to convince the SSA. A US administrative law judge then supported the SSA’s position, concluding the children were not entitled to inherit from the husband under the state intestacy and paternity laws. Mrs Woodward then appealed to the US District Court for the District of Massachusetts, seeking a declaratory judgment to reverse the SSA’s ruling. The Massachusetts District Court concluded that limited circumstances may exist, in which posthumously conceived children may enjoy the inheritance rights of “issue” under the state’s intestacy law. These limited circumstances exist where the surviving parent, or the child’s other representative, demonstrates a genetic relationship between the child and the deceased. The survivor or representative must then establish both that the

---


13 [http://www.law.cornell.edu/socses/spring01/readings/435_mass_536.htm](http://www.law.cornell.edu/socses/spring01/readings/435_mass_536.htm)
deceased affirmatively consented to the posthumous conception and to the support of any resulting child. In other words, if biological parenthood and consent both to the procedure and to support the child can be established, the child can be a legal beneficiary.

However, the Uniform Status of Children of Assisted Conception Act, adopted in North Dakota in 1989, and Virginia in 1991, defined the parental status of the deceased individual in Article 4 (b) as the following:
“An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.”  

Again, the rule of simultaneous existence appears to override the inheritance rights of posthumously conceived children, as described in the previous paragraph.

The United States has a federal legal system in which each state has its own Civil Code. It is therefore difficult to compare the Uniform Law, which is not enforced throughout the United States, with Japanese Law. Nevertheless, if these rulings were applied in the case of Baby X, he would not meet the requirements of legitimacy under Uniform Law, or the consent requirements (written consent and consent to support) under the Massachusetts intestacy statute.

5.1.3 The United Kingdom

In the case of R v Human Fertilization and Embryology Authority, ex parte Blood, sperm was taken without written consent from a comatose husband who subsequently died. In 1991, the applicant and her husband were married and in 1994, decided to start a family. However, before Mrs Blood could conceive, her husband contracted meningitis and lapsed into a coma. She then asked for samples of his sperm to be collected by electro-ejaculation for her use in artificial insemination treatment at a later date. This was done and her husband died shortly afterwards. However, when Mrs Blood wished to use the sperm, the Human Fertilization and Embryology Authority refused to give the necessary consent to treatment in the United Kingdom, because the written consent of the donor, required under the provisions of the Human Fertilization and Embryology Act 1990, had not been obtained prior to the taking of his sperm. The Act requires the donor’s explicit written consent to the taking of the sperm, to the storage of it and to the use of it.

The Court of Appeal judged the absence of the necessary written consent meant that the taking of the husband’s sperm, the storage of it and the applicant’s subsequent treatment were all prohibited


15 All England Law Reports [1997] 2 All ER CA Civil Division, p 687.
by the 1990 Act (although the court did not criticize the preservation of the sperm in the circumstances). The Act specifically provides safeguards in the case of a deceased donor: under para 2(2)(b) of Sch 3, the consent must state what is to happen if the donor dies. In this case, however, the court subsequently allowed Mrs Blood to export the sperm to Belgium for AI treatment, where although the standards are similar to the UK, they do not insist on the same formal requirements for written consent. Export of the sperm was allowed on the basis that the UK Act infringes on the rights of EC citizens under Articles 59 and 60 of the EC Treaty, and that Mrs Blood, as a citizen of the European Community, had a directly enforceable right to receive medical treatment in another member state. This conflict between the UK Act and the EC treaty is unlikely to arise again, since the Act’s requirements for written consent for the taking and storage of sperm will be strictly enforced in the future.

Regarding the legitimacy issue in the UK, in September 2003, the UK Human Fertilization and Embryology (Deceased Fathers) Act 2003 was enacted. Under the Article 1 of this Act, if written consent has been given and is still effective (i.e. has not been withdrawn), the donor in artificial insemination using the deceased’s gametes or embryo is treated as the parent of the child.\(^{16}\)

Again, if we apply the UK Acts to the case of Baby X, the lack of written consent would leave X’s mother in a very weak position regarding the legality of her AI treatment and the legitimacy of X.

### 5.2. Recommendations

All three of these cases from outside Japan show the importance of the deceased’s consent in establishing the right of the wife to use a deceased husband’s sperm and/or in establishing the legitimacy and inheritance rights of a child conceived using the sperm of a deceased father. In fact, this problem was pointed out in Japan more than 20 years ago.\(^{17}\)

The 2003 Japanese Report on Methods of Assisted Medical Reproduction Using Donor Sperm, Eggs and Embryos did not specifically cover the use of a deceased’s sperm. However, the Health Science Council’s Subcommittee on Medical Assisted Reproductive Technology for Advanced Medical Care did discuss the problems of a deceased donor in the case of AID, where the sperm donor or biological father is not the legal father. They recommended that in the case of AID, the donor’s gametes should be destroyed on death for the following reasons.

---


• Major ethical problems may arise if a child is born using the gametes or embryos of a deceased donor, particularly when there may be a long time gap between the giving of consent and death.
• While the donor is alive, he/she can revoke the consent at any time. However, once the donor is deceased, the consent cannot be revoked even though the intention to revoke may have existed prior to death.
• Potential problems for the child’s welfare may arise if the donor, who is the genetic father, does not exist when the baby is born.

These points refer to the case of AID, where the mother’s husband is the legal father of the child; the problems are compounded in the case of a posthumous child like Baby X, born through IVF, whose legitimacy is in question. Therefore, as already suggested in Implications for the Child, Section 4.1, the mother or guardian of such a child should consider other means, such as adoption, to clarify the legitimacy and inheritance rights of the child.

The public prosecutor in the case of Baby X has appealed to the Supreme Court; so we are still waiting for a judgment that might clarify the legal situation in Japan. Meanwhile, in the light of the issues raised by this and similar cases in other countries, I would submit that legislation on human fertilization, which is urgently needed in Japan, must include a clear and detailed definition of the status of the resulting children.