DOES A CHILD CONCEIVED WELL AFTER HIS FATHER PASSED AWAY INHERIT HIS FATHER'S ESTATE?

The Torah describes that Yehudah's son Onan is uninterested in performing proper "yibum" with Tamar, his brother, Er's widow, since he "knows" that the potential future child will not carry his legacy but that of his brother instead.

The question of carrying on a dead father's legacy has taken on new meaning with the modern ability to inseminate a woman with sperm from her deceased husband. This has occurred in cases where the couple was trying to conceive when the husband died and sperm was already retrieved and ready to be used. This has led to intense debate as to the appropriateness of doing so, with one recent case garnering headlines where widow did not want to carry the child and the deceased father's parents petitioned for the right to use their son's sperm to inseminate another woman who would bear their grandchild.

The question has become even more complicated as it is now possible to retrieve sperm from a recently deceased man through testicular microaspiration, raising even further halakhic and ethical concerns.

On the simplest level, Rav Shlomo Zalman Auerbach ruled (Minhat Shlomoh 2:124) that a child born from a post-mortem insemination is most certainly considered to be the halakhic son of the sperm donor. He argued that the paternal halakhic relationship depends exclusively on the identity of the sperm donor, irrespective of when the insemination took place.

But even while such a child is considered the deceased man's son, he does not exempt his mother from yibum. The halakhot of yibum declare that when a man dies childless, his widow now has a zikah relationship with her former husband's brothers (if he has any). This relationship can be consummated though yibum or annulled through chalitzah.

Zikah exists so long as the man has no children at the time of his death. If his wife is pregnant when he dies, she remains in a state of safek (doubt) until she gives birth. If and when she gives birth to a healthy child, she is exempt from yibum. If the fetus doesn't make it to term, then zikah sets in and she retroactively requires yibum or chalitzah.

Rav Auerbach explains that the essential moment that creates zikah is the moment that the husband died. If no child or pregnancy exists at that time, even if one might be created in the future, zikah and all of its ramifications set in.

As such, Rav Auerbach envisions a child who is halakhically considered to be the son of the deceased and as such, also an heir to his inheritance, but whose mother still requires yibum or chalitzah.

Precedence for this conclusion can be found in a teshuvah of the Noda Bi-Yehudah (Mahadura Kama, EH 69). The Gemara (Yevamot 33a) insists that a woman wait 3 months after her husband's death before remarrying. The idea is that it can take up to 3 months for a woman to

be noticeably pregnant (and historically, actually be able to prove that she is pregnant) and it's vital to be able to identify the child's father. The Gemara explains that even if she became pregnant the day that her husband died, 90 days later she will certainly be aware of it and even if she subsequently marries, it will be clear that her recently deceased husband is the father of her child. However, if she marries during those intervening 90 days, it wouldn't be possible to tell who the child's father was, since she may have become pregnant only after marrying the second man and experiencing a quicker than normal visible recognition of her pregnancy.

Noda Bi-Yehudah wonders why the Gemara establishes a strict 90 day waiting period, since by the Gemara's own logic, a 93 day period would have made more sense. Elsewhere, the Gemara (Shabbat 86a) establishes that it can take up to three days after marital relations for a woman to conceive. Noda Bi-Yehudah therefore explains that it's perfectly conceivable for a woman to be pregnant from her first husband but only realize it 93 days after his death (i.e., if they had relations just before he died and she did not conceive until 3 days later). Considering that the Gemara establishes a strict 90 day waiting period and no longer, Noda Bi-Yehudah argues that only a child conceived within the husband's lifetime can exempt his widow from yibum. While the child is considered to be the son of the deceased husband, if fertilization only occurred after the father's death, the Torah considers the father to have the status of ובן אין לו at the time of his death, leading his wife to perform either yibum or chalitzah. While the Keren Orah (Yevamot 87a) disagrees regarding yibum, all agree that this child is still considered the halakhic son of the deceased father and one of his inheritors.

Leaving the issue of yibum aside, the question of inheritance raises many technical halakhic challenges. How is it that a child born only after the father's death can inherit his father's estate?

The Gemara already raises this issue with regard to any child whose mother was pregnant with him at the time of his father's death. While the Rishonim debate whether or not a fetus is able to inherit (Rif [Yevamot 67a] argues that he cannot, while Ra'avad [quoted in Ramban, Bava Batra 142a] argues that he can), all agree that once born, the child certainly inherits his father's estate. The Ramah points out that this is actually a din in the Torah, as the Gemara (Bava Batra 142b) establishes based on pesukim that a child born after his father's death does not affect the calculation of the bekhor's double share of inheritance—implying that he does inherit a חלק פשוט, a share equal to the other brothers.

The question is the Rishonim and Acharonim is the mechanism through which this child inherits, as the general assumption is that matters of inheritance are determined at the moment of death and this child was not yet born at the time.

Tosafot (Yevamot 67a) argue that since the fetus already existed at the time of his father's death, he is considered one of his heirs. This is similar to yibum, where a pregnant widow must wait until she gives birth to see if she is obligated in yibum—meaning that the Halakhah considers the fetus to be a child and heir of the father; it's just a matter of waiting to see that

he will be born alive. Once he is born, he is retroactively considered to be a child of his deceased father at the time of his father's death, and as such, the father died having already had a child and exempting his wife from yibum. However, Ramah, Rashba, and others disagree, arguing that a child only inherits once he is born and not retroactively.

Rav Moshe Mordechai Farbstein (Assia 97-98) argues that these various approaches are very important to understanding the inheritance status of a child conceived through IVF well after the father already passed away.

He argues that those who hold that a fetus is able to inherit while still a fetus, a child conceived only after the father's death cannot inherit. This is based on the position of the Maharit (2 HM 41), who argues that according to the view of the Geonim that a מומר is halakhically disqualified from inheritance, if he were to do teshuvah after his father's death, he would not inherit anything. Since, the critical moment for determining inheritance is the father's death and he was ineligible at that time, nothing he does thereafter can change his status. So too, argues Rav Farbstein, a child conceived only after the father's death cannot inherit. Since these Rishonim hold that a fetus inherits since he alive / exists at the time of the father's passing, there is no proof that a child conceived only thereafter can inherit at all.

The question only arises according to those who posit that a fetus, while a fetus, is ineligible for inheritance.

1. According to Tosafot, a child, once born, inherits retroactively from the time of his father's death. Rav Farbstein argues that it's hard to know how Tosafot would rule in the newer scenario, since even while they acknowledge the possibility of retroactive inheritance, in their case in question, the fetus already existed at the time of his father's death, he was just not yet born. They might reach a different conclusion in the modern situation where conception hadn't even been attempted until [long] after the father's death.
2. The question is stronger according to the many who disagree with Tosafot and argue that a child only inherits once he is born (מכאן ולהבא), but Rav Farbstein argues, would depend on the precise rationale.

   Fundamentally, those who hold this view must explain how a child who will only inherit months after the father's death can still minimize the share of the other inheritors who were around at the moment of death.

   Rav Hayyim Soloveitchik (Terumot 8) argues that fetal inheritance involves two aspects. On the one hand, the fetus is considered to be an inheritor (שם יורש), as he is the biological progeny of the father. However, since he is not yet born, he simply lacks the practical ability to collect his portion (זכיית הירושה). Rav Farbstein suggests that according to Rav Hayyim, the שם יורש can only devolve on a fetus that existed at the time of the father's death. If a fetus were only conceived after the father's passing, he does not have a שם יורש and as such, would not inherit his father's estate.

> Imrei Mosheh (38:23) disagrees and argues that while normally the transfer of money or property requires the active involvement of both parties, the very concept of inheritance breaks the mold, since the estate is only transferred after one party has already died. He posits that Halakhah establishes the ability of the deceased to מוריש (transfer) his estate to his heirs; the heirs take possession by virtue of the ability of their progenitor to מוריש his property to them. As such, a father retains the ability to מוריש his estate to his as of yet unborn son, as the entire "act of inheritance," according to Imrei Mosheh occurs after death.[1]
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> Rav Farbstein argues that according to the Imrei Mosheh, that the act of being מוריש is forward thinking and takes place after the father's death, it's conceivable to envision that it could even apply to a child who was only conceived after his father's death.

Perhaps, however, according to Rav Farbstein's understanding, there might be room to distinguish between two different modern cases. He argues that it is the father who retains the "right" to be מוריש his estate even after his death as to however he saw fit to do so in his life and Rav Farbstein extends this even to a child conceived well after his death. Perhaps that might only be relevant to a case where the couple was actively seeking assistance in conceiving prior to his death and a sperm sample was already obtained. Since it is demonstrably true that the father was actively interested in fathering children, it makes sense to presumptively posit that he would have wanted his ability to be מוריש to extend to this, as of yet unconceived child as well. However, in situations where the widow or the family wants to obtain a post mortem sperm sample [leaving aside the question of the halakhic propriety of such an act], it might be harder to argue that the father ever had such a child in mind and therefore, might be inappropriate to presumptively posit that he would have wanted his ability to be מוריש to extend to such a child as well.

That said, if the couple was trying to have a child but were as of yet unsuccessful, perhaps such a presumption would be appropriate and the child would indeed inherit. But even in that case, it would only make sense if it was the widow herself who was going to be that child's mother (meaning, that IVF would be done with her eggs). However, in a situation where the parents of the father wish to obtain a sperm sample to be used with another woman's (not the widow's) eggs, there would be no room to argue that the potential child would inherit the father's estate.

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[1] The other interpretation would be that a person's estate becomes ownerless (hefker) after his death, but that the Torah decreed that it should become ownerless only vis-a-vis his inheritors. Meaning, that it is the heirs that actively take ownership over their father's property. Tosafot firmly disagrees and argues that the heirs are completely passive in this regard and the estate is transferred by an act of the מוריש.