

A CHIP OFF THE OLD ICEBLOCK: HOW CRYOPRESERVATION HAS CHANGED ESTATE LAW, WHY ATTEMPTS TO ADDRESS THE ISSUE HAVE FALLEN SHORT, AND HOW TO FIX IT

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For thousands of years, the process for determining one's heirs remained unchanged. For a woman, her heirs were fixed at her death; for a man, his heirs were fixed no later than nine months after his death. Then came cryopreservation and, with it, the ability for individuals to conceive children years after their death. This development has created many—largely unanswered—questions. While posthumous conception implicates numerous moral, ethical, and legal issues, this Article focuses on the legal status of posthumously conceived children in the estate law context.

Despite pleas from both courts and commentators, few legislatures have been willing to tackle this sensitive topic. Most judges and scholars who have addressed it agree the three primary goals of any response should be to ensure the efficient administration of estates, carry out the decedent's intent, and protect the children's best interests. However, no consensus has emerged regarding which of these goals should receive priority. These goals need not be mutually exclusive, though, but can each be achieved with appropriate legislation. In this Article, I take a critical look at the statutory and judicial approaches proposed to date, break down the strengths and weaknesses of each, and introduce two new concepts that bridge the gaps in the prior approaches. Specifically, statutes should (1) separate the question of whether a posthumously conceived child is an heir from whether the child will in fact inherit assets, and (2) provide fiduciaries discretion to distribute or retain assets when cryopreserved genetic material exists, based on certain conditions. These improvements will provide flexibility not found in prior approaches and, as a result, advance each of the three key goals. This

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Article provides legislatures, judges, and commentators who tackle this issue with both a comprehensive historical perspective on the issue and a blueprint to follow going forward.

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INTRODUCTION

From ancient Rome until very recently, determining one's heirs had been easy: ascertain all family members living on the date of the decedent's death and, if the decedent's wife was pregnant at his death, wait to see if the child is born alive.¹ By nine months after the decedent's death, the class of possible heirs was closed.² For thousands of years, this approach remained unchanged. Then came cryopreservation, the ability to freeze genetic material and use it at a later date. Now individuals—both male and female—can conceive children after their death. Suddenly, determining one's heirs is no longer so simple.

In 1953, scientists reported the first human pregnancy resulting from cryopreserved sperm.³ The first child who developed from a cryopreserved embryo was born in 1984, and the first child conceived from a cryopreserved egg was born in 1986.⁴ In 2004, a child was born who

¹ See Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 107–08 (2004) (tracing this approach back to the ancient Romans).

² See *id.*

³ Mark S. Frankel, *Cryobanking of Human Sperm*, 1 J. MED. ETHICS 36, 36–38 (1975), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1154441/>.

⁴ U.-B. Wennerholm et al., *Children Born After Cryopreservation of Embryos or Oocytes: A Systematic Review of Outcome Data*, 24 HUMAN REPRODUCTION 2158, 2158 (2009), available at <http://humrep.oxfordjournals.org/content/24/9/2158.full.pdf>.

had been conceived from sperm frozen for twenty-one years.⁵ Today, researchers estimate that over 30,000 children are born each year who were conceived from frozen sperm, and almost 29,000 in vitro fertilization transfers each year use frozen embryos.⁶ The freezing and thawing of genetic material is not the science of tomorrow—the technology exists, it is being used daily, and it is becoming more common each year.

This development has created many (largely unanswered) questions in trust and estate law. For instance, should a child conceived after the death of a parent inherit from that parent? Should it matter if the child is born more than one year after the parent's death? Two years later? Ten years later? Should it matter whether the decedent consented to the posthumous use of his or her genetic material? Should it matter whether the decedent was married at his or her death? What if the decedent had a will that had a general provision for his children—should that include posthumously conceived children? What if the decedent's parents had created a trust years earlier for their descendants—should such children be deemed their descendants? Should the answers change with respect to insurance benefits or retirement plan benefits payable to "issue"? Are posthumously conceived children eligible to receive Social Security survivorship benefits? Should an executor, trustee, or custodian be liable for distributing assets before learning that a decedent left cryopreserved genetic material?

These issues are not just theoretical—a number of courts have struggled to answer some of these questions over the past few years. To do so, they have had to interpret statutes that were never intended to apply to this scenario. While their decisions have been inconsistent, the courts uniformly have appealed to their respective legislatures to address these issues in a thoughtful, comprehensive way. Few legislatures, however, have done so.

While assisted reproduction raises numerous moral, ethical, and legal questions, this Article focuses exclusively on the legal status of posthumously conceived children in the estate law context. To date, there is no consensus regarding the best approach, or even the appropriate goals. Of the few states that have addressed the issue, most have chosen not to recognize these children, placing primary importance on the efficient administration of estates. Most commentators, on the other hand, argue that these children should be recognized, though their reasons differ.

⁵ Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154, 155 (2008) (citing *Baby Born from Frozen Sperm for Record 21 Years*, OBESITY, FITNESS & WELLNESS WEEK, Jun. 19, 2004, at 59).

⁶ U.S. DEP'T OF HEALTH & HUMAN SERVS., 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, NATIONAL SUMMARY AND FERTILITY CLINIC REPORT 91 (2010) [hereinafter 2008 ART REPORT], available at http://www.cdc.gov/art/ART2008/PDF/01_ART_SuccessRates08-FM.pdf.

Some advocate that the decedent's intent should govern, while others assert that the children's best interests should control.

These three interests—efficient administration, decedent's intent, and children's best interests—need not be mutually exclusive, though; each can be achieved by allowing posthumously conceived children to inherit, but under the right set of conditions. While others have proposed some such conditions, including the decedent's consent to posthumous conception, a notice requirement, a time limitation, and a marriage requirement, each approach to date has flaws. This Article takes a critical look at these approaches, breaks down the strengths and weaknesses of each, and suggests the best set of conditions for legislatures to adopt going forward.

In addition, I introduce two important concepts that have not yet been proposed. In each existing approach, a child is an heir, and therefore may receive assets, only if all of the required conditions are met. First, legislatures should separate the question of whether a posthumously conceived child is an heir from the question of whether the child will, in fact, inherit assets from the estate. This distinction is critical for those scenarios where the birth of a posthumously conceived child may adversely affect other's interests. In that event, this distinction would allow a statute to exclude a child from receiving a share of the decedent's estate. However, it would still allow the child to receive other benefits that are contingent on the child's status as an heir, but which have no affect on the decedent's estate (such Social Security survivor benefits or inheritance through, rather than from, the decedent). And to be deemed an heir, the only relevant condition should be the decedent's consent that his or her genetic material be used for posthumous conception.

Second, any remaining conditions (including, I suggest, a notice requirement and time limitation) should serve merely to protect the fiduciary or recipient from liability for distributions, not to bar the child from sharing in any assets that may remain in the estate. In other words, if these conditions are not met, the fiduciary should have discretion to (1) distribute trust or estate assets to the then-existing heirs or beneficiaries without liability or (2) retain the assets until the fiduciary deems it appropriate to make distributions—for instance, if the surviving spouse or partner is actively attempting to have the decedent's child, until that child is born. This would allow an executor or trustee to balance the interests of all parties to the estate, including the potential children, as may be appropriate in each specific situation.

To be sure, assisted reproduction and posthumous conception raise sensitive issues many legislators would prefer to avoid and simply pass

on to judges.⁷ The time has come, though, for legislatures to take up the challenge, think critically about and debate the issues, and respond with clear, comprehensive provisions. This Article provides a comprehensive blueprint for legislatures to consider as they tackle these issues. Part I provides background for this discussion by giving a brief history of assisted reproduction, showing why posthumous reproduction will continue to increase in the future, and explaining why individuals choose posthumous conception. Part II traces the evolution of the statutory and judicial responses to date and critiques the strengths and weaknesses of each. Finally, Part III takes a step-by-step approach through the issues a legislature today must consider when drafting legislation on this topic, proposes two new concepts that bridge the gaps in the previous approaches, and explains my recommendation for each issue.⁸

I. A BRIEF HISTORY OF ASSISTED REPRODUCTION

Assisted reproduction is generally defined as any technique used to conceive a child other than sexual intercourse.⁹ While there are numerous variations, a basic understanding of four key concepts is sufficient for purposes of this Article: (1) artificial insemination, (2) in vitro fertilization, (3) surrogacy, and (4) cryopreservation. The following summarizes each of these concepts, then addresses why assisted reproduction will continue to increase and why some individuals choose posthumous conception.

A. Artificial Insemination

Artificial insemination, also called intrauterine insemination, occurs when sperm is placed through artificial means into a woman's uterus to

⁷ See Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1102–04 (2003) (noting reasons why individual legislators may be hesitant to address these issues).

⁸ Unless otherwise specified, I intend all references in this Article to “posthumous conception” and “posthumously conceived” to include not just the scenario in which an egg is fertilized after a parent's death, but also the scenario in which an egg is fertilized and frozen prior to a parent's death, then implanted into a woman's uterus after a parent's death.

⁹ See, e.g., UNIF. PARENTAGE ACT § 102 (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>; UNIF. PROBATE CODE § 2-115(2) (amended 2008), available at <http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.pdf>. Alternatively, the federal government has defined “assisted reproductive technology” only to include procedures in which a woman's oocytes are retrieved from her body. See 42 U.S.C. § 263a-7(1) (2006) (defining “assisted reproductive technology” for purposes of the Fertility Clinic Success Rate and Certification Act of 1992). This definition would exclude artificial insemination, however, and is too limited for purposes of this Article because an individual can use a deceased partner's frozen sperm to create a posthumously conceived child through artificial insemination.

facilitate fertilization.¹⁰ The first documented use of artificial insemination by humans occurred in England in 1770.¹¹ The first reported use in the United States occurred in 1866.¹² The technique did not become widely used, however, until the 1950s.¹³ In 1980, approximately 10,000 children were born in the United States who had been conceived through artificial insemination.¹⁴ By 1996, the number had jumped to approximately 65,000 children.¹⁵ The numbers likely have continued to increase. However, if they merely remained static, there would have been over 1 million children born in the United States over the past fifteen years who were conceived by artificial insemination.

B. *In vitro* Fertilization

In vitro fertilization (IVF) is a much newer, and more expensive, technique than artificial insemination. IVF involves providing medicine to a woman to stimulate multiple egg production, extracting her eggs, fertilizing them in a laboratory, culturing the zygotes for three or more days, and then transferring one or more embryos to a woman's uterus.¹⁶ Most commonly, fertilization is accomplished by intracytoplasmic sperm injection, in which a single sperm is injected directly into the egg.¹⁷ As

¹⁰ See CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 29–30 (2006). The sperm may come from the woman's partner or from a third-party (typically anonymous) donor. *Id.* at 31–32.

¹¹ Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 284 (Cal. Ct. App. 1993) (citing E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1986)).

¹² Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir From the Freezer*, 35 WM. MITCHELL L. REV. 433, 434 n.4 (2009) (citing Johnson v. Superior Court, 101 Cal. App. 4th 869, 881 (2002)).

¹³ Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393, 395 (2008).

¹⁴ S.J. Behrman, *Artificial Insemination and Public Policy*, 300 NEW ENG. J. MED. 619, 619 (1979).

¹⁵ Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 174 (2007).

¹⁶ See generally AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, ASSISTED REPRODUCTIVE TECHNOLOGIES, A GUIDE FOR PATIENTS (2008) [hereinafter ART GUIDE], available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf; Mabelle M. Seibel, *A New Era in Reproductive Technology*, 318 N. ENGL. J. MED. 828, 829–31 (1988); 2008 ART REPORT, *supra* note 6, at 3. Although I refer to an embryo throughout this discussion, there are similar techniques in which the oocyte is fertilized and transferred to the woman's fallopian tubes before the zygote becomes an embryo (called zygote intrafallopian transfer, or ZIFT) or the oocyte and sperm are mixed and transferred to the woman's fallopian tubes before fertilization occurs (called gamete intrafallopian transfer, or GIFT). ART GUIDE, *supra*, at 10; 2008 ART REPORT, *supra* note 6, at 3. These techniques, however, account for less than one percent of IVF procedures. See *id.* at 91.

¹⁷ See Taun Jain, M.D. & Ruchi S. Gupta, M.D., M.P.H., *Trends in the Use of Intracytoplasmic Sperm Injection in the United States*, 357 N. ENGL. J. MED. 251, 253 (2007); see

with artificial insemination, the sperm may be from the woman's partner or a third-party donor.¹⁸ With IVF, however, the eggs also may derive from a third-party donor.¹⁹

The first child conceived through IVF was born in 1978,²⁰ and the first in the United States was born in 1981.²¹ Since then, the number of children conceived each year by IVF has increased sharply.²² In 1996, over 20,000 children conceived by IVF were born in the United States.²³ In 1999, the number increased to over 30,000.²⁴ In 2008, the number jumped to over 60,000.²⁵ Now, over one percent of the children born each year in the United States are conceived by IVF.²⁶

C. Surrogacy Arrangements

A surrogacy arrangement is an arrangement in which a woman (the surrogate mother) agrees to carry a child to term for another individual or couple.²⁷ A surrogate mother becomes pregnant through either artificial insemination or IVF.²⁸ A surrogate mother who uses her own egg is referred to as a "traditional surrogate," while a surrogate who has no genetic connection to the child is referred to as a "gestational surrogate."²⁹

also 2008 ART REPORT, *supra* note 6, at 91 (showing that 64% of procedures in 2008 used intracytoplasmic sperm injection).

¹⁸ ART GUIDE, *supra* note 16, at 11.

¹⁹ *Id.*

²⁰ Seibel, *supra* note 16, at 828.

²¹ Bym, *supra* note 15, at 174.

²² *Id.* at 174–75.

²³ See U.S. DEP'T OF HEALTH & HUMAN SERVS., 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES, NATIONAL SUMMARY AND FERTILITY CLINIC REPORT 61 (2008) [hereinafter 2006 ART REPORT], available at <http://www.cdc.gov/ART/ART2006/508PDF/2006ART.pdf>. Since 1992, all clinics providing IVF services must report certain information to the Center for Disease Control. See The Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1 to 263a-7 (2006).

²⁴ See 2008 ART REPORT, *supra* note 6, at 65.

²⁵ *Id.* Because the report documents live births, there is a necessary nine-month period after the end of the year before the final results can be determined. *Id.* at 4. The 2008 numbers are based on reports from 436 of the 475 medical centers in the United States that provide assisted reproduction services. *Id.* at 15. Only two states, Montana and Wyoming, had no center. See *id.* Because some women give birth to multiple children, the number of women who gave birth to a live child during these years was somewhat lower. In 1996, there were 21,746 live-birth deliveries; in 2008, there were 46,326. *Id.* at 65.

²⁶ See 2006 ART REPORT, *supra* note 23, at 13.

²⁷ The first known surrogacy contract in the United States was signed in 1976. Keith J. Hey, *Assisted Conception and Surrogacy—Unfinished Business*, 26 J. MARSHALL L. REV. 775, 787 (1993).

²⁸ If a man and woman conceive a child through intercourse, they are deemed to be the child's parents regardless of any agreement to the contrary. See UNIF. PARENTAGE ACT § 701 cmt. (amended 2002). Thus, a valid surrogacy arrangement requires the use of assisted reproduction. *Id.*

²⁹ Bym, *supra* note 15, at 174 n.43.

Many couples who wish to have a genetic child rather than to adopt a child rely on surrogates. For instance, a married couple may hire a surrogate mother if the wife is incapable of carrying a child to term. Likewise, a gay couple must rely on a surrogate to have a child using one of the men's sperm. With the use of surrogacy, however, determining the parent-child relationship becomes particularly complicated. For instance, if a husband is infertile and his wife cannot carry a child to term, a fertility clinic may retrieve eggs from the wife, fertilize the egg with sperm from a third-party donor by IVF, then transfer the embryo to a gestational surrogate. Here, four people—the husband, wife, sperm donor, and gestational surrogate—arguably could be deemed a parent of the child.

The laws governing surrogacy are rapidly evolving and beyond the scope of this Article. To the extent that an individual's genetic material is transferred to a surrogate after that individual's death, however, the interests of the resulting children fall within the scope of this Article. Generally, in the surrogacy context, most states would recognize the parent-child relationship established by the state's parentage statutes for probate purposes, as well.

D. Cryopreservation

Cryopreservation creates the specific issue this Article addresses—the ability to conceive children after the death of a person. For cryopreservation, the genetic material (sperm, eggs, or embryos) is treated with glycerol, cooled to about -80 degrees centigrade, then stored in liquid nitrogen at -196 centigrade.³⁰ Like surrogacy, cryopreservation may be used with artificial insemination or IVF. Today, all clinics in the United States that provide assisted reproduction services offer cryopreservation.³¹

Though scientists had tried to preserve tissue for centuries, cryopreservation of gametes for human reproduction was not possible until scientists discovered in 1949 that they could keep sperm viable by using glycerol in the freezing process.³² Shortly thereafter, men began to successfully freeze sperm,³³ and the first human pregnancy resulting from a

³⁰ Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 211 n.35 (2008).

³¹ See 2008 ART REPORT, *supra* note 6, at 91.

³² See Eric M. Walters et al., *The History of Sperm Cryopreservation*, in SPERM BANKING: THEORY AND PRACTICE 1, 4, 6 (Allan A. Pacey & Matthew J. Tomlinson eds., 2009).

³³ Knaplund, *supra* note 13, at 395.

frozen sperm was reported in 1953.³⁴ By 1988, approximately 30,000 children conceived from frozen sperm were being born each year.³⁵

Likewise, women can freeze their eggs for future use.³⁶ The first child conceived from a frozen egg was born in 1986.³⁷ The success rate using thawed eggs was very low initially, but it has increased over the past decade.³⁸ In 2007, 138 assisted reproduction clinics reported that they freeze human eggs—twice the number from 2004.³⁹

Finally, couples can freeze embryos for future use. In 1984, the first child who developed from a cryopreserved embryo was born.⁴⁰ Today, many couples who attempt IVF freeze excess embryos for later possible use because it is both less invasive and less expensive to use their frozen embryos than to retrieve fresh eggs an additional time.⁴¹ As of 2002, clinics reported having 396,526 frozen embryos on hand, 88.2% of which were designated for reproductive purposes (as opposed to research or other uses).⁴² In 2008, 21.4% of the 148,055 IVF cycles performed used frozen eggs or embryos.⁴³

Cryopreserved genetic material can remain viable for many years. In 2004, a child was born who was conceived using sperm that had been frozen for twenty-one years,⁴⁴ and scientists speculate that embryos may remain viable for fifty years.⁴⁵ Although the time frames undoubtedly

³⁴ Frankel, *supra* note 3 (citing R.G. Bunge & J.K. Sherman, *Fertilizing Capacity of Frozen Human Spermatozoa*, 172 NATURE 767, 767–68 (1953)). In 1961, astronauts stored frozen sperm before venturing into space. Nolan, *supra* note 7, at 1071 n.24 (citing W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 943 (1962)).

³⁵ Bym, *supra* note 15, at 174 n.46.

³⁶ *Id.* at 174 n.43.

³⁷ *Id.*

³⁸ See Filippo Ubaldi et al., *Cumulative Ongoing Pregnancy Rate Achieved With Oocyte Vitriification and Cleavage Stage Transfer Without Embryo Selection in a Standard Infertility Program*, 25 HUM. REPROD. 1199, 1199–2000 (2010).

³⁹ Knaplund, *supra* note 13, at 395–96 n.11 (citing Rob Stein, *Women Hedge Bets by Banking Their Oocytes*, WASH. POST, May 13, 2007, at A1).

⁴⁰ Wennerholm, *supra* note 4, at 2158.

⁴¹ See 2006 ART REPORT, *supra* note 23, at 11; 2008 ART REPORT, *supra* note 6, at 58.

⁴² David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063, 1066–68 (2003), available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Selected_Articles_from_Fertility_and_Sterility/cryoembryos_may2003.pdf. These numbers greatly exceeded most estimates at that time, which placed the number of cryopreserved embryos between 30,000 and 200,000, and which assumed most were stored for research purposes, not for reproduction. *Id.* at 1068.

⁴³ See 2008 ART REPORT, *supra* note 6, at 16.

⁴⁴ Lorio, *supra* note 5.

⁴⁵ Kindregan, Jr., *supra* note 12, at 434 n.5 (citing R.G. Edwards & Helen K. Beard, *Destruction of Cryopreserved Embryos: UK Law Dictated the Destruction of 3000 Cryopreserved Human Embryos*, 12 HUM. REPROD. 3, 3 (1997)).

will increase as the science advances, they are already long enough to create serious consequences in the administration of decedents' estates.

E. The Future of Assisted Reproduction

An estimated 3.5 million children have been conceived through assisted reproduction,⁴⁶ and four factors indicate that this trend will continue to increase. First, as assisted reproduction has increased, the stigma associated with the practice has decreased.⁴⁷ Second, many couples are waiting longer to have children than in previous decades, which has led to increased infertility and reliance on assisted reproduction. The average age of first-time mothers in the United States increased from 21.4 years in 1970 to 25.0 years in 2006.⁴⁸ During this period, the number of women who had their first child when they were age thirty-five or older increased from one in one hundred to one in twelve.⁴⁹ In 2002, approximately 7.4 million women of reproductive age in the United States reported that they had received infertility services at some point during their lives, and eighty-eight percent of IVF procedures in 2008 involved women who were over thirty years of age.⁵⁰ Third, the success rate has increased. In the mid-1980s, the success rate for IVF procedures was about five percent.⁵¹ In 2008, the success rate was over thirty percent.⁵² Finally, more individuals are able to afford these procedures than previously. Although the average cost per IVF cycle has increased over the years,⁵³ the actual cost to a couple for a successful delivery is often much lower today due to the increased success rate (thus, fewer cycles are needed to achieve a successful pregnancy) and increased insurance coverage for fertility issues.⁵⁴

⁴⁶ Wennerholm, *supra* note 4, at 2158.

⁴⁷ See KINDREGAN, JR. & MCBRIEN, *supra* note 10, at 15–19.

⁴⁸ See T.J. MATHEWS & BRADY E. HAMILTON, U.S. DEP'T OF HEALTH & HUMAN SERVS., DELAYED CHILDBEARING: MORE WOMEN ARE HAVING THEIR FIRST CHILD LATER IN LIFE I (2009), available at <http://www.cdc.gov/nchs/data/databriefs/db21.pdf>.

⁴⁹ *Id.* at 2.

⁵⁰ See 2008 ART REPORT, *supra* note 6, at 3, 28.

⁵¹ Bym, *supra* note 15, at 174–75.

⁵² See 2008 ART REPORT, *supra* note 6, at 65.

⁵³ In 1988, the average cost for a single cycle of IVF was approximately \$6,000. Seibel, *supra* note 16, at 832. In 1994, the average cost for a single cycle increased to approximately \$8,000. Peter J. Neumann et al., *The Cost of a Successful Delivery with In Vitro Fertilization*, 331 NEW ENG. J. MED. 239, 239–40, 241 (1994). In 2005, the average cost for a single cycle was over \$13,000. Mark P. Connolly et al., *The Cost and Consequences of Assisted Reproductive Technology: An Economic Perspective*, 16 HUM. REPROD. UPDATE 603, 605 (2010); see also Iva Skoch, *Should IVF Be Affordable for All?*, NEWSWEEK, Jul. 21, 2010 (discussing the comparatively high costs of fertility treatments in the United States).

⁵⁴ See KINDREGAN, JR. & MCBRIEN, *supra* note 10, at 199–204; see also Jain & Gupta, *supra* note 17, at 255 (noting the higher use of certain assisted reproduction techniques in states with mandated insurance coverage for IVF services than in states without mandated coverage).

Just as IVF and cryopreservation were once science fiction, additional assisted reproduction techniques are sure to develop in the future. For instance, human cloning and “designer babies” are foreseeable,⁵⁵ scientists are developing artificial wombs in which an embryo could develop completely outside of the body,⁵⁶ and some scientists believe artificial sperm may be developed from bone marrow.⁵⁷ While each new technique will present its own ethical issues, each will result in children who, as with all children, had no say in the method by which they were created.⁵⁸ As legislatures decide how to treat these children, they should keep in mind these and other possible methods, not just the current realities. Indeed, it was the failure of legislatures to look ahead (or, at the least, respond promptly) that has led to the unresolved issues this Article addresses.

F. *The Reasons for Posthumous Conception*

Although the reasons that couples turn to assisted reproduction to achieve a pregnancy are self-evident, it may be less clear why an individual would use his or her deceased partner’s genetic material to create a child. There are, however, many reasons why an individual may do so, particularly if the individual does not intend to remarry. Some do so as a tribute to a deceased partner.⁵⁹ Others may do so for religious reasons.⁶⁰ Still others may do so out of a desire to know the child’s genetic origin.⁶¹ Likewise, if a couple had a child before the decedent’s death, the surviving parent can produce a full sibling rather than a half sibling for that child by using the decedent’s genetic material.⁶² Further, if a couple had embryos frozen before the decedent’s death and the surviving partner is

⁵⁵ See Danielle Simmons, *Genetic Inequality: Human Genetic Engineering*, NATURE EDUC. (2008), <http://www.nature.com/scitable/topicpage/genetic-inequality-human-genetic-engineering-768>.

⁵⁶ See Knaplund, *supra* note 1, at 99.

⁵⁷ Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent–Child Property Succession*, 62 SMU L. REV. 367, 393 (2009) (citing Charles P. Kindregan, Jr., *Thinking About the Law of Assisted Reproductive Technology*, 27 WIS. J. FAM. L. 123 (2007)).

⁵⁸ See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, prefatory note (1988) (“Although without guile or fault, but because of the accident of birth, these children of the new biology have been deprived of certain basic rights.”).

⁵⁹ Knaplund, *supra* note 13, at 398.

⁶⁰ *Id.* Although Catholicism, for instance, rejects most forms of assisted reproduction, other religions do not. Even among many Catholics, however, individuals who have begun the in vitro fertilization process may choose to use the embryos they created with their partner rather than destroying them. *Id.*; see also J.G. Schenker, *Women’s Reproductive Health: Monotheistic Religious Perspectives*, 70 INT’L J. GYNECOLOGY & OBSTETRICS 77, 84–86 (2000); Lynn D. Wardle, *Global Perspectives on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 428–29 (2006).

⁶¹ Knaplund, *supra* note 13, at 398.

⁶² *Id.* at 399.

now sterile, the use of the frozen embryos may be the only way for the survivor to have his or her own genetic child.⁶³ Also, in many cases it will cost significantly less to use the deceased partner's genetic material than to obtain gametes from a new donor.⁶⁴ Finally, as the remainder of this Article discusses, doing so may allow the child to inherit from certain individuals (including the decedent or other family members), to qualify as a beneficiary of certain trusts, or to receive Social Security or other survivor benefits.⁶⁵

II. EXISTING LEGAL APPROACHES TO POSTHUMOUS CONCEPTION

Before reviewing the various statutory and judicial approaches to date regarding posthumously conceived children, it is important to identify and understand the specific legal issues involved. For purposes of this Article, the interests affected can be grouped into two categories: (1) probate-related issues and (2) class-gift issues. The first category includes pretermitted-heir⁶⁶ status under a state probate code, inheritance rights under state intestacy statutes, and other interests dependent upon a person's right to inherit under state intestacy statutes. For instance, eligibility for Social Security survivor benefits depends in part on one's status as an heir under state law.⁶⁷ Similarly, life insurance policies and retirement plan documents often defer to state intestacy statutes if the owner dies without a valid beneficiary designation. The class-gift issues concern the interpretation of wills, trust agreements, or beneficiary designations that include a general provision for a person's issue, heirs, descendants, children, grandchildren, or the like.

To put these issues into perspective, consider two common scenarios.⁶⁸ First, an engaged couple learns there is a significant chance the man may become sterile—for example, he is diagnosed with a form of cancer requiring aggressive treatment, or he serves in the military and is

⁶³ *Id.*

⁶⁴ *Id.* at 399–400. This is particularly true if the survivor must rely on IVF and the couple had preserved “extra” embryos during prior IVF attempts. 2008 ART REPORT, *supra* note 6, at 58 (noting that the use of frozen embryos avoids the cost of fertility drug stimulation and egg retrieval).

⁶⁵ See Knaplund, *supra* note 13, at 399–401.

⁶⁶ Pretermitted-heir statutes provide generally that a child born after his or her parent executed a will shall have an interest in that parent's estate, unless the parent expressly omitted the future child. See, e.g., UNIF. PROBATE CODE § 2-302 (amended 2008).

⁶⁷ Social Security Act § 216(h)(2)(A), 42 U.S.C. § 416(h)(2)(A) (2006); see *infra* Part II.B.

⁶⁸ For simplicity and consistency, I have assumed in each scenario that the man dies and the woman uses the genetic material after his death. However, the same questions would arise if the woman died first and the man, with the help of a surrogate, used her genetic material after her death. For a list of additional scenarios, see KINDREGAN, JR. & MCBRIEN, *supra* note 10, at 10–12.

deployed to a war zone.⁶⁹ Before he starts treatments or is deployed, the man has his sperm cryopreserved to preserve the possibility that he and his fiancée may have children together. Sadly, he does not survive the treatments or his tour. After a period of grieving, his former fiancée decides to conceive a child using his preserved sperm. Years after his death, she gives birth to a child the man never met.

Because the man was young, unmarried, and had no children, he never created a will. Accordingly, intestacy laws will govern the distribution of his assets. This raises several questions. Should this child be his heir under the law? Should it matter whether he consented to the posthumous use of his sperm? If so, how must his consent be proven? Should there be a presumption of consent? Should clear and convincing proof be required? Must the consent be in writing? Should it matter if the child was born more than one year after the husband's death? Two years later? Ten years later? Should it matter whether the couple was married? What if the couple was a same-sex couple? Should it matter if the husband's executor had already distributed his estate to others? If so, should the executor, the recipients, or both be liable?

Alternatively, imagine a healthy, young, married couple. After they have their first child, they create wills that include provisions for their children. They try unsuccessfully for two years to conceive a second child, then attempt IVF. A fertility clinic harvests a number of the wife's eggs, fertilizes them using her husband's sperm, transfers two of the embryos to her uterus, and freezes the remaining embryos. A few months later, the husband dies unexpectedly in an accident. Shortly after his death, the wife miscarries, but she decides to try again to have another child using the cryopreserved embryos. Should the posthumously conceived child be included in the class of "children" under his will? If the will instead referred specifically to the first child, should the second child be a pretermitted heir (and, thus, be entitled to a share of the decedent's estate)?

In either scenario above, assume that the decedent had life insurance and a retirement account (either privately, through his employer, or both), and he contributed regularly to Social Security—a common scenario for many employees. On the beneficiary designations for his insurance and retirement account, he simply checked a box naming his "heirs" as his primary beneficiaries. Should the posthumously conceived child be deemed an heir for these purposes as well? If so, and if the custodians had already distributed the insurance proceeds or account assets, would

⁶⁹ See Knaplund, *supra* note 1, at 91–92 (citing various reports of soldiers cryopreserving their sperm before being deployed).

the custodians face liability for improper distributions?⁷⁰ Furthermore, should the child be eligible to receive Social Security survivorship benefits as a child dependent on the decedent?⁷¹ If the decedent died while at work, should the child receive worker's compensation survivor benefits under state law?⁷² If the decedent died due to another's negligence, should the child be eligible to receive wrongful death proceeds?

Finally, assume the decedent's parents had created a trust years earlier for their descendants.⁷³ Should the posthumously conceived children be deemed their grandparents' descendants and, therefore, be eligible to receive distributions from the trust? Should the answer differ whether the trusts terminated at the decedent's death or continued after his death?

Now, assume the surviving partner, the decedent's executor, the trustee of the grandparent's trust, the life insurance company, or the retirement account custodian researches state law to find answers to these questions. In thirty-three of the fifty states, that person will find that the code and case law say absolutely nothing about any of these issues.⁷⁴ In the other seventeen, she will find that the states' approaches vary greatly—nine states do not recognize posthumously conceived children in any probate situation,⁷⁵ while eight states do, subject to various condi-

⁷⁰ In the first scenario, the heirs typically would be the decedent's children, then parents, then siblings. It would be extremely likely that the custodian would distribute the assets to the parents or, if none, the siblings shortly after his death. In the second scenario, the sole heir typically would be the surviving spouse, even if the decedent had children, so the concern to the custodian would not be as great. See *infra* Part II.A.1.b.

⁷¹ This last question is surprisingly complicated and has garnered the most attention to date by courts. Part II.B, *infra*, discusses further the issues relating to Social Security survivor benefits.

⁷² See *Finley v. Farm Cat, Inc.*, 288 S.W.3d 685 (Ark. Ct. App. 2008).

⁷³ In 2009, trustees of over 2.6 million trusts for individuals filed federal income tax returns. 2009 SOI Tax Stats-Fiduciary Returns-Sources of Income, Deductions, and Tax Liability-Type of Entity, IRS.GOV, <http://www.irs.gov/taxstats/article/0,,id=225291,00.html> (follow "2009" hyperlink). This included complex trusts (1,344,911), simple trusts (706,775), and grantor trusts (567,585). *Id.* Presumably, a large majority of these trusts had provisions for children, grandchildren, issue, heirs, descendants, or similar class designations. Notably, not all grantor trusts file tax returns and, thus, the actual number of trusts is somewhat higher. See SOI Tax Stats-Income from Trusts and Estates Study Data Sources and Limitations, IRS.GOV, <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=214746,00.html>.

⁷⁴ See *infra* Table 1.

⁷⁵ The nine states that do not recognize posthumously conceived children are Arkansas (*Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008)); Georgia (GA. CODE ANN. § 53-2-1(b)(1) (West, Westlaw through 2011 Reg. Sess.)); Idaho (IDAHO CODE ANN. § 15-2-108 (West, Westlaw through chs. 1-335 effective on or before July 1, 2011)); Minnesota (MINN. STAT. ANN. § 524.2-120(10) (West, Westlaw through 2011 Reg. Sess.)); South Carolina (S.C. CODE ANN. § 62-2-108 (West, Westlaw through 2010 Reg. Sess.)); South Dakota (S.D. CODIFIED LAWS § 29A-2-108 (West, Westlaw through 2011 Reg. Sess., Exec. Order 11-1 and S. Ct. Rule 11-17)); New York (N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)-(b)); Virginia (VA. CODE ANN. § 20-164 (West, Westlaw through 2011 Reg. Sess.)); and New Hampshire (Khabbaz *ex rel.* Eng v. Comm'r, Soc. Sec. Admin., 930 A.2d 1180, 1182 (N.H. 2007)). In New York, although the statute excludes posthumously conceived children for probate purposes, a

tions.⁷⁶ The following breaks down each of these approaches, starting with statutory approaches and then the judicial approaches.

A. *Statutory Approaches*

With respect to posthumously conceived children, state statutes fall into three categories: (1) statutes based on model or uniform codes (the most common), (2) statutes not based on model or uniform codes and that pre-date cryopreservation, and (3) statutes that expressly address posthumously conceived children. The following summarizes the various statutes that fall in each category, the strengths and weaknesses of those statutes, and the states that have adopted each.

1. States with Statutes Based On Model or Uniform Acts

Twenty-six states have a probate or parentage code that includes an “afterborn-heirs” provision based on a model or uniform act.⁷⁷ The following summarizes the historical development of model and uniform codes as they relate to posthumously conceived children and identifies the states that have adopted and still follow each.

a) Model Probate Code (1946)

In 1946, the Probate Law Division of the American Bar Association published the first model or uniform probate act,⁷⁸ the Model Probate Code (MPC). The MPC included an “afterborn-heirs” provision which

court has recognized them for class-gift purposes. *In re Martin B.*, 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007)).

⁷⁶ The eight states that recognize posthumously conceived children are California (CAL. PROB. CODE §§ 249.5–249.8 (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.)); Colorado (COLO. REV. STAT. ANN. § 15-11-120 (West, Westlaw through 1st Reg. Sess. of the 68th Gen. Assemb., 2011)); Florida (FLA. STAT. ANN. § 742.17(4) (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.)); Iowa (IOWA CODE ANN. § 633.220 (West, Westlaw through 2011 Reg. Sess.)); Louisiana (LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.)); Massachusetts (*Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002)); New Jersey (*In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000)); and North Dakota (N.D. CENT. CODE § 30.1-04-19 (West, Westlaw through 2011 Reg. Sess.)).

⁷⁷ See *infra* Table 1. In addition to the twenty-six states shown in Table 1, Minnesota and Iowa have probate statutes based on a model or uniform code; however, because they have also enacted provisions that directly address posthumously conceived children, I have classified them differently for purposes of this Article. See *infra* Part II.A.3. Generally speaking, a model act provides an example for each state to consider, evaluate, and adapt as it sees fit, whereas uniform acts are intended to be adopted, largely intact, by a majority of states in order to provide uniformity among the states. See MICH. LEGAL STUD., PROBLEMS IN PROBATE LAW 10 (1946); Kindregan, Jr. & Snyder, *supra* note 30, at 206.

⁷⁸ MICH. LEGAL STUD., *supra* note 77 (including a complete copy of the Model Probate Code).

codified the traditional rule that all heirs must be living or in gestation at the moment of the decedent's death.⁷⁹ Section 25 stated:

Descendants . . . of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of intestate estates shall be determined by the relationships existing at the time of the death of the intestate.⁸⁰

Read strictly, posthumously conceived children—who are not “begotten” before the decedent's death—do not fit within the limited exception stated in the first sentence and, therefore, would be excluded under the second sentence's general rule. However, there is little doubt that the drafters did not specifically intend to bar such children. This language was approved in 1946, before scientists discovered how to freeze sperm while retaining its viability,⁸¹ and it is based on a rule that had existed unchanged for over a thousand years.⁸² Posthumous conception was literally science fiction both when the rule was established and when the MPC drafters codified it. Accordingly, courts should not feel obligated to read the language strictly. Rather, they should deem themselves free to create a new exception for posthumously conceived children.⁸³

If a court reads the language strictly, however, the MPC's use of “begotten” is problematic given today's science. For instance, if “begotten” is synonymous with conception—the moment that the sperm fertilizes the egg—this language would provide different interests to children depending on the specific assisted reproductive technique used. If a couple froze an embryo prior to the father's death, that child technically would have been “conceived” or “begotten” prior to the father's death—even if the mother did not implant the embryo until after his death—and the child would fall within the statute. Alternatively, if the father froze

⁷⁹ See, e.g., *In re Estate of Kolacy*, 753 A.2d 1257, 1260–61 (N.J. Super. Ct. Ch. Div. 2000). The court noted:

However, there have long been exceptions to the rule that the identity of takers from a decedent's estate is determined as of the date of death. Those exceptions are based on human experience going back to time immemorial. We have always been aware that men sometimes cause a woman to become pregnant and then die before the pregnancy comes to term

Id.

⁸⁰ MODEL PROBATE CODE § 25 (1946).

⁸¹ See Walters et al., *supra* note 32, at 4.

⁸² See Knaplund, *supra* note 1, at 105–08.

⁸³ Just before publication of this Article, the United States Court of Appeals for the Eighth Circuit interpreted this language, which was a part of the Iowa Code, and applied it strictly. *Beeler v. Astrue*, 651 F.3d 954, 965 (8th Cir. 2011). However, two other courts have looked past the statute's plain language when considering similar language because of the legislature's lack of actual intent. See *infra* Parts IV.B.1 and IV.B.2.

his sperm and the mother used the frozen sperm after his death, the resulting child would not be “conceived” or “begotten” until after the father’s death and, thus, would not fall within the statute. It is extremely unlikely that the drafters intended to draw such an arbitrary line when they approved the language in 1946. More likely, they simply had not considered the possibility of posthumous conception, which remained a scientific impossibility at that time.

Four states, Indiana, Maryland, Ohio, and Pennsylvania, still have this language from the 1946 MPC in their probate codes.⁸⁴ Until these states amend their statutes or courts interpret this language, it is unknown whether a posthumously conceived child would be recognized for probate and class-gift purposes in these states.

b) Uniform Probate Code (1969, 1990)

In 1969, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Probate Code (UPC), which replaced the MPC.⁸⁵ The Commissioners incorporated the MPC’s afterborn-heirs provision, but they changed “begotten” to “conceived” and dropped the second sentence.⁸⁶ Section 2-108 of the UPC stated simply, “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”⁸⁷ The changes appear to be merely stylistic, however, not substantive.⁸⁸

⁸⁴ IND. CODE ANN. § 29-1-2-6 (West, Westlaw through 2011 Reg. Sess.); MD. CODE ANN., EST. & TRUSTS § 3-107 (West, Westlaw through 2011 Reg. Sess. of the Gen. Assemb.); OHIO REV. CODE ANN. § 2105.14 (West, Westlaw through 2011 files 1–27, 29–47, and 49 of the 129th Gen. Assemb., approved by Sept. 26, 2011 and filed with the Sec. of State by Sept. 26, 2011); 20 PA. CONS. STAT. ANN. § 2104(4) (West, Westlaw through 2011 Acts 1–75). The language in the Maryland code is slightly different: “A child of the decedent who is conceived before the death of the decedent, but born afterwards shall inherit as if he had been born in the lifetime of the decedent. No other after-born relation may be considered as entitled to distribution in his own right.” MD. CODE ANN., EST. & TRUSTS § 3-107 (Westlaw). Likewise, the Pennsylvania legislature omitted the second sentence because the traditional rule is “already well established” in case law. 20 PA. CONS. STAT. ANN. § 2104(4), cmt. para. 4 (Westlaw). Iowa’s code also includes this language, IOWA CODE ANN. § 633.220 (West, Westlaw through 2011 Reg. Sess.), but its legislature adopted additional language in 2011 that specifically addresses posthumously conceived children. *Id.* § 633.220A. See *infra* Part II.A.3.b.

⁸⁵ The original Uniform Probate Code is available at http://www.law.upenn.edu/bll/archives/ulc/upc/upc_1969.pdf.

⁸⁶ See UNIF. PROBATE CODE § 2-108 (1969) (amended 2008), available at http://www.law.upenn.edu/bll/archives/ulc/upc/upc_1969.pdf.

⁸⁷ *Id.*

⁸⁸ The Commissioners did not provide a comment to § 1-208 to explain the changes, which they likely would have done had they introduced a new approach. Further, although they removed the reference to the traditional rule, § 1-103 of the Uniform Probate Code stated, “Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.”

For the reasons mentioned above regarding the MPC, it is uncertain how a court would apply this language, if at all, in the context of posthumously conceived children. One court, however, has held that the 1969 UPC language does not apply to posthumously conceived children, and the court created its own exception for such children.⁸⁹ Three states, Maine, Nebraska, and Tennessee, still have this language from the 1969 UPC in their probate codes, and it is uncertain what interests a posthumously conceived child would have in these states.⁹⁰

In 1990, the Commissioners revised section 2-108 to state, “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.”⁹¹ The Commissioners did not provide a comment to explain the intent of this change, but it is likely that, this time, they intended to exclude posthumously conceived children. By 1990 cryopreservation was becoming more common, and the change to “in gestation” removed the ambiguity inherent in the words “begotten” (from the MPC) and “conceived” (from the 1969 UPC). In addition, two years earlier the Commissioners had proposed the Uniform Status of Children of Assisted Conception Act (discussed next), which provided that posthumously conceived children have no interest in their deceased parent’s estate.⁹² Like this change to the UPC, that act also used the term “in gestation.”

On the other hand, one could reasonably conclude that UPC section 2-108 does *not* preclude posthumously conceived children from inheriting. In fact, the drafters of the *Restatement (Third) of Property: Wills &*

⁸⁹ *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). The New Jersey legislature has since amended its statute and adopted the afterborn-heir language used in the 1990 Uniform Probate Code. *See infra* Part I.B.1.

⁹⁰ ME. REV. STAT. ANN. tit. 18-A § 2-108 (West, Westlaw through Ch. 447 of the 2011 1st Reg. Sess. of the 125th Leg.); NEB. REV. STAT. § 30-2308 (West, Westlaw through 102nd Leg. 1st Reg. Sess. 2011); TENN. CODE ANN. § 31-2-108 (West, Westlaw through 2011 1st Reg. Sess.). A small number of additional states still include the “conceived before” language in their statutes, but they have recently amended the statutes to clarify that the birth must occur within ten months after the decedent’s death. *See infra* Part II.3.a. Florida’s probate code includes section 108 of the 1969 Uniform Probate Code as well, FLA. STAT. ANN. § 732.106 (West, Westlaw through Ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.), but its legislature passed a separate statute in 2003 specifically addressing posthumously conceived children. *Id.* § 742.17. *See infra* Part 0.0.b.

⁹¹ UNIF. PROBATE CODE § 2-108 (amended 1990). In 2008, this language was revised to read, “An individual in gestation at a decedent’s death is deemed to be living at the decedent’s death if the individual lives 120 hours after birth.” UNIF. PROBATE CODE § 2-104(a)(2) (amended 2008) (moving the prior section 2-108 to section 2-104(a) and revising the language). However, as discussed next, additional provisions were added to the Uniform Probate Code in 2008 that provided that certain posthumously conceived children after a parent’s death would be deemed “in gestation” at the decedent’s death.

⁹² *See infra* Part II.A.1.c.

Other Donative Transfers take this position,⁹³ noting that “[m]ost statutory codifications, including enactments of the Original or Revised Uniform Probate Code . . . do not preclude inheritance by a child conceived after the decedent’s death. They merely provide that a child who is in gestation at the decedent’s death is treated as then living.”⁹⁴ In other words, they do not apply to section 2-108 the canon of construction *expressio unius, exclusio alterius*.⁹⁵ In any event, the Commissioners’ intent—regardless of what it may have been—does not necessarily reflect the intent of the legislatures in the states that have adopted the 1990 UPC.

Nine states, Alaska, Arizona, Hawaii, Michigan, Montana, New Jersey, Vermont, West Virginia, and Wisconsin, still have this language from the 1990 UPC in their probate codes.⁹⁶ Notably, none of these states adopted the 1988 Uniform Status of Children of Assisted Conception Act. In these nine states, a court may or may not read the statutory language strictly, and, thus, may or may not exclude posthumously conceived children.⁹⁷

⁹³ Mary F. Radford, *Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 EST. PLAN. & CMTY. PROP. L.J. 33, 43 (2009). The drafters note that, despite Uniform Probate Code section 2-108, a posthumously conceived child may inherit from a genetic parent, so long as the child is “born within a reasonable time after the decedent’s death in circumstances indicating that the decedent would have approved of the child’s right to inherit.” RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. d (1999).

⁹⁴ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (1999).

⁹⁵ *Expressio unius, exclusio alterius* is a Latin phrase meaning “the expression of one thing excludes another.” HELENE S. SHAPO, ET AL., WRITING AND ANALYSIS IN THE LAW 110–11 (Found. Press 5th ed. 2008).

⁹⁶ ALASKA STAT. ANN. § 13.12.108 (West, Westlaw through Sept. 8, 2011 of 1st Reg. Sess. and 1st Spec. Sess. of 27th Leg.); ARIZ. REV. STAT. ANN. § 14-2108 (West, Westlaw through 1st Reg. Sess. and 3rd Spec. Sess. of the 50th Leg., 2011); HAW. REV. STAT. § 560:2-108 (West, Westlaw with amendments through Act 235 of the 2011 Reg. Sess.); MICH. COMP. LAWS ANN. § 700.2108 (West, Westlaw through P.A. 2011, No. 151 of the 2011 Reg. Sess. of 96th Leg.); MONT. CODE ANN. § 72-2-118 (West, Westlaw through 2011 laws eff. through July 1, 2011); 14; N.J. STAT. ANN. § 3B:5-8 (West, Westlaw through L. 2011, Ch. 124 and J.R. No. 6); VT. STAT. ANN. tit. 14, § 303 (West, Westlaw through No. 46 of the 2011–12 sess. of the Vt. Gen. Assemb.) (non-Uniform Probate Code, but same language); W. VA. CODE ANN., §§ 42-1-3f, 42-1-8 (West, Westlaw through 2011 Reg. Sess.); WISC. STAT. §§ 852.03, 854.21 (West, Westlaw through 2011 Act 31) (non-Uniform Probate Code, but similar language). Minnesota also has this language in its code, MINN. STAT. § 524.2-108 (2010), but in 2010 it added a specific provision excluding posthumously conceived children, *id.* § 524.2-120(10). Similarly, New Mexico and Utah have this language in their statutes but have adopted the 2000 Uniform Parentage Code provisions addressing posthumously conceived children. N.M. STAT. ANN. §§ 40-11A-707 (West, Westlaw through 1st Reg. Sess. of the 50th Leg., 2011) (parentage); § 45-2-108 (afterborn heirs); UTAH CODE ANN. §§ 78B-15-707 (West, Westlaw through 2011 2nd Spec. Sess.) (parentage); 75-2-104(1)(b) (afterborn heirs).

⁹⁷ A federal court considering Arizona state law held that this language excluded posthumously conceived children. See *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002), *rev’d on other grounds*, 371 F.3d 593 (9th Cir. 2004). That decision, however, does not

c) Uniform Status of Children of Assisted Conception Act (1988)

In 1988, the Commissioners proposed for the first time language that specifically addressed the interests of posthumously conceived children.⁹⁸ The Uniform Status of Children of Assisted Conception Act (USCACA) provided that a child conceived after a parent's death is not a child of that parent for any purpose.⁹⁹ Section 4(b) stated, "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." Section 10 clarified that this rule controlled for purposes of intestate succession, "probate law exemptions, allowances, or other protections for children in a parent's estate," and determination of class members for donative transfers.

The Commissioners excluded posthumously conceived or implanted children "to avoid the problems of intestate succession which could arise" from posthumous conception.¹⁰⁰ The decision to exclude such children in favor of administrative convenience is puzzling, however, given the Commissioners' child-centric mandate. The Act's prefatory note stated that the Commission's singular goal was to provide for the children conceived through assisted reproduction. Specifically, "[t]he Committee was given the responsibility to draft an act, a child oriented act, to provide order and design that would inure to the benefit of those children who have been born as a result of this new modern miracle."¹⁰¹ Further, the Commissioners noted that "[t]he narrowness of the Act is designed to limit its applicability to what is best for children."¹⁰² Finally, they added, "Children then are the first priority, others can wait, at least until the children are taken care of."¹⁰³ However, with respect to intestate succession, the Commissioners chose expediency over the interests of these children.¹⁰⁴

necessarily reflect the position of the Arizona Supreme Court and is not binding on an Arizona court. Also, although the New Jersey Superior Court held in 2000 that posthumously conceived children may inherit under the 1969 Uniform Probate Code, In re *Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), the New Jersey legislature later adopted the 1990 Uniform Probate Code language. See 2004 N.J. Laws Serv. 1442 (effective Feb. 27, 2005). Accordingly, it is unclear whether future courts will follow *Kolacy*.

⁹⁸ The Commissioners intended the Uniform Status of Children of Assisted Conception Act to complement the existing Uniform Parentage Act, which at the time did not address posthumously conceived children. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 1 cmt. (1988), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/uscac88.pdf>.

⁹⁹ *Id.*

¹⁰⁰ *Id.* § 4(b) cmt.

¹⁰¹ *Id.* prefatory note, at 2.

¹⁰² *Id.*

¹⁰³ *Id.* prefatory note, at 1.

¹⁰⁴ The Commissioners noted, "Of course, those who want to explicitly provide for such children in their wills may do so." *Id.* § 4(b) cmt.

The USCACA was not a rousing success, and only North Dakota and Virginia adopted it.¹⁰⁵ In 2000, the Commissioners rolled parts of the USCACA into a revised Uniform Parentage Act and withdrew their recommendation that states enact the USCACA.¹⁰⁶ North Dakota repealed its version of the USCACA in 2005 and replaced it with the revised Uniform Parentage Act.¹⁰⁷ Virginia has kept the act, but its version is a bit different than the USCACA language.¹⁰⁸

d) Uniform Parentage Act (2000)

Twelve years later, the Commissioners again addressed posthumously conceived children and, for the first time, provided that they may be treated as children of the deceased parent. In 2000, the Commissioners incorporated parts of the USCACA into the Uniform Parentage Act (UPA),¹⁰⁹ which had not previously addressed the interests of posthumously conceived children. However, the Commissioners did not adopt section 4(b) of the USCACA. Instead, they provided that a child conceived after a parent's death *would* be deemed a child of the deceased parent if the deceased parent gave consent. Specifically, section 707 of the UPA provided, "If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the

¹⁰⁵ N.D. CENT. CODE ANN. § 14-18-04 (West, Westlaw through Reg. Sess. of the 54th Leg. Assemb. 2005, at ND-STMANN95) (repealed 2005); 1991 Va. Acts 1104–11.

¹⁰⁶ See UNIF. PARENTAGE ACT, prefatory note at 2 (amended 2002) ("The promulgation of the Uniform Parentage Act in 2000, as amended in 2002, is now the official recommendation of the Conference on the subject of parentage [and] . . . relegates to history [the] . . . USCACA (1988).").

¹⁰⁷ See 2005 N.D. Laws 719. North Dakota subsequently adopted the 2008 revisions to the Uniform Probate Code, as discussed *infra* Part II.A.1.e.

¹⁰⁸ Virginia's version provides interests to posthumously conceived children only if the birth occurs within ten months after the death of a parent, VA. CODE ANN. § 20-164 (West, Westlaw through 2011 Reg. Sess.), and either "(i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation." *Id.* § 20-158(B). See also Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 590 (2005) (explaining related conflicts and inconsistencies in Virginia's statutes relating to posthumous reproduction).

¹⁰⁹ PROPOSED REVISION OF THE UNIF. PARENTAGE ACT prefatory note at 1 (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/upa300.pdf>. The original Uniform Parentage Act was approved and recommended by the National Conference of Commissioners on Uniform State Laws in 1973. *Id.*; see also UNIF. PARENTAGE ACT (1973), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.pdf>.

child.”¹¹⁰ In 2002, the Commissioners replaced the references to “spouse” with “individual” and made other minor changes.¹¹¹

Thus, for the first time, a model or uniform act recognized a parent–child relationship between a posthumously conceived child and the deceased parent—in at least some circumstances. However, this approach has two significant problems. First, the statute is a parentage act, not a probate act, and it does not clarify whether, or how, it applies in the probate context. Second, if it does apply in the probate context, the provision is so broad that it would create numerous administrative difficulties.

Regarding the first problem, the UPA primarily addresses the rights and responsibilities that flow from a parent–child relationship during the lifetime of the parties, such as child custody, visitation rights, and support obligations.¹¹² Although the UPA recognizes a parent–child relationship between parties, it does not articulate the effect this relationship has in the probate or class-gift context. It does not grant the child any interests in the deceased parent’s estate, nor does it address the child’s interest in class gifts. Nonetheless, the act states broadly that it “applies for all purposes, except as otherwise specifically provided” by another law of the state.¹¹³ Thus, if a state does not specifically address the status of posthumously conceived children in its probate code, a court may look to the UPA to determine the parties’ relationship.

If a state adopted this provision in its parentage statutes, but it did not amend its probate code to clarify the interests of posthumously conceived children, it is unclear what, if any, interests the child would actually have. Specifically, one could reasonably argue either that this new, broader provision expands (or, more accurately, creates an exception to) the UPC’s “posthumous heirs” provision, or that the “posthumous heirs” language—when read strictly—specifically covers posthumously conceived children and is therefore unaffected by the UPA.

Most likely, this act would not be construed to create probate interests for posthumously conceived children. The Commissioners noted

¹¹⁰ *Id.* § 707 (revised 2000), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/upasty1020.pdf>.

¹¹¹ *Id.* (amended 2002), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf>. Notably, although a single use of “spouse” remains in the amended section 707, this appears to be an oversight; the inclusion of “spouse” in that one spot is inconsistent with the balance of section 707 and the stated intent of the Commissioners. *Id.* prefatory note at 2 (“Article 7 . . . recodifies USCACA (1988), but applies its provisions to nonmarital as well as marital children born as a result of assisted reproductive technologies.”).

¹¹² See Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 887–88 (2008); Wardle, *supra* note 60, at 444–46.

¹¹³ UNIF. PARENTAGE ACT § 203 (amended 2002); see also Radford, *supra* note 93, at 39 (noting the scope of the applicability of the UPA).

that these changes to the UPA “recodify” the USCACA, which expressly did not recognize posthumously conceived children, as discussed above.¹¹⁴ And despite the linguistic change from the USCACA on this issue, the comment to section 707 is almost identical to the comment to section 4(b) of the USCACA:

This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.¹¹⁵

Accordingly, a court may conclude that by the addition in the UPA of “unless the deceased spouse consented in a record,” the drafters did not intend to grant new interests, but simply to clarify that a provision for such children in a will would be respected.

This uncertainty highlights a structural problem that legislatures should avoid by addressing posthumous conception in their probate codes, not solely in their parentage acts. Parentage acts and probate codes are entirely different animals with distinct focuses.¹¹⁶ Parentage acts are concerned primarily with a child’s best interests. For instance, if an individual chooses to have intercourse, parentage acts will hold the individual financially responsible for a resulting child, whether intended or not. Children have a right to such support; a parent cannot opt out of these obligations.¹¹⁷

On the other hand, the primary goal of intestacy laws traditionally has been to satisfy the decedent’s likely intent.¹¹⁸ While the United States Supreme Court has recognized that an individual has a right to dispose of her assets,¹¹⁹ it has never held that an individual—not even a

¹¹⁴ See UNIF. PARENTAGE ACT prefatory note at 2 (amended 2002).

¹¹⁵ *Id.* § 707 cmt.

¹¹⁶ As noted by Professor Lee-ford Tritt, “Estates law and family law have very different goals in defining a parent–child relationship. Many salient concerns regarding various issues evoked from a parent–child relationship during the parties’ lifetime are not necessarily relevant to issues concerning the distribution of one’s estate.” Tritt, *supra* note 57, at 370; see also *In re Estate of Palmer*, 658 N.W.2d 197, 200 (Minn. 2003) (stating that, in recognition of the distinct purposes of probate and family law, a state legislature’s decision “not to make the Parentage Act the sole means of establishing paternity for the purposes of probate” was justified).

¹¹⁷ See Monopoli, *supra* note 112, at 887.

¹¹⁸ See Tritt, *supra* note 57, at 370–71.

¹¹⁹ See *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (holding unconstitutional a section of the Indian Land Consolidation Act of 1983 that required that certain undivided fractional interests in land must escheat to the tribe, and stating that “the right to pass on property—to one’s family in particular—has been part of the Anglo–American legal system since feudal times”); *but see Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942) (stating that “[n]othing in the

decendent's spouse or children—has a constitutional right to inherit assets.¹²⁰ Accordingly, legislatures are generally free to dictate the terms of one's inheritance.¹²¹ Indeed, because the interests are different in the parentage and probate contexts, a legislature may reasonably decide to treat posthumously conceived children differently in each context. In any event, legislatures should avoid any confusion by addressing the issue in both places.¹²²

Regarding the second problem, if courts do construe the statute to give posthumously conceived children an interest in the deceased parent's estate, the statute goes too far. There is no time limitation before which the child must be born. If the husband gave written consent for his sperm to be used after his death, the wife seemingly would have an unlimited time under this statute to become pregnant. This would hold up estate administrations indefinitely (in violation of the stated purpose of the provision) or, depending on the state's probate laws, expose a per-

Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.”).

¹²⁰ Rights commonly provided by statute, however, include an elective share for a surviving spouse, a family allowance, and a homestead allowance. *See, e.g.*, UNIF. PROBATE CODE §§ 2-201 to 2-214 (amended 2008) (elective share), 2-404 (family allowance), 2-402 (homestead allowance).

¹²¹ *See* Labine v. Vincent, 401 U.S. 532, 537 (1971) (“[T]he choices reflected by the intestate succession statute are choices which it is within the power of the State to make.”). Commentators have questioned, however, whether statutes treating posthumously conceived children differently than children conceived prior to a decedent's death may violate equal protection rights. *See generally* Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234 (2005) (discussing Equal Protection inheritance claims of non-marital children under traditional common law and analyzing the right of posthumously conceived children to inherit from a decedent's estate under the Equal Protection Clause); Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251 (1999) (discussing whether it is permissible under the Equal Protection Clause to exclude posthumously conceived children from survivor benefits under the Social Security Act). Courts have held that certain statutes denying interests to posthumously conceived children do not violate equal protection principles. *See* Finley v. Astrue, 601 F. Supp. 2d 1092, 1099–1106 (E.D. Ark. 2009); Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 969–70 (D. Ariz. 2002), *rev'd on other grounds*, 371 F.3d 593 (9th Cir. 2004).

¹²² There are other notable instances in which it is unclear whether provisions in a parentage act apply in the probate context. For instance, section 5 of the 1973 Uniform Parentage Act addressed assisted reproduction but not posthumous conception. It recognized a parent-child relationship only in the context of a married couple working with a licensed physician and using sperm from a sperm donor. UNIF. PARENTAGE ACT § 5 (1973) (amended 2002). Even if these requirements were met, it did not address what rights or interests the child would have in the probate context. Similarly, some states require in their parentage acts that paternity be determined during the father's lifetime, others require that paternity be determined within 300 days after the father's death, and others do not limit the time for paternity actions. *See* Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 645–49 (2005); Knaplund, *supra* note 1, at 97; *see also* *In re* Estate of Kolacy, 753 A.2d 1257, 1262–63 (N.J. Super. Ct. Ch. Div. 2000) (declining to apply the 300-day rule in New Jersey's parentage act in the probate context).

sonal representative to indefinite liability for distributing assets to improper heirs. Further, the statute does not state what this “consent” must entail. For instance, an individual may want the child to be recognized as his own, but he may not want a portion of his estate to go to the child. This could be the case, for instance, if the man had other children—from either a prior marriage or the same marriage—whom he knew and would prefer to benefit.¹²³

Seven states—Alabama, Delaware, New Mexico, Texas, Utah, Washington, and Wyoming—have adopted the 2000 UPA but do not expressly address posthumously conceived children in their probate code.¹²⁴ For the above reasons, the interests of posthumously conceived children remain unclear in these states.

e) Uniform Probate Code (2008)

In 2008, the Commissioners amended the UPC to address posthumously conceived children. For the first time, the Commissioners expressly provided that, subject to certain conditions, a posthumously conceived child may be included in both intestate succession¹²⁵ and class gifts.¹²⁶

For probate purposes, a posthumously conceived child will be deemed a child of the deceased parent if two conditions are met. First, the deceased parent must have intended to be “treated as a parent.”¹²⁷ This intent can be shown by a “signed record that, considering all the facts and circumstances, evidences the individual’s consent,”¹²⁸ or by clear and convincing evidence of the deceased parent’s intent.¹²⁹ How-

¹²³ While the decedent could address this in a will, intestacy statutes apply, by definition, to those without a will.

¹²⁴ ALA. CODE §§ 26-17-707 (West, Westlaw through 2011 Reg. Sess.) (parentage), 43-8-47 (afterborn heirs); DEL. CODE ANN. tit. 13, § 8-707 (West, Westlaw through 78 Laws 2011, chs. 1–125) (parentage); tit. 12, §§ 310, 505 (posthumous children); N.M. STAT. ANN. §§ 40-11A-707 (parentage), 45-2-108 (afterborn heirs) (West, Westlaw through 1st Reg. Sess. of 50th Leg. 2011); TEX. FAM. CODE ANN. § 160.707 (West, Westlaw through 2011 Reg. Sess. and 1st Called Sess of 82nd Leg.) (parentage); TEX. PROB. CODE ANN. § 41(a) (West, Westlaw through 2011 Reg. Sess. and 1st Called Sess of 82nd Leg.) (afterborn heirs); UTAH CODE ANN. §§ 78B-15-707 (West, Westlaw through 2011 2nd Spec. Sess.) (parentage), 75-2-104(1)(b) (afterborn heirs); WASH. REV. CODE ANN. § 26.26.730 (West, Westlaw through 2011 legis.) (parentage); WYO. STAT. ANN. §§ 14-2-907 (West, Westlaw through 2011 Gen. Sess.) (parentage), 2-4-103 (posthumous persons). Notably, Texas, Utah, and Washington each retained the word “spouse” (as in the 2000 revision of the Uniform Parentage Act), rather than using “individual” (as in the 2002 amendments to the Uniform Parentage Act). Also, Texas requires that a licensed physician maintain the record. TEX. FAM. CODE ANN. § 160.707 (Westlaw); *see also* Kindregan, Jr., *supra* note 12, at 441–42.

¹²⁵ UNIF. PROBATE CODE § 2-116 (amended 2008).

¹²⁶ *Id.* § 2-705(g)(2).

¹²⁷ *Id.* § 2-120(f).

¹²⁸ *Id.* § 2-120(f)(1).

¹²⁹ *Id.* § 2-120(f)(2)(C).

ever, if a couple was married at the time they contributed their respective genetic material and no divorce proceeding was pending at the first spouse's death, the UPC presumes such intent unless clear and convincing evidence shows otherwise.¹³⁰ Second, the child must be "in utero not later than thirty-six months after the individual's death[, or] born not later than forty-five months after the individual's death."¹³¹

For class-gift purposes, a posthumously conceived child will be deemed the child of the deceased parent if the first condition described above (decedent's consent) is met, absent a contrary provision in the governing instrument.¹³² However, if the class closes due to the deceased parent's death, then the second condition above (time limitation) applies, as well.¹³³ As a result, a child born ten years after a deceased parent's death could be a trust beneficiary if the trust remained ongoing. However, if the trust terminated as a result of the deceased parent's death, the child must be conceived within thirty-six months or born within forty-five months of the parent's death.¹³⁴ These class-gift rules apply to governing instruments of any type, including "a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type."¹³⁵

The Commissioners chose a three-year period for two reasons.¹³⁶ First, it "allow[s] the surviving spouse or partner a period of grieving,

¹³⁰ *Id.* § 2-120(h)(2).

¹³¹ *Id.* § 2-120(k). Specifically, section 2-120(k) provides:

If, under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is: (1) in utero not later than 36 months after the individual's death; or (2) born not later than 45 months after the individual's death.

Under section 2-104(a), the child must also survive for at least 120 hours after birth. *Id.* § 2-104(a).

¹³² *Id.* § 2-705(b). This is a rule of construction, not a mandatory rule. Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30, 31 (2009).

¹³³ UNIF. PROBATE CODE § 2-705(g)(2) provides:

If a child of assisted reproduction or a gestational child is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living on the distribution date if the child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent's death or born not later than 45 months after the deceased parent's death.

¹³⁴ *Id.* § 2-705(g)(2) cmt.

¹³⁵ *Id.* § 1-201(18) (defining "governing instrument").

¹³⁶ The Commissioners added the forty-five-month reference for situations when the implantation or insemination procedure is not done in a medical facility and there is no clear evidence of the specific date that the child first is in utero. *Id.* § 2-120(k) cmt. However, while artificial insemination can be accomplished without clinical assistance, *see* Nolan, *supra*

time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy.”¹³⁷ Second, it mirrors the three-year period that an individual has under section 3-1006 to recover from a distributee the value of assets improperly distributed to that distributee.¹³⁸ In addition, the Commissioners intended for these provisions to apply whether or not the parents were married and whether the deceased parent was the child’s genetic mother or father.¹³⁹

The 2008 UPC is a significant step forward, but it too has flaws. For one, the “treated as a parent” language regarding consent is vague in the posthumous conception context.¹⁴⁰ In addition, it does not include any requirement that a surviving spouse or partner notify the fiduciary¹⁴¹ that she intends to use the decedent’s genetic material. As explained in Part III.B.2, such a requirement would aid in the efficient administration of estates and reduce the possibility of premature distributions. Furthermore, when a class closes, the act only recognizes posthumously conceived children of the individual whose death “closed” the class. As discussed in Part III.A.2, this limitation is unnecessary and could lead to inequitable results.

To date, only Colorado and North Dakota have adopted these provisions.¹⁴²

note 7, at 1069 n.9, it is doubtful that any method requiring cryopreservation—which would be necessary for posthumous conception—may be accomplished without clinical assistance.

¹³⁷ UNIF. PROBATE CODE § 2-120(k) cmt.

¹³⁸ *Id.* § 2-705(g)(2) cmt. However, the time periods do not truly match up, because the requirement is just that the child be in utero within thirty-six months, not that the child be born—or that the executor be notified of the pregnancy—within thirty-six months.

¹³⁹ These interests apply whether the woman who gives birth to the child is the birth mother or a gestational carrier. *Id.* §§ 2-120 (addressing the issue in the context of a birth mother), 2-121 (addressing the issue in the context of a gestational carrier). A “gestational carrier” is a woman who gives birth under a gestational agreement and is not an intended parent. *Id.* § 2-121(a)(2). A “birth mother” is any woman other than a gestational carrier who gives birth to a child, and she is always deemed an intended parent. *Id.* § 2-120(a)(1). While this typically would be the genetic mother, it need not be. *Id.*

¹⁴⁰ *Id.* § 2-120(f). The act does not define “treated as a parent,” but the comment to § 2-115 provides that “functioning as a parent” includes providing economic support. Accordingly, although it is not expressly stated, the consent likely must be not just that the surviving spouse could use the sperm, but that the decedent intended for a portion of the estate to benefit the child. This should be clarified in the statute, though, not hinted at through the comments.

¹⁴¹ This could be a trustee, an executor with respect to probate assets, or a custodian of the decedent’s nonprobate assets.

¹⁴² COLO. REV. STAT. ANN. § 15-11-120 (West, Westlaw through 1st Reg. Sess. of the 68th Gen. Assemb., 2011); N.D. CENT. CODE ANN. § 30.1-04-19 (West, Westlaw through 2011 Reg. Sess.).

f) Other Approaches

To complete the picture, two additional approaches merit mention, although no state has adopted either.¹⁴³ In 2008, the American Bar Association completed a twenty-year project by proposing the Model Act Governing Assisted Reproductive Technology.¹⁴⁴ With respect to posthumously conceived children, the act simply adopts, almost verbatim, section 707 of the 2000 UPA.¹⁴⁵ Accordingly, like the 2000 UPA (and unlike the 2002 UPA), the act refers to “spouse” rather than “individual,” thereby limiting the class of posthumously conceived children who may be deemed an heir of a deceased parent to children of married partners.¹⁴⁶ It would not apply to engaged individuals or individuals in any other long-term relationship.¹⁴⁷ The act differs from the 2000 UPA in two key regards, though. First, the act specifies that the consent must be (among other requirements) signed and dated by not just the participant, but also by his or her healthcare provider.¹⁴⁸ Second, it defines “spouse” as any couple having a legally recognized relationship that state law accords rights and responsibilities “equal to, or substantially equivalent to, those of marriage.”¹⁴⁹ Thus, it would apply to same-sex couples in states that recognize civil unions, not just gay marriage.

Finally, the drafters of the *Restatement (Third) of Property: Wills & Other Donative Transfers* have suggested an extremely broad, fact-sensitive approach: “[T]o inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent’s death in circumstances indicating that the decedent would have approved of the child’s right to inherit.”¹⁵⁰ The drafters added, “A clear case would be

¹⁴³ For a summary of approaches taken in other countries, see Knaplund, *supra* note 1, at 100–01.

¹⁴⁴ Kindregan, Jr. & Snyder, *supra* note 30, at 204. This act was prepared by the American Bar Association’s Section of Family Law’s Committee on Reproductive and Genetic Technology and approved by the Section Council. See MODEL ACT GOVERNING ASSISTED REPROD. TECH., prefatory note (2008), available at <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

¹⁴⁵ MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607 provides:

Except as otherwise provided in the enacting jurisdiction’s probate code, if an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

¹⁴⁶ See Raymond C. O’Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL’Y 332, 376–77 (2009).

¹⁴⁷ MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(21).

¹⁴⁸ *Id.* § 202(1)(b).

¹⁴⁹ *Id.* § 102(21).

¹⁵⁰ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (1999).

that of a child produced by artificial insemination of the decedent's widow with his frozen sperm."¹⁵¹ If born within a reasonable time after the husband's death, the child "should be treated as the husband's child for purposes of inheritance *from* the husband . . . [and] for all purposes of inheritance by, from, or through [any other] intestate decedent who dies thereafter."¹⁵² In addition, the child would be a child of the deceased parent for class-gift purposes.¹⁵³ While this approach may be fine for a court that is required to wrestle with this issue before its legislature has, legislatures should be more precise in their statutes to provide predictability.

2. States with Statutes Similar to a Model or Uniform Act

Ten additional jurisdictions have provisions in their codes that, on their face, appear to grant or deny interests to posthumously conceived children. However, like the MPC and 1969 UPC provisions above, these statutes were adopted (and last revised) before cryopreservation was available or widely used. Accordingly, despite a literal reading, it is not clear whether courts in these states would apply the statutes in the context of posthumously conceived children.

In six states and the District of Columbia, the statutes appear to recognize posthumously conceived children with no limitations. For instance, Connecticut adopted a statute in 1975 which provides that children born to a married couple and conceived through assisted reproduction will be deemed the child of both parents.¹⁵⁴ Further, class designations such as children, issue, heirs, or descendants, "when used in any will or trust instrument, shall, unless the document clearly indicates a contrary intention, include children born as a result of [assisted reproduction]."¹⁵⁵ Similarly, the District of Columbia's intestacy statutes state simply, "[A] child or descendant of the intestate born after the death of the intestate has the same right of inheritance as if born before his death."¹⁵⁶ Illinois's probate code has long provided, "A posthumous child of a decedent shall receive the same share of an estate as if the child had been born in the decedent's lifetime."¹⁵⁷ Kansas's intestacy

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* § 14.8 cmt. h (Tentative Draft No. 4, 2001).

¹⁵⁴ See CONN. GEN. STAT. §§ 45a-771 to -779 (West, Westlaw through Gen. Stat., rev. to Jan. 1, 2011). The act defines "artificial insemination" to include both intrauterine insemination and in vitro fertilization. *Id.* § 45a-771a(1).

¹⁵⁵ *Id.* §§ 45a-778(a); see also *id.* § 45a-262.

¹⁵⁶ D.C. CODE § 19-314 (West, Westlaw through July 27, 2011) (section last revised in 1965).

¹⁵⁷ 755 ILL. COMP. STAT. ANN. 5/2-3 (West, Westlaw through P.A. 97-304, with the exception of P.A. 97-227, P.A. 97-229, P.A. 97-244, and P.A. 97-284, P.A. 97-297 to P.A. 97-299, and P.A. 97-300, of the 2011 Reg. Sess.).

statute states merely, “‘Children’ means biological children, including a posthumous child”¹⁵⁸ Missouri’s probate code provides, “All posthumous children, or descendants, of the intestate shall inherit in like manner, as if born in the lifetime of the intestate”¹⁵⁹ Oklahoma’s probate code states, “Posthumous children are considered as living at the death of their parents.”¹⁶⁰ Finally, Rhode Island’s afterborn-heirs provision states, “No right in the inheritance shall accrue to any persons whatsoever *other than to the children of the intestate*, unless such persons are in being and capable in law to take as heirs at the time of the intestate’s death.”¹⁶¹

Alternatively, three states have adopted provisions similar to the UPC’s “afterborn-heirs” provision that, if read strictly, would—at least by negative implication, or *expressio unius, exclusio alterius*—exclude posthumously conceived children. Kentucky’s code provides that children born within ten months of a decedent shall inherit as if the child was living on the date of death, but that provision has not been revised since 1944.¹⁶² Likewise, North Carolina’s version states, “Lineal descendants and other relatives of an intestate born within 10 lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him.”¹⁶³ Oregon’s probate code reads, “The relationships existing at the time of the death of the decedent govern the passing of the net intestate estate, but persons conceived before the death of the decedent and born alive thereafter inherit as though they were alive at the time of the death of the decedent.”¹⁶⁴

Finally, the Mississippi and Nevada statutes do not address in any manner posthumous heirs—whether conceived before or after the death of a parent.¹⁶⁵

¹⁵⁸ KAN. STAT. ANN. § 59-501 (West, Westlaw through 2010 Reg. Sess.) (section last revised in 1939). Kansas also has had a provision in its parentage act since 1968 that provides that all children conceived through heterologous artificial insemination “shall be considered at law in all respects the same as a naturally conceived child” if the parents are married and both spouses consent. *Id.* § 23-129.

¹⁵⁹ MO. ANN. STAT. § 474.050 (West, Westlaw through 2011 1st Reg. Sess. of the 96th Gen. Assemb.) (section last revised in 1955).

¹⁶⁰ OKLA. STAT. ANN. tit. 84, § 228 (West, Westlaw through chs. of the 1st Reg. Sess. of the 53rd Leg. eff. Aug. 26, 2011) (section last revised in 1910).

¹⁶¹ R.I. GEN. LAWS ANN. § 33-1-4 (West, Westlaw through ch. 407 of the Jan. 2010 Sess.) (emphasis added) (section last revised in 1938).

¹⁶² KY. REV. STAT. ANN. § 391.070 (West, Westlaw through 2011 legis.).

¹⁶³ N.C. GEN. STAT. ANN. § 29-9 (West, Westlaw through ch. 18) (last revised in 1959).

¹⁶⁴ OR. REV. STAT. ANN. § 112.075 (West, Westlaw through ch. 733 of the 2011 Reg. Sess.) (last revised in 1969).

¹⁶⁵ See MISS. CODE ANN. §§ 91-1-1 to -31 (West, Westlaw through 2011 Reg. Sess.); NEV. REV. STAT. ANN. chs. 133–34 (through 2009 75th Reg. Sess. and 2010 26th Spec. Sess.). Mississippi has a provision in its probate code regarding “illegitimate children,” defined as “a person who at the time of his birth was born to natural parents not married to each other and said person was not legitimized by subsequent marriage of said parents or legitimized through

3. States with Statutes Not Based On a Model or Uniform Act

Finally, the legislatures in ten states (in addition to Colorado and North Dakota, which adopted the 2008 UPC provisions) have expressly addressed the interests of posthumously conceived children.¹⁶⁶ Six deny status to posthumously conceived children, and four recognize them in certain circumstances.

a) States That Have Excluded Posthumously Conceived Children

The Georgia, Idaho, Minnesota, South Carolina, and South Dakota legislatures recently revised their statutes to clarify that posthumously conceived children have no right to inherit from the deceased parent's estate.¹⁶⁷ The Georgia, Idaho, South Carolina, and South Dakota statutes state that children must be born within ten months after the death of a parent to inherit from that parent,¹⁶⁸ and the Minnesota statute states that the child must be "in gestation prior to" the parent's death.¹⁶⁹

In Georgia, Idaho, and South Carolina, the language appears to be limited to inheritance rights; it is not clear how posthumously conceived children are to be treated for class-gift purposes under a will or other

a proper judicial proceeding." MISS. CODE ANN. § 91-1-15(1)(C) (Westlaw). Such children may inherit through their mother, but may inherit through their father only if there was an adjudication of paternity within the earlier of ninety days after the administrator's first publication to creditors or one year. *Id.* § 91-1-15(2)–(3). Although a posthumously conceived child technically would fit this definition, it is unclear whether a court would apply it in this context.

¹⁶⁶ Although Iowa (Model Probate Code) and Minnesota (Uniform Probate Code) have adopted a uniform code, their provisions regarding posthumously conceived children do not follow the uniform codes. Accordingly, I have placed Iowa and Minnesota in this category for purposes of this Article.

¹⁶⁷ GA. CODE ANN. § 53-2-1(b)(1) (West, Westlaw through 2011 Reg. Sess.) (relevant language added by 1996 Ga. Laws 529); IDAHO CODE ANN. § 15-2-108 (West, Westlaw through chs. 1–335 that are effective on or before July 1, 2011) (relevant language added by 2005 Idaho Sess. Laws 407); MINN. STAT. ANN. § 524.2-120(10) (West, Westlaw through 2011 Reg. Sess.) (relevant language added by 2010 Minn. Laws 1007); S.C. CODE ANN. § 62-2-108 (West, Westlaw through 2010 Reg. Sess.) (relevant language added by 1990 S.C. Acts 2279); S.D. CODIFIED LAWS § 29A-2-108 (West, Westlaw through 2011 Reg. Sess., Exec. Order 11-1, and S. Ct. Rule 11-17) (relevant language added by 2007 S.D. Sess. Laws 413).

¹⁶⁸ GA. CODE ANN. § 53-2-1(b)(1) (Westlaw); IDAHO CODE ANN. § 15-2-108 (Westlaw); S.C. CODE ANN. § 62-2-108 (Westlaw); S.D. CODIFIED LAWS § 29A-2-108 (Westlaw). Notably, Kentucky and North Carolina likewise have a ten-month requirement, but in each case, the language was added before cryopreservation was available. KY. REV. STAT. ANN. § 391.070 (Westlaw); N.C. GEN. STAT. § 29-9 (Westlaw).

¹⁶⁹ MINN. STAT. ANN. § 524.2-120(10) (Westlaw).

donative instrument.¹⁷⁰ In Minnesota and South Dakota, the rule excludes posthumously conceived children from class gifts, as well.¹⁷¹

In 2006, the New York legislature expressly excluded posthumously conceived children from its pretermitted-heir statute.¹⁷² The memorandum supporting the bill notes that the limitation prevents “children born during the testator’s lifetime [from being] unfairly deprived of their expected inheritance by a child with whom the testator had no relationship, a possibility that in all likelihood would have not been foreseen or desired by the testator.”¹⁷³ Notably, the legislature did not revise its posthumous-heirs or class-gifts provisions, both of which (like the 1969 UPC summarized above) still refer simply to children “conceived before” the decedent’s death. A New York court held in 2007 that posthumously conceived children *may* be included in the class of “issue” under a trust agreement.¹⁷⁴ However, the court indicated that a posthumously conceived child would not inherit under New York law.¹⁷⁵

b) States That Have Included Posthumously Conceived Children

As noted above, Colorado and North Dakota have adopted the 2008 UPC, thereby granting status to posthumously conceived children for inheritance and class-gift purposes. Four additional states, Florida, Louisiana, California, and Iowa, have enacted statutes granting status to posthumously conceived children in limited circumstances.¹⁷⁶

Florida was the first state to recognize posthumously conceived children in the probate context. In 1993, the Florida legislature provided that posthumously conceived children are eligible for a “claim against the decedent’s estate[,]” but only if the decedent provided for the child in

¹⁷⁰ See Mary F. Radford & F. Skip Sugarman, *Georgia’s New Probate Code*, 13 GA. ST. U. L. REV. 605, 621 (1997) (explaining that the legislative purpose behind the limitation was to provide for the efficient administration of estates); 2005 Idaho Sess. Laws 407 (same); S.C. CODE ANN. § 62-2-108 (Westlaw).

¹⁷¹ MINN. STAT. ANN. §§ 524.2-705, -708 (Westlaw) (incorporating the intestate succession rules into class gifts); S.D. CODIFIED LAWS §§ 29A-2-705, -708 (Westlaw) (incorporating the intestate succession rules into class gifts).

¹⁷² 2006 N.Y. Laws 3055 (amending N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)–(b)).

¹⁷³ Memorandum from the N.Y. State Judiciary in Support of B. A10721 (2005), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A10721&term=2005&Summary=Y&Memo=Y.

¹⁷⁴ *In re Martin B.*, 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007); see also *infra* Part II.B.6.

¹⁷⁵ *Id.* at 209 (noting that under state law, “the right of a posthumous child to inherit . . . is limited to a child conceived during the decedent’s lifetime.”).

¹⁷⁶ FLA. STAT. ANN. § 742.17(4) (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.); LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.); CAL. PROB. CODE §§ 249.5–249.8 (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.); IOWA CODE ANN. § 633.220 (West, Westlaw through 2011 Reg. Sess.).

the decedent's will.¹⁷⁷ The practical effect of the statute, however, is questionable. First, it is in Florida's parentage act, not its probate code. Second, it does not clarify what "claim" the child may have. A claim could mean the child may inherit as an heir, is entitled to statutory allowances, can be a pretermitted heir, or has some other undesignated interest (or some combination of these). If the purpose is to grant inheritance rights, yet the child must be named in the will, the benefit would be illusory in most instances because an "heir" is only entitled to assets *not* governed by a will or will substitute, such as a trust or beneficiary designation. In other words, if the decedent had a will, there typically would be little, if any, assets to inherit through intestacy. Third, the statute does not provide any procedure or time limitation for the not-yet-born child (or a representative for that child) to assert any of these claims.¹⁷⁸ If a child were born three years after the decedent's death, there would not likely be assets remaining to satisfy a claim for an allowance or pretermitted-heir share. Finally, as one court has noted, the statute is not clear whether the reference in the will must be specific, or whether a general reference to "my children" or "my issue" would be deemed to include posthumously conceived children.¹⁷⁹ This is another example of a quick fix in the parentage provisions that creates uncertainty in the probate context.¹⁸⁰

In 2001, the Louisiana legislature improved on Florida's effort and provided that a posthumously conceived child is a decedent's "legitimate child" if (1) the decedent, in writing, authorized the surviving spouse to use the genetic material, and (2) the child was born within two years after the decedent's death.¹⁸¹ In 2003, the legislature extended the time limitation to three years and clarified that this included the right to inherit assets:

Notwithstanding the provisions of any law to the contrary, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the

¹⁷⁷ FLA. STAT. ANN. § 742.17(4) (Westlaw) ("A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.").

¹⁷⁸ *Id.*

¹⁷⁹ Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1265 n.10 (M.D. Fla. 2005).

¹⁸⁰ See discussion *supra* Part II.A.1.d.

¹⁸¹ 2001 La. Acts 1044.

surviving spouse, using the gametes of the decedent,
within three years of the death of the decedent.¹⁸²

Although the statute allows “his surviving spouse to use his gametes,” the comment to this provision notes that the statute is gender neutral with respect to the deceased parent.¹⁸³ The comment also notes that the language “allows the child to qualify for Social Security benefits of the deceased parent pursuant to 42 U.S.C. § 416(h)(2)(A).”¹⁸⁴

The scope of this statute is fairly limited. Because the legislature used “surviving spouse,” a posthumously conceived child will not be recognized as the deceased parent’s child unless the parents were married at the decedent’s death. Also, the statute does not expressly address whether a posthumously conceived child is included in a class of heirs, issue, descendants, or the like for class-gift purposes. Given the broad language used—“with all rights, including the capacity to inherit”¹⁸⁵—the child seemingly would be included in such a class, but only if born within three years of the parent’s death. As a result, if a surviving spouse had one child within three years after the decedent’s death and one child after three years, the children could be treated differently both for inheritance and class-gift purposes.

In 2005, California adopted the most extensive statute to address posthumously conceived children to date.¹⁸⁶ It provides that a posthumously conceived child will be deemed to have been living at the deceased parent’s death if three conditions are met.¹⁸⁷ First, the decedent must state in writing that his or her genetic material may “be used for posthumous conception.”¹⁸⁸ The writing must be signed and dated, must designate a person to “control the use of” the genetic material, and may be revoked or amended only by a signed and dated writing.¹⁸⁹ Second, the designated person must give written notice to the person with author-

¹⁸² 2003 La. Acts 1918.

¹⁸³ LA. REV. STAT. ANN. § 9:391.1(A) cmt. (West, Westlaw through 2011 1st Extraordinary Sess.).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* § 9:391.1(A).

¹⁸⁶ See CAL. PROB. CODE §§ 249.5–249.8 (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.) (*added by* 2004 Cal. Legis. Serv. 4551–57 (West), *amended by* 2005 Cal. Legis. Serv. 2224–26 (West)). In addition to the probate provisions summarized below, the bill included corresponding changes to sections 10172 and 10172.5 of the California Insurance Code.

¹⁸⁷ See *id.*

¹⁸⁸ *Id.* § 249.5(a).

¹⁸⁹ *Id.* § 249.5(a)(1)–(3). The original version did not require that the writing be dated, but did require that it be witnessed by at least one competent witness. 2004 Cal. Legis. Serv. 4555 (West). The California Health & Safety Code further requires that

[a]ny entity that receives genetic material of a human being that may be used for conception shall provide to the person depositing his or her genetic material a form for use by the depositor that, if signed by the depositor, would satisfy the conditions

ity to distribute the decedent's property that the decedent's genetic material may be used for posthumous conception.¹⁹⁰ This notice must be sent by certified mail within four months from the date the decedent's death certificate is issued or a judgment is entered declaring the death, whichever occurs first.¹⁹¹ Third, the child must be in utero within two years from this date.¹⁹² These conditions must be satisfied by clear and convincing evidence.¹⁹³

Once these conditions are met, the person with the power to distribute the assets may not distribute any assets that could become distributable to a posthumously conceived child until the two-year window has closed.¹⁹⁴ The person with the power to distribute assets shall not be liable for any distributions made prior to receiving the written notice or acquiring actual notice that the decedent left genetic material available for posthumous conception.¹⁹⁵ However, for a period of three years after such transfer,¹⁹⁶ the recipient of the property may be personally liable to any posthumous children for the fair market value of the assets distributed.¹⁹⁷

California's statute does not expressly extend interests in class gifts to posthumously conceived children. Although California courts would likely recognize such children in a class-gift context, it is not clear whether these conditions would apply when construing a reference to issue, descendants, or the like in a trust agreement of the decedent or a will or trust agreement of another individual.

Most recently, Iowa enacted a 2011 statute that recognizes posthumously conceived children for inheritance purposes if (1) the decedent authorized in writing the posthumous use of the decedent's genetic material, (2) the material is used by the decedent's surviving spouse, and (3) the child is born within two years of the decedent's death.¹⁹⁸ This test also applies in the context of pretermitted heirs under a will or a revoca-

set forth in § 249.5 of the Probate Code, regarding the decedent's intent for the use of that material.

CAL. HEALTH & SAFETY CODE § 1644.7 (West, Westlaw through ch. 135 of 2011 Reg. Sess. and ch. 8 of 2011–12 1st Ex. Sess.).

¹⁹⁰ CAL. PROB. CODE § 249.5(b) (Westlaw). Generally, this person will be the executor, trustee, or custodian of assets subject to a beneficiary designation.

¹⁹¹ *Id.*

¹⁹² *Id.* § 249.5(c).

¹⁹³ *Id.* § 249.5.

¹⁹⁴ *Id.* § 249.6(a)–(b).

¹⁹⁵ *Id.* § 249.6(d).

¹⁹⁶ *Id.* § 249.6(g).

¹⁹⁷ *Id.* § 249.6(e). Further, any person who fraudulently secures the transfer of such property is liable for three times the property's value. *Id.* § 249.6(f). The original version of this statute did not include subsections (e), (f), or (g). 2004 Cal. Legis. Serv. 4555–56 (West).

¹⁹⁸ See IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.).

ble trust agreement.¹⁹⁹ The Iowa code also requires a personal representative to state in the final accounting whether the decedent left genetic material and, if so, (1) whether the personal representative has set aside an appropriate amount to fund a potential distribution to a posthumous child, (2) that the personal representative will wait until two years after the decedent's death to make the final distribution, and (3) that the personal representative will file a supplemental report at that time.²⁰⁰

B. *Judicial Approaches*

The first published decisions regarding posthumous conception occurred in the early 1990s. In those cases, the issues revolved around ownership of cryopreserved genetic material after a marriage ends or after a contributor's death.²⁰¹ Since then, courts have addressed the interests of the children conceived from such material in ten published opinions. Nine of these cases concerned a posthumously conceived child's ability to receive survivor benefits under the Social Security Act—the answer to which depends on state intestacy laws.²⁰² In the other case, the court considered whether a posthumously conceived child may share in a class gift, notwithstanding that the applicable state's statutes deny posthumously conceived children status for inheritance purposes. This Part will focus first on six of the Social Security cases,²⁰³ and it will then address the single case regarding class gifts.

¹⁹⁹ *Id.* §§ 633.267(2), 633A.3106(2). The Iowa code does not expressly address class gifts, though, and it is not clear whether, or how, this rule would be applied in the class gift context.

²⁰⁰ *Id.* § 633.477.

²⁰¹ *See* Hall v. Fertility Inst. of New Orleans, 647 So.2d 1348 (La. Ct. App. 1994) (involving a contest between a decedent's parent and his girlfriend regarding the disposition of his preserved sperm); Hecht v. Superior Court, 16 Cal. App. 4th 836 (Cal. Ct. App. 1993) (involving a contest between a decedent's girlfriend and children regarding the disposition of his preserved sperm, which he had devised to his girlfriend in his will); Davis v. Davis, 842 S.W.2d 588, 603–04 (Tenn. 1992) (holding that an individual's interest in destroying embryos created during marriage outweighed the former spouse's interest in donating the embryos to a third party).

²⁰² Although eligibility to receive these benefits depends on one's status as an heir, the benefits are available whether the decedent had a will or died intestate. *See, e.g.*, 20 C.F.R. § 404.355(b)(1) (2011). Thus, even if a decedent had a will that covered all of her property and clearly stated her intentions regarding posthumously conceived children, this issue still may apply.

²⁰³ In the other three Social Security cases, the facts "fit" squarely within the state statutes and the issue was easily resolved. In *Schafer v. Astrue*, 641 F.3d 49, 52, 55–56 (4th Cir. 2011), the court held that the child was not an heir under the Virginia statute previously discussed because the child was born more than ten months after the decedent's death. The court also addressed in further detail the interpretation of the Social Security Act continued, but it quickly resolved whether the child was an "heir" under Virginia law. *Id.* In *Vernoff v. Astrue*, 568 F.3d 1102, 1109–11 (9th Cir. 2009), the court applied a prior California statute but also analyzed the facts under the current California statute previously discussed. In *Stephen v. Comm'r of Social Security*, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005), the court held that

Before reviewing the cases, it is important to understand the Social Security provisions at issue and their importance to many individuals. Since 1939,²⁰⁴ the Social Security Act has provided “survivor benefits” to replace the economic support a family loses after a parental death.²⁰⁵ Specifically, if a worker is currently or fully insured under the Social Security Act at the worker’s death, each of the worker’s children who was dependent on that worker at the worker’s death may receive monthly benefits if the child is not married and (1) is under eighteen years of age, (2) is under nineteen years of age and in high school, or (3) is under a disability the child attained before age twenty-two.²⁰⁶ In addition, if the worker’s spouse provides primary care for an eligible child, the spouse may also receive monthly benefits until that child reaches age sixteen or is no longer disabled.²⁰⁷ The amount payable to a survivor equals 75% of the decedent’s primary insurance amount, which is the monthly benefit amount that would have been payable to the worker upon initial entitlement at full retirement age.²⁰⁸ However, a family maximum provision limits the total benefits to a family to between 150% and 188% of the worker’s primary insurance amount.²⁰⁹

This can be a great benefit to a family. In 2010, the average monthly award to an eligible child was \$750 (\$9,000 annually).²¹⁰ Thus, for an “average” family with one child, the annual survivor benefits to the child and surviving spouse would total \$18,840.²¹¹ Over eighteen years, these benefits would total \$306,000.²¹² For a high-earning family,

the child was not an heir because the decedent had not consented to provide for the child in his will as required under the Florida statute previously discussed. In both *Vernoff* and *Stephen*, the surviving wife, without her husband’s consent, had sperm retrieved from his body shortly after his unexpected death. *Vernoff*, 568 F.3d at 1105 (stating that the husband died in a car accident); *Stephen*, 368 F. Supp. 2d at 1259 (stating that the husband died of a heart attack three weeks after the couple’s marriage). For more on postmortem sperm retrieval, see generally Radford, *supra* note 93.

²⁰⁴ Social Security Act § 201 (1939), 53 Stat. 1362, 1364–66 (1939).

²⁰⁵ See *Mathews v. Lucas*, 427 U.S. 495 (1976).

²⁰⁶ Social Security Act § 202(d)(1)(B), 42 U.S.C. § 402(d)(1)(B) (2006).

²⁰⁷ 42 U.S.C. § 402(g); 20 C.F.R. § 404.341(b) (2011). In addition, the surviving spouse is not eligible if she remarries or is eligible for survivor benefits under another provision. *Id.*

²⁰⁸ 42 U.S.C. §§ 402(d)(2), (g)(2).

²⁰⁹ For an explanation of the family allowance and how to calculate it, see Social Security Online, Formula for Maximum Family Benefit, available at <http://www.ssa.gov/oact/cola/familymax.html>.

²¹⁰ The exact amount was \$751.09, but I have rounded for convenience. See *Benefits Awarded in 12-Month Period Ending in 2010*, SOC. SEC. ONLINE, <http://www.ssa.gov/OACT/ProgData/awards.html> (type in “2010” at “Select year,” click on “Dec” at “Select month ending the time period,” then click on “12” at “Select number of months in period”).

²¹¹ *Id.*

²¹² While the child’s benefit would continue until the child reaches age eighteen, the surviving spouse’s benefit would cease when the child reaches age sixteen (unless the child is disabled). See *Types of Benefits*, SOC. SEC. ONLINE, <http://www.ssa.gov/OACT/ProgData/types.html>.

or a family with multiple children, the benefit can be even greater. For instance, if a thirty year-old worker had paid the maximum Social Security tax since age twenty-one, then died in 2011, the worker's spouse and dependent children each would receive \$1,902 monthly (\$22,824 annually), subject to a \$4,440 monthly family maximum (\$53,287 annually).²¹³ Over eighteen years, these benefits could total over \$900,000. In either scenario, if children conceived years *after* the worker's death qualify, the benefits could extend well beyond eighteen years.²¹⁴

With this background, should posthumously conceived children receive survivor benefits? In other words, does the Social Security Act deem them (1) to be children of the worker (2) who were dependent on the worker at his death? To answer the first question, one must look to the intestacy laws of the state where the worker resided at his or her death.²¹⁵ Section 216(h) of the Social Security Act, titled "Determination of family status," provides:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual . . . was domiciled at the time of his death²¹⁶

The Regulations add, "You may be eligible for benefits as the insured's natural child if . . . [y]ou could inherit the insured's personal property as his or her natural child under State inheritance laws" ²¹⁷ Thus, if the intestacy laws of the state where the worker lived at his death would recognize a posthumously conceived child as an heir, the applicant is considered a "child" of the worker for benefit purposes.²¹⁸

²¹³ See *Quick Calculator Benefit Estimates*, SOC. SEC. ONLINE, <http://www.ssa.gov/OACT/quickcalc/index.html> (enter "7/01/1981" at "Enter your date of birth," enter "\$200,000" at "Enter earnings in the current year," and select "today's dollars" under "Select to see your benefit estimate in").

²¹⁴ The benefit also would continue past eighteen years if the decedent had an adult child who was disabled prior to age twenty-two. 42 U.S.C. § 402(d)(1)(B) (2006).

²¹⁵ See *id.* § 416(e).

²¹⁶ *Id.* § 416(h)(2)(A).

²¹⁷ 20 C.F.R. § 404.355(a) (2011).

²¹⁸ Technically, heirs are those individuals who would *actually* receive a share of the decedent's estate, not those who would have been next in line. For instance, if a man died with a wife and two children, but the statute provided that the decedent's entire intestate estate shall be distributed to the wife, the children are not heirs—the decedent's wife is the only heir. Likewise, if a man died with a will that completely disposed of his estate, he would have no heirs. However, the Code of Federal Regulations requires only that the child could have inherited under the applicable state's intestacy laws if the decedent did not have a will, not that the individual actually inherit. See *id.* § 404.355(b)(1).

Regarding the dependency element, common sense dictates that a child born after a parent's death was not dependent on that parent at the time of his or her death. However, the Act deems all "legitimate" children to be dependent on their parents.²¹⁹ Further, the Act also deems any child to be "legitimate" who (1) is deemed legitimate under applicable state law²²⁰ or (2) satisfies the intestacy test set out in section 216(h).²²¹

Accordingly, if the intestacy laws of the state where the worker lived at his death would recognize a posthumously conceived child as an heir, that worker's child will be deemed both a "child" of the worker and "dependent" on that worker for purposes of the Act—and the child and the worker's spouse may receive survivor benefits. If the state's intestacy laws do not recognize the child as the decedent's heir, neither the child nor the spouse can receive those benefits.²²² As the following cases illustrate, however, the answer becomes much murkier when courts construe each state's intestacy laws—most of which were written decades before this issue crossed any legislator's mind.

1. *Estate of Kolacy* (New Jersey Law)

In 2000, the New Jersey Superior Court became the first court to publish an opinion that addressed whether a posthumously conceived child may inherit from the deceased parent.²²³ The court construed the New Jersey probate code, which mirrored the 1969 UPC, and held that it did not apply because the legislature did not intend for it to cover posthumously conceived children.²²⁴ Rather, the court established its own guidelines under which such children could inherit.

²¹⁹ 42 U.S.C. § 402(d)(3).

²²⁰ *See id.*; *see also* Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004) ("Legitimacy in § 402(d)(3) is determined in accordance with state law.").

²²¹ 42 U.S.C. § 402(d)(3) (citing § 416(h)(3)); *see also* Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009).

²²² If a child does not qualify in this way, the Social Security Administration will also recognize a child as the worker's child under other methods, including if the worker "had acknowledged in writing that the applicant is his or her son or daughter . . ." 42 U.S.C. § 416(h)(3)(C)(i)(I). The Social Security Administration's position is that a child must meet one of the tests in 42 U.S.C. § 416(h). The Third and Ninth Circuits, however, have ruled otherwise. *See* Capato v. Comm'r of Soc. Sec., 631 F.3d 626 (3rd Cir. 2011); *Gillett-Netting*, 371 F.3d at 599; *see also* discussion *infra* note 282.

²²³ *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). The issue came before the United States District Court for the Eastern District of Louisiana in 1996. But before the court ruled, the Social Security Commissioner agreed to pay survivor benefits, which made the issue moot, and noted, "[r]ecent advances in modern medical practice, particularly in the field of reproductive medicine, . . . should involve the executive and legislative branches, rather than the courts." Banks, *supra* note 121, at 256 (quoting News Release from Shirley S. Chater, Comm'r of Soc. Sec. at 1 (Mar. 11, 1996)).

²²⁴ *Kolacy*, 753 A.2d at 1261, 1264.

In *Estate of Kolacy*, a husband had deposited sperm with a sperm bank before he started unsuccessful chemotherapy treatments.²²⁵ One year after his death at age twenty-six, his wife used his sperm for IVF and became pregnant.²²⁶ Seven months later—nineteen months after her husband died—she gave birth to twin girls.²²⁷ The Social Security Administration denied her application for survivor benefits for her daughters on the basis that they were not children of the deceased worker.²²⁸ As the case worked its way through the Administration's appeal process, the wife petitioned the New Jersey Superior Court for a declaration that her daughters were heirs under New Jersey law.²²⁹

New Jersey's probate code included the following afterborn-heirs provision from the 1969 UPC: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."²³⁰ Because the children were conceived after their father's death, the children did not fall within the statute's afterborn-heirs exception.²³¹ Nonetheless, the judge made his own exception. He explained that when the legislature adopted that statute, "it was not giving any thought whatsoever to the kind of problem . . . in this case."²³² The judge added, "It is my view that the general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us."²³³ Rather, the legislature had otherwise "manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death."²³⁴

²²⁵ *Id.* at 1258.

²²⁶ *Id.* The opinion does not indicate whether the husband consented to the post-death use of his sperm.

²²⁷ *Id.*

²²⁸ *Id.* at 1259.

²²⁹ *Id.* The court strained a bit to accept this case, and it seems the court wanted this opportunity to speak on the matter. The court agreed to hear the matter despite the objection of New Jersey's Deputy Attorney General and despite that its decision would not bind the Administration or a later federal court. *Id.* The court noted that it was not determining whether the twins were entitled to Social Security benefits, which a federal court could later determine, but simply whether the daughters were heirs under New Jersey law. *Id.* at 1260. The court added that "it would clearly be unfortunate for those federal adjudicatory processes to reach a result based in part upon an incorrect determination by federal tribunals of New Jersey law." *Id.* at 1259.

²³⁰ *Id.* at 1260 (quoting N.J. STAT. ANN. § 3B:5-8). In 2004, the legislature amended the statute to make it consistent with the 1990 version of the Uniform Probate Code. 2004 N.J. Laws 1442 (effective Feb. 27, 2005). It now reads, "An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." N.J. STAT. ANN. § 3B:5-8 (West, Westlaw through L. 2011, ch. 124 and J.R. No. 7).

²³¹ See *Kolacy*, 753 A.2d at 1262 (noting that the court would not adopt a restrictive, literal reading of the statute).

²³² *Id.* at 1261.

²³³ *Id.* at 1262.

²³⁴ *Id.*

Accordingly, the judge established that posthumously conceived children should be granted “the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.”²³⁵ Because the husband had died with no other children and no probate assets, the court noted that granting heir status would violate neither of these caveats in this case.²³⁶ Therefore, the judge concluded, “I believe it is entirely fitting to recognize that [the twins] are the legal heirs of William Kolacy under the intestate laws of New Jersey.”²³⁷

This court’s approach to the issue is commendable. Rather than forcing the issue into a statute that was never intended to cover the situation, the court addressed the issue head-on and created a working rule. There is no question that the judge made law here, and he acknowledged that he was doing so, stating, “[I]t would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into the courts seeking redress for present problems.”²³⁸ The judge added, “We judges cannot simply put those problems on hold in the hope that someday (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available.”²³⁹ Notably, over ten years later, the New Jersey legislature still has not addressed the issue.²⁴⁰

Furthermore, the court was honest about its reasoning and motivations. After first expressing reservations about encouraging “parents to move precipitously in this area,” the judge added that “once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity[,] and legal protection which that status requires.”²⁴¹ Accordingly, the judge concluded, “It seems to me that a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons.”²⁴²

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 1264.

²³⁸ *Id.* at 1261.

²³⁹ *Id.* at 1261–62.

²⁴⁰ Although the legislature amended the statute in 2004 (to make it consistent with the 1990 version of the Uniform Probate Code, *see* 2004 N.J. Laws 1442 (effective Feb. 27, 2005)), the legislature did not address posthumously conceived children.

²⁴¹ *Kolacy*, 753 A.2d at 1263.

²⁴² *Id.*

While commendable in its honesty, the test established is not ideal. Determining heirship is generally a black-and-white test. This approach introduces a facts-and-circumstances analysis that would require a case-by-case determination. For instance, what if the next couple already has one child and that child would inherit a share but now must wait? Would the delay “unfairly intrude” on that child’s rights or “cause serious problems in the orderly administration of the estate”? If so, is the posthumously conceived child not an heir—and therefore not entitled to survivor benefits (which are independent of the other child’s rights or the administration of the estate)?

Unlike legislatures, however, courts—and particularly trial level courts—are required to rule on the facts before them. They do not have the liberty to establish specific conditions outside of the facts they are presented with. That said, this court could have phrased its holding differently and provided that posthumously conceived children are always heirs of the deceased parent, though in certain circumstances they may be estopped from inheriting. This distinction is important because, in future cases where a posthumously conceived child’s interests may unfairly intrude on another’s inheritance, it would still allow this child, as an heir, to receive Social Security survivor benefits.²⁴³

2. *Woodward v. Commissioner* (Massachusetts Law)

Two years later, a state’s highest court considered for the first time whether a posthumously conceived child may inherit under that state’s intestacy laws.²⁴⁴ As in *Kolacy*, the Massachusetts’ Supreme Judicial Court also refused to read its state’s statutory language strictly, although in this case the language would have, in fact, allowed the children to inherit.²⁴⁵ Instead, the court also established its own rule that permits posthumously conceived children to inherit in limited circumstances.²⁴⁶

In *Woodward v. Commissioner*, a husband had his sperm frozen before he began unsuccessful leukemia treatments.²⁴⁷ Two years after he died, his wife gave birth to twin daughters she conceived using his preserved sperm and artificial insemination.²⁴⁸ She then applied for Social Security survivor benefits, was denied, and appealed to the United States

²⁴³ See discussion *infra* Part III.B. The court does suggest that payments made in the routine course of administration before the advent of after-born children could be deemed vested, and those following the birth would be made to both categories of children. *Kolacy*, 753 A.2d at 1262. While this is a practical approach that responds to this concern, it is only dicta.

²⁴⁴ *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

²⁴⁵ *Id.* at 261–63.

²⁴⁶ *Id.* at 259.

²⁴⁷ *Id.* at 260.

²⁴⁸ *Id.*

District Court for the District of Massachusetts.²⁴⁹ The district court asked the Massachusetts Supreme Judicial Court, by certified question, whether posthumously conceived children may inherit under Massachusetts' law.²⁵⁰

Massachusetts had a statute that, on its face, answered the question directly: "Posthumous children shall be considered as living at the death of their parent."²⁵¹ The court noted, however, that this provision was added to the intestacy statutes in 1836.²⁵² Furthermore, it codified an 1834 holding that children *in utero* on the date of their father's death are deemed "in being" and entitled to inherit.²⁵³ Accordingly, the legislature did not have the present scenario in mind when it adopted that amendment, and the court declined to read the statute literally.²⁵⁴ Nor was the court willing to hold that the exception was limited to the facts of the earlier case.²⁵⁵ The court noted that while assisted reproductive technologies have been widely known for several decades, the legislature had not restricted the statute's broad language in any way.²⁵⁶

Instead, the court established a rule under which such children would be deemed "issue" for Massachusetts' inheritance law in "certain limited circumstances."²⁵⁷ Specifically, the child will be granted inheritance rights as the deceased parent's issue if (1) time limitations do not bar the child's claim, and (2) the surviving parent (or other representative of the child) can establish three facts: (a) a genetic relationship exists between the child and the decedent, (b) the decedent consented to post-death conception, and (c) the decedent consented to support any resulting child.²⁵⁸ The court tried to balance the best interests of the children, the

²⁴⁹ *Id.* at 260–61

²⁵⁰ *Id.* at 261. The exact question certified was:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?

Id. at 259.

²⁵¹ *Id.* at 264 (citing MASS. GEN. LAWS ch. 190, § 8 (1994)).

²⁵² *Id.*

²⁵³ *Id.* (citing *Hall v. Hancock*, 15 Mass. 255 (15 Pick. 1934)).

²⁵⁴ *See id.*; *see also* *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 968 (D. Ariz. 2002) (discussing *Woodward*), *rev'd on other grounds*, 371 F.3d 593 (9th Cir. 2004).

²⁵⁵ *Woodward*, 760 N.E.2d at 264.

²⁵⁶ *Id.* at 264–65.

²⁵⁷ *Id.* at 259.

²⁵⁸ *Id.* Massachusetts' probate code requires that, for nonmarital children to be deemed heirs, a paternity action must be commenced and notice given to the executor of that action and all other interested parties, within one year from the decedent's death. *Id.* at 267, 271. The court recognized that children conceived after the death of a parent are by definition nonmarital children, but questioned whether this time limitation would apply to posthumously conceived children. *Id.* at 267–68. The court declined to answer this question, though, be-

reproductive rights of the parents, and all parties' interests in the orderly and prompt administration of estates.²⁵⁹ The court did not answer whether the wife in this case had met her burden, but left that to the district court to determine.²⁶⁰

As in *Kolacy*, the court was clear about its approach and motivations. The court urged the legislature to address the issue of posthumously conceived children, noting that:

[T]he complex moral, legal, social, and ethical questions that surround their birth . . . cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.²⁶¹

The court concluded that “[i]n the absence of statutory directives, we have answered the certified question by identifying and harmonizing the important State interests implicated therein.”²⁶² Notably, more than eight years later, the Massachusetts legislature still has not addressed the issue.²⁶³

This approach provides great flexibility for a court but, like the approach set out in *Kolacy*, provides little guidance or certainty. For instance, it does not state what evidence may be sufficient to establish the decedent's consent to post-death conception or support, nor does it indicate what length of time may preclude a claim.²⁶⁴ Rather, it requires that every such situation go before a judge.²⁶⁵ As noted above (and as the

cause Social Security Administration regulations instruct that time limitations delineated in state intestacy statutes for determining paternity shall be ignored for purposes of determining eligibility for benefits. *Id.* at 267–68.

²⁵⁹ *Id.* at 265.

²⁶⁰ *Id.* at 270–71.

²⁶¹ *Id.* at 272.

²⁶² *Id.*

²⁶³ In 2008, an administrative law judge applying Massachusetts law relied on the “limited circumstances” standard set forth in the *Woodward* decision and granted survivor benefits to a posthumously conceived child and his mother. *See* *Hanson v. Astrue*, 733 F. Supp. 2d 214, 215 (D. Mass. 2010). The decedent and his wife had unsuccessfully tried IVF for two years prior to the husband's unexpected death. *Id.* Three months after his death, she became pregnant using an embryo they had preserved during the IVF process. *Id.* In this case, the genetic material included his sperm but an egg from a third-party donor. *Id.* Following the administrative law judge's determination, the Social Security Administration Appeals Council reopened the case *sua sponte* and reversed the decision to grant benefits. *Id.* at 216. On appeal, the United States District Court for the District of Massachusetts ruled that the Appeals Council exceeded its authority in reopening the case, and the court reinstated the administrative law judge's decision. *Id.* at 219. The court, however, did not address the substantive issue of whether the posthumously conceived child and mother were entitled to the benefits. *Id.* at 215.

²⁶⁴ *See Woodward*, 760 N.E.2d at 269–70.

²⁶⁵ *Id.* at 266–67.

court recognized), however, this is probably about the best result a court can come up with given its limited role.²⁶⁶

Woodward marked the end of the road for claimants. In the following string of cases, each court held that statutes similar to those in *Woodward* and *Kolacy* expressly excluded posthumously conceived children.

3. *Gillett-Netting v. Barnhart* (Arizona Law)

Later in 2002, the United States District Court for the District of Arizona became the first federal court to address this situation in a published opinion.²⁶⁷ Unlike the courts in *Kolacy* and *Woodward*, this court strictly applied the statutory language to the facts and held that posthumously conceived children may not inherit as heirs under Arizona law.²⁶⁸

In *Gillett-Netting v. Barnhart*, a husband deposited sperm prior to undergoing chemotherapy treatments.²⁶⁹ Both his wife and the doctor who assisted the couple stated that the husband agreed that, if he died, his wife could use his sperm after his death.²⁷⁰ Ten months after his death, doctors fertilized one or more of her eggs with his sperm by IVF, and she gave birth to twins almost eight months later.²⁷¹ She applied for survivor benefits for the twins, was denied, and appealed to the Arizona federal district court.²⁷² The court did not certify the question to the Arizona Supreme Court but analyzed Arizona law itself in a brief discussion.²⁷³

Arizona's probate code was (and still is) based on the 1990 UPC. The court noted that Arizona Statute section 14-2104 requires that all heirs must "survive" the decedent.²⁷⁴ The court, citing no authority, construed this survivorship requirement to mean that all heirs "must be *in existence* at the time of the decedent's death."²⁷⁵ The court recognized that Arizona Statute section 14-2108 provides an exception for posthumous heirs by stating that "[a] child in gestation at a particular time is treated as living at that time if the child lives at least one hundred twenty hours after its birth."²⁷⁶ However, because the twins were neither in gestation at their father's death nor born within 120 hours after his death,

²⁶⁶ See *id.* at 272.

²⁶⁷ *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002), *rev'd on other grounds*, 371 F.3d 593 (9th Cir. 2004). For more information on *Gillett-Netting* at the Ninth Circuit, see *infra* note 282.

²⁶⁸ *Gillett-Netting*, 231 F. Supp. 2d at 970.

²⁶⁹ *Id.* at 963.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 964.

²⁷³ See *id.* at 966–67.

²⁷⁴ *Id.* at 966.

²⁷⁵ *Id.* (emphasis added).

²⁷⁶ *Id.* (quoting ARIZ. REV. STAT. § 14-2108).

the court held that “they could not inherit . . . under the plain language of Arizona’s intestacy laws.”²⁷⁷

Although the court strictly construed the statute, it ignored—in fact, completely failed to mention—that Arizona’s probate code defines “survive.” The statute provides that a person survives if that person “has neither predeceased an event, including the death of another person, nor is deemed to have predeceased an event under section 14-2104 or 14-2702.”²⁷⁸ If read literally, this would include a posthumously conceived child, who certainly could not predecease the decedent or any other event in the sections cited. Similarly, the court noted that Arizona Statute section 14-2108 “*specifically states* that a child must at least be ‘in gestation’ at the time of decedent’s death.”²⁷⁹ It does not. It simply recognizes that children in gestation at the death of the decedent may inherit—not that the child “must at least be in gestation.”²⁸⁰ To reach this result, the court strictly construed one section of the statute, ignored one section altogether, and then misstated another.

Finally, the court distinguished its case from *Woodward* because the Massachusetts legislature (1) used “posthumous children” rather than “in gestation,” and (2) could not have considered this issue when it approved the language in 1836.²⁸¹ However, what else could the Massachusetts legislature have been considering in 1836 if not children in gestation? Cryopreservation was still more than a hundred years in the future. Further, the court does not cite any evidence that the Arizona legislature considered this issue when it passed its statute containing this language.

I am not arguing that the court’s decision was right or wrong. Nor am I arguing that the court had a responsibility to create an inheritance right as the courts in *Kolacy* and *Woodward* did. What is troubling, however, is that the judge seems to have decided the case on unexpressed moral, public policy, or other grounds, then selectively—and awkwardly—worked backward through the statute to justify the result. This concern applies in any state that has not addressed these issues through its legislature. Although this case is instructive, the decision was reversed on other grounds and was not made by an Arizona state court, and thus did not establish Arizona law.²⁸² Accordingly, it remains unclear

²⁷⁷ *Id.*

²⁷⁸ ARIZ. REV. STAT. ANN. § 14-1201(53) (West, Westlaw through 1st Reg. Sess. and 3rd Spec. Sess. of the 50th Leg., 2011).

²⁷⁹ *Gillett-Netting*, 231 F. Supp. 2d at 968 (emphasis added).

²⁸⁰ ARIZ. REV. STAT. ANN. § 14-2108 (Westlaw).

²⁸¹ *Gillett-Netting*, 231 F. Supp. 2d at 968.

²⁸² Even if it were not reversed, a federal court’s decision on a state law issue is not binding on an Arizona court. In its opinion reversing this decision, the Ninth Circuit did not address whether the children were “heirs” under Arizona law. Rather, the Ninth Circuit held that under the plain language of the Social Security Act, all biological children of a decedent are “children” if there is no dispute that the decedent is the biological parent of the child,

today what interests, if any, posthumously conceived children may have under Arizona law.

4. *Finley v. Astrue* (Arkansas Law)

In 2008, the Arkansas Supreme Court became the first state court to deny heirship status to posthumously conceived children.²⁸³ The court construed language almost identical to that in *Kolacy*, but it reached the opposite result. As in *Gillett-Netting*, this court too seemed to reach its decision on unstated policy grounds, then applied the statutes selectively to support its decision.

In *Finley v. Astrue*, a young couple produced ten embryos through IVF, and the husband died in an accident shortly thereafter.²⁸⁴ Eleven months after his death, the wife had two of the embryos transferred to her uterus, and she gave birth to a daughter nine months later.²⁸⁵ She applied for dependent benefits, was denied, and appealed to the United States District Court for the Eastern District of Arkansas.²⁸⁶ The district court

which there rarely will be with posthumous conception. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596–97 (9th Cir. 2004). The court explained that a state’s intestacy laws are relevant only if there is a dispute regarding the parentage of the decedent, at which point a state’s intestacy laws are one of several options under 42 U.S.C. § 416(h) a claimant has for proving the child was dependent on the decedent. *Id.* at 597. Finally, the court held that because Arizona Revised Statutes section 8-601 provides that “[e]very child is the legitimate child of its natural parents,” and 42 U.S.C. § 402(d)(3) deems all legitimate children to have been dependent on their parents, the children satisfy the dependency element as well. *Id.* at 598–99. Because the Ninth Circuit’s opinion and reasoning address a technical interpretation of the Social Security Act independent of Arizona’s intestacy statutes, *id.* at 599 n.8, that discussion is not directly relevant to the scope of this Article. The Social Security Administration disagreed with the reasoning and holding in *Gillett-Netting*, and its interpretation remains that a child is only a “child” under § 402(e) if the child can demonstrate a connection to the insured under § 416(h)(2)—which includes the intestacy requirement. *See Vernoff v. Astrue*, 568 F.3d 1102, 1106 (9th Cir. 2009); 42 U.S.C. §§ 402(e), 416(h)(2) (2006). Nonetheless, the Social Security Administration has acquiesced to the extent that cases are brought in the Ninth Circuit. SSAR 05-1(9), 70 Fed. Reg. 55,656–57 (Sept. 22, 2005); *see also Vernoff*, 568 F.3d at 1105.

In early 2011, the Third Circuit reached the same conclusion as the Ninth Circuit by holding that where parentage is undisputed, it is unnecessary to look to state intestacy laws to determine whether a child is a “child” of the worker under the Social Security Act. *Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626, 629–30 (3d Cir. 2011), *petition for cert. filed*, 2011 WL 3511023 (U.S. Aug. 8, 2011) (No. 11-159). Most recently, however, both the Fourth Circuit and the Eighth Circuit reached the opposite conclusion and held that § 416(h) provides the “exclusive means by which an applicant can establish ‘child’ status under § 416(e) as a natural child.” *Beeler v. Astrue*, 651 F.3d 954, 960 (8th Cir. 2011) (reversing the district court which had followed *Gillett-Netting*); *see also Schafer v. Astrue*, 641 F.3d 49, 63 (4th Cir. 2011) (2–1 decision). In light of the clear split of authority on this issue, it is likely that either the United States Supreme Court or the Social Security Administration itself may address the issue shortly.

²⁸³ *Finley v. Astrue*, 270 S.W.3d 849, 854–55 (Ark. 2008).

²⁸⁴ *Id.* at 850.

²⁸⁵ *Id.* at 850–51.

²⁸⁶ *Id.* at 851. The wife also brought a claim for worker’s compensation benefits for the child under Arkansas Code Annotated section 11-9-527(c) (2002). *Finley v. Farm Cat, Inc.*,

certified the following question to the Arkansas Supreme Court: “Does a child, who was created as an embryo through *in vitro* fertilization during his parents’ marriage, but implanted into his mother’s womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?”²⁸⁷

Arkansas’s intestacy statute is not based on the UPC, but it includes an almost identical afterborn-heirs provision that reads: “Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.”²⁸⁸ The court first concluded that it is “clear” from the plain language of the statute that a child must be conceived prior to her parent’s death to inherit through intestate succession.²⁸⁹ Having “resolved” this issue, the court turned to the definition of conception, which the statute left undefined. The wife relied on a medical dictionary that defined conception as the moment that the egg is fertilized.²⁹⁰ The Commissioner responded that this could not have been the legislature’s intent; rather, it must have intended “conceived” to mean become pregnant.²⁹¹ Both parties cited public policy to support their respective interpretations.²⁹²

The court sidestepped this thorny question altogether, however, and stated that it need not define the term because “we can definitively say that the General Assembly, in enacting . . . Ark. Code Ann. § 28-9-210, did not intend for the statute to permit a child, created through *in vitro* fertilization and implanted after the father’s death, to inherit under intestate succession.”²⁹³ The court reasoned, “Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of *in vitro* fertilization was developed.”²⁹⁴ The court somehow concludes that because the legisla-

288 S.W.3d 685, 687 (Ark. Ct. App. 2008). Like the Social Security Act, this statute requires that the applicant be a child of the worker who was “wholly and actually dependent” on the worker at the worker’s death. *Id.* at 688. The statute does not, however, look to the state’s intestacy laws to determine whether a child is the worker’s “child.” The court declined to define child but held that the child was not dependent on the worker at the time of the worker’s death. *Id.* at 689. The court rejected the applicant’s creative argument that by paying storage fees to keep the frozen embryos viable, the worker was in essence “providing shelter” for the embryos and they were dependent on the worker. *Id.*

²⁸⁷ *Finley*, 270 S.W.3d at 850. The United States District Court for the District of Massachusetts faced this scenario—pre-death conception, post-death implantation—just last year, but the court resolved the case on procedural grounds. *See Hanson v. Astrue*, 733 F. Supp. 2d 214, 219 (D. Mass. 2010).

²⁸⁸ ARK. CODE ANN. § 28-9-210(a) (West, Westlaw through 2011 Reg. Sess.).

²⁸⁹ *Finley*, 270 S.W.3d at 853.

²⁹⁰ *Id.* at 851.

²⁹¹ *Id.*

²⁹² *Id.* at 851–52.

²⁹³ *Id.* at 853.

²⁹⁴ *Id.*

ture did not consider the possibility of such children, it intended to treat them differently.

The court also addressed a provision that provided, “‘Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession.’”²⁹⁵ The court determined that this section was irrelevant for two reasons. First, the court noted that the statute addresses the legitimacy of a child.²⁹⁶ Although it does, it does so expressly “for all purposes of intestate succession.”²⁹⁷ Second, the court noted that the statute only addressed children born through artificial insemination, a “completely different procedure[]” than *in vitro* fertilization.²⁹⁸ Technically, the procedures are different. But as the court had explained just two paragraphs earlier, the legislature drafted the statute “well before” *in vitro* fertilization existed.²⁹⁹ Thus, the legislature was not drawing a distinction between procedures but was simply addressing the assisted reproductive technology as it then existed—and extending rights to children born from that technology.

The court closed by excusing itself from any responsibility for the effect of its decision:

Our role is not to create the law, but to interpret the law and to give effect to the legislature’s intent. *In vitro* fertilization and other methods of assisted reproduction are new technologies that have created new legal issues not addressed by already-existing law With this in mind, we strongly encourage the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve.³⁰⁰

The difference in reasoning between the Supreme Court of Arkansas in *Finley* and the Superior Court of New Jersey in *Kolacy*, while construing essentially identical language, is telling. The Arkansas court stated:

Were we to define the term “conceive,” we would be making a determination that would implicate many public policy concerns That is not our role. The determination of public policy lies almost exclusively with

²⁹⁵ *Id.* at 854 (quoting ARK. CODE ANN. § 28-9-209(c) (Repl. 2004)).

²⁹⁶ *See id.*

²⁹⁷ *See id.*

²⁹⁸ *See id.*

²⁹⁹ *See id.* at 853.

³⁰⁰ *Id.* at 854–55 (internal citations omitted).

the legislature, and we will not interfere with that determination in the absence of palpable errors.³⁰¹

Alternatively, the New Jersey court recognized, “It would undoubtedly be useful for the Legislature to deal consciously and in a well-informed way with at least some of the issues presented by reproductive technology In the meanwhile, life goes on, and people come into the courts seeking redress for present problems.”³⁰² The New Jersey court then concluded, “We judges cannot simply put those problems on hold in the hope that someday (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available.”³⁰³

Both courts, of course, *are* establishing policy—they have charted the law in their respective states regarding this issue until the legislature takes it up. One court, however, was forthright in its approach; the other hid behind the legislative process.

5. *Khabbaz v. Commissioner* (New Hampshire Law)

In 2007 the Supreme Court of New Hampshire considered whether “a child conceived after her father’s death via artificial insemination [is] eligible to inherit from her father as his surviving issue under New Hampshire intestacy law”³⁰⁴ This court, too, held that posthumously conceived children may not inherit.³⁰⁵

In *Khabbaz ex rel. Eng v. Commissioner, Social Security Administration*, a young couple banked the husband’s sperm after he was diagnosed with a terminal condition.³⁰⁶ The husband signed a written consent stating that the wife could use his sperm “to achieve a pregnancy” and that he “desire[d] and inten[ded] to be legally recognized as the father of the child to the fullest extent allowable by law.”³⁰⁷ Two years after his death, his wife gave birth to their daughter.³⁰⁸

New Hampshire is one of three states without an express posthumous-heirs provision in its probate code.³⁰⁹ Rather, the New Hampshire code simply provides that “surviving issue” shall inherit a share of the estate.³¹⁰ The court focused on the “surviving” requirement and adopted

³⁰¹ *Id.* at 855.

³⁰² *In re Estate of Kolacy*, 753 A.2d 1257, 1261 (N.J. Super. Ct. Ch. Div. 2000).

³⁰³ *Id.* at 1261–62.

³⁰⁴ *Khabbaz ex rel. Eng v. Comm’r, Soc. Sec. Admin.*, 930 A.2d 1180, 1182 (N.H. 2007).

³⁰⁵ *See id.* at 1186.

³⁰⁶ *Id.* at 1182.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *See id.* at 1183 (quoting N.H. REV. STAT. ANN. § 561:1 (2007)); *see also supra* note 146 and accompanying text (noting that the other two states are Mississippi and Nevada).

³¹⁰ *See Khabbaz*, 930 A.2d at 1183 (quoting N.H. REV. STAT. ANN. § 561:1 (2007)).

the Webster's dictionary definition for "surviving," which is "remaining alive or in existence."³¹¹ Because a posthumously conceived child is neither remaining alive nor in existence at the decedent's death, the court held that the statute does not include posthumously conceived children.³¹² Notably, the court's reasoning leaves open whether a child conceived prior to a parent's death through IVF, but implanted after the death of a parent, is "in existence" and, thus, "surviving" under the statute.

As in *Finley*, the court claimed that its hands were bound by its limited role in shaping policy. The applicant asked the court to adopt a *Woodward*-type approach, but the court responded:

[T]he intestacy statute . . . essentially leaves an entire class of . . . children unprotected. However, the present statute requires that result. To reach the opposite result and adopt the reasoning of *Woodward* would require us to add words to a statute. We reserve such matters of public policy for the legislature.³¹³

A concurring judge added, "I . . . respectfully urge the legislature to examine, within the context of the state's intestacy statute, the confluence of new, ever-expanding birth technologies and the seemingly arcane language and presumptions attendant to the settlement of decedents' estates."³¹⁴ As in Arkansas, Massachusetts, and New Jersey, the New Hampshire legislature has ignored this appeal.³¹⁵

6. *Beeler v. Astrue* (Iowa Law)

Most recently, the United States Court of Appeals for the Eighth Circuit addressed the issue under Iowa law.³¹⁶ Iowa's afterborn-heirs provision was based on the Model Probate Code's "begotten before [the intestate's] death but born thereafter" language.³¹⁷ In *Beeler v. Astrue*, a married couple had the husband's sperm frozen before he started treatment for leukemia.³¹⁸ The man, in writing, authorized his wife to use his sperm after his death and stated that he intended to support any child.³¹⁹ With little discussion, the court held that because the child was not con-

³¹¹ *Id.* at 1183–84 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2303 (unabridged ed. 2002)).

³¹² *Id.* at 1184.

³¹³ *Id.* at 1186 (internal citations omitted).

³¹⁴ *Id.* at 1187 (Broderick, C.J., concurring specially).

³¹⁵ See *infra* Table 1.

³¹⁶ *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011).

³¹⁷ MODEL PROBATE CODE § 25 (1946); IOWA CODE ANN. § 633.220 (West, Westlaw through 2011 Reg. Sess.).

³¹⁸ *Beeler*, 651 F.3d at 956.

³¹⁹ *Id.*

ceived until a year after the decedent's death, the child was not "begotten" before his death, as required by the plain language of the statute.³²⁰ The court did not address, however, whether the result may have been different had the couple instead used IVF and preserved one or more embryos before the decedent's death. In any event, the Iowa legislature amended the statute while the case was pending and now specifically recognizes posthumously conceived children in limited circumstances.³²¹ However, this opinion may still be instructive for courts in the four states that still have the Model Probate Code language as their afterborn-heirs provision.³²²

7. *In re Martin B.* (New York Law)

The New York Surrogate's Court is the only court to issue a published decision regarding posthumous conception outside of the Social Security context.³²³ In 2007, the court held that a posthumously conceived child may share in a class gift for "issue" under an existing trust agreement,³²⁴ notwithstanding that New York law expressly precludes posthumously conceived children from sharing in their deceased parent's probate estate.³²⁵

In *In re Martin B.*, a grantor had created seven irrevocable trust agreements in 1969.³²⁶ The agreements (1) authorized the trustee to distribute principal among the grantor's "issue" and (2) directed the trustee to distribute any assets remaining at the death of the grantor's wife among the grantor's issue.³²⁷ The grantor had two sons, but one, James, died of cancer in 2001 without children.³²⁸ Before James died, however, he had sperm frozen for his wife's later use.³²⁹ Three years after his death, his wife had a child she conceived using James's sperm.³³⁰ Five years after his death, she had a second child by this method.³³¹ The

³²⁰ *Id.* at 965. The Federal District Court for the Northern District of Iowa had also held that the child did not qualify under section 633.220. *Id.* The district court also addressed section 633.222, which provides that a child may inherit from the biological father if the father recognizes the child as the father. Although the district court held that the child satisfied this test based on the decedent's written consent, the Ninth Circuit reversed on this issue and held that the specific scope of the afterborn-heirs provision (section 633.220) controls the issue, not the general language of section 633.222. *Id.*

³²¹ See IOWA CODE ANN. § 633.220A (Westlaw); *supra* Part II.A.3.b.

³²² These states are Indiana, Maryland, Ohio, and Pennsylvania. See Part II.A.1.a.

³²³ *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007).

³²⁴ *Id.* at 211.

³²⁵ *Id.* at 209.

³²⁶ See *id.* at 207–08.

³²⁷ *Id.* at 208.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.*

trustees asked the court whether James's children were "issue" of the grantor under the trust agreements.³³² If so, they would be eligible for distributions; if not, only the grantor's surviving son and his children would be eligible.³³³

New York had amended its probate statutes in 2006 to clarify that a child must be conceived before a parent's death to be a pretermitted heir of that parent.³³⁴ The court noted, however, that this statute applied only to wills, not trust agreements, and only to the testator's children, not the children of third parties.³³⁵ Furthermore, the policies supporting the statutes—efficient estate administration and fairness to the living devisees—are irrelevant in the context of an ongoing trust.³³⁶ Accordingly, the court refused to apply the statute and instead looked to the grantor's intent. However, the court recognized that the grantor likely had no intent regarding this possibility when he created the trusts in 1969.³³⁷ Therefore, the court adopted its own policy, stating, "[W]here a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights 'for all purposes as those of a natural child.'"³³⁸ The court added, "[I]f an individual considers a child to be his or her own, society through its laws should do so as well."³³⁹ Finally, the court stated, "As can be seen from all of the above, there is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology. Accordingly, copies of this decision are being sent to [the legislature]."³⁴⁰ Here, too, the legislature has not acted further.

If there is one take-home from these cases, it is this: until a legislature addresses this issue clearly, the approach a court will take is anybody's best guess. In each of the cases above, the courts were required to construe statutes drafted without consideration of posthumous conception.³⁴¹ Though the language in each was essentially identical, the outcomes varied widely. A few courts refused to read the statutes literally and established an exception for posthumously conceived children;³⁴² the others held that they were constrained to read the statutes literally and excluded the children.³⁴³ The former acknowledged that they were es-

³³² *See id.*

³³³ *See id.*

³³⁴ *See id.* at 209 (citing N.Y. EST. POWERS & TRUSTS LAW § 5-3.2).

³³⁵ *Id.* at 209–10.

³³⁶ *See id.*

³³⁷ *Id.* at 211.

³³⁸ *Id.* (quoting *In re Estate of Park*, 207 N.E.2d 859, 861 (N.Y. 1965)).

³³⁹ *Id.*

³⁴⁰ *Id.* at 212.

³⁴¹ *See supra* Part II.B.

³⁴² *See supra* text accompanying notes 231–34, 256, and 323–24.

³⁴³ *See supra* text accompanying notes 267, 289, 309–11, and 316–322.

tablishing policy;³⁴⁴ the latter denied this, asserting that only the legislature can do so.³⁴⁵ These decisions chart the law, though, and in so doing establish the state's policy on these matters. Unfortunately, this policy is not based on the collective and representative will of the legislature after study, deliberation, and debate; rather, it is based on a particular judge's (or panel of judges') personal view regarding these morally complex issues.³⁴⁶ Sometimes the judges are open about this; sometimes they are not. This uncertainty is unnecessary, and it is costly for individuals facing these issues as they seek answers. As each of the above courts has implored, it is time for all legislatures to address this issue in a thoughtful, comprehensive manner.³⁴⁷

C. *Summary of the Existing Approaches*

Thirty-three states, plus the District of Columbia, still have not addressed whether a posthumously conceived child has any interest in the deceased parent's estate, or whether such a child can be included as a child, issue, heir, descendant, or similar term under a class-gift provision in a will, trust agreement, or other governing instrument.³⁴⁸ Until these legislatures address the issue, the interests of posthumously conceived children will be determined by a court's construction of statutory provisions that pre-date the present issue. As shown above, how a particular court will resolve the issue is anyone's best guess.³⁴⁹

Of the seventeen states that have addressed the issue, the states are almost evenly split.³⁵⁰ Eight states have granted status to posthumously conceived children for probate purposes. Six have done so by statute,³⁵¹ and two have done so through the courts³⁵²—though only one was the state's highest court, and in the other state, New Jersey, the legislature

³⁴⁴ See *supra* text accompanying notes 237–38, 260–61, and 338.

³⁴⁵ See *supra* text accompanying notes 298, 312, and 313.

³⁴⁶ See *supra* text accompanying notes 232, 260–61, and 334–36.

³⁴⁷ See *supra* Part II.B.

³⁴⁸ See *infra* Table 1.

³⁴⁹ See *supra* Part II.B.

³⁵⁰ See *infra* Table 1.

³⁵¹ These states are California (CAL. PROB. CODE §§ 249.5–249.8 (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.)); Colorado (COLO. REV. STAT. ANN. § 15-11-120 (West, Westlaw through 1st Reg. Sess. of the 68th Gen. Assemb., 2011)); Florida (FLA. STAT. ANN. § 742.17(4) (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.)); Iowa (IOWA CODE ANN. § 633.220 (West, Westlaw through 2011 Reg. Sess.)); Louisiana (LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.)); and North Dakota (N.D. CENT. CODE ANN. § 30.1-04-19 (West, Westlaw through 2011 Reg. Sess.)).

³⁵² These states are Massachusetts (Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002)) and New Jersey (*In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000)).

subsequently amended the statute at issue.³⁵³ Of the six states that have addressed the issue by statute, only two expressly extend the status to both the probate and class-gift contexts.³⁵⁴ In the other four states, it is unclear whether, or how, the statutes apply to class gifts.³⁵⁵

The other nine states have denied status to posthumously conceived children for probate purposes. Seven have done so by statute,³⁵⁶ and two have done so through the courts.³⁵⁷ Of these seven states, only three have expressly provided that the exclusion applies in both probate and class-gift contexts.³⁵⁸ In New York, although the legislature provided that posthumously conceived children have no interest in the probate context, the New York Surrogate's Court held that such children nonetheless may be considered a decedent's heirs for class-gift purposes.³⁵⁹ In the remaining three states, the statute is silent regarding class gifts, and the distinction remains unresolved.³⁶⁰

Notably, in the four court cases that have established the law in their respective jurisdictions, the courts split while construing essentially identical provisions.³⁶¹ In each case, though, the court urged its respective legislature to address the issue in a thoughtful, comprehensive way.³⁶² None of these legislatures has done so.³⁶³

³⁵³ See *supra* Part II.B.1 (New Jersey) and III.B.2 (Massachusetts).

³⁵⁴ These states are Colorado (COLO. REV. STAT. § 15-11-120 (Westlaw)) and North Dakota (N.D. CENT. CODE § 30.1-04-19 (Westlaw)). See *supra* Part II.A.1.e.

³⁵⁵ See *supra* Part II.A.3.b.

³⁵⁶ These states are Georgia (GA. CODE ANN. § 53-2-1(b)(1) (West, Westlaw through 2011 Reg. Sess.)); Idaho (IDAHO CODE ANN. § 15-2-108 (West, Westlaw through chs. 1-335 that are effective on or before July 1, 2011)); Minnesota (MINN. STAT. ANN. § 524.2-120(10) (West, Westlaw through 2011 Reg. Sess.)); South Carolina (S.C. CODE ANN. § 62-2-108 (West, Westlaw through 2010 Reg. Sess.)); South Dakota (S.D. CODIFIED LAWS § 29A-2-108 (West, Westlaw through 2011 Reg. Sess., Exec. Order 11-1, and S. Ct. Rule 11-17)); New York (N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)-(b)); Virginia (VA. CODE ANN. § 20-164 (West, Westlaw through 2011 Reg. Sess.)). In New York, although the statute excludes posthumously conceived children for probate purposes, a court has recognized them for class-gift purposes. *In re Martin B.*, 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007).

³⁵⁷ These states are Arkansas (Finley v. Astrue, 270 S.W.3d 849 (Ark. 2008)) and New Hampshire (Khabbaz *ex rel.* Eng v. Comm'r, Soc. Sec. Admin., 930 A.2d 1180, 1182 (N.H. 2007)).

³⁵⁸ These states are Minnesota (MINN. STAT. ANN. §§ 524.2-705, -708 (Westlaw)); South Dakota (S.D. CODIFIED LAWS §§ 29A-2-705, -708 (Westlaw)); and Virginia (VA. CODE ANN. § 20-164 (Westlaw)).

³⁵⁹ See *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. Ct. 2007); *supra* Part II.B.6.

³⁶⁰ See *supra* Part II.A.3.a.

³⁶¹ See *infra* Table 1. I have excluded Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002), *rev'd* 371 F.3d 593 (9th Cir. 2004), because the decision was reversed, and Beeler v. Astrue, 651 F.2d 954 (8th Cir. 2011), because the Iowa statute it interpreted has been amended and now clearly addresses posthumously conceived children. In addition, though I have included *Kolacy*, its precedential weight at this time is questionable. See *infra* note 368.

³⁶² See *supra* Part II.B.

³⁶³ See *supra* Part II.B.

The following table summarizes which states recognize posthumously conceived children for probate purposes, which states do not, for which states the answer remains unclear, and the source of the law in each scenario.

TABLE 1: APPROACHES TO POSTHUMOUSLY CONCEIVED CHILDREN FOR PROBATE PURPOSES BY JURISDICTION³⁶⁴

Source	Includes	Excludes	Unclear	Jurisdiction
1946 MPC			4	Indiana, Maryland, Ohio, Pennsylvania
1969 UPC			3	Maine, Nebraska, Tennessee
1988 USCACA		1		Virginia ³⁶⁵
1990 UPC			8	Alaska, Arizona ³⁶⁶ , Hawaii, Michigan, Montana, Vermont, West Virginia, Wisconsin
2000 UPA			7	Alabama, Delaware, New Mexico, Texas, Utah, Washington, Wyoming
2008 UPC	2			Colorado, North Dakota
Other statute	4	6	12	<i>Includes:</i> California, Florida, Iowa, Louisiana <i>Excludes:</i> ³⁶⁷ Georgia, Idaho, Minnesota, South Carolina, South Dakota, New York <i>Unclear:</i> Connecticut, District of Columbia, Illinois, Kansas, Missouri, Oklahoma, Kentucky, North Carolina, Oregon, Rhode Island, Mississippi, Nevada

³⁶⁴ See *supra* Part II.A.1 (statutes), II.B (caselaw).

³⁶⁵ Virginia law excludes posthumously conceived children for both probate and class-gift purposes. See *supra* Part II.A.1.c.

³⁶⁶ Although the United States District Court for the District of Arizona held that posthumously conceived children are excluded under Arizona law, the decision was reversed on other grounds. *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002), *rev'd* 371 F.3d 593 (9th Cir. 2004). In addition, its holding does not necessarily reflect the view of the Arizona Supreme Court and would not have been binding on Arizona courts. See *supra* Part II.B.3.

³⁶⁷ In Minnesota and South Dakota, the exclusion also applies to class gifts. See *supra* Part II.A.3.a. In Georgia, Idaho, New York, and South Carolina, the statutes do not state whether the exclusion also applies to class gifts. See *supra* Part II.A.3.a. In New York, however, the Surrogate's Court has allowed posthumously conceived children to participate in class gifts. See *supra* Part II.B.6.

Caselow	2	2	<i>Includes:</i> Massachusetts (Woodward); New Jersey (Kolacy) ³⁶⁸ <i>Excludes:</i> Arkansas (Finley); New Hampshire (Khabbaz)
Total	8	9	34

III. A BLUEPRINT FOR FUTURE STATUTES

Judges across the country have urged their respective legislatures to address the issues raised by posthumously conception in a thoughtful, comprehensive manner.³⁶⁹ Few, however, have answered the call. And in those states where legislatures have, the approaches have been diverse and the statutes vague and incomplete.³⁷⁰

The following addresses the key issues a legislature should address when drafting such legislation, the benefits and drawbacks of the various options, and the approach I suggest for each issue. Specifically, legislatures first must decide whether to recognize posthumously conceived children for probate purposes, class-gift purposes, both, or neither. If they decide to recognize such children, they must decide what conditions, if any, should apply. These conditions include whether (1) the decedent's consent should be required, (2) the surviving parent should be required to provide notice of his or her intent to use the decedent's genetic material, (3) the surviving parent should be required to have the child within a certain period of time, and (4) the parents must have been married at the decedent's death.

No consensus has emerged as to the best approach.³⁷¹ Some states have chosen not to recognize posthumously conceived children, placing primary importance on the efficient administration of estates.³⁷² Others do recognize these children.³⁷³ Some commentators advocate that the decedent's intent should govern;³⁷⁴ others assert that the children's best interests should control.³⁷⁵ While a uniform approach may be ideal, the

³⁶⁸ Although the New Jersey Superior Court held that the posthumously conceived children may be heirs under the 1969 UPC, *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), it was a trial court decision and the New Jersey legislature subsequently revised the statute's language from that found in the 1969 UPC ("conceived before") to that in the 1990 UPC ("in gestation"), 2004 N.J. Law 1442 (effective Feb. 27, 2005). Therefore, *Kolacy* likely has little remaining force. See *supra* Part II.B.1.

³⁶⁹ See *supra* Part II.B.

³⁷⁰ See *supra* Part II.A–B.

³⁷¹ See *supra* Table 1.

³⁷² See *supra* Part II.A–B.

³⁷³ See *supra* Table 1.

³⁷⁴ See Tritt, *supra* note 57, at 404–06.

³⁷⁵ See Nolan, *supra* note 7, at 1068.

lack of uniformity is not the greatest problem. Rather, the bigger problem is that in most states, nobody can say whether such children would be recognized or not.³⁷⁶ The first priority should be for legislatures to adopt a clear approach—whether or not their approach recognizes posthumously conceived children. Only then will citizens be able to act accordingly. The following provides a roadmap for legislatures to follow as they consider these issues.

A. *For What Purposes Should Legislatures Recognize A Parent–Child Relationship?*

The first question a legislature must answer is whether to recognize a parent–child relationship between a deceased parent and posthumously conceived child for probate purposes, class-gift purposes, both, or neither. In this context, “probate purposes” includes intestacy statutes and pretermitted-heir statutes. Class-gift purposes include designations of heirs, descendants, issue, children, grandchildren, or similar terms under a will, trust agreement, beneficiary designation, or other donative document.³⁷⁷ For the reasons set out below, I recommend that legislatures recognize posthumously conceived children for both purposes, subject to the conditions discussed in Part III.B.

1. Probate Context

Nine states do not recognize posthumously conceived children for probate purposes, while eight states do (if certain conditions are met).³⁷⁸ On its face, the “no recognition” approach has four main benefits: it (1) facilitates the efficient administration of estates, (2) is consistent with the traditional rule that all parties must be living or in gestation at the decedent’s death, (3) promotes the traditional two-parent family, and (4) simplifies the preparation of estate tax returns. In application, however, the purported benefits are minimal and are outweighed by the interest in car-

³⁷⁶ See *supra* Table 1.

³⁷⁷ Importantly, life insurance companies and retirement account custodians are free as a matter of contract law to draft into their customer agreements their own default rules for the distribution of assets they hold. In most cases, these entities will want to limit any delay in the distribution of assets after the death of an insured or plan participant. Therefore, they may adopt a “no recognition” approach for assets they hold. However, if their contracts or plan documents simply refer to state law regarding determination of heirs, they too may be bound by these statutes.

³⁷⁸ See generally *supra* Part II. Georgia, Idaho, Minnesota, South Carolina, South Dakota, New York, and Virginia have passed statutes excluding posthumously conceived children, while the Arkansas and New Hampshire courts have interpreted existing statutes to exclude them. California, Colorado, Florida, Iowa, Louisiana, and North Dakota have passed statutes recognizing posthumously conceived children for probate purposes, and the Massachusetts Supreme Judicial Court has held that posthumously conceived children may be heirs for probate purposes. The New Jersey Superior Court has held so as well, although the New Jersey’s legislature later amended the statute at issue. See *supra* Part II.

rying out the decedent's likely intent and the best interests of the children.

a) Administrative Ease

The primary reason cited for the “no recognition” approach is that it facilitates the orderly and efficient administration of estates, which helps to prevent fraudulent claims and provides finality for the parties receiving assets.³⁷⁹ This is an appropriate consideration, and probably the strongest argument in favor of excluding posthumously conceived children altogether. However, a legislature can ameliorate these concerns by requiring that certain conditions be met for a posthumously conceived child to inherit, as proposed below in Part III.B. An absolute exclusion of these children—regardless of the decedent's intent or interests of the parties in the particular case—is unnecessary.³⁸⁰

First, fraudulent claims are a minor concern in the context of posthumous conception. The possibility of a fraudulent claim by a child is almost nonexistent in light of today's genetic testing capabilities, combined with the medical involvement needed to successfully thaw and transfer genetic material.³⁸¹ On the other hand, if a legislature requires that the decedent consented to the posthumous use of his or her genetic material, fraudulent claims by the surviving spouse or partner regarding the decedent's intent are foreseeable. A legislature can address those concerns, though, by creating time limitations or establishing a heightened standard of proof, as discussed below in Part III.B.³⁸² The legislature need not rely on a blanket denial to protect against this concern.

Second, concerns regarding an heir's expectation of a prompt administration appear a bit overblown when considering the issue in the context of existing probate practices and statutes, which already allow for extended administrations in many scenarios. To the surprise (and dismay) of many heirs, the distribution of a decedent's assets is rarely an immediate event. As a general matter, an executor's primary responsibility is to ensure that the appropriate parties receive their appropriate share

³⁷⁹ See, e.g., *Khabbaz ex rel. Eng v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1184 (N.H. 2007) (noting that “waiting for the potential birth of a posthumously conceived child could tie up estate distributions indefinitely”); *In re Martin B.*, 841 N.Y.S.2d 207, 209 (Sur. Ct. 2007) (noting that New York's statutory exclusion of posthumously conceived children “was intended to ensure certainty in identifying persons interests in an estate and finality in its distribution”).

³⁸⁰ See Nolan, *supra* note 7, at 1094 (noting that “an outright denial of establishing the parent–child relationship is not justified” simply to provide for the efficient and accurate administration of intestate estates).

³⁸¹ *Id.* at 1095; see also Goodwin, *supra* note 121, at 275.

³⁸² See *infra* Part III.B.

of the estate, not that they receive that share immediately.³⁸³ This is a process, and sometimes a quite lengthy process.³⁸⁴ At a minimum, prudent executors wait to distribute any of the decedent's assets to the heirs until the period for creditors to file claims has expired.³⁸⁵ In many states, a decedent's creditors have four months after the executor publishes notice of the decedent's death to file a claim.³⁸⁶ While this is a fairly short window, the executor may delay the distribution of assets much longer until all disputed claims are resolved.³⁸⁷ In addition, other events often delay the distribution of assets beyond the creditor period, such as the payment of income taxes and estate taxes,³⁸⁸ the liquidation of real estate, the winding up of a business, difficulty in locating heirs, or will contests. Indeed, there are many situations in which an estate administration is appropriately extended until all issues are resolved. The desire to avoid inconveniencing presumptive heirs should not be elevated above the desire to ensure the appropriate parties receive the appropriate share of the estate—particularly when the parties include a decedent's potential children.

Furthermore, whenever a decedent is married at his death, a significant portion of the estate could be distributed in the "ordinary course" of administration, notwithstanding the potential that a posthumously conceived child may be later born. For instance, assume a married man dies in the state of Minnesota, which has adopted the UPC with some revisions,³⁸⁹ and that Minnesota recognizes such children for probate pur-

³⁸³ See 31 AM. JUR. 2D *Executors and Administrators* §§ 1, 915–917 (2002); see also 76 AM. JUR. 2D *Trusts* § 562 (2005) (“[T]he trustee cannot make a complete distribution until provision has been made for all the expenses, claims, and taxes the trust may be obligated to pay . . .”).

³⁸⁴ Certain assets that are not a part of the probate estate (either testate or intestate), however, may be distributed promptly. Generally, this would include property held jointly with a right of survivorship and assets with a beneficiary designation, such as life insurance proceeds and retirement account benefits, provided the designation is not in favor of the decedent's "estate." However, life insurance companies and retirement account custodians may provide in their contract or plan documents their own "default rules" for the distribution of assets or interpretation of terms.

³⁸⁵ Cf. UNIF. PROBATE CODE §§ 3-109, 3-801, 3-807(b) (amended 2008) (placing liability on the personal representative for premature distributions); 31 AM. JUR. 2D *Executors and Administrators* § 649.

³⁸⁶ See, e.g., UNIF. PROBATE CODE § 3-801.

³⁸⁷ See 31 AM. JUR. 2D *Executors and Administrators* §§ 917–918.

³⁸⁸ See *id.* All estates must pay a decedent's final income taxes for the year of the decedent's death, and the preparation of the returns may not be completed until the spring of the following year. Further, if an estate must pay state or federal estate tax, the tax is due nine months after the decedent's death, I.R.C. § 6075(a) (2006), and, in the author's experience, the estate typically does not receive a closing letter from the state or federal government until six to nine months after that. Prudent executors hold back an appropriate share of the estate until receiving the closing letter.

³⁸⁹ See *supra* Part II. The result in any particular state would, of course, depend on that state's specific provisions, and each legislature would have to consider this under their own

poses.³⁹⁰ The man's wife³⁹¹ would, at a minimum, be entitled to the first \$150,000 of his estate, plus one-half of the remaining balance.³⁹² As in any other administration, the executor could distribute these amounts to the wife after the estate's debts and expenses are paid.³⁹³ The birth of a posthumously conceived child would not change this result.

Granted, there are situations where a posthumously conceived child would alter the result, and the executor may wish to retain control of the assets until a child is born or the frozen material is destroyed. For instance, in the example in the prior paragraph, a posthumously conceived child would alter the rights of the recipients of the remaining one-half of the husband's estate if the decedent or his wife had a child from a prior relationship.³⁹⁴ Likewise, whenever a couple is not married, a posthumously conceived child would always change the result. The estate would be distributed first to the decedent's children, then parents, then siblings (and so on).³⁹⁵ Thus, if the unmarried decedent had no children while living, the decedent's parents (or siblings, if no parent survived) would receive the decedent's entire intestate estate.³⁹⁶ However, if a posthumously conceived child were born, that child would be entitled to the entire intestate estate and would, in effect, "divest" the decedent's parents of their share.³⁹⁷

specific circumstances. In particular, the results may be more complicated in the few community property states, such as California. *See* Knaplund, *supra* note 122, at 634. That said, application of Minnesota law provides a useful example for purposes of this Article.

³⁹⁰ In 2010, Minnesota adopted a provision precluding posthumously conceived children from having any interest in the deceased parent's estate. MINN. STAT. ANN. § 524.2-120(10) (West, Westlaw through 2011 Reg. Sess.). However, this example demonstrates that to the extent a goal of the legislation was to facilitate the orderly administration of estates, that goal is only marginally met by the outright preclusion.

³⁹¹ For simplicity and consistency, these examples refer to the decedent as male and the surviving partner as female, though the gender of each is interchangeable.

³⁹² MINN. STAT. ANN. § 524.2-102 (Westlaw).

³⁹³ 31 AM. JUR. 2d *Executors and Administrators* § 917 (2002).

³⁹⁴ *Id.* § 524.2-103. If neither spouse had children from a prior relationship, the wife would be entitled to the remaining one-half, as well. If either spouse had a child, the remaining one-half of the assets would be distributed in that case to the decedent's closest heirs (excluding the wife). *Id.* Thus, if the decedent had no children living at his death, a posthumously conceived child could "divest" the decedent's parents or siblings of the share they otherwise would have received. If the decedent had a child living at his death, a posthumously conceived child would reduce the portion of the share distributable to that child. Accordingly, the executor in this case would delay distributing this one-half share of the remaining balance.

³⁹⁵ *Id.* Non-relatives of a decedent, including a fiancé or fiancée, never inherit through intestacy.

³⁹⁶ *Id.*

³⁹⁷ *See id.* Alternatively, if the unmarried decedent had a child living (or in gestation) at his death, that child would be entitled to the entire estate. *See id.* If a posthumously conceived child were born, however, that child also would be entitled to a share of the estate. *See id.* Even here, though, the distribution of assets need not be unduly delayed. Minors generally do not receive assets from an estate outright until they reach eighteen or twenty-one years of age, depending on the jurisdiction. In the meantime, assets are typically held for that child by an

It is certainly true that in these cases, the potential heirs may be inconvenienced by waiting some period of time to determine whether they will receive a share of the decedent's estate. However, this is no less true than if there were litigated claims, tax disputes, or other issues that currently delay distributions. In fact, if this "waiting period" is reasonably limited,³⁹⁸ any delay would be both foreseeable and short term—a luxury not always available to the heirs when other claims remain pending. In addition, the potential heirs are not being deprived of a right to those assets.³⁹⁹ The state has the authority to control the terms of one's inheritance. The overriding concern should be the decedent's likely intent and the best interests of his or her children, not the convenience of other potential heirs.

b) The Principles Underlying the Traditional Rule Do Not Apply Here

A second possible benefit of the "no recognition" approach is consistency: the approach does not disturb the traditional rule that all heirs must be living or in gestation at the decedent's death. A traditional rule should be extended to a new situation, however, only if the principles underlying the rule apply in the new context. That is not the case here.

While the traditional rule ostensibly covers posthumously conceived children, it was not created to do so. The rule has been traced back to ancient Rome, at which time it adequately covered the possible scenarios regarding procreation.⁴⁰⁰ Posthumous conception was a scientific impossibility at that time, and it remained so for over one thousand years. Indeed, the first successful pregnancy from cryopreserved sperm was reported just fifty-eight years ago, and the first child who developed from a cryopreserved embryo was born just twenty-five years ago.⁴⁰¹ The reality that the traditional rule responded to has changed dramatically over the past fifty years, and the traditional rule simply was not intended to address the scenarios possible today.

In other instances, probate law has departed from its roots to keep pace with a changing society. Under common law and early statutes,

appointed conservator or in a Uniform Transfers to Minors Act account. See UNIF. PROBATE CODE § 3-915 (amended 2008); UNIF. TRANSFERS TO MINORS ACT §§ 5-6 (1986), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utma86.pdf>. Thus, if a posthumously conceived child had a sibling who was five years old at the child's birth, the sibling would not have "relied" on those assets; the child would have had no access to those assets until he or she reaches eighteen or twenty-one years of age. Except in the rare situation when a sibling is eighteen years old at the parent's death, the assets would be accounted for and the respective custodians could reallocate the assets as may be appropriate.

³⁹⁸ As suggested *infra* in Parts III.B.2 and III.B.3.

³⁹⁹ See *supra* notes 119-120.

⁴⁰⁰ See Knaplund, *supra* note 1, at 105-08.

⁴⁰¹ See *supra* notes 33-35, and accompanying text.

states refused to recognize a parent–child relationship between nonmarital children and either parent.⁴⁰² The law considered them *filius nullius*, the child of no one.⁴⁰³ Statutes referred to them as “bastards” or “illegitimate.”⁴⁰⁴ Over time, however, society’s view toward nonmarital children changed,⁴⁰⁵ and the legal focus shifted from affecting a moral judgment on the parents⁴⁰⁶ to protecting the best interests of the innocent children. Accordingly, the law began to recognize a relationship with the child and mother, but not the father.⁴⁰⁷ Now, most states recognize a parent–child relationship between the child and both biological parents if paternity is established.⁴⁰⁸ Likewise, early probate statutes presumed that individuals did not intend for an adopted child to inherit through the adoptive parent.⁴⁰⁹ Now, however, the probate codes in all states recognize a parent–child relationship between an adopted child and the adoptive parents.⁴¹⁰

In both of these examples, the traditional rule was discarded despite that the underlying facts were no different when the rule was established

⁴⁰² See Goodwin, *supra* note 121, at 241.

⁴⁰³ See, e.g., Weber v. Anderson, 269 N.W.2d 892, 894 (Minn. 1978).

⁴⁰⁴ A number of states passed laws requiring the replacement of all references to “bastard” and “illegitimate” with “child born out of wedlock.” See, e.g., NEB. REV. STAT. § 43-1413 (enacted in 1941); N.Y. GEN. CONSTR. LAW § 59 (enacted in 1925); OKLA. STAT. ANN. tit. 10, § 6.5 (enacted in 1975). Only one state, Alabama, still uses the term “bastard” in its parentage statutes. ALA. CODE §§ 26-11-1, -2 (West, Westlaw through 2011 Reg. Sess.).

⁴⁰⁵ See generally Monopoli, *supra* note 112, at 857 (noting that the number of nonmarital children born each year increased from 89,500 in 1940 to over 1.5 million by 2005).

⁴⁰⁶ See Joseph C. Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 37 (1902) (“It was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions. Parents were to be punished in their children’s disabilities more effectively than in themselves.”). Additional reasons cited for the exclusion of nonmarital children were to promote marriage, discourage promiscuity, and avoid evidentiary problems when determining heirs. See Laurence C. Nolan, “Unwed Parents” and *Their Children Before the Supreme Court From Levy to Michael H: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 7 (1999).

⁴⁰⁷ *Id.*; see also Goodwin, *supra* note 121, at 241.

⁴⁰⁸ See, e.g., Weber, 269 N.W.2d at 895, n.2. For example, section 2-117 of the Uniform Probate Code now states that “a parent–child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.” UNIF. PROBATE CODE § 2-117 (amended 2008). This change mirrors the change in parentage statutes. As noted by Mary Patricia Byrn:

By the early 1970s, however, the Conference [of Commissioners on Uniform State Laws] recognized that such treatment of children was becoming scientifically, socially, and legally untenable and took the ‘revolutionary’ step of promulgating an act that identified two legal parents for both marital and nonmarital children. This choice . . . led to similar changes in the parentage laws of every state in the country. Byrn, *supra* note 15, at 165, 168–69; Banks, *supra* note 121, at 322–27.

⁴⁰⁹ See RESTATEMENT (FIRST) OF PROP. § 287 (1940); see also, e.g., Wielert v. Larson, 404 N.E.2d 1111 (Ill. Ct. App. 1980) (“The undeniable effect of the 1955 amendment to the [Illinois] Probate Act was to transform a presumption against inclusion of adopted children in written instruments into a presumption in favor of such inclusion.”).

⁴¹⁰ Cf. UNIF. PROBATE CODE § 2-118(a).

than they are today. What changed was simply society's attitude toward these situations and its concern for the children, who had no say in the matter. With posthumously conceived children, however, the underlying facts have changed—dramatically—since the traditional rule was established. Society's view toward posthumous conception will undoubtedly evolve as well, and the law may evolve with it. When legislatures draft their initial response, though, the traditional rule should not be their polestar. Rather, legislatures should feel free to address the issue in a fresh and proactive way, unburdened by the traditional rule.

c) Default Rules Do Not Regulate Behavior

A third benefit cited for not recognizing posthumously conceived children is that this practice promotes socially desirable behavior by encouraging individuals to raise children in a home with two parents—a mother and a father.⁴¹¹ This goal, however, will not be furthered by such statutes. Probate rules are default rules that apply only to individuals who have not thought through the inheritance issues.⁴¹² Individuals who are aware of and dislike the applicable intestacy provisions are largely free to write their own rules for the distribution of their assets.⁴¹³ With few exceptions,⁴¹⁴ individuals can “opt out” of probate rules simply by executing a will or trust agreement, by making lifetime gifts, or through beneficiary designations and retitling of assets—into joint tenancy with a right of survivorship, for instance.⁴¹⁵ By definition then, intestacy provisions apply only to individuals who are either unaware of the law or are aware but agree with the law.⁴¹⁶ Thus, default rules are not an effective

⁴¹¹ See, e.g., Wardle, *supra* note 60, at 442–44. Others may characterize the benefit as discouraging individuals from participating in socially undesirable behavior. See *In re Estate of Kolacy*, 753 A.2d 1257, 1263 (N.J. Super. Ct. Ch. Div. 2000). However, the United States Supreme Court has “unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents’ misconduct.” *Reed v. Campbell*, 476 U.S. 852, 854 (1978). The Court noted, however, that it has upheld distinctions based on legitimacy that have a “substantial relation to the State’s interest in providing for the orderly and just distribution of a decedent’s property at death.” *Id.* at 855.

⁴¹² See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS div. I, ch. 2 introductory note (1999); see also Monopoli, *supra* note 112, at 886–87.

⁴¹³ See Monopoli, *supra* note 112, at 887.

⁴¹⁴ In most separate property states, the probate statutes grant the decedent’s surviving spouse (and, in some cases, children) a limited interest in the decedent’s estate that the decedent cannot alter. These interests include a homestead allowance, UNIF. PROBATE CODE § 2-402; the right to personal property under a designated value, *id.* § 2-403; a modest family allowance, *id.* § 2-404; and an elective share of the decedent’s “augmented” estate, *id.* §§ 2-201 to 2-214.

⁴¹⁵ See Monopoli, *supra* note 112, at 887.

⁴¹⁶ In my experience practicing law, the cause is often due simply to velleity. In any event, individuals may opt out if they feel strongly enough about the result. See *id.*

way to regulate behavior.⁴¹⁷ Though the legislation may encourage an individual to create a will, it will not discourage him from allowing his spouse or partner to use his genetic material after his death. Indeed, the United States Supreme Court has “expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.”⁴¹⁸

However, these statutes could provide incentive to a surviving spouse or partner if they created a financial incentive to have a posthumously conceived child. For instance, by having a posthumously conceived child, a surviving spouse may be entitled to receive additional Social Security survivor benefits⁴¹⁹ or, in some states, a larger share of the decedent’s estate.⁴²⁰ However, these incentives would apply only if the couple was married. For instance, the additional Social Security benefits are available only to a surviving spouse who provides primary care to a child.⁴²¹ Likewise, an unmarried partner has no direct interest in the decedent’s intestate estate under any scenario.⁴²² Rather, if the couple was not married, any financial benefits would flow solely to the child.⁴²³ Though the surviving parent may benefit indirectly from assets passing to his or her child, the assets would be protected through a conservatorship or a Uniform Transfers to Minors Act account if the amount is sizable.⁴²⁴

Furthermore, even in the few cases where a surviving spouse would receive a direct benefit, the financial gain typically would be extremely modest. Intestacy laws, as default rules, apply only to the extent that an individual did not do any formal estate planning. The larger the decedent’s estate, the more likely it seems that the decedent would have done so.⁴²⁵ Accordingly, though there may be exceptions, these statutes typi-

⁴¹⁷ There are numerous regulations regarding assisted reproduction in other contexts, however, that serve to promote quality of health care, to ensure that individuals undergoing these procedures do so responsibly and safely, and to encourage traditional family structures. See Wardle, *supra* note 60, at 416–21; cf. Helene S. Shapo, *Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue*, 100 Nw. U. L. REV. 465, 474–75 (2006) (summarizing statutory approaches to surrogacy arrangements).

⁴¹⁸ *Trimble v. Gordon*, 430 U.S. 762, 769 (1977); see also Monopoli, *supra* note 112, at 880 n.149 (quoting *Trimble*). Professor Monopoli adds, “If, as a matter of social policy, the legislature chooses to encourage marriage, it should arguably privilege the spousal relationship rather than impose burdens on the parent–child relationship.” *Id.* at 880.

⁴¹⁹ Cf. 42 U.S.C. § 402(g) (granting Social Security survivor benefits to a decedent’s surviving spouse who provides primary care to an eligible person).

⁴²⁰ See *supra* Part III.A.1.a.

⁴²¹ *Id.*

⁴²² See UNIF. PROBATE CODE §§ 2-101 to -103 (amended 2008).

⁴²³ *Id.* § 2-103.

⁴²⁴ See *id.* § 3-915; UNIF. TRANSFERS TO MINORS ACT §§ 5–6 (1986).

⁴²⁵ This is particularly so if the decision to freeze gametes was because the decedent had cancer, was serving in active duty, or faced any other life-threatening scenario.

cally will apply to decedents of modest means. Moreover, under many states' statutes, the surviving spouse is entitled to at least the first \$150,000 of the probate estate, plus one-half of any remaining balance (after the payment of any taxes, administration expenses, and statutory allowances).⁴²⁶ The possible gain to a surviving spouse by having a posthumously conceived child would merely be the final one-half of the remaining balance (and, again, the estate in these scenarios likely would be modest to start with).⁴²⁷

It would be the rare case that a person would take on the physical, emotional, and financial commitment of raising a child as a single parent simply for a modest financial gain. Rather, in most cases, the survivor would take on that commitment for much deeper personal reasons—reasons which default rules would not change. While it is possible to create a hypothetical in which the financial incentive may be large enough to persuade the survivor to conceive the decedent's child, it would be the rare situation in practice. These hypothetical exceptions should be considered, but they should not be elevated above the other appropriate considerations.

d) Estate Tax Issues

A fourth benefit of the “no recognition” rule is that it may, in some cases, simplify the estate tax return process. For instance, assume a decedent's will provides that her entire estate shall be distributed into a trust for her children or, if she has no children, to a named charity. The decedent's representative has nine months from the decedent's death to file an estate tax return⁴²⁸ and pay any estate tax due.⁴²⁹ If the estate goes to the charity, no estate tax would be due as a result of the charitable deduction.⁴³⁰ If the estate goes to a trust for her children, however, there may be a tax due (depending on the size of the estate).⁴³¹ Accordingly, if the representative files a return that shows the assets will be distributed to the charity (and thus pays no tax when filing the return), but a posthu-

⁴²⁶ See, e.g., UNIF. PROBATE CODE § 2-102.

⁴²⁷ Regarding the incentive created by Social Security survivor benefits, many may believe that, as a matter of policy, posthumously conceived children (and their surviving parent) should not be entitled to receive survivor benefits in any event. In the author's opinion, however, that is an issue for the Social Security Administration to address and, until it does so, states should not pass laws that would preclude its residents from receiving federal benefits that may otherwise be available to its residents—particularly to its children.

⁴²⁸ I.R.C. § 6075(a) (2006).

⁴²⁹ Treas. Reg. § 20.6151-1(a) (2011). Although an estate is allowed an automatic six month extension to file the return, *id.* § 20.6081-1(b), the estimated tax must still be paid at nine months, *id.* § 20.6151-1(a).

⁴³⁰ I.R.C. § 2055(a).

⁴³¹ See *id.* §§ 2053–2058 (providing deductions only for amounts needed to satisfy bequests to a charity or to a surviving spouse, as well as for amounts needed to pay certain debts, expenses, or taxes).

mously conceived child is born two years later, the estate may incur significant underpayment penalties and interest.⁴³²

While one can think of a troublesome hypothetical to almost any scenario, this concern too should be minimal. First, if the person has no will, the estate can only pass to individuals. If the individual was married, the spouse will receive a large share of, if not the entire, estate regardless of whether posthumously conceived children are born.⁴³³ If the individual was not married, other family members would receive the estate.⁴³⁴ While the identification of the individuals may change if one or more posthumously conceived children are born, the tax effect would not change because there is no deduction for distributions to any individual other than a spouse.⁴³⁵

Accordingly, this concern only applies in the class-gift context. In light of the current \$5 million federal estate tax exemption,⁴³⁶ relatively few individuals will have a taxable estate in the first place.⁴³⁷ For those that do, the penalties and interest could be avoided by instead paying the estate tax at nine months as if the decedent has the child, and, if the child is not born, amending the return before the statute of limitations expires (and recovering the tax paid at that point). While this is certainly not ideal, it would solve the problem for those few estates so affected.⁴³⁸

e) Considerations That Support a Recognition Approach

For the reasons set out above, the perceived benefits to a no-recognition approach may sound compelling in theory, but are minimal in ap-

⁴³² See generally *id.* §§ 6651 (penalties), 6601 (interest). Notably, the statute of limitations for the Internal Revenue Service to assess an estate tax deficiency is three years after the date the return is filed, *id.* § 6501(a), and this date cannot be extended by agreement of the taxpayer and IRS, *see id.* § 6501(c)(4)(A). Because the return must be filed either nine months after the decedent's death, *id.* § 6075(a), or fifteen months after the decedent's death if an extension is requested, Treas. Reg. § 20.6081-1(b) (2011), the representative would have time to supplement the return within the Uniform Probate Code's forty-five month window, UNIF. PROBATE CODE § 2-120(k) (amended 2008). If a child is born after the statute of limitations expired, the representative would have no obligation to supplement the return. However, if the return is a false or fraudulent return with the intent to evade tax, the statute does not apply. I.R.C. § 6501(c)(1). Thus, a representative should clearly note on the return the contingency that a posthumously conceived child could receive a share of the estate.

⁴³³ See, e.g., UNIF. PROBATE CODE § 2-102.

⁴³⁴ See, e.g., *id.* § 2-103.

⁴³⁵ See I.R.C. §§ 2053–2058 (providing no deduction for amounts that pass to any individual other than a surviving spouse).

⁴³⁶ *Id.* § 2010(c)(3)(A).

⁴³⁷ The Tax Policy Center has estimated that, in light of the \$5,000,000 estate tax exemption, only 3,300 individuals who die in 2012 will pay an estate tax. Jeffrey Rohaly & Katherine Lim, *Wealth Transfer Taxes: How many people pay the estate tax?*, TAXPOLICYCENTER.ORG, <http://www.taxpolicycenter.org/briefing-book/key-elements/estate/how-many.cfm> (last visited Sept. 28, 2011).

⁴³⁸ Legislatures in states with an estate tax and a significantly lower exemption amount, however, should consider whether that state's estate tax laws merit consideration on this issue.

plication. Furthermore, the approach wholly ignores two additional interests: respect for the decedent's likely intent and the children's best interests. Each of these interests is compelling in its own right, and both support an approach that recognizes posthumously conceived children under certain conditions.

Achieving the decedent's likely intent has long been the hallmark of probate law.⁴³⁹ Indeed, intestacy statutes represent a legislative attempt to provide citizens a distributive scheme that mirrors the intent of most decedents.⁴⁴⁰ While a blanket "no recognition" rule may reflect the intent of some individuals who freeze genetic material, there is no indication that it reflects that of the majority. Rather, the rule unnecessarily proscribes any inquiry into an individual's intent—even if the intent to provide for the child is undisputed. As discussed in more detail below in Part III.B.1, an approach that conditions the child's status as an heir on the decedent's intent to treat the child as his or her own would satisfy this foundational principle of probate law.

Furthermore, the no-recognition rule wholly fails to consider the best interests of the posthumously conceived children.⁴⁴¹ Not only does it preclude them from receiving a share of their deceased parent's estate, it prevents them from receiving benefits that are independent from the estate itself but which could otherwise be available to them. For instance, these benefits may include Social Security survivor benefits⁴⁴² or inheritance through (rather than directly from) the deceased parent.⁴⁴³ Instead of punishing these children—who of course had no say in the method by which they were created—with a blanket exclusion, the better approach would be to at least leave the door open to these children to share in assets otherwise available to a decedent's heirs, subject to the conditions discussed below in Part III.B.

2. Class-gift Context

Of the six state legislatures that have granted status to posthumously conceived children, only Colorado's and North Dakota's expressly provide that these children may share in class gifts to descendants, heirs,

⁴³⁹ See Tritt, *supra* note 57, at 374, 379–80.

⁴⁴⁰ See *id.*

⁴⁴¹ Some may argue the no-recognition approach considers the best interests of children by encouraging individuals to raise children in two-parent homes. In other words, it encourages individuals not to have posthumously conceived children in the first place. As discussed in Part III.A.1.b, this justification is misplaced in the context of default probate rules. Rather, the focus should not be on the parents' conduct, but on a resulting child's best interests.

⁴⁴² See *supra* Part II.B.

⁴⁴³ Nolan, *supra* note 7, at 1092.

issue, or the like.⁴⁴⁴ In these states, which adopted the 2008 UPC amendments, there is no time limit before which the child must be born, unless the class is closing.⁴⁴⁵ If the class is closing, the child must be conceived within thirty-six months or born within forty-five months of the event that closed the class.⁴⁴⁶

In California, Iowa, and Louisiana, the statutes grant status to posthumously conceived children in the probate context if, among other requirements, the child is in utero within two years of the decedent's death (California and Iowa)⁴⁴⁷ or born within three years of the decedent's death (Louisiana).⁴⁴⁸ Although the statutes do not expressly extend this status to the class-gift context, it is likely that a court would do so in these states. It is unclear, however, whether these time limits would apply in the class-gift context.⁴⁴⁹

In New York, the Surrogate's Court held that posthumously conceived children may share in a class gift, notwithstanding that the legislature has provided that posthumously conceived children have no interests in the probate context.⁴⁵⁰ In Florida, the other state that grants status to posthumously conceived children, the statute is silent regarding the interests of posthumously conceived children in class gifts.⁴⁵¹

Whether or not states recognize posthumously conceived children for probate purposes, they should do so for class-gift purposes—at least while the applicable class remains open. While a class remains open, the existing members' interests are always subject to dilution.⁴⁵² Further, any concerns regarding finality of administration are inapplicable while the trust is ongoing.⁴⁵³ Accordingly, the only “benefit” that may remain

⁴⁴⁴ See COLO. REV. STAT. ANN. §§ 15-11-705(2), -708 (West, Westlaw through 1st Reg. Sess. of the 68th Gen. Assemb., 2011); N.D. CENT. CODE ANN. §§ 30.1-09.1-05(2), -08 (West, Westlaw through 2011 Reg. Sess.).

⁴⁴⁵ See COLO. REV. STAT. § 15-11-705(7)(b) (Westlaw); N.D. CENT. CODE § 30.1-09.1-05(5)(b) (Westlaw).

⁴⁴⁶ See COLO. REV. STAT. § 15-11-705(7)(b) (Westlaw); N.D. CENT. CODE § 30.1-09.1-05(5)(b) (Westlaw).

⁴⁴⁷ See CAL. PROB. CODE § 249.5 (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.); IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.).

⁴⁴⁸ See LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.).

⁴⁴⁹ In Massachusetts and New Jersey, courts have recognized posthumously conceived heirs for inheritance purposes. See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). Although the issue has not come up in the class gift context yet, the courts likely would include such children in class gifts, as well.

⁴⁵⁰ See *In re Martin B.*, 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007).

⁴⁵¹ See FLA. STAT. ANN. §§ 732.608, 742.17 (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.).

⁴⁵² See *In re Martin B.*, 841 N.Y.S.2d at 210.

⁴⁵³ See *id.* at 210.

is to discourage certain behaviors. However, as discussed above in Part III.A.1.c, default statutes such as this are unlikely to affect behavior.

Once the class closes, though, many of the same concerns discussed above in the probate context do apply (finality of administration, determination of beneficiaries, etc.). Thus, a state's class-gift rules should then mirror its probate rules regarding posthumously conceived children. In this regard, the 2008 UPC provides a good starting point—it imposes no time limitations for the birth of posthumous children while the class remains open, but it incorporates the thirty-six or forty-five month rule once the class closes.⁴⁵⁴ However, the 2008 UPC is flawed on this issue.

The 2008 UPC provides additional time to allow for posthumously conceived children only if the class-closing event is the death of the posthumously conceived child's parent.⁴⁵⁵ This limitation is unnecessary and could create inequitable results. For instance, assume a settlor has a son and daughter and creates a trust for the settlor's issue that terminates at the death of her last surviving child. If the son dies first, any posthumously conceived children of the daughter would be included in the class if born within forty-five months of the daughter's death because the class would close at her death. However, no posthumously conceived children of the son born after the daughter's death would be included—even if he dies immediately before the daughter—because the class-closing event is not his death. Alternatively, if the daughter dies first, her posthumously conceived children would not be included after the son's death, while the son's would. This arbitrary result could be avoided if, rather than limiting the time extension to the children of the decedent who “closed the class,” the extension applied to all parties once the class closed.

B. Under What Conditions Should Legislatures Recognize A Parent–Child Relationship?

If a legislature decides to recognize a parent–child relationship for probate or class-gift purposes, it must decide what conditions, if any, should apply. These conditions include whether (1) the decedent's consent should be required, (2) the surviving parent should be required to provide notice of his or her intent to use the decedent's genetic material, (3) the surviving parent should be required to have the child within a certain period of time, and (4) the parents must have been married at the decedent's death. The following proposes a new way of adapting such conditions that would further all three key interests: efficient estate administration, the decedent's intent, and the children's best interests.

⁴⁵⁴ See UNIF. PROBATE CODE § 2-705(g)(2) (amended 2008).

⁴⁵⁵ See *id.*

1. Consent

The first condition legislatures should consider is whether the decedent must have consented to the posthumous use of his or her genetic material for reproduction. To date, the answer has been a universal “yes.” Each of the six legislatures that have granted status to posthumously conceived children has required the decedent’s consent.⁴⁵⁶ Likewise, the Massachusetts Supreme Judicial Court required the decedent’s consent.⁴⁵⁷ In New Jersey and New York, courts granted status but did not discuss whether consent should be required.⁴⁵⁸ This should be a threshold question—if the decedent did not consent to the posthumous use of her genetic material, the child should not be deemed an heir for probate or class-gift purposes.

Less clear, however, is to what exactly the decedent must consent in these states. Must the decedent have consented generally to the use of his or her genetic material, to the posthumous use of the material, or to support a posthumously conceived child? The California statute states that the decedent must consent that the genetic material may “be used for posthumous conception.”⁴⁵⁹ Similarly, the Iowa statute states that the decedent must authorize his or her spouse to use the “genetic material to initiate the posthumous procedure that resulted in the child’s birth.”⁴⁶⁰ Massachusetts’s highest court, on the other hand, required that the decedent consent both to the use of his or her genetic material and to support the child.⁴⁶¹ Other states’ statutes are vague regarding the consent required. The Colorado and North Dakota statutes require that the decedent consented to “be treated as a parent.”⁴⁶² In Florida, the decedent must have “provided for” the child in the decedent’s will.⁴⁶³ The statute

⁴⁵⁶ See *supra* Part II.A.3.b.

⁴⁵⁷ *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

⁴⁵⁸ See *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007). There is a question of whether the use of a decedent’s genetic material without his or her consent may violate a reproductive freedom right—the right *not* to have children after your death. Knaplund, *supra* note 13, at 409. That is a separate question from that addressed by this article, though, which is whether a parent–child relationship will be recognized for probate and class-gift purposes once such a child *has* been born.

⁴⁵⁹ CAL. PROB. CODE § 249.5(b) (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.).

⁴⁶⁰ IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.).

⁴⁶¹ *Woodward*, 760 N.E.2d at 259.

⁴⁶² The Commissioners explain in their comments to the 2008 Uniform Probate Code (which Colorado and North Dakota adopted) that being “treated as a parent” includes providing economic support. See UNIF. PROBATE CODE § 2-115 cmt. (amended 2008). Accordingly, a court may (or may not) construe this language to require consent to support the child. In the probate context, this would seem to mean an intent for the child to share in the decedent’s estate.

⁴⁶³ See FLA. STAT. ANN. § 742.17(4) (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.).

does not clarify, however, whether “provid[ing] for” the child means financially supporting or simply acknowledging the child.⁴⁶⁴

Scholars uniformly support a consent requirement as well,⁴⁶⁵ but they too disagree on the specific consent that should be required. Some argue that if a person consents to the posthumous use of his or her genetic material, that person should be deemed to have consented to provide support as a matter of law.⁴⁶⁶ By analogy, if an individual chooses to have sex with another, that individual will be financially responsible for a child conceived from that act, whether or not either individual intended for conception to occur.⁴⁶⁷ Similarly, “once one consents to having a posthumously conceived child . . . , one’s estate must bear the consequences [imposed by] the applicable intestacy statute.”⁴⁶⁸ Others argue that the decedent’s intent should always control and consent should not be presumed. Rather, the posthumously conceived child should share in the estate only if the decedent affirmatively consented to support the child after his death.⁴⁶⁹ For instance, if a decedent had children during his life, he may authorize his wife or partner to use his genetic material to produce another child, but he may intend to share his estate only with the children he knew.⁴⁷⁰

Notably, a consent requirement of any kind would be a bit of a break from traditional probate law. The decedent’s likely intent regarding whom he or she would want to support has been the overriding con-

⁴⁶⁴ See *id.* The American Medical Association’s position regarding the posthumous use of frozen sperm is:

If the donor left no instructions, it is reasonable to allow the remaining partner to use the semen for artificial insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it.

Am. Med. Ass’n Code of Medical Ethics, Opinion 2.04 (updated December 1994). Regarding embryos, the American Medical Association states, “The gamete providers should have an equal say in the use of their pre-embryos and, therefore, the pre-embryos should not be available for use by either provider or changed from their frozen state without the consent of both providers.” *Id.*, Opinion 2.141 (updated June 1994). See also Knaplund, *supra* note 1, at 96.

⁴⁶⁵ See, e.g., Kindregan, Jr. & McBrien, *supra* note 108, at 597.

⁴⁶⁶ Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 995 (1996) (asserting that an individual should not even be allowed to escape this obligation by intentionally omitting the child in a will); see also Nolan, *supra* note 7, at 1094.

⁴⁶⁷ See Monopoli, *supra* note 112, at 887.

⁴⁶⁸ Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727, 735 (2004).

⁴⁶⁹ See Tritt, *supra* note 57, at 404–06.

⁴⁷⁰ Notably, the consent issue may also apply in situations where a spouse or partner uses another’s genetic material while that individual is living but incompetent. For example, this may occur if an individual is in a long-term coma and his or her partner wants to have another child. See Kindregan Jr., *supra* note 12, at 435. Consent issues also arise with postmortem sperm retrieval. See generally Radford, *supra* note 93.

sideration when establishing the framework for inheritance.⁴⁷¹ Legislatures would determine to whom most decedent's would want their property to pass, and this determination then applied to all decedents who died intestate.⁴⁷² Apart from a valid will, there is no other instance in probate law when a decedent's actual intent regarding support supersedes that framework.⁴⁷³ For instance, it may be undisputed that a decedent intended to give his entire estate to his alma mater, his girlfriend, or to only one of his two children. But if the decedent did not "opt out" of the intestacy provisions by creating a valid, properly executed will, his actual intent is irrelevant.⁴⁷⁴ The estate will be distributed to his closest heirs as provided by the statutes.⁴⁷⁵ Indeed, if courts had to determine a decedent's actual intent in every situation, this would place an enormous burden on probate courts and delay in the administration of estates.

Posthumous conception, however, is not a traditional method of procreation, and the traditional approach to intestacy does not fit. At a minimum, legislatures should require proof that the decedent consented to the posthumous use of his or her genetic material. Absent this requirement, the door would be open to the possibility of improper posthumous use of one's genetic material—for instance, postmortem sperm retrieval. However, regarding consent to support the child, it is more appropriate for the legislature to establish an objective rule that fits the majority of cases. Though I am not aware of objective data regarding this, I believe that the majority of individuals who have invested the "significant time, effort, and expense of assisted reproduction"⁴⁷⁶ and have consented to the posthumous use of their genetic material by their spouse or partner would intend to support the resulting child. Thus, an irrebuttable presumption of intent is appropriate. For the minority of decedents who

⁴⁷¹ See Tritt, *supra* note 57, at 374, 379–80.

⁴⁷² *Id.*

⁴⁷³ When a decedent dies testate, courts will consider the decedent's intent when asked to construe an ambiguous or vague will or trust agreement. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.2 (1999).

⁴⁷⁴ Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 967 (D. Ariz. 2002) ("The law of intestate succession provides for a specific order of distribution of a decedent's property when no will exists. The intent of the decedent is not a factor."), *rev'd on other grounds*, 371 F.3d 593 (9th Cir. 2004). Individuals may also carry out their intent by a combination of other estate planning vehicles, such as revocable and irrevocable trusts, beneficiary designations, and joint ownership of assets. However, any assets that constitute the intestate estate will be distributed according to the intestacy laws, regardless of intent. See *id.* For instance, about half of the states disregard an unwitnessed holographic will, even though it may clearly state the decedent's intent in her own handwriting. See, e.g., Wilson v. Speer, 499 N.W.2d 850, 857 and 857 n.1 (Minn. Ct. App. 1993) (noting that about half of the states do not recognize holographic wills, including Minnesota, "despite the fact holographics can be authenticated as a true desire of a deceased's intentions").

⁴⁷⁵ See UNIF. PROBATE CODE § 2-103 (amended 2008).

⁴⁷⁶ KINDREGAN, JR. & MCBRIEN, *supra* note 10, at 20.

would not wish to support the child they consented to creating, it would be their obligation to provide otherwise in a will.

Finally, whichever consent is required, the statute should state the required burden of proof and who bears it. For instance, the Iowa, Louisiana, and California statutes require that the consent be in writing.⁴⁷⁷ In Florida, the writing must be a will.⁴⁷⁸ In Colorado and North Dakota (the two states that have adopted the 2008 UPC), the consent may be in writing or established by clear and convincing evidence.⁴⁷⁹ However, if the parents were married at the decedent's death, their consent will be presumed unless proven otherwise by clear and convincing evidence.⁴⁸⁰ In Massachusetts and New Jersey, the courts did not discuss the required level of proof.⁴⁸¹

A clear and convincing burden of proof is appropriate to protect against the possibility of fraudulent claims by surviving partners. However, a writing requirement is problematic because these are default rules.⁴⁸² If an individual is thinking about these issues, she typically will create a will or otherwise take steps to address them while living. While that is certainly preferred, these statutes, like all intestacy statutes, would not apply to those individuals. Rather, these statutes are intended to apply to individuals who did not take such steps (possibly because they were unaware of the requirements). If a writing is required, a decedent's clearly expressed but unwritten intent may not be carried out, even if the decedent's intent is not otherwise disputed. In any event, the key here is that the legislature be clear in its statute regarding (1) whether consent is

⁴⁷⁷ See IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.); LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.); CAL. PROB. CODE § 249.5(a) (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011-12 1st Ex. Sess.).

⁴⁷⁸ See FLA. STAT. ANN. § 742.17(4) (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.).

⁴⁷⁹ See COLO. REV. STAT. ANN. § 15-11-120(6) (West, Westlaw through 1st Reg. Sess. of the 68th Gen. Assemb., 2011); N.D. CENT. CODE § 30.1-04-19(6) (West, Westlaw through 2011 Reg. Sess.).

⁴⁸⁰ See COLO. REV. STAT. § 15-11-120(8) (Westlaw); N.D. CENT. CODE § 30.1-04-19(8) (Westlaw).

⁴⁸¹ See *In re Estate of Kolacy*, 753 A.2d.1257 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002). Some parentage acts require that consent for posthumous use be recognized by a licensed physician. It is unclear how such parentage statutes may be applied, if at all, in the probate context. See *supra* Part II.A.1.d.

⁴⁸² Alternatively, states may require clinics providing assisted reproductive technology to provide forms to patients that ask their intent regarding posthumous use. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 501 (2008). While this would be helpful, it is more of a regulatory approach regarding assisted reproduction in general and is (or should be) separate from probate considerations. In other words, a posthumously conceived child should not be precluded from inheriting if the decedent's intent can be proven but the clinic fails to provide the required form.

required, (2) what exactly that consent must address, and (3) what level of proof will be required regarding such intent.

Finally, unlike any other approach proposed to date, consent should be the single condition regarding a child's status as an heir. If the decedent did not consent to the posthumous use of his or her genetic material, the child should not be an heir for probate or class-gift purposes. If the decedent did consent, the child should be deemed an heir. The conditions discussed in the following Parts would then determine whether it would be equitable, in light of the interests of other potential heirs or beneficiaries, for the child to in fact receive assets from a trust or estate.

This distinction is critical. Under the existing approaches, a child is not an heir unless *all* conditions are met.⁴⁸³ However, the remaining conditions (notice requirement and time limitation) really are procedural conditions that relate to the efficient administration of the decedent's estate and the interests other parties have in that estate. This distinction would allow the posthumously conceived child to still receive benefits that are unrelated to the decedent's estate. For instance, the child, as an heir, may still inherit through the deceased parent at the death of other family members (e.g., from the decedent's parents, who would be that child's grandparents). Additionally, the child, as the decedent's heir, could still receive Social Security survivor benefits.⁴⁸⁴

For example, compare this to Iowa's statute. There, a child born twenty-three months after the parent's death would be an "heir" and eligible to inherit from the decedent, to inherit through the decedent, and to receive Social Security survivor benefits.⁴⁸⁵ However, a child born at twenty-five months would not be an "heir" and, thus, not entitled to any of these benefits.⁴⁸⁶ If, on the other hand, the statute defined both children as heirs, both children would still inherit through their deceased parent and receive survivor benefits.⁴⁸⁷

⁴⁸³ See *supra* Part II.

⁴⁸⁴ Nolan, *supra* note 7, at 1092.

⁴⁸⁵ IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.). In *Beeler v. Astrue*, 651 F.2d 954 (8th Cir. 2011) (discussed *supra* Part II.B.6), the child was born one week before the second anniversary of the decedent's death. Under current law, that child would have been an heir. But if she had been born seven days later, she would not have been an heir.

⁴⁸⁶ IOWA CODE ANN. § 633.220A (Westlaw).

⁴⁸⁷ Some may disagree with the policy that posthumously conceived children should receive survivor benefits in any event. That, however, is an issue for the Social Security Administration to address. In the meantime, states should not pass laws that would preclude its residents from receiving federal benefits that may otherwise be available to its residents—particularly to its children. See Banks, *supra* note 121, at 267. For a discussion of the policies underlying the Act, see Banks, *supra* note 121, at 305–20.

2. Notice

The second condition legislatures should consider is whether (and if so, by when) the surviving spouse or partner must give notice to a fiduciary or custodian holding the decedent's assets of the survivor's intent to use the decedent's genetic material.⁴⁸⁸ Only California's legislature has established a notice requirement.⁴⁸⁹ Specifically, the person with "control of" the genetic material must notify each person with control over the decedent's assets that that person intends to use the genetic material.⁴⁹⁰ This notice must be provided no later than four months from the date of the decedent's death certificate or the date a judgment is entered declaring the decedent's death.⁴⁹¹

The California approach is desirable for three reasons. First, it places responsibility on the surviving spouse or partner to advise the fiduciary. This is particularly appropriate in the context of retirement assets or insurance proceeds, when the custodian may have no personal connection to the decedent and no knowledge of frozen genetic material. However, it certainly could be the case for estate or trust assets, as well, particularly if a corporate fiduciary is involved. Second, even when a custodian or fiduciary has knowledge, there may be many instances when the surviving spouse or partner has no intention of using the decedent's genetic material after the death. Without this notice requirement, a careful fiduciary would want to obtain some sort of claim waiver, indemnity agreement, or other protection from the surviving spouse or partner before distributing assets. Third, this would protect the other beneficiaries from transferee liability. It would provide a clear method for the surviving parent to protect the future child's interests, but, if those simple steps are not taken, it would allow the other recipients to use the assets they receive without facing future liability for doing so. Finally, as with creditor claims, the statute should require that the notice provided to the fiduciary be in writing to avoid questions of fact regarding the fiduciary's knowledge.

As for the time period for this notice, four months, as California has provided, provides enough time for the survivor to overcome the initial shock of his or her partner's unexpected death, obtain legal advice if

⁴⁸⁸ In this context, "fiduciary" refers to a personal representative of a decedent's estate or trustee of a trust, whereas "custodian" refers to a life insurance company, retirement account custodian, or other financial institution with custody of assets but limited fiduciary responsibilities.

⁴⁸⁹ The Massachusetts Supreme Court stated that a claim may be brought if "time limitations do not preclude" the claim, but it did not provide any specific time frame or other procedural requirements. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

⁴⁹⁰ CAL. PROB. CODE § 249.5(b) (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.).

⁴⁹¹ *Id.*

necessary, and provide notice. The notice need not state that the individual is actively attempting to have the child (which the survivor may not be emotionally prepared to do after just four months), but simply that the survivor has the decedent's frozen genetic material and may use it in the future. Further, four months coincides with the period that creditors have in many states to file a claim against the estate.⁴⁹² Accordingly, if the fiduciary has not received notice after four months, the fiduciary could confidently advise the heirs or devisees of their respective share of the estate and distribute assets without liability.

Unlike California's statute, however, the failure to provide this notice should not *bar* a future child from receiving assets. In other words, the child's status as an heir should not depend on this procedural condition is met—which neither the child nor the decedent has any control over. Rather, the survivor's failure to provide such notice should simply limit the fiduciary and recipient's liability for distributions made after the notice period expires without knowledge by the fiduciary of the survivor's intent to have the decedent's posthumously conceived child. Unlike a creditor's claim (which would be barred absent notice within four months), this is not a business deal or third-party interaction. It is a (potential) future child of the decedent—whom the decedent had consented to support. If the fiduciary does not receive notice that the future parent intends to use the genetic material, the fiduciary may distribute the assets without liability after four months. Furthermore, if the fiduciary does receive written notice after this period has expired, the fiduciary then should have a duty to hold all or an appropriate portion of the assets still in the fiduciary's possession for a longer period of time, as discussed next.

3. Time Limitations

The third condition a legislature should consider is whether the child must be born within a specific period after the deceased parent's death. For instance, in Iowa the child must be born within two years after the decedent's death.⁴⁹³ In California, the child must be "in utero" within two years after the decedent's death.⁴⁹⁴ In Louisiana, the child must be born within three years after the decedent's death.⁴⁹⁵ In Colorado and North Dakota, the child must be in gestation within three years or born within forty-five months after the issuance of the decedent's

⁴⁹² See, e.g., UNIF. PROBATE CODE § 3-801 (amended 2008).

⁴⁹³ IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.).

⁴⁹⁴ More specifically, the limit is two years from the date of the death certificate or of a judgment declaring the decedent's death. CAL. PROB. CODE § 249.5(b) (Westlaw).

⁴⁹⁵ LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.).

death certificate.⁴⁹⁶ The Massachusetts Supreme Judicial Court provided simply that the posthumously conceived child may be an heir if “time limitations [do not] preclude” this result.⁴⁹⁷ It did not provide any guidance on what length of time, or other factors, may serve as a bar. Neither the Florida legislature nor the New Jersey Superior Court addressed a time limitation.

It is important to establish a limitation period to provide finality to the administration process in those scenarios where a posthumously conceived child could “divest” others of all or a part of their share of the decedent’s estate. Without this, an estate could remain open indefinitely while the executor waits for a posthumously conceived child to be born—an event which may never happen. If a notice requirement is not adopted, this time limitation also helps to protect fiduciaries who may distribute assets while unaware that the decedent left preserved genetic material.

Similar to the notice requirement—and unlike any approaches proposed or enacted to date—the limitation period should relate to liability for distributions, not a child’s ability to receive distributions. Once the time limitation has passed, a later born child, as an heir, should still be entitled to receive a share of any assets that remain in the estate at the time of that child’s birth.⁴⁹⁸ In the meantime, however, the fiduciary should be entitled to distribute assets to the devisees or beneficiaries as they then stand, and neither the fiduciary nor the recipient shall have any liability to later-born children for doing so.

Importantly, this distinction would provide the fiduciary with discretion to retain the assets (or some portion of the assets) if the fiduciary knows that the surviving spouse or parent is attempting to use the decedent’s genetic material but has not yet achieved a successful pregnancy. The justifications given for a two- or three-year window are that it (1) provides a grieving spouse or partner time to prepare emotionally to have a child after the decedent’s death, (2) allows a period to become pregnant if an initial attempt is not successful, and (3) creates finality by establishing a cut-off date that fiduciaries and other beneficiaries can rely on. While these are appropriate considerations, each can be satisfied without the absolute cut-off. An approach that limits fiduciary and transferee liability after a certain point, but does not close the door completely, still

⁴⁹⁶ COLO. REV. STAT. ANN. § 15-11-120(11) (West, Westlaw through 1st Reg. Sess. of the 68th Gen. Assemb., 2011); N.D. CENT. CODE ANN. § 30.1-04-19(11) (West, Westlaw through 2011 Reg. Sess.).

⁴⁹⁷ *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

⁴⁹⁸ For an alternative view, see Browne C. Lewis, *Dead Men Reproducing: Responding to The Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 443 (2009) (“A specific time should be stated in order for the child to be conceived. After that time period has expired, the class of the decedent’s heirs should be closed.”).

satisfies each of these goals. But it also allows (though does not require) a fiduciary to leave the door open for those who have tried unsuccessfully, but continue to try, to have the child.

How long, then, should this limitation period be? As noted above, two or three years allows for a period of grieving, one or two attempts to become pregnant, and a fairly efficient estate administration. In addition, any longer period could create some difficulty from an income tax standpoint. All estates and most trusts are taxpayers for income tax purposes during their administration.⁴⁹⁹ For an estate, this period starts at the decedent's death and runs through the "period actually required by the administrator or executor to perform the ordinary duties of administration, such as the collection of assets and the payment of debts, taxes, legacies, and bequests" ⁵⁰⁰ For a trust, this period includes some time after the duration of the trust ends for the trustee to perform its final duties.⁵⁰¹ However, if the administration is "unduly prolonged," the estate or trust will be considered terminated for federal income tax purposes,⁵⁰² and the gross income, deductions, and credits of the estate or trust are thereafter considered the gross income, deduction, and credits of the persons succeeding to that property.⁵⁰³

Whether an administration has been unduly prolonged is a question of fact, and the Internal Revenue Service (IRS) will not issue advance rulings on this issue.⁵⁰⁴ Although an administration may be considered complete if the only task left is to distribute assets to ascertained beneficiaries,⁵⁰⁵ it is not complete while there is ongoing litigation regarding the identity of the beneficiaries.⁵⁰⁶ The IRS has not addressed this in the context of posthumously conceived children, but a strong argument could be made that retention of assets until the beneficiaries are finally determined is not "unduly prolonging" the administration. If, however, the IRS disagrees, the income from those estate or trust assets could be charged to (and the tax, therefore, paid by) beneficiaries who may never, in fact, receive the assets. Admittedly, however, this result is unlikely.

⁴⁹⁹ I.R.C. § 641(b) (2006). Although "grantor" trusts are not taxpayers under Internal Revenue Code sections 641-48, the grantor trust status of a revocable trust ceases at the deemed owner's death.

⁵⁰⁰ Treas. Reg. § 1.641(b)-3(a) (2011).

⁵⁰¹ *Id.* § 1.641(b)-3(b).

⁵⁰² *Id.* § 1-641(b)-3(a) and (b).

⁵⁰³ *Id.* § 1-641-3(d).

⁵⁰⁴ Rev. Proc. 2011-3, 2011-1 I.R.B. 111, § 3.01(51).

⁵⁰⁵ *See* Estate of Berger v. Comm'r, 60 T.C.M (CCH) 1079 (1990).

⁵⁰⁶ *See* Wylie v. United States, 281 F. Supp. 180 (N.D. Tex. 1968).

4. Relationship of Parents

The final condition legislatures must consider is whether the decedent must have been married to the surviving party at the time of the decedent's death. In Iowa and Louisiana, the parties must be married at the decedent's death in order for the future child to be deemed his heir.⁵⁰⁷ This would exclude engaged couples and, in most states, same-sex couples. The 2008 UPC (adopted in Colorado and North Dakota) and the California statute apply regardless of the decedent's relationship.⁵⁰⁸ The Florida statute does not address the parties' relationship, nor did the Massachusetts Supreme Court or the New Jersey Chancery Court.⁵⁰⁹

The marital status of the parents should not be a requirement in the probate or class-gift context. First, statutes that distinguish between the marital status of a child's parents may face equal protection challenges. For instance, the United States Supreme Court has struck down, on equal protection grounds, a statute that permitted only marital children to bring a wrongful death claim⁵¹⁰ and statutes that permitted a nonmarital child to inherit from the child's father only if the child's parents had later married.⁵¹¹ Aside from that, however, this decision boils down to whether the legislature's primary goal is to (1) regulate or incentivize behavior, (2) carry out the decedent's most likely intent, or (3) protect the best interests of the child. If the first is the goal, a legislature may require that the couple be married. For the reasons noted above,⁵¹² however, such default rules will not effectively regulate behavior in this context. If the purpose is to carry out the decedent's intent, it is purely anecdotal whether more married individuals would consent to the posthumous use of their genetic material than would single individuals in a committed relationship. Alternatively, if the goal is protecting the best interests of the child, then the marital status of the decedent should not be relevant. As explained above,⁵¹³ in the majority of cases a surviving spouse is entitled to the entire estate regardless of whether the decedent had children. Thus, if a statute gave interests only to posthumously conceived children whose parents were married, the statute would, in almost every

⁵⁰⁷ IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.) (referring to "surviving spouse"); LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.) (referring to "surviving spouse").

⁵⁰⁸ See *supra* Part II.A.

⁵⁰⁹ *Id.*

⁵¹⁰ *Levy v. Louisiana*, 391 U.S. 68 (1968).

⁵¹¹ *Reed v. Campbell*, 476 U.S. 852 (1986) (abrogating a Texas statute); *Trimble v. Gordon*, 430 U.S. 762 (1977) (abrogating a Illinois statute); see also *Monopoli*, *supra* note 112, at 860–68 (reviewing United States Supreme Court cases that have addressed equal protection in the context of non-marital children).

⁵¹² See *supra* Part III.A.1.c.

⁵¹³ See *supra* Part III.A.1.a.

case, effectively provide no relief to any children—whether their parents were married or not.

C. *Additional Drafting Considerations*

In addition, legislatures should keep in mind three specific drafting considerations. First, for the reasons detailed in Part II.A.1.d, legislatures should address these issues in probate statutes, not parentage statutes. Second, legislatures should be sure that any rules of construction relating to posthumously conceived children apply to any testamentary or donative document, not just to wills. This is particularly important as more individuals use revocable trust agreements in place of wills and create irrevocable trusts for their families.⁵¹⁴ This would also capture beneficiary designations (to the extent, at least, the custodial institution does not provide otherwise in its plan documents, insurance contracts, or the like). Third, legislatures should give great care to the words they choose.⁵¹⁵ For instance, the term “conceive” may create an ambiguity when applied to assisted reproduction using thawed sperm or eggs (when conception truly occurs after thawing) and IVF (when conception technically occurs before thawing). Legislatures should define what they mean by conceive or, if appropriate, use terms such as “transferred,” “in gestation,” or “in utero.”⁵¹⁶ Likewise, courts have struggled over whether “survive” and “surviving” means that the child had to be alive at the time of the parent’s death or at any time after the parent’s death.⁵¹⁷ Moreover, legislatures should define assisted reproduction broadly to include the various forms available—and that may be available in the future.⁵¹⁸ Finally, legislatures should be specific regarding the genetic material. For instance, Virginia uses “embryo” in its statutes, which could exclude frozen sperm or eggs (or, possibly, even zygotes or pre-embryos) if read strictly.

⁵¹⁴ In 2009, trustees of over 2.6 million irrevocable trusts filed income tax returns. *See* 2009 SOI Tax Stats, *supra* note 73.

⁵¹⁵ Though this of course is always important for legislatures to do, it is particularly easy to choose a word that creates ambiguity in this context given the rapidly changing technology.

⁵¹⁶ For instance, the Iowa statute refers to “a child of the intestate conceived and born after the intestate’s death or born as the result of the implantation of an embryo after the death of the intestate.” IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.).

⁵¹⁷ *See* Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002).

⁵¹⁸ For instance, the California statute excludes cloned individuals. CAL. PROB. CODE § 249.5(c) (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.). In addition to cloning, the next frontier of artificial insemination may include artificial wombs, Knaplund, *supra* note 1, at 99, and the creation of artificial sperm from bone marrow. Tritt, *supra* note 57, at 393 (citing Charles P. Kindregan, Jr., *Thinking About the Law of Assisted Reproductive Technologies*, 27 WIS. J. FAM. L. 123 (2007)).

CONCLUSION

Almost ten years ago, Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court recognized:

As these [artificial reproduction] technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.⁵¹⁹

To date, Massachusetts's legislature has ignored this appeal—as have the majority of legislatures around the country. Instead, they have passed the cost and burden of sorting out these issues to their citizens and courts. The use of both assisted reproduction and cryopreservation will only continue to increase, however, and the issues they create require the attention of legislatures.

Specifically, legislatures should recognize posthumously conceived children as a child of the deceased parent for probate purposes and for class-gift purposes if the decedent consented to the posthumous use of his or her genetic material for reproduction. Denying status in these contexts would neither regulate their parent's behavior nor, in most cases, create more efficient estate administrations. Recognizing these children, however, would carry out the decedent's intent, a hallmark of probate law, and protect the best interests of the innocent children by allowing them to qualify, at a minimum, for benefits unrelated to the decedent's estate (such as Social Security survivor benefits and inheritance through the deceased parent). However, courts should allow fiduciaries or custodians to distribute assets, without liability to themselves or the recipients, if the surviving spouse or partner does not notify them within four months after the decedent's death of his or her intent to use the decedent's genetic material. Further, the fiduciary or custodian should be free (but not required) to distribute the assets to the presumptive beneficiaries if the child is not born within a certain period of time after the deceased parent's death, such as three years. Importantly, though, the failure of the survivor to provide notice or to have the child within this period of time should not affect the child's status as an heir. Rather, it should just protect the fiduciary, custodian, and existing beneficiaries. A later-born child would still be eligible to receive other benefits as an

⁵¹⁹ Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002).

“heir” (such as Social Security survivor benefits), to inherit through the decedent, to be a member of a class that remains open after the decedent’s death, and to share in any assets that remain undistributed when the child is born.