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# Second Class Children: The Intestate Inheritance Rights Denied to Posthumously Conceived Children and How Legislative Reform and Estate Planning Techniques Can Create Equality

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Second Class Children: The Intestate Inheritance Rights Denied to Posthumously Conceived Children and How Legislative Reform and Estate Planning Techniques Can Create Equality

by: Mary Kate Zago

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## I. Introduction

Women and men are procreating later in life due to a change in social norms.

Procreation under this plan becomes more difficult due to aging reproductive organs and medical issues. At one time, if a person was considered infertile, there was nothing to be done; however, modern medicine has developed new ways for people to procreate by extracting and storing eggs, sperm, and embryos until the person or couple is ready to reproduce, even if that happens to be after one of the donors has passed away. Posthumous reproduction has the potential to affect numerous estate plans because of the current statutory views on children conceived through artificial means after the death of one of the genetic parents.

The majority of testators leave their assets to their spouses and children at their death and certain employment and government benefits are distributed to children upon death of the parent. If the decedent had utilized the genetic material storage system and their spouse or partner used their eggs or sperm (both “gametes”) or embryos to reproduce after the decedent’s death, is that posthumously conceived child considered a child of the decedent? States are split on this issue. If a posthumous child is not considered a child of the decedent, they will not inherit from the deceased parent, nor can they inherit through them under intestacy laws.<sup>1</sup> Since governmental benefits, like social security insurance, are distributed based on state law, there is a need to have conformity among the states.

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<sup>1</sup> See generally: 60 A.L.R.3d 631 (Originally published in 1974) (...adoption terminates the right of inheritance from or through the natural parents of the adopted child). Inheriting “*from*” means receiving property directly from the decedent’s estate. Inheriting “*through*” refers to when the deceased parent is an intestate heir or a beneficiary in someone else’s Will and that Will provides that if the beneficiary dies, his/her share shall be distributed to their children. For example, when dad dies and mom uses dad’s sperm to posthumously conceive son, then dad’s parents die afterwards and their Wills leave property to dad, son cannot inherit property from his grandparents because he is deemed to be a stranger to them and not their grandson. Dad is considered to have died leaving no issue (unless of course he had children before his death in which case those children would inherit, but posthumous son would not).

This article explores the statutes and case law examining the issue of posthumous reproduction and its effect on the decedent's estate plan. Part II examines the Techniques and reasons for creating posthumous children and explores the issue of why such children are denied inheritance rights. Part III discusses the existing case law concerning the inheritance rights of posthumously conceived children. Part IV explores what estate planning attorneys are advocating and how they are changing their own practice to address this issue. Lastly, Part V will advocate for state and federal recognition of posthumously conceived children through statutory reform.

## **II. How Posthumously Conceived Children are Created**

We live in a world where advances in medical technology have created options that were once an impossibility. One such advancement is the ability to conceive a child through the use of cryopreserved (frozen) gametes and embryos. This technology has enabled people to conceive such children after the death of one or both genetic parents due to the long shelf life, so to speak, of the frozen genetic material. In some cases, the legal system treats these posthumously conceived children differently than children conceived before the death of their parent, especially in the area of inheritance laws.

### **A. Cryopreservation Procedure**

Cryopreservation is a multi-step process beginning with gamete retrieval from the person. Once the gamete is retrieved, it is cooled and dehydrated in preparation of the freezing stage.<sup>2</sup> It is then treated with a chemical that replaces the water in the cells.<sup>3</sup> Once it is partially frozen, it is then transferred to liquid nitrogen where it is cooled even more for long-

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<sup>2</sup> Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. Legal Med. 547, 550 (1996).

<sup>3</sup> *Id.*

term storage.<sup>4</sup> In order to use the gamete, it must be rehydrated and the chemical must be removed from it.<sup>5</sup> Once frozen, sperm can be stored for an indefinite period of time,<sup>6</sup> eggs have been known to be stored for up to ten years,<sup>7</sup> and embryos resulted in successful pregnancy up to twelve years after first being preserved.<sup>8</sup>

These procedures are extremely expensive. A woman is required for the process, whether she is the parent or a surrogate. If the woman is the parent, she must be implanted with the sperm or embryo at a time in her menstrual cycle in which she is fertile enough to conceive the child.<sup>9</sup> Doctors appointments and fertility drugs are usually involved in this process.<sup>10</sup> If the woman is a surrogate, she has to be compensated for her time and service, provided with fertility drugs to ensure implantation, and the costs must be paid for an embryo to be created in a lab before implantation.<sup>11</sup> These costs range from \$865.00 to \$100,000.00 per implantation cycle depending on which procedure and drugs are required.<sup>12</sup> Due to this expense, a person who wishes to conceive a decedent's child may not have the funds readily available to do so, especially if they require more than one implantation.

The process is also time consuming. As mentioned above, the woman must be at a point in her menstrual cycle where she can become pregnant, and ability to conceive is not a scientific certainty because there are several circumstances personal to the woman and the

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Susan Donaldson James, *Sperm Retrieval: Mother Creates Life After Death*, ABC news, Feb. 23, 2010 at 1.

<sup>7</sup> University of Southern California Fertility, *Egg Freezing FAQ's*, (last visited Dec. 15, 2013), [http://www.uscfertility.org/fertility\\_options/egg\\_freezing/egg\\_freezing\\_faqs.php](http://www.uscfertility.org/fertility_options/egg_freezing/egg_freezing_faqs.php).

<sup>8</sup> Kristine S. Knaplund, *Born To Be Wild: Assisted Reproduction and Estate Planning* presentation at the ABA Real Property Trust & Estate Spring Symposia 2011 (Apr. 29, 2011) [hereinafter *Knaplund Presentation*].

<sup>9</sup> Donna Christiano, *Fertility Treatment Options*, Parents Magazine (2011), <http://www.parents.com/getting-pregnant/infertility/treatments/guide-to-fertility-methods>.

<sup>10</sup> *Id.*

<sup>11</sup> The Surrogacy Source, *Surrogate Mother Compensation*, (last visited Dec. 5, 2013), [\\_http://www.thesurrogacysource.com/sg\\_compensation.htm](http://www.thesurrogacysource.com/sg_compensation.htm).

<sup>12</sup> Office on Women's Health, *Infertility Fact Sheet*, (2009); available at <http://www.womenshealth.gov/publications/our-publications/fact-sheet/infertility.html#o>.

gametes that are unpredictable.<sup>13</sup> In many cases the process has to be performed several times in order to result in live birth, due to the less than fifty percent success rate in artificial reproduction technology (“ART”) implantations.<sup>14</sup> Even if the ART implantation is successful, there is always a risk of miscarriage. If miscarriage occurred late in the pregnancy, this would result in several months of lost time to conceive. There are also outside factors that affect fertility, such as being overweight or a smoker, which may take several months to correct.<sup>15</sup>

### **B. Reasons for Posthumous Reproduction**

Many couples use cryopreservation when dealing with fertility issues. In some cases, couples that have stored their gametes or embryos for this purpose experience tragedy when one of the partners unexpectedly dies.<sup>16</sup> Some couples, married or unmarried, also elect to preserve their gametes or embryos when one of them has a terminal illness or is going to undergo a procedure that can render them sterile.<sup>17</sup> Military couples have also elected cryopreservation before deployment in the event they fail to return home.<sup>18</sup> In some cases, gamete retrieval occurs after death, for example when a man unexpectedly dies in a car accident, his wife can request his sperm be retrieved and cryopreserved for her later use.<sup>19</sup> All of these reasons for cryopreservation are what put a person in a place to decide to have a posthumously conceived child.

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<sup>13</sup> New York State Task Force on Life and the Law, *Questions and Answers about Infertility and Its Treatment*, (2009); available at <http://www.health.ny.gov/publications/1128.pdf>. [hereinafter *NY Task Force*]

<sup>14</sup> Centers for Disease Control and Prevention, *National ART Success Rates*,<sub>2</sub> (last updated Aug 13, 2013); available at [http://nccd.cdc.gov/DRH\\_ART/Apps/NationalSummaryReport.aspx](http://nccd.cdc.gov/DRH_ART/Apps/NationalSummaryReport.aspx).

<sup>15</sup> *NY Task Force*; *supra* at note 13.

<sup>16</sup> Ruth Zafran, *Dying to Be A Father: Legal Paternity in Cases of Posthumous Conception*, 8 Hous. J. Health L. & Pol'y 47, 51 (2007).

<sup>17</sup> *Id.*

<sup>18</sup> Ellen Gamerman, *For U.S. Troops, a Personal Mission*, Balt. Sun, Jan. 27, 2003, at 1A.

<sup>19</sup> Charles P. Kindregan, Jr., *Dead Dads: Thawing an Heir from the Freezer*, 35 Wm. Mitchell L. Rev. 433, 436 (2009).

### **III. The Problem with Current Inheritance Rights Under State Law**

When a person dies, their property is distributed under one of two sets of rules. If the person dies leaving a Last Will and Testament, their property is distributed in accordance with the instructions provided by that Will. This is called dying testate. If the person did not leave a Will, their estate is distributed according to state statute.<sup>20</sup> This is known as intestacy. The laws of intestacy are also used when a term in a Will is ambiguous, so as to determine the Testator's intent.<sup>21</sup>

#### **A. Uniform Model Laws that Influence State Intestacy Laws**

For children that are conceived before the death of a parent, the law on their intestate inheritance rights is clear cut around the country because every state has enacted intestacy statutes.<sup>22</sup> Some states derive their statutes from uniform codes that are created by legal scholars in order to promote uniformity of laws between the states.<sup>23</sup> These laws are not binding unless a state has adopted them.<sup>24</sup> Some intestacy laws have been derived from a source known as the Uniform Probate Code ("UPC") either in its entirety or in part.<sup>25</sup> Even if a state has not adopted the UPC, it is often used as a model for states to base their laws from.<sup>26</sup>

The UPC clearly dictates that children conceived *during* the deceased parent's lifetime are entitled to inherit what they would have if they had been born during the parent's lifetime.<sup>27</sup>

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<sup>20</sup> *Intestate*, Last Will and Testament.com, <http://www.lastwillandtestament.us/intestate> (last visited Dec. 7, 2013).

<sup>21</sup> Unif. Probate Code § 2-602 (2008).

<sup>22</sup> Intestacy, EY Financial Planning Center, Intestacy, <https://eyfpc.com/LinkClick.aspx?fileticket=nGcXgRhgXHo%3D&tabid=367&mid=717&language=en-US> (last visited Dec. 7, 2013).

<sup>23</sup> Roger W. Anderson, *The Influence of the Uniform Probate Code in Non Adopting States*, 8 Seattle U. L. Rev. 599, 599 (1985).

<sup>24</sup> *Id.*

<sup>25</sup> Nash, Nash, Bean & Ford, LLP, *What is the Uniform Probate Code?*, (Oct. 20, 2013), <http://www.nashbeanford.com/uniform-probate-code>.

<sup>26</sup> Anderson, *supra* note 23 at 600.

<sup>27</sup> Unif. Probate Code § 2-108 (2008).

In 2008, the UPC added a section addressing the issue of posthumously conceived children.<sup>28</sup> This section recognizes inheritance rights of posthumously conceived children that were either conceived within thirty-six months or were born no later than forty-five months of decedent's death.<sup>29</sup>

Even though the UPC addresses posthumously conceived children, the issue is not resolved because most states have not adopted the UPC's section on posthumous children and the time limit the UPC has proposed is inadequate. Currently, only Massachusetts has adopted the UPC's section on posthumously conceived children.<sup>30</sup> This section has a strict time period in which the child must either be born or conceived, which may be detrimental to the health of the child and the mother. For example, imagine a mother trying to conceive a posthumous child but is unable to conceive that child until thirty-seven months after the death of the decedent father. In that case, if she carried the child to term (nine months) the child would not be recognized as the child of the decedent because it would have been born one month too late. However, the mother could elect to have an early caesarian section performed so that the child is born within forty-five months of the death of the father. Caesarian births have a higher mortality rate for both the baby and the mother than vaginal births and the premature birth can cause various health risks to the child.<sup>31</sup>

In addition to the UPC, another uniform model law affecting inheritance rights is the Uniform Parentage Act ("UPA"). A majority of the states that have addressed the posthumously conceived child issue have adopted section 707 of the UPA which defines the

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<sup>28</sup> Unif. Probate Code § 2-120 (2008).

<sup>29</sup> *Id.*

<sup>30</sup> Mass. Gen. Laws Ann. ch. 190B, § 2-705 (West).

<sup>31</sup> Barbara Williams Cosentino R.N., LCSW, *Elective Cesarean: Is it for you*, BabyCenter.com, [http://www.babycenter.com/0\\_elective-cesarean-is-it-for-you\\_1498696.bc?page=3](http://www.babycenter.com/0_elective-cesarean-is-it-for-you_1498696.bc?page=3) (last visited Dec. 7, 2013).

status of the posthumously conceived child.<sup>32</sup> The UPA provides that a posthumously conceived child will only be recognized as a child of the decedent if the decedent *spouse* consented to be such child's parent in a writing before death.<sup>33</sup> This provision means that only a parent who was married to the decedent before death can posthumously conceive their child and have that child be considered the child of the decedent. Some states have corrected this limitation of spousal consent to individual consent, but beyond that original limitation there are three additional problems with using the UPA standard as the basis for state inheritance laws.<sup>34</sup>

First, the writing requirement is extremely prohibitive because in order to have such writing, the decedent parent must have known they were going to die and that someone would use their gametes after their death to reproduce. Generally speaking, if a person is taking the time to store their gametes in contemplation of death, then they are likely also preparing an estate plan. Hopefully, the estate planning attorney will be knowledgeable enough to alert this couple to the writing requirement if they happen to live in a UPA state. However, based on the research below in Part IV many estate planning attorneys are not informed of the posthumously conceived child issue and may not know to prepare a writing to preserve the decedent's intent. Additionally, if the parents were storing for infertility or medical purposes or gamete retrieval was done after death, they are automatically excluded because in all likelihood no writing would be left behind regarding intent of the decedent. Currently, cryopreservation clinics store embryos for a given period of time and may not ask their clients what their intent is regarding

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<sup>32</sup> Unif. Parentage Act §707 (2000). *See also*: Ala. Code § 26-17-101; Colo. Rev. Stat. Ann. § 19-4-106 (West); Del. Code Ann. tit. 13, § 8-707 (West); HRS § 584-1 et seq. (West); Minn. Stat. Ann. § 257.51 (West); MO ST T. XII, Ch. 210, Refs & Annot. N.J. Stat. Ann. § 3B:5-10 (West) N.D. Cent. Code Ann. § 14-20-65 (West); Okla. Stat. Ann. tit. 10, § 7700-101 (West); Tex. Fam. Code Ann. § 160.707 (West); Utah Code Ann. § 78B-15-707 (West); Wash. Rev. Code Ann. § 26.26.730 (West); Wyo. Stat. Ann. § 14-2-907 (West). For a description of state statutes applicable to posthumous conception and intestacy to children, *see* Figure 1 *infra* Part III(B)(2).

<sup>33</sup> Unif. Parentage Act §707 (2000).

<sup>34</sup> Bruce A. Fowler, Teresa C. Baird, *Frozen in Time: Planning for the Posthumously Conceived Child*, Colo. Law., June 2008, at 45 – 46.

their embryos until the storage period is about to expire.<sup>35</sup> This means that there is no writing provided to clients evidencing their after death intent.

Second, states are basing their inheritance laws off of a parenting statute. The UPA is designed from a Family Law perspective; that is, in creating section 707, the UPA was concerned with child support obligations of an Estate, rather than inheritance rights of a child.<sup>36</sup> Parentage acts are created to protect the right of a child to be supported by their parent, whether they were intended to be conceived or not.<sup>37</sup> Probate acts are created to devise of property in a way that was likely the decedent's intent.<sup>38</sup> These are two fundamentally different purposes. This means that states who have adopted the UPA's status of a posthumously conceived child as the only law on the issue are severely limiting the rights of children who were intended to be children of the decedent.

Third, requiring a writing as the only proof of intent severely impedes a decedent's actual intent. In other areas of law, intent has been established in several other ways. Land contracts are required to be in writing under the statute of frauds, but Courts often find oral contracts for the sale of land to be valid and enforceable in equity by examining parol evidence and extrinsic factors such as payment for the land and making improvements to it.<sup>39</sup> The courts find that the parties *intended* to create a contract by their actions and words. The same can be done in establishing the intent of a deceased parent. The surviving partner, doctors, friends and family can offer affidavits that the decedent used cryopreservation with the intent of becoming a parent to the child. Additionally, the act of storing gametes or embryos alone can be offered

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<sup>35</sup> Interview with Receptionist, IVFNJ, (Dec. 6, 2014). See Part IV *infra* on how estate planners can help to correct this oversight.

<sup>36</sup> Benjamin C. Carpenter, *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*, 21 Cornell J.L. & Pub. Pol'y 347, 369 (2011)

<sup>37</sup> *Id.* at 370.

<sup>38</sup> *Id.*

<sup>39</sup> Mark S. Dennison, *Circumstances Entitling Purchaser to Relief for Acts Performed in Reliance on Oral Land Contract*, 63 Am. Jur. Proof of Facts 3d 105 (2001).

as proof because a person who did not intend to parent a child would not go through the expense and process of cryopreservation.

Even though these model laws exist, many states have yet to address the issue of posthumous children. In such cases, the courts must decide the child's fate. If a posthumously conceived child is not recognized as being a child of the deceased parent they do not receive a right to inheritance in intestacy and will also be denied Social Security survivor benefits.<sup>40</sup> Accordingly, a child who is one hundred percent genetically the child of a deceased person could get no recognition as such in the eyes of the law.

### **B. State Laws**

As mentioned above, the intestacy laws control ambiguous terms in a decedent's Will. In the case of posthumously conceived children, even if the deceased parent had a valid Will leaving property to their children, the term "children" is usually not defined within the Will or if it is its interpretation may not clearly include children who are conceived after their death. The intestate inheritance rights of posthumously conceived children have only been addressed by thirty states.<sup>41</sup> Some states have created specific statutes dealing with posthumously conceived children and some have established the issue by case law that interprets existing statutes. The problem is that states do not agree on the proper way to treat these children. This can be problematic because federal benefits, such as social security survivor insurance, are based off of state law.<sup>42</sup> If the states disagree on the issue of posthumous children's inheritance rights, then these children will be treated differently depending on which state they live in. In other words, some children will receive the social security benefit because they are considered a child of the decedent, while others will not.

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<sup>40</sup> Kindregan, *supra* note 19 at 441.

<sup>41</sup> See Figure 1 *infra*, Part III(B)(2).

<sup>42</sup> 42 U.S.C. § 416.

In 2004, the United States Court of Appeals for the Ninth Circuit attempted to redress this unfairness by interpreting the federal law regarding social security benefits in a different way.<sup>43</sup> In *Gillett-Netting v. Barnhart*, a married couple was going through fertility treatments when they discovered that the husband had cancer.<sup>44</sup> His chemotherapy would most likely cause sterility, so they decided to preserve his sperm so that the wife could continue fertility treatments.<sup>45</sup> The husband told his wife that he wanted her to use his sperm after his death to conceive.<sup>46</sup> After the husband's death, the wife successfully conceived and gave birth to twins.<sup>47</sup> The wife applied for social security insurance benefits for the twins and was denied because the children were not dependent on the husband as of his date of death.<sup>48</sup> The wife filed a complaint in district court, which found in favor of the Social Security Commissioner, and the wife appealed to the Ninth Circuit.<sup>49</sup> The court reviewed certain factors such as the children were his biological children and found other cases found insurance entitlement to children that did not in fact depend on the deceased wage earner.<sup>50</sup> Based on these factors, the court ruled that if a child is the biological child of the deceased insured, paternity is not disputed and the child is a child of the wage earner for purposes of insurance.<sup>51</sup>

However, in 2012 the United States Supreme Court disagreed with the Ninth Circuit and determined that a posthumously conceived child can only be considered a child of the decedent for Social Security benefits if they are considered a child of the decedent under the

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<sup>43</sup> *Gillett-Netting v. Barnhart*, 371 F.3d 593, 597 (9th Cir. 2004).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 595.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 596-599; citing *Mathews v. Lucas*, 427 U.S. 495, 502 (1976) ("all legitimate children, are statutorily entitled ... to survivorship benefits regardless of actual dependency"); *Smith v. Heckler*, 820 F.2d 1093, 1094-95 (9th Cir.1987) ("Dependency is presumed if a child is legitimate unless adopted by another[.]"); *Doran v. Schweiker*, 681 F.2d 605, 606 n. 1 (9th Cir.1982) ("To establish eligibility for Social Security Insurance survivor benefits, children born of a legitimate marriage need only show that their deceased parent was fully insured.")

<sup>51</sup> *Id.* at 597.

intestacy laws of the State in which the decedent resided at their date of death.<sup>52</sup> This case had similar facts to *Gillett-Netting* in that the wife used her husband’s frozen sperm to conceive and give birth to twins after he passed away from cancer and her application for social security children’s insurance benefits for the children was denied.<sup>53</sup> The arguments made were based on the text of the Social Security Act authorizing such benefits.<sup>54</sup> The wife argued that the definition of “child” in the Act is, “...the child or legally adopted child of an [insured] individual” and since her children are the biological children of the insured, there should be no further inquiry.<sup>55</sup> The Social Security Administration argued that there were other provisions defining child that did not include the Capato twins.<sup>56</sup> The Court focused on one of those definitional provisions in the Act called, “Determination of family status” which provides, “In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State].”<sup>57</sup> The Court, using *Chevron* deference,<sup>58</sup> determined that the Social Security Administration had defined the status of child correctly and that the twins were only entitled to social security benefits if they could inherit under the law of the state in which the decedent died.<sup>59</sup>

This ruling is the reason why the inheritance rights of posthumously conceived children should become uniform among the states. Without similar laws across the United States, posthumously conceived children will be unfairly treated based upon the state in which their

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<sup>52</sup> *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2034 (2012).

<sup>53</sup> *Id.* at 2025.

<sup>54</sup> *Id.* at 2026; 42 U.S.C. § 416.

<sup>55</sup> *Capato* 132 S.Ct. at 2026., quoting 42 U.S.C. §416(e).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* citing §416 (h)(2)(A).

<sup>58</sup> “Chevron deference is appropriate ‘when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’” *Id.* at 2033-34 quoting *United States v. Mead Corp.*, 533 U.S. 218, 226–227 (2001).

<sup>59</sup> *Id.*

parent happened to die a resident of. In order to develop uniformity, the current status of posthumously conceived children's inheritance rights around the country should be examined.

### ***1. States that Deny Inheritance Rights to Posthumously Conceived Children***

The states that have addressed this issue and have decided to deny posthumously conceived children their inheritance rights have mostly done so through case law that interpreted existing statutes. In 2008, the Supreme Court of Arkansas was presented with the issue of whether a posthumously conceived child was entitled to Social Security insurance benefits.<sup>60</sup> Here, a mother who had conceived and bore her husband's child after his death applied for social security child insurance benefits for the child.<sup>61</sup> A child is entitled to such federal benefits if they are considered to be a child of the individual who dies while insured and the status of child is determined by the law of intestacy in the State in which the decedent died.<sup>62</sup> Since Arkansas had never addressed the issue of posthumously conceived children, the court strictly limited itself to the existing Arkansas statutes.<sup>63</sup> The Arkansas statute on posthumous descendants provided that, "[p]osthumous 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."<sup>64</sup> Since this statute strictly requires the child to be conceived before death, the court found that a posthumously conceived child will not inherit in Arkansas.<sup>65</sup>

The Iowa, Nebraska, and New Hampshire existing intestacy laws have also been similarly interpreted.<sup>66</sup> Other states, such as Ohio and Georgia, which have not yet addressed this issue but have similar posthumous descendant statutes are also susceptible to this

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<sup>60</sup> *Finley v. Astrue*, 270 S.W.3d 849 (2008)

<sup>61</sup> *Id.* at 850-52.

<sup>62</sup> *Id.* at 852.

<sup>63</sup> *Id.* at 853.

<sup>64</sup> Ark. Code Ann. § 28-9-210 (West)

<sup>65</sup> *Finley*, 853.

<sup>66</sup> *Beeler supra* note 37; *Amen v. Astrue*, 822 N.W.2d 419 (2012); *Khabbaz, by & through her mother & Next friend, Donna M. Eng v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180 (2007).

interpretation if a strict textualist view is taken in their courts.<sup>67</sup>

## ***2. States Allowing Inheritance Rights to Posthumously Conceived Children Under Limited Circumstances***

As mentioned above, several states have adopted the UPC and UPA definitions of a posthumously conceived child. To help clarify the analysis below, this chart, which lays out the states that have or have not adopted statutes on posthumously conceived children, may serve as a useful reference:

Figure 1.

UPC version <sup>68</sup>	Massachusetts
UPA version <sup>69</sup>	Alabama, Delaware, Hawaii*, Minnesota, Missouri, New Jersey, Oklahoma, Texas, Utah, Washington, Wyoming.
Both UPA and UPC <sup>70</sup>	Colorado, New Mexico, North Dakota
No Statutes on Posthumously Conceived Children	Connecticut, Illinois, Indiana, Kansas, Kentucky, Michigan, Mississippi, Nevada, New York**, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin
OTHER <sup>71</sup>	Alaska***, Arizona***, Arkansas, California, Florida, Georgia, Idaho***, Iowa, Louisiana, Maine, Maryland, Montana***, Nebraska, New Hampshire, South Dakota***, Virginia

\*However, the UPA is not the exclusive means by which determination of paternity can be made.<sup>72</sup>

\*\* The Surrogate Court of New York has allowed posthumously conceived children to inherit through a trust.<sup>73</sup>

\*\*\*These states have adopted the UPC or the UPA, but they have not adopted the newer versions that address posthumously conceived children.

<sup>67</sup> Ohio Rev. Code Ann. § 2105.14 (West); Ga. Code Ann. § 53-2-1 (West).

<sup>68</sup> Mass. Gen. Laws Ann. ch. 190B, § 2-705 (West)

<sup>69</sup> Ala. Code § 26-17-101; Del. Code Ann. tit. 13, § 8-707 (West); HRS § 584-1 et seq. (West); Minn. Stat. Ann. § 257.51 (West); MO ST T. XII, Ch. 210, Refs & Annos;t N.J. Stat. Ann. § 3B:5-10 (West); Okla. Stat. Ann. tit. 10, § 7700-101 (West); Tex. Fam. Code Ann. § 160.707 (West); Utah Code Ann. § 78B-15-707 (West); Wash. Rev. Code Ann. § 26.26.730 (West); Wyo. Stat. Ann. § 14-2-907 (West).

<sup>70</sup> Certain states may have adopted both the UPA and the UPC, but they are only listed under this heading if they have adopted the new provisions concerning posthumously conceived children. *See: Knaplund Presentation, supra* note 8; Colo. Rev. Stat. Ann. § 19-4-106 (West); Colo. Rev. Stat §15-11-115-121 (West); N.M. Stat. Ann. § 45-2-120 (West); N.M. Stat. Ann. § 40-11A-707 (West); N.D. Cent. Code Ann. § 14-20-65 (West); N.D. Cent. Code Ann. § 30.1-04-04 (West).

<sup>71</sup> Alaska Stat. Ann. § 13.12.114 (West); Ariz. Rev. Stat. Ann. § 14-2114 (West); Ark. Code Ann. § 28-9-210 (West), *see also: Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849 (2008); 2004 Cal. Legis. Serv. Ch. 775, p. 92 (A.B. 1910) (West); Fla. Stat. Ann. § 742.17 (West); Ga. Code Ann. § 53-2-1 (West); Idaho Code Ann. § 15-2-108 (West); Iowa Code Ann. § 633.220A (West); La. Rev. Stat. Ann. § 9:391.1 (West); Me. Rev. Stat. tit. 18-A, § 2-109; Md. Code Ann., Est. & Trusts § 3-107 (West); MT ST T. 40, Ch. 6, Pt. 1, Refs & Annos; Neb. Rev. Stat. § 30-2308, *see also: Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012); N.H. Rev. Stat. Ann. § 561:1.

<sup>72</sup> *Doe v. Doe*, 52 P.3d 255 (2002).

<sup>73</sup> *In re Martin B.*, 841 N.Y.S.2d 207 (Sur. 2007).

Some states also allow inheritance rights to posthumously conceived children, but are even narrower than the UPC and UPA's standards. Florida, for example, only recognizes posthumously conceived children's rights to inheritance if the decedent parent specifically provided for them in their Will.<sup>74</sup> California follows the UPA but imposes an additional requirement that the decedent parent provided the name of the person who shall be responsible for posthumously conceiving the child.<sup>75</sup> Louisiana not only requires a writing by the decedent evidencing intent, but also requires that the decedent authorize their *spouse* to use their genetic information to conceive the child after death, and has adopted the UPC's requirement that the child must be born within three years of the decedent's death.<sup>76</sup>

Virginia's statute is even stricter. Virginia requires that the genetic parents were married prior to death, and allows the child to inherit so long as the *father* consented to insemination and either party died within the ten months preceding the child's birth.<sup>77</sup> In the event that an embryo is to be implanted, the resulting child will not be considered a child for inheritance purposes if the implantation occurred before the doctor could be reasonably notified of the death or the decedent consented to be a parent prior to implantation.<sup>78</sup>

### **3. States Allowing Intestate Inheritance Rights to Posthumously Conceived Children**

Other states have taken a more open-minded view on this issue. New Jersey was the pioneer in granting inheritance rights to a posthumously conceived child. In re Estate of Kolacy was a typical case, but came to the New Jersey jurisdiction on unusual circumstances.<sup>79</sup> Mr. and Mrs. Kolacy were a young couple when Mr. Kolacy was diagnosed with leukemia.<sup>80</sup>

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<sup>74</sup> Fla. Stat. Ann. § 742.17 (West).

<sup>75</sup> 2004 Cal. Legis. Serv. Ch. 775, p. 92 (A.B. 1910) (West).

<sup>76</sup> La. Rev. Stat. Ann. § 9:391.1 (West).

<sup>77</sup> Va. Code Ann. § 20-158 (West).

<sup>78</sup> *Id.*; see also: *Knaplund Presentation*, *supra* note 8.

<sup>79</sup> *In re Estate of Kolacy*, 753 A.2d 1257 (Ch. Div. 2000).

<sup>80</sup> *Id.* at 1258.

Fearing infertility, they cryopreserved his sperm before and during chemotherapy.<sup>81</sup>

Unfortunately Mr. Kolacy passed away at the age of twenty-six.<sup>82</sup> Approximately one year later, Mrs. Kolacy utilized Mr. Kolacy's sperm and became pregnant with twin girls.<sup>83</sup> Similar to the above mentioned cases, Mrs. Kolacy applied for social security benefits for the girls and was denied.<sup>84</sup> While her appeal was pending, her attorney knew that the children's social security benefits would be determined by whether state intestacy law considered them children of the decedent; so, she sought to have the New Jersey superior court declare her daughters' the right to inherit under New Jersey law so that they would be considered children of her deceased husband for federal purposes.<sup>85</sup>

The court first considered whether it had jurisdiction because the social security issue was a matter of federal court jurisdiction, even though it required interpretation of New Jersey law.<sup>86</sup> However, the judge determined that he had appropriate jurisdiction to determine the girls' inheritance rights because, even though their father left no estate, there was the remote possibility that they could potentially inherit through his estate, which was a matter of New Jersey jurisdiction.<sup>87</sup> Like the later social security cases mentioned above, New Jersey had in existence a statute on posthumously born children that were conceived during the deceased parent's lifetime.<sup>88</sup> The judge reviewed the legislative history of the statute, finding that there was likely no consideration or even expectation of the issue presented in creating the statute, but more of a historical acknowledgement that husbands can die while their wives are

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1259.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1259-60; *see also: supra* Note 1.

<sup>88</sup> *Id.* at 1260.

pregnant.<sup>89</sup> With that in mind, the judge determined that the intent of the legislature was to have biological children inherit from their parents, whether or not they were conceived before death, and therefore the girls were entitled to inherit from and through their father's estate.<sup>90</sup>

However this is not the end of the story.<sup>91</sup> Five years later, the legislature amended the statute that the judge relied upon.<sup>92</sup> The new statute 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."<sup>93</sup> This new statute does not clarify what "at a particular time" means and does not seem to address inheritance rights of posthumous children, however, New Jersey has decided, when it comes to estate distribution at least, to address all issues of parentage under the New Jersey Parentage Act.<sup>94</sup> The New Jersey Parentage Act, when it comes to children created through ART, has the same requirements as the UPA.<sup>95</sup> However, Kolacy has not yet been overruled in New Jersey, so these new statutes may or may not affect the fate of other posthumously conceived children in the future.

Two years after *Kolacy* was decided, Massachusetts was presented with the same question.<sup>96</sup> In *Woodward v. Comm'r of Soc. Sec.*, the facts were substantially the same as in *Kolacy*, except that the United States District Court for the District of Massachusetts requested that the Massachusetts Supreme Court interpret the issue of inheritance rights.<sup>97</sup> The court held,

In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of "issue" under the Massachusetts intestacy statute. These limited

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<sup>89</sup> *Id.* at 1261.

<sup>90</sup> *Id.* at 1262.

<sup>91</sup> The social security appeal was not published. In an attempt to find out the resolution of that matter, I tried to contact the attorney who represented the plaintiff in this case, but he has since passed away.

<sup>92</sup> 7A N.J. Prac., Wills And Administration § 1573 (Rev.3d ed.).

<sup>93</sup> N.J. Stat. Ann. § 3B:5-8 (West).

<sup>94</sup> N.J. Stat. Ann. § 3B:5-10 (West).

<sup>95</sup> N.J. Stat. Ann. § 9:17-44 (West).

<sup>96</sup> *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (2002).

<sup>97</sup> *Id.* at 536.

circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child. *Woodward*, 760 N.E.2d at 259.

After this case, in 2008, the Massachusetts legislature repealed the statute that the court relied upon when it adopted the UPC.<sup>98</sup> The statute relied upon in *Woodward* was replaced by a new statute with the exact same wording as the New Jersey amended statute.<sup>99</sup> However, in another statute, Massachusetts adopted the UPC verbatim as to posthumous conception.<sup>100</sup> The comments to this statute read, “If a child of assisted reproduction ... or a gestational child ... is conceived posthumously, and if the distribution date arises at the deceased parent's death, then the child is treated as living on the distribution date if the child lives 120 hours after birth and was either (i) in utero no later than 36 months after the deceased parent's death or (ii) born no later than 45 months after the deceased parent's death.”<sup>101</sup> This statute allows posthumously conceived children to inherit, but the effect of the *Woodward* case under these new statutory guidelines is yet to be determined.

The states’ views on inheritance rights for posthumous children are disjointed. While a few states have allowed inheritance rights by case law, some have completely denied rights by statutory interpretation, while others have created or adopted laws that only allow inheritance in certain circumstances. Since reform and uniformity will take several years to complete, parents who are currently utilizing ART must be prepared for all options, including what will

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<sup>98</sup> Mass. Gen. Laws Ann. ch. 190, § 8 (West).

<sup>99</sup> Mass. Gen. Laws Ann. ch. 190B, § 2-108 (West).

<sup>100</sup> Mass. Gen. Laws Ann. ch. 190B, § 2-705 (West).

<sup>101</sup> *Id.*

happen in the event their partner passes away. As such, the only current solution for this issue is to prepare a well drafted estate plan.

#### **IV. Planning for Posthumously Conceived Children in Estate Plans**

The idea of post mortem reproduction is not well known, especially in the legal field. Both general practitioners and attorneys who specialize in estate planning may not know to ask whether couples have gametes or embryos in storage. Many states have continuing legal education or practitioner publications that help guide attorneys in their practice, especially in the complex field of estate planning.<sup>102</sup> Estate planning attorneys rely on these publications, such as a model Estate Planning Questionnaire, to make sure that they are conducting a thorough investigation of the couple or person in order to provide them with adequate and necessary estate planning needs.<sup>103</sup>

The current state of law is heavily slanted towards denying posthumously conceived children any intestate inheritance rights. This fact, coupled with the fact that the ability to conceive a child after the death of a parent is relatively unknown, provides for the possibility of a detrimental oversight in estate planning in which a posthumous child is not provided for. Estate planning attorneys must educate themselves on the possibility of and consequences of posthumous conception. Even if an attorney creates a Will providing for posthumous conception inheritance, they must also prepare for intestate succession because even if their client specifically provides for the child in their Will, these children may still be denied federal benefits if their state laws deny them inheritance rights.<sup>104</sup> The attorney must also do this in

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<sup>102</sup> An example of this would be The New Jersey Practice Series, *supra* note 92.

<sup>103</sup> An Estate Planning Questionnaire is a document that is given to the client in order to assess their financial situation, their family structure, and their wishes upon death.

<sup>104</sup> This is because a Will does not follow intestacy statutes unless a term is ambiguous. Social security benefits may still be denied to the child under state law. See generally: *Beeler*, 651 F.3d at 956 (Posthumously conceived child was denied Social Security benefits, even though her father acknowledged his paternity before his death in a written memorandum); *Capato*, 132 S. Ct. at 2029 (explaining the Social Security Administrations interpretation

case the Will or the provision regarding posthumously conceived children is declared invalid.

First, the estate planning attorney must revise their Estate Planning Questionnaire to encompass this situation and discover which clients may need estate plans that specifically address posthumous conception, by creating specific questions addressing ART and cryopreservation. Unfortunately, Colorado seems to be the only state that has a publication addressing the needs of couples that have utilized cryopreservation methods.<sup>105</sup> In their Estate Planning Questionnaire, there is a question that specifically addresses whether the person or couple has utilized sperm, egg, or embryo storage and what the intent of such stored material is upon death.<sup>106</sup> However, the question alone does not tell the attorney that a special writing may be necessary in order for a posthumously conceived child to inherit from the parent. This is an essential piece of the estate planning process for couples who intend on or may have the option of procreating after death. Without a document establishing intent, in UPA states for example, the child will be forever barred from inheriting from or through the deceased parent.<sup>107</sup>

The Colorado form can be used as a starting point, but no matter how the attorney decides to structure their form, they need to make sure they know the answers to the following questions: Do you have sperm, eggs, or embryos stored in a storage facility? Do you plan on storing sperm, eggs, or embryos in a storage facility? Do you know if you have had or will have fertility issues? Would you want to conceive a child after your partner's death? If the answer to any of these questions is yes or maybe, then the attorney must have a thorough discussion about cryopreservation and death with their client and whether they want a

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of the Act that provides benefits to children provides that a child can inherit so long as their parent acknowledged in writing to be a parent to that child).

<sup>105</sup> Colorado Estate Planning Form 22A, 2011 WL 3863353, 2012 Continuing Legal Education in Colorado, Inc.

<sup>106</sup> *Id.* at question 17.

<sup>107</sup> *Supra* note 1.

posthumously conceived child to inherit from their estate.<sup>108</sup> If the answer is no, the attorney should discuss the possibility of the clients children having posthumously conceived children and if they would like such grand-children to inherit through the deceased parent.<sup>109</sup>

Second, if the client decides they do not want a posthumously conceived child to inherit, then the attorney must specify the definition of “child” in the Will to only include children conceived during decedent’s life.<sup>110</sup> While this may not be necessary in some states due to intestacy interpretation, it clarifies the client’s actual intent in the event a posthumous child is conceived. If the client is currently using gamete storage, the attorney should also make sure that the facility has conforming instructions on how to dispose of the gametes at client’s death.<sup>111</sup>

If the client decides that they want their child to inherit, then an estate planner must know whether the jurisdiction their client resides in has adopted the UPA, the UPC, both, neither, or some other law regarding this situation. Not all states that have adopted both the UPA and the UPC have determined which trumps the other and if not the planner must know and advise their client of the status of the law in both cases.<sup>112</sup> The chart above at Part III can be a useful guideline for practitioners.

If the state has adopted the UPA, the attorney needs to advise their client that the child can only inherit if there is a written consent by the deceased parent evidencing the intent to be a parent.<sup>113</sup> Due to the uncertain nature of the law, the attorney should also prepare a separate notarized document other than a Will or Trust to establish this intent. Additionally, the attorney

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<sup>108</sup> Fowler & Baird, *supra* note 34 at 47.

<sup>109</sup> *Id.* at 48.

<sup>110</sup> *Id.*

<sup>111</sup> *Knaplund Presentation, supra* note 8.

<sup>112</sup> North Dakota, New Mexico, Utah, Washington, and Wyoming have determined the UPC trumps the UPA. *Knaplund Presentation, supra* note 8.

<sup>113</sup> Fowler & Baird, *supra* note 34 at 48.

needs to know if their client is married to the intended parent of their child, due to the spousal requirements of some UPA states.<sup>114</sup>

If the state has adopted the UPC or its wording, there are time restrictions in which the child must be conceived or born that the attorney must make the client aware of.<sup>115</sup> Also, marital status is a concern here, because the UPC assumes that the deceased spouse consented to their spouse using their gametes to conceive a child after their death.<sup>116</sup> If the parents are not married, intent will not be assumed and a writing must be prepared.<sup>117</sup>

If the state has adopted some other law or does not have a statute regarding posthumously conceived children, the work is a bit harder. The planner must first advise the client that the state in which they live has not yet addressed the question and that certain benefits, such as social security and employment benefits may not be guaranteed to that child.

At this point, the attorney should also ask to review any agreements the clients have with the facility regarding treatment of gamete storage upon a client's death so that the facility does not destroy the gametes or embryos when the client's intent is to use them posthumously.<sup>118</sup> The attorney should also advise the client that the posthumously conceived child's inheritance and government benefit rights may be changed if the client moves out of the jurisdiction.<sup>119</sup>

Third, the attorney must prepare the documents necessary to complete their estate plan. The attorney can use their standard Will and, if needed, Trust that is in line with the client's other estate planning needs and simply add some provisions to ensure a posthumously

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<sup>114</sup> *Id.*

<sup>115</sup> *Knaplund Presentation, supra* note 8.

<sup>116</sup> *Knaplund Presentation, supra* note 8.

<sup>117</sup> *Knaplund Presentation, supra* note 8.

<sup>118</sup> *Knaplund Presentation, supra* note 8.

<sup>119</sup> *Knaplund Presentation, supra* note 8.

conceived child will inherit. As mentioned in Part III B, the term “children” is usually defined in a Will. However, the standard definition the attorney is using in their Wills may not be specific enough to include posthumously conceived children. In order to prevent a Will challenge on this technicality, the attorney can define child as:

Any child born to my [spouse] and me shall include a posthumously conceived child by me by means of assisted reproduction whereby [my spouse and I provided the sperm and egg], as long as (1) such child is born during my [spouse’s] lifetime and (2) my [spouse] has acted as such child’s legal guardian unless unable to do so as a result of death or disability. On the written declaration of any descendant of me and my [spouse] and subject to any restrictions contained in such written declaration, a posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant’s ancestors. *Knaplund Presentation, supra* note 8.

This definition specifically allows posthumously conceived children to inherit under the Will, effectively preventing Will challenges against posthumous children based on a definitional term.

Last, the attorney should keep a record of which clients they have prepared posthumous conception estate plans. This way, if the law in the jurisdiction changes, the attorney can change the estate documents to reflect the current law.

Although estate planning is helpful in providing some rights to posthumously conceived children, it doesn’t go far enough to create equality among all children of deceased parents. For true or substantial equality to occur, the intestacy laws regarding posthumously conceived children’s rights must be reformed.

#### **V. Future Recognition of Posthumously Conceived Children’s Inheritance Rights**

Due to the fact that the status of posthumously conceived children’s rights is largely

based in state statute, there needs to be a push for legislation to create some type of uniformity among the states. Uniformity is necessary to ensure children are being treated similarly no matter what state their parents reside in. By adopting a more uniform standard across the country, posthumously conceived children will be entitled to the same rights that children conceived before death are entitled to. They will not be discriminated against based off of the timing of their conception nor be denied federal benefits based on which state their parent happened to die a resident of. In order to create this equality, the legislatures must adopt a standard that adequately addresses the rights these children should be entitled to and the concerns that have shaped the existing laws that deny these rights to posthumously conceived children.

**A. Legislative Concerns Regarding Granting Posthumously Conceived Children  
Inheritance Rights.**

Whenever legislative reform is proposed, there are always arguments against reform. In order to grant posthumously conceived children inheritance rights, we must first address these arguments.

First, the legislatures want to insure that the intent of the decedent is complied with. This is likely the reason why the UPA and Florida require the intent to be established in writing. However, as mentioned above in Part III (A), a writing is not the only way to establish intent and extrinsic evidence, affidavits and the act of storing gametes can be used to show the decedent intend to be a parent to this child.

Second, as mentioned above, legislatures want to ensure orderly administration of estates.<sup>120</sup> Legislatures are concerned about leaving estates open for years and delaying the

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<sup>120</sup> Carpenter, *supra* note 36 at 404.

distribution to the living beneficiaries.<sup>121</sup> This concern is a bit far-fetched in light of the existing estate administration practices leaving estates open for extended periods of time.<sup>122</sup> Uncontrollable events such as selling real estate, waiting for taxing authorities to okay estate and inheritance tax payments, and paying off claims of creditors, are constantly affecting the timely distribution of estates.<sup>123</sup> Such concerns could be reasonably limited by statutorily imposing a waiting period to distribute the funds until all of the frozen genetic information is depleted or destroyed or until the passage of a fair period of time, whichever occurs first.<sup>124</sup>

Third, legislatures have denied inheritance rights to posthumously conceived children by touting concerns for adhering to traditional rules of distribution, specifically the notion that heirs must be living or in gestation at the time of decedent's death.<sup>125</sup> Again, this concern has little weight considering modern practices. Probate law has constantly changed over the years to keep up with modern issues that may arise, such as recognizing the inheritance rights of children born out of wedlock or those that have been adopted.<sup>126</sup> As such, this concern should be discounted.

Fourth, there is a concern about correct payment of estate and inheritance taxes.<sup>127</sup> The taxes owed on an estate distribution depend on who you are distributing the estate to and how large the estate is. For example, New Jersey imposes an inheritance tax on certain distributions to persons other than spouses, parents, children, or charitable entities, no matter how large the estate is.<sup>128</sup> In New Jersey, at least, if a posthumous child is not considered a child of the

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<sup>121</sup> Id. at 406.

<sup>122</sup> Id. at 406.

<sup>123</sup> Id. at 407.

<sup>124</sup> Id. at 409.

<sup>125</sup> Id. at 409.

<sup>126</sup> Id. at 409-410.

<sup>127</sup> Id. at 413.

<sup>128</sup> *Inheritance and Estate Tax Overview*, State of NJ Dept. of Treas., [http://www.state.nj.us/treasury/taxation/inheritance\\_over.shtml](http://www.state.nj.us/treasury/taxation/inheritance_over.shtml) (last updated Sep. 27, 2010).

decedent parent, and that parent or other relative has provided for them in their Will, they will not be exempt from the inheritance tax, depending on the amount devised, as they are considered a stranger to the decedent.<sup>129</sup> In states that impose an inheritance tax and do not recognize posthumously conceived children's rights, if a posthumous child is born and does inherit under their deceased parent's Will, that amount is subject to a state inheritance tax. In these states, the payment is generally due nine to eighteen months after the decedent dies.<sup>130</sup> If a tax is not paid by that date, and the posthumously conceived child is born after that date, there are fines and penalties imposed based upon how many days late the payment is.<sup>131</sup> This can cause problems such as not having enough money to pay the penalties if they exceed the amount of inheritance and overloading state tax assessors with amended returns. If posthumously conceived children were recognized as children of the decedent, then this would not be an issue.

Fortunately, the estate taxes, both state and federal, are not based on whom you give money to, generally speaking, but how much money you have when you die.<sup>132</sup> As such, this tax should not be affected by posthumously conceived children. Of course, there is always the possibility that a person could leave a certain amount to their children who could be taxed, but federal and state estate taxes are not imposed unless the decedent dies with a minimum estate amount. For example, for 2014, the federal government imposes an estate tax on persons dying

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<sup>129</sup> *Id.* Instead of being taxed at zero percent, as a "natural" child would be, the posthumously conceived child would now be taxed at a minimum rate of 15%, if they received more than \$500.

<sup>130</sup> Julie Garber, *State Inheritance Tax Chart: A State Death Tax on Who Inherits Your Property*, <http://wills.about.com/od/stateestatetaxes/a/inheritancetaxchart.htm>, (last visited Dec. 7, 2013).

<sup>131</sup> *Transfer Inheritance and Estate Tax Instructions*; NJ Div. of Tax'n, [http://www.state.nj.us/treasury/taxation/pdf/other\\_forms/inheritance/itrbk.pdf](http://www.state.nj.us/treasury/taxation/pdf/other_forms/inheritance/itrbk.pdf), (last visited Dec. 7, 2013).

<sup>132</sup> Any amounts left to a surviving spouse are not taxed; this is called the marital deduction. 26 C.F.R. § 20.2056(a)-1.

with estates equal to or greater than \$5,340,000.<sup>133</sup> State estate tax exemptions are generally lower, with New Jersey being the lowest and not imposing the estate tax until the decedent's estate is worth \$675,000 or more.<sup>134</sup> While not impossible, people with that amount of wealth usually are creating complex estate plans to minimize Estate Tax liability and the issue of posthumously conceived children may well be accounted for in their Wills and Trusts to address this tax payment issue.

Even if such children are not accounted for or the issue is not addressed in the estate plan, and the State allows posthumously conceived children to inherit, the Estate can file a return based on the situation (having a posthumous child/children vs. not having a posthumous child/children) that would create the most tax liability, and file for a refund in the event the lower tax scenario occurs.<sup>135</sup> The Federal government specifically allows taxpayers to do this by filing a protective claim for refund.<sup>136</sup> The claim for refund states:

Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time which the tax was paid. 26 U.S.C. § 6511 (a).

The estate has nine months from the date of death to file and pay the federal estate tax. An extension of time to file is available which increases the due date by six months, but the tax is still owed on the nine month date.<sup>137</sup> Therefore, the last day to file a protective claim for refund is essentially four years and three months after the date of death. This means that posthumously

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<sup>133</sup> Rev. Proc. 13-35, 2013-47 I.R.B. 11 (2013), available at <http://www.irs.gov/pub/irs-drop/rp-13-35.pdf>.

<sup>134</sup> Garber *infra* note 130.

<sup>135</sup> Carpenter, *supra* note 36 at 414.

<sup>136</sup> Kristy M. Bowden, *Protective Claims for Refund: Protecting the Interests of Taxpayers and the IRS*, 56 Me. L. Rev. 149, 150 (2004).

<sup>137</sup> *General Instructions*, IRS, <http://www.irs.gov/instructions/i706/ch01.html#d0e234> (last visited: Dec. 7, 2013).

conceived children born within four years and three months of the decedent's death will not adversely affect the timely payment of their parent's estate and the legislatures can craft laws that allow for this consideration.

Seeing that these concerns can be overcome by proper drafting, the next step for legislative reform is to determine what limitations and wording is needed in order to effectuate equality among children of deceased parents.

### **B. Proposed Statutes Addressing Posthumously Conceived Children's Inheritance Rights**

Some legal groups have hypothesized ways in which uniformity can be achieved. One source of guidance is not favorable to posthumously conceived children. The Uniform Status of Children of Assisted Conception Act ("Uniform SCACA") has created a blueprint on how to treat children conceived through ART, but it specifically excludes children who were posthumously conceived.<sup>138</sup> It goes further to say that a child conceived after the death of one of their genetic parents is not a child of that parent.<sup>139</sup> Authors and theorists do not advocate for the adoption of this standard, but unfortunately a few states have already adopted it.<sup>140</sup>

The American Bar Association ("ABA") has also created a model act that covers ART children.<sup>141</sup> However, this Act is even narrower than the UPA guidelines currently utilized in many states. Like the UPA, the Act requires written consent, but also imposes disclosures and mental health evaluations on all the parties involved.<sup>142</sup> The problem with requiring mental health evaluations is that it is a subjective determination of whether the parent is fit and they

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<sup>138</sup> Michael K. Elliott, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 Real Prop. Prob. & Tr. J. 47, 49 (2004)

<sup>139</sup> *Id.*

<sup>140</sup> Linda Choe, *What, in the Name of Conception? A Comparative Analysis of the Inheritance Rights of Posthumously Conceived Children in the United States and the United Kingdom*, Syracuse Sci. & Tech. L. Rep., Fall 2011, at 53, 66; Elliott, *supra* note 138 at 49 (as of 2004, North Dakota, Florida, and West Virginia are the only states to adopt USACA, but the effect of their adoption on inheritance rights of posthumously conceived children is yet to be determined).

<sup>141</sup> Choe, *supra* note 140 at 66.

<sup>142</sup> *Id.*

are not required when a couple is able to conceive naturally. Similar to the UPC, the Act imposes a time limit for conception to occur but allows the parties involved to alter that time limit by agreement.<sup>143</sup> This flexibility allows families who know that posthumous conception is a possibility for them to decide how long after death they are going to try to conceive.

The Joint Editorial Board for Uniform Trust and Estate Acts (“JEB”) has also weighed in on how to determine heir status of posthumously conceived children.<sup>144</sup> The JEB proposes three elements: genetic relationship between parent and child, parental consent, and that the conception occurred within a reasonable time after parent’s death, only if the child survived for 120 hours after birth.<sup>145</sup> The JEB did not clarify, however, if the consent should be in writing, must be proved, or can be implied.<sup>146</sup> Critics do not like the use of a “reasonable time period” because it is vague and subjective.<sup>147</sup>

### **C. An All Encompassing Solution**

I would propose that a posthumously conceived child should only be allowed to inherit from their deceased parent so long as it can be shown that the deceased parent consented to be a parent to the child, that child has a genetic relationship to the deceased parent, and such child can only inherit *from* the parent if they are born within four years from date of death.<sup>148</sup> My proposition is a hybrid of the ABA and JEB proposals and may be the right starting point for uniformity among states. I agree with the ABA’s proposal that consent should be a requirement, but I do not agree that intent should have to be established solely in writing. The written requirement is an unnecessary barrier to affording children the rights they would have

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 67.

<sup>145</sup> *Id.*

<sup>146</sup> Susan N. Gary, *Posthumously Conceived Heirs Where the Law Stands and What to Do About It Now*, Prob. & Prop., Mar./Apr. 2005, at 32, 35.

<sup>147</sup> Choe, *supra* note 140 at 66.

<sup>148</sup> I propose a different standard for inheriting *through* the parent *infra*.

received if their parents had been fertile or had conceived before their death. It effectively discriminates against couples with fertility issues. Consent is needed to show that the decedent intended to be a parent to the child, but, as mentioned above at Part III(A) consent can be proven by the mere act of storing genetic information for purposes of procreation and affidavits by spouse, doctors, friends, and family.

My proposal also draws from the JEB requirements of having a genetic relationship between the deceased parent and child and the imposition of a time limit. Requiring the genetic relationship ensures that the decedent is in fact the actual parent of the child and eliminates the risk of the child accidentally inheriting from someone they are not related to. The time limitation requirement is important, but should be specified rather than left to a reasonable period. Having four years to procreate would allow the living parent the time to find out the legal implications of posthumously conceiving, make any health or habit changes necessary to successfully conceive, save the necessary funds to conceive, and allow for several implantations in the event conception is unsuccessful. However, The strict cut-off at four years is necessary. When an estate is finally distributed, that should be the end of the administration. However, if a posthumously conceived child is born after the estate is distributed and is entitled to inherit from it, the heirs or beneficiaries who have already received their distribution will be required to pay back to the estate their portion of inheritance that they were “over paid,” so to speak, so that the new child can receive their share. This can be problematic because it does not create a definitive end to the estate and the heirs and beneficiaries may have already exhausted the funds that they received and possibly were taxed on. If the state adopted this proposed time limit then the birth of a posthumous child would be of no consequence because there would be enough time to determine and correctly pay any estate or inheritance

tax due.<sup>149</sup>

I would also propose that a posthumously conceived child should inherit *through* the parent for an unlimited time period so long as the child is living within a specified period after the decedent's death. This would allow the child to inherit from other persons other than their deceased parent in the event they are not born within the four year period proposed. The specified period should be based either on the set time period to inherit in the decedent's Will or by intestacy statutes on survivorship. This time limit is necessary so that the timely distribution of the decedent's estate is not disrupted and to avoid a parent conceiving a child for the purpose of that child inheriting from a distant relative.

Last, drawing from the JEB, I advocate for states to require facilities that provide cryopreservation to inform their clients about the possibility of posthumously conceiving a child, but the absence of disclosure should not prohibit a posthumously conceived child from inheriting. States can require gamete storage facilities to alert all of their clients that posthumously conceived children may not have the same rights as children conceived before death and such facilities should direct the client to speak to an estate planning attorney to facilitate their wants and needs when it comes to estate distribution. This would allow the opportunity for parents to educate themselves on their rights and the rights of their children without preventing the posthumous child from inheriting.

## **VI. Conclusion**

In a world where medical advancements are making what used to be impossible possible, such as ART and posthumous conception, the laws are slow to catch up. Courts and legislatures are using outdated laws to determine the rights of individuals created using modern

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<sup>149</sup> Ideally, I would like to see the state time period be extended to five years, but the Federal law on filing protective refunds would need to be amended to allow for that.

day technology. These posthumously conceived children are no less human and are entitled to be treated for exactly who they are: genetic descendants of their parents. The timing of their birth should be of no consequence to their status so long as the deceased parent consented to their birth, either expressly or implicitly, and their birth does not adversely disrupt the administration of their parent's estate. Their status can only be protected by taking affirmative steps to protect their rights both presently and in the future. Presently, there needs to be education among people utilizing cryopreservation with the intent to procreate. The parents need to have proper estate planning in place so that their children are protected as much as possible from becoming the victims of poorly considered intestacy law. The laws need to be reformed so that the status of these children is protected and they are entitled to be treated as a child of the deceased parent.