Valparaiso University Law Review

Volume 38
Number 1 *Fall 2003*

*pp.*267-315

Fall 2003

The "Art" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate

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THE "ART" OF INHERITANCE: A PROPOSAL FOR LEGISLATION REQUIRING PROOF OF PARENTAL INTENT BEFORE POSTHUMOUSLY CONCEIVED CHILDREN CAN INHERIT FROM A DECEASED PARENT'S ESTATE

Perhaps the most important area of legal inquiry today is the interaction between law and technology, for it is at this point that law either becomes a tool for shaping the future or an obsolete inconvenience circumvented by increasing technological innovation. . . . The development of modern reproductive technology and its widespread availability present an important challenge to the law of inheritance: change with technology or pass into obsolescence.[1]

I. INTRODUCTION

John and Mary, his second wife, intended to have children, but they had not yet conceived a child when John was diagnosed with cancer. John and Mary decided to have some of John's sperm frozen in fear that the chemotherapy he was undergoing would render him infertile. John's health quickly deteriorated, and he died before Mary could be impregnated with his cryopreserved sperm. Almost twenty-seven months later, Mary successfully conceived a child through in vitro fertilization using John's frozen sperm. Sarah, the biological child of John and Mary, was born nearly three years after the death of her father. Nathan and Emily, John's children from his first marriage, were concerned that this new child would result in the dilution of their shares of their father's estate. Nathan and Emily filed suit, arguing that Sarah should not be entitled to a portion of John's estate because he did not intend for her to be conceived and because she was born more than nine months after his death.[2]

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1 James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 744-45 (1998).

2 *See infra* note 84 and accompanying text (discussing the significance of the nine-month period).

Sarah was conceived through modern artificial reproductive technologies ("ARTs").[3] These technologies may now result in children being conceived long after their parents' deaths and also raise many issues, including property rights in reproductive materials[4] and government benefits and entitlements.[5] However, the scope of this Note is limited to examining the impact of ARTs on the law of inheritance. Because states have an interest both in carrying out the wishes of the deceased and in the timely settlement of the deceased's estate, the idea of a posthumously conceived child[6] claiming a share of the deceased parent's estate potentially compromises the interests of the other parties involved in the administration of the estate. Given that posthumous conception is a present reality—both in feasibility and practice—courts must be prepared to address the competing claims that will arise in the context of estate administration.

This Note will address two issues that should be considered in determining whether a posthumously conceived child is a child of the deceased parent for purposes of inheritance: (1) intent—whether the father knowingly agreed to the conception of a child with his sperm after his death, and (2) time—whether a period of limitations for filing a claim

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3 For a discussion of modern reproductive technologies, see *infra* Part II.A.

4 For a brief discussion of the property interest in reproductive materials, see *infra* notes 88-96 and accompanying text; *see also* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 280-81 (Ct. App. 1993) (concluding that the argument raised by the decedent's children that the decedent had no ownership or possessory interest in his sperm once it left his body was "self-defeating"); Andrea Corvalan, Comment, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 338-39 (1997) (discussing the impact of classifying reproductive materials as property, capable of being bequeathed, because otherwise a donor's interest in his sperm would remain with him and consequently die with him). *Hecht* was the first, and is currently the only, case to address the question whether gametes could be bequeathed. Bailey, *supra* note 1, at 748.

5 According to the Social Security Administration's ("SSA") regulations:

> To decide whether you have inheritance rights as the natural child of the insured, we use the law on inheritance rights that the State courts would use to decide whether you could inherit a child's share of the insured's personal property if the insured were to die without leaving a will.

20 C.F.R. § 404.355(b)(1) (2003). For a discussion of whether social security survivor's benefits should be made available to posthumously conceived children, see generally 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).

6 A "posthumously conceived child" is "a child [conceived] after the death of one or both of the biological parents." Cindy L. Steeb, Note, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 141 (2000).

against the estate should be imposed on the child.[7] Part II briefly describes the current ARTs that have led to this controversy and provides an overview of inheritance rights for children.[8] Part III presents the problems with the current status of the law regarding the rights of posthumously conceived children in light of developing reproductive technologies.[9] Part IV proposes an amendment to the Uniform Probate Code ("UPC") as a possible solution to the controversy.[10]

II. BACKGROUND

Understanding the need for inheritance laws that not only embrace current ARTs but also are flexible enough to accommodate future ARTs requires an explanation of the existing ARTs, as well as an overview of how inheritance rights historically developed with respect to children who have been adopted, born out of wedlock, posthumously born, or posthumously conceived.

A. *Current ARTs*

ARTs assist infertile couples in conceiving through noncoital methods, which are methods that do not involve sexual intercourse.[11] The oldest of these methods is artificial insemination ("AI").[12] AI involves artificially inserting sperm either into the vagina, into the cervical canal, or directly into the uterus.[13] The seminal fluid may be drawn from the woman's husband (artificial insemination homologous—"AIH"), from a donor (artificial insemination heterologous—"AID"), or from a combination of the husband and donor

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7 Because current case law only addresses posthumous conception with cryopreserved sperm, much of this Note will focus on children conceived posthumous to their fathers' deaths. However, children may also be conceived from cryopreserved ova, or eggs, after their mothers' deaths, and the standards should be the same.

8 *See infra* Part II.

9 *See infra* Part III.

10 *See infra* Part IV.

11 Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter?*, 11 BYU J. PUB. L. 1, 3 (1997).

12 Steeb, *supra* note 6, at 139-40. AI has been performed on animals for centuries. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1986). The first successful AI occurred in the fourteenth century when the semen of a stallion was used to impregnate an Arab mare. *Id.* The first successful human AI was performed in England in 1770. *Id.*

13 Christine A. Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 337 (1994).

(combined artificial insemination—"CAI").[14] The sperm may be inserted into the woman immediately, or it may be frozen and used for AI up to ten years later.[15] Long viability periods for reproductive material increase the chance that conception could occur many years after the donor's death.[16] On average, seven insemination attempts over 4.4 menstrual cycles are required to establish pregnancy.[17] Only about 40% of patients successfully become pregnant through AI.[18]

A more expensive and less successful method is in vitro fertilization ("IVF"), the procedure by which eggs are removed from a woman's ovaries and fertilized with sperm outside her body.[19] The ova may be from the mother or from a donor and may be fertilized with fresh or previously frozen sperm.[20] The resulting "preembryos" are then implanted in the mother's womb or frozen for later use.[21]

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[14] *Id.* at 337. The donor in AID is usually a man who is compensated for making a sperm deposit. Shapiro & Sonnenblick, *supra* note 12, at 236; *see also* Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 976 & n.38 (1996).

[15] Djalleta, *supra* note 13, at 337. Sperm is frozen and stored in a nitrogen-filled tank at -328° Fahrenheit. Shapiro & Sonnenblick, *supra* note 12, at 234.

[16] Amy L. Komoroski, Comment, *After* Woodward v. Commissioner of Social Services [sic]: *Where Do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297, 303 (2002). The viability of frozen sperm varies, depending on the treatment it receives. *Id.* at 302-03. For a discussion of the viability of cryopreserved sperm and eggs, see Bailey, *supra* note 1, at 818.

[17] Monica Shah, Comment, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 549 (1996).

[18] *Id.* Of the more than 20,000 babies born by AI in the United States each year, approximately 1,500 are born to unmarried women. Shapiro & Sonnenblick, *supra* note 12, at 241; *see also* Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 671 (1985).

[19] Djalleta, *supra* note 13, at 337. This method is generally used when the egg is prevented from passing through the fallopian tubes because the oviducts are blocked. ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 87 (1995). Louise Brown, the first baby conceived by means of IVF, was born in England in July, 1978. *Id.* at 89. The first baby conceived in the United States by means of IVF, Elizabeth Carr, was born on December 28, 1981. *Id.* In 2000, the combined pregnancy success rates for IVF, GIFT, and ZIFT were as follows: 37.6% of women under the age of thirty-five, 32.2% of women thirty-five to thirty-seven years old, 24.6% of women thirty-eight to forty years old, and 16.0% of women greater than forty-one years old. National Center for Chronic Disease Prevention and Health Promotion, *2000 Assisted Reproductive Technology Success Rates*, *at* http://apps.nccd.cdc.gov/art00/nation00.asp (last visited Nov. 17, 2003).

[20] Djalleta, *supra* note 13, at 338.

[21] *Id.*

One variation of IVF is gamete intrafallopian transfer ("GIFT").[22] GIFT involves the separate transfer of sperm and unfertilized eggs into the fallopian tubes.[23] This method differs from regular IVF procedures because fertilization occurs inside the body rather than inside a petri dish.[24] Another variation, zygote intrafallopian transfer ("ZIFT"), involves placing the embryo via catheter into the fallopian tube about eighteen hours after fertilization.[25] Both variations may use donor ova and sperm as well as cryopreserved embryos.[26] IVF and its variations allow for the possibility of conception after the death of the father or mother.[27]

Surrogacy is another possible method of reproduction.[28] In the simplest case, an unmarried surrogate mother is impregnated with the sperm and egg of a married couple.[29] A second alternative is for an unmarried surrogate mother to be inseminated with sperm from the father or a donor.[30] A third option is for a married couple to contract with a married surrogate to undergo implantation of donated sperm and eggs.[31] As with AI, IVF, and their variations, frozen sperm or ova may

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22 BLANK & MERRICK, *supra* note 19, at 87; *see also* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 498 n.6 (1996).

23 BLANK & MERRICK, *supra* note 19, at 87; *see also* Elizabeth Price Foley, *Human Cloning and the Right to Reproduce*, 65 ALB. L. REV. 625, 631 n.45 (2002).

24 BLANK & MERRICK, *supra* note 19, at 87.

25 *Id.*; *see also* Foley, *supra* note 23, at 631 n.46.

26 BLANK & MERRICK, *supra* note 19, at 87.

27 Komoroski, *supra* note 16, at 303.

28 Djalleta, *supra* note 13, at 339. In such arrangements, there may be as many as six individuals who qualify as the parents of the resulting child. Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 48 (2001).

29 *Id.* In this case, the identity of the father is unequivocal because the surrogate is unmarried. *Id.* Thus, the natural father may easily establish his paternity either through (1) acknowledgment, an agreement with the surrogate, or (2) a lawsuit if the surrogate changes her mind and wishes to keep the child as her own. *Id.* However, the child has two potential mothers: the wife who is the natural mother and the surrogate who gives birth. *Id.* Most states declare the natural mother to be the legal mother. *See, e.g.*, 410 ILL. COMP. STAT. 535/12(9) (2000) ("[T]he names of the biological mother and biological father . . . shall be entered on the child's birth certificate, and the names of the surrogate mother and surrogate mother's husband, if any, shall not be on the birth certificate.").

30 Djalleta, *supra* note 13, at 339. Here, the child has four potential parents: the natural father, the sperm donor if one exists, the natural mother, and the surrogate mother. *See* Roberts, *supra* note 28, at 48.

31 Roberts, *supra* note 28, at 49. In this more complicated scenario, there are three potential mothers (wife, surrogate, and egg donor) and three potential fathers (husband, surrogate's husband, and sperm donor). *Id.* Presumptions of paternity in these situations exist in some states. *Id.*

be used in surrogacy, which provides the opportunity for posthumous conception.

Because ARTs allow for the possibility of conception after the death of the father or mother, thus increasing the number of children who could qualify as takers under state laws of inheritance, the impact of ARTs on the laws of inheritance is unavoidable. Before analyzing how the laws of inheritance should be amended to respond to ARTs, an overview of the evolution of inheritance rights in children is provided.

B. Transfers to Children

Children, like adults, may receive property from their parents upon the parents' deaths through testamentary transfer, intestate succession, or non-probate transfers such as trusts and life insurance.[32] What the child takes upon the death of the parent is relatively clear when the child is a natural child born during the lives of both natural parents.[33] The child may take under the parent's will or under state pretermission statutes, which provide for children either born after a parent's death or unintentionally left out of a will.[34] In the absence of a will, the default rules of intestate succession apply.[35]

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[32] For a brief history of estate administration, see Sarajane Love, *Estate Creditors, the Constitution, and the Uniform Probate Code*, 30 U. RICH. L. REV. 411, 415-25 (1996). There are three major functions of probate, which is the administration of the decedent's estate: (1) to provide evidence of transfer of title, (2) to protect creditors by requiring payment of debts, and (3) to distribute the decedent's property according to his or her intent. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, & ESTATES 39 (6th ed. 2000).

[33] *See* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206 (2001).

[34] *See infra* notes 65-68 and accompanying text.

[35] Foster, *supra* note 33, at 206. People may choose not to make a will because they cannot face the fact of their own deaths or the cost involved. DUKEMINIER & JOHANSON, *supra* note 32, at 71. State laws of descent and distribution govern the distribution of the property of the person who dies intestate. *Id.* at 72. Generally, the disposition of the decedent's personal property is governed by the law of the state where the decedent was domiciled at death, and the disposition of the decedent's real property is governed by the law of the state where such real property is located. *Id.* The UPC, originally promulgated in 1969 and revised in 1993, is a model code that states can choose to adopt or can use in organizing their own probate codes. *Id.* at 40. The portion of the code relating to intestacy, found in Article II, is as follows:

> (a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this Code, except as modified by the decedent's will.
> (b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by

However, "[o]ne of the increasingly notable shortcomings of modern probate law is its failure to provide adequate guidelines governing the inheritance rights of children outside the traditional nuclear family."[36] Despite a lack of clarity, with the passage of time and the evolution of the law, adopted children, children born out of wedlock, and children conceived before but born after the death of one or more of the natural parents have all received recognition as "children" who have inheritance rights to their parents' property.[37]

1. Adopted Children

Inheritance rights of adopted children vary by state. In some states, adopted children can inherit only from their adoptive parents and relatives within the adoptive family.[38] In others, adopted children can inherit from both their adoptive and natural parents and relatives within both families.[39] In still others, where the adoption is by the spouse of a

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> intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed his [or her] intestate share.

UNIF. PROBATE CODE § 2-101 (amended 1993), 8.I U.L.A. 79-80 (2001).

36 Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94 (1996).

37 *See infra* Part II.B.1-3.

38 *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 1-207 (2001). For purposes of inheritance:

> [a]n adopted child shall be treated as a natural child of his [or her] adopting parent or parents. On adoption, a child no longer shall be considered a child of either natural parent, except that upon adoption by the spouse of a natural parent, the child shall still be considered the child of that natural parent.

Id. § 1-207(a); *see also* Hall v. Vallandingham, 540 A.2d 1162, 1164-65 (Md. Ct. Spec. App. 1988) (holding that the adopted child's right to inherit from his or her natural parents is eliminated upon adoption).

39 *See, e.g.*, TEX. PROB. CODE ANN. § 40 (Vernon 2003). For purposes of inheritance:

> an adopted child shall be regarded as the child of the parent or parents by adoption, such adopted child and its descendants inheriting from and through the parent or parents by adoption and their kin the same as if such child were the natural child of such parent or parents by adoption, and such parent or parents by adoption and their kin inheriting from and through such adopted child the same as if such child were the natural child of such parent or parents by adoption. The natural parent or parents of such child and their kin shall not inherit from or through said child, but said child shall inherit from and through its natural parent or parents.

Id.; *see also* Hamilton v. Butler, 397 S.W.2d 932, 935 (Tex. Civ. App. 1965) (awarding the adopted granddaughter of the intestate decedent the entirety of his estate over his blood-

natural parent, the child's inheritance rights continue in both the natural parents as well as the adoptive parent.[40] Furthermore, adopted children are considered brothers and sisters of their adopting parents' natural children for purposes of intestate succession to the estate of the natural child or children of the adopting parents.[41]

The state of Washington follows the view that adopted children should inherit only from their adoptive parents and the adoptive parents' relatives. In *In re Estates of Donnelly*,[42] the trial court held that a child could inherit from her natural grandfather through her deceased natural father, even though the child had been adopted by her mother's new husband.[43] The appellate court affirmed that decision, finding no ambiguity in the statute and "no explicitly expressed intent to deprive an adopted child [her] right to inherit from [her] intestate grandparent."[44] The Supreme Court of Washington reversed the decision of the trial

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related nieces and nephews because the law gave the adopted child the same right to inherit from her adoptive parents as that of a natural child, and she was the only grandchild of the decedent).

40 *See, e.g.*, UNIF. PROBATE CODE § 2-114(b), 8.I. U.L.A. 91. For purposes of inheritance:

> [a]n adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

Id. (second and third alterations in original); *see also* N.M. STAT. ANN. § 45-2-114(b) (Michie 1995) (adopting a provision similar to UPC section 2-114(b)).

41 Estate of Kuhn v. Kuhn, 267 N.E.2d 876, 879 (Ind. Ct. App. 1971). Prior to the revision of the probate code, the Indiana courts held that adopted children could not inherit from the adopting parents' natural children. Jacobs v. Schulmeyer, 70 N.E.2d 435, 435 (Ind. Ct. App. 1947). In 1953, however, the legislature altered the code so that adopted children could inherit from their stepbrothers and stepsisters. *Id.* IND. CODE § 29-1-2-8 (1953).

42 502 P.2d 1163 (Wash. 1972).

43 *Id.* at 1164. The decedent and his wife had two children, Kathleen and John, Jr. *Id.* John, Jr. and his wife, Faith, had a baby girl, Jean, but John, Jr. died less than one year after her birth. *Id.* Approximately two years later, Faith married Richard Hansen. *Id.* Shortly after the marriage, Richard adopted Jean with Faith's consent. *Id.* In his will, the decedent devised all of his property to his wife, making no provision for the distribution of his property in the event that his wife predeceased him. *Id.* Because the sole beneficiary of his will predeceased him, he died intestate. *Id.* (referring to the common law rule as set forth in *In re* Estate of Sims, 235 P.2d 204, 205 (Wash. 1951)). His daughter, Kathleen, was named administrator. *Id.* Kathleen petitioned the court to declare that her niece, the decedent's granddaughter, could not inherit from the decedent's estate. *Id.* Kathleen argued that Jean was not her grandfather's heir because she was adopted. *In re* Estates of Donnelly, 486 P.2d 1158, 1160 (Wash. Ct. App. 1971).

44 *Id.* at 1161.

court, concluding that the legislature intended to sever an adopted child from his or her natural bloodline for purposes of intestate succession.[45]

The supreme court concluded that the child was an "issue" of the decedent, her grandfather, and under normal circumstances would share his estate as dictated by the descent and distribution statutes.[46] However, the court then proceeded to determine whether the child was divested of her statutory inheritance right by another state statute, which provided that "[a] lawfully adopted child shall not be considered an 'heir' of his natural parents for purposes of this title."[47] Thus, the issue was whether the statute also precluded an adoptee from representing the natural parent and thereby inheriting from the natural grandparent.[48] Noting that Washington's adoption statute divested the natural parent of all legal rights and obligations associated with the child and provided that the child would be entitled to inherit only from his or her adoptive parent or parents, the Washington Supreme Court held that the child was not entitled to inherit from her grandfather's estate.[49]

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[45] *Donnelly*, 502 P.2d at 1168. The court found that the legislative purpose was clear and that the issue "should . . . be decided in the context of the broad legislative objective of giving the adopted child a 'fresh start' by treating [her] as the natural child of the adoptive parent, and severing all ties with the past." *Id.* at 1166.

[46] *Id.* at 1165. The decedent's estate would normally pass by the statute governing intestacy, which provides in pertinent part:

> The net estate of a person dying intestate . . . shall be distributed as follows: . . . the entire net estate if there is no surviving spouse, shall descend and be distributed . . . . To the *issue* of the intestate; if they are all in the same degree of kinship to the intestate, they shall take equally, or if of unequal degree, then those of more remote degree shall take by representation.

WASH. REV. CODE § 11.04.015(2)(a) (1998) (emphasis added). Issue "includes all of the lawful lineal descendants of the ancestor." *Id.* § 11.02.005(4). A descendant is "[o]ne who follows in lineage, such as a child or grandchild—but not a collateral relative." BLACK'S LAW DICTIONARY 455 (7th ed. 1999). Thus, both the daughter and granddaughter were each a descendant and issue of Donnelly. *Donnelly*, 502 P.2d at 1165. The daughter would take as the most immediate descendant, and the granddaughter would take by representation as the sole issue of her deceased father. *Id.*

[47] *Id.* at 1165 (citing WASH. REV. CODE § 11.04.085). The court had previously held that the legislature's intent was that an adopted child could not inherit a share of the natural parent's estate by intestate succession. *Id.* at 1165.

[48] *Id.*

[49] *Id.* at 1166. The statute provided that an adopted child "shall be . . . the child, legal heir, and lawful issue of his or her adopter or adopters, entitled to all rights and privileges, including the right of inheritance . . . and subject to all the obligations of a child . . . begotten in lawful wedlock." *Id.* (emphasis omitted) (citing WASH. REV. CODE § 26.32.140 (repealed 1985)).

2. Nonmarital Children

At common law, a child born out of wedlock was *filius nullius*, a child of no one, and could not inherit from either parent.[50] In order to deal with this unfortunate condition in a more just and humane way, the states turned to the civil law, which provided several methods by which the child could be legitimated.[51] Currently, all jurisdictions permit inheritance from the mother, but the rules regarding inheritance from the father vary.[52]

In *Trimble v. Gordon*,[53] the Supreme Court held an Illinois statute denying a nonmarital child inheritance rights from the father unconstitutional under the Equal Protection Clause.[54] The statute in question provided that nonmarital children could inherit only from their mothers, but allowed marital children to inherit from both their mothers and their fathers.[55] The purported purpose of the statute was to address

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50 DUKEMINIER & JOHANSON, *supra* note 32, at 115.

51 Pfeifer v. Wright, 41 F.2d 464, 465-66 (10th Cir. 1930). Judge McDermott, in his dissent, noted that the Roman law provided six methods of legitimation: (1) subsequent marriage of the parents; (2) consecration of the child to the state's use; (3) adoption; (4) the father's last will; (5) special dispensation from the emperor; and (6) the father's recognition. *Id.* at 470. Thus, the civil law places nonmarital children "upon the same footing as if born in lawful wedlock." *Id.* (citation omitted).

52 DUKEMINIER & JOHANSON, *supra* note 32, at 115; *see, e.g.*, ARK. CODE ANN. § 28-9-209 (Michie 1987) (a nonmarital child may inherit from and through the child's mother, but the child may inherit from and through the child's father only if there is an adjudication of paternity, a written acknowledgment or consent by the father, subsequent intermarriage by the parents, or a written promise by or court order for the father to support the child); COLO. REV. STAT. § 15-11-109(b)(II) (1987) (a nonmarital child is allowed to inherit when paternity is proven by a preponderance of the evidence); TENN. CODE ANN. § 31-2-105(a)(2) (2001) (a nonmarital child is a child of the mother, but the nonmarital child is a child of the father only if the natural parents are subsequently married or if paternity is established by an adjudication either before the father's death or after his death upon a showing of clear and convincing proof).

53 430 U.S. 762 (1977).

54 *Id.* at 776. The Equal Protection Clause states, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Deta Mona Trimble was the illegitimate daughter of Jessie Trimble and Sherman Gordon. *Trimble*, 430 U.S. at 763-64. On January 2, 1973, a paternity order found Gordon to be the father of Deta Mona. *Id.* at 764. He was ordered to pay fifteen dollars per week in child support. *Id.* Thereafter, Gordon supported Deta Mona and openly acknowledged her as his child. *Id.* He was murdered in 1974, leaving an intestate estate consisting only of an automobile worth approximately $2,500. *Id.* The probate court determined that Gordon's only heirs for purposes of intestate succession were his father, mother, brother, two sisters, and a half brother. *Id.*

55 *Id.* at 763. The statute that permitted nonmarital children to inherit only from their mothers stated:

the state's interest in the promotion of legitimate family relationships.[56] However, the Court rejected this purpose and reasoned that promoting family relationships was unrelated to illegitimate children's interests in the estates of their fathers and mothers.[57] The Court further held that the alleged difficulty in proving paternity did not justify statutory disinheritance.[58] Finally, the Court rejected the argument that the decedent can assure his nonmarital children an inheritance by naming them in a will.[59]

In *Lalli v. Lalli*,[60] the Supreme Court upheld a New York statute that permitted a nonmarital child to inherit from the father only if the father had married the mother or had been formally adjudicated by a court during the father's lifetime.[61] The statute required illegitimate children

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> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate.

Id. at 764-65 (citing ILL. REV. STAT. c. 3, § 12 (1973)). The Probate Act further allowed marital children to inherit from both parents. *Id.* at 763 (citing ILL. REV. STAT. c. 3, § 2-1(b)).

56 *Id.* at 768.

57 *Id.* at 768 n.13. Reflecting on the purported purpose, the Court commented:

> This purpose is not apparent from the statute. Penalizing children as a means of influencing their parents seems inconsistent with the desire of the Illinois Legislature to make the intestate succession law more just to illegitimate children. Moreover, the difference in the rights of illegitimate children in the estates of their mothers and their fathers appears to be unrelated to the purpose of promoting family relationships.

Id. The Court further stated, "the Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Id.* at 769.

58 *Id.* at 772. Prior to his death, Gordon was found to be the father of Deta Mona in a state-court paternity action, and was ordered to pay child support. *Id.* The Court determined that the original adjudication was equally sufficient to establish the child's right to claim a share of her father's estate, "for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances." *Id.*

59 *Id.* at 774. This reasoning was illogical because had Gordon devised his estate to Deta Mona in his will, the case would not have been before the Court. *Id.* The Court said, "Hard questions cannot be avoided by a hypothetical reshuffling of the facts." *Id.*

60 439 U.S. 259 (1978).

61 *Id.* at 275. Robert Lalli was the illegitimate son of Mario Lalli, who died intestate in 1973. *Id.* at 261. Robert's mother, who died in 1968, never married Mario. *Id.* After Mario's widow was appointed administrator of his estate, Robert petitioned the Surrogate's

to provide a judicial order of filiation, a particular form of proof of paternity, in order to inherit from their fathers by intestate succession.[62] Although this requirement was not imposed on legitimate children or children born out of wedlock whose parents married each other, the court found that the statute did not discriminate against the child.[63] The court noted that the state's primary goal in enacting the statute was to provide for the just and orderly disposition of property at death.[64]

3. Posthumously Born Children

Under common law, a pretermitted child, a child born after the will was written or even after the parent's death, could cause the will to be revoked.[65] Today, most states provide that an afterborn child is entitled

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Court for a compulsory accounting. *Id.* Robert claimed that he and his sister Maureen Lalli, as Mario's children, were entitled to inherit from his estate. *Id.*

62 *Id.* at 261-62. The statute provided in part:

> An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

Id. (quoting N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2) (McKinney 1967)).

63 *Id.* at 276. The Court noted that section 4-1.2 operated unfairly when it was applied to those illegitimate children who could establish a relationship to their deceased fathers without serious impact on the administration of estates. *Id.* at 272-73. Fairness, however, was not the issue the Court was concerned with:

> [F]ew statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.

Id. at 273.

64 *Id.* at 268. The Court determined that this interest was directly implicated when illegitimate children seek to inherit from their fathers because of the unusual problems of proof that are involved. *Id.* Establishing "[t]hat the child is the child of a particular woman is rarely difficult." *Id.* (quoting *In re* Ortiz, 303 N.Y.S.2d 806, 812 (1969)). On the other hand, proof of paternity may be difficult when the father is not part of the traditional family unit. *Id.*

65 79 AM. JUR. 2D *Wills* § 555 (2002). The common law rule was:

> [T]he marriage of a man and the birth to the union thus consummated of a child capable of inheriting from him—both events occurring subsequent to the execution of his will—revoke the will so as to permit the after-born child to take a share as an heir of the testator, in the absence of a provision for the benefit of the child, or of anything in the will to indicate that it was made in contemplation of marriage.

Id. (footnotes omitted). The birth of a posthumous child was also within this rule. *Id.*

to some share of the estate even if he or she was omitted from the decedent's will, so long as the omission was not intentional.[66] Pretermission laws are based on the notion that the testator merely forgot to amend his will even though he or she was aware of the omitted child.[67] Though the pretermission statutes cover technically all afterborn children, including posthumous children, "the purpose of a pretermission statute is to presume the deceased's intent regarding his living children by presupposing that these children were overlooked rather than intentionally excluded."[68]

In 1884, the Supreme Judicial Court of Massachusetts considered whether a child born nearly three months after her father's death should receive a share of her father's estate.[69] The court held that the child was entitled to a share of the estate to the same extent as if her father had died intestate.[70] The court reasoned that excluding the child from a proportionate share of her father's estate would be unreasonable because it would leave her "entirely dependent upon public support or the charity of individuals."[71] Thus, to deny a share in the estate to any

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66 Bailey, *supra* note 1, at 792. The UPC provides a share to the omitted afterborn child unless "it appears from the will that the omission was intentional." UNIF. PROBATE CODE § 2-302(b)(1) (amended 1993), 8.I U.L.A. 136 (2001). The intent must be evident in the will itself; extrinsic evidence showing that the omission was intentional is not permitted. *Id.* However, if a testator made nonprobate transfers to the omitted child, the testator's statements or other extrinsic evidence can be used to show the testator's intent that these transfers bar the child from claiming a pretermitted share. *Id.* § 2-302(b)(2), 8.I U.L.A. 136; *see also In re* Estate of Padilla, 641 P.2d 539, 544 (N.M. Ct. App. 1982) (holding that a testator's will declaring that he had no children whom he had omitted from the will did not disinherit his nonmarital child because "an affirmative, not negative, indication of intention must appear on the face of the Will"); Estate of Peterson, 442 P.2d 980, 983 (Wash. 1968) (holding that a testator's will declaring that he had no children did not disinherit a child whose paternity he denied because there was "no indication in the will that the testator remembered the [child] and intended to disinherit him").

67 Bailey, *supra* note 1, at 794.

68 *Id.* at 793.

69 Bowen v. Hoxie, 137 Mass. 527, 527-28 (1884). In his will, the child's father had named his wife and the other nine children then living as beneficiaries of a $50,000 trust. *Id.* at 527.

70 *Id.* at 528. The court relied on PUB. STS. c. 127, § 22, which provided that "when a child of a testator, born after his father's death, has no provision made for him by his father in his will or otherwise, he shall take the same share of his father's estate that he would have been entitled to if his father had died intestate." *Id.* at 527-28. The court further noted that "marriage and the birth of a posthumous child are an implied entire revocation of a will executed when single." *Id.* at 530.

71 *Id.* at 528.

posthumously born child "would not only shock the testator himself, but would be contrary to the common feelings of humanity."[72]

Similarly, the Supreme Court of Kentucky held that a posthumous, nonmarital child was an heir of his father, and thus entitled to a share of his father's estate.[73] The court concluded that a clear and convincing evidence standard, rather than a preponderance of the evidence standard, was the appropriate standard of proof that should be required of an illegitimate, posthumous child in proving paternity.[74] The court defined the standard as follows: "Clear and convincing does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent minded people."[75] The court determined that the child had established this proof by showing that (1) the nature of the mother's relationship with the decedent was consistent with him being the father; (2) the mother had informed others that decedent was the father; and (3) the mother and decedent had planned to be married the weekend he unexpectedly died.[76]

In another case involving both illegitimacy and posthumous birth, a child born nearly nine months after her father committed suicide was granted survivor's benefits under Title II of the Social Security Act.[77] The

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72 *Id.*

73 Fykes v. Clark, 635 S.W.2d 316, 318 (Ky. 1982). The court initially determined that Joseph had standing to prove his paternity because it saw no difference between the case at hand and an illegitimate child born before the father's death who does not attempt to prove paternity until after the father's death. *Id.* at 317.

74 *Id.* at 317-18.

75 *Id.* at 318 (citing Clemens v. Richards, 200 S.W.2d 156, 159 (Ky. 1947)).

76 *Id.*

77 Smith v. Heckler, 820 F.2d 1093 (9th Cir. 1987). Title II of the Social Security Act states:

> Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child–
> (A) has filed application for child's insurance benefits,
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and
> (C) was dependent upon such individual–
> (i) if such individual is living, at the time such application was filed,
> (ii) if such individual has died, at the time of such death, or

issue was whether the child was dependent on her father within the meaning of the act.[78] In order to establish dependency, the child had to show that her deceased father was in fact her father and that he was living with her or contributing to her support at the time of his death.[79] The Ninth Circuit applied the test from *Doran v. Schweiker*,[80] and determined that even though the father did not provide baby clothes, diapers, bottles, or other tangible items, he still satisfied the support requirement by making contributions to the mother's support.[81] Therefore, the child was considered indirectly dependent on her father.[82] The court stressed that an objective standard rather than a subjective standard of intent to support was to be applied because "[i]ntent cannot be shown when the father [has] no knowledge of the pregnancy."[83]

> (iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits, shall be entitled to a child's insurance benefit . . . .

42 U.S.C. § 402(d)(1) (2000).

78 *Heckler*, 820 F.2d at 1095. Hossler and Smith, who were both separated from their spouses, began an intimate relationship in May, 1982. *Id.* at 1094. They spent almost every night and all of their free time together. *Id.* They shared expenses for cars, groceries, and laundry. *Id.* Hossler often paid for the gas for Smith's car. *Id.* Hossler killed himself on July 27, 1982. *Id.* The next day, Smith confirmed her pregnancy. *Id.* She gave birth to Ariana on April 4, 1983. *Id.*

79 *Id.* at 1095; *see also* 42 U.S.C. § 416(h)(3)(C)(ii).

80 681 F.2d 605 (9th Cir. 1982). If the father's support is "commensurate with the needs of the unborn child at the time of the father's death," then the child is qualified for survivor's benefits. *Id.* at 608-09 (quoting Adams v. Weinberger, 521 F.2d 656, 660 (2d Cir. 1975)).

81 *Heckler*, 820 F.2d at 1095. In *Doran*, the father had made two contributions to the mother's support—he helped her move to another home and repaired her roof. 681 F.2d at 609. The *Heckler* court disagreed with the Administrative Law Judge's conclusion that the gifts to the mother could not be construed as evidence of the father's intent to contribute support to Ariana because he had no actual knowledge of the pregnancy. 820 F.2d at 1095. The court noted that "few parents purchase [baby] items before or during the third month of pregnancy." *Id.* at 1096 (alteration in original) (quoting *Doran*, 681 F.2d at 609).

82 *Id.* at 1095-96.

83 *Id.* at 1095. The court stated:

> There is no logical reason for imposing an intent requirement during the early months of pregnancy when we require no manifestation of separate support for the child. Intent cannot be shown when the father had no knowledge of the pregnancy. Even when the father has knowledge of the pregnancy, intent may be impossible to prove in early pregnancy cases, because support of the baby would likely be as indirect as it was in *Doran*.

Id. at 1095-96.

As illustrated, states began to recognize that adopted children, nonmarital children, and posthumously born children should not be denied inheritance rights, in essence punished, for the accidents of their birth. In light of current and future ARTs, the definition of "child" is broadening even more. Children are now being conceived, not just born, after the death of one or both natural parents through the use of cryopreserved reproductive materials. Courts may soon be faced with questions surrounding the survivorship and inheritance rights of these children, but the present laws do not adequately provide guidance.

4. Posthumously Conceived Children

Under present law, posthumous children born to the widow of a deceased father are treated as "in being" and are able to inherit if the child is born alive within either 280 or 300 days after the father's death.[84] The 280-300 day gestation period presumes that the child is the married decedent's legitimate child.[85] A child who is born after being cryopreserved as a preembryo would fall within this statutory period because the child would have been conceived before the parent's death.[86] However, if the decedent left only frozen gametes rather than embryos in storage, a child born from those gametes would not be conceived until after the parent's death, and thus, would not satisfy the statutory period.[87]

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84 DUKEMINIER & JOHANSON, *supra* note 32, at 97. The 280-day presumption has been established by the judicial system. *Id.* Two-hundred-and-eighty days is approximately forty weeks, or nine months. *Id.* On the other hand, the Uniform Parentage Act ("UPA") presumes that the normal period of gestation is 300 days. UNIF. PARENTAGE ACT § 204 (amended 2000), 9B U.L.A. 311 (2001).

85 *Id.* § 204(2), 9B U.L.A. 311.

86 Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1154 (1997). The embryo, however, may not be implanted and born until years after the parent dies. *Id.* If the mother dies, a surrogate could gestate the embryo. *Id.*

87 *Id.* An example of the need to address this situation can be drawn from the *Rios* case. Barry Brown, *Courts Have Been Reluctant to Extend Property Rights Analysis into the Area of Reproductive Authority, Leaving Them Unable to Articulate a Cogent Basis for Their Decisions*, 6 STAN. L. & POL'Y REV. 73, 77 (1995). Mario and Elsa Rios, two very wealthy Americans, were killed in a plane crash in 1983. *Id.* At the time of their deaths, they had two pre-embryos preserved at an Australian medical center. *Id.* There was speculation that the pre-embryos might be considered beneficiaries or heirs at law to the decedents. *Id.* A California trial court finally settled the matter, holding that the pre-embryos were neither the heirs nor the property of the estate. *Id.*

An initial issue in posthumous reproduction is whether reproductive materials may be classified as property.[88] If they are not property, then a donor's interest in his sperm remains with him and, consequently, will die with him.[89] Accordingly, legal postmortem insemination would be impossible, and the issue whether resulting children would have intestacy rights would not need to be addressed.[90]

Courts have often found that defining "property" is a difficult task.[91] Some judges and commentators recognize that the term "property" more accurately refers to the relationship between things and people rather than only to things.[92] *Black's Law Dictionary* defines property as "the right of ownership," but does not identify the meaning of the term "ownership" within the definition.[93] However, the law recognizes that when someone demonstrates sufficient control over something, he or she is deemed to "own" that thing.[94] On the other hand, the law does not recognize ownership in items that cannot be placed under someone's physical control.[95] Therefore, the proper inquiry is whether anyone can demonstrate sufficient physical control over genetic material.[96]

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[88] Corvalan, *supra* note 4, at 338. According to The American Fertility Society, reproductive materials, including sperm, are the property of the donors. Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213, 218 (1996).

[89] Corvalan, *supra* note 4, at 338-39. For an argument that sperm should not be considered property, see Bonnie Steinbock, *Sperm as Property: In the Absence of a Compelling Argument Against Posthumous Reproduction, Individual Autonomy Should Prevail*, 6 STAN. L. & POL'Y REV. 57, 64-66 (1995).

[90] Corvalan, *supra* note 4, at 339.

[91] Bailey, *supra* note 1, at 757; *see, e.g.*, Brotherton v. Cleveland, 923 F.2d 477, 481 (6th Cir. 1991) ("The concept of 'property' in the law is extremely broad and abstract. The legal definition of 'property' most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object.").

[92] Bailey, *supra* note 1, at 757.

[93] BLACK'S LAW DICTIONARY 1232 (7th ed. 1999). The term "ownership" is separately defined as "[t]he collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control." *Id.* at 1131.

[94] Bailey, *supra* note 1, at 757.

[95] *Id.* at 758.

[96] The courts have appeared to reach a consensus and have classified gametes as having an "interim" property interest, somewhere between an object and a life. Corvalan, *supra* note 4, at 339. While there is no straightforward property interest in gametes as there is in an object such as a car or a television set, there is also not a complete absence of a property interest in gametes as there is in a person or a life. *Id.*

The California Court of Appeals faced this issue in *Hecht v. Superior Court*,[97] when it considered whether a decedent's sperm was "property" that could be bequeathed to his girlfriend by will.[98] Nine days before he committed suicide, the decedent wrote a letter stating his intent that his girlfriend, Deborah Hecht, use his preserved sperm to have a child.[99] The trial court ordered the sperm destroyed, but Hecht was successful in seeking an immediate stay on the verdict.[100] The appellate court reversed the order to destroy the sperm, finding that "Hecht is not only the residual beneficiary specified therein, but the will evidences the decedent's intent that Hecht, should she so desire, is to receive his sperm stored in the sperm bank to bear his child posthumously."[101]

The appellate court initially determined that the decedent's interest in his cryogenically preserved sperm was "property" over which the probate court had jurisdiction.[102] In order to reach this decision, the appellate court was confronted with the question, "What is property?"[103] To answer this question, the court relied on a provision of the California Probate Code, which provided that property is "anything that may be the subject of ownership and includes both real and personal property and any interest therein."[104] Therefore, the decedent had a right to bequeath his sperm, in which he had an ownership interest while he was living, to his girlfriend.[105]

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97 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

98 *Id.* at 281-84.

99 *Id.* at 277. The letter stated, "I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah [Hecht] will decide—as I hope she will—to have a child by me after my death. I've been assiduously generating frozen sperm samples for that eventuality." *Id.*

100 *Id.* at 279-80.

101 *Id.* at 283-84. The court noted, in dicta, that in light of the UPA and UPC sections 6407 and 6408, "it is unlikely that the estate would be subject to claims with respect to any such children." *Id.* at 290.

102 *Id.* at 283. The court concluded that the argument raised by the decedent's children that the decedent had no ownership or possessory interest in his sperm once it left his body was "self-defeating." *Id.* at 280-81 (using the rationale of Moore v. Regents of Univ. of Cal., 51 Cal. 3d 120, 136-37 (1990)).

103 *Id.* at 281.

104 *Id.* (citing CAL. PROB. CODE § 62 (West 2002)).

105 *Id.* at 283. Although the court concluded that the sperm was part of the decedent's estate, it did "not address the issue of the validity or enforceability of any contract or will purporting to express [the] decedent's intent with respect to the stored sperm." *Id.* The court also addressed the argument that public policy forbade the artificial insemination of the decedent's girlfriend because she was an unmarried woman. *Id.* at 284-88 (discussing Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986)).

In reaching its decision, the *Hecht* court noted that only one other court, a French court, had addressed the property interest in reproductive materials.[106] In *Parpalaix v. CECOS*,[107] Alain Parpalaix, who was suffering from testicular cancer, made one deposit of sperm at the Center d'Etude et de Conservation du Sperme ("CECOS"), but left no instructions as to the future use of the sperm.[108] At the time of the deposit, Alain was living with Corinne, whom he later married.[109] Two days after their marriage, Alain died.[110] Soon thereafter, Corinne requested his sperm deposit from CECOS, which denied the request just as other centers had denied other widows' requests.[111] Corinne, joined by Alain's parents, pursued the matter in court, where they contended that as his natural heirs, widow and parents, they had become the legal owners of the sperm and CECOS had broken the bailment contract.[112] They also argued that they had a moral right to the sperm.[113] Among its arguments, CECOS contended that (1) it owed a legal obligation only to the donor, not to the wife; (2) because sperm is "an indivisible part of the body, much like a limb, [or] an organ," it is not inheritable absent express instructions; and (3) the act of depositing sperm was strictly for

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106 *Id.* at 287.

107 Shapiro & Sonnenblick, *supra* note 12, at 229-33. Shapiro and Sonnenblick obtained their information concerning the *Parpalaix* case from the Gazette du Palais, September 15, 1984, at 11-14. *Id.*

108 *Id.* at 229-30. The complication in this case was that the sperm bank assumed that Alain's sperm would be used only if he survived the treatment and not if he died. *Id.* at 231 (stating CECOS' argument that "since Alain failed to state his wishes in regard to the sperm's future use, and since he and Corrine were not married at the time he made the deposit, his intentions . . . were unclear[; therefore], the sperm deposit should not be turned over").

109 *Id.* at 230.

110 *Id.*

111 *Id.* (observing that CECOS' procedures did not provide for the return of the sperm without prior instruction from the depositor).

112 *Id.* CECOS referred Corinne to the Ministry of Health, which had previously found "that both the husband and the wife must consent to [AI]." *Id.* However, the Ministry decided not to address the matter until a later time. *Id.* Corinne, reacting with outrage, pursued the matter in court. *Id.* She and Alain's parents argued that CECOS had broken its contract by not returning Alain's sperm to his natural heirs, who were the true owners. *Id.* They relied on a provision of the French Civil Code, which stated, "In the case of death of the person who made the bailment, the thing bailed may be returned only to his heir." *Id.*

113 *Id.* at 231. Corinne's attorney urged the court to "[l]et her give life to this child, the fruit of a love that she goes on expressing with quiet determination. It is her most sacred right." *Id.*

therapeutic purposes, to aid Alain psychologically, and that his wife giving birth to his child was not a therapeutic matter.[114]

The French court expressly declined to apply ordinary contract principles as suggested by Corrine's family, finding that human sperm could not be characterized as movable, inheritable property.[115] Instead, the court determined that the sole issue was *intent*—whether Alain Parpalaix intended his widow to be artificially inseminated with his sperm and whether that intent was "unequivocable."[116] The court found that the testimony of Alain's widow and his parents established his desire to make his wife the mother of his child.[117]

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[114] *Id.* Before discussing the parties' contentions:

> the [court] acknowledged and briefly described the difficulties that French laws governing inheritance rights and illegitimacy would impose on a child born "post-mortem." By strict interpretation of the Civil Code . . . any child born more than 300 days after the putative father's death is deemed illegitimate. Even if the reach of the article were to be miraculously interpreted or legislatively altered to establish paternity, the child would be barred from inheriting through his father pursuant to another article of the code which states that to inherit, the child must exist at the time of death and then expressly disqualifies "[o]ne who is not yet conceived."

Id. at 231-32 (citations omitted).

[115] *Id.* at 232. The court further characterized sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive." *Id.* Shapiro and Sonnenblick explained, "This fundamental right must be jealously protected, and is not to be subjected to the rules of contracts. Rather, the fate of the sperm must be decided by the person from whom it is drawn." *Id.*

[116] *Id.* The court took all relevant factors into consideration. *Id.* Thus, the absence of a written document showing intent did not by itself preclude Corinne from using Alain's sperm. *Id.*

[117] *Id.* Corinne was eventually artificially inseminated with Alain's sperm, but she did not become pregnant. *Id.* at 233. According to Shapiro and Sonnenblick:

> Although the *Parpalaix* decision has been generally acclaimed as eminently humane, it has been criticized by doctors and lawyers alike. The court's order is a victory for the widow and even for the father who can sire a child from the grave, but it may be detrimental to the child. Though the court permitted Corinne Parpalaix to continue expressing her love for Alain by bearing his child, nowhere in the *Parpalaix* decision did it address and consider the best interests of the child. Commentators have suggested that the child could suffer psychologically from being conceived by a dead man. How such psychological effects would differ from those experienced by a child born to an unmarried woman by AID or a child who, at a very young age, loses his father, remains to be explained.

Id. at 246-47 (footnotes omitted).

The first case in the United States to address the actual intestacy rights of children conceived posthumously was *Hart v. Shalala*.[118] On June 4, 1991, Nancy Hart gave birth to a baby girl, Judith, almost thirteen months after the death of her husband, Edward.[119] Judith was conceived by GIFT three months after her father's death.[120] Nancy applied for survivor's benefits for Judith approximately one year after her birth.[121] The SSA concluded that Judith was not Edward's legal child and denied Nancy's claim on several grounds.[122] First, Judith did not qualify as her father's heir for intestacy purposes because she was neither alive at his death nor born within 300 days after his death.[123] Second, Judith was considered an illegitimate child because her father's death legally dissolved the marriage between him and Judith's mother.[124] However, during proceedings before the Louisiana district court, the Social Security Commissioner announced that Judith Hart would be paid survivor's benefits.[125] The Commissioner stated that "in light of [r]ecent advances in modern medical practice, particularly in the field of reproductive medicine," the resolution of the significant public policy issues "should involve the executive and legislative branches, rather than the courts."[126]

Similarly, a mother sought Social Security benefits for her twin daughters, who were conceived by IVF and born nearly eighteen months after their father's death, in *In re Estate of Kolacy*.[127] The state urged the

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118 *See* Banks, *supra* note 5, at 251-57 (citing and discussing Hart v. Shalala, No. 94-3944 (E.D. La. Dec. 12, 1994) (unpublished opinion)).

119 *Id.* at 251.

120 *Id.* For a description of the GIFT procedure, see *supra* notes 22-24 and accompanying text.

121 Banks, *supra* note 5, at 251.

122 *Id.* at 251-52.

123 *Id.* at 252.

124 *Id.* Judith was unable to prove filiation within the one-year-after-death statute of limitations because she was only ten days old when the time limitation expired in her case. *Id.* Further, Judith's birth certificate was not available, and her mother was recovering from childbirth and was unable to file a petition. *Id.*

125 *Id.* at 255.

126 *Id.* at 256 (alteration in original).

127 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). On February 7, 1994, William Kolacy was diagnosed with leukemia. *Id.* at 1258. His doctors advised him to begin chemotherapy as soon as possible. *Id.* The morning after the diagnosis, William and his wife, Mariantonia, decided to harvest William's sperm in fear that he would be rendered infertile by either the disease or its treatment. *Id.* After one month of chemotherapy, William underwent a second harvesting of sperm and deposited it in the same sperm bank. *Id.* On April 15, 1995, William passed away. *Id.* Almost a year after his death, Mariantonia underwent an IVF procedure uniting William's sperm and her eggs. *Id.*; see also *supra*

Superior Court of New Jersey not to adjudicate the case for a number of reasons, including the assertion that the decision whether to grant Social Security benefits is strictly a federal matter.[128] However, the court decided that a present determination of the twins' status as heirs was appropriate "because of the effect it has on their general legal and social status and because of the impact that it may have upon property rights as they evolve over a period of time."[129]

The statute at issue provided, "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."[130] From this provision, the court discerned a basic legislative intent that children should be able to take property directly from their parents and through their parents from relatives.[131] The court further observed that the general intent should prevail over the literal reading of the statute due to the emergence of new reproductive technologies that the legislature had not had reason to address in the statute.[132] The court noted that the legislature would probably need to deal with the difficult legal issues that evolving ARTs

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notes 19-21 and accompanying text for a description of the IVF procedure. Mariantonia gave birth to Amanda and Elyse, twin girls, on November 3, 1996, slightly more than eighteen months after their father's death. *Kolacy*, 753 A.2d at 1258.

128 *Id.* at 1259-60. The State argued that the case was not justiciable because Mariantonia was asserting that her children were entitled to Social Security benefits, which are federal rights that should be restricted to federal tribunals. *Id.* at 1259. The State further argued that "because William Kolacy left no assets and thus had no estate at the time of his death, there is really no point in determining who are his heirs under New Jersey law." *Id.* at 1260.

129 *Id.* The court noted that William might have an estate at a future date, yet the reality that the children could take from his parents or collateral relatives if they died intestate was a more significant reason for a determination. *Id.* The children might also have inheritance rights under the wills of their father's relatives if declared his heirs. *Id.*

130 *Id.* (citing N.J. STAT. ANN. § 3B:5-8 (West 1983)).

131 *Id.* at 1262.

132 *Id.* at 1261-62.

create.[133] Ultimately, the court declared that Amanda and Elyse were the legal heirs of William under New Jersey's intestate laws.[134]

In a similar case, the Supreme Judicial Court of Massachusetts was asked to answer the certified question whether posthumously conceived children enjoyed the same inheritance rights as those of natural children under Massachusetts' intestate succession law.[135] As in *Kolacy*, Warren and Lauren Woodward arranged to have some of Warren's semen medically withdrawn and preserved after he was diagnosed with leukemia and advised that the treatment might leave him sterile.[136] Warren then underwent a bone marrow transplant, which was not successful.[137] Almost two years after his death, Lauren gave birth to twin girls, who were conceived through AIH using their father's preserved sperm.[138]

In January 1996, Lauren applied for Social Security survivor benefits for her two children, as well as for herself.[139] Her eligibility for such

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133 *Id.* The court declared:

> The evolving human productive technology opens up some wonderful possibilities, but it also creates difficult issues and potential problems in many areas. 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.... It would undoubtedly be both fair and constitutional for a Legislature to impose time limits and other situationally described limits on the ability of after born children to take from or through a parent. In the absence of legislative provision in that regard, it would undoubtedly be fair and constitutional for courts to impose limits on the ability of after born children to take in particular cases.

Id.

134 *Id.* at 1264.

135 Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002). A "certified question" is "[a] point of law on which a U.S. court of appeals seeks guidance from either the U.S. Supreme Court or the highest court in a state." BLACK'S LAW DICTIONARY 220 (7th ed. 1999). The certified question in *Woodward* was:

> If a married man and woman arranged 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?

760 N.E.2d at 259.

136 *Id.* at 260.

137 *Id.*

138 *Id.*; see *supra* note 14 and accompanying text for a description of AIH.

139 *Woodward*, 760 N.E.2d at 260.

benefits hinged on her children's eligibility.[140] The SSA rejected her claims, concluding that she had failed to establish that the twin girls were her husband's "children" within the meaning of the Social Security Act.[141] Lauren then presented evidence, including a judgment of paternity and amended birth certificates that added her deceased husband as the twins' father, to the SSA, but the agency remained unpersuaded.[142] She then brought her claim before a United States Administrative Law Judge, who concluded that because the children were not entitled to inherit under Massachusetts intestacy and paternity laws, they did not qualify for Social Security benefits.[143] Lauren sought a declaratory judgment from the United States District Court for the District of Massachusetts.[144] The district court judge certified the question to the Supreme Judicial Court of Massachusetts because no directly applicable Massachusetts precedent existed as to the issue of whether the children possessed intestacy rights.[145]

Lauren argued that under Massachusetts law of intestate succession, posthumously conceived children, because of their genetic connection with the decedent, "must *always* be permitted to enjoy the inheritance rights of the deceased parent's children."[146] On the other hand, the government argued that posthumously conceived children should *never* enjoy intestacy rights because they are not "in being" at the time of the father's death within the meaning of the statute.[147]

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140 *Id.* at 260 n.3. Lauren was claiming both "child's benefits" and "mother's benefits" under the SSA. *Id.* at 260. "Mother's benefits" are provided to the widow of a fully insured individual if she has to care for a child. *Id.* at 260 n.3 (citing 42 U.S.C. § 402(g)(1) (2000)).

141 *Id.* at 260. The Act defines children as the "child or legally adopted child of an individual." *Id.* at 260 n.4 (citing 42 U.S.C. § 416(e)). The Act also establishes a requirement of dependency. *Id.*; *see supra* note 77 and accompanying text.

142 *Woodward*, 760 N.E.2d at 261.

143 *Id.* The Administrative Law Judge reasoned that "the children were not 'ascertainable heirs as defined by the intestacy laws of Massachusetts,' because they were neither born nor in utero at the date of the husband's death and 'the statutes and cases contemplated an ascertainable child, one who had been conceived prior to the father's death.'" *Id.* at 261 n.6 (citations omitted in original).

144 *Id.* at 261; *accord In re* Estate of Kolacy, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000) (noting that mother of posthumously conceived children had also sought declaratory judgment).

145 *Woodward*, 760 N.E.2d at 261. The Massachusetts Supreme Court was aware of only two cases that had addressed the issue: *Hecht* and *Kolacy*. *Id.* at 261 n.9. *Hecht* is discussed at *supra* notes 97-106 and accompanying text. For a discussion of *Kolacy*, see *supra* notes 127-134 and accompanying text.

146 *Woodward*, 760 N.E.2d at 262 (emphasis added).

147 *Id.*

The statute did not provide any definitive guidance, so the court considered whether and to what extent, consistent with the purposes of Massachusetts intestacy law, a child resulting from posthumous reproduction may take as an intestate heir of the deceased genetic parent.[148] The court addressed three powerful state interests: (1) the child's best interests, (2) the state's interest in orderly administration of estates, and (3) the genetic parent's reproductive rights.[149]

Taking these interests into consideration, the court held that in certain limited circumstances, a posthumously conceived child might enjoy inheritance rights as "issue" under the Massachusetts intestacy statute.[150] The court acknowledged that these limited circumstances exist when the surviving parent demonstrates a genetic relationship between her child and the decedent, and when there is evidence that the decedent *consented* to posthumous conception and to the support of the resulting child.[151] In this case, the court found that although the deceased husband was the genetic father of the wife's children, that fact alone was not sufficient to establish legal parentage.[152] At the time, there was no evidence presented of the deceased husband's consent to support such children.[153] Consequently, the court did not grant Social Security benefits to the twins.[154]

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148 *Id.* at 264. The court began its analysis with the intestacy law of Massachusetts. *Id.* at 262. Section 1 of the statute provides that "issue" of a decedent are entitled to inherit a fixed portion of his estate subject to debts, expenses, and the rights of the surviving spouse. MASS. GEN. LAWS ANN. ch. 190, § 1 (West 1993). The statute itself does not define "issue," though in the context of intestacy the term is generally understood to mean "all lineal (genetic) descendants, and now includes both marital and nonmarital descendants." *Woodward*, 760 N.E.2d at 263 (footnote omitted). Another provision states that "[p]osthumous children shall be considered as living at the death of their parent," but once again fails to define the term "posthumous children." *Id.* at 264; *see also* MASS. GEN. LAWS ANN. ch. 190, § 8. The court pointed out that the statute does not contain an express requirement that posthumous children must "be in existence" at the time of their father's death. *Woodward*, 760 N.E.2d at 264. "In the absence of express legislative directives, [the court] construe[s] the Legislature's purposes from statutory indicia and judicial decisions in a manner that advances the purposes of the intestacy law." *Id.*

149 *Id.* at 265; *see also infra* Part III.A-C.

150 *Woodward*, 760 N.E.2d at 272.

151 *Id.* The court further noted that a posthumous child's claim for succession rights may be precluded by time limitations, but it was not going to address such limitations in the present case. *Id.* at 259.

152 *Id.* at 271.

153 *Id.* The court noted, however, that the wife could come forward with other evidence as to her deceased husband's consent to posthumously conceive children. *Id.*

154 *Id.*

As ARTs advance, the number of posthumously conceived children will continue to multiply, as will the complex ethical, moral, legal, and social issues that surround their births. Existing case law has confirmed that solutions outside the adversary process must be found, as the process only considers the interests and rights of the parties in the case at hand. As the *Hart* court contemplated, the legislature should be involved in recommending a comprehensive scheme that would provide more certainty and predictability for families considering posthumous conception.[155]

III. ANALYSIS

This Part identifies the legal problems that arise in determining under what circumstances a posthumously conceived child should share in the deceased parent's estate. In considering whether a posthumously conceived child is a child of the deceased parent for purposes of inheritance, several factors should be considered. Part III.A discusses the importance in promoting the best interests of the posthumously conceived child.[156] Part III.B discusses the state's interest in the timely administration of estates.[157] Part III.C considers the importance of determining the deceased's intent to conceive a child posthumously.[158] Part III.D examines the current proposals that address the inheritance problems surrounding the birth of posthumously conceived children.[159] Based on these considerations, a proposal is then offered for a revision to the UPC that can serve as a model for state statutory amendment.

A. *Best Interests of the Posthumously Conceived Child*

Whenever a child is involved in any type of legal dispute, there is concern to promote and protect that child's best interests.[160] Among the

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155 *See supra* text accompanying note 126.

156 *See infra* Part III.A.

157 *See infra* Part III.B.

158 *See infra* Part III.C.

159 *See infra* Part III.D.

160 For example, many states consider the best interests of the child in awarding custody. The child custody statute in Indiana provides, "The court shall determine custody and enter a custody order in accordance with the *best interests of the child.* In determining the best interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors . . . ." IND. CODE. § 31-17-2-8 (1998) (emphasis added). The best interests of the child are also considered in awarding child support. *See* In *re* Marriage of Beecher, 582 N.W.2d 510, 513 (Iowa 1998) (recognizing both parents' duty to provide adequate support for their children).

many rights and protections afforded to all children is the right to financial support.[161] Many children receive this support from their parents or, if their parents are deceased, from their parents' estates.[162] Government benefits and entitlements exist for those children who do not receive sufficient financial support from either their parents or deceased parents' estates.[163] The same rights and protections should be granted to posthumously conceived children, because although they "may not come into the world the way the majority of children do . . . they are children nonetheless."[164]

Granting government benefits and entitlements to posthumously conceived children is one method of providing for their financial needs.[165] However, increasing the number of children on public assistance increases the burden placed on taxpayers. Public policy dictates that children should be provided for as completely as possible, from their parents' resources, thereby alleviating this burden.[166] Therefore, when a deceased parent's estate could sufficiently support a posthumous child, another option would be to grant that child inheritance rights. Hence, placing an outright ban on the ability of posthumously conceived children to inherit or receive survivor's benefits would be contrary to their best interests and, arguably, the public's interest.[167]

While the best interests of posthumously conceived children are of great importance, they are not conclusive in the context of intestacy

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161 Woodward v. Comm'r Soc. Sec., 760 N.E.2d 257, 265 (Mass. 2002).

162 See *supra* notes 65-68 and accompanying text for a discussion of pretermission.

163 Child poverty rates vary widely across demographic groups. Temporary Assistance for Needy Families, 4TH ANNUAL REPORT TO CONG., ch. IX (April 2002), *at* http://www.acf.hhs.gov/programs/opre/ar2001/chapter09.htm (last modified May 22, 2002). There are also significant variations in child poverty rates according to marital status. *Id.* For example, "[a] child living in a single-parent family is about four-and-one-half times as likely to be poor as a child living in a two-parent family." *Id.* Approximately forty percent of the children living only with their mothers are poor. *Id.* Fortunately, the child poverty rate in the year 2000 was the lowest since 1978. *Id.*

164 *Woodward*, 760 N.E.2d at 266.

165 *See supra* note 5.

166 *Woodward*, 760 N.E.2d at 265 (referring to the policy laid out by MASS. GEN. LAWS ANN. ch. 119A, § 1 (West 1993)).

167 *See* Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 984 (1996). "[T]he primary purpose of survivors' benefits is to provide support for the dependents of a deceased wage earner." *Id.* (alteration in original) (quoting Daniels v. Sullivan, 979 F.2d 1516, 1521 (11th Cir. 1992)).

law.[168] They must be balanced against the other important state interests—namely the timely administration of estates and the intent of the deceased to become a posthumous parent.

B. Timely Administration of Estates

A second factor to consider is the importance of providing certainty to heirs and creditors effectuated through the accurate and prompt administration of the decedent's estate.[169] The *Kolacy* court acknowledged this concern, stating that "[e]states cannot be held open for years simply to allow for the possibility that after born children may come into existence. People alive at the time of a decedent's death who are entitled to receive property from the decedent's estate are entitled to receive it reasonably promptly."[170] The *Hecht* court also recognized "[t]he interest of heirs and courts in the finality of probate rulings. . . ."[171] Therefore, in order to promote the best interests of posthumously conceived children while at the same time respecting the state's interest in the timely settlement of estates, certain time constraints should be imposed on a posthumously conceived child's inheritance rights.[172] In formulating a period of limitations, consideration must be given to the current limitations on the time to file claims against an estate, the ultimate time limitations on closing an estate, and the ability to reopen an estate.

Every state has a nonclaim statute that specifies the time limits within which a claimant must file its claims against a decedent's estate.[173] These statutes bar claims that are not filed within a period of time either after probate proceedings have begun or after the decedent's death.[174] For example, the UPC bars claims against the estate that are not presented within one year of the decedent's death.[175] Indiana, on the

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168 *Woodward*, 760 N.E.2d at 266.

169 *Id.*; *see also* Reed v. Campbell, 476 U.S. 852, 855 (1986); Lalli v. Lalli, 439 U.S. 259, 265 (1978).

170 *In re* Estate of Kolacy, 753 A.2d 1257, 1262 (N.J. Sup. Ct. Ch. Div. 2000).

171 Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 290 (Ct. App. 1993).

172 *See generally* Corvalan, *supra* note 4, at 361-62. "Since public policy in most states desires the smooth distribution of estates, allowing potential children to take without some time limitations is highly unlikely." *Id.* at 362.

173 DUKEMINIER & JOHANSON, *supra* note 32, at 41; *see, e.g.*, IND. CODE § 29-1-14-1 (1998).

174 DUKEMINIER & JOHANSON, *supra* note 32, at 41.

175 UNIF. PROBATE CODE § 3-803(a)(1) (amended 1993), 8.II U.L.A. 215 (2001); *see also* Spohr v. Berryman, 589 So. 2d 225, 227 (Fla. 1991) (holding that claims against an estate are

other hand, is slightly more stringent, and only allows nine months after the death of the decedent for bringing non-tort claims against the estate.[176]

Under the common law, a will could be probated at any time after the decedent's death.[177] However, the UPC sets a three-year statute of limitations on probate.[178] If a will is not probated within that time period, the presumption of intestacy is conclusive.[179] The UPC also allows an estate to be reopened, but only for limited circumstances. The maximum time limit to recover property that has been improperly distributed is either three years after the decedent's death or one year from the time of the distribution.[180] The maximum time limit for creditors, however, is restricted to one year after the decedent's death.[181] If other property of the estate is discovered subsequent to the closing of an estate, the probate court may appoint a personal representative to administer the newly discovered estate.[182]

Although providing certainty to heirs and creditors is an important state interest, timely estate administration "is not a sufficient justification to deny posthumous children their rightful place in the family when the

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not limited to obligations of the decedent that could have been enforced against him while he was still alive).

176 IND. CODE § 29-1-14-1(d). Claims must also be filed either (1) three months after the date of the first published notice to creditors or (2) three months after the court revokes probate of a will in which the claimant is named a beneficiary, whichever is later. *Id.* § 29-1-14-1(c). While published notice to creditors is necessary in order to toll the time for filing claims, failure to publish such notice does not bar the filing of a claim. *See* Schrenker v. Methodist Hosp. of Ind., Inc., 233 N.E.2d 791, 797 (Ind. Ct. App. 1968). For a discussion of the notice requirement, see Robert Roy, Annotation, *Validity of Nonclaim Statute or Rule Provision for Notice by Publication to Claimants Against Estate – Post-1950 Cases*, 56 A.L.R.4TH 458 (1987). Tort claims against the estate may be filed at any time within the statute of limitations provided for the tort action. IND. CODE § 29-1-14-1(f). The interest in the assets of the estate is only affected by recovery against the tortfeasor's estate if the suit was filed within the statute of limitations allowed for filing claims against the estate. *Id.*

177 DUKEMINIER & JOHANSON, *supra* note 32, at 40.

178 UNIF. PROBATE CODE § 3-108(a)(2), 8.II U.L.A. 42.

179 *Id.* § 3-108 cmt., 8.II U.L.A. 42.

180 *Id.* § 3-1006, 8.II U.L.A. 299; *see also In re* Estate of Shuler, 981 P.2d 1109, 1116 (Colo. Ct. App. 1999) (concluding that the probate court's order reopening the estate to resolve tax issues did not preclude the court from expanding the scope of the reopened administration by ordering the distributee to return the brokerage account proceeds that had been improperly distributed to her).

181 UNIF. PROBATE CODE § 3-1006, 8.II U.L.A. 299.

182 *Id.* § 3-1008, 8.II U.L.A. 300-01.

'Constitution recognizes higher values than speed and efficiency.'"[183] Therefore, speed and efficiency must be balanced against the best interests of the posthumously conceived child. However, there is a third state interest that must be added to the scale: the intent of the deceased to become a posthumous parent.

C. *The Importance of Intent*

Ascertaining the intent of the deceased to become a posthumous parent is important because of the individual's procreative rights and the state's interest in carrying out the wishes of the deceased. In *Meyer v. Nebraska*,[184] the Supreme Court for the first time established the fundamental right to procreate[185] when it recognized "the right of the individual . . . to marry, establish a home and bring up children."[186] In

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183 Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1048 (citing Stanley v. Illinois, 405 U.S. 645, 656 (1972)). Scharman further stated, "[I]f the family is 'deeply rooted in America's history and tradition' and is the social institution through which 'we inculcate and pass down many of our most cherished values, moral and cultural,' then certainly the child's right to establish legal membership within that family is more important than mere administrative convenience." *Id.* at 1050 (footnote omitted) (citing Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977)).

184 262 U.S. 390 (1923).

185 Fundamental rights are liberties that are so important that the government cannot infringe on them unless it meets strict scrutiny. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 695 (2001). Such liberties include "rights protecting family autonomy; procreation; sexual activity and sexual orientation; medical care decision making; travel; voting; and access to the courts." *Id.* These rights are protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, or, in rare instances, the Ninth Amendment. *Id.* at 696-97. In analyzing fundamental rights, courts must consider: (1) whether there is a fundamental right, (2) whether that right has been infringed, (3) whether the government has a compelling interest justifying the infringement, and (4) whether the means are sufficiently related to the purpose. *Id.* at 698-700. One commentator has suggested that if a constitutional right to procreate exists, then restrictions placed on the bequest and inheritance of gametes risk constitutional violations. Bailey, *supra* note 1, at 778.

186 *Meyer*, 262 U.S. at 399. However, four years later, the Court upheld a law that permitted the involuntary salpingectomy (sterilization) of an allegedly retarded woman. Buck v. Bell, 274 U.S. 200, 207 (1927). The Court described Carrie Buck as a "feeble-minded white woman." *Id.* at 205. Buck's mother and illegitimate child were also described as feeble minded. *Id.* The state sterilized Buck under the authority of a Virginia statute, which stated:

> [T]he health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, [etc.]; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in

Skinner v. Oklahoma,[187] the Court explicitly recognized the right, stating, "Marriage and procreation are fundamental to the very existence and survival of the [human] race."[188]

> various institutions many defective persons who if now discharged would become a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, [etc.]

Id. at 205-06 (citing an Act of Virginia, approved Mar. 20, 1924). The statute gave the superintendent of the mental institution the power to order sterilization when he was of opinion that it was for the "best interests of the patients and of society that an inmate under his care should be sexually sterilized." *Id.* at 206. In concluding that the Fourteenth Amendment did not protect Buck from involuntary sterilization, Justice Holmes observed, "Three generations of imbeciles are enough." *Id.* at 207. However, Buck was later discovered to be a woman of normal intelligence. Stephen Jay Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENT. 331, 336 (1985). Sadly, she was one of almost 20,000 "forced eugenic sterilizations" that had been performed in the United States by 1935. *Id.* at 332.

In *Gerber v. Hickman*, Gerber was serving a sentence of 100 years to life plus eleven years in the Mule Creek State Prison. 291 F.3d 617, 619 (9th Cir. 2002). He and his wife wanted to have a baby, but the California Department of Corrections prohibited family visits for inmates "sentenced to life without the possibility of parole [or] sentenced to life, without a parole date established by the Board of Prison Terms." *Id.* (alteration in original) (quoting Gerber v. Hickman, 103 F. Supp. 2d 1214, 1216 (E.D. Cal. 2000)). Because no parole date seemed likely, Gerber wanted to artificially inseminate his wife. *Id.* Gerber argued that his constitutional right to procreate arose out of the right to be free from forced surgical sterilization combined with the right to marry while in prison. *Id.* at 622; *see also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that a law permitting the state to sterilize habitual criminals was a violation of equal protection); Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988) (holding that the right to marry survives imprisonment). The Ninth Circuit rejected his argument and held that "to artificially inseminate his wife as a matter of constitutional right would be a radical and unprecedented interpretation of the Constitution." *Gerber*, 291 F.3d at 623.

187 316 U.S. 535 (1942).

188 *Id.* at 541. Skinner was convicted in 1926 of stealing chickens, a felony involving "moral turpitude." *Id.* at 537. In 1929, he was convicted of robbery with firearms. *Id.* He was convicted again of robbery with firearms in 1934 and was sentenced to the penitentiary. *Id.* One year later, Oklahoma passed the Habitual Criminal Sterilization Act. *Id.* at 536; OKLA. STAT. ANN. tit. 57, §§ 171-195 (West 1991) (repealed as unconstitutional). The Act defined an "habitual criminal" as:

> a person who, having been convicted two or more times for crimes 'amounting to felonies involving moral turpitude,' either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.

Skinner, 316 U.S. at 536 (citing OKLA. STAT. ANN. tit. 57, § 173). The jury found that a vasectomy could be performed on Skinner without detriment to his general health. *Id.* at 537. However, the Supreme Court concluded that the Act was unconstitutional as a

On the other hand, *Griswold v. Connecticut*[189] established the right of married couples to use contraception, thus exercising their right *not* to procreate.[190] The Court extended this right of procreative choice to unmarried individuals in *Eisenstadt v. Baird*.[191] As Justice Brennan declared, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[192]

Closely related to the fundamental right to procreate is the right to control the use of one's gametes.[193] Therefore, when the husband

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violation of equal protection. *Id.* at 541. The Court observed that those who had committed grand larceny three times could be sterilized, but those who were embezzlers were immune from the Act. *Id.* The Court concluded, "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Id.* The Court noted, "The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear." *Id.*

189 381 U.S. 479 (1965).

190 *Id.* at 485. *Griswold* was the first of a series of Supreme Court cases to include the right to reproductive freedom within a "zone of privacy" fashioned by several fundamental constitutional guarantees. *Id.* at 485. The Court categorized the right to privacy as "a right . . . older than the Bill of Rights—older than our political parties, older than our school system." *Id.* at 486. This right is created in the Fourth and Fifth Amendments. *See* Mapp v. Ohio, 367 U.S. 643, 656 (1961) (understanding the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people"); Boyd v. United States, 116 U.S. 616, 630 (1886) (recognizing the protection afforded by the Fourth and Fifth Amendments against all governmental invasions "of the sanctity of a man's home and the privacies of life").

Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Buxton, a licensed physician, provided information, instruction, and medical advice to married couples on preventing conception. *Griswold*, 381 U.S. at 480. Their services included an examination of the wife and a recommendation of the best contraceptive device for her use. *Id.* Griswold and Buxton were fined $100 each for violating provisions of the General Statutes of Connecticut. *Id.* Section 53-32 provided, "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* Section 54-196 provided, "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.*

191 405 U.S. 438, 453 (1972). The Court, following the reasoning of *Griswold*, found that "the State [can]not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons." *Id.* at 454.

192 *Id.* at 453 (emphasis omitted).

193 *See supra* notes 88-96 and accompanying text.

predeceases the wife, it is his and not her reproductive rights that are at risk of being infringed. The *Woodward* court noted that nothing prevents the wife from choosing to conceive a child using her deceased husband's sperm.[194] However, the deceased husband has the right not to father a child conceived through ARTs. Thus, his true intentions regarding posthumous conception must be considered.

The significance of intent to become a posthumous parent stems from the state's overall interest in assuring the living that their wishes will be carried out upon their death as directed.[195] State regulations govern the probate of a will and the distribution of the estate in the event of intestacy. The primary policy behind intestacy statutes is to carry out the *probable intent* of the decedent.[196] Therefore, when an individual shows significant intent of parenting a child posthumously, the state has an interest in carrying out this wish as well.

The clearest way to establish such intent would be through an express showing, such as through a writing. For example, in *Hecht* two

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194 Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 269 (Mass. 2002).

195 Bailey, *supra* note 1, at 778 (stating that "[i]n the absence of a clearly articulated public policy reason, the instructions of the deceased involving parenthood, even though posthumous, should be followed").

196 DUKEMINIER & JOHANSON, *supra* note 32, at 74. States also recognize the individual's interest in the disposition of his or her remains upon death. *See* B.C. Ricketts, Annotation, *Validity and Testamentary Direction as to Disposition of Testator's Body*, 7 A.L.R.3D 747, 747 (1966). Courts have recognized that corpses, though not property in a commercial sense, possess many of the attributes of property, and have frequently described them as "quasi-property." *See* 22A AM. JUR. 2D *Dead Bodies* § 2 (1988).

> Despite adherence to the view that there can be no true property right in a corpse, courts have refused to follow the doctrine to the end of preventing anyone from seeing to it that the body is decently interred and that the resting place uninterfered with, and, thus, have recognized a quasi-property right in dead bodies for certain purposes.

Id. For example, in *Osteen v. Southern Railway Co.*, the court held that when a person dies, there exists a limited property interest in the body so that it may be decently interred and its resting place may be uninterfered with. 86 S.E. 30, 31 (S.C. 1915). Osteen purchased six tickets for himself, four others, and the dead body of his sister-in-law. *Id.* at 30. The undertaker handed the ticket for the corpse to the station baggage agent, who gave him a receipt for the coffin. *Id.* On the train, Osteen handed the collector the five remaining tickets for the living members of the funeral party, but did not think to present the baggage check for his sister-in-law's body. *Id.* Although Osteen protested that he had bought a ticket for her corpse, the collector demanded and collected seventy cents in excess of the legal fare rate. *Id.* The court awarded Osteen $2,000 in damages for violation of his rights and feelings as a passenger. *Id. Contra* Griffith v. Charlotte, Colombia & Augusta R.R. Co., 23 S.C. 25, 38-39 (1885) (noting that under the common law there is no property interest in corpses).

written documents evidenced William Kane's intent that Deborah Hecht, his girlfriend, would bear him a child either before or after his death.[197] A provision in his will provided, "it is my wish that, should [Hecht] become impregnated with my sperm, before *or after my death*, she [may] preserve any or all of my mementoes and diplomas and the like for our future child or children."[198] Kane also wrote a letter to his children, stating, "I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah [Hecht] will decide—as I hope she will—to have a child by me *after my death*. I've been assiduously generating frozen sperm samples for that eventuality."[199] Although the *Hecht* court abstained from addressing the validity or enforceability of the writing, these two documents would satisfy a showing of express intent. However, not every individual who clearly desires and intends to have a child anticipates his or her own death as a factor in the decision. Therefore, posthumously conceived children should also be allowed to demonstrate their parent's intent by some means other than an express showing, such as through conduct.[200]

The *Kolacy* court acknowledged this possibility, noting that William Kolacy "by his intentional conduct created the possibility of having long-delayed after born children."[201] The court also accepted Mariantonia's statement that "her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children" as evidence of William's intent to become a posthumous parent.[202] Furthermore, the *Woodward* court noted that the administrative law judge, who first heard the case, would have considered "additional declarations or written statements from the decedent's family, [the wife's] family, financial records or records from the fertility institute that demonstrate any

197 Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 276-77 (Ct. App. 1993).

198 *Id.* (emphasis added).

199 *Id.* at 277 (emphasis added).

200 Corvalan, *supra* note 4, at 356 (discussing a proposal that allows courts and hospitals to infer intent but limits the resulting child's legal rights); Shari Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 564 (1993) (advocating a three-pronged test for determining whether postmortem insemination should be permitted, and whether the resulting child would be legitimate). *Contra* Chester, *supra* note 14, at 984 (maintaining that the law of wills should not be extended to include postmortem children absent the testator's express intent).

201 *In re* Estate of Kolacy, 753 A.2d 1257, 1264 (N.J. Super. Ct. Ch. Div. 2000).

202 *Id.* at 1263.

acknowledgement [of the children] made by [the husband]" as evidence of his intent.[203]

Determining the parent donor's intentions is also important because of the implications on other donors. For this reason, allowing a mere genetic tie or the mere deposit of sperm into a sperm bank as conclusive evidence of intent to parent a child posthumously would subject unsuspecting men to potential liabilities for every child that results from the use of their sperm.[204] The *Woodward* court recognized this concern of shielding sperm donors from the responsibilities of legal parentage in order to encourage the beneficial practice of sperm donation.[205] Medical treatment is not the only reason that a man chooses to preserve his semen. He may also donate his sperm to an infertility clinic for use by an anonymous third party.[206] Anonymous donors usually sign a contract relinquishing all legal parental rights and responsibilities.[207]

The *Hecht* court further observed this concern when it considered the Uniform Status of Children of Assisted Conception Act ("USCACA").[208] The Act's primary purpose of denying a legal parent-child relationship to posthumously conceived children is to "provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death."[209] According to the drafters of the USCACA, such finality is necessary to "avoid the problems of intestate succession which could arise if the posthumous use of a[ny] person's genetic material could lead to the deceased being termed a parent."[210]

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203 Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 271 (Mass. 2002) (alterations in original).

204 *See, e.g., Hecht*, 20 Cal. Rptr. 2d at 282. Sperm banks generally require anonymous donors to sign a written waiver of rights and paternity claims when they make a deposit. *Id.* In return, the donor's anonymity is guaranteed. *Id.* "Thus, according to the contract between the parties, the donor no longer 'owns' the sperm." *Id.*

205 *Woodward*, 760 N.E.2d at 270 n.23.

206 *Id.*

207 *Id.*

208 *Hecht*, 20 Cal. Rptr. 2d at 290.

209 UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 cmt., 9C U.L.A. 372 (2001).

210 *Id.* Although the comment to section 4 acknowledges that parents can "explicitly provide for such children in their wills," posthumously conceived children cannot take in the parent's estate through intestate succession because "implantation after the death of any genetic parent would not result in that genetic parent being the legally recognized parent." *Id.*

Posthumous conception should not be permitted when the living family members can only speculate about the deceased's wishes.[211] Even if there is evidence that the deceased desired parenthood in life, to assume that he or she would have actually wanted to become a parent posthumously is too speculative.[212] Therefore, when the sperm or egg donor dies, some indicia of intent to allow posthumous procreation and to support the resulting child should exist.

In sum, the state has interests in promoting the best interests of posthumously conceived children, in the prompt administration of estates so as to provide certainty and finality to other heirs and creditors, and in carrying out the reproductive wishes of the deceased. These powerful interests must be balanced in promulgating regulations that address inheritance rights in children conceived after one or both of their parents' deaths through ARTs. State legislatures, "with their collective resources, experience, and wisdom, could develop any number of methods for achieving a balance between the interests of the state and the interests of the posthumous child."[213]

D. An Examination of Existing Proposals

Uniform acts are drafted "to promote uniformity in state law, on all subjects where uniformity is desirable and practicable, by voluntary action of each state government."[214] Uniformity in state law with respect to inheritance rights in children, especially posthumously conceived children, is desirable. Section 2-114 of the UPC addresses parent-child

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211 Anne Reichman Schiff, *Posthumous Conception and the Need for Consent: We Should Require Prior Consent to Safeguard the Interests of the Deceased*, 170 MED. J. AUSTRALIA 53, ¶ 7 (1998), *at* http://www.mja.com.au/public/issues/jan18/schiff/schiff.html.

212 *Id.* ¶ 7.

> If the deceased person's wishes are to be safeguarded adequately in posthumous reproduction, clear evidence of intent to reproduce after death should be required. The strong procreative interest of family members seeking posthumous conception may tempt them to portray the deceased's values and desires in ways that are not necessarily compatible with the interests of the deceased. Given that posthumous procreation, unlike organ donation, entails significant and permanent implications for the deceased's family, the potential for a serious conflict of interest justifies a far more limited decision-making role for the family.

Id. ¶ 8.

213 Scharman, *supra* note 183, at 1050.

214 8.I U.L.A. iii (2001).

relationships for purposes of intestate succession.[215] This section provides that children born out of wedlock may inherit as long as parentage has been established.[216] The state's parentage statute provides the requirements for establishing paternity.[217] Although there is some variation among jurisdictions, "most states permit paternity to be established by evidence of the subsequent marriage of the parents, by the father's acknowledgment, by an adjudication during the father's life, or by clear and convincing proof after the father's death."[218] The Special Committee on Uniform Probate Code ("UPC Committee") has suggested, however, that it would consider further revisions of this section, as the issue of children's status for purposes of intestate succession is under continuing review.[219]

The parent-child relationship provision focuses on the status of adopted and nonmarital children, but does not adequately address the rights of posthumously conceived children. Therefore, by considering other proposals that have been prepared to specifically address inheritance rights in light of ARTs, this Note will propose an amendment

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215 UNIF. PROBATE CODE § 2-114 (amended 1990), 8.I U.L.A. 91 (2001). The UPC is an Act:

> [r]elating to affairs of decedents, missing persons, protected persons, minors, incapacitated persons and certain others and constituting the Uniform Probate Code; consolidating and revising aspects of the law relating to wills and intestacy and the administration and distribution of estates of decedents, missing persons, protected persons, minors, incapacitated person and certain others; ordering the powers and procedures of the Court concerned with the affairs of decedents and certain others; providing for the validity and effect of certain non-testamentary transfers, contracts and deposits which relate to death and appear to have testamentary effect; providing certain procedures to facilitate enforcement of testamentary and other trusts; making uniform the law with respect to decedents and certain others; and repealing inconsistent legislation.

Id. purpose cl., 8.I U.L.A. 9. Portions of the UPC have been adopted in sixteen states. *Id.* tbl., 8.I U.L.A. 1.

216 *Id.* § 2-114(a), 8.I U.L.A. 91.

217 *Id.*

218 Patricia G. Roberts, *Adopted and Non-marital Children – Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539, 542 (1998) (citing JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 107 (5th ed. 1995)).

219 UNIF. PROBATE CODE art. II cmt. 4, 8.I U.L.A. 79 ("Although only a modest revision of the section dealing with the status of adopted children and children born of unmarried parents is made at this time, the question is under continuing review and further revisions may be presented in the future.").

to the parent-child provision of the UPC. The first proposal, the UPA,[220] suggests that intention, rather than biology, is the controlling factor in determining whether a deceased parent of a posthumously conceived child is the legal parent of the child for purposes of inheritance.[221] The second proposal, the American Bar Association's ("ABA") Model Reproductive Technologies Act,[222] suggests a solution to the problem raised by timely estate administration and proposes requirements for establishing the decedent's intent to become a posthumous parent.[223]

1. Uniform Parentage Act

Section 102(4) of the UPA defines "assisted reproduction" as a method of causing pregnancy other than sexual intercourse.[224] The term includes intrauterine insemination, donation of eggs and embryos, IVF and transfer of embryos, and intracytoplasmic sperm injection.[225] Article 7 of the Act is entitled "Child of Assisted Reproduction."[226] UPA section 701 explains that Article 7 applies only to children born as the result of assisted reproduction.[227] If a child is conceived through sexual intercourse or is the result of a surrogacy agreement, then this section of

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220 UNIF. PARENTAGE ACT § 707 (amended 2000), 9B U.L.A. 358 (2001). The UPA was originally drafted in 1973 "at a time when the states need[ed] new legislation on this subject because the bulk of current law on the subject of children born out of wedlock [was] either unconstitutional or subject to grave constitutional doubt." *Id.* prefatory n. (repealed 2000), 9B U.L.A. 378. The Act was further promulgated to "fulfill an important social need in terms of improving the states' systems of support enforcement." *Id.*, 9B U.L.A. 380. Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming have adopted the UPA (1973). *Id.* tbl. (1973), 9B U.L.A. 377 (2001). The Act was amended in 2000 because widely differing treatment on subjects not dealt with by the Act, such as determination of parentage after a divorce and scientific advances in reproduction, was common. *Id.* prefatory n., 9B U.L.A. 297. Texas has adopted this version of the Act. *Id.* tbl. (amended 2000), 9B U.L.A. 2 (Supp. 2002).

221 *See infra* Part III.D.1.

222 ABA MODEL ASSISTED REPROD. TECHS. ACT §§ 1.01-1.11 (1999) *at* http://www.abanet.org/ftp/pub/family/modelassistedreptech.doc. The Model Assisted Reproductive Technologies Act was drafted by the Committee on the Laws of Assisted Reproductive Technologies and Genetics in December, 1999. The discussion draft has not yet been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

223 *See infra* Part III.D.2.

224 UNIF. PARENTAGE ACT § 102(4), 9B U.L.A. 303.

225 *Id.* § 102(4)(A)-(E), 9B U.L.A. 303.

226 *Id.* art. 7, 9B U.L.A. 354.

227 *Id.* § 701 cmt., 9B U.L.A. 354.

the UPA does not apply.[228] If a child is conceived as the result of assisted reproduction, section 702 clarifies that a sperm or egg donor is not a parent of the resulting child.[229] However, the term "donor" does not include a husband who provides sperm for use by his wife, who also provides her own eggs, in assisted reproduction.[230] The wife is the child's mother under section 201(a)(1) by virtue of giving birth to the child, and, if the husband has consented to the assisted reproduction, he is the child's father under section 201(b)(5).[231]

The UPA also addresses the situation in which the husband dies before his wife undergoes assisted reproduction—he is not the legal father of any posthumously conceived child unless there is a record of his consent to be the father of such child.[232] In cases where consent is lacking, the child would have a legal mother and a genetic, but not legal, father. The committee that drafted the UPA ("UPA Committee") suggested that this section was "designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being determined to be a parent."[233] The UPA Committee further stated that a

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228 *Id.* § 701, 9B U.L.A. 354. UPA Article 8 provides guidelines for children conceived as a result of surrogate, or gestational, agreements. *Id.* art. 8, 9B U.L.A. 360.

229 *Id.* § 702 cmt., 9B U.L.A. 355. Donors are in essence eliminated from the parental equation because "[t]he donor can neither sue to establish parental rights, nor be sued and required to support the resulting child." *Id.* The comment to this provision explains that the UPA "does not deal with many of the complex and serious legal problems raised by the practice of assisted reproduction. Issues such as ownership and disposition of embryos, regulation of the medical procedures, insurance coverage, etc., are left to other statutes or common law." *Id.*

230 *Id.* § 102(8)(a), 9B U.L.A. 304. The term also does not include a woman who gives birth to a child through assisted reproduction. *Id.*

231 *Id.* § 201, 9B U.L.A. 309. This point is emphasized in section 703, which states that a husband who provides sperm for use by his wife in assisted reproduction is the father of any resulting child. *Id.* § 703, 9B U.L.A. 356. Moreover, even if the husband merely consents to assisted reproduction by his wife, even if his sperm is not used, he is presumed to be the father of a child born to the wife by this means. *Id.* § 703 cmt., 9B U.L.A. 356. To be effective, the husband's consent must be in a record signed by both the woman and her husband. *Id.* § 704, 9B U.L.A. 356. If a husband does not consent to assisted reproduction, he may nonetheless be found to be the father of a resulting child if he and his wife openly treat the child as their own. *Id.* § 704(b), 9B U.L.A. 356.

232 *Id.* § 707, 9B U.L.A. 358. Similarly, when a husband and wife have entered into an agreement for the use of assisted reproduction and the marriage is dissolved, before implantation, the former husband is not the legal parent of a child resulting from assisted reproduction unless the agreement contains his consent to the post-divorce use of his sperm. *Id.* § 706, 9B U.L.A. 358.

233 *Id.* § 707 cmt., 9B U.L.A. 359.

spouse who wished to provide for posthumously conceived children could do so in his or her will.[234]

Although the UPA attempts to address the issues that arise from posthumous conception, it does not adequately serve the interests of all the concerned parties. The UPA does not solve the problem that arises when a father consents to posthumous reproduction but does not provide for the child in his will. Prohibiting unintentionally excluded children from collecting support from their biological father's estate would be against their best interests. Furthermore, the provision fails to address the interests of the deceased parent and those involved in the administration of the estate. Therefore, a more comprehensive scheme is needed.

2. Model Assisted Reproductive Technologies Act

In 1999, the ABA Committee on the Laws of Assisted Reproductive Technologies and Genetics proposed a model act in attempt to "give ART patients, participants, parents, and providers clear legal rights and protections."[235] The model act precludes a posthumous child from

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[234] *Id.*

[235] ABA MODEL ASSISTED REPROD. TECHS. ACT purpose stmt. (1999) *at* http://www.abanet.org/ftp/pub/family/modelassistedreptech.doc. The purpose of the Act is as follows:

> Since the birth of the world's first IVF baby in 1978, extraordinary advances in reproductive medicine have made biological parenthood possible for many individuals suffering from infertility, other medical illness or diseases, or those at risk for passing on inherited illnesses or genetic disabilities. Such advances have also been applied (or proposed) to extend reproductive potential, such as for treating post-menopausal women or cloning. The new technologies and treatments, including the use of third parties to assist in creation or gestation of an embryo, have also created a host of novel legal issues, including the very real possibility of a child being born with up to six potential parents.
>
> Because of the great, but intangible value of creating and rearing a child, and the unique physical, psychological, and legal issues raised by Assisted Reproductive Technologies (ART), this Act seeks to give ART patients, participants, parents, and providers clear legal rights and protections. The Act also seeks to protect the rights of children conceived through the ARTs, and to establish legal standards for the donation, use, storage, and disposition of gametes and embryos, including cryopreserved gametes and embryos. The Act also address [sic] societal concerns about the ARTs, such as providing insurance coverage for ARTs that is comparable to coverage for treatments of similar conditions. The Act further attempts to clarify standards for

inheriting unless the embryo transfer occurred prior to the death of the intended parent, or the intended parent executed a will consenting to inheritance.[236] It also provides that a child must be born within three years of the death of the intended parent for that child to be considered an heir.[237]

A three-year statute of limitations recognizes the concerns surrounding the timely settlement of estates because the child would have to be born within the period already required by the UPC.[238] However, it does not truly consider the interests of all parties involved in estate administration. If the estate was settled and closed before the three-year deadline, the estate would have to be reopened in order to distribute a share to a posthumously conceived child. A period of limitations less than three years and closer to the period of time during which claims are allowed to be brought against the estate, therefore, would seem more appropriate. However, the application of a one-year

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informed consent, statistical reporting requirements, truth in advertising, and quality assurance standards.

Id.

236 *Id.* § 1.07. Section 1.07 states:

> Subd. 1. In the absence of a testamentary document executed by an intended parent, the following principles apply:
> (a) If an intended parent dies before embryo transfer, the resulting child has no rights against the estate of that intended parent.
> (b) If one or both intended parents die at any time during the pregnancy of a gestational carrier, the resulting child is an heir of both intended parents.
> (c) If an intended parent dies after storage of gametes, or creation or storage of an embryo(s), but before the time of transfer of gametes or embryo(s), then the resulting child is not the heir of the deceased intended parent.
> (d) If one or both intended parents die after the transfer of an embryo(s) or gametes, but before birth of the child, the resulting child is an heir of both intended parents.
> Subd. 2. A child resulting from assisted conception is not an heir of a donor.
> Subd. 3. A donor has no rights against the child or the child's estate.

Id. Embryo transfer is the method of transferring or placing an embryo into the body of "a woman intended to gestate the embryo, with the intent to achieve live birth of a child." *Id.* § 1.01, Subd. 9. An intended parent is "an individual or couple, married or unmarried, who enter into a written or oral agreement with a donor, or gestational carrier, under this Act providing that they intend to be legally bound as the parent of a child or children born through assisted conception." *Id.* § 1.01, Subd. 13.

237 *Id.* § 1.05, Subd. 1(c)(5) ("No child born more than three years following the death of an intended parent may be considered that individual's legal child.").

238 *See supra* notes 178-80 and accompanying text.

statute of limitations could pose significant burdens on the surviving spouse, who would be required to make the decision to bear the child of her deceased spouse while still in the midst of grieving.[239] A one-year period would also necessitate the quick success of conception attempts.[240]

Imposing a notice requirement could resolve this problem. If the surviving spouse were required to notify the deceased spouse's estate within a year of his or her intent to reproduce using the deceased spouse's preserved gametes, then the resulting child's share could be held in statutory trust until his or her birth.[241] Then applying a three-year statute of limitations to the *birth* of the child would be more reasonable, as it would consider both the timeliness of estate administration and the likely success of conception. If the surviving spouse is unsuccessful in his or her attempts at conception, then the share that had been set aside for the resulting child could be distributed to the heirs upon the expiration of the three-year statute of limitations. The surviving heirs would then not risk dilution of their shares by a posthumously conceived child, but would only stand to gain a larger share if no child is born. However, the three-year statute of limitations should be subject to a reasonableness standard. For example, a child who is scheduled to be born within the statutory period according to the mother's due date but who is born one week later should be allowed to inherit.

The ABA's model act also requires binding written agreements as to the use and disposition of the embryos in the event of divorce, death, or other change in circumstances.[242] It further provides that if, subsequent

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239 Woodward v. Comm'r Soc. Sec., 760 N.E.2d 257, 268 (2002). The *Woodward* court decided to leave the resolution of the time constraints surrounding inheritance rights of posthumously conceived children to "the appropriate case, should one arise." *Id.*

240 *Id.* at 268; *see also supra* notes 17-18 and accompanying text.

241 *See supra* notes 173-76 and accompanying text (discussing the time limitations on bringing claims against the estate); *see also* Shapo, *supra* note 86, at 1155.

242 ABA MODEL ASSISTED REPROD. TECHS. ACT § 1.05, Subd. 1(a). Section 1.05 states:

> (a) Prior to embryo creation, binding written agreements must be entered into by all participants as to:
>
> (1) their intended use and disposition of the embryos;
>
> (2) the use and disposition of the embryos in the event of divorce, illness, death or other change of circumstances; and
>
> (3) the time at which, and conditions under which, embryos will be deemed abandoned and the disposition thereof.

Id. A "written authorization" must include the following:

> (a) Is written in plain language.

to a written agreement, there is a dispute and a divorce, then the parent who wishes to use the embryo to create a child may do so, but the non-consenting parent will not be granted any parental rights.[243] However, while the mere storage of sperm or eggs should not be enough to establish intent, a more flexible standard that would permit oral declarations of intent should be allowed in certain circumstances.[244]

(b) Is dated and signed by the individual.
(c) Describes the nature of the treatment, including medical, legal, and psychological risks.
(d) Includes an embryo disposition agreement pursuant to Section 1.05 of this Act.
(e) Includes the mental health counseling notice as provided in Section 1.03 of this Act.
(f) Includes a written agreement clarifying legal parental rights if collaborative reproduction is used pursuant to Section 1.06 of this Act.
(g) States that disclosures have been given pursuant to this Act.
(h) Includes contact information for storage of embryos pursuant to Section 1.05 of this Act.
(i) Includes contact information for the donor registry pursuant to Section 1.09 of this Act.
(j) Specifies the length of time the authorization shall remain valid.
(k) Advises the person signing the authorization of the right to receive a copy of the authorization.

Id. § 1.02, Subd. 3. The model act further provides, "It shall be unlawful to collect gametes or embryos from a deceased person for any reason, without a written testamentary document executed by an intended parent pursuant to section 1.07 of this Act." *Id.* § 1.02, Subd. 6.

243 *Id.* § 1.05, Subd. 1(c)(4). This provision states:

> In the event of a subsequent disagreement between intended parents, wherein one intended parent no longer wishes to use stored embryos to create a child as previously agreed, following a divorce or in the event of non-married embryo creators, that intended parent may use the embryos to create a child as previously agreed; however, the non-consenting intended parent will not be considered a legal parent of any resulting child and will have no parental rights or obligations to any resulting child.

Id.

244 *See* Bailey, *supra* note 1, at 793. While discussing pretermission, Bailey states:

> The simple fact that the testator took the unusual step of cryogenically preserving his or her reproductive material could be seen as an indication of the intention by the testator that the eventual posthumous child receive a share from the estate. If so, then it seems unlikely that a court would conclude that the testator desired to disinherit a product of the cryogenically preserved material. However, . . . many people forget that the reproductive material is in storage. If a testator specifically devises reproductive material but does not include a testamentary provision for potential offspring from that material, a court could reasonably reach two contrary conclusions: either that the testator deliberately excluded such children, or that the testator's

Some courts already admit oral declarations as evidence of intent in other situations, including those in which there is an ambiguity in a will.[245] For instance, declarations that clearly show intent to become a posthumous parent made under impending death should be permitted.

The above proposals provide a starting point in balancing the interests of the state in the timely administration of estates and the interests of the posthumously conceived child and his or her deceased natural parent. The following proposed amendment addresses the need for consideration of these interests by allowing posthumously conceived children to inherit when there is clear intent and when they are born within a certain period of time.

IV. PROPOSED AMENDMENT TO THE UNIFORM PROBATE CODE

Courts can continue to make ad hoc decisions, looking to the imperfectly designed model acts and a growing body of case law for guidance in light of modern ARTs, or "the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques."[246] By adopting the following statutory framework, states could protect both the interests of the posthumously conceived child as well as the interests of third parties.

§ 2-114. Parent and Child Relationship

> (a) Except as provided in subsections (b), (c), *and (d)*, for purposes of intestate succession by, through, or from a person, an individual *conceived during the lifetime of his or her natural parents* is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established under [the

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> mention of them in the will implied a desire to treat them as any other children. The inherent ambiguity in such actions strains theoretical foundations of pretermission statutes designed for less complex situations.

Id.

245 Joseph W. deFuria, Jr., *Mistakes in Wills Resulting from Scriveners' Errors: The Argument for Reformation*, 40 CATH. U. L. REV. 1, 17 (1990). "When a will is the product of malfeasance or fraudulent representation, not only is evidence of the testator's surroundings and circumstances admissible, but also evidence of the testator's oral or written declarations of intention or affection." *Id.* at 10 (footnotes omitted).

246 *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (1998).

Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

(b) An adopted individual is the child of his [or her] adopting parent or parents and not of his [or her] natural parents, but adoption of a child by the spouse of either natural parent has no effect on (i) the relationship between the child and that natural parent or (ii) the right of the child or a descendant of the child to inherit from or through the other natural parent.

(c) An individual conceived after the death of one or both natural parents is a child of the deceased natural parent(s) only if (i) the circumstances clearly and convincingly establish that the deceased natural parent(s) intended to be a posthumous parent(s) and (ii) the individual who wishes to use the deceased's gametes notifies the estate of his or her intentions within one year of the death of the natural parent and the child is born within three years of the death of the natural parent.

(d) Inheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.[247]

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[247] UNIF. PROBATE CODE § 2-114 (amended 1990), 8.I U.L.A. 91 (2001) (alterations in original) (author's contribution in italics).

Comment

Subsection (a) sets forth the general rule that for purposes of intestate succession, a child is the child of his or her natural parents, regardless of their marital status.[248] Because a new subsection addressing posthumously conceived children is proposed, the phrase "conceived during the lifetime of his or her natural parents" is added to distinguish the general rule from the exception.

Subsection (b) contains an exception to the general rule, but it remains unchanged because the inheritance rights of adopted children are beyond the scope of this Note.[249]

Subsection (c) contains a second exception to the general rule. Subsection (c) states the rule that, for inheritance purposes, a posthumously conceived child is the child of his or her deceased natural parent under certain circumstances. First, the deceased natural parent must have, during his or her lifetime, unequivocally manifested his or her intent to have and support a posthumous child. This intent may be either express or implied, but it must be clear and convincing.[250] Clear and convincing evidence is:

> evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitance, of the truth of the facts related.[251]

For example, an individual's death-bed declaration of intent that his or her preserved reproductive materials be used to conceive a child even after his or her death should be allowed. Second, the surviving individual must notify the administrator of the estate of his or her desire

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248 UNIF. PROBATE CODE § 2-114 cmt., 8.I U.L.A. 91; *see also* Lalli v. Lalli, 439 U.S. 259, 261-62 (1978) (upholding a New York statute that required nonmarital children to provide a judicial order of paternity in order to inherit from their fathers by intestate succession).

249 For a proposed amendment to the act pertaining to committed partners, see Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 684-85 (2002).

250 *See supra* notes 197-202 and accompanying text (discussing the intent found in *Hecht* (express) and *Kolacy* (implied)).

251 United States v. Jepsen, 105 F. Supp. 2d 1031, 1036 (W.D. Ark. 2002) (quoting Bishop v. Bishop, 961 S.W.2d 770, 773 (Ark. Ct. App. 1998)).

to use the deceased's sperm or eggs to conceive a child within one year from death.[252] This subsection is subject to a standard of reasonableness.

To illustrate, consider the hypothetical situation proposed at the beginning of this Note. John has two children from a previous marriage. Mary, his widow, conceives a child through ART using John's frozen sperm twenty-seven months after his death. Sarah, the biological child of John and Mary, is born nearly three years after the death of her father. With respect to subsection (c)(i), consider three variations:

Variation 1: The only proof Mary has that John intended to have a child is that he deposited his sperm at the fertility clinic. In this case, Sarah would not be entitled to a share of the estate because the deposit of sperm or eggs alone is not enough to establish intent under subsection (c)(i).[253]

Variation 2: Although there is no documented evidence that John intended to have a posthumous child, minutes before he died he told Mary and the relatives standing nearby that he wished for her to conceive his child after his death. In this situation, John's intent may be reasonably inferred from the circumstances, and Sarah would be entitled to a share of her father's estate if Mary complied with subsection (c)(ii) of this provision.[254]

Variation 3: When he deposited his sperm at the fertility clinic, John asked that a letter be included in his file that stated his intentions that if he were to die before Mary could become pregnant, she would still use the stored samples to conceive his child. Here there is express written evidence of John's intent to become a posthumous parent.[255] Therefore, Sarah would be entitled to a share of her father's estate if Mary complied with subsection (c)(ii) of this provision.

With respect to subsection (c)(ii), consider three variations:

Variation 1: Within a year after John's death, Mary notified the estate that she wished to use John's sperm to conceive a child. Sarah was expected to be born before but was born one week after the three-year statute of limitations. In this case, if Sarah is born after her due date,

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252 *See supra* notes 173-76, 241 and accompanying text.
253 *See supra* note 244 and accompanying text.
254 *See supra* notes 244-45 and accompanying text.
255 *See supra* notes 197-200 and accompanying text.

which would have fallen within the statute of limitations, and Mary complies with the notice requirement, reasonableness would dictate that Sarah would be entitled to a share of her father's estate if there was evidence of John's intent under subsection (c)(i) of this provision.

Variation 2: Mary failed to notify John's estate of her intent to use his sperm to conceive a child. Sarah was expected to be born before but was born one week after the three-year statute of limitations. Although subject to a standard of reasonableness, if Mary failed to comply with the notice provision, the state's interest in the final settlement of the estate outweighs Sarah's interest. Therefore, Sarah would not be entitled to a share of her father's estate, even if there was evidence of his intent under subsection (c)(i) of this provision.

Variation 3: Within a year after John's death, Mary notified the estate that she wished to use John's sperm to conceive a child. Sarah was not expected to be born until one week after the three-year statute of limitations, but Mary notified the estate that she was pregnant. In this situation, the probate court would have to consider the reasons why Mary could not comply with the statute of limitations. If, for example, she had been trying to conceive but was not successful until now, reasonableness would dictate that Sarah would be entitled to a share of her father's estate if there was evidence of John's intent under subsection (c)(i) of this provision and if Mary complied with the notice requirements. If, on the other hand, Mary failed to notify the estate within one year of John's death, the state's interest in the final settlement of the estate would outweigh Sarah's interest.

As illustrated, the proposed amendment to UPC § 2-114 attempts to solve the imbalance of parental, child, and estate administration interests. By failing to acknowledge the interests of all the parties affected when posthumously conceived children wish to take a part of the deceased parent's estate, the existing proposals do not provide the comprehensive legislative scheme that is necessary to address these complex issues. Consequently, the existing law must change with technology.

V. CONCLUSION

In the years to come, more posthumously conceived children like Sarah will be born. Cases involving these children and their right to inherit from the deceased parent will become more common, unless the rights of these children are addressed today. Current laws are

inadequate for dealing with the inheritance rights of these children. Their best interests, specifically their interest in parental support, should not be outweighed by the state's interest in the timely administration of estates. Likewise, these interests should not outweigh the deceased parent's intent. Just as there is a fundamental right to procreate, there is a fundamental right *not* to procreate, so individuals should not be forced to become posthumous parents. The amendment to the UPC proposed by this Note considers the harmonization of these interests, and thus imposes a clear and convincing determination of the deceased's intent as well as statute of limitations under which a posthumously conceived child may make a claim against his or her deceased parent's estate. The proposed amendment serves as a tool for state legislatures, because as ARTs advance and more posthumously conceived children are born, the law must adapt.

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* I would like to express my gratitude to those who provided invaluable guidance and critiquing during the writing of this Note, especially Professor Linda Whitton, Lori Kosakowski, and Monica R. Brownewell. Special thanks to my family and my fiancé, Michael Vasich, for their continuous love and support, and to Melissa Lynott for her generous help.