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What Sex-Ed Didn't Teach You: Addressing the Inadequacies of West Virginia Code Section 42-1-8 and the Future of Posthumously Conceived Children

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WHAT SEX-ED DIDN'T TEACH YOU: ADDRESSING THE INADEQUACIES OF WEST VIRGINIA CODE SECTION 42-1-8 AND THE FUTURE OF POSTHUMOUSLY CONCEIVED CHILDREN

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I. INTRODUCTION

“Reproduction after death” is an anomaly of sorts. This notion is not an entirely new concept;¹ however, it is a process that only realized its full potential in recent years.² Modern advances in reproductive science, increasing the success rates and usage of related procedures,³ have caused a shortcoming in the law with regards to its ability to dispose of cases and issues caused by these contemporary changes.⁴ More specifically, the growing popularity of posthumous conception causes a predicament when deciding the extent of the child’s right to inherit from the deceased parent⁵ and right to receive other benefits such as Social Security.⁶

Science has caught up to and passed the limits of what the current law, at least in states such as West Virginia,⁷ can appropriately handle concerning the posthumously conceived child. Therefore, the time is upon West Virginia for a change in its law to adequately address the issues related to posthumous conception in such a way that meets the needs of interested parties and is in accord with current social policy.

Several states have made decisions concerning posthumous conception. However, some of those states only dealt with the issue by means of adjudication as the cases were presented.⁸ In order to prevent uncertainty upon presentation of a posthumous conception case, the West Virginia legislature must

¹ Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154, 155 (2008) (explains that the ability to freeze sperm was discovered by an Italian scientist, Mantegazza, in 1866).

² Michael K. Elliot, *Tales of Parenthood From the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 51 (2004).

³ *See id.*

⁴ *See id.* at 50.

⁵ Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 255 (2005).

⁶ Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 628 (2005).

⁷ *See infra* Part IV.

⁸ *See infra* Part V.A.1–3.

preemptively act by altering West Virginia Code section 42-1-8,⁹ which deals with descent and distribution. An alteration in this statute will prevent a future debacle on the bench in terms of deciding how best to interpret the inheritance rights of a posthumously conceived child.

Part II of this Note provides background and a history of the development of posthumous conception and its intricacies, leading to the complex legal issues related thereto. Part III considers externalities such as constitutional rights to post-mortem reproduction, property rights of ownership, the rule against perpetuities, and each of these items' effect on the rights of posthumously conceived children. Then, Part IV examines West Virginia's relevant statute, section 42-1-8, and highlights its inadequacies as they relate to the posthumously conceived child. Part V includes a case study and comparison of current statutes addressing the rights of posthumously conceived children, which is necessary in order to provide West Virginia with a breadth of experience and samples upon which to base its own decision on how best to deal with this issue.

A critique of select states' current statutes, specifically geared towards posthumously conceived children, will explain differences, as well as provide a cost-benefit analysis of the various approaches to the posthumous conception dilemma. Finally, after noting controlling public policy concerns, Part VI offers a recommendation as to where West Virginia needs to go in order to most effectively handle posthumously conceived children's rights to inheritance and receipt of other benefits. Ultimately, this Note argues that a posthumously conceived child should be able to inherit from all living members of the decedent's family except for the decedent himself, with no time restraints, so long as the decedent provides explicit, written consent.

II. BACKGROUND: WHERE HAVE WE COME FROM AND WHERE ARE WE GOING?

Despite the seemingly obvious nature of what constitutes a posthumously conceived child and where he or she comes from, there exists a convoluted set of problems that must be addressed in order to fully grasp the dilemmas the law must address concerning posthumously conceived children and inheritance. Some of these dilemmas relate to basic definitional confusion over what and who the posthumously conceived child is, thus creating a problem of over-generalization with regards to differentiating the posthumously conceived child from the posthumously born child. Furthermore, it is easy to presume, as some states apparently do, that prior, outdated statutes¹⁰ and case law will sufficiently control the rights of the posthumously conceived child to inherit and receive other benefits. However, there is an entirely new element placed in the equation when dealing with posthumous *conception* that is not addressed by older statutes

⁹ The title of West Virginia Code section 42-1-8 is "Posthumous children to take." W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

¹⁰ See, e.g., *id.*

that typically only address posthumous *birth*. An elementary understanding of these concepts and some of the related legal implications is imperative for a full appreciation of the inadequacy of West Virginia's current statute¹¹ dealing with descent and distribution to posthumous children.

A. "*Posthumously Born*" vs. "*Posthumously Conceived*": What's the Difference?

A fundamental distinction exists between the child that is posthumously born and the child that is posthumously conceived. Some might consider the distinction obvious; however, the legal ramifications of the differences are not so simple. Posthumously *born* children, often times referred to as "posthumous children,"¹² are children conceived before, but born after one of their parents' deaths. Posthumously *conceived* children are not only born after, but also conceived after, the death of one of their parents.¹³

A child only *born* posthumously is, in most states (including West Virginia), considered "in being" at the time of conception.¹⁴ Therefore, that child, for inheritance purposes, is considered to be alive ("in being") at the time of the parent's death and, consequently, will take as a child already born at the time of the parent's death.¹⁵ However, this is not the case with the posthumously *conceived* child, who is not "in being" at the time of the parent's death because the child has not yet been conceived. Consequently, an entirely different set of descent and distribution legislation and case law is necessary in order to specifically deal with the issues¹⁶ related to the posthumously conceived child.

The considerations regarding the rights of posthumously conceived children are more complex because of the post-mortem nature of the children's creation, mandating close scrutiny of the intentions, rights, and any testate dispositions of the decedent-parent. Again, a foundational understanding of the differences between commonly mistaken terms provides a clearer comprehension of the multitude of external factors to be considered with posthumously conceived children that can be overlooked with posthumously born children.

¹¹ *Id.*

¹² *See, e.g., id.* (the title of this code section is "Posthumous children to take," however, the code section only addresses posthumously *born* children, not posthumously *conceived* children).

¹³ JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 117 (Vicki Been et al. eds., 8th ed. 2009).

¹⁴ *See* W. VA. CODE ANN. § 42-1-8 (permitting inheritance by "[a]ny child in the womb of its mother at, and which may be born after, the death of the intestate").

¹⁵ DUKEMINIER ET AL., *supra* note 13, at 117.

¹⁶ *See infra* Part III.

B. *Assisted Reproduction and its Effect on the Post-Mortem World*¹⁷

An overview of some of the most common forms of reproductive assistance and their relation to posthumous conception is helpful in gaining an understanding of the legal issues implicated by these procedures. More specifically, upon understanding the mechanisms involved in this process, one can better see the bigger picture of the legal rights to ownership and reproduction that the donor of genetic material might assert in a related case.

1. Artificial Insemination

“Artificial insemination (“AI”) is probably the most common and widespread reproductive assistance technique.”¹⁸ AI involves the placement of sperm “either into the vagina, uterus, or fallopian tubes of a woman with a syringe. The sperm can be fresh or thawed, cryopreserved sperm. It may come from an anonymous donor or from the husband of the woman being inseminated.”¹⁹ Its popularity can be attributed to simplicity, cost efficiency, and relatively high success rates.²⁰ Furthermore, AI may be conducted from “home without the assistance of a physician.”²¹

With its first successful procedure dating back to 1770, the concept of AI is not a newfound invention.²² However, it was not until over two centuries later, on June 4, 1986, that AI was performed in the United States using a frozen ovum.²³ It is easier to understand why the law currently lags²⁴ in its ability to handle posthumously conceived child cases when viewed in light of the recent nature of the procedure’s more advanced capabilities.²⁵

2. In Vitro Fertilization and Cryopreservation

“In vitro fertilization (“IVF”) is a process in which eggs are extracted from a woman’s ovaries, the extracted eggs are fertilized in a lab with sperm, and the fertilized eggs are then inserted back into the woman’s uterus through the cervix.”²⁶ IVF does not have as high of a success rate as AI.²⁷

¹⁷ “Today going to the fertility clinic for a procedure is as commonplace as going to one’s family doctor for a cold.” Elliot, *supra* note 2, at 51.

¹⁸ *Id.* at 52.

¹⁹ Goodwin, *supra* note 5, at 238.

²⁰ *See id.*

²¹ Elliot, *supra* note 2, at 52.

²² Goodwin, *supra* note 5, at 238.

²³ Elliot, *supra* note 2, at 51.

²⁴ *See, e.g.,* W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010); *see also infra* Part IV.

²⁵ *See* Goodwin, *supra* note 5, at 238.

²⁶ *Id.* at 239.

“Cryopreservation is the general term used to describe the process of freezing different reproductive material, including gametes, zygotes, pre-embryos, and embryos. It is the key process that makes assisted reproductive technology possible after one parent has already died.”²⁸ Cryopreservation is believed to maintain sperm’s viability for at least ten years, and some researchers even suggest its ability to maintain sperm for up to one hundred years.²⁹ The process dates back to 1949 when scientists discovered that adding glycerol to frozen sperm worked to preserve the sperm’s viability.³⁰ This process is the means by which posthumous conception becomes possible, therefore solidifying its stake in the current, related dilemmas.

C. *The Reasons to Use and Consequences of Posthumous Conception*

Discussing the development of the procedures that make posthumous conception possible raises the question of why a person would choose to utilize posthumous conception. There are a vast number of benefits and motivations behind relying on this form of reproduction. Therefore, it is necessary to mention the considerations a potential parent of a posthumously conceived child makes from the perspectives of both the surviving spouse and the decedent-donor. Granted, posthumous conception does not necessarily occur in the spousal setting. It is an available option for non-married persons who are seeking an anonymous donor’s sperm for conception.³¹ However, those anonymous scenarios are beyond the scope of this Note. Here, the focus is on the rights of both the posthumously conceived child and his or her *known* parents’ rights.

1. Right to Inherit

If a child is already born at the time of the decedent parent’s death, then there is no question as to the right to inherit by means of intestacy or a specific devise within a will. Furthermore, many states provide, statutorily, for a child’s inheritance rights even in the case of being posthumously born, but who were conceived before the decedent parent’s death.³²

However, states that have specifically dealt with the right of a posthumously conceived child to inherit, either through intestacy or testacy, are few in number.³³ Inheritance rights also implicate other convoluted considerations re-

²⁷ *Id.*

²⁸ *Id.* at 237 (footnotes omitted).

²⁹ *Id.*

³⁰ Elliot, *supra* note 2, at 51.

³¹ Goodwin, *supra* note 5, at 238.

³² See, e.g., W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

³³ As of the spring of 2010, only twelve states have enacted statutes specifically addressing the rights of posthumously conceive children. Morgan Kirkland Wood, *It Takes a Village: Consider-*

garding policy, certainty, and efficiency.³⁴ Consequently, a potential parent of a posthumously conceived child must strongly consider the laws of the state in which they are domiciled in order to predict the degree of protection their posthumously conceived child will receive.

In West Virginia, as in any other state, a parent likely wants his or her posthumously conceived child to inherit from the deceased parent's estate. An inheritance, similar to receipt of Social Security benefits, is a mechanism for providing for the well-being of dependent persons. A posthumously conceived child is a dependent, just as any other child of the deceased parent, and has no control over its post-mortem conception. Stemming from this concern are the constitutional considerations of equal protection under the Fifth and Fourteenth Amendments.³⁵ It is logical for a parent to assume that any child born from the genetic material of his or her deceased spouse will have a natural right to inherit from his or her biological parent. But, as discussed below, there are countervailing interests that must be balanced into the equation as well.

2. Financial Benefits

Although the scope of this Note focuses primarily on the rights of posthumously conceived children to inherit, it is necessary to briefly mention the Social Security aspect of the posthumously conceived child dilemma. Much of the current case law³⁶ concerning posthumously conceived children revolves around the rights of posthumously conceived children to receive Social Security benefits through the decedent parent. Thus, it is important to establish a basic understanding of this issue in order to fully comprehend all related aspects of the problem.

A parent makes the logical presumption that any and all of their children will receive benefits (inheritance and Social Security) from their deceased parent. As stated by the mother (the surviving spouse) from *Woodward v. Commissioner of Social Security*,³⁷ in support of her posthumously conceived children receiving Social Security benefits, “[l]ook at them and tell me that’s not right.”³⁸ Parents naturally presume that their children, who are products of the same genetic suppliers, are equal in all regards and retain equal rights. Therefore, the desire to receive Social Security and any other financial benefits for a posthumously conceived child is an expected sentiment of the child’s parents.

ing the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children, 44 GA. L. REV. 873, 890–95 (2010); see *infra* Part V.B.

³⁴ Elliot, *supra* note 2, at 64–65.

³⁵ U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; ERWIN CHERMERSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 684–85 (Vicki Been et al. eds., 4th ed. 2011); see also *infra* Part III.G.

³⁶ See *infra* Part V.A.

³⁷ 760 N.E.2d 257 (Mass. 2002).

³⁸ DUKEMINIER ET AL., *supra* note 13, at 119.

However, there is an important distinction in the governing law when considering Social Security benefits versus rights of inheritance: “[t]he Social Security Act is *federal* legislation.”³⁹ Therefore, the law governing the rights of posthumously conceived children’s access to these benefits is controlled at the federal level, which will override some state laws related to access to benefits by surviving children.⁴⁰ But, “[t]he provisions that allow surviving children of a deceased, qualifying worker to receive benefits do involve state law in defining who is a surviving child”⁴¹ Consequently, state laws, defining a valid “surviving child” are implicated in this federal scheme, further accentuating the need for statutory reform at the state level.

3. Security in One’s Ability to Reproduce

An additional benefit of posthumous conception is the opportunity to form a security blanket over a person’s ability to procreate. For many people, the ability to reproduce with their chosen partner is one of the most sacred choices ever made. However, certain obstacles and potential dangers to this choice inevitably present themselves within one’s lifetime. These dangers may come in the form of a hazardous job, disease, unexpected disasters, and any harm members of the armed forces face during service.⁴² Therefore, many people find security in being able to preserve their genetic material, to be used in the event of one of the aforementioned circumstances by their surviving spouse or designated surrogate.

III. LEGAL RAMIFICATIONS OF THE POSTHUMOUSLY CONCEIVED CHILD

A vast array of legal issues arises from the birth of a posthumously conceived child. These issues require efficient disposition in order to most effectively provide for the well-being of the child, a polestar concern in cases related to posthumous conception.⁴³ This Note narrows its scope to the legal consequences of posthumous conception related to inheritance and other rights of the child to receive support benefits.⁴⁴ A brief overview of the legal ramifications

³⁹ 42 U.S.C. § 402 (2006) (“Old-age and survivors insurance benefit payments” section of the federal Social Security Act); Laurence C. Nolan, *Critiquing Society’s Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1100 (2003) (emphasis added).

⁴⁰ Nolan, *supra* note 39, at 1101. “Congress can act independently of state legislatures in providing for the welfare of posthumously conceived children whose deceased parent died an insured worker under the Act.” *Id.*

⁴¹ *Id.* at 1100.

⁴² See Lorio, *supra* note 1, at 155 (discussing some of the motivations causing people to preserve their genetic material).

⁴³ Nolan, *supra* note 39, at 1090.

⁴⁴ These issues require a special focus on state descent and distribution law. See, e.g., W. VA. CODE ANN. § 42-1-2 (LexisNexis 2010).

most likely to be encountered in these types of cases is imperative for an understanding of what West Virginia must consider in deciding how to revise its current legislation.

A. *The Parent-Child Relationship*

“The primary legal issue facing posthumously conceived children is whether there exists a parent-child relationship between the child and the deceased parent, even in cases where the parents were married to each other.”⁴⁵ The decedent parent, who donated his or her genetic material, is unquestionably the biological parent of the posthumously conceived child. However, complications arise when determining whether a *legal* parent-child relationship exists for purposes of inheritance and receipt of other support benefits.⁴⁶

Under common law, in order to inherit, heirs had to be determined at the time of the decedent's death.⁴⁷ However, even at common law, children who were in gestation at the time of the decedent's death but were born within nine months of the decedent's death were treated as being alive at the time of the decedent's death, thus permitting them to inherit.⁴⁸ Then, in 2002, the Uniform Parentage Act (“UPA”) “was amended to allow for a posthumous child to be considered a child of the deceased parent ‘if the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.’”⁴⁹ These variations in the law illustrate attempts, which seem to favor recognition of a legal parent-child relationship, to adapt to the changing needs of posthumously conceived children.

Thus, there have been attempts at reconciling existing, original statutes with the developing needs of posthumously conceived children that were not as readily apparent at the time the original statutes were promulgated. But many of the existing state statutes, despite curative attempts by model Acts like the UPA, retain potential interpretive⁵⁰ complications because the statutes' language leaves an opening for an interpretation that only gives posthumously born children certain rights, but not posthumously conceived children.⁵¹ These ambiguous openings must be addressed.

Because the decedent's estate is distributed to the living heirs of the decedent at the time of the decedent's death, the question of what constitutes a valid parent-child relationship at that time is paramount. There are various arguments for the establishment of a legal parent-child relationship with regards to

⁴⁵ Nolan, *supra* note 39, at 1072.

⁴⁶ *See id.*

⁴⁷ Goodwin, *supra* note 5, at 254.

⁴⁸ *Id.*

⁴⁹ Lorio, *supra* note 1, at 160.

⁵⁰ *See id.*

⁵¹ *E.g.*, W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

the posthumously conceived child. The arguments take into consideration social policy concerning the needs of the child and surviving parent as well as the various interests of the state, such as efficient closure of the decedent's estate.⁵²

The positions assumed by the parties in the case of *Woodward v. Commissioner of Social Security*⁵³ are illustrative of some of the arguments related to the parent-child relationship in the posthumously conceived child context. On one side, "[t]he wife's principal argument [was] that, by virtue of their genetic connection with the decedent, posthumously conceived children must *always* be permitted to enjoy the inheritance rights of the deceased parent's children under our law of intestate succession."⁵⁴ In rebuttal to the wife's position, the government argued that "because posthumously conceived children are not 'in being' as of the date of the parent's death, they are *always* barred from enjoying such inheritance rights."⁵⁵ The court in that case ruled in favor of the mother; however, it did not do so until after it had conducted a thorough analysis of the relevant intestacy laws of its state.⁵⁶

The mother in *Woodward* assumes a position strongly aligned with the best interest of her children.⁵⁷ Furthermore, the mother asserts a social policy stance seeking an equitable result because the children are genetically related to the father, thus the children naturally should assume the rights to support as any other child because "it seems right."⁵⁸

As a side note, and at a moral level, the mother's seemingly zealous advocacy for her children's rights raises questions as to the possibility of ulterior motives, such as her attempt to realize financial incentives for herself. Under the Social Security Act,⁵⁹ as it stands today, the child *and the surviving spouse* receive benefits from a secured, deceased spouse-parent.⁶⁰ Therefore, although it may seem brash by some to even think of the possibility that a mother would exploit her children as a means to reap personal financial gains, it would be naïve not to realize this possibility. Cast in that light, the arguments against a mother filing for the Social Security benefits of a posthumously conceived child are slightly more palatable, or at least understandable.

One commentator emphasized the repercussions of not establishing a legal parent-child relationship between the posthumously conceived child and his or her genetic parent:

⁵² Elliot, *supra* note 2, at 64–65.

⁵³ 760 N.E.2d 257 (Mass. 2002).

⁵⁴ *Id.* at 262.

⁵⁵ *Id.*

⁵⁶ *Id.* at 262–70.

⁵⁷ *See id.* at 262.

⁵⁸ DUKEMINIER ET AL., *supra* note 13, at 119 (quoting the mother of the posthumously conceived children in the *Woodward* case).

⁵⁹ 42 U.S.C.A. § 402 (West 2011).

⁶⁰ Knaplund, *supra* note 6, at 632.

Without the recognition of a parent-child relationship, the posthumously conceived child forfeits many of the benefits derived from that relationship. The child cannot inherit by intestate succession from the deceased parent or inherit through intestate succession from the deceased parent's own parents, the grandparents, or other collateral relations. Similarly, the posthumously conceived child does not have the right to claim to be a pretermitted heir in states that allow children, under certain circumstances, who are omitted from a parent's will still to share in the parent's estate. The common law Rule Against Perpetuities also works to their detriment. They do not qualify to receive survivor's benefits from the deceased parent's social security, pension, insurance, or worker's compensation. They would most likely be ineligible to receive wrongful death recoveries.⁶¹

There are a myriad of reasons for establishing the legal parent-child relationship between a posthumously conceived child and his or her genetic parent. Not establishing that relationship effectively abandons the child in such a way that surely runs contrary to the best interest of the child, which is of course one of the state's primary interests.⁶² Additionally, not permitting the child to inherit via intestacy from his or her parents obligates the state and federal government to care for the child through their already depleted support programs.⁶³

Conversely, the state maintains a colorful counterargument to posthumously conceived children inheriting from their deceased genetic parents and receiving other support benefits. Primarily, the state maintains a strong interest in efficient closure of the decedent's estate.⁶⁴ If a state's probate courts are required to leave an estate open for an inordinate amount of time, numerous complications will arise related to certainty, predictability, and efficient distribution of the decedent's estate to heirs living at the time of the decedent's death who might be in immediate need of their inheritances.⁶⁵

⁶¹ Nolan, *supra* note 39, at 1075–76 (footnotes omitted).

⁶² *Id.* at 1068. “The tenor of any legislation should be based on the welfare of these children, and secondarily on any other policies.” *Id.*

⁶³ Elliot, *supra* note 2, at 65 (“[T]he children will become wards of the state in an already overburdened welfare society.”); Stephen Ohlemacher, *Social Security, Medicare Rapidly Being Depleted*, LJWORLD.COM (May 13, 2009), <http://www2.ljworld.com/news/2009/may/13/social-security-medicare-rapidly-being-depleted/> (discussing the projected decline in Social Security funding as the baby boomer generation continues to age).

⁶⁴ Elliot, *supra* note 2, at 64–65.

⁶⁵ *See id.*; Nolan, *supra* note 39, at 1091–92.

B. *Post-Mortem Property Rights of the Donor-Parent*

To what degree does the law permit a person to bequeath his or her genetic material to his or her spouse, and then continue controlling the use of his or her genetic material post-mortem? This vexing question is a reminder that courts and legislatures must also consider the rights of the donor-parent, not just the child. A person may bequeath his or her property, real and personal, to whomever he or she pleases upon his or her death.⁶⁶ However, bequeathing genetic material to be used posthumously implicates a whole new set of concerns, such as the establishment of parentage, the extent of the legatee's control over the property, and the power to destroy the genetic material.

Ultimately, whether the deceased donor desires to provide for the posthumously conceived child or not, the decedent is the biological parent of the child, which involves certain aspects of the child's rights to support. Even when the parent provides explicit provisions for, and consents to, providing for the child posthumously, it is important to consider whether social policy lends itself towards requiring the donor-parent to provide for the child. Professor Laurence C. Nolan points out that there could be certain time limits on how long a deceased parent's genetic material should be used, due to unforeseen changes in circumstances, before being destroyed.⁶⁷ Additionally, the "dead hand" of the testator continuing to control his or her property after death presents a conflict of interests between the property rights of the decedent and the efficient closure of estates by the state.⁶⁸

Consent of the decedent-donor appears to be one of the overwhelming concerns related to the decedent's rights. "As the Massachusetts Supreme Court noted in *Woodward*, the concern here is for the decedent's procreative rights; he should not be forced to have a child without his consent."⁶⁹ Although the court in *Woodward* is discussing the rights of the deceased parent to procreate, there is a relation to his property rights because both deal with consent. Therefore, uncertainties related to the posthumously conceived child's right to inherit can be eliminated with properly documented consent of the deceased parent explicit-

⁶⁶ See generally *Hodel v. Irving*, 481 U.S. 704 (1987) (establishment of a property interest in the right to transfer property at death via the Just Compensation Clause); *DUKEMINIER ET AL.*, *supra* note 13, at 1-15.

⁶⁷ Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

⁶⁸ The issue of the "dead hand" in estate distribution involves the decedent having too much control over the use of his or her property post-mortem, and the limits that must be placed on this control without infringing on the right to dispose of one's property freely. *DUKEMINIER ET AL.*, *supra* note 13, at 27 (discussing the problems of the "dead hand" in estate distribution).

⁶⁹ *Knaplund*, *supra* note 6, at 650; *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 269 (Mass. 2002).

ly stating his intent to become a parent through his bequeathed genetic material.⁷⁰

Despite having the consent of the deceased parent, it is important to recognize the perpetual possibility of the circumstances under which the decedent gave consent changing. When this happens, to what extent should the decedent's original consent be treated as controlling authority?⁷¹ The property rights of the decedent become harder to interpret and execute when there are changes in circumstances that materially alter the way in which his or her original consent may be carried out.⁷²

C. *Post-Mortem Rights to Reproduce*

The United States Constitution is read to protect one's right to reproduce, or one's decision to refrain from doing so.⁷³ The Supreme Court of the United States has implied that the fundamental right to privacy covers the right to procreate.⁷⁴ Furthermore, in the landmark case of *Planned Parenthood v. Casey*,⁷⁵ "the Supreme Court reaffirmed the constitutional protection accorded to a person's liberty interest relating to intimate relationships, the family, and decisions about whether to beget or bear a child."⁷⁶ Therefore, the constitutionally established right to reproduce is not in question, at least under traditional forms of reproduction.

However, complications arise related to the right to reproduce after death. Although the Supreme Court has recognized a protected right to repro-

⁷⁰ Knaplund, *supra* note 6, at 651. One author suggests that if the decedent simply provides in his or her will for the posthumously conceived child the uncertainty of intent could be cured. Elliot, *supra* note 2, at 65. The author's illustrative, curative will provision is as follows: "I hereby devise, bequest, and bequeath fifty percent of my estate to my children. It is my express intention that that the term 'my children' include any children living and in existence at the time of my death, and any biological children that may be conceived and born posthumously." *Id.*

⁷¹ Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

⁷² *Id.* For example, assume that upon the decedent-donor's death he or she gave written consent for a spouse to use his or her genetic material for posthumous conception. However, a number of years later the spouse remarries an infertile second husband or wife. The original spouse decides to then use the original, deceased spouse's frozen genetic material for posthumous conception. Although some persons may retain their consent towards their spouse using their genetic material posthumously while remarried to another spouse, it is likely that many persons would not feel the same. Therefore, the effect and control of the original consent given by the deceased spouse to this new scenario is a morally conflicting question yet to be determined. *Id.*

⁷³ See U.S. CONST. amends I, III, and IV; Elliot, *supra* note 2, at 55 ("Procreative liberty' is a broad term that encompasses a whole list of activities. At a minimum it includes the freedom to reproduce and the freedom to avoid reproduction.").

⁷⁴ *Griswold v. Connecticut*, 381 U.S. 479, 495-96 (1985); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

⁷⁵ 505 U.S. 833, 857 (1992).

⁷⁶ Elliot, *supra* note 2, at 56 (emphasis added); see also *Planned Parenthood*, 505 U.S. at 857.

duce during one's life, there has not been an explicit recognition of this right post-mortem.⁷⁷ It seems reasonable and equitable for children created by new forms of reproductive technology to receive the same benefits and protection as any other child created by other forms of reproduction. These children did not choose the means by which they would be created and introduced into the world. It would run against the current of social policy and the best interest of the child to deny the posthumously conceived child the benefits and protections received by all other children.⁷⁸ Therefore, denial of a post-mortem right to control reproductive activity could result in external implications such that the denial of a parent to posthumously control the use of his or her genetic material, and establish the rights of its products, could negatively impact the resultant children as well.⁷⁹

D. Intestacy

Intestate distribution⁸⁰ of a decedent's property is particularly difficult when the heirs qualified to inherit are not in existence at the time of the decedent's death. There are a small number of states that have enacted legislation attempting to resolve who may inherit via intestacy in the context of posthumous conception.⁸¹ However, these states' laws do not necessarily handle the issues in the most reasonable fashion. Illustrative of the continued problems within these statutes are those that place time limits on how long after the death of the decedent a child may be born and still inherit.⁸² The result of these restric-

⁷⁷ Elliot, *supra* note 2, at 56. However, the Supreme Court of the United States has explicitly acknowledged the parents' right to control the upbringing and education of their children. *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972); *see also* *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925). These cases, although specifically relating to the rights of the parents during their lifetime, represent a general sentiment and policy of deference to the parents' control over their children's upbringing, which should be carried out in the posthumously conceived child context by recognizing the decedent's post-mortem procreative liberties. *See generally* *Yoder*, 406 U.S. 205.

⁷⁸ *See infra* Part III.G.

⁷⁹ The post-mortem right to reproduction implicates some of the concerns that Professor Nolan emphasized regarding the care of the posthumously conceived children and who will take care of them. Should a decedent be denied the right to reproduce posthumously, the parent-child relationship is destroyed, effectively afflicting upon the state the duties of caring for the child. Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

⁸⁰ Intestate distribution is the default mechanism by which a state distributes a decedent's property to his qualifying heirs when the decedent leaves no will providing otherwise. The distribution is conducted in accordance with the adopted statutory scheme for distribution within the specific state (e.g., "Per Capita by the Generation," etc.). West Virginia adopts a "Per Capita by the Generation" intestate succession scheme. *See* W. VA. CODE ANN. § 42-1-2 (LexisNexis 2010).

⁸¹ *See infra* Part V.B.; *see also* Knaplund, *supra* note 6, at 636–42.

⁸² *See* Knaplund, *supra* note 6, at 637 (Louisiana statutes place a three-year limit within which the posthumously conceived child must be born after the decedent-parent's death in order for him or her to inherit via intestacy); *see, e.g.*, LA. REV. STAT. ANN. § 9:391.1 (2011).

tions is an often times arbitrary limitation on the posthumously conceived child's right to inherit through intestacy, either directly from the decedent or from other living relatives.⁸³ Professor Nolan notes the inescapable problem of time limits within statutes, explaining that such restrictions have the potential to bar dependent children with no control as to the means of their creation from receiving support.⁸⁴

State intestacy laws and the posthumously conceived child's right to inherit through intestacy directly implicate defining who a "child" is under those laws. Intestate succession, in this context, requires establishment of a parent-child relationship between the posthumously conceived child and the decedent-parent.⁸⁵ Reference should be made to the relevant statute of the state within which the decedent was domiciled in order to determine the technicalities and precise definition of who qualifies as a "child" for inheritance purposes within that state.⁸⁶ An additional consideration in establishing the intestate inheritance rights of posthumously conceived children is the time in which the child must file a paternity action, should such action become necessary in establishing the potential heir as a "child" under the provisions of the statute.⁸⁷ As one commentator noted:

In states that have not enacted specific legislation regarding PMC children, general statutes of limitations on filing paternity actions or claims against the estate may prevent PMC children from making claims years after the decedent has died. In these states, we need to inquire as to whether a state allows a paternity claim to be brought after the father's death, whether the statute of limitations to bring an action to inherit begins on the decedent's death or is instead triggered by other events (such as appointment of an executor or administrator, or publication of notice to creditors), and how long the statute of limitations to bring a claim runs.⁸⁸

⁸³ Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

⁸⁴ *Id.* Professor Nolan further discussed the expansive reach of some of these statutes when the posthumously conceived child disrupts the inheritance of children in being at the time of the death of the decedent. *Id.* For further discussion and possible solutions, see *infra* Part VI.

⁸⁵ See *supra* Part III.A.

⁸⁶ See, e.g., W. VA. CODE ANN. § 42-1-1 (LexisNexis 2010) (providing definitions to be applied under the "descent and distribution" scheme of the West Virginia Code). For additional discussion on the inadequacies of the definitions provided within that statute, see *infra* Part VI.

⁸⁷ See Lorio, *supra* note 1, at 159. The paternity action process and restrictions arise in conjunction with the establishment of a "parent-child relationship." See *supra* Part III.A.

⁸⁸ Knaplund, *supra* note 6, at 639-40.

Although many states have not adopted statutes that specifically provide for the intestacy inheritance rights of posthumously conceived children, there are current uniform codes recommending the adoption of such provisions.⁸⁹ These model codes even provide the policy behind certain provisions within the statute, such as the reasoning for time limits.⁹⁰

The aforementioned considerations are imperative because of the potential obstacles surrounding the extension of intestate inheritance rights to posthumously conceived children. There exist other legal implications relating to the posthumously conceived child and his or her intestate inheritance rights; however, the discussion included in this section provides a sufficient background for one to place into context the exorbitant number of issues West Virginia must consider in its deliberations over any related legislation in the future.

E. The Will and the Statutory Trust

One of the easiest mechanisms to avoid confusion and uncertainty as to the posthumously conceived child's legal right to inherit is a provision for the child in the decedent's will, with explicitly articulated intent to provide for the child.⁹¹ Inclusion of a specific provision within the decedent's will evinces the *intent* of the testator to provide for his or her posthumously conceived child.⁹²

The testator's intent is the controlling factor in the context of wills interpretation and construction.⁹³ Therefore, it is imperative that the testator includes a specific provision that provides for the possibility of a posthumously conceived child when the testator has made his or her genetic material available for post-mortem use. Inclusion of one of these provisions in a will prevents confusion and uncertainty as to the testator's intentions to provide for the posthumously conceived child.⁹⁴ Additionally, "[a]bsent this specificity in the will, it is

⁸⁹ See *infra* Part V.C.

⁹⁰ The 2008 comment to section 2-120(k) of the Uniform Probate Code provides in pertinent part: "The 36-month period in subsection (k) is designed to allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy." UNIF. PROBATE CODE § 2-120(k) cmt. at 79 (2008).

⁹¹ Elliot, *supra* note 2, at 65; see also *supra* note 70 (providing a suggested, illustrative will provision). One scholar presented an example for how one could most effectively prevent complications concerning the rights of their posthumously conceived child via their will: "[i]nclusion of a phrase such as 'to my children, including whatever children are conceived or born before or after my death from my frozen genetic material' has been suggested as inclusive phraseology." Lorio, *supra* note 1, at 163.

⁹² In states that require the decedent's consent in order to establish a parent-child relationship, the will provision seemingly would suffice as additional evidence of such.

⁹³ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003).

⁹⁴ See Lorio, *supra* note 1, at 163.

unclear whether a posthumously conceived child could be included as a pretermitted heir.”⁹⁵

An alternative option for predictable and reliable disposition of the rights of a posthumously conceived child is a non-probate form of transfer, such as a trust: “[a]nother possibility is to create a statutory trust for any posthumously conceived child, allowing for the remainder of the estate to be administered and distributed in a timely fashion.”⁹⁶ Today, non-probate forms of transfer are an increasingly popular means of distributing a decedent’s estate.⁹⁷ Therefore, it is logical for a person to be able to rely on the same types of provisions that are in wills, which specifically provide for inheritance rights of a posthumously conceived child, to apply in inter vivos trusts and other non-probate forms of transfer.

F. *Social Security Benefits*

Much of the case law related to posthumously conceived children’s rights involves the child’s right to Social Security benefits from the deceased parent.⁹⁸ The basic principles of Social Security eligibility are matters of federal law that implicate certain state law provisions.⁹⁹ Although the laws for defining a surviving child (for purposes of receiving Social Security benefits) do implicate state laws, the Supreme Court of the United States has set overriding precedent for meeting a second requirement of demonstrating “dependency,”¹⁰⁰ making this element one of federal concern.¹⁰¹ Posthumously conceived children are dependent on a deceased parent as much as any other child.

Social Security benefits are one means of supporting a child. As one commentator predicts, there is the potential for constitutional attacks against the denial of Social Security benefits to posthumously conceived children through the Fifth Amendment’s Equal Protection Clause.¹⁰² Because the posthumously

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984) (explaining the decline in use of the probate system and the rules of descent and distribution in the modern American system because of the increased use of non-probate forms of transfer, such as the revocable trust).

⁹⁸ See *infra* Part V.A.; Lorio, *supra* note 1, at 156 (“The issue of a posthumously conceived child’s right to inherit from his deceased father was first raised in 1993 in the context of a denial of Social Security benefits.”).

⁹⁹ See *supra* Part II.C.2.

¹⁰⁰ See Nolan, *supra* note 39, at 1100–01 (citing *Matthews v. Lucas*, 427 U.S. 495 (1976) (discussing 42 U.S.C. § 402(d)(1)(C))).

¹⁰¹ *Id.*

¹⁰² *Id.* at 1101. (“Thus, one may argue that under constitutional analysis this section of the Act is unconstitutional since it does not accommodate this subclass of nonmarital [sic] children.”); see also U.S. CONST. amend. V.

conceived child's right to inherit repeatedly implicates Social Security benefits, states must strongly consider the ramifications of a posthumously conceived child statute on this often vital support system.

G. The Child's Constitutional Right of Equal Protection

"The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying to any person within their jurisdictions 'the equal protection of the laws.' Courts and commentators have interpreted this language as requiring that similarly-situated individuals and groups be treated alike."¹⁰³ A state must meet one of several "scrutiny" tests, depending on the type of its classification, in order for differential treatment of a certain class to pass judicial review.¹⁰⁴ Therefore, differential treatment of posthumously conceived children must pass a certain level of scrutiny, which is an additional consideration in any disparate treatment a state may choose to afford them.

As proposed by one scholar, an ideal approach to the equal protection rights of posthumously conceived children is an intermediate level of scrutiny.¹⁰⁵ This is an acceptable standard for deciding the rights of posthumously conceived children concerning related state laws because of the children's "immutable characteristic[s]."¹⁰⁶ Because the child has no control over the posthumous nature of its conception, it should not be legally deprived on the basis of that immutable characteristic. Therefore, any state's differential treatment of this class of children should meet a somewhat heightened standard of scrutiny¹⁰⁷ to withstand judicial review.

Intermediate scrutiny is reasonable, and certainly equitable, especially when viewed in light of the nearly invariable principle of placing the best interest of the child above all else.¹⁰⁸ As stated by one author, "[w]ith new reproductive assistance technologies emerging every day, however, posthumous reproduction and the children created thereby should be afforded the same constitu-

¹⁰³ Goodwin, *supra* note 5, at 242; *see also* U.S. CONST. amend. XIV.

¹⁰⁴ Under the Equal Protection clause, the Supreme Court analyzes the type of differential treatment a specific group receives through a state's action under one of three standards: 1) Rational Basis Test (lowest level of scrutiny), 2) Substantially Related to a Government Interest Test (intermediate level scrutiny), and 3) Compelling Purpose Test (strict level scrutiny). CHIMERINSKY, *supra* note 35, at 683–809 (also explains the different levels of scrutiny for different classifications, as well as, information about the requirements of a "legitimate purpose" and "reasonable relationship" in a state's differential treatment action).

¹⁰⁵ Goodwin, *supra* note 5, at 245.

¹⁰⁶ *Id.* at 245–46. The Supreme Court of the United States has utilized an intermediate level of scrutiny when deciding the rights of illegitimate children, and has held that such a characteristic is *not within the control of the child*. Therefore, the state must prove that its differential treatment substantially relates to an important state interest. *Id.*; *see also* Mathews v. Lucas, 427 U.S. 495, 518 (1976).

¹⁰⁷ Mathews, 427 U.S. at 518; Goodwin, *supra* note 5, at 245.

¹⁰⁸ Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 265 (Mass. 2002).

tional protections that traditional reproductive methods and the children created thereby receive.”¹⁰⁹ In determining what degree of legal recognition to afford posthumously conceived children, West Virginia must strongly consider the constitutional ramifications surrounding these children’s creation and his or her right to support.

H. The Rule Against Perpetuities, Anti-Lapse Statutes, and Pretermitted Heir Statutes

“The Uniform Status of Children of Assisted Conception Act and its recodification in the Uniform Parental Act of 2002 suggest in their respective comments that parents can provide for posthumously conceived children in their wills.”¹¹⁰ Along with the ability to provide for one’s posthumously conceived children through a will comes the possibility of complications with latent, yet lurking hazards. One such hazard is the Rule Against Perpetuities,¹¹¹ which aside from frustrating first year law students also presents itself in the context of testate distribution to posthumously conceived children.

“[T]he common law Rule Against Perpetuities did not anticipate posthumously conceived children.”¹¹² Under the traditional Rule Against Perpetuities, devises to posthumously conceived children have the potential to violate the Rule because the children could potentially be born more than twenty-one years after the death of the testator, who creates the interest.¹¹³ Granted, many states have adopted less stringent approaches to the Rule by means of the Wait-and-See Doctrine¹¹⁴ or the Reformation Doctrine, also known as “cy pres.”¹¹⁵ However, even with these measures in place there is the potential for the Rule to cause unnecessary havoc in interpretation and construction of the testator’s provisions, due to unforeseen circumstances. One proposed solution is to make the surviving spouse of the decedent, and other parent of the posthumously con-

¹⁰⁹ Elliot, *supra* note 2, at 56. “However, if the decision to bear a child is a constitutionally protected choice, then it is logical. . . . that the manner in which the child is conceived, [either by sexual intercourse or utilizing reproductive assistance], is also a constitutionally protected decision.” *Id.* (quoting Robert J. Kerekes, *My Child . . . But not my Heir: Technology Law and Post-Mortem Conception*, 31 REAL PROP. PROB. & TRUST J. 213, 227 (1996)).

¹¹⁰ Nolan, *supra* note 39, at 1098 (footnotes omitted).

¹¹¹ UNIF. STATUTORY R. AGAINST PERPETUITIES § 1 (West 1990).

¹¹² Nolan, *supra* note 39, at 1099.

¹¹³ *Id.*

¹¹⁴ The “Wait-and-See Doctrine” permits a court to “wait and see” what happens with regards to a potential violation of the Rule Against Perpetuities, as opposed to the traditional approach of assuming what “could” happen as causing a violation. The amount of time that a court will wait is statutorily prescribed. *DUKEMINIER ET AL.*, *supra* note 13, at 900–02.

¹¹⁵ The “Reformation Doctrine,” which is often called the “Doctrine of Cy Pres,” is a method by which a court will modify a will or trust “so as to carry out the testator’s intent within the perpetuities period” so that it does not violate the Rule Against Perpetuities. *Id.* at 899.

ceived child, the measuring life, thus preventing any child born of her from violating the Rule.¹¹⁶

Finally, West Virginia must also contemplate the entanglement of the state's applicable pretermitted heir and anti-lapse statutes with the issue during its debates over the appropriate measures to be taken with regards to posthumously conceived children. However, aside from noting the necessity of being addressed, no further discussion of those topics is included in this Note.

IV. HOME SWEET HOME: WHERE DOES WEST VIRGINIA STAND?

Now, with the appropriate foundational knowledge, it is possible to analyze where West Virginia sits with regards to its current Code and the posthumously conceived child. The short of the matter is that West Virginia is nowhere, or so it would seem. Section 42-1-8 of the West Virginia Code¹¹⁷ specifically provides protection for the inheritance rights of the posthumously *born* child, but not the posthumously *conceived* child.¹¹⁸ Consequently, West Virginia retains a gap within its Code¹¹⁹ in which there is an unpredictable and seemingly hopeless disposition for the inheritance rights of the posthumously conceived child.

Section 42-1-8 of the West Virginia Code provides as follows: "Any child *in the womb of its mother* at, and which may be born after the death of the intestate, shall be capable of taking by inheritance in the same manner as if such child were in being at the time of such death."¹²⁰ Thus, West Virginia provides statutory protection for the rights of the posthumously born child, if the child was "in the womb of its mother" at the time of the decedent's death.¹²¹ However, this provision clearly excludes from its protection the posthumously *conceived* child for intestate inheritance purposes.

Questions arise when considering this statutory void. One might reasonably think that West Virginia purposefully omitted from the statute any specific reference to the posthumously *conceived* child. However, upon exploration of West Virginia's legislative history, model codes, other jurisdictions, and the relatively recent presentation of related cases, it is inexcusable that West Virginia would not at least address the issue of providing intestate inheritance rights for these children in some capacity, either in the positive¹²² or the negative.¹²³

¹¹⁶ *Id.*

¹¹⁷ W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.*

¹²² See, e.g., UNIF. PROBATE CODE § 2-120 (2008) (example of a model statute that offers posthumously conceived children intestate inheritance rights from their deceased parent).

¹²³ Although not ideal, West Virginia could of course decide that the interests of the state, in opposition to extending inheritance rights to posthumously conceived children, outweigh any

Problems will inevitably arise when there is a complete lack of statutory consideration given to an entire class of persons.

When considering the rising prevalence of posthumously conceived children in modern society,¹²⁴ there is no excuse for West Virginia to intentionally or unintentionally omit from its Code any provision related to these children. Granted, it is possible that the state has in fact intentionally omitted them from the Code. However, the want of an explicit provision leads to uncertainty in statutory interpretation. If West Virginia desired to prohibit the posthumously conceived child from inheriting from its deceased parent, it would be more effective to lucidly articulate that goal within the language of the statute. Therefore, it is more likely that the state has simply not updated this Code section¹²⁵ in order to accommodate for the relatively recent developments related to posthumously conceived children.

The legislative history of section 42-1-8, or the lack thereof, bolsters the assertion that West Virginia has simply neglected to address the intestate inheritance rights of posthumously conceived children, as opposed to intentionally omitting them from the statute. Unfortunately, section 42-1-8's legislative history is scarce. Per usual in West Virginia, there is a dearth of House or Senate reports within the relevant journals surrounding the years of the statute's adoption that convey any substantive reasoning behind the statute's enactment.¹²⁶ However, an assiduous search within each year's relevant West Virginia Code section, as it passed through time, procured the origin of the statute and a meager reason behind its one-time change in its West Virginia history. The current section 42-1-8 has only changed one time since its original establishment in West Virginia in 1882.¹²⁷ In 1931 the legislature amended the statute's language to its present articulation;¹²⁸ that was the last time the statute has changed in eighty years.

interests supporting extension of those rights. At least if the issue is statutorily addressed, there will not be room for uncertainty in these cases.

¹²⁴ Elliot, *supra* note 2, at 51.

¹²⁵ W. VA. CODE ANN. § 42-1-8.

¹²⁶ H.D. 314, 1882 Leg., Adjourned Sess. (W. Va. 1882) (With no reasoning cited therein, this only contains reference to the passing of an amended and re-enacted chapter seventy-eight. Chapter seventy-eight was the original chapter in which current section 42-1-8 was found.); S. 314, 1882 Leg., Adjourned Sess. (W. Va. 1882) (only contains reference to the passing of the equivalent bill sent from the House of Delegates with no reasoning cited therein). Before the adoption of this statute in West Virginia, the line of legislative history traces itself back to the State of Virginia's statutory scheme, as far back as 1849. See VA. CODE 123-8 § (1849). It would seem that West Virginia's adoption of the statute was a default adoption of the entire, related statutory construction from the state of Virginia.

¹²⁷ 1882 W. Va. Acts 252 (original Act establishing a "posthumous children" statute under the descent and distribution section in West Virginia's Acts).

¹²⁸ W. VA. CODE § 42-1-8 (1931). The statute which was amended in 1931 adopted the exact same articulation codified in the current West Virginia Code section 42-1-8: "Any child in the womb of its mother at, and which may be born after, the death of the intestate, shall be capable of

The implemented change occurred in 1931, which removed a ten month time limit within which the child must be born after the decedent's death; however, it still required the child to be "in the womb of its mother" at the time of the decedent's death.¹²⁹ Lastly, the 1931 change reworded the French phrase "en ventre sa mere" into its English equivalent, meaning "in the womb of its mother."¹³⁰ A comment to the 1931 statute section explained that the reason for removing the time limit was that it ran "contrary to scientific opinion."¹³¹ Furthermore, the scientific component of the statute's alteration was provided in a comment to a different section of the West Virginia Code section 36-1-13,¹³² of that same year. The comment elaborated that because of scientific opinion, no time limit should be affixed to the birth of the child.¹³³ But removing the time limitation and translating the French phrase into English are the only changes made to the statute in eighty years.

These changes, however, only considered scientific development¹³⁴ for posthumously born children, not posthumously conceived children, because of the retention of the "in the womb of its mother" requirement.¹³⁵ Therefore, the only change to the statute failed to accommodate for posthumously conceived children. Nevertheless, based on this historical attempt to adapt to scientific progression, one could argue that West Virginia maintains a policy of staying current with developing technologies therefore making an immediate change to the current statute imperative.¹³⁶ The fact that there has only been one change to this statute, made eighty years ago, provides overwhelming support for the central contention of this Note: section 42-1-8 of the West Virginia Code is out of date and needs substantial revision for the accommodation of posthumously conceived children.

A deeper examination of the West Virginia Code lends no support to finding accommodation for posthumously conceived children. Section 42-1-3(f)

taking by inheritance in the same manner as if such child were in being at the time of such death"). *Id.*

¹²⁹ *Id.* at reviser's note.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² W. VA. CODE § 36-1-13 (1931) (this section, entitled "Limitations Contingent Upon Death," falls under the general chapter "Estates in Property," and the comment briefly discusses the reasons for redacting the time limit for children "in the womb of its mother" at the time of the decedent's death).

¹³³ *Id.* at reviser's note (b).

¹³⁴ The scientific opinion noted in the comments to the 1931 statute could not have possibly contemplated posthumously conceived children because of the statute's retention of the "in the womb of its mother" requirement. Thus, despite the commendable attempt to adapt to scientific progress, these changes are out of date. *Id.*

¹³⁵ W. VA. CODE § 42-1-8 (1931).

¹³⁶ See *Farley v. Sartin*, 466 S.E.2d 522, 531 (W. Va. 1995) (references section 42-1-8 of the West Virginia Code as an example of West Virginia's purported policy of attempting to stay current with scientific advancements).

of the West Virginia Code provides for afterborn heirs.¹³⁷ This part of the Code reads: “An individual *in gestation* at a particular time is treated as living at that time if the individual lives one hundred twenty hours or more after birth.”¹³⁸ However, here too, complications arise with regards to posthumously conceived children because, for inheritance purposes, the posthumously conceived child cannot, by definition, be “in gestation” until after the death of the decedent parent.¹³⁹ Therefore, the child will be precluded from inheriting, even if it does live one hundred twenty hours after its birth.

Additionally, section 42-1-1(5) of the West Virginia Code defines descendant as follows: “Descendant of an individual means all of his or her descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this code.”¹⁴⁰ A legal parent-child relationship, as discussed *supra*,¹⁴¹ must be established in order for the child to inherit. Thus, according to section 42-1-1(5) of the West Virginia Code, a posthumously conceived child in West Virginia must establish a parent-child relationship in order to be considered a descendant of its deceased parent for inheritance purposes.¹⁴² The problem of establishing the parent-child relationship is particularly acute for the posthumously conceived child in West Virginia, because even if the child establishes that relationship, section 42-1-8¹⁴³ does not permit the otherwise valid “child”¹⁴⁴ to inherit if it was not in the womb of the mother at the time of the decedent’s death.¹⁴⁵

In West Virginia, there will inevitably be future chaos on the bench with regards to deciding how best to interpret the current statute when a posthumously conceived child case presents itself. The West Virginia Supreme Court of

¹³⁷ W. VA. CODE ANN. § 42-1-3(f) (LexisNexis 2010).

¹³⁸ *Id.* (emphasis added).

¹³⁹ DUKEMINIER ET AL., *supra* note 13, at 117.

¹⁴⁰ W. VA. CODE ANN. § 42-1-1(5) (LexisNexis 2010). Also note, “‘Heirs’ means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.” W. VA. CODE ANN. § 42-1-1(16) (LexisNexis 2010). Additionally, “‘Parent’ includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent or grandparent.” W. VA. CODE ANN. § 42-1-1(26) (LexisNexis 2010).

¹⁴¹ See *supra* Part III.A.

¹⁴² § 42-1-5.

¹⁴³ W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

¹⁴⁴ The term “child” is not specifically defined under the definitions section of the relevant code section, § 42-1-1, despite reference to it (in relation to the parent-child relationship) in section 42-1-1(5). Therefore, although a parent child relationship is purportedly required, an applicable definition of “child” must be found in other related chapters of the Code and in relevant case law. See, e.g., *Sec. Nat’l Bank & Trust Co. v. Willim*, 153 S.E.2d 114 (W. Va. 1967); *Ramsey v. Saunders*, 172 S.E. 798 (W. Va. 1934); *State v. Scarbrough*, 150 S.E. 219 (W. Va. 1929); *Cunningham v. Dunn*, 100 S.E. 410 (W. Va. 1919); *Martin v. Martin*, 44 S.E. 198 (W. Va. 1903).

¹⁴⁵ § 42-1-8.

Appeals, with inadequate statutory guidance, will be forced to adjudicate on this type of case, creating case law on the matter. However, confusion and unpredictability can be avoided if the legislature preemptively acts to promulgate a new, or at least revised, statutory scheme accommodating for the rights of the posthumously conceived child. This being so, it is time to look forward and decide where the State needs to go with regards to handling the rights of these children.

V. LOOKING OUTSIDE: ANALYZING THE VARIOUS APPROACHES TO POSTHUMOUS CONCEPTION

Exploring some of the existing approaches to the posthumously conceived child's dilemma establishes guidelines for West Virginia to base its deliberations on when promulgating a newly revised and comprehensive statute for these children. The most effective mechanism for approaching this critical analysis involves a separate examination of select cases and statutes.

A. *Case Law*

Currently, very few jurisdictions have directly adjudicated on the rights of a posthumously conceived child to inherit. Furthermore, the following cases that are discussed are only a few of the most groundbreaking and persuasively decided cases. Based on the selected cases, it is easier to comprehend the necessary analysis a court must give to the problems confronted by the posthumously conceived child. Comparison of case law is useful in its ability to provide the reasoning conducted by other courts as they decided how best to deal with these issues. There may not be one correct answer to the problem of balancing state and personal interests; however, it is apparent that equity and the totality of the circumstances play a role in a court's decision.¹⁴⁶

These cases provide a foundation of knowledge that will be useful to the legislature and the bench. Existing statutes, from foreign jurisdictions, often times fall short of perfection. Thus, the existing body of case law provides additional considerations that can be synthesized with the existing model and foreign statutes during debates over an appropriate approach to the dilemma, resulting in a culmination of wisdom from which West Virginia may base its statute. A combination of case law and statutory examples should be utilized when promulgating the new West Virginia rendition of the statute, escaping the deficiencies that would result should only one body of experience be relied upon.

1. *Hecht v. Superior Court*¹⁴⁷

Before committing suicide in a Las Vegas hotel, the decedent stored fifteen vials of his genetic material at a sperm bank.¹⁴⁸ He signed a release state-

¹⁴⁶ See *infra* Part V.A.1–3 and accompanying notes.

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

ment at the sperm bank, which authorized the release of his stored sperm to his girlfriend, Deborah Hecht.¹⁴⁹ The decedent died testate, bequeathing the sperm to his girlfriend.¹⁵⁰ The decedent's will read, in relevant part, "I bequeath all right, title, and interest that I may have in any specimens of my sperm stored at any sperm bank or similar facility for storage to Deborah Ellen Hecht."¹⁵¹ Furthermore, the decedent overtly expressed his *intention* that Ms. Hecht use his sperm in a subsequent provision of the will, "It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire. . . ."¹⁵² Based on this bequest, Ms. Hecht sought to collect the vials of sperm, over the objections of the decedent's surviving children from a previous marriage.¹⁵³

The court focused on the *ownership interest* that a decedent has in his preserved genetic material, as well as his *intention* for the post-mortem use of the material.¹⁵⁴ The court recognized the unique value of this case by explaining that "[s]perm which is stored by its provider with an intent that it be used for artificial insemination is thus unlike other human tissue because it is 'gametic material' that can be used for reproduction . . . the value of sperm lies in its potential to create a child after fertilization, growth, and birth."¹⁵⁵ Therefore, the court concluded that at the time of his death, the decedent maintains an ownership interest in the use of his sperm for reproduction.¹⁵⁶

The court continued its analysis with an elaboration on the decedent's intention for the use of the preserved sperm.¹⁵⁷ The decedent's intent to bequeath the sperm to his girlfriend to be used, if she desired, for reproduction was evinced through the specific provisions of the decedent's will.¹⁵⁸ Therefore, the decedent's wish, that his girlfriend receive his sperm for her use, may validly be carried out based on the unambiguous intentions explicitly set forth in the

¹⁴⁸ *Id.* at 276.

¹⁴⁹ *Id.* (The release statement, at the sperm bank, signed by the decedent, read in pertinent part: "I, William Everett Kane, . . . authorize the [sperm bank] to release my semen specimens (vials) to Deborah Ellen Hecht.").

¹⁵⁰ *Id.* at 276.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ The interests of the children living at the time of the decedent's death are important to Professor Nolan because of the potential for immediate need of their share of the decedent's estate. Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011); *see also infra* Part VI.

¹⁵⁴ *Hecht*, 20 Cal. Rptr. 2d at 280–81, 283–84.

¹⁵⁵ *Id.* at 283 (citations omitted).

¹⁵⁶ The court advanced its reasoning and conclusion by stating that the decedent's interest in his sperm, at the time of his death, "constitute[s] 'property' within the meaning of" the state's probate code. *Id.*

¹⁵⁷ *Id.* at 283–84.

¹⁵⁸ *Id.*

will.¹⁵⁹ Finally, the court dictated another influential policy, by affirming a right to utilize post-mortem artificial insemination.¹⁶⁰ The court based its conclusion on the lack of public policy or statute to the contrary.¹⁶¹

The *Hecht* case illustrates the establishment of a decedent's post-mortem right to control his or her gametic material.¹⁶² More importantly, the court's reasoning in reaching its conclusions represents some of the important, controlling factors that should influence legislatures in their attempts to codify a means by which a decedent may validly provide for the post-mortem use of his or her gametic material, and also the ability to effectively provide for the products of its use. The principles of ownership and intent are recurring themes in this body of litigation, which cannot be taken lightly as "intent" alone serves as a polestar principle in testate interpretation.¹⁶³ West Virginia can use this case for supporting the decedent's right to dispose of his genetic material, as well as for him to provide for the products of it in the manner he deems most appropriate when his intent is sufficiently established.

2. *In re Estate of Kolacy*¹⁶⁴

Twins that were posthumously conceived, and born almost eighteen months after their father's death were held to be legal heirs for state intestacy purposes.¹⁶⁵ The decedent, like many other decedents in these cases, deposited his sperm for preservation after being diagnosed with cancer.¹⁶⁶ Sadly, he died at the age of twenty-six, leaving with his surviving wife the right to use his preserved sperm for reproductive purposes.¹⁶⁷ More than eighteen months after the death of the decedent, twins were born from his preserved genetic material.¹⁶⁸ The surviving wife sought judicial declaration of the children being legal heirs of their father's estate under New Jersey's intestacy statute.¹⁶⁹ At that time, the relevant statute in New Jersey granted no inheritance rights to the posthumously

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 287–90.

¹⁶¹ *Id.* at 289–90 (“Decedent’s adult children also fail to provide any legal or factual basis to support their contention that the birth of a child through artificial insemination of Hecht with decedent’s sperm implicates their ‘fundamental right to protection of their family integrity’ . . .”). See also Elliot, *supra* note 2, at 58.

¹⁶² 20 Cal. Rptr. 2d at 287–90.

¹⁶³ RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003).

¹⁶⁴ 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

¹⁶⁵ *Id.* at 1258.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

conceived children,¹⁷⁰ which is similar to that of West Virginia's statute¹⁷¹ in that no inheritance rights were accorded to posthumously *conceived* children.¹⁷²

Despite the lack of express reference to the rights of posthumously *conceived* children, the court looked to what it believed was the actual intent of the legislature in promulgating its current statute.¹⁷³ Based on this approach, the judge said he “discern[ed] a basic legislative intent to enable children to take property from their parents and through their parents from parental relatives.”¹⁷⁴ Furthermore, the judge elaborated on the reasoning by saying that the legislature's “general intent should prevail over restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us.”¹⁷⁵

Although the court came to an ultimate conclusion in favor of recognizing the children's inheritance rights, it did not do so without clearly expressing a concern for the interests of third parties.¹⁷⁶ The court recognized that the interests of the posthumously conceived children should, if possible, be protected; however, if “doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates[,]” then those outside interests must be given serious consideration as well.¹⁷⁷

West Virginia's analogous statute¹⁷⁸ has yet to be interpreted in the same context as the *Kolacy* case, but West Virginia should strive to mirror the court's liberal interpretation of the statute,¹⁷⁹ capturing the intent of the legislature.¹⁸⁰ The court accorded more weight to the needs and rights of the children, who are unable to change the means by which they were born,¹⁸¹ than to certain

¹⁷⁰ *Id.* at 1260

¹⁷¹ W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

¹⁷² *In re Estate of Kolacy*, 753 A.2d at 1261.

¹⁷³ After acknowledging the inadequacy of the state's current posthumous child intestacy statute, the court explained that “[s]imple justice requires us to do the best we can with the statutory law which is presently available.” *Id.* at 1261–62.

¹⁷⁴ *Id.* at 1262.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (“Estates 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.”). This illustrates one of the precise concerns echoed by Professor Nolan. Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

¹⁷⁸ W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

¹⁷⁹ 753 A.2d at 1262.

¹⁸⁰ *Id.*; see *supra* Part IV (discusses the intention of West Virginia, in its statutory scheme, to remain current with scientific developments).

¹⁸¹ The court sympathetically expressed its concern for posthumously born children's rights when it said, “once a child comes into existence, she is a full-fledged human being and is entitled

administrative needs of the state. Ultimately, the court explicitly acknowledged the need and suitability of the legislature to take charge in expressly speaking to the specific needs of these children.¹⁸²

3. *Woodward v. Commissioner of Social Security*¹⁸³

A surviving wife, who was artificially impregnated with her deceased husband's sperm, attempted to claim Social Security benefits for the resulting children.¹⁸⁴ The court in this case held that posthumously conceived children enjoy the same inheritance rights of naturally born children under Massachusetts intestacy law if the surviving spouse established 1) the genetic, paternal relationship between the children and the decedent; and 2) that the decedent consented to both reproducing posthumously and supporting the resultant children.¹⁸⁵

The court focused on “three powerful state interests: the best interest of [the] children, the State’s interest in the orderly administration of [the] estates, and the reproductive rights of the genetic parent.”¹⁸⁶ The court expanded by saying that its “task is to balance and harmonize these interests to effect the Legislature’s over-all purposes.”¹⁸⁷

The *best interest*¹⁸⁸ of children, the *certainty*¹⁸⁹ in estate administration, and the *intention and consent*¹⁹⁰ of the decedent providing the gametic material all serve as the overarching principles in the interpretation of these cases. Ultimately, and what seems to be a recurring theme, the court decided in favor of protecting the interests of the children, notwithstanding any deficiencies within the current state statute; this is a theme West Virginia should adopt.¹⁹¹ However,

to all of the love, respect, dignity and *legal protection* which that status requires.” *In re Estate of Kolacy*, 753 A.2d at 1263 (emphasis added).

¹⁸² *Id.* at 1261.

¹⁸³ 760 N.E.2d 257 (Mass. 2002).

¹⁸⁴ *Id.* at 260.

¹⁸⁵ *Id.* at 259.

¹⁸⁶ *Id.* at 265.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 266.

¹⁹⁰ *Id.* at 269. *See also In re Martin B.*, 841 N.Y.S.2d 207, 212 (N.Y. Surr. Ct. N.Y. 2007). That court held that posthumously conceived children qualify as heirs because “a sympathetic reading of these instruments warrants the conclusion that that Grantor *intended* all members of his bloodline to receive their share.” *Id.* (emphasis added).

¹⁹¹ The *Woodward* court noted that “the legislature has expressed its will that all children be ‘entitled to the same rights and protections of the law’ regardless of the accidents of their birth.” 760 N.E.2d at 265 (quotations omitted). *See also Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011) (adopting a liberal interpretation of the term “child” in acknowledging posthumously conceived children as being “children” within the meaning of the Social Security Act’s surviving child’s insurance benefits provision).

this is not to suggest that the opposite cannot be decided, based on a statutory interpretation favoring the state's interest of certainty and orderly administration of estates over the child's interests.¹⁹²

West Virginia has before it a colossal task. As expressed by other jurisdictions having already adjudicated on the matter, "there is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology."¹⁹³ West Virginia, like many of the state courts from the cases discussed herein, lacks sufficient legislation to resolve the multifaceted issues surrounding the inheritance rights of posthumously conceived children. However, as is evident from other state's cases, there are recurring themes that seem to serve as polestars to interpretation and construction of the rights of these unique, yet ever more prevalent, group of children.¹⁹⁴

B. A Point of Reference: On-Point Statutes from Other Jurisdictions

As of the spring of 2010, there were twelve states with enacted legislation specifically geared toward posthumously conceived children.¹⁹⁵ Of those twelve statutes, only a few have been selected for detailed analysis in order to thoroughly explore the intricacies and ramifications of those promulgations. Furthermore, selecting a limited number of state statutes is equally useful because many of the statutes are similarly constructed.

An attempt is made to present statutes that illustrate recurring themes of interpretation and construction relied on in the above-mentioned cases.¹⁹⁶ It is upon these guiding principles that West Virginia can rest its ultimate conclusion on how best to resolve the legislative deficiencies currently at large in the state. Based on the examples provided below, West Virginia will more efficiently

¹⁹² *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011) (denying posthumously conceived child Social Security benefits based on the language of state statutes); *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011) (a case close to home for West Virginia, where the Fourth Circuit Court of Appeals adopted a strict construction of Virginia's posthumously conceived child statute in denying Social Security benefits to a posthumously conceived child born several years after the statute's ten month limitation); *Finley v. Astrue*, 601 F. Supp. 2d 1092 (E.D. Ark. 2009) (denying the inheritance rights of a posthumously conceived child under Arkansas's intestacy statutes); *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005). *See also* Lorio, *supra* note 1, at 158–59.

¹⁹³ *In re Martin B.*, 841 N.Y.S.2d at 212.

¹⁹⁴ There are currently a handful of additional relevant cases supporting the recognition of posthumously conceived children's rights to intestate inheritance. *See, e.g.*, *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

¹⁹⁵ *Wood*, *supra* note 33, at 890–91. Although this Note only explores the provisions of a select number of states, the remaining states' statutory provisions are of course useful in understanding the possible routes to be taken with regards to this class of children. The comprehensive list of states includes: California, Colorado, Delaware, Florida, Louisiana, North Dakota, Ohio, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* For the relevant statute sections for each of these states, see *infra* notes 188–209.

¹⁹⁶ *See supra* Part V.A.1–3 and accompanying notes.

conduct legislative debates concerning posthumously conceived children because of its ability to compare the costs and benefits of different states' approaches to the posthumously conceived child issue. Each representative state statute, and the states with similar statutory schemes, is listed in separate sections below, starting with the restrictive approach assumed by Florida.

1. Florida

Florida's posthumously conceived child statute reads as follows:

A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.¹⁹⁷

Florida's statute represents a restrictive approach¹⁹⁸ because it specifically requires testate disposition of a posthumously conceived child's right to inherit from the deceased parent, if the child was not in the woman's body before the death of the decedent.¹⁹⁹ This means the deceased parent must provide, in his or her will, for the posthumously conceived child. This statutory scheme offers some, but not complete, protection for the child.²⁰⁰ In a perfect world, all children would be equally protected in their attempts to receive support from their parents; however, not all children are produced through the same mechanisms, requiring adjustments in the disposition of their rights in intestacy.

In Florida, special emphasis is placed on the intent of the parent,²⁰¹ because the provisions within one's will require an affirmative, intentional action on the part of the testator to provide for those specific beneficiaries. Denial of intestate inheritance rights exemplifies a state interest and preference towards certainty and efficient closure of the deceased parent's estate. Although the Florida statute does permit testate inheritance, its denial of any intestate inheritance by the posthumously conceived child may be subject to constitutional challenge as discussed previously.²⁰² Another consideration brought to light through Florida's statute is whether a posthumously conceived child will qualify as a beneficiary under a will that makes a class gift, if the class gift only articulates a

¹⁹⁷ FLA. STAT. ANN. § 742.17(4) (LexisNexis 2011).

¹⁹⁸ Ohio's statute is another example of a state adopting an extremely restrictive view of the posthumously conceived child's right to inherit. OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2011) (completely barring from intestate inheritance any child not in existence or in gestation at the time of the decedent's death).

¹⁹⁹ FLA. STAT. ANN. § 742.17(4).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See supra* Part III.G.

bequest to “children” generally, never explicitly referring to posthumously conceived children.²⁰³

Florida’s relevant statute²⁰⁴ is specifically included in this Note for purposes of contrast from other states because it answers the question of whether a posthumously conceived child can inherit from the deceased parent narrowly. Although this Note argues for a fairly broad acknowledgement of the posthumously conceived child’s right to inherit in most circumstances, that view is by no means the only one. Therefore, it is of equal importance for West Virginia to consider the policy and consequences behind not permitting the posthumously conceived child to inherit except in very narrow circumstances.²⁰⁵ The representative statute of the next state, Virginia, assumes an increasingly intricate scheme.

2. Virginia

Virginia’s relevant code section provides:

Death of spouse. --Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.

However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure *or* (ii) the person consents to be a parent in writing executed before the implantation.²⁰⁶

Virginia takes a more convoluted approach in its statutory design, through a variety of statutorily prescribed responses to different circumstances.²⁰⁷ The posthumously conceived child may inherit when there is written consent by the deceased parent.²⁰⁸ This requirement is in accord with the other states adopting a similar requirement. However, Virginia’s statute makes a de-

²⁰³ See Goodwin, *supra* note 5, at 260.

²⁰⁴ FLA. STAT. ANN. § 742.17(4).

²⁰⁵ *Id.*

²⁰⁶ VA. CODE ANN. § 20-158(B) (2011) (emphasis added).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

tailed effort in providing guidance for various circumstances that may arise concerning posthumous children generally. The statute is an “all-in-one” statutory approach, with the posthumous *conception* provision embedded within the overall statute.²⁰⁹ Virginia also places a ten month time restriction on the rights of a posthumous child by means of an entirely separate statute,²¹⁰ which is unique in this state’s statutory design.

West Virginia should take from this statute the benefit of providing specific provisions for varying circumstances (e.g., tardy notice of decedent’s death to the physician²¹¹), but also the potential negative results of such actions because of the restrictive function those provisions perform. Virginia’s statute also places a time limit on the child,²¹² which acts to potentially deprive the child of the inheritance it could receive, and may need, upon its delayed birth.²¹³ Continuing the present discussion of restrictively oriented statutes, Louisiana represents an additional example of these intricate designs.

3. Louisiana

Louisiana’s relevant statute reads:

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

B. Any heir or legatee of the decedent whose interest in the succession of the decedent will be reduced by the birth of a child conceived as provided in Subsection A of this Section shall

²⁰⁹ *Id.*

²¹⁰ VA. CODE ANN. § 20-164 (2011) (requires any child born of a decedent parent be born within ten months of the decedent’s death for inheritance purposes); *see also* Wood, *supra* note 33, at 891–92.

²¹¹ VA. CODE ANN. § 20-158(B)(i).

²¹² VA. CODE ANN. § 20-164.

²¹³ *See, e.g.*, Schafer v. Astrue, 641 F.3d 49 (4th Cir. 2011) (recent case where the Court of Appeals affirmed this Note’s prediction of potentially negative results for the posthumously conceived child by adopting a strict construction of Virginia’s posthumously conceived child statute in denying Social Security benefits to a posthumously conceived child born several years after the statute’s ten month limitation).

have one year from the birth of such child within which to bring an action to disavow paternity.²¹⁴

Louisiana, like Virginia, sets forth detailed requirements in order for a posthumously conceived child to inherit from its parents.²¹⁵ Louisiana, and any other state articulating copious requirements to be met in order for a posthumously conceived child to inherit, resolves the problems of predictability and certainty in the state's favor. Through an intricate set of requirements, Louisiana provides the state a high degree of predictability, while also establishing a means by which the posthumously conceived child might inherit and receive other benefits as well.

West Virginia must be cautious, however, in navigating these highly regulated waters because of the potential for eliminating certain children from support because of requirements too stringently enforced and prescribed. However, by way of detailed statutory instruction, Louisiana serves as a superb example of a state providing recourse for a disgruntled third party whose share of inheritance is disturbed by the arrival of a posthumously conceived child.²¹⁶ West Virginia now has an example²¹⁷ upon which to base its own form of discourse for already living children, if it should decide to so provide. The next representative state, Colorado, adopts a more liberal statutory scheme.

4. Colorado

Colorado's relevant statute reads as follows:

If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if the assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.²¹⁸

Colorado, like many states,²¹⁹ adopts the Uniform Parentage Act's (hereinafter "UPA") version²²⁰ of the posthumously conceived child statute. By

²¹⁴ LA. REV. STAT. ANN. § 9:391.1 (2011).

²¹⁵ VA. CODE ANN. § 20-158(B) (2011). California serves as an additional example (to an extreme) of a state requiring explicit, detailed requirements for a posthumously conceived child to inherit from its deceased parent. CAL. PROB. CODE § 249.5 (West 2011) (California's statute even requires that the decedent's designated person to control the genetic material be notified by certified mail).

²¹⁶ LA. REV. STAT. ANN. § 9:391.1(B).

²¹⁷ *Id.*

²¹⁸ COLO. REV. STAT. § 19-4-106(8) (2011).

²¹⁹ Seven states have adopted the UPA's model statute (or very similar renditions) within their own codes. The six states, in addition to Colorado include Delaware (DEL. CODE ANN. tit. 13, § 8-707 (2011)); North Dakota (N.D. CENT. CODE § 14-20-65 (2011)); Texas (TEX. FAM. CODE ANN. §

adopting the UPA's articulation, Colorado's statute and other similar statutes represent a simplistic mechanism for accommodating the needs of the posthumously conceived child because the UPA sets forth an easy-to-follow model for states to quickly incorporate within their own codes.²²¹ By simply requiring that the decedent provide consent to be the parent of the child, these statutes permit a liberal statutory scheme. The statute contemplates caring for posthumously conceived children in most circumstances so long as the decedent gave consent, and there is not some other restrictive intestacy statute within the state, etc. This kind of provision for the child in this capacity represents extreme protection and support, but these statutes admittedly do not necessarily consider valid, counter-vailing interests of the state and third parties. A middle ground approach should be aspired to by West Virginia.²²²

C. *The Standard: Model and Uniform Codes*

There are model codes by which many states have based their own version of a posthumously conceived child statute on model codes.²²³ A review of these models provides a thorough and scholarly foundation upon which West Virginia might base its own statute, or at least formulate potential ideas for parts of its statutory scheme. This discussion starts with the Uniform Probate Code's rendition.

1. Uniform Probate Code

The Uniform Probate Code provides:

If under this section, an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of Section 2-104(a)(2) if the child is: (1) in utero not later than 36 months after the individual's death; or (2) born not later than 45 months after the individual's death.²²⁴

160.707 (West 2011) (adding only one additional requirement: the decedent's consent must be held by a licensed physician)); Utah (UTAH CODE ANN. § 78B-15-707 (LexisNexis 2011)); Washington (WASH. REV. CODE ANN. § 26.26.730 (West 2011)); and Wyoming (WYO. STAT. ANN. § 14-2-907 (2011)). *See also* Wood, *supra* note 33, at 890–91.

²²⁰ *See infra* Part V.C.2.

²²¹ *Id.*

²²² *See infra* Part VI.

²²³ *See supra* notes 218, 219 and accompanying text.

²²⁴ UNIF. PROBATE CODE § 2-120(k) (2008).

The Uniform Probate Code requires specific time limits within which the child must be born or conceived.²²⁵ The time limits serve state interests while still permitting the posthumously conceived child to inherit should it be born within the specified time parameters. Although there are time limits, which serve state interests, the model statute provides some form of inheritance and support protection for the posthumously conceived child. However, the same potential problems related to time limits on the ability of a posthumously conceived child to inherit are identical to those discussed in relation to Virginia's time sensitive statute, discussed above.²²⁶ Because there are in fact potential problems related to placing time limits on the posthumously conceived child, the discussion of the UPA's model statute (with no time limits) in the next section is useful.

2. Uniform Parentage Act²²⁷

The UPA provides:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.²²⁸

Aside from being the model upon which many states base their posthumously conceived children statutes,²²⁹ the UPA provides one of the more lenient versions of this type of statute. By simply requiring the written consent of the deceased parent, this model provides expansive protection for the child.²³⁰ Adequate protection of the posthumously conceived children's right to inherit is crucially important. Nevertheless, it is equally important to not let over-zealous

²²⁵ *Id.*; see also VA. CODE ANN. § 20-164 (2011).

²²⁶ See *supra* Part V.B.2. Professor Nolan expanded on some of the potential problems of imposing time limits that the state and decedent may never have contemplated. One such example is the possibility that the decedent has given full consent for use of the genetic material post-mortem. However, the surviving spouse attempts to use the genetic material, in a timely manner, but the implantation process fails to work until after the time restriction has surpassed. This presents the unique issue of a surviving spouse attempting to utilize the material within the time limits, but it simply is not successful until afterwards. Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

²²⁷ The Uniform Parentage Act is what the majority of states adopting posthumously conceived children statutes base their own constructions off of. See *supra* notes 224, 225 and accompanying text.

²²⁸ UNIF. PARENTAGE ACT § 707 (amended 2002).

²²⁹ *Id.*; see *supra* notes 221–227 and accompanying text.

²³⁰ UNIF. PARENTAGE ACT § 707.

protection of these children blind West Virginia from recognizing the state's interests of efficient closure of estates, and avoiding disturbance of the shares of children living at the time of the decedent's death.

The model codes, representative state statutes, and case law concerning posthumously conceived children convey an expansive set of attitudes and approaches to the dilemma. West Virginia should be sufficiently equipped with scholarly and experiential references upon which to base its own revision to section 42-1-8 of the West Virginia Code.²³¹

VI. RECOMMENDED SOLUTION: WHERE DOES WEST VIRGINIA GO NOW?

West Virginia may find consolation in the fact that only a minority of states have formally addressed the needs of posthumously conceived children.²³² However, the time has come for West Virginia to more appropriately provide protection for the children resulting from new age technology. Granted, the state maintains its own interests in this issue, such as efficient closure of estates upon a decedent's death and providing certainty for living heirs. However, the best interest of the posthumously conceived children and the equal protection that must be afforded to all of them ought rise above any other countervailing concerns when deciding on the result of the posthumously conceived child legislation in West Virginia.

There are colorful arguments for West Virginia to assume the position of states such as Colorado or Delaware, providing protection for the children with minimal restrictions, such as a simple written consent.²³³ Conversely, equally persuasive arguments exist for following the highly regulated and convoluted schemes within states such as Louisiana and California.²³⁴ However, this Note, based on a thoughtful analysis of the history of this topic and consideration of Professor Nolan's concerns,²³⁵ argues that a middle-road approach should be adopted in West Virginia. West Virginia should adopt a posthumously conceived children statutory scheme that sets certain limits, while being careful not to over regulate the process, which might lead to unintentional denial to these children of intestate inheritance rights.

Therefore, West Virginia should promulgate a statute that adopts and synthesizes provisions and concepts from the UPA,²³⁶ the Louisiana statute,²³⁷

²³¹ W. VA. CODE ANN. § 42-1-8 (LexisNexis 2010).

²³² See *supra* note 186.

²³³ See COLO. REV. STAT. § 19-4-106(8) (2011); DEL. CODE ANN. tit. 13, § 8-707 (2011); UNIF. PARENTAGE ACT § 707; see also *supra* notes 163, 164 and accompanying text.

²³⁴ See CAL. PROB. CODE § 249.5 (West 2011); LA. REV. STAT. ANN. § 9:391.1 (2011); see also *supra* notes 213–14 and accompanying text.

²³⁵ Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

²³⁶ UNIF. PARENTAGE ACT § 707.

²³⁷ LA. REV. STAT. ANN. § 9:391.1.

and the New Jersey case of *In re Estate of Kolacy*.²³⁸ The UPA's requirement of written consent and its lack of a time restriction²³⁹ are imperative because of the undeniable proof of the decedent's intent and its accommodation of a child who cannot help how long after its parent's death it is born.²⁴⁰ However, this alone will not be enough to deal with all of the related issues. Louisiana's separate provision that offers recourse for already existing children when a posthumously conceived child disturbs their shares is novel.²⁴¹ Louisiana provides for the inheritance rights of posthumously conceived children, but not without recognizing third party interests as well.²⁴² However, the means by which Louisiana protects already existing children is less than perfect.

Based on a persuasive discussion with Professor Nolan,²⁴³ already existing children should be given full protection of their shares of inheritance received at the time of decedent's death, by not permitting a posthumously conceived child to inherit directly from the *decedent* himself.²⁴⁴ Nevertheless, the child will be accorded full rights as a collateral and heir of the decedent under West Virginia's intestate distribution scheme,²⁴⁵ permitting it to inherit from all other living members of the decedent's family. Although not inheriting directly from the decedent, the child is still receiving adequate support via any other form of inheritance, as well as, being fully eligible for any other support benefits, based on the written consent establishing a valid parent-child relationship.²⁴⁶ This type of provision fully appreciates existing children's rights as well as the state's interest in efficient closure of estates.

Obviously, this perspective is not the only one, but it does provide fair and equitable protection to a class of children with an immutable characteristic: the posthumous means of their conception.²⁴⁷ Additionally, a statute with these provisions would provide adequate notice to the state of a potential future beneficiary, permit efficient closure of estates, and provide relief to the already living children of the decedent. It is now up to the legislature, and possibly the

²³⁸ 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

²³⁹ UNIF. PARENTAGE ACT § 707.

²⁴⁰ For a relevant example of why a child might be born outside of some state's time restrictions, but still being in need of support, see *supra* note 224.

²⁴¹ LA. REV. STAT. ANN. § 9:391.1(B).

²⁴² *Id.*

²⁴³ Telephone Interview with Laurence C. Nolan, Professor of Law, Howard Univ. (Feb. 9, 2011).

²⁴⁴ *Id.*

²⁴⁵ W. VA. CODE ANN. § 42-1-2 (LexisNexis 2010).

²⁴⁶ Providing specific, clearly articulated, statutory protection for a posthumously conceived child is more imperative than ever based on the recent decision by the Fourth Circuit Court of Appeals. In *Schaffer v. Astrue*, 641 F.3d 49 (4th Cir. 2011), the Fourth Circuit effectively took the stance of strict statutory construction in a posthumously conceived child case.

²⁴⁷ See *supra* Part III.G.

West Virginia Supreme Court of Appeals, to efficiently and responsibly handle this vexing matter.

VII. CONCLUSION

The time is now for the state of West Virginia to revise its archaic, eighty-year-old posthumous child statute in light of new age technology. The law related to the posthumously conceived child is lacking consideration in most states. However, as case law proves, the issues are evolving and will only grow more complex. Therefore, whether West Virginia adopts the model codes' suggestions, another states' attempted promulgation, or best yet, the proposal made in this Note, any step towards resolving the issue will prevent future headaches for the parties, the bench, and the legislature in trying to apply old law to new issues.

As West Virginia begins its legislative process on this issue it should keep in mind the advice of the Massachusetts Supreme Court:

As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.²⁴⁸

West Virginia has before it an important task. The controlling policy behind, and the balanced interests of the child, the parent, and the state must be accorded their due consideration regarding the matters set forth herein sooner rather than later.

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²⁴⁸ Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 272 (Mass. 2002).

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