Journal of Contemporary Health Law & Policy (1985-2015)

Volume 25 | Issue 2 Article 5

2009

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INTRODUCTION

As much as the law seeks to provide certainties, human evolution illustrates the continuity of uncertainty. John Stuart Mill was prescient when he observed: "There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life."[1] Today, in the first decade of the twenty-first century, twenty-five years after the inauguration of *The Journal of Contemporary Health Law and Policy* at the Columbus School of Law of The Catholic University of America, the law wrestles with the legal uncertainties spawned by advances in medical technology enabling posthumous conception. A quarter-century ago, medical procedures allowing for conception to occur long after the death of the providers of sperm, egg or embryos were nascent at best. Today, it is possible to bring about human posthumous conception for decades after death, challenging myriad laws of paternity, inheritance, and economic benefits all associated with paternity or maternity. State and federal statutes seek to provide certainty of disposition, but at present we are still gathering momentum, seeking some assurance sufficient for the purposes of human life. The latest development in this search is the Model Act Governing Assisted Reproductive Technology [hereinafter Model Act], dated February 2008, and approved by the American Bar Association to provide guidance to the states.[2] The Model Act encompasses far more than posthumous conception, but offers a benchmark for all that is to come.

When an infant is born following conception, federal and state statutes, and concomitant case law, have sought to provide certainty in the following situations: (1) establishing paternity because each child deserves a parent; (2) identifying heirs for inheritance benefits, both under state intestate statutes[3] and to comply with the wishes of testators and settlors in the

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1. JOHN STUART MILL, ON LIBERTY 37 (London, John W. Parker & Son, West Strand, 2d ed. 1859).

2. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008), *available at* http://www.abanet.org/family/committees/artmodelact.pdf.

3. *See* UNIF. PROBATE CODE § 2-101 (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.pdf ("Any part of decedent's

implementation of wills and trusts; and (3) structure qualifications for federal and state benefits, such as Social Security, Medicaid, or any of the child support guidelines. When conception and birth occurred only through sexual intercourse, and children were born within three hundred days of conception, these three goals were achievable within existing laws. Nonetheless, medical advances in assisted reproductive technologies have developed so rapidly that statutory law no longer provides certainty. Today, with an objective vacuum, courts have sought to provide a modicum of judicial assurance of equity and reason until such time as legislatures may accommodate the evolution of human procreation possibilities beyond the realm of only sexual intercourse. Each of the judicial decisions to be discussed that address the issue of posthumous conception, although few in number, speak to the need of statutory certainty. These decisions offer a judicial interim response; the Model Act contributes to the momentum, suggesting that the states now address the issues raised with statutes of their own, specifically in reference to posthumous conception.

Posthumous conception may be defined as "the transfer of an embryo or gametes with the intent to reproduce a live birth after a gamete provider has died."[4] The procedure is a form of assisted reproductive technology (ART) that encompasses any scientific intervention to bring about a human live birth but is now meant to apply only to conception leading to birth *after the death* of the gamete provider. Hence the term: posthumous conception. This is not the same as artificial insemination or in vitro fertilization. In an effort to provide clarity, and to distinguish this process from artificial insemination, the Supreme Court of Arkansas described in vitro fertilization as follows:

> After the woman has taken injectable ovulation-inducing medications . . ., multiple oocytes are retrieved from the woman's ovaries by a minor surgical procedure. The oocytes are placed in a petri dish with

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estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed . . . ."). For legal issues involved in testate and intestate succession, see James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743 (1998).

4. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102. A "gamete" means "a cell containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete. Sperm and eggs are gametes. A gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being." *Id. See generally* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE (ABA 2006); Michelle L. Brenwald & Kay Redeker, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599 (1999).

> her male partner's sperm (in vitro) and placed in an incubator for fertilization to occur. The embryos are allowed to grow for a period of three to five days before they are placed back into the woman's uterus.[5]

Conception after the death of the gamete provider is distinguishable from when sperm and egg (ova) create an embryo through in vitro fertilization *during the lifetime* of a gamete provider. Arguably, whenever sperm and egg create an embryo, conception occurs. Obviously, this may occur during the lifetimes of the gamete providers, and furthermore, if the birth of a child occurs as a result of this procedure, existing statutes would provide protection and eligibility because the resulting child will be born within the statutory period of time. But if conception occurs during the lifetime of the gamete provider, but implantation does not occur until after the death of one or both of the providers, then the birth of the resulting child would not be provided protection or eligibility under almost all existing statutes. This is the focus of posthumous conception.

There are two sets of circumstances that delineate the difference between posthumous conception and established, protected conception. One is when the conception occurs in an artificial environment, the conception—union of sperm and egg—occurring through in vitro fertilization and the resulting embryo remains outside of a gestational carrier or intended mother. Presumptively, the embryo is implanted after the death of one or both of the providers of the gametes. This is one set of circumstances and encompasses posthumous conception. Of course sperm may be taken from cryopreserved sperm deposited from a male provider, or even from a recently deceased male. Once taken, the sperm could be used for conception in a female. This also would be posthumous conception as the male provider has predeceased the conception.

Under a second set of circumstances the embryo may be implanted into the womb of a woman *during the lifetime* of the male gamete provider with the intention of carrying the embryo to term. This set of circumstances better envisions the context of the existing paternity and probate statutes. The difficulty facing the courts and legislatures today is trying to accommodate the first set of circumstances, posthumous conception, into the latter one envisioned by present-day statutes. Each statute must be read closely to see which set of circumstances is contemplated. Undoubtedly, if conception and implantation occur *prior to the death* of the gamete provider and a child results, the infant would qualify for paternity, inheritance, and benefits from the gamete providers. The resulting child would qualify as "in existence." Such circumstances would not encompass posthumous conception, but they do prompt considerations of paternity and ownership

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5. Finley v. Astrue, 270 S.W.3d 849, 850 n.2 (Ark. 2008) (quoting 17-289 ATTORNEYS' TEXTBOOK OF MEDICINE 289.81 (3d ed. 2007)).

issues.[6] These issues are addressed by the Uniform Parentage Act[7] and are outside the scope of posthumous conception and this Article. Notably, these issues have not gone unnoticed, as scholars, ethicists and moralists struggle with the implications prompted by the new assisted reproductive technologies.[8]

This Article addresses the scenario of when, through advanced medical technology, a procedure is performed resulting in the birth of a child more than three hundred days—a time suggested by some statutes—after the death of the gamete provider.[9] The embryo may result from in vitro fertilization or

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6. *See, e.g.*, *In re* Kievernagel, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008) (holding that agreement husband had with the cryopreservation storage facility to destroy his sperm after his death manifested his express intent and the husband's intent takes precedence over any rights of the wife to that sperm); J.B. v. M.B., 783 A.2d 707 (N.J. 2001) (noting that a husband and wife created seven preembryos while married and then prior to implantation divorced and the issue was how to dispose of the preembryos. The court enforced the terms of the agreement as this will allow for reliance by the parties and the clinics involved.); *In re* Dahl and Angle, 194 P.3d 834 (Or. App. 2008) (involving six cryopreserved frozen embryos created during marriage under an agreement executed by the couple with the storage facility that the embryos could be destroyed upon the dissolution of the marriage. The former wife had the authority under the agreement to determine disposition of the embryos and she ordered their destruction. The court affirmed, holding that it was just and proper to give effect to the agreement executed by the parties); *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005) (holding that a woman who consented to the in vitro fertilization of ova donated from another woman and sperm contributed by her boyfriend was the legal mother of the three children that resulted from the embryos that had been implanted in her and that she had carried to term).

7. UNIF. PARENTAGE ACT §§ 201-204 (2002), *available at* http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf.

8. *See, e.g.*, Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (proposing an "interpretive methodology" to legal parentage determinations); Stacey Sutton, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857 (1999) (cataloging the many methods of assisted reproductive technology); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55 (1994) (suggesting changes in the law to accommodate reproductive opportunities).

9. For a complete description of all of the factual permeations, see Ruth Zafran, *Dying to be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47, 51-55 (2007), listing: (1) woman wishing to use sperm cryopreserved prior to the man's death; (2) conception occurs through the use of sperm retrieved soon after the man's death; (3) another person, because of a relationship with the mother, wishes to be declared the parent of her child conceived through the sperm of another man; and (4) the deceased woman's eggs may also be the subject of posthumous conception, either cryopreserved prior to her death or retrieved shortly after she dies.

from a woman being artificially inseminated with the sperm of a deceased male gamete provider. And of course the woman could have predeceased too and left a viable ova, that was then fertilized with the sperm of a living or a deceased male to create an embryo, which was then placed into a surrogate, a gestational carrier. The essential element is that the act, which results in a future birth, occurs after the death of one or both of the gamete providers. This is the essence of posthumous conception. That is, once the egg and sperm are brought together through assisted reproductive technology to form an embryo, both or either of the persons who donated the sperm and egg or embryo are dead, perhaps for a long time. If this is the point of conception, then the issue arises as to whether the resulting posthumously conceived infant should qualify under the law for paternity, inheritance and benefits. How long should the law wait for conception before terminating status? The law strives for certainty and medical technology has made certainty an elusive prey.

This all sounds very complicated because human experience has so few introductions to these possibilities. Not too long ago the issues involving posthumous conception would not have occurred because the medical technology was not there to allow for it. But today, with technological advances each day, it is estimated that there are hundreds of thousands of cryopreserved embryos in the United States alone.[10] Moreover, it is possible that sperm, eggs and embryos may be preserved for more than fifty years.[11] Undoubtedly, continuing medical advances will extend the life-spans of embryos and other genetic materials. So too, the reasons why men and women wish to preserve them will multiply in parallel to the complexities of modern life. The admonitions concerning the ethics[12] or morality of assisted

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10. Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 579 n.1 (2005); *see generally* Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 595 (2004) (stating that there are 400,000 frozen embryos stored in the United States); Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213 (1996); E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J. L. & HEALTH 229 (1986-87) (discussing the legal and scientific history of artificial insemination).

11. Kindregan & McBrien, *supra* note 10, at 579 n.1.

12. *See, e.g.*, G. Bahadur, *Ethical Challenges in Reproductive Medicine: Posthumous Reproduction*, 1266 INT'L CONGRESS SERIES 295 (2004) (recommending that legislatures exercise caution in allowing for posthumous conception and should balance all of the interests at stake); Andrea Corvalan, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335 (1997); Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289 (2006); R. Landau, *Posthumous Sperm Retrieval for the Purpose of Later Insemination or IVF in Israel: An Ethical and*

reproductive technology need to be taken very seriously,[13] but the genie is out of the bottle and this is the world in which we now live. The decisional law we are about to discuss reveals how uncertain society is regarding how to address the paternity, inheritance or benefits associated with the posthumously conceived infant.[14]

Psychosocial Critique, 19:9 HUM. REPROD. 1952 (2004) (arguing that posthumously taking sperm to fertilize an egg exploits the dead and does a disservice to the resulting child); M. Parker, *Response to Orr and Siegler–Collective Intentionality and Procreative Desires: The Permissible View on Consent to Posthumous Conception,* 30 J. MED. ETHICS 389 (2004) (arguing for a presumption that the decedent intended to use gametes for posthumous conception and only an explicit prohibition would prohibit use for procreation).

13. Pope Benedict XVI, in addressing the General Assembly of the Pontifical Academy for Life, reaffirmed the position of the Roman Catholic Church that the "Magisterium of the Church has constantly proclaimed the sacred and inviolable character of every human life from its conception until its natural end . . . . This moral judgment also applies to the origins of the life of an embryo even before it is implanted in the mother's womb, which will protect and nourish it for nine months until the moment of birth." Pope Benedict XVI, Address to the Participants at the Twelfth General Assembly of the Pontifical Academy for Life and Congress on "The Human Embryo in the Pre-Implantation Phase," (Feb. 27, 2006), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/february/documents/hf_ben-xvi_spe_20060227_embrione-umano_en.html. More recently, the Vatican's Congregation for the Doctrine of the Faith, issued an instruction titled *Instruction Dignitas Personae On Certain Bioethical Questions* rejecting in vitro fertilization, destruction of human embryos, freezing of embryos, freezing of oocytes, and intracytoplasmic sperm injection. CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION *DIGNITAS PERSONAE* ON CERTAIN BIOETHICAL QUESTIONS (2008) [hereinafter INSTRUCTION *DIGNITAS PERSONAE*], *available at* http://www.usccb.org/comm/Dignitaspersonae/Dignitas_Personae.pdf. For additional comments on religious perspectives, see generally Nigel M. De S. Cameron, *Pandora's Progeny: Ethical Issues in Assisted Human Reproduction,* 39 FAM. L.Q. 745, 752 (2005) (noting that the Roman Catholic Church opposes assisted reproductive technology because it is "an improper intrusion into the marital bond . . . [and is] contrary to the unity of marriage, to the dignity of the spouses, to the vocation proper to parents, and the child's right to be conceived and brought into the world in marriage and from marriage."); Helen Alvare, *Assisted Reproductive Technology and the Family,* United States Catholic Conference of Catholic Bishops (2007), *available at* http://www.usccb.org/prolife/programs/rlp/Alvare.pdf (detailing the Church's moral objections to assisted reproductive technologies).

14. For a discussion of some of the legal issues arising from reproductive technology see, for example, Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family,* 1996 UTAH L. REV. 93 (1996); Ronald Chester, *Freezing the Heir Apparent: A Dialogue in Postmortem Conception, Parental Responsibility, and Inheritance,* 33 HOUS. L. REV. 967 (1996) (arguing that if support is required then inheritance rights should flow

The Model Act, recently approved by the American Bar Association, "does not either advocate or oppose the use of [advanced reproductive] technologies, but accepts the reality that they are being used by many people today and proposes legal solutions and protections for those involved."[15] Nonetheless, using the Model Act as a precipitating vehicle, this Article recommends further steps that may be taken to accommodate persons who harbor sincerely held objections to the medical technology now available to reproductive clinics. Indeed, the Model Act addresses the issues surrounding the use of assisted reproductive technology and, if nothing more, offers an initial step toward comprehensive regulation of various practices. The practices include (1) transfers and dispositions of embryos, (2) parental status issues, (3) surrogacy arrangements, (4) payments to donors and gestational carriers, (5) infertility and insurance coverage, (6) regulations of the clinics and storage facilities, and (7) management to safeguard the privacy of health information.[16] While still grappling for acceptable modes of regulation, the continuing evolution of technology poses continuing challenges.

> If initially human and social progress was characterized primarily by industrial developments and the production of consumer goods, today

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from this); Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination,* 22 HOFSTRA L. REV. 521 (1993) (anticipating the issues generated by posthumous conception and offering suggestions for their solution); Kerekes, *supra* note 10 (suggesting the adoption of a uniform act); Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter?,* 11 BYU J. PUB. L. 1 (1997) (suggesting greater state control over posthumous conception); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation,* 75 N.C. L. REV. 901 (1997) (offering moral and legal considerations); Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception,* 17 J. LEGAL MED. 547 (1996) (discussing taxpayer responsibility for issues raised by posthumous conception); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage,* 53 HASTINGS L.J. 597 (2002); Melissa B. Vegter, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate,* 38 VAL. U. L. REV. 267 (2003); Bruce L. Wilder, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law,* 18 J. AM. ACAD. MATRIMONIAL LAW. 177 (2002) (suggesting that courts should not restrict parentage to biology but instead to "legally significant acts").

15. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at Report to the American Bar Association (2008). The American Bar Association does oppose the use of cloning for human reproduction, *see* 129 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION 571-76 (2004).

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

> it is distinguished by developments in information technologies, research in genetics, medicine and biotechnologies for human benefit, which are areas of great importance for the future of humanity, but in which there are also evident and unacceptable abuses.[17]

This Article is an assessment of the law concerning posthumous conception, noting that this is a very recent development prompted by significant advances in medical technology. This topic was chosen to honor all who have edited, supported and published within *The Journal of Contemporary Health Law and Policy* for the last twenty-five years. The topic of posthumous conception demonstrates the need and utility of such prestigious health law journals, illustrating that this is an issue that has immense personal and economic consequences today but was not clearly envisioned at the time of the Journal's inception. In tribute, this Article will first, briefly describe the evolution of assisted reproductive technologies that allow for human posthumous conception. Second, this Article will discuss the existing cases and how the courts have defined the issues and resulting common law to provide a solution to the need for certainty. Third, statutes that have been proposed and even adopted will be discussed. Lastly, in conclusion, this Article will offer some suggestions as to the future of the debate.

I. THE EVOLUTION OF ASSISTED REPRODUCTIVE TECHNOLOGY

Posthumous conception has evolved from the practice of artificial insemination, which, "in itself is not new, having been performed on animals for centuries, the first recorded successful human artificial insemination was performed in England in 1770."[18] "By 1986, it was estimated that as many as 20,000 women each year were artificially inseminated in the United States."[19] In an article that was descriptive of artificial conception—assisted reproductive technology—as well as cautionary as to the legal challenges the procedure prompts, Professor Walter Wadlington wrote in 1983 that "artificial insemination (AI) today is a widely accepted, nonexperimental medical procedure."[20] In his article, Professor Wadlington describes three

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17. INSTRUCTION *DIGNITAS PERSONAE*, *supra* note 13, at 22.

18. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 284 (Cal. Ct. App. 1993) (quoting E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1986-87)).

19. *Id.* at 285 (citing Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 532 n.1 (Cal. Ct. App. 1986)). For additional information on assisted reproductive technology, see West Key Numbers: 285 (Parent and Child); and 285k20 (Assisted Reproduction; Surrogate Parenting).

20. Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 468 (1983).

distinct procedures: (1) heterologous artificial insemination, where a woman is impregnated with semen from a man not her husband; (2) homologous artificial insemination, where a married woman is impregnated with the semen of her husband when normal copulation fails because of various medical issues; and (3) combined artificial insemination, where a married woman is inseminated with a mixture of her husband's and a donor's sperm.[21] Commenting on the availability of long-term storage capabilities, an important factor in eventual posthumous conception, Professor Wadlington noted that: "Through modern cryogenic capabilities, semen can be frozen and stored for future use in sperm banks. Some banks operate as commercial enterprises, though, unlike their counterparts in the financial field, they are virtually free from state licensing and other regulation."[22]

Even though sperm could be cryopreserved, eggs and certainly embryos were more delicate. During the last two decades of the twentieth century, the viability of frozen embryos produced from sperm and ova was considered risky and unlikely to survive thawing and implantation,[23] and there were always concerns about an increased risk of recessive genetic defects.[24] Scientific advances continued, however, and with the achievement of the ability to preserve sperm and embryos, legal issues began to surface. The first judicial controversy regarding posthumous conception may well have occurred in Louisiana in 1994.[25] The case involved an infant girl, Judith Christine Hart, born more than one year after the death of her father, Edward Hart. When a claim was made to provide the minor child with Social Security benefits due as a result of her father's death, the Social Security Administration rejected the claim but later rescinded its ruling and permitted the child to receive benefits without the necessity of a court ruling.[26] The case provided little momentum, but

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21. *Id.* at 468-69.

22. *Id.* at 468.

23. *See, e.g., Embryos' Fate Weighed After Couple's Death*, WASH. POST, June 18, 1984, at A4.

24. *See, e.g.*, John D. Biggers, *In Vitro Fertilization and Embryo Transfer in Human Beings*, 304 NEW ENG. J. MED. 336, 341 (1981). Indeed, modern legal decisions concerning artificial conception comment upon the fact that "[e]gg cells must be fertilized before undergoing cryopreservation because unfertilized cells are difficult to preserve and, once preserved, are difficult to fertilize." J.B. v. M.B., 783 A.2d 707, 709 (N.J. 2001).

25. *See* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 251 & n.1 (1999) (citing Plaintiff's Second Amended Complaint at 5, Hart v. Shalala (E.D. La. 1994) (No. 94-3944) (on file with Loyola of Los Angeles Law Review)).

26. For additional commentary on the case, see *id.*

indicates that the issue of posthumous conception was surfacing as a distinct possibility.

In late 1991, the important case of *Hecht v. Superior Court* was initiated in Los Angeles involving the right of a man to bequeath cryopreserved sperm to his girlfriend for the purpose of posthumous conception.[27] The decedent, William E. Kane, had committed suicide a few months before, but prior to doing so had deposited fifteen vials of his sperm with California Cryobank, Inc., in Los Angeles. His will bequeathed the sperm to his long-time girlfriend, Deborah Ellen Hecht, with instructions that indicated he wished her to use the sperm to impregnate herself if she wished, thereby giving tacit consent to posthumous conception. But Mr. Kane's two existing children from a previous marriage objected to Ms. Hecht inheriting the sperm of their father, arguing that this would jeopardize the existing family by injecting after-born children into their stable family. Plus, any after-born children would never have a traditional family because they would never know their father. And finally, since Mr. Kane and Ms. Hecht were never married it was a violation of public policy for Ms. Hecht to become pregnant with his sperm.[28]

In 1993, the *Hecht* court issued an opinion that was both innovative and illustrative of succeeding issues to arise with posthumous conception. In allowing Ms. Hecht to have access to the sperm for possible posthumous conception, the court held that:

> Sperm which is stored by its provider with the intent that it be used for artificial insemination is . . . unlike other human tissue because it is 'gametic material' . . . that can be used for reproduction. . . . [T]he value of sperm lies in its potential to create a child after fertilization, growth, and birth. We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute 'property' within the meaning of [the Probate Code].[29]

As property, the decedent had the right to bequeath it under his last will and testament to Ms. Hecht.

In concluding that sperm is property even though it is gamete material, the court, by implication, provided the same status to other reproductive materials, all of which will eventually find their way into the current legal paradigm of posthumous conception.[30] The *Hecht* court does make mention

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

28. *Id.* at 279.

29. *Id.* at 283.

30. *See infra* Part II (discussing cases that specifically address issues raised under posthumous conception).

of post-mortem artificial insemination, discussing a French decision, the only one at the time, *Parpalaix v. CECOS* decided on August 1, 1984. The French Tribunal de Grande Instance (T.G.I.) (the ordinary court for civil litigation) held that the sperm belonged to the man and that his intent is paramount and must be given effect. But the court concluded that the inheritance laws of the country were far too complicated to allow for inheritance by anyone who had not been *conceived pre-mortem.* Calling for more modern laws to be enacted by the legislature, the French court abandoned further discussion and the issue lay dormant until the *Hecht* decision.[31] The practical implications lay dormant while waiting to see if Ms. Hecht would posthumously conceive a child using Mr. Kane's sperm.

In 1993, when the California court rendered its decision, Ms. Hecht had not become pregnant with Mr. Kane's sperm, so the court was not forced to determine inheritance rights under California law.[32] Nonetheless, the California court, at a minimum, similar to what was decided in France, certainly implied that the right to posthumously conceive is a viable right.[33] So too, the California court concluded that public policy is not violated by posthumous conception, even between unmarried persons, and that it creates no unwarranted obstacles to existing children. Nonetheless, the court acknowledged the obstacles a posthumously conceived child would face in seeking to inherit under existing state probate laws. And, of course, the court called upon the legislature to address the issue.[34] This dicta anticipates the issues, advice, and admonitions of all of the courts to follow.

The *Hecht* decision was an important decision for many reasons. First, the court, in holding that reproductive tissue was property, allowed for a legal apparatus to be utilized to distribute the tissue after death. These would include a valid last will and testament, various forms of non-probate transfers, and intestate succession. The point is that the gamete is property and may be considered protected as such under the United States

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31. Shapiro & Sonnenblick, *supra* note 10, at 229-33 (discussing the *Parpalaix* case).

32. The California court did order that the sperm be released to Ms. Hecht in 1995, as she was then forty years of age and her chances of becoming pregnant decreased each year, thereby causing her irreparable harm to wait. Kane v. Superior Court, 44 Cal. Rptr. 2d 578, 580-81, 584 (Cal. Ct. App. 1995). For further discussion of California law as it relates to posthumous conception, see Lisa M. Burkdall, *A Dead Man's Tale: The Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875 (1995); Summer A. Johnson, *Chapter 775: Babies with Bucks— Posthumously Conceived Children Receive Inheritance Rights*, 36 MCGEORGE L. REV. 926 (2005).

33. The California court relied upon the dicta in Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (holding that the preferences of the progenitors should guide the court in the disposition of preembryos).

34. *Hecht*, 20 Cal. Rptr. 2d at 290-91.

Constitution.[35] Second, when the court rejected public policy arguments to prohibit posthumous conception, it permitted an individual's right to private ordering, self-determination, and a guarantee that the wishes of the provider would be honored if they met the minimum standards of objective consent. Third, the court separated the ability to posthumously conceive from the guarantee that the child born will automatically inherit or receive benefits as a result of a connection with the provider of the gamete. Thus, as we shall see in subsequent posthumous conception cases, the establishment of paternity is simply the first step in the progression of status and inheritance. Previously, under the Uniform Parentage Act, there was no such distinction and the long line of Supreme Court decisions guaranteeing equal protection to non-marital children are seemingly in abeyance.[36] Fourth, by calling upon the legislature to formulate objective standards for inheritance and provision of benefits, the court initiated a public debate that is now witnessing some results.

Rationally, the *Hecht* decision provides support for posthumous conception as a theory even though Deborah Hecht never put the theory to a test by bearing the child of William Kane. But the possibility has borne fruit in subsequent judicial decisions, be they generated by cryopreserved sperm or by postmortem removal of the sperm from the decedent. In these cases, state courts, left with little legislative guidance, sought to develop a judicial response to petitions to provide for inheritance and/or Social Security benefits commensurate with the paternity of a deceased father.[37] At present there are few decisions, thus giving the courts and the legislatures additional

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35. For a leading case in the protection of a person's right to transmit property at death, see Hodel v. Irving, 481 U.S. 704, 715-16 (1987), holding that this right is just one stick "in the bundle of rights that are commonly characterized as property."

36. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Gomez v. Perez, 409 U.S. 535 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968). Today, establishment of paternity in posthumous conception cases is the first step. A claimant must then prove that "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." UNIF. PARENTAGE ACT § 707 (2002). Some states, among the few that have addressed the issue of posthumous conception, have added a third element to consider in addition to paternity and consent to parent, that is a time period for any resulting child to bring a claim. *See, e.g.*, LA. REV. STAT. ANN. § 9:391.1(A) (2008); CAL. FAM. CODE § 7648.9 (West Supp. 2009).

37. For a discussion of inheritance and benefit rights, see generally John Doroghazi, Gillett-Netting v. Barnhart *and Unanswered Questions about Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597 (2005); Johnson, *supra* note 32; Kindregan & McBrien, *supra* note 10; Kayla VanCannon, *Fathering a Child From the Grave: What Are The Inheritance Rights of Children Born Through New Technology After the Death of a Parent?*, 52 DRAKE L. REV. 331 (2004).

time to prepare for increasing petitions that will inevitably occur with advancing medical technology.

II. THE DECISIONAL APPROACHES

In addition to the sole international case, *Parpalaix*, discussed *supra*, there are a few federal cases discussing the rights of children in connection with entitlement to federal benefits in general.[38] One of these cases, decided in 2005, was *Stephen v. Commissioner of Social Security*.[39] The case facts are unique, although not uncommon, as they involve the removal of sperm from a decedent for use in conception obviously after his death. But the facts did not prompt the court's result. Instead, the court based its rejection of the resulting child's right to Social Security benefits upon the state's intestate statute. That is, a posthumously conceived child was not entitled to inherit under the state's intestacy statutes and the only recourse would be for the decedent to provide for the child in a valid last will and testament. But of course, this would not result in Social Security benefits—only the state's unique statute would make that possible. Basing entitlement to Social Security benefits upon the right of a child to inherit as an intestate child of the decedent, the court noted that the child was not born until more than three years after the decedent's death. Because the decedent was a domiciliary of Florida at the time of his death the court looked to the law of Florida and found that, "[u]nder Florida law, a child conceived from the sperm of a person who died before the transfer of sperm to a woman's body is not eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."[40] The court distinguished the case of *Gillett-Netting v. Barnhart,* which follows, since in that case Arizona law did not address the issue of posthumously conceived children by statute. The *Stephen* court was thus able to address the rights of the children from the perspective of whether the children were presumed to be legitimate. Since the children were deemed to be legitimate, there was no controversy as

38. Relevant West Key Numbers are 356A (Social Security and Public Welfare); 356Ak4.10 (Eligibility and Right to Benefits; Termination); and 356Ak137 (Children in General).

39. 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (discussing facts where a wife removed sperm from her husband for posthumous conception after his death from an apparent heart attack).

40. *Id.* at 1264 (citing FLA. STAT. § 742.17 (1993): "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.")

to whether the children would be able to inherit intestate from the deceased parent under the state's statute.[41]

In *Gillette-Netting v. Barnhart*,[42] another federal decision and this time from the Ninth Circuit Court of Appeals, the court held that the ability to inherit under the state's intestacy laws was irrelevant. The court held that posthumously conceived children were entitled to inherit from the decedent as long as the children were legitimate under the state's laws.[43] They thus made a distinction between the right to inherit intestate and the right to be considered legitimate, a distinction rejected by the Social Security Administration.[44] This could have vast implications for eventual establishment of rights for posthumously conceived children if other courts similarly make legitimacy the test instead of intestate eligibility.

The facts in *Gillett-Netting* were illustrative of other posthumous conception cases. The mother and father of the children were married and attempting to have children but they encountered fertility problems and were working with a clinic. Subsequently the father was diagnosed with cancer

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41. *Id.* at 1265. For additional information on terms and cases involving intestate succession, see relevant West Key Numbers: 124 (Descent and Distribution); 124II (Persons Entitled and Their Respective Shares); 124II(A) (Heirs and Next of Kin); 124k25 (Descendants); 124k27 (Posthumous Children); 92k3510 (Wills, Probate, Inheritance, and Dower Issues); and 76Hk88 (Proceedings for Exclusion from Inheritance or Succession). For a general description of inheritance rights of heirs in general, see generally Joseph H. Karlin, *"Daddy Can You Spare a Dime?": Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317 (2006); Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613 (2004) (describing the rights of the state, the child, and the decedent in reference to inheritance).

42. 371 F.3d 593 (9th Cir. 2004). *See generally* Doroghazi, *supra* note 37 (proposing amending the Social Security law to eliminate dependency on state statutes); Karen Minor, *Posthumously Conceived Children and Social Security Survivor's Benefits: Implications of the Ninth Circuit's Novel Approach for Determining Eligibility in* Gillett-Netting v. Barnhart, 35 GOLDEN GATE U. L. REV. 85 (2005); Ann-Patton Nelson, *A New Era of Dead-Beat Dads: Determining Social Security Survivor Benefits for Children Who Are Posthumously Conceived*, 56 MERCER L. REV. 759 (2005); *Posthumously Conceived Children Aren't Entitled to Survivor Benefits*, 29 BNA FAM. L. REP. 1075 (2002).

43. *Gillett-Netting*, 371 F.3d at 597-98. To review the briefs presented in the case, see Brief of Plaintiff-Appellant, Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004) (No. 03-15442), 2003 WL 22717238; Reply Brief of Plaintiff-Appellant, Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004) (No. 03-15442), 2003 WL 22717244.

44. The Social Security Administration takes the position that to be a "child" within the terms of the Act, an after-conceived child must be able to inherit under state intestate statutes. *See* Social Security Acquiescence Ruling 05-1(9); Gillett-Netting v. Barnhart; Application of State Law and the Social Security Act in Determining Eligibility for a Child Conceived by Artificial Means after an Insured Individual's Death – Title II of the Social Security Act, 70 Fed. Reg. 55,656 (Sept. 22, 2005).

and, having been warned about possible sterility due to the chemotherapy treatment, the father cryopreserved sperm for later use by his wife.[45] The father eventually died from the cancer on February 4, 1995, and ten months later his former wife ordered the in vitro fertilization of the sperm and her eggs. The resulting embryos were transferred to her on December 21, 1995. On August 6, 1996, two children were born, Juliet and Piers.[46] Two weeks later the mother filed an application for Social Security benefits based on the father's earnings, but the application was denied by the Social Security Administration, a decision which was upheld by an administrative law judge. The judge's reasoning was, in part, that "children conceived after the wage earner's death cannot be deemed dependent on the wage earner" and thus do not qualify for Social Security benefits from the wage earner.[47] An appeal of the ruling was denied by the Social Security Appeals Council, which was then finalized by the Commissioner.

The mother then filed a complaint in the federal district court, arguing that the children were being denied due process and equal protection of the law.[48] The district court denied her claim, holding that, "Juliet and Piers do not qualify for child's insurance benefits because they are not [the father's] 'children' under the Act and they were not dependent on [him] at the time of his death."[49] The mother then appealed to the Ninth Circuit Court of Appeals. In its opinion the court acknowledged the technological advances made by reproductive technology and voiced a common refrain in stating that state and federal statutes have not kept pace with the possibilities such as posthumous conception. Nonetheless, the court acknowledged that it was bound by the current statutes. Under these statutes benefits may be conferred on children if: (1) a parent dies fully insured; (2) a guardian makes an application for benefits; (3) the child is unmarried and a minor; and (4) the child was dependent on the insured wage earner at the time of his death.[50] There was no state statute in Arizona that specifically addressed posthumous conception, as there was in Florida under the *Stephen* decision, nor was there a specific prohibition in state law prohibiting the two children from being able to inherit through intestate succession.

In holding that the children may receive the benefits, the court based its opinion on the definition of the word "child." Because the Social Security Act allows for a child to be defined broadly as (1) legally adopted, (2) a

45. *Gillette-Netting*, 371 F.3d at 594.

46. *Id.* at 595.

47. *Id.*

48. For additional information as to constitutional claims, see relevant West Key Numbers: 92 (Constitutional Law); 92XXVI (Equal Protection); 92XXVI(E) (Particular Issues and Applications).

49. *Gillett-Netting*, 371 F.3d at 595.

50. *Id.* at 596.

stepchild for at least nine months before the insured dies, (3) grandchild, (4) stepgrandchild, (5) equitably adopted child, or (5) a biological child,[51] then a posthumously conceived child should be considered as deserving of benefits as well.[52] Furthermore, the children do not have to prove dependency at the time of death of the insured: "It is well-settled that all legitimate children automatically are considered to have been dependent on the insured individual, absent narrow circumstances not present in [the] case."[53] Thus, "[b]ecause Juliet and Piers are [the father's] legitimate children under [the state's] law, they are deemed dependent under [the Social Security Act] and need not demonstrate actual dependency."[54] Based on this, the court ordered a remand to the Commissioner of Social Security for an award of benefits to the posthumously conceived children.

The Ninth Circuit decision made reference to a Massachusetts state decision in its opinion.[55] The Massachusetts decision, *Woodward v. Commissioner of Social Security*,[56] involved similar facts to *Gillette-Netting*. A man and woman were married and the man was diagnosed with leukemia. The couple had no children at the time he was diagnosed and so to prepare for possible sterilization occasioned by the medical treatment, the husband had sperm medically withdrawn and cryopreserved. This was in 1993. Shortly thereafter the husband died and the wife was appointed as the administrator of his estate. In 1995, the wife gave birth to twin girls through artificial insemination using the husband's sperm. The husband had been fully insured under the Social Security Act so the wife applied for benefits for the dependent children. But the Social Security Administrator rejected her claim because she had not established the paternity of the children - that they were the children of her deceased husband.[57] When she appealed the rejection of benefits, an administrative law judge ruled de novo that the children did not qualify for benefits. This time the ruling was based on the

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51. *Id.* (citing 42 U.S.C. § 416(e) (2000); 20 C.F.R. § 404.354 (2008)).

52. *Id.* at 597.

53. *Id.* at 598.

54. *Id.* at 599.

55. *Gillett-Netting*, 371 F.3d at 596 n.3 (referring to the state court's decision as "well-reasoned").

56. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002). *See generally* Amy L. Komoroski, *After* Woodward v. Commissioner of Social Services*: Where Do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297 (2002); Renee H. Sekino, *Posthumous Conception: The Birth of a New Class*, 8 B.U. J. SCI. & TECH. L. 362 (2002); Susan C. Stevenson-Popp, *"I Have Loved You in My Dreams": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U. L. REV. 727 (2003); *Posthumously Conceived Children are "Issue" of Deceased Parent*, 28 BNA FAM. L. REP. 1099 (2002).

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

fact that the children were not entitled to inherit under Massachusetts intestate statutes.[58] The Commissioner approved this decision and the wife then appealed to the federal district court, but the federal judge certified the question to the state court because an interpretation of state intestacy law was needed.[59]

Prior to *Woodward*, no Massachusetts precedent existed as to posthumous conception. Entitlement to Social Security benefits was the issue raised in *Stephen*, see *supra*, decided three years after *Woodward*. But the two cases, although the facts are similar, reach different results as to whether Social Security benefits should be available for a child born as a result of posthumous conception. *Woodward* looks to the best interest of the child, the state's objective to provide for an orderly administration of an estate, the rights of gamete providers, and arrives at a rational judicial decision that allows for the children to be eligible for intestate inheritance as long as paternity may be established, parental consent to support the posthumously conceived child is provided, the procedure and birth are timely, and notice is provided to all affected. Of course inheritance rights precipitates Social Security entitlement. In spite of this ruling, the court nonetheless suggests that the proper forum to resolve this issue in the legislature.[60] The essential difference between the two decisions rested upon the wording of the state's intestate statutes; attention focused on whether the posthumously conceived children were "issue" as defined in the statute.

The Massachusetts intestate statute did reference posthumous children, stating that they "shall be considered as living at the death of their parent[s]."[61] But the legislation did not define who was a posthumous child and, importantly, there is no express requirement that any child be "in existence" at the death of the decedent from whom the child would inherit. But it is certainly logical to assume that the statute never contemplated posthumous conception. Indeed, the posthumously conceived child provision in the Massachusetts statute had remained essentially unchanged for 165 years.[62] Therefore, immune from express statutory constraints, the court set out to establish parameters as to "whether, under our intestacy law, there is any reason that children conceived after the decedent's death who are the decedent's direct genetic descendants . . . may not enjoy the same succession rights as children conceived before the decedent's death who are the decedent's direct genetic descendants."[63]

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58. *Id.* at 261.

59. *Id.*

60. *Id.* at 272. The case will be discussed in greater detail below.

61. MASS. GEN. LAWS ch. 190 § 8 (2004).

62. *Woodward*, 760 N.E.2d at 264.

63. *Id.* The court acknowledged that "posthumously conceived children are always nonmarital children. And because the parentage of such children can be neither

The parameters established by the court countenance three state interests: (1) the best interests of the child; (2) the state's interest in the orderly administration of estates; and (3) the reproductive rights of a parent.[64] Mindful that the state has a long-standing interest in certainty of estate devolution, the court emphasized an equally strong desire to protect the best interests of a child. In addition, there is an acknowledgment of the advances made in medical technology, specifically in reference to assisted reproductive technology. These advances import responsibilities under privacy, equal protection, and due process,[65] but they do not decrease the need for certainty in paternity or maternity.[66] When taken together, these interests also involve practical considerations as to timing: Should there be a statute of limitations on conception after the death of the decedent? On the one hand, to do so, "may pose significant burdens on the surviving parent, and consequently on the child. It requires, in effect, that the survivor make a decision to bear children while in the freshness of grieving. It also requires that attempts at conception succeed quickly."[67] But on the other hand, the certainty and speed of estate administration demands finality so as to meet the needs of the decedent, existing family members, and support for children born as a result of posthumous conception. All of these factors must be balanced in tandem.

The *Woodward* court held in favor of the mother's petition allowing for the children to be considered the children of the decedent father under the facts of posthumous conception. But this was a judicial decision, albeit well-reasoned, and certainly not the last word on the inheritance and benefits to which posthumously created children are entitled. In its decision the court reached the following conclusions. First, that the Massachusetts court could arrive at a judicial determination because the state had no statute that expressly prohibited children, born as a result of posthumous conception,

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acknowledged nor adjudicated prior to the decedent's death, . . . under the intestacy statute, posthumously conceived children must obtain a judgment of paternity as a necessary prerequisite to enjoying inheritance rights in the estate." *Id.* at 267.

64. *Id.* at 265, 266, 268.

65. *See generally* Julie E. Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234 (2005) (arguing that children posthumously conceived should be analyzed under a middle level of scrutiny).

66. *Woodward*, 760 N.E.2d at 269. "The prospective donor parent must clearly and unequivocally consent not only to posthumous reproduction but also to the support of any resulting child." *Id.* Furthermore, "[t]hat a man has medically preserved his [sperm] for use by his spouse thus may indicate only that he wished to reproduce after some contingency while he was alive, and not that he consented to the different circumstances of creating a child after his death." *Id.*

67. *Id.* at 268.

from inheriting under the state's intestate laws. In this vacuum the court sought to accommodate the "[l]egislature's over-all purposes."[68] Second, the court acknowledged the technological advances made by science and suggested that "[t]he 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."[69] Third, the court reminded all interested parties that a child conceived posthumously is not automatically the child of the decedent, but this fact must be resolved in accordance with the state's paternity or maternity requirements.[70] Similarly, once paternity or maternity is established, it is incumbent upon the claimants to establish affirmatively that the decedent consented to the posthumous conception and that the decedent consented to the support of the resulting child. The court noted that assisted reproductive technology is not similar to sexual intercourse; indeed, sexual intercourse is excluded as a means of conception in this context. In the latter, obligations for support and parental responsibilities can, and have been, logically presumed and extensive provisions have been made for this in the Uniform Parentage Act.[71] However, this is not so in the former instance. With posthumously conceived children, the burden must be upon the claimant to demonstrate that the parent intended to have a child in order to assess support obligations. Finally, a fourth factor considered important by the court was the time in which the child may be conceived and then be entitled to benefits. The court did not establish an objective standard–a precise statute of limitations–but suggests a reasonable time is necessary to balance the grieving, the time necessary for a successful conception, and to accommodate the orderly administration of the decedent's estate.[72]

While decisive, the *Woodward* case is not the last word on the subject, but it is a thoughtful response to the issues raised and the Model Act will address these same issues in the context of a statute. *Gillett-Netting,* the federal decision issued in 2004, agreed with *Woodward* that posthumously conceived children should be able to take Social Security benefits earned by the deceased father simply because they were legitimate issue under Arizona law.[73] Prior to these two cases, however, was *In re Estate of Kolacy,*[74] a

68. *Id.* at 272.

69. *Id.*

70. For a discussion of the state's definition of parent, see John L. Gordon, *Successive Rights of Posthumously Conceived Children,* 18 J. JUV. L. 84 (1997).

71. UNIF. PARENTAGE ACT § 203 (2002).

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

73. Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004). *See supra* notes 43-55 and accompanying text discussing *Gillett-Netting.*

74. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

state court decision and one that would again find in favor of children born of assisted reproductive technology.

The facts in *Kolacy* were similar to the previous decisions. The husband, fearful that he would be made sterile by chemotherapy treatments, deposited sperm with a sperm bank. Almost a year after his death, his widow underwent an in vitro fertilization procedure and the embryos that resulted were placed into her womb and she eventually gave birth to twin girls slightly more than eighteen months after the death of her husband, the sperm provider.[75] The court found that the twins were genetically linked to the decedent and that the mother was seeking, on behalf of her daughters, to obtain Social Security benefits for her daughters from her deceased husband.[76] Initially, the court was concerned whether the case was an exclusively federal matter since Social Security is a federal program. Rejecting this, the court found that this was a case of first impression in the state and the twins had a right to establish their rights under state law no matter what occurs at the federal level.[77] The court formulated the issue as to whether the twins, born more than eighteen months after the death of their father, had a right to inherit from him under the state's intestate statutes.[78]

The *Kolacy* court rejected the approach that stated that a person's heirs should only be determined at the date of the decedent's death: "[T]here have long been exceptions to the rule that the identity of takers from a decedent's estate is determined as of the date of death."[79] Furthermore, the court noted that no statute addressed the issues created by the case. But it then stated: "It would undoubtedly be useful for the Legislature to deal consciously and in a well informed way with at least some of the issues presented by reproductive technology."[80] The court continued, "[w]e judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question."[81] Thus, the court discerned a general legislative intent to enable children to take property from their parents and that once a genetic connection is established, we should "routinely grant that child the legal status of being an heir of the decedent."[82] An exception, the court notes, would occur when there are "serious problems

75. *Id.* at 1258.

76. *Id.* at 1259-60.

77. *Id.* at 1260.

78. *Id.*

79. *Id.*

80. *Kolacy*, 753 A.2d at 1261. The court suggested that the legislature should impose a time limit on the ability of after born children to take from or through a parent. *Id.* at 1262.

81. *Id.* at 1261.

82. *Id.* at 1262.

in terms of the orderly administration of estates."[83] But in spite of practical issues yet to be resolved, the court held that the twins were entitled to inherit under New Jersey's intestate statutes. The rationale provided was that "a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons."[84]

Soon after this decision, another state court decision, held in a permissive fashion such as *Gillett-Netting, Woodward*, and *Kolacy*, that a posthumously conceived child may inherit. This decision was *In re Martin*.[85] Interestingly, the facts of *Martin* were different from those of previous decisions. Specifically, in *Martin* the issue was whether, "the terms 'issue' and 'descendants' include children conceived by means of in vitro fertilization with the cryopreserved semen of the Grantor's son who had died several years prior to such conception."[86] Thus, unlike the previous federal and state decisions, the court was asked to incorporate posthumous conception into the terms of a trust instrument, address a conception that occurred several years after the death of the gamete provider, and benefit not children, but issue of the Grantor, the creator of the trust. The decision is significant because it has immense implications for class gift designations under trusts.

The facts of *Martin* were as follows: Two children were born as a result of posthumous conception; James Mitchell was born three years after the death of his father and Warren was born five years after the death of his father. There was no dispute as to the genetic connection. Their father was the son of a man–the Grantor–who had created a trust whereby his trustees had discretion to "sprinkle" principal to the *issue or descendants* of the Grantor, and then the Grantor's wife had the ability to give whatever remains of the trust principal at her death to the Grantor's *issue or descendants*. Thus, the Grantor had created a familiar trust device whereby he wanted to benefit his dynasty, persons he defines as issue and descendants. The practical consideration for the court was whether "the two infant boys are 'descendants' and 'issue' for purposes of such provisions."[87]

Similar to other cases, no state statute addressed the facts presented in the case. Admittedly, there were statutes that made reference to "posthumous children" but they were enacted long before the advances in medical

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83. *Id.*

84. *Id.* at 1263. For support of this position, see generally Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067 (2003); Jason Pobjoy, *Medically Mediated Reproduction: Posthumous Conception and the Best Interests of the Child*, 15 J.L. & MED. 450 (2007).

85. 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007).

86. *Id.* at 208.

87. *Id.*

technology that generate this issue. Those earlier statutes concerned children who were in gestation at the time of death of the decedent or other vesting event.[88] Nonetheless, the court noted that a few states had enacted statutes that addressed the issue of posthumous conception,[89] and the court discussed the few cases that addressed the issue presented to date, specifically, *Woodward, Kolacy*, and *Gillett-Netting,* all discussed *supra,* all of which allowed the child to qualify for benefits.

The court based its opinion upon the intent of the parties involved. First, the court could find no intent evidenced by the Grantor that children conceived by assisted reproductive technology be excluded from being part of the dynasty of beneficiaries intended by the Grantor. In addressing the status of beneficiaries under the terms of a trust, the intent of the Grantor is paramount. Second, the court held that the provider of the sperm, the deceased parent of the two boys, intended the boys to be his own and to benefit from him. Thus, in allowing the boys to be considered "issue" or "descendants" under the terms of the trust, the court held that, "if an individual considers a child to be his or her own, society through its laws should do so as well."[90]

Interestingly, the court in *Martin* did not address the length of time between the date of death of the provider of the sperm and the posthumous conception of the two boys. A fleeting reference was made to the cryopreserved sperm of the provider having been destroyed, eliminating the possibility of any additional issue or descendents. And the court noted that the Louisiana Code provides that a post-conceived child may inherit from his or her father if the child is born within three years of the father's death.[91] The time allowance by the court may be in accordance with traditional class gift construction, which provides that when there has been no distribution of the trust corpus to the descendants to date, it is administratively convenient to include these two after-born issue within the class of persons eligible to take under the Grantor's trust.[92] Finally, obeisant to the legislature, the court repeated a familiar plea: "[T]here is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology."[93]

With the exception of the federal *Stephen* decision in 2005, there were, by the time of *Martin*, three well-reasoned decisions offering a rationale for either providing benefits for posthumously conceived children or including them as issue or descendants. Nonetheless, in 2007 and then in 2008,

88. *Id.* at 210.

89. These statutes and others will be discussed, *infra* Part III.

90. *In re Martin*, 841 N.Y.S.2d at 211.

91. *See id.* at 210 (citing LA. REV. STAT. ANN. § 9:391.1(A) (2008)).

92. For an explanation of class gift distribution generally, *see* RAYMOND C. O'BRIEN & MICHAEL T. FLANNERY, DECEDENTS' ESTATES 629-48 (2006).

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

different state courts denied posthumously conceived children the right to take under state intestate statutes. This seemingly reversed the trend and therefore each case must be analyzed as to why.

The first decision, *Khabbaz v. Commissioner of Social Security*,[94] ruled that a child conceived after her father's death via artificial insemination was ineligible to inherit from her father's estate under the state's intestate statutes.[95] The facts were similar to other cases previously decided. Man and woman were married and already had one child when the man was diagnosed with a terminal illness. He and his wife then elected to cryopreserve sperm so that she could become artificially inseminated in the event he died. The man did die and two years after the man's death a child was born, Christine, and her mother applied for Social Security benefits in accordance with federal law. That law provides that in order to qualify, a child must be able to inherit as an intestate heir of the decedent parent under the state's intestate statute:[96] "Thus, if Christine may inherit from [her father] as his surviving issue under New Hampshire intestacy law, she is considered to be the 'child' of [her father] under the [Social Security Act] and is therefore entitled to a child's insurance benefits."[97] The Commissioner of Social Security denied Christine's claim for benefits, citing to her status under the state's intestacy statute and Christine appealed the decision to the state courts.

The Supreme Court of New Hampshire ruled that the state statute's use of the term "surviving" issue incorporates a requirement that the issue be "alive" or "in existence" at the time of the death of the person from whom the child would inherit.[98] Christine was not alive until more than a year after her father's death and therefore did not come within the ambit of the statute. Furthermore, since no "posthumously conceived" child can be "in existence" at the date of death of someone from whom he or she would take, it is impossible under the statute for such a child to be an intestate heir.

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94. 930 A.2d 1180 (N.H. 2007). *See* Brief of Plaintiff-Appellant, Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180 (N.H. 2007) (No. 2006-0751), 2007 WL 4967426 (stressing that it is illogical to recognize a biological connection but deny a concomitant legal one); Brief of Defendant-Appellee, Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180 (N.H. 2007) (No. 2006-0751), 206 WL 5431537 (arguing for strict time constraints to be imposed). *See also Child Conceived After Father's Death via Banked Sperm isn't "Surviving Issue,"* 33 BNA FAM. L. REP. 1462 (2007); *Deceased Beneficiary's Posthumous Children–In Vitro Fertilization,* 33 BNA FAM. L. REP. 1441 (2007).

95. *Khabbaz*, 930 A.2d at 1182.

96. *Id.* For a discussion of intestate succession and the laws that may affect posthumously conceived children, see 23 AM. JUR. 2D *Descent and Distribution* § 108 (2002).

97. *Khabbaz*, 930 A.2d at 1182.

98. *Id.* at 1184.

Concluding that the statute must be read as a whole, rather than taken in isolation, there is "clear legislative intent to create an overall statutory scheme under which those who 'survive' a decedent—that is, those who remain alive at the time of the decedent's death—may inherit in a timely and orderly fashion contingent upon who is alive."[99] To hold otherwise, according to the court, would undermine the orderly distribution process clearly contemplated by the state.

Khabbaz rejected the reasoning of *Woodward,* holding that the Massachusetts decision in *Woodward* was based upon intestate statutes different from those in New Hampshire. Furthermore, to adopt *Woodward's* reasonable approach so as to protect a class of persons conceived posthumously, would have required the court to add words to the statute and the court was not willing to do so.[100] But like *Woodward* and all of the other decisions, the New Hampshire court called upon the state legislature to develop a legislative response to the new medical technology reflective of the considered will of the people.[101]

The second decision, *Finley v. Astrue*,[102] also denied a posthumously conceived child the right to inherit under the state's intestate statutes. As in the *Khabbaz* decision, the man and woman were married and the man cryopreserved sperm at the University of Arkansas for Medical Sciences for the purpose of in vitro fertilization. The man died intestate on July 19, 2001, and eleven months later his widow had "two of the previously frozen embryos thawed and transferred into her uterus, resulting in a single pregnancy."[103] A child was born on March 4, 2003, and the mother filed a claim for Social Security benefits the following month. Initially, the administrative law judge awarded the child the requested benefits, but the Appeals Council reversed this decision and the mother then appealed to the courts.

In rejecting the mother's appeal, the court looked to the language of the statute, which stipulated that posthumous descendants of the intestate must be *conceived before* the decedent's death.[104] Since the word "conceived" is not defined in the statute and an argument could be made that conception occurred when the embryo was created during the life of the father, the court could have interpreted the statute to allow for inclusion within the terms of the statute. But the court rejected this definition of "conceived" and held

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99. *Id.*

100. *Id.* at 1186.

101. *Id.* (citing Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002)).

102. 270 S.W.3d 849 (Ark. 2008); *see also Wills & Estates—Assisted Conception—IVF—Implantation after Father's Death—"Surviving Child,"* 34 BNA FAM. L. REP. 1119 (2008).

103. *Finley*, 270 S.W.3d at 850-51.

104. *See* ARK. CODE ANN. § 28-9-210(a) (2004).

that since the statute was enacted long before in vitro fertilization was possible, the legislature did not intend to define conception in the context of a petri dish. The court commented: "[W]e are very hesitant to interpret a legislative act in a manner contrary to its express language, unless it is clear that a drafting error or omission has circumvented the legislative intent."[105] Furthermore, "[o]ur role is not to create the law, but to interpret the law and to give effect to the legislature's intent."[106]

The court referred to previous decisions affecting the rights of posthumously conceived issue—*Khabbaz, Stephen, Gillett-Netting, and Woodward*—but concluded that none of these cases could impact the clear and unique language of the Arkansas code. But, as in all of the other cases, the court stated: "[W]e strongly encourage the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve."[107]

The judicial solicitation of legislative guidelines is the consistent element in all of the existent cases involving posthumous conception in the evolution of medical technological advances in assisted reproductive technology. What follows is a review of existing statutes—a few obviously in response to the issues raised in the preceding cases. Finally, we will conclude with an analysis of the American Bar Association recommended Model Act Governing Assisted Reproductive Technology.[108]

III. STATUTORY RESPONSES TO POSTHUMOUS CONCEPTION

Consistent within all of the cases discussed, is the request for legislative guidance in the conferral of inheritance and benefits rights for posthumously created children. Gradually there has been increasing statutory attention given to this phenomenon.[109] Nonetheless, the issue of posthumous

105. *Finley*, 270 S.W.3d at 853.

106. *Id.* at 854.

107. *Id.* at 855.

108. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008).

109. *See, e.g.*, UNIF. PARENTAGE ACT § 707 (2002) (allowing for a posthumously conceived child to be considered a child of the decedent-provider if the decedent consented in a record that if assisted reproduction were to occur after death, the deceased provider would be a parent of the child); COLO. REV. STAT. § 19-4-106(8)(2008) ("If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child."); DEL. CODE ANN. tit. 13, § 8-707 (Supp. 2008); TEX. FAM. CODE ANN. § 160.707 (Vernon 2008) ("If a spouse dies before the 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 kept by a licensed physician that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child."); WASH.

conception, specifically in the context of conception after the death of the decedent, is a recent phenomenon and the legislatures have not considered all of the permeations—the implication for trusts and the Rule Against Perpetuities for example.[110] Even in the few statutes that can be interpreted as being applicable, upon review of the legislative intent at the enactment, there will be scant consideration, if any at all, as to posthumous conception. There are few international statutes[111] from which guidance may be drawn, and only a scattering of articles and surveys.[112] Of recent import is the

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REV. CODE § 26.26.730 (2005) ("If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child."); and significantly, the UNIF. PROBATE CODE § 2-120(k) (2006) (permitting a child to be treated as in gestation at the death of the gamete provider if the child is in utero not later than 36 months after the provider's death, or born not later than 45 months after the provider's death. Being "in gestation" will result in all rights associated with inheritance.) California and Louisiana have also enacted statutes permitting a posthumously conceived child to be treated as "in being." *See*, CAL. FAM. CODE § 7648.9 (West Supp. 2009); LA. REV. STAT. ANN. § 9:391.1(A) (2008).

110. For a discussion of estate planning issues raised by posthumous conception, see Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 AM. C. TR. & EST. COUNS. J. 154 (2008).

111. *See, e.g.*, Human Fertilisation and Embryology Act, 1990, c. 37, § 12, sched. 3 (Eng.) (while the statute does not discuss the particular circumstances of posthumous conception, it does discuss consent requirements for a provider's gametes during life and after death); Human Fertilisation and Embryology (Deceased Fathers) Act, 2003, c. 24, § 1, (Eng.) (the statute does incorporate a reference to posthumous conception by inclusion of circumstances when provider may become the legal parent of a posthumously conceived child).

112. *See, e.g.*, Elizabeth Corrigan, S. Elizabeth Mumford & M.G.R. Hull, *Posthumous Storage and Use of Sperm and Embryos: Survey of Opinion of Treatment Centres*, 313 BRIT. MED. J. 24 (1996) (discussing the Human Fertilisation and Embryology Act of 1990, allowing staff to abstain from participating in posthumous conceptions on conscientious grounds); Clare Dyer, *Government Reviews Law on "Posthumous Conceptions,"* 315 BRIT. MED. J. 831 (1997) (discussing British government's completion of the first stage of its review of posthumous conceptions laws); Jose Miola, *Mix-Ups, Mistake and Moral Judgment: Recent Developments in U.K. Law on Assisted Conception*, 12 FEMINIST LEGAL STUD. 67 (2004) (providing an analysis of current British law); F. Shenfield, *Filiation in Assisted Reproduction: Potential Conflicts and Legal Implications*, 9 HUM. REPROD. 1348 (1994) (comparing British and French laws on posthumous conception); Kirsty Horsey, *Regulating Posthumous Conception*, IVF NEWS, Nov. 18, 2003, *available at* http://www.ivf.net/ivf/regulating_posthumous_conception-0231-en.html (describing recent decisions in Israel, Belgium and Japan on posthumous conception).

model legislation adopted by the American Bar Association in the winter of 2008, to be discussed separately in this Article. But first, it is useful to review a compilation of what exists now at the federal and state levels. These statutes and the cases previously discussed, prompt an examination of the model legislation approved by the House of Delegates of the American Bar Association.

A. FEDERAL STATUTES AND REGULATIONS

To date, the majority of the cases that have arisen in the context of posthumous conception concerned the child's attempts to qualify for Social Security benefits as a result of a parent's death. The United States Code provides the basis for these rulings, with the code defining the word "child" for inclusion in the benefits program.[113] Because the federal Social Security benefits are dependent upon state laws concerning paternity and the ability to inherit intestate, federal specifics as to posthumous conception are sparse. In accordance, federal regulations do stipulate that a "natural child" is eligible for benefits if state law allows inheritance under intestacy.[114] But there are no specific comments concerning posthumous conception.[115]

While the focus of the existent cases has been upon federal benefits, state benefits would also be impacted by requirements for eligibility. As may have been expected, state regulatory provisions do not expressly contemplate posthumously conceived children.[116] This is not to say that the

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113. *See* 42 U.S.C. §§ 402(d)(1), 402(d)(3), 416(h)(2)(A) (2000).

114. *See* 20 C.F.R. § 404.355 (2008).

115. *See, e.g.*, Old-Age, Disability, Dependents' and Survivors' Insurance Benefits; Period of Disability, 44 Fed. Reg. 34,481 (June 15, 1979); Federal Old-Age, Disability, Dependents' and Survivors' Insurance Benefits, 43 Fed. Reg. 52,936 (proposed Nov. 14, 1978) (to be codified at 20 C.F.R. pt. 404). For a discussion of state and federal statutes and court decisions affecting the legal rights of posthumously conceived children, see William H. Danne, Jr., Annotation, *Legal Status of Posthumously Conceived Child of Decedent*, 17 A.L.R. 6th 593 (2006).

116. *See, e.g.*, CAL. CODE REGS. tit. 2, § 582 (2008) (codifying that children are eligible for state public retirement benefits if living at death of employed parent or who were conceived prior to his or her death); 8 COLO. CODE REGS. § 1502-1 (2007) (codifying that children are eligible who are biological children of a member and are conceived prior to date of the member's death and are born within normal gestational periods after death of the member parent); LA. ADMIN. CODE tit. 22, § 103 (2003) (codifying that, for crime victim reparations, a child must be conceived prior to but born after the personal injury or death of the victim); S.D. ADMIN. R. 20:16:16:01 (2002) (codifying that cement commission retirement benefits includes child or children as those conceived during the employee's lifetime and born after the employee's death); 34 TEX. ADMIN. CODE § 75.1(b) (2008) (regarding hazardous profession death benefits: "No claim for benefits on behalf of a child born after the death of the law enforcement officer or fire

courts would not be free to fashion a remedy as was done for federal eligibility in cases such as *Woodward,* but explicit entitlement is absent and presumptively must be addressed by state legislatures.

It is reasonable that eventually federal courts will entertain petitions from claimants based upon the grounds enumerated in many previous cases that discussed the equal protection and due process rights of posthumously conceived children. The arguments may result from a claim that conception occurs as soon as an embryo is formed, and if that conception takes place during the lifetime of the gamete provider it is not rational to deny the resulting child the status of issue or descendant or child. Likewise, it is irrational to deny benefits to a child conceived posthumously if the provider of the gamete consented to the reproduction and intended that the resulting child be his or her own. There are state considerations of certainty and timing as rational reasons for denial. But barring these, the federal claims are nascent and expected. Passage of a federal statute that incorporates the suggestions made in this Article would preempt these challenges.

B. STATE STATUTES

A few states have recently enacted legislation that specifically addresses the issues raised by posthumous conception. Interestingly, at present, none of these states is one that was impacted by the decisions discussed previously. Those states that have made judicial determinations are Arkansas (denying status), New Hampshire (denying status), New York (permitting status), Massachusetts (permitting status), and New Jersey (permitting status). But the fact that states have begun to enact legislation, plus initiatives associated with the Model Act, indicates a movement towards recognition.

California now provides that:

> [f]or purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived after the death of the decedent, other than a child conceived as a result of human cloning, shall be deemed to have been born in the lifetime of the decedent if the child or his or her representative proves by clear and convincing evidence that specified conditions are satisfied.[117]

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fighter will be paid, unless it is accompanied by a certificate of the attending physician that the child was conceived during the decedent's lifetime.").

117. 2004 Cal. Legis. Serv. 775 (West). This statute amends CAL. FAM. CODE §§ 7611, 7630, and 7650; adds Chapter 4.4 to Division 2 of the CAL. HEALTH & SAFETY CODE; amends CAL. INS. CODE §§ 10172 and 10172.5; amends CAL. PROB. CODE § 6453; and adds CAL. PROB. CODE §§ 249.5, 249.6, 249.7, and 249.8. All of the legislative history associated with the passage of the bill may be found at:

A review of the discussion offered concerning the new California legislation reveals a number of questions still unanswered. For example, when a posthumously conceived child is born, should the child have the right to recover from previous distributees? That is, if the estate was distributed and then an additional child was born and that child would qualify as taking from the estate, how should that posthumously conceived child take from the existing heirs?[118] Such considerations are not insurmountable obstacles, such issues having been considered and disposed of through probate statutes already in existence. The legislature in Louisiana was among the first to enact a statute permitting posthumous children to inherit from parents who anticipated this possibility and then specifically consented to this eventual occurrence, thus legitimating the child for purposes of inheritance. Under the current version of the state statute, the child must be born within three years of the death of the decedent, and once born, the child is entitled to "all rights, including the capacity to inherit from the decedent as the child would have had the child been in existence at the time of the death of the deceased parent."[119]

Consent of the provider of the gamete to posthumous conception is an essential element of any new legislation being considered. Illustrative is the Virginia provision requiring that before a provider may be considered a parent of a posthumously conceived child, that same decedent, prior to death, must have consented in writing to the implantation of the procedure resulting in birth.[120] Likewise, Texas provides that,

> [i]f a spouse dies before the 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 kept by a licensed physician that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child.[121]

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http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0651-0700/ab_695_bill_20040105_amended_asm.pdf.

118. *See* CAL. S. JUDICIARY COMM., *Decedents' Estates: Posthumously Conceived Children, A.B. 1910 - Bill Analysis*, Reg. Sess. 2003-2004 (June 22, 2004).

119. LA. REV. STAT. ANN. § 9:391.1(A) (2008).

120. VA. CODE ANN. § 20-158 (2008). For further information, see J. SUBCOMM. ON SURROGATE MOTHERHOOD, REPORT OF THE JOINT SUBCOMMITTEE ON SURROGATE MOTHERHOOD TO THE GOVERNOR AND GENERAL ASSEMBLY OF VIRGINIA, S. DOC. NO. 10 (1991).

121. TEX. FAM. CODE ANN. § 160.707 (Supp. 2008). For further information, see OFFICE OF H. B. ANALYSIS, BILL ANALYSIS OF H.B. 920, H. 77 (2001).

Similar provisions may be found in North Dakota,[122] Louisiana,[123] and Washington.[124] Florida, on the other hand, provides that a posthumously conceived child is not entitled to inherit under state intestacy statutes unless the decedent provided for that child in his or her last will and testament.[125]

The issue of consent recently arose in California. The case, *Estate of Kievernagel*,[126] involved a widow's right to use the cryopreserved sperm of her husband after he died suddenly in a helicopter crash in 2005. When the husband deposited his sperm with the clinic he signed an agreement that stated that the sperm was his sole and separate property and that he retained all control over its disposition. In addition, the husband had checked the box on the agreement that stated that he wanted the sperm destroyed upon his death. The court differentiated the sperm from an embryo in which the wife would have a consideration. Only the husband had an interest in his sperm and when he did not give his consent to its use following his death, the widow could not use it for posthumous conception purposes. The sperm was then destroyed.[127]

C. UNIFORM ACTS

1. Uniform Probate Code

The National Conference of Commissioners on Uniform State Laws proposed the Uniform Probate Code[128] "to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons,

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122. N.D. CENT. CODE § 14-20-65 (Supp. 2007) (codifying that a decedent is a "parent" of a posthumously conceived child only if decedent consented in the record to assisted reproduction after death).

123. LA. REV. STAT. ANN. § 9:391.1(A) (2008) (codifying that a posthumously conceived child is entitled to all rights of inheritance provided that the decedent specifically consented to posthumous conception in writing and so long as conception occurs within three years of death).

124. WASH. REV. CODE ANN. § 26.26.730 (West 2005) ("If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.")

125. FLA. STAT. ANN. § 742.17(4) (West 2005).

126. *In re* Kievernagel, 83 Cal. Rptr. 3d 311 (Cal. Ct. App. 2008).

127. *Id.* at 312-18.

128. For complete text, see UNIF. PROBATE CODE (2006), *available at* http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.pdf.

minors and incapacitated persons."[129] But even as the law seeks to protect the interests of persons, its corollary is "to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors."[130] To accomplish both its protective role and its efficiency stance, the Code provides for those states that adopt it, an orderly approach to passing the property of a decedent who (1) dies without a last will and testament (intestate succession), (2) dies with a last will and testament naming persons as heirs or legatees (testate succession), or (3) creates trusts during life that name beneficiaries that must be determined at a point in time. Because posthumous conception can create persons who would qualify under intestate, testate or trust law, the Uniform Probate Code would be impacted by the resolution of posthumous conception.

The provision defining a child defines this status as someone who takes under intestate succession, "from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant."[131] Any court seeking to establish rights for a posthumously created child would be referred to the intestate statutes and to the requirements for establishing paternity.[132] In addition, little clarity is provided by the Restatement (Third) of Property. The applicable provision in the Restatement simply states that a child must be born within a reasonable time after the decedent's death under circumstances that indicate that the decedent approved of that child's right to inherit under the state's

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129. UNIF. PROBATE CODE § 1-102(b)(1). For a discussion of the Uniform Probate Code and the new reproductive technology, see Christine Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335 (1994); Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727 (2004).

130. UNIF. PROBATE CODE § 1-102(b)(3).

131. *Id.* § 1-201(5).

132. *Id.* § 2-114 ("Parent and Child Relationship.

(a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents regardless of their marital status. The parent and child relationship may be established under the [Uniform Parentage Act] [applicable state law] [insert proper statutory reference].

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

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

applicable statutes.[133] Arguments may be made, but there is nothing specific to posthumous conception.

During the summer of 2008, the National Conference of Commissioners on Uniform State Laws amended the Uniform Probate Code to, among other changes, make provision for posthumously conceived children. This recognition of intestacy status for the posthumously conceived child is a significant development, especially as it will influence state legislatures in adopting similar statutes. Under the new Uniform Probate Code provision, "an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, [and] the child is treated as in gestation at the individual's death for purposes of . . . [intestate succession] . . . 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."[134] Comments concerning the new provision recognize the increase in assisted reproductive technology, as well as the ethical policies of the American Medical Association mandating that stored sperm not be used for purposes other than intended by the donor.[135]

Once the Commissioners adopted the policy allowing for the posthumously conceived child to be considered as in gestation, attendant policies followed. Thus, first, the decedent's personal representative, in administering the estate of the decedent, may accommodate the possibility of posthumous conception in the distribution of the estate.[136] Second, the thirty-six month period was not chosen without reference to other code policies. Under Section 3-1006, an heir is allowed to recover property improperly distributed, or its value, from any distributees during the later of three years after the decedent's death or one year after distribution. The forty-five month period is based on the thirty-six months plus an additional nine months added to allow for a period of pregnancy. Third, if any posthumously conceived child is a member of a class gift, then the child is included among those living at the distribution date of the gift if the "child lives 120 hours after birth and was in utero not later than 36 months after the deceased parent's death or born not later than 45 months after the deceased parent's death."[137]

Assuming that the intent of the donor is satisfied under the provisions mandated by the American Medical Association, the provisions of the

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133. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. l (1999).

134. UNIF. PROBATE CODE § 2-120(k) (2008 amend.), *available at* http://www.law.upenn.edu/bll/archives/ulc/upc/2008am_approved.pdf.

135. AM. MED. ASS'N COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS: CURRENT OPINIONS E-2.04 (Issued June 1993; updated December 2004).

136. *See* UNIF. PROBATE CODE § 3-703 (2006).

137. UNIF. PROBATE CODE § 2-705(g)(2) (2008 amend.).

Uniform Probate Code satisfy the requirements of the judicial decisions that have been perplexed by the difficulties proposed by posthumous conception. Under these statutory rules, a reasonable time is established, consent obtained, and paternity established. We will discuss paternity in connection with the next uniform act, the Uniform Parentage Act.

2. Uniform Parentage Act

In addition to the Uniform Probate Code, the National Conference of Commissioners on Uniform State Laws promulgated the most recent version of the Uniform Parentage Act in 2000, and then amended it in 2002.[138] The more recent version of the Act incorporates under Article 7, the Uniform Status of Children of Assisted Conception Act (1988),[139] and "applies its provisions to nonmarital as well as marital children born as a result of assisted reproductive technologies."[140] In addition to this Act, the Uniform Parentage Act seeks to provide consistency in application with the Uniform Interstate Family Support Act (2001) and the Uniform Child Custody Jurisdiction and Enforcement Act (1997). Obviously, the governing consideration is the best interest of any child in terms of support and custody, and paternity is a major hurdle in both of these pursuits.

Adopted in 2008, the Model Act Governing Assisted Reproductive Technology makes specific reference to the Uniform Parentage Act: "Articles 6 and 7 of the [Model Act] are drawn from and are identical to the provisions of the [UPA] dealing with children of assisted reproduction and gestational agreements."[141] When the Uniform Parentage Act was amended in 2002, it allowed for the possibility of a posthumous child to be considered a child of the decedent 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."[142] This is a significant improvement over the much more restrictive approach of the Uniform Status of Children of Assisted Conception Act of 1988. In this latter statute, "an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg

138. UNIF. PARENTAGE ACT (2002), *available at* http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf.

139. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/uscaca88.pdf. The Act provides that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child." *Id.* § 4(b).

140. UNIF. PARENTAGE ACT prefatory note.

141. MODEL ACT GOVERNING ASSISTED REPROD. TECH., REPORT at 38 (2008).

142. UNIF. PARENTAGE ACT § 707.

or sperm is not a parent of the resulting child."[143] Nonetheless, comments to the statute's provision indicate that an argument could be made that the provision recognizes the possibility that a posthumously conceived child could still inherit if the decedent provider so provided in a valid last will and testament.[144]

The Uniform Parentage Act certainly contemplates all of the means of assisted reproduction.[145] Nonetheless, the parent-child relationship does not exist unless, in the general context of posthumous conception, the man "consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child . . . or [in] an adjudication confirming the man as a parent of a child born to a gestational mother if the agreement was validated under [Article] 8 or is enforceable under other law . . . ."[146] This paternity procedure, involving consent to be a parent, is distinctive from the presumption of paternity for a child in gestation–in existence—at the death of the father and born within three hundred days after the marriage between the mother and father was "terminated by death, annulment, declaration of invalidity, or divorce."[147] Nor is this consent procedure the same as "[i]f a married couple uses their own eggs and sperm to conceive a child born to the wife . . . . The wife is the mother—by gestation and genetics, the husband is the father—by genetics and presumption."[148]

Parental status attained by a person who died prior to conception is treated under the Uniform Parentage Act, as previously described, as derived generally from the consent of the gamete provider. Thus the Act 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.[149]

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143. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(b).

144. *Id.* And this approach has been adopted in Florida. FLA. STAT. ANN. § 742.17(4) (West 2005).

145. UNIF. PARENTAGE ACT § 102(4) (2002) ("'Assisted reproduction' means a method of causing pregnancy other than sexual intercourse. The term includes: (A) intrauterine insemination; (B) donation of eggs; (C) donation of embryos; (D) in-vitro fertilization and transfer of embryos; and (E) intracytoplasmic sperm injection.").

146. *Id.* § 201(b)(5)-(6).

147. *Id.* § 204.

148. *Id.* art. 7 cmt.

149. *Id.* § 707. Likewise, "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child." *Id.* § 703. And "the husband of a wife who gives birth to a child by means of assisted reproduction may not challenge his paternity . .

By implication, posthumous conception will result in the child born being the child of the decedent if the decedent consented in a manner deemed permissible. Such a procedure would meet the minimum requirements of the cases previously discussed.

The consent requirement is not coupled with a "reasonable time" limitation as with the Restatement (Third) of Property, Wills and Other Donative Transfers, but the elements of a sufficient consent by the gamete provider will be an essential element of the Model Act Governing Assisted Reproductive Technology.[150] It is not surprising that the Model Act uses the same language as the Uniform Parentage Act, stressing the necessity of obtaining consent of the gamete provider. Certainly disputes will arise as to whether the consent may be implied or written, and how to address the status of an embryo, which involves the gametes of two providers. These issues are addressed in the Model Act.

IV. THE MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY

The Model Act[151] was formulated and adopted in an effort to encourage uniformity among the states as they seek to integrate assisted reproductive technology into state laws and procedures. Certainly the provisions seek to address the few cases that have been decided to date, and discussed previously. The Model Act, as well as those cases, represent the conflict among first, the emerging rights of adults seeking to procreate, second, the states' responsibilities toward the best interests of the resulting children, and third, the need for certainty in the distribution of inheritance and benefits.[152]

. unless: . . . (2) the court finds that he did not consent to the assisted reproduction, before or after birth of the child." *Id.* § 705(a).

150. *See id.* § 304 (listing the meager rules concerning acknowledgment of paternity).

151. For a complete text of the Model Act Governing Assisted Reproductive Technology (2008), see http://www.abanet.org/family/committees/artmodelact.pdf. The Model Act, as distinguished from a uniform act, was drafted by the Committee on Reproductive and Genetic Technology of the Section of Family Law of the American Bar Association. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at prefatory note (2008). It was approved by the American Bar Association in 2008. *Id. See generally*, Kindregan & Snyder, *supra* note 16 (describing how the Act began in 1988 in the midst of "Baby M" headlines, and was adopted, twenty years later, at a time when collaborative reproduction is increasingly common).

152. There has been little consideration given to additional legal issues that will occur as a result of assisted reproductive technology. *See, e.g.*, Michael K. Elliott, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child,* 39 REAL PROP. PROB. & TR. J. 47 (2004); Joshua Greenfield, *Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN. J. L. SCI. & TECH. 277 (2007); Hoffman &

The issues generated are novel ones and are hardly compatible with statutes or common law precedents, although as the abovementioned cases demonstrate, attempts have been made to accommodate the new technology.

The Model Act signals the suddenness of these issues when it writes, in the Prefatory Note to the Model Act:

> Since the birth of the first in vitro fertilization (IVF) baby in 1978, extraordinary advances in reproductive medicine have made biological parenthood possible for people with infertility, certain other medical conditions, for persons who risk passing on inheritable diseases or genetic abnormalities, or for persons who are effectively infertile due to social rather than medical reasons.[153]

And signaling that future developments will occur, the Model Act will be supplemented at later dates with "a statement of necessary provisions and standards of best practice for drafting the informed consents and various [assisted reproductive technology] agreements suggested or required by [the Act]."[154] Notably the Model Act,

> goes beyond purely parentage issues and proposes standards protecting the legal interests of all concerned parties as these technologies are increasingly used to conceive children. It neither advocates nor opposes the use of these technologies, but accepts the reality that many people are using them today and proposes legal solutions and protections for those involved.[155]

Each of the judicial controversies that has arisen in connection with posthumous conception occasioned the court to call for legislative guidance in this developing area of the law. The Model Act is an attempt to provide

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Morriss, *supra* note 10. Sociological issues have not been fully explored. *See, e.g.*, Rebecca Collins, *Posthumous Reproduction and the Presumption Against Consent in Cases of Death Caused by Sudden Trauma,* 30 J. MED. & PHIL. 431 (2005) (arguing for a presumption in favor of consent when the decedent dies suddenly); Gary S. Nakhuda, Joseph E. Pena, & Mark V. Sauer, *Deaths of HIV-Positive Men in the Context of Assisted Reproduction: Five Case Studies from a Single Center,* 19 AIDS PATIENT CARE & STDS 712 (2005) (discussing HIV infection); Bob Simpson, *Making 'Bad' Deaths 'Good': The Kinship Consequences of Posthumous Conception,* 7 J. ROYAL ANTHROPOLOGICAL INST. 1 (2001) (arguing that the commercialization of sperm may detract from the realization that the resulting child is human).

153. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at prefatory note (2008).

154. *Id.*

155. Kindregan & Snyder, *supra* note 16, at 207. The reality of practice precipitates caution in others, especially those opposed to "[t]hese developments [in medical science that are] . . . negative and cannot be utilized when they involve the destruction of human beings or when they employ means which contradict the dignity of the person or when they are used for purposes contrary to the integral good of man." INSTRUCTION *DIGNITAS PERSONAE*, *supra* note 13, at 3.

this guidance: "The growing number of court decisions and fast-paced medical developments such as cryopreservation of gametes and embryos, in vitro fertilization, embryo transfer, and intracytoplasmic sperm injection make it abundantly clear that some legislation on assisted reproduction is needed."[156] But the Model Act is not to be the final word, and was not considered to be so by the drafters. Instead,

> [t]he Act should stimulate awareness and analysis within the framework of its various proposals. Legislative committees could use the issues generated by the Act to seek the input of diverse groups of professionals, including legal scholars, practicing attorneys, medical practitioners, scientists and ethicists to review these proposals and to seek alternative proposals.[157]

The Model Act interfaces with the posthumous-conception-judicial-decisions discussed previously and offers legislative guidance as requested. When analyzed, these decisions suggest that guidance is needed in the following areas: (1) the establishment of paternity or maternity between the gamete provider and the resulting child; (2) consent to paternity or maternity by the gamete provider for the resulting child; (3) accommodation within the existing state structure for state inheritance and any state benefits; (4) accommodation within the existing federal status requirements for the conferral of federal benefits; and (5) a resolution of paternity or maternity within a reasonable time so as to accommodate an orderly and certain distribution of inheritance and benefits. To this list, we will also suggest that there be a sixth area: (6) ethical and religious accommodations associated with posthumous conception. We now examine each of these within the specific parameters of the Model Act.

1. Establishing Paternity or Maternity

The Model Act takes "advantage of the prior work done on parentage by incorporating the Uniform Parentage Act standards, where they can now be viewed in the broader context of existing and emerging reproductive

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156. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at Report to the House of Delegates (2008).

157. *Id. See, e.g.*, Miller v. American Infertility Group of Illinois, 897 N.E.2d 837 (Ill. App. Ct. 2008) (involving a couple that underwent attempted in vitro fertilization (IVF) at the defendant clinic, and the clinic did not cryopreserve the resulting blastocyst (early form of embryo) for future use. The couple then sought damages from the clinic under the state's Wrongful Death Act for the destruction of the embryo. The court ruled that the Act must be strictly construed and it has never been applied to situations involving in vitro fertilization and the cryopreservation of blastocysts or pre-embryos. Such a cause of action could only come about through legislative action, not judicial pronouncement.).

technologies."[158] Specifically, the Model Act's Articles 6 and 7 are identical to the provisions of the Uniform Parentage Act, since "the UPA has previously been approved by the American Bar Association [and] these articles [in the Model Act] clearly reflect existing ABA policy."[159] Nonetheless, the Model Act excludes from its provisions "the birth of a child conceived by means of sexual intercourse,"[160] or when a bona fide donor is involved in the subsequent birth of a child.[161] Uniquely, the Model Act specifically includes–and is intended to concern–those situations when "[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child . . . ."[162] And then, in reference to posthumous conception, "to produce a live birth after a gamete provider has died."[163] The Model Act applies to more than posthumous conception. It encompasses the many new medical procedures by which persons seek to become parents: "The Act provides a framework by which

158. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at Report to the House of Delegates (2008). The Uniform Probate Code revisions pertaining to posthumous conception were not approved until summer of 2008, and the Model Act did not wish to contradict this or the 2002 revisions of the Uniform Parentage Act, hence the Model Act cautions legislatures to make certain that no conflict exists among the various statutes that they may have enacted. Kindregan & Snyder, *supra* note 16, at 219.

159. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at Report to the House of Delegates (2008).

160. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 601 (2008). Obviously, most contests over paternity are generated in the context of sexual intercourse and a dispute concerning the resulting child. *See, e.g.*, Pettit v. Pettit, 189 P.3d 1102 (Ariz. Ct. App. 2008) (holding that a man's admission that he was the father of a child in a divorce petition precluded him from later denying paternity); Burden v. Burden, 945 A.2d 656 (Md. Ct. Spec. App. 2008) (holding that a man who signed a voluntary acknowledgment of paternity in another state, as to a child born to his wife before they even met, is required to pay child support for the child when the man and the wife divorced six years later); *In re* J.B., 953 A.2d 1186 (N.H. 2008) (holding that a man, later proven not to be the biological parent, was nonetheless the father of a nonmarital child when he had established sufficient facts to establish himself as a parent).

161. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 602; *see also id.* § 102(10) ("'Donor' means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include: (a) a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife; (b) a woman who gives birth to a child by means of assisted reproduction except as otherwise provided in Article 6; or (c) a parent under Article 6 or an intended parent under Article 7. Embryo donor means a person or persons with dispositional control of an embryo who provides it to another for gestation and relinquishes all present and future parental and inheritance rights and obligations to a resulting person or persons.").

162. *Id.* § 603.

163. *Id.* § 102(30).

issues such as informed consent, donor identity, control of cryopreserved gametes, mental health consultation, privacy, gamete and embryo donation, insurance, and quality assurance can be addressed and resolved."[164] For example, there are a number of provisions in the Model Act establishing parentage under circumstances when the legal spouse of a man gives birth to a child by means of assisted reproduction,[165] or when a marriage is dissolved through divorce or annulment before transfer of the eggs, sperm, or embryos.[166]

For purposes of posthumous conception, the gamete provider is no longer living when the conception occurs. The issue then becomes establishing parenthood for inheritance and benefits, which is the focus of the cases discussed in the federal and state courts to date. The Model Act specifies:

> 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.[167]

It is unambiguous that parenthood may only be established by a clear acceptance of the consequences of parenthood by the person providing the gametes. Such establishment is present in Sections 6 and 7 of the Uniform Parentage Act, but the Model Act is intended to do more than address parentage issues.[168] The Model Act provides greater specificity as to consent requirements, an essential element of parenthood under either the Uniform Parentage Act or the Model Act. This issue of consent should be considered separately.

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164. *Id.* at Report to the House of Delegates.

165. *Id.* § 605.

166. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 606 (2008). The issue of the disposition of embryos was considered in Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992) (upholding the terms of the agreement to discard the embryos upon his death).

167. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607.

168. The Uniform Parentage Act establishes a parent-child relationship when a child is in gestation at the death of the gamete provider. *See* UNIF. PARENTAGE ACT § 204(a)(2) (2002) ("[C]hild is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce . . . ."). Or, identical to the Model Act, "an individual who consented in a record to be a parent . . . dies before placements of the eggs, sperm, or embryos . . . would be a parent of the child." MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607.

2. Consent to Paternity or Maternity

The Model Act provides the following:

> SECTION 202. RECORD AUTHORIZATION REQUIRED
>
> 1. The provider must document informed consent in a record for each participant that must:
>
> (a) Be in plain language;
>
> (b) Be dated and signed by the provider and by the participant;
>
> (c) Include an agreement in a record clarifying, to the extent possible, parental rights of all participants (participants not named are presumed to have no parental rights or duties) if collaborative reproduction is used;
>
> (d) State that disclosures have been made pursuant to this Act;
>
> (e) Specify the length of time the consent remains valid; and
>
> (f) Advise the party signing the informed consent document of the right to receive a copy of the record.
>
> 2. Except in an emergency, the record(s) must be signed by the parties before informed consent is valid or the commencement of any assisted reproduction.[169]

In the context of the judicial opinions summarized in this Article, the consent of the man cryopreserving sperm to be used to fertilize an egg that eventually becomes a child must be clear and convincing. Taking each of the cases chronologically, William Kane, as described in the 1993 California decision, certainly intended that his long-time girlfriend use his cryopreserved sperm to become pregnant.[170] Likewise, in the 2000 decision of *In re Estate of Kolacy*,[171] the court stated that it accepted as true the wife's "statement that her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children."[172] The issue in the case is whether the alleged oral permission and direction given by the husband would be sufficient in other circumstances, and particularly in reference to the Model Act's requirement that the consent be in a record.

In *Woodward v. Commissioner of Social Security*,[173] the father was less than precise in his consent to insemination after his death, and the court comments that, "a decedent's silence, or his equivocal indications of a desire to parent posthumously, 'ought not to be construed as consent.'"[174]

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169. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 202.

170. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

171. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

172. *Id.* at 1263.

173. 760 N.E.2d 257 (Mass. 2002).

174. *Id.* at 269.

Furthermore, "[a]fter the [provider's death], the burden rests with the surviving parent . . . to prove the deceased genetic parent's affirmative consent to both" conception and support of the resulting child.[175] The court cited the ability to preserve the gametes for a long period of time, thus compounding the efforts to establish consent. Sufficient evidence may just evaporate. Then, the court concluded that the administrative law judge was justified in ruling that consent had been given adequately. The administrative law judge's ruling was based on written statements from the decedent's family, the wife's family, and the decedent's financial records, which all led to the conclusion that there was proper consent to posthumous conception.[176]

Like *Woodward,* in the case of *Gillett-Netting*[177] the Ninth Circuit Court of Appeals reversed the federal district court and held that when a husband deposited sperm prior to undergoing chemotherapy for cancer, he "wanted [his wife] to have their child after his death using his frozen sperm."[178] Admittedly, the court was more favorable to establishing consent and parenthood because the mother and the gamete provider were married at the time of his death - an important factor in Arizona, the decedent's domicile at death.[179] The case demonstrates that when the facts lack specificity, the court will look to surrounding circumstances.

Another federal decision, *Stephen v. Commissioner of Social Security*,[180] was not as accepting of consent and resulting parentage. *Stephen* is an interesting decision because it involved a wife's removal of her husband's sperm after he died of a heart attack; there was no deposit prior to his death from which the surviving spouse could take for purposes of conception. The court denied the mother's request for Social Security benefits that she sought on behalf of the son born as a result of the posthumous conception. The court held that the child was not provided for in the decedent's last will and testament, and furthermore, the child was not dependent upon the decedent at the time of the decedent's death.[181] These factors, based on circumstances other than the specific consent of the decedent, resulted in a denial of status for the child. It was difficult to find any evidence in the record that the husband did in fact consent to the use of his sperm for the posthumous conception.

Making specific reference to the removal of sperm after the death of the provider, the Model Act provides that:

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175. *Id.*

176. *Id.* at 270.

177. Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).

178. *Id.* at 595.

179. *See id.* at 599 n.7.

180. 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

181. *Id.* at 1265.

> Gametes or embryos shall not be collected from deceased or incompetent individuals or from preserved tissues unless consent in a record was executed prior to death or incompetency by the individual from whom the gametes or embryos are to be collected or the individual's authorized fiduciary who has express authorization from the principal to so consent.[182]

Furthermore, once collected, the gametes or embryos may not be placed (transferred) into the body of a woman with the intent to achieve pregnancy and live birth without a court order.[183] Failure to observe these restrictions will subject the perpetrator to civil and criminal sanctions.[184]

By mid-2007, another interesting set of facts would arise concerning consent. In the New York case *In re Martin B.*,[185] the court was asked to establish the consent of not the gamete provider, but rather the provider's father, the Grantor of seven trusts benefitting "issue and descendants." The posthumously conceived children who would otherwise qualify as issue were born several years after the death of the gamete provider. If they were considered issue or descendants they would receive benefits under the terms of the trusts. New York accepted the "consent" to artificial insemination between spouses to establish parenthood and thus establish the children as issue under the terms of the trust, even though this allowed for the process of posthumous conception to benefit someone other than the children of the provider.[186]

For the *Martin* court, the essential element was the intent of the Grantor of the trusts: whether the Grantor wanted to include the after born children of his son, particularly under the circumstances of posthumous conception. The court ruled that the children should be included as beneficiaries of the trust, stating that "the absence of specific intent should not necessarily preclude a determination that such children are members of the class of issue."[187] Nonetheless, even though the court was willing to allow for a silent trust to include posthumously conceived children, the court went on to say that children must be born with the "consent of their parent."[188] They simply assumed that this occurred here.

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182. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 205(1) (2008). Arguably, section 607 of the Model Act applies to persons who, while alive, make provision for gamete implantation after the provider's death. *See* Kindregan & Snyder, *supra* note 16, at 215.

183. *Id.* § 205(3).

184. *Id.* § 205(4).

185. 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007).

186. *Id.* at 209.

187. *Id.* at 211.

188. *Id.*

In the same year, the Supreme Court of New Hampshire ruled that a child conceived posthumously could not inherit – or thus receive Social Security benefits – under state law.[189] Interestingly, the man and woman were married, and the husband had executed a consent form specifically stating that the wife could use the cryopreserved sperm to achieve pregnancy and that he wanted to be the father of the child to the fullest extent possible.[190] The court rejected the consent of the decedent as the determining factor. Rather, the court held that under the terms of the state's intestate statute, the child would need to be alive at the time of the father's death in order to inherit, and here she was not.[191] Consent was irrelevant when the state statute dictated otherwise.

Finally, in early 2008, the Supreme Court of Arkansas ruled that a child who was "created as an embryo through in vitro fertilization during the child's parents' marriage, but implanted into the child's mother's womb after the death of the child's father," was not entitled to inherit as the father's intestate heir.[192] The husband and wife had undergone fertility treatments in an effort to become pregnant, but by the time of the husband's death, the wife had not been able to carry a child to term. Less than one year after his death, the wife had two of the embryos transferred to her uterus and this procedure resulted in a single pregnancy that produced a child.

The issue for the Arkansas court was not the consent of the father, but rather whether conception had occurred prior to his death so as to comply with the terms of the Arkansas Code requiring conception prior to death to inherit as an intestate heir.[193] Since the child was neither born nor conceived during the marriage, the child was not entitled to take an intestate share, thus the child was also disqualified from Social Security benefits. The court rejected the argument that the father consented to the birth and thus the child should be able to inherit. To so hold, the court concluded, would depart from the clearly stated words used in the statute, requiring birth or conception during the life of the parent, not consent. It was not within the court's ambit to "create the law, but [instead] to interpret the law and to give effect to the legislature's intent."[194]

Taken as a whole, the cases reveal that the consent to paternity or maternity of the provider of the gamete does not dispose of the existing situations. There is a distinction to be made between consent and inheritance. For example, in both *Finley* and *Khabbaz*, the courts focused on the words of the intestate statutes, rather than on the level of consent

189. Khabbaz v. Comm'r Soc. Sec. Admin., 930 A.2d 1180, 1186 (N.H. 2007).

190. *Id.* at 1182.

191. *Id.* at 1184.

192. Finley v. Astrue, 270 S.W.3d 849, 850 (Ark. 2008).

193. *Id.* at 853 (referencing ARK. CODE ANN. § 28-9-210(a) (2004)).

194. *Id.* at 854.

exhibited by the provider. The state's intestate statutes must be addressed by the appropriate legislatures. So too, whether posthumously conceived children should be considered as beneficiaries under valid trusts when the trust allows for the inclusion of additional "issue" or "descendants." Indeed, "foisting heirs upon the unwilling" has long been an issue in trust administration. But the Uniform Probate Code is willing to allow such language to include those who would "succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment."[195] In those states retaining the Rule Against Perpetuities, there are certainly instances when an after born life would jeopardize validity under the Rule if that human life was a measuring life but not a life in being.[196] The Model Act does not accommodate the Rule and this should be a consideration.

3. Accommodation Within the State's Intestate Scheme

The Model Act, in its report to the American Bar Association House of Delegates, states that the Act is "intended to provide the needed legal framework by challenging the legislatures to consider the potential legal issues arising from assisted reproduction."[197] Many, if not most, states use state intestate statutes that omit any reference to or may be interpreted as disallowing for posthumously conceived children to be considered intestate heirs.[198] State courts may allow for the inclusion of posthumously

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195. UNIF. PROBATE CODE § 2-711 (2006); *see id.* § 2-705 (allowing for adopted children and children born out of wedlock to be included in classes allowed to take under intestate succession); *see also* Lux v. Lux, 288 A.2d 701, 705 (R.I. 1972) ("The ascertainment of time within which a person who answers a class description such as 'children' or 'grandchildren' must be born in order to be entitled to share in a testator's bounty is not an easy matter. In seeking a solution, the court must seek to effectuate the testator's intent.").

196. *See* Lorio, *supra* note 110, at 161-162 (commenting that if a life-in-being standard is determinative for a violation under the Rule, then the possibility that a posthumously conceived child may cause a violation is a consideration. Nonetheless, if the state adopts a statute that treats the child posthumously conceived as being in gestation at the death of the parent, then the child is "in being" for purposes of the Rule. Nonetheless, it seems better for any state adopting any legislation allowing for posthumous conception, to specifically exempt this possibility from the repertoire of the Rule.).

197. MODEL ACT GOVERNING ASSISTED REPROD. TECH., at Report to the House of Delegates (2008).

198. *See, e.g., Finley*, 270 S.W.3d at 853-55 (holding that a child must be born or conceived prior to the parent's death to inherit intestate and the state statute's definition of conception did not include an embryo); *see generally* Woodward v. Comm. of Soc.

conceived children, but reliance upon judicial interpretation leaves all at risk, with only a patchwork quilt of state allowances and benefits.

Since Articles 6 and 7 of the Model Act mirror the corresponding provisions of the Uniform Parentage Act, the solution for each of the state legislatures, in seeking to bring their intestate statutes into conformity with benefits to be conferred on posthumously conceived children, should be to inquire as to whether they have adopted the Uniform Parentage Act. In addition, with the amendments to the Uniform Probate Code,[199] states have added incentives and model from which to choose to accommodate the rights of the children and the intent of the parents. And since the Model Act is meant to integrate itself into the existing acts, its three sections deserve further legislative consideration.

The first section pertinent to intestate succession and posthumous conception states:

> 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.[200]

A requirement of spousal status will jeopardize the rights of children born as a result of non-marital cohabitation and posthumous conception not included within the general provisions of Section 603, which states: "A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 604 with the intent to be the parent of her child is a parent of the resulting child."[201] Any confusion over marital status will result in loss of benefits and delay. The proliferation of private ordering among adults in establishing relationships other than marriage involving property interests continues.[202] And states are increasingly recognizing civil unions, domestic partnerships and reciprocal beneficiary arrangements

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Sec., 760 N.E.2d 257 (Mass. 2002) (holding that the best interest of the child and equality among all children require that the state's intestate statute be read to incorporate posthumously conceived children); *In re* Martin B., 841 N.Y.S. 2d 207 (N.Y. Sur. Ct. 2007) (allowing for an evolution of state public policy to allow for the inclusion of posthumously conceived children).

199. UNIF. PROBATE CODE §§ 2-120(k); 2-104(a)(2); 3-703; and 3-1006.

200. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607.

201. *Id.* § 603. *See also id.* § 604(1) (requiring "[c]onsent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man," would allow for inclusion under posthumous conception analysis.).

202. *See generally* WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 33-40 (2d ed. 2007).

among persons of the same sex. There must be greater certainty of what is meant by spousal status.

The second section pertinent to intestate succession and posthumous conception involves parentage under a valid gestational agreement. It is conceivable that a provider of sperm, eggs or embryos may direct that any of these be used to bring about conception after the death of the provider. Furthermore, it is conceivable that upon birth of a child to a gestational carrier, the intended parents could seek to confirm parenthood in accordance with the provisions of the Model Act.[203] The obligations, rights, and duties under the gestational agreement as set forth in the Model Act are important and need to be included as prerequisites for intestate succession status.

The third section involves the collection of gametes or embryos from deceased or incompetent persons, or from preserved tissues. The Model Act specifies that, in order to be utilized in the context of posthumous conception, there must be consent in a record that was executed prior to death or incompetency. Additionally, court permission must be obtained in an emergency situation. The consent must come from the provider or from that person's authorized fiduciary who has express authorization from the provider to so consent.[204] Facts involving the removal of sperm from a decedent and then cryopreserving the sperm so as to bring about conception occurred in *Stephen v. Commissioner of Social Security*.[205] Certainly the medical technology is available, both for retrieval and for cryopreservation. Any intestate statute must be attentive to the consent requirements pertaining to the decedent, and the Model Act provides for this. But, in an effort to promote certainty there must be a reasonable time limit for purposes of conception. Already, some states place a time restraint upon when conception may occur after the death of the provider of the gametes. California requires that a child be in utero within two years of decedent's death.[206] Louisiana requires that the child be born not more than three years after the death of the provider of the gametes.[207] And the Uniform Probate Code allows for a child to be treated as in gestation if the child is in utero not later then thirty-six months after the death of the gamete provider, or born not later than forty-five months.[208] Perhaps a reasonable standard would be

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203. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 707 (Alternative A) (2008).

204. *Id.* § 205.

205. 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (holding that a child resulting from posthumous conception was not eligible for intestate inheritance or Social Security benefits).

206. CAL. PROB. CODE § 249.5 (West Supp. 2008).

207. LA. REV. STAT. ANN. § 9:391.1(A) (2008).

208. UNIF. PROBATE CODE § 2-120(k) (2006).

more equitable, as was suggested in the *Woodward* decision, but proper estate administration requires certainty at some point in time.

The identification of heirs, issue, descendants, and related class gift designations within the context of trusts may remain more fluid. Thus, rather than establish an objective time limit on the establishment of status within the class, it is reasonable to allow for the class—including those posthumously conceived—to increase in accordance with administrative convenience. The Uniform Probate Code offers an example of a reasonable approach to class membership in trusts when it provides that "property passes to those persons . . . when the disposition is to take effect in possession or enjoyment."[209] The effect of the statute is to allow for after conceived and after born members of the class to enjoy the benefits of the trust, no matter when conception occurs, as long as the class members are in existence at the time distribution of the trust assets takes place. Plus, the Code now *specifically* includes posthumously conceived children within the class of Section 2-705(g)(2).[210]

4. Accommodating the Requirement of Federal Benefits

A consistent refrain in many of the cases involving posthumous conception was the requirement that federal Social Security benefits be dependent upon the state's intestate statute including the resulting child in the inheritance scheme.[211] The cases often refer to the Social Security regulations as requiring that the child actually be a child of the decedent from whom the benefits are sought. To make this determination, "the Commissioner [of Social Security] is instructed to 'apply such law as would be applied in determining the devolution of intestate personal property . . . by the courts of the State in which [the insured] was domiciled at the time of his death.'"[212] Furthermore, the cases, because they rely on different intestate statutes, provide inconsistent benefits to children resulting from posthumous conception. It is reasonable to question whether the federal benefits should be dependent upon state statutes when the result is to deny benefits to those most vulnerable children.

The *Woodward* decision was the first to seek to identify the best interests of the children as the deciding factor in a balancing of state certainty and the financial entitlement of children. The court wrote that:

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209. *Id.* § 2-711.

210. UNIF. PROBATE CODE § 2-705(g)(2) (2008 amend.).

211. *See, e.g.*, Finley v. Astrue, 270 S.W.3d 849, 853-55 (Ark. 2008) (holding that a child could not inherit under state's intestate statute, ARK. CODE ANN. § 28-9-210(a) (2004), thus the child was denied federal Social Security benefits).

212. *Id.* at 852-53 (quoting 42 U.S.C. § 416(h)(2)(A) (2000)).

> Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the legislature intended that such children be "entitled," in so far as possible, "to the same rights and protections of the law" as children conceived before death.[213]

Likewise, in *Martin B.*, the court opted in favor of including children within the state's statute since, "where a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights 'for all purposes as those of a natural child.'"[214] These cases clearly imply an equal protection argument for children, but more directly, they suggest the need for federal initiative to separate federal entitlements from state eligibility requirements.

5. Establishing Paternity or Maternity Within a Reasonable Time

The reasonableness of time restraints on the establishment of paternity or maternity when posthumous conception occurs has been addressed under individual headings within this Article. There are other time limitations contained in the Model Act. For example, (1) "[a] donor who has given permission for release of identifying health or other information may not revoke such permission after transfer of the donated gametes or of embryos created with the donated gametes."[215] (2) Consent to use gametes for the purpose of posthumous conception must be obtained from the provider prior to death or incompetency.[216] (3) Counseling is required to be offered prior to the transfer of donor gametes or embryos to a female intended parent or to a gestational carrier. In addition, assessments of participants must be provided prior to the procedures.[217] And of course, (4) binding agreements must be executed prior to embryo creation by the intended parents.[218]

The Model Act further provides (5) a period of five years to pass before an embryo is deemed to be abandoned, and only if there has been a diligent search to notify the interested parties.[219] The Model Act adopts the provisions of the Uniform Parentage Act in establishing parameters for paternity; some of these provide time limits.[220] But the section that applies to the parental status of a deceased individual does not make reference to a

213. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266 (Mass. 2002).

214. *In re* Martin B., 841 N.Y.S.2d 207, 211 (N.Y. Sur. Ct. 2007).

215. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 204(2) (2008).

216. *Id.* § 205(1).

217. *Id.* § 302.

218. *Id.* § 501.

219. *Id.* § 504.

220. *Id.* §§ 601-07.

time for conception to take place in order for the child to be considered a child of the decedent. The provision simply requires consent.[221]

Posthumous conception may occur through the use of a gestational agreement, but there is no time limit on the gestational agreement. There is a residency requirement of ninety days that applies to persons seeking to validate the agreement.[222] Then, "[u]pon birth of a child to a gestational carrier, the intended parents shall file notice with the court that a child has been born to the gestational carrier within 300 days after assisted reproduction."[223] If the intended parents do not file notice within three hundred days, perhaps because of the death of the intended parent prior to conception but after the gestational agreement, the "gestational carrier or the appropriate State agency may file notice with the court that a child has been born . . . within 300 days after assisted reproduction."[224] Finally, "[i]ndividuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for support of the resulting child under the law."[225] Clearly, the statute includes facts conducive to posthumous conception, but greater clarity is needed to provide certainty of benefits upon a petition by the gestational carrier or by the appropriate state agency.

6. Ethical or Religious Accommodation

Advances in medical technology allowing for the procedures described in this Article prompt deeply held concerns by some persons within religious communities and by others fearful of the adverse effects upon children, privacy and the possibility of genetic harvesting.[226] For religious observants, assisted reproductive techniques are viewed as "gravely immoral" because the techniques used "entail the disassociation of husband and wife, by the intrusion of a person other than the couple . . . . [Also, t]hese techniques . . . infringe the child's right to be born of a father and

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221. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607 (2008) ("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.").

222. *Id.* § 702 (Alternative A).

223. *Id.* § 707(1) (Alternative A).

224. *Id.* § 707(3) (Alternative A).

225. *Id.* § 709(3) (Alternative A).

226. *See, e.g.*, Bahadur, *supra* note 12; Corrigan, Mumford & Hull, *supra* note 112 (discussing in part, the British Human Fertilisation and Embryology Act of 1990, which permits staff to abstain from participating in posthumous conception on conscientious grounds).

mother known to him and bound to each other by marriage."[227] Often too, there is insufficient consideration given to the embryos, and religious observants advocate that "[e]very human life, from the moment of conception until death, is sacred because the human person has been willed for its own sake in the image and likeness of the living and holy God."[228]

The Roman Catholic Church has "frequently intervened to clarify and resolve moral questions" in the area of bioethics.[229] In 1987, the Congregation for the Doctrine of the Faith issued a document titled, *Instruction* Donum Vitae *on Respect for Human Life At Its Origins and for the Dignity of Procreation.* There were two encyclicals authored by Pope John Paul II, *Veritatis Splendor* (1993), and *Evangelium Vitae* (1995), and in 2008, Pope Benedict XVI addressed the United Nations where his comments embraced the protection of the life of every human being. Consistent within all of these pronouncements is the Church's assertion as to the following:

> The origin of human life has its authentic context in marriage and in the family, where it is generated through an act which expresses the reciprocal love between a man and a woman. Procreation which is truly responsible vis-a-vis the child to be born "must be the fruit of marriage."[230]

> The Church, by expressing an ethical judgment on some developments of recent medical research concerning man and his beginnings, does not intervene in the area proper to medical science itself, but rather calls everyone to ethical and social responsibility for their actions. She reminds them that the ethical value of biomedical science is gauged in reference to both the unconditional respect owed to every human being at every moment of his or her existence, and the defense of the specific character of the personal act which transmits life.[231]
>
> ". . . Therefore, the Magisterium of the Church has constantly proclaimed the sacred and inviolable character of every human life from its conception until its natural end."[232]

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227. UNITED STATES CATHOLIC CONFERENCE, CATECHISM OF THE CATHOLIC CHURCH, § 2376, at 571 (2d ed. 1997) (1994).

228. *Id.* at § 2319, at 558.

229. INSTRUCTION *DIGNITAS PERSONAE*, *supra* note 13, at 1.

230. INSTRUCTION *DIGNITAS PERSONAE*, *supra* note 13, at 4 (quoting CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION *DONUM VITAE* (1988)).

231. *Id.* at 6.

232. *Id.* at 10 (quoting Pope Benedict XVI, Address to the General Assembly of the Pontifical Academy for Life and International Congress on "The Human Embryo in the Pre-implantation Phase," (February 27, 2006)).

> All things considered, it needs to be recognized that the thousands of abandoned embryos represent a situation of injustice which in fact cannot be resolved.[233]
>
> From the ethical point of view, embryo reduction is an intentional selective abortion. It is in fact the deliberate and direct elimination of one or more innocent human beings in the initial phase of their existence and as such it always constitutes a grave moral disorder.[234]
>
> In the context of the urgent need to mobilize consciences in favour of life, people in the field of healthcare need to be reminded that "their responsibility today is greatly increased. Its deepest inspiration and strongest support lie in the intrinsic and undeniable ethical dimension of the health-care profession, something already recognized by the ancient and still relevant Hippocratic Oath, which requires every doctor to commit himself to absolute respect for human life and its sacredness."[235]

Because medical technology has advanced so rapidly and so recently, there are few specific references to posthumous conception in ethical or religious text. Publications are readily available from religious denominations condemning cloning and stem cell research,[236] but there are very few references to more recent medical developments. The abovementioned Vatican documents offer the best summaries. Nonetheless, one recent decision involved medical personnel refusing to assist unmarried persons seeking to utilize assisted reproductive technology. Medical personnel objected based on their federal and state constitutional rights to the free exercise of their religious beliefs.[237] The California case involved a

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233. *Id.* at 11.

234. *Id.* at 12.

235. *Id.* at 21 (quoting Pope John Paul II, Encyclical Letter *Evangelium Vitae*, 63 (1995)).

236. *See, e.g.*, SECRETARIAT OF PRO-LIFE ACTIVITIES, UNITED STATES CATHOLIC CONFERENCE OF CATHOLIC BISHOPS, STEM CELL RESEARCH AND HUMAN CLONING: QUESTIONS AND ANSWERS (2004), http://www.usccb.org/prolife/stemcellQ&A.pdf; Pope John Paul II, Encyclical Letter The Gospel of Life (*Evangelium Vitae*) (March 25, 1995), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/index.htm; Pope Benedict XVI, Address to the Participants in the Plenary Session of the Congregation for the Doctrine of the Faith (Jan. 31, 2008), http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/january/index_en.htm; Pope Benedict XVI, Address to the Participants in the International Congress Sponsored by the Pontifical Academy for Life (Sept. 16, 2006), http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/index_en.htm.

237. *See* N. Coast Women's Care Med. Group, Inc. v. San Diego County Super. Ct., 189 P.3d 959 (Cal. 2008). As to other objections to statutes based on free exercise of religion, see generally Raymond C. O'Brien & Michael T. Flannery, *The Pending*

lesbian woman who lived with her female partner and sought to become pregnant with the use of donor sperm. She met with a physician at the North Coast Women's Care Medical Group, Inc., and was told that to become pregnant she may have to use intrauterine insemination (IUI). But the physician refused to personally perform the procedure because of her religious beliefs. Nonetheless, the physician stated that other people on staff would perform the procedure. As the case developed it appeared this was not so.

There was a dispute at the time of the trial as to whether the religious objections derived from the fact that the woman seeking the procedure was unmarried, or because she was a lesbian. California's Unruh Civil Rights Act did not prohibit marital status discrimination, but it did prohibit discrimination based upon sexual orientation.[238] The physician argued that to force her to perform the procedure would unduly burden her free exercise of religion, but the court rejected her objections, holding the physician bound by the state's non-discrimination statute. At best, "defendant physicians remain free to voice their objections, religious or otherwise, to the Act's prohibition against sexual orientation discrimination."[239] And it is such objection that is contemplated by the Roman Catholic Church's call for physicians and others to "mobilize consciences in favour of life."[240]

When faced with statutes that violate religious beliefs, religious denominations often seek accommodations within the statutes themselves. State legislatures sometimes place accommodation clauses into legislation that allow groups to isolate themselves from the provisions of an act. For example, when California enacted the Women's Contraception Equity Act, which aimed to improve access to prescription contraceptives, the statute contained an accommodation permitting a religious employer to provide a prescription drug plan for its employees that would exclude contraceptives. Certain specific factors identified religious employers who could take advantage of the accommodation. Catholic Charities of Sacramento sought accommodation within the religious employer exception so as to avoid being

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Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse, 25 LOY. L.A. L. REV. 1 (1991).

238. *See N. Coast Women's Care Med. Group*, 189 P.3d at 965 (citing CAL. CIV. CODE § 51(a) (West 2007) "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."). In 2005, the legislature amended the Act to expressly prohibit discrimination based on sexual orientation. *Id.*

239. *Id.* at 967.

240. INSTRUCTION *DIGNITAS PERSONAE*, *supra* note 13, at 21.

forced to provide contraceptives to employees.[241] But the California Supreme Court denied Catholic Charities the accommodation, not because they did not have religious objections to the distribution of contraceptives, but rather because they did not come within the statute's exemption factors.

The *Catholic Charities* court provided a lengthy explanation of the free exercise of religion and the requirement that any statute not expressly discriminate against any particular religion. But the court ruled that requiring an employer to provide contraceptives "conflicts with Catholic Charities' religious beliefs only incidentally, because those beliefs happen to make prescription contraceptives sinful."[242] Since many of the employees of Catholic Charities were non-Catholic, there was no effort made to evangelize persons who used the services, and there was no requirement that clients be Catholic, the court ruled that any infringement on their free exercise of religion was incidental at best.

Denied the ability to use a First Amendment free exercise argument, Catholic Charities needed to find accommodation within the statute for an exemption, but the court held that they could not meet the requirements established by the legislature: "The Legislature's decision to grant preferential treatment to religious employers who do object [to providing contraceptives] is justifiable as an accommodation of religious exercise . . . ."[243] In this case, Catholic Charities could not meet the elements of the accommodation so as to be exempt from the law. But this does not mean that statutes involving other issues may not contain an accommodation clause. It is reasonable to suggest to legislatures that accommodation be granted in all aspects of assisted reproductive technology for persons with sincerely held ethical or religious objections. Both the *North Coast* decision and the *Catholic Charities* decision are pertinent to any discussion of assisted reproductive technology, especially as applied to posthumous conception, a procedure that is relatively new and still prompting litigation and statutory accommodation.

CONCLUSION

While this Article explores the current judicial, legislative and public policy parameters of posthumous conception, so does it salute *The Journal of Contemporary Health Law and Policy* on the milestone of its twenty-fifth anniversary. The issue presented in these few pages was not formulated when the Journal first appeared, but the radical health law developments of

241. Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 74-75 (Cal. 2004).

242. *Id.* at 82.

243. *Id.* at 84.

these past years are documented, giving witness to the continuity of change and to the developments yet to come.

This Article identifies the dilemma of the courts and the states, to provide certainty in an area of the law so fraught with change and competing claims of best interest and entitlement. We have read how courts wish to strictly interpret the statutes seeking to define a child as in existence at the death of a parent, or as being born within days if need be. Then we have seen courts admit that the statutes, although formulated in the past, should look to the future, especially if that future will have as its polestar the best interest of a child. Often the child is omitted from participation in benefits. One solution would occur if the federal benefits were dependent upon federal standards rather than state ones. This is a real and fruitful option. But then too, state legislatures could enact changes to their intestate statutes, providing status and protection to the children of posthumous conception. Specificity is needed. To enact appropriate legislation, the legislatures can draw upon the Model Act Governing Assisted Reproductive Technology, approved by the American Bar Association in 2008. The Model Act is a significant contribution to the field; to the overall field of assisted reproductive technology, but also specifically to the children and providers of gametes of posthumous conception.

The Model Act is meant to be a good beginning and suggestions are included in this Article that would conform to the purposes of the Model Act. These suggestions concern a time requirement and consideration of the impact that posthumous conception would have upon trusts and the classes of heirs contained therein. In addition, the Model Act should also consider an accommodation for those persons who, through sincerely held ethical or religious beliefs, are unable to comply with the procedures now available to the scientific world.