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Dead Dads: Thawing an Heir from the Freezer

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DEAD DADS: THAWING AN HEIR FROM THE FREEZER

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I. INTRODUCTION

A remarkable consequence of medical science which enables us to cryopreserve[1] human gametes is the ability to conceive

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1. Cryopreservation is a process for preserving gametes or embryos in which the cells are dehydrated, suspended in an aqueous medium, treated with a cyopreservant and transferred to liquid nitrogen, cooled off to minus 196 degrees, and stored in this frozen condition for possible future use. *See* Michael S. Simon, *"Honey, I Froze the Kids":* Davis v. Davis *and the Legal Status of Early Embryos,* 23 LOY. U. CHI. L.J. 131, 131 n.7 (1991). This is sometimes referred to as the "freezing" of gametes. *Id.* The A.B.A. Model Act Governing Assisted Reproductive Technology section 102(31) uses the term "preservation" rather than cryopreservation to account for the possibility that future research may produce other methods of preserving embryos and gametes. A.B.A. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(31) (2008), *available at* http://www.abanet.org/family/committees/artmodelact.pdf [hereinafter MODEL ACT].

children long after the parent's death.[2] This ability may be a remarkable achievement of reproductive medical science, but it also created legal problems that prior generations did not consider. Human intrauterine insemination[3] has been used for assisted human reproduction in the United States since the mid-nineteenth century.[4] The potential for posthumous reproduction was not realized, however, until science achieved the ability to cryopreserve gametes and embryos for long periods of time.[5] When the potential for preserving sperm for many years after the father's death was recognized fifty years ago, the possibility of rethinking traditional concepts of parenthood and inheritance quickly followed and gave birth to the concept of the "fertile decedent" that is now familiar to students of future interests.[6]

II. DEFINITIONS OF POSTHUMOUS CHILDREN

For purposes of this article, a posthumous child is one who is *conceived* after the death of its parent. This definition does not include a pretermitted child who was born or adopted after the execution of a will.[7] Neither will it deal with a child who is conceived by coitus during the lifetime of its father but not born until after his death.[8] A situation in which a father sexually

2. Although it is possible to preserve sperm and embryos for long periods of time, the cryopreservation of unfertilized eggs for long periods has been less successful. Debra A. Gook & David H. Edgar, *Human Oocyte Cryopreservation,* 13 HUM. REPROD. UPDATE 591, 591–605 (2007) (noting that the science of egg preservation shows no proper evidence of improved clinical outcome).

3. Intrauterine insemination is also sometimes called "artificial insemination."

4. Johnson v. Super. Ct., 101 Cal. App. 4th 869, 881 (2002) (referencing the fact that the first reported use of intrauterine insemination in the United States was in 1866).

5. For example, cryopreserved embryos may be preserved in a viable condition for up to half a century. R. G. Edwards & Helen K. Beard, *Destruction of Cryopreserved Embryos: UK Law Dictated the Destruction of 3000 Cryopreserved Human Embryos*, 12 HUM. REPROD. 3 (1997).

6. *See* W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942 (1962).

7. The Uniform Probate Code, section 2-108 provides that a child "in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." UNIF. PROBATE CODE § 2-114 (revised 1990), 8 U.L.A. 91 (Supp. 2008). Thus, a child in gestation who so qualifies is the legal heir of its parent even if that parent is dead when the child is born. *See also* 26B C.J.S. *Descent and Distribution* § 51 (2008) (noting that a posthumous child is not necessarily a pretermitted child).

8. By definition, a child conceived by sexual intercourse is not a child of

impregnates a woman during his lifetime and the child is not born until after his death does not raise the same kinds of legal issues as the use of gametes to conceive a child after a parent's death.[9] This article will focus on the legal implications of the use of gametes and embryos to conceive human children after the death of the producer(s) of cryopreserved sperm, eggs or embryos.

Although there is a clear difference between the status of a child conceived after a parent's death and one conceived by the use of the gametes of an incompetent parent who is not able to give consent, the law treats the two situations the same. Therefore, the American Bar Association Model Act on Assisted Reproduction[10] requires that, except in an emergency,[11] gametes or embryos should not be collected from *either* a deceased *or* an incompetent person unless they gave consent in a record[12] before death or incompetency, or expressly authorized a fiduciary to give such consent.[13] For that reason, any comments in this article about consent of a deceased parent to use of his or her gametes should also apply to an incompetent person.

assisted reproduction. MODEL ACT, *supra* note 1, § 102-1.

9. The kinds of issues presented in a case involving a child allegedly conceived by sexual intercourse before his father's death revolve around traditional paternity litigation, such as whether the decedent is the child's biological father. The general rule is that a child born after a parent's death is not an heir under the law of inheritance unless the child was conceived naturally, *i.e.* by sexual intercourse. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 cmt. d (1999).

10. The American Bar Association Family Law Section approved the A.B.A. Model Act Governing Assisted Reproductive Technology in 2007, and the A.B.A. House of Delegates approved it on February 11, 2008. *See* 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) (discussing the history of the Act, its approval by the American Bar Association, and the provisions of the Act).

11. The A.B.A. Model Act Governing Assisted Reproductive Technology, section 205(2) defines an exception in the collection of gametes or embryos as circumstances in which, in the treating physician's opinion, delay would cause a loss of viability, and there is a genuine question as to the existence of a recorded consent by the now incompetent or deceased person. MODEL ACT, *supra* note 1, § 205(2).

12. The A.B.A. Model Act Governing Assisted Reproductive Technology, section 102(33) defines a record as "information inscribed in a tangible medium or stored in an electronic or other medium that is retrievable in perceivable form." MODEL ACT, *supra* note 1, § 102(33).

13. MODEL ACT, *supra* note 1, § 205(1).

III. WHY IS POSTHUMOUS REPRODUCTION USED?

There are various circumstances in which people seek to procreate a child using the gametes of a deceased person. In some instances, a surviving spouse or intimate friend seeks to use the gametes which have been specifically cryopreserved for use prior to the death of the loved one.[14] Examples include situations in which a soldier or other person engaged in high risk activity cryopreserved his or her gametes.[15] Another example is when a dying or seriously ill person cryopreserves gametes for use by specifically named potential survivors.[16] In other instances, an untimely death may create a situation in which gametes become available even though the deceased person did not anticipate death and therefore did not specifically consent before death.[17] These are the most legally troublesome cases.[18] For example, a parent or spouse may seek access to the sperm of a person killed in an automobile accident or in a war, wishing to continue the genetic line of the family.[19] In another example, a husband may seek to use

14. Hecht v. Super. Ct., 16 Cal. App. 4th 836, 840–41 (1993) (man executed a will giving his cryopreserved sperm to his girlfriend before committing suicide).

15. Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will,* 46 ARIZ. L. REV. 91, 91–92 (2004) (citing various newspaper reports of United States soldiers cryopreserving their sperm before deployment); Major Maria Doucettperry, *A Look at Posthumous Reproduction as it Relates to Today's Military*, Dept. of the Army, Pamphlet 27-50-420 (reviewing policies of the United States Army involving the collection of gametes and their use in producing posthumous reproduction).

16. Elizabeth Gorman, *Minnesota Woman Trying to Conceive Her Husband's Child—After His Death*, MINNPOST.COM, June 24, 2008, http://www.minnpost.com/stories/2008/06/24/2340/minnesota_woman_trying_to_conceive_her_husbands_child_–_after_his_death (noting that husband cryopreserved his sperm for his wife's use before starting cancer treatment which was likely to make him infertile). *See also* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 260 (Mass. 2002) (husband placed his sperm in sperm bank before his death for his wife's use).

17. Ike Flores, *Newlywed Dies in Crash, But Hopes For Children Live in Extracted Sperm*, L.A. TIMES, July 3, 1994, at A10 (recounting removal of sperm from body of man killed in an accident); Peter Gregory, *Court Lets Widow Save Husband's Sperm,* THE SIDNEY MORNING HERALD, July 22, 1998, at 3 (recounting that a widow whose husband died in an motor vehicle accident obtained court judgment to have her husband's sperm removed from his body).

18. *See* Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39 (1999) (questioning use of gametes removed from body of deceased person).

19. Aron Heller, *Family Gets OK to Use Dead Man's Sperm*, SAN FRANCISCO CHRON., Jan. 29, 2007, http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/01/29/international/i054346S45.DTL&feed=rss.news (family of soldier killed by a sniper obtained an Israeli court order to use sperm removed immediately after his death to have a child to be carried by a gestational surrogate).

the eggs of his now incompetent wife in order to use a gestational surrogate to gestate them. In other instances, a person may seek access to the gametes of a family member which the deceased person had cryopreserved for his own future use.

IV. PROPOSALS REGARDING POSTHUMOUS REPRODUCTION

For the most part, issues relating to posthumous reproduction have focused on inheritance issues,[20] Social Security issues,[21] or other benefits.[22] The drafts of the various uniform and model acts, however, reflect the wider importance of the topic even beyond eligibility for benefits, and they continue to try to develop law on the subject notwithstanding the failure of the first proposed uniform law on the subject.[23] The newest version of the Uniform Parentage Act (2000), amended in 2002, includes a provision titled "Parental Status of Deceased Individual."[24] This provides:

> [I]f 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[25]

20. *See* Robert M. Harper, *Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should be Amended to Treat Posthumously Conceived Children as Decedent's Issue and Descendents*, 21 QUINNIPIAC PROB. L.J. 267 (2008) (discussing problems of inheritance in determining the status of posthumously conceived children); Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility and Inheritance*, 33 HOUS. L. REV. 967 (1996) (discussing inheritance problems from posthumous conception of children).

21. *Compare Woodward*, 760 N.E.2d 257 (children posthumously conceived using dead father's sperm were entitled to Social Security benefits), *with* Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1108 (N.H. 2007) (posthumously conceived child not entitled to Social Security benefits).

22. *See, e.g.*, Finley v. Farm Cat, Inc., No. CA 08-222, 2008 WL 4724076 (Ark. App. Oct. 28, 2008) (posthumously conceived children entitled to workman's compensation benefits).

23. The first attempt to draft a uniform law governing assisted reproduction was the Uniform Status of Children of Assisted Conception Act. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988). Section 4(b) of the Act provided that a child conceived using eggs or sperm of a deceased person is not a parent of the resulting child. *Id.* § 4(b). The Act was not widely adopted and was replaced by the provisions in Articles 7 and 8 of the Uniform Parentage Act. UNIF. PARENTAGE ACT (2000) §§ 701–809 (amended 2002), 9B U.L.A. 51 (Supp. 2008).

24. UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 55 (Supp. 2008).

25. The term "deceased spouse" in the official text of section 707 appears inconsistent with the term "individual" in the remainder of the statute. *Compare id.*, *with* UNIF. PARENTAGE ACT § 701 (amended 2002), 9B U.L.A. 51 (Supp. 2008). Prior to the 2002 amendments, the consent provision of section 707 governing

> consented in a record that if the assisted reproduction were to occur after death, the deceased individual would be a parent of the child.[26]

This proposed rule would clearly require express consent in some sort of record given during the lifetime of the person whose gametes or embryos are to be used after his or her death to conceive a child. If such consent does not exist prior to the placement of the gametes or embryos *and* the death of the person, the law would not attribute parentage of the resulting child to the deceased person.[27] The consent requirement, however, does not apply to a gamete donor or embryo donors because that person or those persons did not intend to be a parent either during his or her lifetime or after death.[28]

The American Bar Association Model Act on Assisted Reproduction in part tracks the Uniform Parentage Act consent provisions as applied to post-mortem conception, but with several differences. It provides:

> [E]xcept as otherwise provided in the enacting jurisdiction's probate code, if an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a

consent by a person to post-mortem use of his or her gametes limited consent to a "spouse," but the 2002 amendments replaced "spouse" with "individual" except as noted in the quotation in the text. *Id.* In enacting the uniform act, Texas and Utah replaced the word "individual" with the term "spouse" throughout their version of section 707, making clear that in those states, only a married person's consent has the effect of approving consent. TEX. FAM. CODE ANN. § 160 (2001); UTAH CODE ANN. § 78B-15-707 (2008). Some states enacted section 707 by eliminating the word "spouse" entirely, making clear that the provision deals with individual consent whether the person is married or not. *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-707 (2008).

26. UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 55 (Supp. 2008). *See generally* Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579 (2005).

27. In the case of the placement of an embryo produced by both now-deceased persons, it seems obvious that the consent of both of them during their lifetimes would be required. Such mutual consent would also be required in an inter vivos embryo transfer. *See* Charles P. Kindregan, Jr. & Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. REV. 169 (2004).

28. UNIF. PARENTAGE ACT (2000) § 704 (amended 2002), 9B U.L.A. 53 (Supp. 2008) (consent requirement does not apply to a donor). A donor is an individual who produces eggs or sperm for assisted reproduction, as distinguished from an intended parent. *Id.* § 102(8).

> record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.[29]

The Model Act by its own terms is intended to defer to any probate code provision which a state may enact dealing with posthumous reproduction, while the uniform law contains no such provision.[30] During the drafting of the Model Act, concerns were expressed about the potential impact on estate planning and administration of estates when there are cryopreserved gametes and embryos which at the time of death are still not placed.[31] While the Uniform Probate Code does not currently expressly provide for children of posthumous reproduction,[32] it is possible that future legislation in some states may do so. The A.B.A. Model Act provides for this potential development.[33]

It will be noted that both the Uniform Parentage Act and the A.B.A. Model Act on Assisted Reproduction refer to the consent of a deceased spouse,[34] but the Model Act contains a very broad definition of legal spouse. According to the Model Act, legal

29. MODEL ACT, *supra* note 1, § 607. An example of a court honoring the intent of a deceased gamete provider is found in *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311 (Cal. App. 2008) in which a widow sought a court order giving her access to her late husband's cryopreserved sperm, which had been deposited as part of the couple's in vitro fertilization treatment. The parents of the deceased man appeared and objected to release of the sperm. *Id.* at 312. Before his death in an accident, the man expressed a desire not to have children, but agreed to participate in the fertility treatment to please his wife and to avoid a divorce. *Id.* at 313. As part of the medical treatment, he executed a form that included an option to dispose of his deposited sperm in the event of his death. *Id.* This box was checked on the form. *Id.* The court ruled that his expression of intent controlled, and that this did not implicate the widow's procreative autonomy since only his gametes and not hers were affected by the choice to discard the sperm. *Id.* at 317–18.

30. MODEL ACT, *supra* note 1, § 607.

31. This information is personal knowledge of the author, obtained while he served as Chair of the A.B.A. Family Law Section Committee on Reproductive and Genetic Technologies Committee during the drafting of the Model Act Governing Assisted Reproductive Technology. To deal with this problem a provision was added to section 607 (which deals with the parental status of a deceased individual) which defers to any contrary provision in a state's probate code.

32. The current version of the Uniform Probate Code does not provide either for or against inheritance by a posthumous child and simply provides that for purposes of intestate inheritance, an individual is the child of its natural parents regardless of their marital status. UNIF. PROBATE CODE § 2-114 (revised 1990), 8 U.L.A. 91 (Supp. 2008).

33. MODEL ACT, *supra* note 1, § 701–02.

34. UNIF.. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 55 (Supp. 2008); MODEL ACT, *supra* note 1, § 501-3-4.

spouse means "an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage."[35] Both the Uniform Parentage Act and the A.B.A. Model Act provisions relating to posthumous reproduction are premised on the existence of a spousal relationship, however "spouse" may be defined under state law.[36] They would not, therefore, be applicable to the factual situation that existed in the famous California decision in *Hecht v. Superior Court,* in which a deceased man provided in his will for his surviving girlfriend to have and be able to use his cryopreserved sperm.[37]

The A.B.A. Model Act Governing Assisted Reproduction also restricts the collection of gametes, embryos or preserved tissue from a deceased person unless that person executed consent in a record prior to death, or unless that person's authorized fiduciary has express authorization from the deceased person to give such consent.[38] This does not, however, solve the problem when, for example, an emergency room physician is asked to remove sperm or eggs from a recently deceased person and the failure to do so promptly would result in loss of viability. For this reason, the A.B.A. Model Act contains a provision expressly allowing the prompt removal of the gametes when it is alleged that the deceased person did consent in a record but the record is not then immediately available.[39] Gametes removed in this emergency situation, however, may not be transferred unless subsequently

35. MODEL ACT, *supra* note 1, § 102-21. The Uniform Parentage Act does not define spouse or legal spouse, and it is potentially subject to interpretation as being restricted to traditional male-female formal marriage. UNIF. PARENTAGE ACT (2000) § 102 (amended 2002), 9B U.L.A. 8 (Supp. 2008).

36. Section 707 of the Uniform Parentage Act and section 606 of the Model Act Governing Assisted Reproductive Technology both require a recorded consent to posthumous reproduction by the "deceased spouse." UNIF. PARENTAGE ACT (2000), § 707 (amended 2002); MODEL ACT, *supra* note 1, § 707. The Uniform Parentage Act does not define spouse, but § 102-21 defines a legal spouse as "an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage." UNIF. PARENTAGE ACT (2000), § 102-21 (amended 2002). This definition would treat partners in a legal civil union or registered domestic partnership as being "spouses."

37. Hecht v. Super. Ct., 16 Cal. App. 4th 836, 860–61 (1993) (ruling that the use of cryopreserved sperm of a deceased man to produce a child would not be contrary to public policy).

38. MODEL ACT, *supra* note 1, § 205-1.

39. *Id.* § 205-2.

approved by a court, and the absence of a record consent creates a presumption that no consent was given.[40]

V. STATE LAWS GOVERNING THE STATUS OF POSTHUMOUSLY CONCEIVED CHILDREN

The status of a child that is posthumously conceived is important for the resolution of various legal issues. The most important of these is the question of inheritance rights of the child under the state's intestacy laws. This in turn becomes important in the resolution of Social Security rights,[41] discussed below, since federal law defers to state law in the determination of the status of the child. The question may also be important in determining the child support obligations of the estate of the deceased parent, at least in states in which the estate may have an obligation to pay child support.[42]

Most states have no statutes dealing expressly with posthumous reproduction. A few states have enacted the Uniform Parentage Act, which contains some version of Section 707 dealing with children of posthumous reproduction.[43] In some of these states—Texas,[44] Utah,[45] and Washington[46]—the legislation deletes the word "individual" at the beginning of section 707 and substitutes the word "spouse," making clear that those states did not wish to legalize consent to posthumous reproduction by unmarried

40. *Id.* § 205-3. Failure to comply with the rules governing post-mortem removal of gametes or embryos can result in civil or criminal liability, as provided in law. *Id.* § 205-4.

41. *See* 42 U.S.C. § 402(d)(1) (2000); *see also* 20 C.F.R. § 404.355 (1989) (standard for determining rights of child of Social Security beneficiary).

42. *See, e.g.*, L.M. v. R.L.R., 888 N.E.2d 934, 937 (Mass. 2008) (initial order of support for nonmarital child may be entered and made enforceable against his estate after parent's death).

43. As of the date this article was written Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming have enacted the Uniform Parentage Act. UNIF. PARENTAGE ACT (2000) (amended 2002). A number of states have retained the older Uniform Parentage Act (1973) rather than enacting the newer version which was drafted years before the modern use of assisted reproduction except for intrauterine insemination; the 1973 version is not discussed in this article since the National Conference of Commissioners on Uniform State Laws has replaced it with the 2000 version as amended in 2002. *Id.* Oklahoma elected to omit section 707 in its enactment of the Uniform Parentage Act. OKLA. STAT. ANN., tit. 10, § 7700 (West Supp. 2008).

44. TEX. FAM. CODE ANN. § 160.707 (Vernon 2002 & Supp. 2008).

45. UTAH CODE ANN. § 78B-15-707 (Supp. 2008).

46. WASH. REV. CODE ANN. § 26.26.730 (West 2008)

persons. The Texas statute also provides that the record containing the consent of the deceased person must be maintained by a licensed physician.[47] Delaware[48] and Wyoming[49] have enacted versions of section 707 of the Uniform Parentage Act which eliminate the word "spouse" and simply refer to "individuals" as consenting to posthumous reproduction. Before it enacted the 2000 Uniform Parentage Act in 2005,[50] North Dakota was the only state which by statute expressly denied the parenthood of any person whose gametes were used after his or her death, but this law has been repealed.[51] No state by statute now expressly prohibits any recognition of posthumous reproduction for all purposes.

Some states have enacted statutes governing assisted reproduction that specifically provide for posthumously conceived children. Colorado[52] enacted a statute governing assisted reproduction which recognizes the status of a child whose gametes were produced from a now-deceased spouse. Florida restricts claims for inheritance by a posthumously conceived child unless the deceased parent has provided for the child by will.[53] Virginia[54] has enacted several statutes, but they are not entirely consistent.[55]

A. The California Statute

The California courts were the first to struggle with the issues created by the possibility of posthumous conception. In 1993 the Second District California Court of Appeal was asked to decide if an unmarried woman who had been designated by will to have access to and right to use the sperm of her now–deceased boyfriend

47. TEX. FAM. CODE ANN. § 160.707 (Vernon 2002 & Supp. 2008).

48. DEL. CODE ANN. tit. 13, § 8-707 (Supp. 2006).

49. WYO. STAT. ANN. § 14-2-907 (2007).

50. N.D. CENT. CODE § 14-20-65 (Supp. 2007) (applying section 707 to child of deceased spouse).

51. N.D. CENT. CODE §§ 14-18-06 to -07, *repealed by* S.L. 2005, ch. 135, § 11.

52. COLO. REV. STAT. ANN. § 19-4-106(8) (West 2005 & Supp. 2007).

53. FLA. STAT. ANN. § 742.17 (West 2005 & Supp. 2008); *see also* Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1266 (M.D. Fla. 2005) (posthumously conceived child is not the legal heir of father under Florida law in absence of will so providing).

54. *See* VA. CODE ANN. §§ 20-158B, -164(i) (2008).

55. *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 232–33 (2006) (noting problems and inconsistencies in application of the Virginia statutes).

should be allowed to receive his cryopreserved sperm.[56] The court had been asked by the children of the deceased man to rule that state public policy should not approve of posthumous reproduction since it would permit the creation of an orphaned child by artificial means.[57] A lower court had ordered the sperm destroyed, but on appeal the court reversed.[58] In a decision of first impression under American law the court ruled that, in the absence of a statute governing the matter, a court did not have the authority to order the cryopreserved sperm destroyed and that no overriding public policy would prevent the gametes from being used to create a child after the father's death when he specifically consented to it during his lifetime.[59]

A decade later, California enacted a statute in 2004 dealing with the consequences of posthumous reproduction.[60] This is the most comprehensive attempt to regulate posthumous reproduction by statute to date. The statute deemed a posthumously conceived child to have been born during the lifetime of the parent when the requirements of the statute have been met.[61] The statute provides for distribution of a parent's property to the posthumously conceived child if the parent had consented to the postmortem use of his gametes in writing and designated a specified person to have their use.[62] It is also required that the posthumous child be conceived and exist *in utero* within two years of the parent's death.[63] This statute recognizes the real potential for posthumous reproduction, and solves several problems. These problems include the need for specific consent requirements, the need for a relative proximity of conception to the time of the parent's death, and the need for the estate administrator to close the estate and make distribution in a reasonable time after the parent's death.

56. Hecht v. Kane, 20 Cal. Rptr. 2d 275 (1993).
57. *Id.* at 288.
58. *Id.* at 291.
59. *Id.* at 288–89.
60. 2004 Cal. Legis. Serv. Ch. 775, p. 92 (A.B. 1910) (West) (amending various provisions in the California Codes, including the Family Code, the Health and Safety Code, the Insurance Code and the Probate Code). The statute does not apply to posthumous children conceived by cloning. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

B. Interpreting the Law in States That Have No Explicit Posthumous Conception Statutes

When a state has not enacted a statute which expressly deals with the legal status of a posthumously conceived child, the courts will have to provide a legal interpretation based on its reading of the generalized statutes and common law in the jurisdiction. The most common context in which this question has arisen to date involve Social Security claims. The claims of a posthumously conceived child for Social Security benefits are based on the child's relationship to the deceased Social Security beneficiary.[64] This is dependent on the child's status under state law; thus there have not been consistent results in various Social Security cases around the country.[65]

Under federal law, a child is entitled to benefits if he is the legally recognized child of a person who dies fully insured under the Social Security law, is under the age of 18, and was dependent on the Social Security beneficiary at the time of that person's death.[66] In one case, a man who was dying of cancer cryopreserved his sperm with the intent of his wife having a child after his death, and the wife was successfully impregnated with his sperm sixteen months after his death.[67] Twins were born more than two years after his death, and application was made for Social Security benefits for them.[68] The administrator of the Social Security agency declined to award benefits, and counsel for the children filed suit in the U.S. District Court for Massachusetts.[69] On appeal, the U.S. District Court judge sent certified questions to the Supreme Judicial Court of the state regarding the status of the twins under state law.[70] The Massachusetts intestacy statute did not contain a provision requiring that a posthumous child actually be

64. Smith v. Heckler, 820 F.2d 1093, 1094 (9th Cir. 1987) (minor claiming Social Security benefits based on status of deceased parent must have been dependent on that parent).

65. *Compare* Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004) (granting Social Society benefits), *and* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002) (granting Social Society benefits), *with* Finley v. Astrue, No. 07-627, 2008 WL 95775 (Ark. Jan. 10, 2008) (denying Social Security benefits) *and* Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1108 (N.H. 2007) (denying Social Security benefits).

66. 42 U.S.C. § 402(d)(1) (2004); 20 C.F.R. § 404.355 (2008).

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

68. *Id.*

69. *Id.* at 260–61.

70. *Id.* at 261.

in utero at the time of a parent's death in order to qualify as an heir.[71]

The Massachusetts court responded to the certified questions by stating that under state law it would be possible for the twins to be legal heirs of the deceased father.[72] The state court noted that in such a case, the children would have to be the genetic children of the deceased person and the deceased parent would have to have consented to use of his gametes for posthumous reproduction and to the support of a resulting child.[73] The court also expressed the need to balance the state's interest in the orderly and prompt administration of estates with the rights of the children.[74] This suggests that in a future case in which a child is conceived long after the parent's death, the result could be different.[75]

The United States Court of Appeals for the Ninth Circuit, interpreting Arizona law, also ruled that twins conceived with their genetic father's sperm ten months after his death were entitled to Social Security benefits.[76] The Social Security administration argued that since the children did not exist when the father died, they were not then dependent on him for support.[77] The court reasoned, however, that since the children were his legitimate children under state law, they were dependent on him.[78]

In a case involving an embryo that was implanted in a widow after the death of her husband, the Supreme Court of Arkansas ruled that the resulting child was not the legal heir of its biological father.[79] The court's decision was based on the fact that the statute[80] provides for inheritance for a posthumously born child

71. *Id.* at 264.

72. *Id.* at 271–72. *See also* L.M. v. R.L.R., 888 N.E.2d 934 (Mass. 2008) (noting that in Massachusetts, an estate can sometimes be held liable for child support).

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

74. *Id.* at 266–68.

75. Since death of a spouse terminates the marriage, technically a posthumously conceived child is born out of wedlock; in *Woodward,* the court noted that this did not affect the children's right to inherit since under state law marital and nonmarital children are entitled to be treated equally. *Id.* at 266–67. However, such equal treatment with regard to the distribution of a parent's estate is not possible as to a child conceived after estate distribution has been made. *Id.* at 267–68.

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

77. *Id.* at 595.

78. *Id.* at 599.

79. Finley v. Astrue, No. 07-627, 2008 WL 95775, at *1 (Ark. Jan. 10, 2008).

80. ARK. CODE ANN. § 28-9-210(a) (2004).

only if it was conceived before the parent's death.[81] Since the embryo was implanted after the father's death the court ruled that the child could not inherit.[82] The Supreme Court of New Hampshire, interpreting a statute relating to "surviving issue," ruled that the posthumously conceived child must be surviving at the time of the father's death in order to qualify as his heir.[83] A federal court interpreted a Florida statute as providing that a posthumously conceived child is the issue of its deceased parent only if he provided for the child in his will.[84]

Based on court rulings to date it is apparent that at least for Social Security purposes state inheritance law must either expressly allow for posthumous conception of a child or contain language which is sufficiently vague to permit such an interpretation.[85] A requirement in a state statute that a child be a life in being at the time of a parent's death would make it practically impossible to find that a child conceived after a parent's death was a legal heir.[86] In addition the resulting child must be genetically connected to the deceased parent, which effectively rules out the use of donor sperm or eggs. To the extent that legitimacy is a factor to be considered under state law the surviving parent and the deceased parent's marriage becomes relevant. Even independent of Social Security issues, the length of time which elapses between the death of the parent and the use of that person's gametes to conceive a child becomes relevant, and in the future some reasonable time factor is likely to evolve.[87]

81. *Finley*, 2008 WL 95775, at *4.

82. *Id.* at *1. The court declined to define the meaning of the word conception. *Id.* at *5.

83. Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180, 1184 (N.H. 2007).

84. FLA. STAT. § 742.17 (2008) (interpreted in Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005)).

85. *See* Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004); *Stephen*, 386 F. Supp. 2d at 1265; *Finley*, 2008 WL 95775, at *5; *Khabbaz*, 930 A.2d at 1184; Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 260 (Mass. 2002).

86. A Social Security claim might prevail, however, based on some constitutional argument. In *Hart v. Charter*, 94-3944 (E.D. La. 1996), *dismissed,* the court interpreted a Louisiana Statute as providing that a child not conceived naturally was not in being as of the death of a parent, but when a Social Security claimant who was conceived after the death of its parent raised constitutional arguments the Social Security Administration agreed to pay benefits. *See* Charles P. Kindregan, Jr. & Maureen McBrien, *supra* note 55, at 240–41 (discussing the *Hart* litigation).

87. The Restatement (Third) of Property provides that for an afterborn child to inherit, the child would have to be born within a "reasonable time after the decedent's death in order not to delay distribution of the estate unduly."

Probate cases also provide some analysis on the issue of posthumously conceived children. A New Jersey decision noted that the status of a posthumous child should be determined even if the father left no estate to be distributed in probate because it could be relevant if other persons left property to the "children" of the father in a will or if a child might be entitled to take from the estate of the father's relatives who die intestate.[88]

Complications can arise when a settlor of a trust or other testamentary gift provides for "issue" or a similar designation and after that person's death a child is conceived using assisted reproduction.[89] For example, a New York case involved a trust created in 1959 which provided for the income from the settlor's trust to go to the issue of children but excluded adopted children.[90] The question presented to the court involved the status of twins conceived after the settlor's death using his son-in-law's sperm but a donor egg and a gestational surrogate.[91] The court ruled that the child was a beneficiary of the trust since the settlor intended to exclude only adopted children, not all children who were not genetically related to him.[92]

In another case involving a trust created in 1969, the question presented was whether children conceived by in vitro fertilization using the sperm of the grantor's son, who died a few years before the procedure, were "issue" or "descendants" of the grantor when the grantor intended members of his bloodline to be beneficiaries of his trust.[93] The court reasoned that as a matter of policy the law should consider one "born of this new biotechnology with the consent of their parents" as a natural child.[94] Providing a "sympathetic reading" of the trust instruments, the New York court ruled that the twins were part of the grantor's bloodline.[95]

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5, ¶ 8 (1999).

88. *In re* Estate of Kolacy, 753 A.2d 1257, 1259–60 (N.J. Super. Ct. Ch. Div. 2000).

89. *See, e.g.*, *In re* Doe, 793 N.Y.S.2d 878 (N.Y. Sur. 2005).

90. *Id.* at 879.

91. *Id.* at 879–80.

92. *Id.* at 878. The husband and wife obtained a judgment of parentage from a California court, and the New York court noted that a child conceived by surrogacy in California is not governed by the adoption statute. *Id.* at 881.

93. *In re* Martin B., 841 N.Y.S.2d 207, 208 (N.Y. Sur. 2007).

94. *Id.* at 211.

95. *Id.* at 211–12.

VI. CONCLUSION

Notwithstanding that the reproductive technology has been available for over half of a century, the law governing posthumously conceived children is only starting to develop. There is no uniformity in the governing law across the country, and from all appearances it is unlikely that universally accepted norms will evolve in the near future. While, as discussed in this article, various statutory schemes have been proposed, no uniformity has been achieved. This leaves the law in doubt, but it also leaves the legal status of parents and children in limbo and subject to different results in different states. There is also no reason to treat non-marital posthumous children differently from marital children conceived after death when the deceased parent has consented to their posthumous conception. It is to be hoped that more consideration will be given to these issues and will result in more uniform legislative action in the future.