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POSTHUMOUS REPRODUCTION

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Introduction:

As a result of advances in the field of assisted reproductive technology, it is now possible for children to be conceived posthumously, meaning *after* the death of one or both of their genetic parents. Specifically, the development of cryopreservation (the technology of freezing used to preserve individual gametes and embryos) has created the potential for non-coital posthumous conception of children.¹ Courts have already been

¹ Early-stage gametes or embryos are injected with a cryoprotectant solution to prevent the formation of ice crystals that would destroy them. Then they are placed in a straw-like structure that is gradually frozen. Once frozen, the structures are stored in canisters at approximately minus 196 degrees centigrade. The President's Council on Bioethics, *Reproduction and Responsibility: The Regulation of New Biotechnologies* (hereinafter "Reproduction and Responsibility") ch. 2, page 6 (Mar. 2004), available at <http://bioethicsprint.bioethics.gov/reports/reproductionandresponsibility/index.html>. Some commentators suggest that embryos can be cryopreserved and remain viable for fifty years. R. Edwards, et al., *Destruction of Cryopreserved Embryos: UK Law Dictated the Destruction of 5000 Cryopreserved Human Embryos*, **Human Reproduction** 12:3 (1997). It has been estimated that hundred of thousands of cryopreserved embryos now exist in the United States. D. Hoffman, et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 **Fertility and Sterility** 1063-1069 (2003). The number is climbing, as the practice of American soldiers storing their sperm increases, as the practice of harvesting sperm from newly deceased spouses becomes more common, and as the technology of cryopreserving ova advances. *Reproduction and Responsibility*, supra, at ch. 2, page 17. See also, Charles

called upon to resolve disputes over the status of parents and children when medical technology is used to conceive a child after the death of a parent, and it is certain that in the coming years such cases will become even more common.

An abundance of cryopreserved gametes exist, with a large portion designated for potential future use to conceive following the deaths of the gamete providers. It is increasingly common for men, for example, to store sperm for potential use by a wife or a girlfriend in the event of their deaths. Soldiers who are assigned to combat zones, men who have cancer or other terminal illnesses, or athletes and others engaged in dangerous activities might also elect to have their sperm cryopreserved.² Sperm harvesting, the process by which sperm is extracted following a man's death, also comprises a source of cryopreserved gametes for postmortem conception that has received public recognition.³ In addition, advances in long-term preservation of female ova (eggs) might enable a child to be born after the death of its genetic mother.⁴ Surplus cryopreserved embryos resulting from *in vitro* fertilization treatments during the lives of the gamete providers⁵ could also be designated in a will or other legal document for potential use for postmortem conception of children following the death of the gamete providers. The availability of these gametes and embryos after death creates ample resources for the posthumous conception of children.

Until very recently, legal issues surrounding posthumous children focused on inheritance rights of a child who was *conceived* while the biological parents were alive with the child being *born* after the death of the father. The law largely deals with this problem by providing for the legal heirship of children born within the normal gestational period following the death of the father. But the development of such technologies as intrauterine insemination, *in vitro* fertilization, surrogacy, cryopreservation of gametes and embryos and (someday) human reproductive cloning have created the potential for an entirely different set of legal issues. These issues are not based on the *birth* of a child after the death of the father when the child is conceived prior to the father's death. Instead, the new reality is based on *conceiving* a child or *implanting* a preexisting embryo *after* the death of a genetic parent or parents. This article explores some of the evolving issues created by the use of cryopreserved gametes and embryos after the death of one or both gamete providers.

P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 **Vill. L. Rev.** 169 (2004).

² Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 **Ariz. L. Rev.** 91 (2004) [providing examples of persons who might choose to cryopreserve their gametes]. Some of the time, sperm is cryopreserved for the man's own future use in the event of infertility due to illness or disease, but in the alternative, if he dies, the sperm could be made available for a surviving partner.

³ See, for example, Ike Flores, *Newlywed Dies in Crash, But Hopes for Children Live in Extracted Sperm*, **Los Angeles Times**, A10, July 3, 1994; Maggie Gallagher, *The Ultimate Deadbeat Dad*, **Newsday**, A28, Feb. 1, 1995; Robert Salladay, *Child's Rights are Focus of Case Involving Sperm From Accident Victim*, **The Boston Globe** (May 23, 2004). See also, Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?* 3 **DePaul J. Health Care L.** 39 (1999)

⁴ As to donor eggs see Jessica Weiner & Lori Andrews, *The Donor Egg: Emerging Issues in Liability and Paternity*, 25 **Fam. Advoc.** 15 (Fall 2002).

⁵ Susan L. Crockin & Nanette Elster, *Cryopreserved Embryos: Understanding and Making Choices*, 18 **Amer. J. Fam. L.**

Inheritance:

Until the development of assisted reproductive technology, a child born after the death of its genetic father was certain to be born at least within about nine months of his or her father's death. When the genetic parents were married, such an untimely death of the father had severe family consequences, leaving a widowed mother and a fatherless child. The statutory law developed a method to protect such after-born children to permit them to inherit from their deceased fathers. Such statutes operate to provide for afterborn heirs⁶ or pretermitted children.⁷ In other words, children who are conceived during the lives of their parents,⁸ even if born after the death of a parent, are protected under the laws of inheritance and are considered lawful heirs.

Inheritance issues involving the status of children who are conceived posthumously by use of assisted reproduction, however, are more legally ambiguous. Posthumous children of assisted reproduction who are born long after the death of a parent do not for the most part fit the categories of afterborn or pretermitted children conceived during the lives of their parents. As a result, children conceived posthumously through assisted reproduction may fall outside the purview of statutes originally designed to protect naturally conceived but posthumously born children.

Certainly the law should seek to protect posthumous children conceived after the death of one or both of their parents, but their inheritance rights may depend on a wide range of considerations, including legislative willingness to address such novel and often controversial issues. Absent clear legal direction, persons involved in posthumous reproduction should legally establish or disestablish familial relationships since inheritance rights historically have had their origin in legally recognized familial relationships.

Who is a Child or Issue?

As a starting point in considering the familial and legal relationships of a posthumous child we may consider a testamentary document referring to a class of beneficiaries such as "my children," "my grandchildren," "my issue," or similar descriptions. A court could construe such terms as requiring a genetic relationship between a trust settlor or testator and the posthumous child claiming to be a beneficiary. But it is also possible that a different court could construe such words to include posthumous children conceived by assisted reproduction even in the absence of a genetic relation to the testator or trust settlor. However if the testamentary document clearly manifests an intent to exclude

⁶ An example is § 2-108 of the Uniform Probate Code, providing at "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."

⁷ Uniform Probate Code § 2-302 [child born or adopted after execution of deceased parent's will].

⁸ As used here the word "parent" refers to the persons who provide the gametes to produce their genetic offspring. Note that in examining assisted reproduction issues the word "parent" could also be applied in different contexts to include surrogate parents, gamete donors, embryo donors, intended parents with no genetic connection to the child etc.

persons not related by “blood,” biology” or “genetics” the child conceived by the use of donor gametes and carried by a surrogate could be excluded from a share in the estate or trust.

A New York decision of first impression addressed the issue of how to interpret an *intervivos* trust which provided for payments of income to be paid to the “issue” or “descendents” of the settlor’s children but excluded payments to “adopted” children. The question involved the status of children who had no genetic connection to the settlor. They had been conceived after the settlor’s death using the sperm of the husband of the settlor’s daughter (but not using the settlor’s daughter’s egg) and were carried to term by a gestational surrogate.⁹ The trust document had been executed years before either gestational surrogacy or *in vitro* fertilization existed. The court ruled that the exclusion of adopted children from the trust did not operate to exclude the children of assisted reproductive technology since the settlor did not intend to exclude all non-blood relatives. The settlor had provided for spouses of issue to take under certain circumstances. Further, “no language in the trusts anticipates technologies relating to birth that may be developed in the future.”¹⁰

It was also relevant in the same case that the posthumous children were born in California and under the law of that state the intended parents (including the settlor’s daughter) obtained a judgment of parentage of the twin children after their birth from a California court under surrogacy law and not under adoption law. The New York court ruled that the judgment was entitled to full faith and credit. Interestingly, New York law makes surrogacy contracts void and unenforceable,¹¹ but this did not prevent the result in this case since New York state law does allow maternity declarations and does not require an adoption proceeding following *in vitro* fertilization and a gestational surrogacy arrangement.

Problems similar to those addressed by the New York court are bound to arise with increasing frequency in future years. In the absence of controlling statutes courts will have to struggle to interpret the meaning of words which until the advent of assisted reproduction seemed to have unambiguous meaning. The reality is that unless and until a uniform set of statutory laws gain universal recognition the status of posthumous children of assisted reproduction will remain doubtful and probably be the subject of conflicting judicial treatment.

Inheritance, Deceased Donors and Posthumously Conceived Children:

Sperm donation is the oldest form of non-sexual assisted reproduction, and it is still an important aspect of assisted reproduction. The potential for posthumous

⁹ Petition of Successor Trustees for the Construction of Three *Inter Vivos* Trusts Created in 1959, 2005 WL 236164 (N.Y. Sur. Ct., Jan. 25, 2005).

¹⁰ Id.

¹¹ New York Domestic Relations Law, §122.

reproduction using cryopreserved sperm has been recognized for decades. As early as 1962, an article published in the American Bar Association Journal introduced a new character to the law of future interests in the person of the “fertile decedent,”¹² based on the fact that sperm could be stored for decades after the death of the sperm provider. In the absence of any controlling statutory law courts have had to struggle with the issue of who in a family has the right to control the cryopreserved sperm of a deceased person which could be used to conceive a posthumous child.¹³

The law governing sperm donation and intrauterine insemination are better developed and more specific in most states than those governing other reproductive technologies. Some state laws extinguish all rights and responsibilities of anonymous sperm donors, whether explicitly or inferentially.¹⁴ Courts honor such statutes and have not compelled an anonymous donor to pay support or permitted a child to inherit from his or her genetic sperm donor father.¹⁵

It is conceivable that a child who is the posthumous product of a deceased sperm donor could discover the identity of the donor and make a claim to his estate. Children can easily discover an anonymous donor’s identity given the increasing medical history and information required of sperm donors, the trend toward allowing children greater access to information concerning genetic parents, and the increasing ease and accuracy of scientifically establishing parentage of deceased parents by genetic marker testing.¹⁶ In

¹² W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 **A.B.A.J.** 942 (1962). See also, Naomi R. Cahn, *Parenthood, Genes and Gametes, The Family Law Trusts and Estates Perspectives*, 32 **U. Memphis L. Rev.** 563 (2002), Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Post-Mortem Conception, Parental Responsibility and Inheritance*, 33 **Hous. L. Rev.** 967 (1996); Les A. McCrimmon, *Gametes, Embryos and the Life in Being: The Impact of Reproductive Technology on the Rule Against Perpetuities*, 34 **Real Prop., Prob. & Tr. J.** 697(2000); John P. Robertson, *Posthumous Reproduction*, 69 **Ind. L.J.** 1027 (1994).

¹³ See the extensive discussion of this issue in *Hecht v. Kane*, 16 Cal.App.4th 836 (Cal.App. 2nd Dist. 1993) [dispute over control of sperm between female lover and will beneficiary of a deceased man and his children]. See Evelyn Shuster, *The Posthumous Give of Life: The World According to Kane*, 15 **J. Contemp. Health L. & Pol’y.** 401 (1999).

¹⁴ Over thirty-five states have statutes governing intrauterine insemination by donor. Susan L. Crockin et al. *Adoption and Reproductive Technology Law in Massachusetts* § 10.2.3 (2000). Most provide that when a husband consents to the insemination of his wife using donor sperm the husband, not the donor, is the legal father of the child. As an example of a statute that implies that the sperm donor has no parental rights or obligations, the Massachusetts statute states that: “Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.” Mass. Gen. Laws Ann. c. 46, § 4B (2005).. See, for example, *McIntyre v. Crouch*, 780 P.2d 239 (Or. App. 1989) [non-husband sperm donor is not father of child born to married woman under state statute]. Some states require that certain conditions be met so that the donor will have no parental rights or duties stemming from the conception of the child. See e.g., N.J. Stat. § 9:17-446 (2004). Some require that a physician do the insemination, and others require that the husband consent in writing in order for the protections to attach to the donor. The current version of the Uniform Parentage Act (2000), 9B U.L.A. 29, § 702, provides simply that a “donor is not a parent of a child conceived by means of a assisted conception.”

¹⁵ Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 **Utah L. Rev.** 93,158, 190 (1996).

¹⁶ *Id.* at 193. Federal law requires genetic marker testing in certain paternity cases, but not all; 42 U.S.C. § 666(a)(5)(A) (2005). Genetic marker testing is now universally accepted as scientifically sound, and

states which have statutes protecting sperm donors from liability, an argument could be made that if a posthumous child discovers the identity of his genetic father/sperm donor, he or she would have no claim of inheritance from the donor's estate.¹⁷ However, even the estates of anonymous donors may be vulnerable if the state has no statute clearly giving the donor's estate immunity from claims by the posthumous child. When a donor's identity is revealed, his estate may be subject to potential liability in the absence of statutory protection.

A child could also be the posthumous product of a deceased egg donor. Some state statutes only reference sperm donors and intrauterine insemination, leaving the estates of egg donors in those states potentially vulnerable to claims. The potential rights and responsibilities of egg donors are not expressly legally protected in most states, and any child who is conceived posthumously from the egg of a deceased egg donor could conceivably discover that donor's identity and make a claim to her estate.¹⁸

A child could also be the posthumous product of a crypreserved embryo, created by two deceased gamete providers. Potentially, such a child could make a claim against both genetic mother and father's estates.

The success of such claims would in large part depend on the child's status as related to the gamete providers. Relevant areas of inquiry would include whether; 1) the child already has two legal parents; 2) the gamete provider(s) provided for or excluded posthumous children in their estate planning; 3) the gametes provider(s) consented to the postmortem use of their gametes or embryos; 4) the gamete provider's estate was already administered when the claim of the posthumous child was made; 5) genetic consanguinity was proved; 6) whether the governing state has statutory law governing the inheritance rights of the posthumously conceived; and 7) whether the governing state has laws insulating gamete and/or embryo donors from such claims.

The Identity of the Gamete and Embryo Donors:

Most of the statutes governing gamete donation do not distinguish between known versus anonymous donors. Arguably, all donors, regardless of their status should be treated equally when the statute is silent as to this distinction. In the context of intrauterine insemination, however, courts have sometimes treated known sperm donors differently from anonymous donors. This could impact claims by posthumous children

depending on the degree of probability shown by the results and the standard set out in a state's statute is presumed to establish paternity in the majority of states. The Uniform Parentage Act creates a rebuttable presumption of paternity when the test results show that a "man has a 99 percent probability of paternity, using a prior probability of 0.50, as calculated by using the combined paternity index obtained at the time of testing; and a combined paternity index of at least 100 to 1." Uniform Parentage Act (2000), § 505(a) (1) & (2).

¹⁷ *Id.* at 191.

¹⁸ Egg donors might have an equal protection argument that such disparate treatment from sperm donors violates their equal protection rights under the law. Oklahoma has a statute expressly protecting egg donors; 10 Okla. Stat. §555 (2004).

against the estate of an identified sperm donor.¹⁹ A few known sperm donors have successfully asserted parental rights.²⁰ In theory a known sperm donor might be required to support a child conceived using that person's donated sperm even if the parties had not intended to treat the donor as a parent.²¹ If a legal parent-child status exists under the law between known donor and resulting child, the child would have a claim as an heir to the donor's estate.

Couples who donate their embryos to another couple (as opposed to individuals donating single gametes) also need to be wary of the potential inheritance implications as to posthumously born children. This may especially be true in an open arrangement, where all the parties are known to each other. Only a few states have statutes expressly governing embryo transfer.²² Although limited law exists governing the legal implications of donated embryos in a few states,²³ analogies may be drawn by referencing the law governing other forms of gamete donation, such as sperm or egg donation. In states where gamete donors are protected by statute, a couple donating their embryos arguably might not be subject to potential claims against their estates from children resulting from their donated embryos. However, it is also possible that couples donating embryos might fall outside the purview of donor statutes protecting single gamete donors, when the statutes do not expressly reference embryo donors.²⁴ Certainly in the absence of statutes which explicitly protect embryo donors, couples who donate their embryos have no assurance that claims by posthumously conceived children created by using their embryos could not be brought against their estates.²⁵

Although couples who donate their unused cryopreserved embryos anonymously are less likely than known embryo donors to be considered legal parents, they may have potential exposure from claims by posthumous children. Absent legislation on the

¹⁹ See discussion in In re Interest of R.C., 775 P.2d 27 (Colo. 1989) [anonymous sperm donors should be protected in order to encourage sperm donation].

²⁰ See, e.g., C.M. v. C.C., 377 A.2d 821 (N.J. Cumberland County Juv. & Dom. Rel. Ct. 1977) [known sperm donor allowed to visit with child over mother's objections]; Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (1995), appeal dismissed, 655 N.E.2d 708 (N.Y. 1995) [known sperm donor who had been allowed post-birth contact with child entitled to order of filiation]; Jhordan C. v. Mary K., 179 Cal.App.3d 386 (1986) [parental interests of known sperm donor recognized]. But see Lamaritata v. Lucas, 823 So. 2d 316 (Fla. Dist. Ct. App. 2002) [denying parental rights to "mere sperm donor" who sued to establish his rights after his contractual promise not to do so]. See also, In re Matter of Adoption of Michael, 636 N.Y.S.2d 608 (N.Y. Sur. Ct., Bronx Cty. 1996) [no attempt must be made to locate and give notice to sperm donor when the child was being adopted].

²¹ It is consistent with public policy for courts to strive to find two legal parents for each child. Susan L. Crockin et al., *Adoption and Reproductive Technology Law in Massachusetts*, at § 10.2.3 (2000).

²² Oklahoma has an extensive statute governing parties to an embryo transfer, and insulates the estates and parental liabilities of all parties involved. See 10 Okl. St. § 556 (2005). Louisiana expressly permits the adoption of an embryo. See La. Rev. Stat. Ann. §§ 9:123-9:133 (2005).

²³ See Charles P. Kindregan, Jr. and Maureen McBrien, *Embryo Donation: Unresolved Legal Issues in the Transfer of surplus Cryopreserved Embryos*, 49 **Vill. L. Rev.** 169 (2004).

²⁴ This might be in fact the case with embryo donation, because the rights of two people are implicated, as opposed to single gamete donation, where the rights of one individual only are implicated.

²⁵ Couples donating embryos have no such statutory assurance in most states. But see 10 Okl. St. § 556 (2004) [protecting embryo donors].

matter, anonymous embryo donors, like anonymous sperm and egg donors in states with no legislation on the matter, may be subject to potential claims against their estates by children resulting from their donations.

Uniform Laws and Posthumous Children:

The various uniform laws promulgated by the National Conference of Commissioners on Uniform State Law do not present a comprehensive proposal for determining rights and liabilities growing out of assisted reproduction. Some legal literature has focused on the problems resulting from the absence of comprehensive law governing posthumously conceived children.²⁶ However, the Uniform Probate Code, the Uniform Parentage Act, and the Restatement of Property all have some relevance in this regard.

The general rule in the United States is that a child born after the death of a parent is not an heir under the law of inheritance, unless that child was conceived naturally (i.e. by sexual intercourse).²⁷ For this reason some states would probably deny posthumously conceived children of assisted reproduction inheritance rights in the estate of a deceased parent unless the child was born to a surviving spouse within a specific number of days after death as provided in an afterborn child statute.²⁸ However, since assisted reproduction now makes posthumous reproduction possible using the cryopreserved gametes of a decedent who intended or consented to having a child after death, the nature of the inquiry regarding the child's inheritance rights must be resolved in a different context from that which existed before assisted reproductive technology.

Although the Uniform Probate Code (UPC) does not provide that a posthumous child conceived by assisted reproductive technology has a right to inherit, neither does it bar such a finding. The UPC simply provides that "for purposes of intestate succession... an individual is the child of his [or her] natural parents, regardless of their marital status."²⁹ A finding of heirship of a child conceiving using the gametes of a genetic parent who consented to the gametes being used after his or her death to conceive that person's child would seem to be consistent with this provision.

²⁶ See, for example, Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 **Real Prop., Prob. & Tr. J.** 727; Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in the Light of the New Reproductive Technologies*, 67 **Temp. L. Q.** 335 (1994); Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now*, 19 **Prob. & Prop.** 32 (March/April 2005); Susan C. Stevenson-Popp, *I Have Loved You in My Dreams: Posthumous Reproduction and the Need for a Change in the Uniform Parental Act*, 52 **Cath. U. L. Rev.** 727 (2003).

²⁷ Restatement (Third) of the Law of Property. § 2.1, Comment *d* (1999).

²⁸ Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 **La. L. Rev.** 613 (Spring 2004).

²⁹ Uniform Probate Code, § 2-114 [Revised 1993]. The Comment to this section includes a cross-reference the Uniform Status of Children of Assisted Conception Act (1988), which was withdrawn by the National Conference of Commissioners on Uniform State Law in 2000.

The Uniform Parentage Act (UPA) takes a more direct approach to the potential for posthumous reproduction created by assisted reproductive technology, at least as to a deceased person who was *married* at the time of death. The UPA provides that “[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 consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.”³⁰ The UPA requirement of consent in a record would often apparently preclude a finding of parentage, even in cases in which a man who has never executed such a record dies an untimely death, is relatively young, leaves a spouse, and post-death retrieval of his sperm is possible.³¹

The Restatement (Third) of Property dealing with probate transfer of property Under the law of inheritance³² makes an individual “the child of his or her genetic parents.”³³ This takes into account the fact that today assisted reproductive technology can be used to posthumously conceive a genetic child of a deceased person. “This Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the deceased by assisted reproductive technology must be born within a reasonable time after the decedent’s death in circumstances indicating that the decedent would have approved the child’s right to inherit. A clear case would be that of a child produced by artificial insemination of the decedent’s widow with his frozen sperm.”³⁴

State Laws Defining the Inheritance Rights of Posthumously Conceived Children:

A few states, including California, Colorado, Delaware, Florida, North Dakota, Texas, Virginia, Washington, and Wyoming have statutes explicitly defining the inheritance rights of posthumously conceived children.

In Colorado, Delaware, Texas, Washington and Wyoming a deceased person is not a parent of any posthumously conceived biological child, unless he or she consented in a written record to being a parent after death.³⁵ In Colorado, Texas, and Washington, as long as his or her parent consented in a record, a posthumously conceived child may inherit from a deceased parent. Although there is no time limit to posthumous conception

³⁰ Uniform Parentage Act (2000), §707 (Revised 2002). A “record” means information which is inscribed in a tangible medium or stored in a retrievable electronic medium. UPA, § 102(18).

³¹ See Janet J. Berry, *Life After Death: Preservation of the Immortal Seed*, 72 **Tulane L. Rev.** 231 (1977) [providing examples].

³² Probate transfers include both transfer of property by will and inheritance under the laws of intestacy. Transfer of property by will to a child conceived posthumously is, of course, an option outside the laws of inheritance, but a will providing for an unascertained child conceived after the death of the testator might not be effective and if effective would be akin to a gift in trust.

³³ Restatement (Third) of the Law of Property, § 2.5(1) (1999).

³⁴ *Id.*, Comment, 81. The Reporter’s Note indicates that the decedent’s approval of the use of his sperm “would be doubtful, for example, if the decedent and his surviving spouse were in the process of divorcing when the decedent died.”

³⁵ Colo. Rev. Stat. 19-4-106 §(8); Tex. Fam. Code § 160.707 (2005); Rev. Code Wash. (ARCW) § 26.26.730 (2005).

in these states, presumably, even though a child theoretically would have the right to inherit, if he or she is born after a parent's estate is administered, there would be nothing left to distribute. That being said, such a child might be entitled to other benefits conferred upon legal children, such as entitlement to Social Security survivorship benefits.³⁶

For purposes of determining parental status of a deceased gamete provider in Delaware and Wyoming, the statutes are essentially the same as the Colorado, Texas, and Washington statutes, except that the former are more inclusive as they use the term "individual" rather than "spouse."³⁷ Statutes using the word "spouse" limit the application of the right to consent in a written record to posthumous reproduction to a deceased person who was married, whereas statutes referring to an "individual" do not limit the application to married persons.

A few states have enacted or are considering the most recent version of the Uniform Parentage Act (2000, revised in 2002) (UPA) which contains a provision specifically addressing posthumous parentage in the context of assisted reproduction. The UPA provides: "If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of the resulting child unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."³⁸

Florida's statute requires the intended parents and the treating physician to sign a written agreement delineating what happens to the eggs, sperm and preembryos in the event of the death of a spouse.³⁹ However, even if the couple consents to posthumous reproduction in such an agreement, a posthumously conceived child "shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."⁴⁰

A North Dakota statute explicitly states that a person is not a parent if his or her gametes are used to create a child after that person's death.⁴¹ Under this statute, a child conceived posthumously in North Dakota would have no right to inherit from the deceased gamete-provider's estate.⁴² North Dakota is the only state with such a blanket

³⁶ See discussion on Social Security, *infra*, notes 58-90 and accompanying text.

³⁷ 13 Del. C. § 8-707 (2005); Wyo. Stat. 14-2-907 (2005).

³⁸ Uniform Parentage Act (2000, as amended 2002), §707, 9B ULA. The official Comment to this proposed statute states that it is "designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent." This section of the UPA has been enacted in Colorado, Delaware, Texas, Washington and Wyoming. Some state versions use the word "spouse" in place of "individual" which limits application to the traditional marital family.

³⁹ Fla. Stat. § 742.17 (2005). The written agreement also provides for what will happen in the event of divorce or any other unforeseen circumstance.

⁴⁰ Fla. Stat. § 742.17 (4) (2005).

⁴¹ N.D. Cent. Code § 14-18-04 2 (2005).

⁴² See N.D. Cent. Code § 14-18-07 1 (2005) [noting that a posthumous child is not entitled to take under intestate succession].

prohibition on any rights to intestate inheritance for the posthumously conceived child. The status of a gift in a will to posthumous child conceived after a testator/gamete provider's death is unknown.

Various statutes in Virginia suggest conflicting or confusing applications. In Virginia, a person who dies before his sperm or her egg is implanted to create a child is not a parent unless the person consented to be a parent in writing, or unless "implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure."⁴³ Another portion of the Virginia statute only addresses married couples. It provides a ten-month window for a widow to conceive a child using her decedent husband's sperm, in order for any resulting child to be considered a child of the decedent husband and his wife.⁴⁴ In applying this statute, a child conceived in the tenth month following his or her father's death would be born approximately nineteen to twenty months following the death, and still be entitled to inherit.

The potential results are confusing when applying hypotheticals to the Virginia statute as a whole. For example, because the statute appears to only address the time frame in the context of married couples, what is the status of an unmarried couple where the male partner consented to posthumous reproduction? Would the ten-month window apply? Alternatively, for a married couple where there was written consent rather than another form of consent, would the ten-month window apply? The answer is uncertain given that one portion of the statute implies that if a person consents in writing, he or she is the parent, irrespective of any time frame. To overcome any potential time limitation on conception or birth, couples in Virginia should be advised to get written consent whenever possible, in order to ensure that any posthumously conceived child will be considered the child of the decedent.

Even if a child is considered a child of the decedent under Virginia law, he or she still might not be able to inherit from the estate of an intestate decedent parent because another Virginia statute states that "a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of . . ."; "(i) intestate succession . . ."⁴⁵ Even if the posthumous child cannot inherit from the intestate parent's estate, he or she might be entitled to other benefits, such as social security benefits, or perhaps as an heir under a will.

The California statute provides that "for 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

⁴³ Va. Code. Ann. § 20-158B (2005). The other gamete can be from any source. This paragraph of the statute falls under the heading of "Death of Spouse" but addresses persons in general and not just spouses.

⁴⁴ Va. Code. Ann. § 20-158B (2005). The statute does not provide for (because perhaps the legislators did not contemplate) the contrary, i.e. that a widower be able to conceive using his decedent wife's cryopreserved ova.

⁴⁵ Va. Code. Ann. § 20-164 (i) (2005).

satisfied.”⁴⁶ In order for the decedent’s property to be distributed to the posthumously conceived child, the decedent must have consented in writing to the posthumous reproduction, and have designated a certain person to use the genetic material.⁴⁷ Further, the child must be born in *utero* within two years of the date of the decedent’s death.⁴⁸ The California statute seems to be the most comprehensive and specific state statute governing posthumous reproduction and could serve as an appropriate model for other states to emulate.

Court Decisions Defining Parental Recognition in Posthumous Reproduction:

A decision of the Supreme Judicial Court Massachusetts prohibits the recognition of gamete donors as parents of posthumously conceived children unless certain requirements are met. These requirements include that the gamete (sperm in this case) provider affirmatively consents to posthumous reproduction before his or her death.⁴⁹ The donor must also consent to support any resulting child and his genetic parentage must be established.⁵⁰ Where these requirements are met, and the elapsed period of time between the death of the parent and the conception of the child is not unreasonable, the Massachusetts courts will recognize the child as a legal heir.⁵¹

In *Estate of Kolacy*, a New Jersey court commented extensively on the rights of posthumously conceived children, in deciding that twins born eighteen months after the death of their father were in fact his legal heirs.⁵² Without specifying multiple factors to be used for determination of posthumous parentage, the New Jersey court implied that a posthumously conceived child should be able to inherit as long as the surviving parent proves that the decedent parent expressed a desire to posthumously conceive, and unless doing so would unfairly intrude on the rights of other heirs, or seriously disrupt the orderly administration of the decedent’s estate.⁵³ In other words, in cases involving claims by posthumously conceived children to their decedent parent’s estate, New Jersey employs a balancing test between competing interests to determine whether that child may inherit.⁵⁴ There is no hard and steadfast rule in New Jersey, however, as in a similar case, the court declined to rule on the status of a posthumously conceived child, noting it was a matter for the legislature and not the court.⁵⁵

⁴⁶ Cal. Legislative Counsel’s Digest of Assembly Bill 1910, approved Sept. 24, 2004. The bill amends various sections of the Family Code, Health and Safety Code, Insurance Code and the Probate Code.

⁴⁷ Cal. Probate Code, § 249.5 (2005).

⁴⁸ *Id.*

⁴⁹ See generally *Woodward v. Comm’r of Soc. Sec.*, 760 N.E. 2d 257 (Mass. 2002).

⁵⁰ *Id.* at 269.

⁵¹ *Id.*

⁵² See generally *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

⁵³ *Id.*, at 1262.

⁵⁴ The court noted 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 person.” *Id.* at 1263-1264.

⁵⁵ See *In the Matter of the Estate of Rudy Julian*, Deceased A0-00-4321-79 (N.J. Super. Ct. App. Div., May 25, 2000).

In *Estate of Kolacy* the New Jersey Superior Court noted that the legal status of posthumous children should be established, even if the decedent father has no estate available for distribution.⁵⁶ This is because their status as their father's heirs would bear on their potential entitlement to take in the event that one of their father's relatives was to die intestate, or in determining their rights under wills leaving bequests to issue or children of the father.⁵⁷ Such considerations are important factors in deciding whether to pursue legal establishment of parentage on behalf of the posthumously conceived.

Issues of the kind raised in the Massachusetts and New Jersey decisions are bound to be raised in other states. Given the advances in cryopreservation and the ability to conserve gametes for many years, states must consider enacting legislation in order to safeguard the orderly administration of estates disrupted by claims from posthumously conceived children. A balance must be struck between the child's right to inherit, on the one hand, and the state's interest in the orderly administration of estates on the other, as well as the interests of prior born children.

The Social Security Cases and Posthumously Conceived Children:

Courts in two leading decisions, *Woodward*⁵⁸ in Massachusetts and *Gillett-Netting*⁵⁹ in the Ninth Circuit, have interpreted the Social Security Act (hereinafter "Act") as it relates to posthumously conceived children's right to inherit. Under the Social Security Act, a child is entitled to insurance benefits provided he or she is a child of an individual who dies fully insured, and the child is unmarried, under the age of eighteen and was dependent on such individual at the time of his or her death.⁶⁰

"Child" as defined in the Social Security Act means "the child or legally adopted child of an individual."⁶¹ "Child" has been interpreted to mean a natural or biological child of the decedent.⁶² However, a non-biological and non-adoptive child may also be deemed a child for purposes of the Act if, among other things, that child would be entitled to inherit under the law of intestacy in the state where the decedent was domiciled; the child's parents went through a marriage ceremony they believed was valid but was not; the decedent acknowledged the child as his or hers in writing, or; the decedent had been ordered by the court to support the child.⁶³

If a child's status is disputed, the Social Security Administration may reference state intestacy law to determine whether a child is entitled to benefits.⁶⁴ In that regard, some states have more favorable laws than others. For example, a child born to a civil union in

⁵⁶ *In re Estate of Kolacy*, 753 A.2d 1257 at 1260 (N.J. Super. Ct. Ch. Div. 2000).

⁵⁷ *Id.* at 1260.

⁵⁸ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257 (Mass. 2002).

⁵⁹ *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. Ariz., June 9, 2004).

⁶⁰ See 42 U.S.C. §402(d)(1); *Smith v. Heckler*, 820 F.2d 1093, 1094 (9th Cir. 1987).

⁶¹ 42 U.S.C. §416(e)(1).

⁶² See *Tsosie v. Califano*, 630 F.2d 1328, 1333 (9th Cir. 1980) [noting "child" includes natural/biological child].

⁶³ See 42 U.S.C. §§416(h)(2),(3) (2005).

⁶⁴ See 42 U.S.C. § 416(h)(2)(A) (2005) [outlining appropriate application of state law].

Vermont is considered a child for inheritance purposes under Vermont law, and perhaps could be considered as such for Social Security survivor benefits as well.⁶⁵ Hawaii has a statute that protects the inheritance rights of children of reciprocal beneficiary relationships.⁶⁶ Children of assisted reproduction are also accorded legal protections when born to persons in a same-sex civil union in Connecticut⁶⁷ and when born to persons in a registered domestic partnership in California.⁶⁸ In Massachusetts, a child born to a same-sex married couple is entitled to the same benefits as a child born to a heterosexual couple.⁶⁹ However Federal law could create problems with affording children such legal protections because of the Defense of Marriage Act.⁷⁰

In theory the federal government should look to state law to determine legal parentage (except possibly as to same-sex unions under the Defense of Marriage Act). Therefore, the inheritance rights of children conceived using the gametes of a deceased parent under state law is important. Posthumously conceived children who are entitled to inherit under the law of the state where the decedent was domiciled, should be deemed children for the purposes of Social Security. Posthumously conceived children can expressly inherit by statute or court decision, if certain conditions are met, in California, Colorado, Delaware, Florida, Massachusetts, New Jersey, Texas, Virginia, Washington and Wyoming. The only state where a statute expressly prohibits posthumously conceived children from inheriting is in North Dakota. The issue is currently not addressed in the vast majority of states. Historically, however, the Social Security Act has been construed liberally for the purpose of providing posthumously conceived children benefits.⁷¹

The Massachusetts decision in *Woodward* established posthumously conceived children's right to inherit under certain limited circumstances. In that case, a husband dying from Leukemia had his sperm cryopreserved, so that his wife could conceive after his death. Approximately sixteen months after the husband's death, the wife was successfully inseminated with the husband's sperm and twins were born approximately

⁶⁵ The highest court in Vermont held that the state Constitution requires that same-sex couples be afforded the same benefits and protections as those afforded to married couples. *Baker v. State*, 744 A.2d 864 (Vt. 1999). See Vt. Stat. Ann., tit. 15, §§ 1202-1206 (2005) [same-sex unions].

⁶⁶ See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Hawaii, recognizing that precluding same sex couples from marrying might constitute sex discrimination, amended their constitution to reserve marriage to heterosexual couples, but at the same time, afforded substantial rights to same sex couples. See Hawaii Rev. Stat. § 572C-1 (2005).

⁶⁷ Conn. Senate Bill 963, effective October 1, 2005.

⁶⁸ Cal. Fam. Code, § 297, effective January 1, 2005.

⁶⁹ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) [holding same-sex couple entitled to marry]. Massachusetts presumes parentage of a child born to a married couple]. See Mass. Gen. Laws Ann. c. 209C, § 6, and M.G. L. c. 46, § 4B (2005). As such, children born during the marriage of their same sex parents, or presumably even after the death of one of them would be entitled to Social Security survivor benefits. But see additional requirements for posthumous inheritance, as outlined in *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257 (Mass. 2002).

⁷⁰ 1 U.S.C. § 7 (2005).

⁷¹ See *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. Ariz., 2004), citing *Smith v. Heckler*, 820 F.2d 1093, 1095 (9th Cir. 1987); *Doran v. Schweiker*, 681 F.2d 605, 607 (9th Cir. 1982) [noting Social Security Act is construed liberally].

two years after their father's death.⁷² The wife applied for Social Security survivor benefits on behalf of the twins and was denied, on the basis that the wife had not established that the children were the husband's children within the meaning of the Act.⁷³ On appeal, the Social Security Administration's decision was reversed.

The Court noted in *Woodward* that the Massachusetts intestacy statute referencing posthumously conceived children did not limit the class of posthumously conceived children to those *in utero* at the time of the decedent's death.⁷⁴ As such, posthumously conceived children conceived through assisted reproduction are not expressly prohibited from inheriting under the state's intestacy laws. The Court also noted that all children should be treated equally, regardless of the circumstances of their births.⁷⁵ That being said, such children's rights must be somewhat limited due to the balancing of their interests with the state's interest in the orderly administration of estates, and the genetic parent's reproductive rights.⁷⁶ The two major interrelated concerns with respect to the orderly administration of estates include: the length of time that is reasonable to keep an estate open and the fairness of reducing the shares available to pre-existing children, by allowing posthumously conceived children to inherit.

Some states have enacted time limitations that, in effect, exclude posthumously conceived children who are born after that time limit from inheriting.⁷⁷ It has been suggested that imposing time limits is both fair and constitutional as heirs alive at the time of the decedent's death deserve to receive their distributions in a reasonably prompt time.⁷⁸ The majority of states, however, have no time limitations. It would seem that in those states, children born after an estate was administered would be precluded from inheriting as it is unlikely and impractical to reopen an estate for the benefit of an after born child after final distributions have been made.

The *Woodward* court reasoned that children born posthumously are technically non-marital children, since death ends a marriage.⁷⁹ All non-marital children in Massachusetts have to obtain a judicial determination of paternity in order to inherit from their father's intestate estate.⁸⁰ From this reasoning, the court determined the first

⁷² *Woodward v. Comm'r. of Soc. Sec.*, 760 N.E. 2d 257 at 267 (Mass. 2002).

⁷³ *Id.*, *Woodward*, 760 N.E. 2d at 260.

⁷⁴ *Id.*, *Woodward*, 760 N.E. 2d at 262, analyzing Mass. Gen. Laws. c. 190, § 8 (2005). But see La. Civ. Code Ann. art. 939 (West 2000) ["A successor must exist at the death of the decedent"].

⁷⁵ *Id.*, *Woodward*, 760 N.E. 2d at 265, citing Mass. Gen. Laws Ann. c. 209C, § 1 (2005) [noting that the legislature implicitly intended for posthumously conceived children to be entitled, in so far as possible, to the same rights and protections as children conceived naturally].

⁷⁶ *Id.*, *Woodward*, 760 N.E. 2d at 266-267.

⁷⁷ See, e.g., Va. Code Ann. § 20-158B (2005) [noting child must be conceived within ten months of husband's death in order to be considered a child of the decedent]. But see Va. Code Ann. 20-164(i) (2005) [child *born* more than ten months after decedent's death is not a child for purposes of intestate succession]; Cal. Probate Code § 249.5 [child must be in utero within two years of the death of the decedent].

⁷⁸ *In re Estate of Kolacy*, 1753 A.2d 1257 at 1262 (N.J. 2002).

⁷⁹ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257 at 266-267 (Mass. 2002). But see *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. Ariz., 2004) [the court considered posthumously born children to be children of the marriage].

⁸⁰ *Id.*, *Woodward*, 760 N.E. 2d at 267.

requirement for posthumously conceived children to inherit in Massachusetts is proving paternity, which essentially equates to proving genetic consanguinity. The other requirements are that the surviving parent (or child's legal representative) must prove that the decedent consented to posthumous reproduction and to the support of any resulting child.⁸¹ Presumably, the latter two consent requirements serve to protect the reproductive rights of the decedent. In an action to establish inheritance rights of a posthumously conceived child, notice must be given to all interested parties, including heirs who would take a larger share but for the existence of the posthumously conceived child. The court went on to note, that even if all the above mentioned requirements are met, time limitations may preclude a claim to inherit.⁸²

The Ninth Circuit decision in *Gillett-Netting*⁸³ involved a claim for Social Security survivor benefits by the mother of twins conceived ten months after their father's death. The children were conceived using sperm their father deposited before undergoing chemotherapy for the cancer that quickly took his life. Initially, the children were denied benefits on the basis that they were not the decedent's children under the Social Security Act and were not dependant upon the decedent at the time of his death.⁸⁴ The decision was reversed when the higher court determined the children were the decedent's legitimate children under Arizona law, and therefore deemed dependant upon him, entitling the children to benefits.

In *Gillett-Netting*, the United States Court of Appeals for the Ninth Circuit noted that parentage was not in dispute because the children were unquestionably the biological children of the deceased wage earner. Since case law firmly establishes that a natural (meaning a biological) child is a child under the Act, there was no need to analyze whether the children were the decedent's children for purposes of the Act.⁸⁵ Secondly, "legitimate" children, meaning those born to a marriage, such as the children at issue, do not need to establish dependency on the decedent, as they are deemed dependent under the Act.⁸⁶ As such, the children, both being the dependant children of the decedent, were entitled to benefits.

In Louisiana, children conceived posthumously through assisted reproduction are prohibited from inheriting because they do not exist at the moment of the death of the parent.⁸⁷ As such, a posthumously conceived child will not be entitled to social security benefits under Louisiana law. In a case involving such a child that was denied Social

⁸¹ Id. *Woodward*, 760 N.E. 2d at 269.

⁸² Id., *Woodward*, 760 N.E. 2d at 272.

⁸³ *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir., Ariz. 2004).

⁸⁴ *Gillett-Netting v. Barnhart*, 231 F.Supp. 961 (D. Ariz. 2002), *rev'd*. 371 F.3d 593 (9th Cir. 2004).

⁸⁵ See *Tsosie v. Califano*, 630 F.2d 1328, 1333 (9th Cir. 1980) [noting "child" includes natural child]; 20 C.F.R. § 404.354 [stating claimant entitled to benefits as an insured person's natural child].

⁸⁶ It is interesting to note that the Ninth Circuit considered these children born of the marriage, even though they were born after the death of a parent, when technically, the marriage no longer existed. This may be a moot point, as the children probably would not have had to prove dependency anyway, given the Court's further commentary that "only completely unacknowledged, illegitimate children must prove actual dependency in order to be entitled to child's insurance benefits." *Gillett-Netting*, 371 F.3d at 598.

⁸⁷ La. C.C. art. 939 (2005). But posthumously born children conceived naturally can inherit. La. C.C. art. 940 (2005).

Security benefits, counsel argued that excluding the child from being able to obtain benefits was unconstitutional.⁸⁸ In deciding not to defend against that argument, the Social Security Administration dropped its case and agreed to pay benefits to the child.⁸⁹ This case stands for the proposition that even when state law does not consider a posthumously conceived child a child of the decedent, a possibility exists that the child might still be entitled to benefits. In general, the social security cases seem to favor the rights of the children whenever possible.

A predominant theme in relation to children of assisted reproduction is that the decedent gamete provider must have consented in writing or at least such consent to posthumous conception must be clearly established by other evidence. Absent that consent, it seems that most posthumously conceived children would probably be denied the right to inherit from the decedent. The consent issue gets interesting in cases where sperm is extracted right after a person's death (a process known as sperm harvesting).⁹⁰ What if the couple had talked about having a child, death was unexpected, and the wife still wanted to fulfill her dreams of having genetic children with her late husband? What will suffice as "consent" of the decedent? In such a scenario, the reproductive rights of both the decedent and the surviving spouse are at issue. Without a doubt, more litigation will be spawned in this area, as more and more rights are implicated by the possibility of posthumous reproduction, especially those of pre-existing family members, such as older siblings.

Some potential problems can be avoided by creating thorough estate planning documents, clearly outlining the intent of the parties. Some clients may be resistant to highlighting unusual conception scenarios in their estate documents, especially if the children conceived through assisted reproduction are unaware of how they came into being. Nevertheless, it is important for attorneys to advise their clients of the potential complications in failing to address the circumstances of their children's births in their estate plan. Absent an estate plan, a court will solve disputes by applying applicable state law, which may or may not result in the decedent's wishes being honored or in any resulting child's interests being protected.

⁸⁸ Hart v. Charter, No. 94-3944 (E.D. La. dismissed Mar. 18, 1996).

⁸⁹ Id.

⁹⁰ Sperm must be harvested within hours of death for sperm to remain motile. Susan L. Crockin, et al. Adoption and Reproductive Technology Law in Massachusetts, § 10.2.4 (2000).