A CHIP OFF THE OLD ICEBLOCK: HOW CRYOPRESERVATION HAS CHANGED ESTATE LAW, WHY ATTEMPTS TO ADDRESS THE ISSUE HAVE FALLEN SHORT, AND HOW TO FIX IT

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For thousands of years, the process for determining one’s heirs remained unchanged. For a woman, her heirs were fixed at her death; for a man, his heirs were fixed no later than nine months after his death. Then came cryopreservation and, with it, the ability for individuals to conceive children years after their death. This development has created many—largely unanswered—questions. While posthumous conception implicates numerous moral, ethical, and legal issues, this Article focuses on the legal status of posthumously conceived children in the estate law context.

Despite pleas from both courts and commentators, few legislatures have been willing to tackle this sensitive topic. Most judges and scholars who have addressed it agree the three primary goals of any response should be to ensure the efficient administration of estates, carry out the decedent’s intent, and protect the children’s best interests. However, no consensus has emerged regarding which of these goals should receive priority. These goals need not be mutually exclusive, though, but can each be achieved with appropriate legislation. In this Article, I take a critical look at the statutory and judicial approaches proposed to date, break down the strengths and weaknesses of each, and introduce two new concepts that bridge the gaps in the prior approaches. Specifically, statutes should (1) separate the question of whether a posthumously conceived child is an heir from whether the child will in fact inherit assets, and (2) provide fiduciaries discretion to distribute or retain assets when cryopreserved genetic material exists, based on certain conditions. These improvements will provide flexibility not found in prior approaches and, as a result, advance each of the three key goals. This

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Article provides legislators, judges, and commentators who tackle this issue with both a comprehensive historical perspective on the issue and a blueprint to follow going forward.

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INTRODUCTION

From ancient Rome until very recently, determining one’s heirs had been easy: ascertain all family members living on the date of the decedent’s death and, if the decedent’s wife was pregnant at his death, wait to see if the child is born alive.1 By nine months after the decedent’s death, the class of possible heirs was closed.2 For thousands of years, this approach remained unchanged. Then came cryopreservation, the ability to freeze genetic material and use it at a later date. Now individuals—both male and female—can conceive children after their death. Suddenly, determining one’s heirs is no longer so simple.

In 1953, scientists reported the first human pregnancy resulting from cryopreserved sperm.3 The first child who developed from a cryopreserved embryo was born in 1984, and the first child conceived from a cryopreserved egg was born in 1986.4 In 2004, a child was born who

1 See Kristine S. Knaplund, Postmortem Conception and a Father’s Last Will, 46 ARIZ. L. REV. 91, 107–08 (2004) (tracing this approach back to the ancient Romans).
2 See id.
had been conceived from sperm frozen for twenty-one years.\textsuperscript{5} Today, researchers estimate that over 30,000 children are born each year who were conceived from frozen sperm, and almost 29,000 in vitro fertilization transfers each year use frozen embryos.\textsuperscript{6} The freezing and thawing of genetic material is not the science of tomorrow—the technology exists, it is being used daily, and it is becoming more common each year.

This development has created many (largely unanswered) questions in trust and estate law. For instance, should a child conceived after the death of a parent inherit from that parent? Should it matter if the child is born more than one year after the parent’s death? Two years later? Ten years later? Should it matter whether the decedent consented to the posthumous use of his or her genetic material? Should it matter whether the decedent was married at his or her death? What if the decedent had a will that had a general provision for his children—should that include posthumously conceived children? What if the decedent’s parents had created a trust years earlier for their descendants—should such children be deemed their descendants? Should the answers change with respect to insurance benefits or retirement plan benefits payable to “issue”? Are posthumously conceived children eligible to receive Social Security survivorship benefits? Should an executor, trustee, or custodian be liable for distributing assets before learning that a decedent left cryopreserved genetic material?

These issues are not just theoretical—a number of courts have struggled to answer some of these questions over the past few years. To do so, they have had to interpret statutes that were never intended to apply to this scenario. While their decisions have been inconsistent, the courts uniformly have appealed to their respective legislatures to address these issues in a thoughtful, comprehensive way. Few legislatures, however, have done so.

While assisted reproduction raises numerous moral, ethical, and legal questions, this Article focuses exclusively on the legal status of posthumously conceived children in the estate law context. To date, there is no consensus regarding the best approach, or even the appropriate goals. Of the few states that have addressed the issue, most have chosen not to recognize these children, placing primary importance on the efficient administration of estates. Most commentators, on the other hand, argue that these children should be recognized, though their reasons differ.


Some advocate that the decedent’s intent should govern, while others assert that the children’s best interests should control.

These three interests—efficient administration, decedent’s intent, and children’s best interests—need not be mutually exclusive, though; each can be achieved by allowing posthumously conceived children to inherit, but under the right set of conditions. While others have proposed some such conditions, including the decedent’s consent to posthumous conception, a notice requirement, a time limitation, and a marriage requirement, each approach to date has flaws. This Article takes a critical look at these approaches, breaks down the strengths and weaknesses of each, and suggests the best set of conditions for legislatures to adopt going forward.

In addition, I introduce two important concepts that have not yet been proposed. In each existing approach, a child is an heir, and therefore may receive assets, only if all of the required conditions are met. First, legislatures should separate the question of whether a posthumously conceived child is an heir from the question of whether the child will, in fact, inherit assets from the estate. This distinction is critical for those scenarios where the birth of a posthumously conceived child may adversely affect other’s interests. In that event, this distinction would allow a statute to exclude a child from receiving a share of the decedent’s estate. However, it would still allow the child to receive other benefits that are contingent on the child’s status as an heir, but which have no affect on the decedent’s estate (such Social Security survivor benefits or inheritance through, rather than from, the decedent). And to be deemed an heir, the only relevant condition should be the decedent’s consent that his or her genetic material be used for posthumous conception.

Second, any remaining conditions (including, I suggest, a notice requirement and time limitation) should serve merely to protect the fiduciary or recipient from liability for distributions, not to bar the child from sharing in any assets that may remain in the estate. In other words, if these conditions are not met, the fiduciary should have discretion to (1) distribute trust or estate assets to the then-existing heirs or beneficiaries without liability or (2) retain the assets until the fiduciary deems it appropriate to make distributions—for instance, if the surviving spouse or partner is actively attempting to have the decedent’s child, until that child is born. This would allow an executor or trustee to balance the interests of all parties to the estate, including the potential children, as may be appropriate in each specific situation.

To be sure, assisted reproduction and posthumous conception raise sensitive issues many legislators would prefer to avoid and simply pass.
on to judges.\textsuperscript{7} The time has come, though, for legislatures to take up the challenge, think critically about and debate the issues, and respond with clear, comprehensive provisions. This Article provides a comprehensive blueprint for legislatures to consider as they tackle these issues. Part I provides background for this discussion by giving a brief history of assisted reproduction, showing why posthumous reproduction will continue to increase in the future, and explaining why individuals choose posthumous conception. Part II traces the evolution of the statutory and judicial responses to date and critiques the strengths and weaknesses of each. Finally, Part III takes a step-by-step approach through the issues a legislature today must consider when drafting legislation on this topic, proposes two new concepts that bridge the gaps in the previous approaches, and explains my recommendation for each issue.\textsuperscript{8}

I. A BRIEF HISTORY OF ASSISTED REPRODUCTION

Assisted reproduction is generally defined as any technique used to conceive a child other than sexual intercourse.\textsuperscript{9} While there are numerous variations, a basic understanding of four key concepts is sufficient for purposes of this Article: (1) artificial insemination, (2) in vitro fertilization, (3) surrogacy, and (4) cryopreservation. The following summarizes each of these concepts, then addresses why assisted reproduction will continue to increase and why some individuals choose posthumous conception.

A. Artificial Insemination

Artificial insemination, also called intrauterine insemination, occurs when sperm is placed through artificial means into a woman’s uterus to

\textsuperscript{7} See Laurence C. Nolan, Critiquing Society’s Response to the Needs of Posthumously Conceived Children, 82 Or. L. Rev. 1067, 1102–04 (2003) (noting reasons why individual legislators may be hesitant to address these issues).

\textsuperscript{8} Unless otherwise specified, I intend all references in this Article to “posthumous conception” and “posthumously conceived” to include not just the scenario in which an egg is fertilized after a parent’s death, but also the scenario in which an egg is fertilized and frozen prior to a parent’s death, then implanted into a woman’s uterus after a parent’s death.

\textsuperscript{9} See, e.g., UNIF. PARENTAGE ACT § 102 (amended 2002), available at http://www.law.upenn.edu/bll/archives/ulc/apa/final2002.pdf; UNIF. PROBATE CODE § 2-115(2) (amended 2008), available at http://www.law.upenn.edu/bll/archives/ulc/upc/2008final.pdf. Alternatively, the federal government has defined “assisted reproductive technology” only to include procedures in which a woman’s oocytes are retrieved from her body. See 42 U.S.C. § 263a-7(1) (2006) (defining “assisted reproductive technology” for purposes of the Fertility Clinic Success Rate and Certification Act of 1992). This definition would exclude artificial insemination, however, and is too limited for purposes of this Article because an individual can use a deceased partner’s frozen sperm to create a posthumously conceived child through artificial insemination.
facilitate fertilization. The first documented use of artificial insemination by humans occurred in England in 1770. The first reported use in the United States occurred in 1866. The technique did not become widely used, however, until the 1950s. In 1980, approximately 10,000 children were born in the United States who had been conceived through artificial insemination. By 1996, the number had jumped to approximately 65,000 children. The numbers likely have continued to increase. However, if they merely remained static, there would have been over 1 million children born in the United States over the past fifteen years who were conceived by artificial insemination.

B. In vitro Fertilization

In vitro fertilization (IVF) is a much newer, and more expensive, technique than artificial insemination. IVF involves providing medicine to a woman to stimulate multiple egg production, extracting her eggs, fertilizing them in a laboratory, culturing the zygotes for three or more days, and then transferring one or more embryos to a woman’s uterus. Most commonly, fertilization is accomplished by intracytoplasmic sperm injection, in which a single sperm is injected directly into the egg. As

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10 See Charles P. Kindregan, Jr. & Maureen McBrein, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE 29–30 (2006). The sperm may come from the woman’s partner or from a third-party (typically anonymous) donor. Id. at 31–32.


16 See generally AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, ASSISTED REPRODUCTIVE TECHNOLOGIES, A GUIDE FOR PATIENTS (2008) [hereinafter ART GUIDE], available at http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf; Machelle M. Seibel, A New Era in Reproductive Technology, 318 N. ENGIL. J. MED. 828, 829–31 (1988); 2008 ART REPORT, supra note 6, at 3. Although I refer to an embryo throughout this discussion, there are similar techniques in which the oocyte is fertilized and transferred to the woman’s fallopian tubes before the zygote becomes an embryo (called zygote intrafallopian transfer, or ZIFT) or the oocyte and sperm are mixed and transferred to the woman’s fallopian tubes before fertilization occurs (called gamete intrafallopian transfer, or GIFT). ART GUIDE, supra, at 10; 2008 ART REPORT, supra note 6, at 3. These techniques, however, account for less than one percent of IVF procedures. See id. at 91.

17 See Taun Jain, M.D. & Ruchi S. Gupta, M.D., M.P.H., Trends in the Use of Intracytoplasmic Sperm Injection in the United States, 357 N. ENGIL. J. MED. 251, 253 (2007); see
with artificial insemination, the sperm may be from the woman’s partner or a third-party donor. With IVF, however, the eggs also may derive from a third-party donor.

The first child conceived through IVF was born in 1978, and the first in the United States was born in 1981. Since then, the number of children conceived each year by IVF has increased sharply. In 1996, over 20,000 children conceived by IVF were born in the United States. In 1999, the number increased to over 30,000. In 2008, the number jumped to over 60,000. Now, over one percent of the children born each year in the United States are conceived by IVF.

C. Surrogacy Arrangements

A surrogacy arrangement is an arrangement in which a woman (the surrogate mother) agrees to carry a child to term for another individual or couple. A surrogate mother becomes pregnant through either artificial insemination or IVF. A surrogate mother who uses her own egg is referred to as a "traditional surrogate," while a surrogate who has no genetic connection to the child is referred to as a "gestational surrogate."
Many couples who wish to have a genetic child rather than to adopt a child rely on surrogates. For instance, a married couple may hire a surrogate mother if the wife is incapable of carrying a child to term. Likewise, a gay couple must rely on a surrogate to have a child using one of the men’s sperm. With the use of surrogacy, however, determining the parent–child relationship becomes particularly complicated. For instance, if a husband is infertile and his wife cannot carry a child to term, a fertility clinic may retrieve eggs from the wife, fertilize the egg with sperm from a third-party donor by IVF, then transfer the embryo to a gestational surrogate. Here, four people—the husband, wife, sperm donor, and gestational surrogate—arguably could be deemed a parent of the child.

The laws governing surrogacy are rapidly evolving and beyond the scope of this Article. To the extent that an individual’s genetic material is transferred to a surrogate after that individual’s death, however, the interests of the resulting children fall within the scope of this Article. Generally, in the surrogacy context, most states would recognize the parent–child relationship established by the state’s parentage statutes for probate purposes, as well.

D. Cryopreservation

Cryopreservation creates the specific issue this Article addresses—the ability to conceive children after the death of a person. For cryopreservation, the genetic material (sperm, eggs, or embryos) is treated with glycerol, cooled to about –80 degrees centigrade, then stored in liquid nitrogen at –196 centigrade.30 Like surrogacy, cryopreservation may be used with artificial insemination or IVF. Today, all clinics in the United States that provide assisted reproduction services offer cryopreservation.31

Though scientists had tried to preserve tissue for centuries, cryopreservation of gametes for human reproduction was not possible until scientists discovered in 1949 that they could keep sperm viable by using glycerol in the freezing process.32 Shortly thereafter, men began to successfully freeze sperm,33 and the first human pregnancy resulting from a
frozen sperm was reported in 1953.34 By 1988, approximately 30,000 children conceived from frozen sperm were being born each year.35

Likewise, women can freeze their eggs for future use.36 The first child conceived from a frozen egg was born in 1986.37 The success rate using thawed eggs was very low initially, but it has increased over the past decade.38 In 2007, 138 assisted reproduction clinics reported that they freeze human eggs—twice the number from 2004.39

Finally, couples can freeze embryos for future use. In 1984, the first child who developed from a cryopreserved embryo was born.40 Today, many couples who attempt IVF freeze excess embryos for later possible use because it is both less invasive and less expensive to use their frozen embryos than to retrieve fresh eggs an additional time.41 As of 2002, clinics reported having 396,526 frozen embryos on hand, 88.2% of which were designated for reproductive purposes (as opposed to research or other uses).42 In 2008, 21.4% of the 148,055 IVF cycles performed used frozen eggs or embryos.43

Cryopreserved genetic material can remain viable for many years. In 2004, a child was born who was conceived using sperm that had been frozen for twenty-one years,44 and scientists speculate that embryos may remain viable for fifty years.45 Although the time frames undoubtedly

35 Byrn, supra note 15, at 174 n.46.
36 Id. at 174 n.43.
37 Id.
40 Wennerholm, supra note 4, at 2158.
42 David I. Hoffman et al., Cryopreserved Embryos in the United States and Their Availability for Research, 79 Fertility & Sterility 1063, 1066–68 (2003), available at http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Selected_Articles_from_Fertility_and_Sterility/cryoembryos_may2003.pdf. These numbers greatly exceeded most estimates at that time, which placed the number of cryopreserved embryos between 30,000 and 200,000, and which assumed most were stored for research purposes, not for reproduction. Id. at 1068.
43 See 2008 ART Report, supra note 6, at 16.
44 Lorio, supra note 5.
will increase as the science advances, they are already long enough to create serious consequences in the administration of decedents’ estates.

E. The Future of Assisted Reproduction

An estimated 3.5 million children have been conceived through assisted reproduction, and four factors indicate that this trend will continue to increase. First, as assisted reproduction has increased, the stigma associated with the practice has decreased. Second, many couples are waiting longer to have children than in previous decades, which has led to increased infertility and reliance on assisted reproduction. The average age of first-time mothers in the United States increased from 21.4 years in 1970 to 25.0 years in 2006. During this period, the number of women who had their first child when they were age thirty-five or older increased from one in one hundred to one in twelve. In 2002, approximately 7.4 million women of reproductive age in the United States reported that they had received infertility services at some point during their lives, and eighty-eight percent of IVF procedures in 2008 involved women who were over thirty years of age. Third, the success rate has increased. In the mid-1980s, the success rate for IVF procedures was about five percent. In 2008, the success rate was over thirty percent. Finally, more individuals are able to afford these procedures than previously. Although the average cost per IVF cycle has increased over the years, the actual cost to a couple for a successful delivery is often much lower today due to the increased success rate (thus, fewer cycles are needed to achieve a successful pregnancy) and increased insurance coverage for fertility issues.

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46 Wennerholm, supra note 4, at 2158.
49 Id. at 2.
50 See 2008 ART Report, supra note 6, at 3, 28.
51 Byrn, supra note 15, at 174–75.
52 See 2008 ART Report, supra note 6, at 65.
53 In 1988, the average cost for a single cycle of IVF was approximately $6,000. Seibel, supra note 16, at 832. In 1994, the average cost for a single cycle increased to approximately $8,000. Peter J. Neumann et al., The Cost of a Successful Delivery with In Vitro Fertilization, 331 New Eng. J. Med. 239, 239–40, 241 (1994). In 2005, the average cost for a single cycle was over $13,000. Mark P. Connolly et al., The Cost and Consequences of Assisted Reproductive Technology: An Economic Perspective, 16 Hum. Reprod. Update 603, 605 (2010); see also Iva Skoch, Should IVF Be Affordable to All?, Newsweek, Jul. 21, 2010 (discussing the comparatively high costs of fertility treatments in the United States).
54 See Kindredgan, Jr. & McBrien, supra note 10, at 199–204; see also Jain & Gupta, supra note 17, at 255 (noting the higher use of certain assisted reproduction techniques in states with mandated insurance coverage for IVF services than in states without mandated coverage).
Just as IVF and cryopreservation were once science fiction, additional assisted reproduction techniques are sure to develop in the future. For instance, human cloning and “designer babies” are foreseeable,\textsuperscript{55} scientists are developing artificial wombs in which an embryo could develop completely outside of the body,\textsuperscript{56} and some scientists believe artificial sperm may be developed from bone marrow.\textsuperscript{57} While each new technique will present its own ethical issues, each will result in children who, as with all children, had no say in the method by which they were created.\textsuperscript{58} As legislatures decide how to treat these children, they should keep in mind these and other possible methods, not just the current realities. Indeed, it was the failure of legislatures to look ahead (or, at the least, respond promptly) that has led to the unresolved issues this Article addresses.

F. The Reasons for Posthumous Conception

Although the reasons that couples turn to assisted reproduction to achieve a pregnancy are self-evident, it may be less clear why an individual would use his or her deceased partner’s genetic material to create a child. There are, however, many reasons why an individual may do so, particularly if the individual does not intend to remarry. Some do so as a tribute to a deceased partner.\textsuperscript{59} Others may do so for religious reasons.\textsuperscript{60} Still others may do so out of a desire to know the child’s genetic origin.\textsuperscript{61} Likewise, if a couple had a child before the decedent’s death, the surviving parent can produce a full sibling rather than a half sibling for that child by using the decedent’s genetic material.\textsuperscript{62} Further, if a couple had embryos frozen before the decedent’s death and the surviving partner is


\textsuperscript{56} See Knaplund, supra note 1, at 99.


\textsuperscript{58} See UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, prefatory note (1988) (“Although without guile or fault, but because of the accident of birth, these children of the new biology have been deprived of certain basic rights.”).

\textsuperscript{59} Knaplund, supra note 13, at 398.

\textsuperscript{60} Id. Although Catholicism, for instance, rejects most forms of assisted reproduction, other religions do not. Even among many Catholics, however, individuals who have begun the in vitro fertilization process may choose to use the embryos they created with their partner rather than destroying them. Id.; see also J.G. Schenker, Women’s Reproductive Health: Monotheistic Religious Perspectives, 70 Int’l J. Gynecology & Obstetrics 77, 84–86 (2000); Lynn D. Wardle, Global Perspectives on Procreation and Parentage by Assisted Reproduction, 35 Cap. U. L. Rev. 413, 428–29 (2006).

\textsuperscript{61} Knaplund, supra note 13, at 398.

\textsuperscript{62} Id. at 399.
now sterile, the use of the frozen embryos may be the only way for the survivor to have his or her own genetic child.\textsuperscript{63} Also, in many cases it will cost significantly less to use the deceased partner’s genetic material than to obtain gametes from a new donor.\textsuperscript{64} Finally, as the remainder of this Article discusses, doing so may allow the child to inherit from certain individuals (including the decedent or other family members), to qualify as a beneficiary of certain trusts, or to receive Social Security or other survivor benefits.\textsuperscript{65}

II. EXISTING LEGAL APPROACHES TO POSTHUMOUS CONCEPTION

Before reviewing the various statutory and judicial approaches to date regarding posthumously conceived children, it is important to identify and understand the specific legal issues involved. For purposes of this Article, the interests affected can be grouped into two categories: (1) probate-related issues and (2) class-gift issues. The first category includes pretermitted-heir\textsuperscript{66} status under a state probate code, inheritance rights under state intestacy statutes, and other interests dependent upon a person’s right to inherit under state intestacy statutes. For instance, eligibility for Social Security survivor benefits depends in part on one’s status as an heir under state law.\textsuperscript{67} Similarly, life insurance policies and retirement plan documents often defer to state intestacy statutes if the owner dies without a valid beneficiary designation. The class-gift issues concern the interpretation of wills, trust agreements, or beneficiary designations that include a general provision for a person’s issue, heirs, descendants, children, grandchildren, or the like.

To put these issues into perspective, consider two common scenarios.\textsuperscript{68} First, an engaged couple learns there is a significant chance the man may become sterile—for example, he is diagnosed with a form of cancer requiring aggressive treatment, or he serves in the military and is

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 399–400. This is particularly true if the survivor must rely on IVF and the couple had preserved “extra” embryos during prior IVF attempts. 2008 ART REPORT, supra note 6, at 58 (noting that the use of frozen embryos avoids the cost of fertility drug stimulation and egg retrieval).

\textsuperscript{65} See Knaplund, supra note 13, at 399–401.

\textsuperscript{66} Pretermitted-heir statutes provide generally that a child born after his or her parent executed a will shall have an interest in that parent’s estate, unless the parent expressly omitted the future child. See, e.g., UNIF. PROBATE CODE § 2-302 (amended 2008).

\textsuperscript{67} Social Security Act § 216(h)(2)(A), 42 U.S.C. § 416(h)(2)(A) (2006); see infra Part II.B.

\textsuperscript{68} For simplicity and consistency, I have assumed in each scenario that the man dies and the woman uses the genetic material after his death. However, the same questions would arise if the woman died first and the man, with the help of a surrogate, used her genetic material after her death. For a list of additional scenarios, see KINDREGAN, JR. & McBRIEN, supra note 10, at 10–12.
deployed to a war zone.\footnote{See Knaplund, supra note 1, at 91–92 (citing various reports of soldiers cryopreserving their sperm before being deployed).} Before he starts treatments or is deployed, the man has his sperm cryopreserved to preserve the possibility that he and his fiancée may have children together. Sadly, he does not survive the treatments or his tour. After a period of grieving, his former fiancée decides to conceive a child using his preserved sperm. Years after his death, she gives birth to a child the man never met.

Because the man was young, unmarried, and had no children, he never created a will. Accordingly, intestacy laws will govern the distribution of his assets. This raises several questions. Should this child be his heir under the law? Should it matter whether he consented to the posthumous use of his sperm? If so, how must his consent be proven? Should there be a presumption of consent? Should clear and convincing proof be required? Must the consent be in writing? Should it matter if the child was born more than one year after the husband’s death? Two years later? Ten years later? Should it matter whether the couple was married? What if the couple was a same-sex couple? Should it matter if the husband’s executor had already distributed his estate to others? If so, should the executor, the recipients, or both be liable?

Alternatively, imagine a healthy, young, married couple. After they have their first child, they create wills that include provisions for their children. They try unsuccessfully for two years to conceive a second child, then attempt IVF. A fertility clinic harvests a number of the wife’s eggs, fertilizes them using her husband’s sperm, transfers two of the embryos to her uterus, and freezes the remaining embryos. A few months later, the husband dies unexpectedly in an accident. Shortly after his death, the wife miscarries, but she decides to try again to have another child using the cryopreserved embryos. Should the posthumously conceived child be included in the class of “children” under his will? If the will instead referred specifically to the first child, should the second child be a pretermitted heir (and, thus, be entitled to a share of the decedent’s estate)?

In either scenario above, assume that the decedent had life insurance and a retirement account (either privately, through his employer, or both), and he contributed regularly to Social Security—a common scenario for many employees. On the beneficiary designations for his insurance and retirement account, he simply checked a box naming his “heirs” as his primary beneficiaries. Should the posthumously conceived child be deemed an heir for these purposes as well? If so, and if the custodians had already distributed the insurance proceeds or account assets, would
the custodians face liability for improper distributions? Furthermore, should the child be eligible to receive Social Security survivorship benefits as a child dependent on the decedent? If the decedent died while at work, should the child receive worker’s compensation survivor benefits under state law? If the decedent died due to another’s negligence, should the child be eligible to receive wrongful death proceeds?

Finally, assume the decedent’s parents had created a trust years earlier for their descendants. Should the posthumously conceived children be deemed their grandparents’ descendants and, therefore, be eligible to receive distributions from the trust? Should the answer differ whether the trusts terminated at the decedent’s death or continued after his death?

Now, assume the surviving partner, the decedent’s executor, the trustee of the grandparent’s trust, the life insurance company, or the retirement account custodian researches state law to find answers to these questions. In thirty-three of the fifty states, that person will find that the code and case law say absolutely nothing about any of these issues. In the other seventeen, she will find that the states’ approaches vary greatly—nine states do not recognize posthumously conceived children in any probate situation, while eight states do, subject to various condi-

70 In the first scenario, the heirs typically would be the decedent’s children, then parents, then siblings. It would be extremely likely that the custodian would distribute the assets to the parents or, if none, the siblings shortly after his death. In the second scenario, the sole heir typically would be the surviving spouse, even if the decedent had children, so the concern to the custodian would not be as great. See infra Part II.A.1.b.

71 This last question is surprisingly complicated and has garnered the most attention to date by courts. Part II.B, infra, discusses further the issues relating to Social Security survivor benefits.


73 In 2009, trustees of over 2.6 million trusts for individuals filed federal income tax returns. 2009 SOI Tax Stats-Fiduciary Returns-Sources of Income, Deductions, and Tax Liability-Type of Entity, IRS.gov, http://www.irs.gov/taxstats/article/0,,id=225291,00.html (follow “2009” hyperlink). This included complex trusts (1,344,911), simple trusts (706,775), and grantor trusts (567,585). Id. Presumably, a large majority of these trusts had provisions for children, grandchildren, issue, heirs, descendants, or similar class designations. Notably, not all grantor trusts file tax returns and, thus, the actual number of trusts is somewhat higher. See SOI Tax Stats-Income from Trusts and Estates Study Data Sources and Limitations, IRS.gov, http://www.irs.gov/taxstats/indtaxstats/article/0,,id=214746,00.html.

74 See infra Table 1.

The following breaks down each of these approaches, starting with statutory approaches and then the judicial approaches.

A. Statutory Approaches

With respect to posthumously conceived children, state statutes fall into three categories: (1) statutes based on model or uniform codes (the most common), (2) statutes not based on model or uniform codes and that pre-date cryopreservation, and (3) statutes that expressly address posthumously conceived children. The following summarizes the various statutes that fall in each category, the strengths and weaknesses of those statutes, and the states that have adopted each.

1. States with Statutes Based On Model or Uniform Acts

Twenty-six states have a probate or parentage code that includes an “afterborn-heirs” provision based on a model or uniform act. The following summarizes the historical development of model and uniform codes as they relate to posthumously conceived children and identifies the states that have adopted and still follow each.

a) Model Probate Code (1946)

In 1946, the Probate Law Division of the American Bar Association published the first model or uniform probate act, the Model Probate Code (MPC). The MPC included an “afterborn-heirs” provision which court has recognized them for class-gift purposes. In re Martin B., 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007)).

The following table lists the states that have adopted the MPC or similar model acts:

<table>
<thead>
<tr>
<th>States</th>
<th>Model Code Adoption</th>
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See infra Table 1. In addition to the twenty-six states shown in Table 1, Minnesota and Iowa have probate statutes based on a model or uniform code; however, because they have also enacted provisions that directly address posthumously conceived children, I have classified them differently for purposes of this Article. See infra Part II.A.3. Generally speaking, a model act provides an example for each state to consider, evaluate, and adapt as it sees fit, whereas uniform acts are intended to be adopted, largely intact, by a majority of states in order to provide uniformity among the states. See Mich. Legal Stud., Problems in Probate Law 10 (1946); Kindregan, Jr. & Snyder, supra note 30, at 206.

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codified the traditional rule that all heirs must be living or in gestation at the moment of the decedent’s death. Section 25 stated:

Descendants . . . of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived him. With this exception, the descent and distribution of intestate estates shall be determined by the relationships existing at the time of the death of the intestate.

Read strictly, posthumously conceived children—who are not “begotten” before the decedent’s death—do not fit within the limited exception stated in the first sentence and, therefore, would be excluded under the second sentence’s general rule. However, there is little doubt that the drafters did not specifically intend to bar such children. This language was approved in 1946, before scientists discovered how to freeze sperm while retaining its viability, and it is based on a rule that had existed unchanged for over a thousand years. Posthumous conception was literally science fiction both when the rule was established and when the MPC drafters codified it. Accordingly, courts should not feel obligated to read the language strictly. Rather, they should deem themselves free to create a new exception for posthumously conceived children.

If a court reads the language strictly, however, the MPC’s use of “begotten” is problematic given today’s science. For instance, if “begotten” is synonymous with conception—the moment that the sperm fertilizes the egg—this language would provide different interests to children depending on the specific assisted reproductive technique used. If a couple froze an embryo prior to the father’s death, that child technically would have been “conceived” or “begotten” prior to the father’s death—even if the mother did not implant the embryo until after his death—and the child would fall within the statute. Alternatively, if the father froze

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However, there have long been exceptions to the rule that the identity of takers from a decedent’s estate is determined as of the date of death. Those exceptions are based on human experience going back to time immemorial. We have always been aware that men sometimes cause a woman to become pregnant and then die before the pregnancy comes to term . . . .

Id.

80 MODEL PROBATE CODE § 25 (1946).
81 See Walters et al., supra note 32, at 4.
82 See Knaplund, supra note 1, at 105–08.
83 Just before publication of this Article, the United States Court of Appeals for the Eighth Circuit interpreted this language, which was a part of the Iowa Code, and applied it strictly. Beeler v. Astrue, 651 F.3d 954, 965 (8th Cir. 2011). However, two other courts have looked past the statute’s plain language when considering similar language because of the legislature’s lack of actual intent. See infra Parts IV.B.1 and IV.B.2.
his sperm and the mother used the frozen sperm after his death, the resulting child would not be “conceived” or “begotten” until after the father’s death and, thus, would not fall within the statute. It is extremely unlikely that the drafters intended to draw such an arbitrary line when they approved the language in 1946. More likely, they simply had not considered the possibility of posthumous conception, which remained a scientific impossibility at that time.

Four states, Indiana, Maryland, Ohio, and Pennsylvania, still have this language from the 1946 MPC in their probate codes. Until these states amend their statutes or courts interpret this language, it is unknown whether a posthumously conceived child would be recognized for probate and class-gift purposes in these states.


In 1969, the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Probate Code (UPC), which replaced the MPC. The Commissioners incorporated the MPC’s afterborn-heirs provision, but they changed “begotten” to “conceived” and dropped the second sentence. Section 2-108 of the UPC stated simply, “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.” The changes appear to be merely stylistic, however, not substantive.


87 Id.

88 The Commissioners did not provide a comment to § 1-208 to explain the changes, which they likely would have done had they introduced a new approach. Further, although they removed the reference to the traditional rule, § 1-103 of the Uniform Probate Code stated, “Unless displaced by the particular provisions of this Code, the principles of law and equity supplement its provisions.”
For the reasons mentioned above regarding the MPC, it is uncertain how a court would apply this language, if at all, in the context of posthumously conceived children. One court, however, has held that the 1969 UPC language does not apply to posthumously conceived children, and the court created its own exception for such children. Three states, Maine, Nebraska, and Tennessee, still have this language from the 1969 UPC in their probate codes, and it is uncertain what interests a posthumously conceived child would have in these states.

In 1990, the Commissioners revised section 2-108 to state, “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” The Commissioners did not provide a comment to explain the intent of this change, but it is likely that, this time, they intended to exclude posthumously conceived children. By 1990 cryopreservation was becoming more common, and the change to “in gestation” removed the ambiguity inherent in the words “begotten” (from the MPC) and “conceived” (from the 1969 UPC). In addition, two years earlier the Commissioners had proposed the Uniform Status of Children of Assisted Conception Act (discussed next), which provided that posthumously conceived children have no interest in their deceased parent’s estate. Like this change to the UPC, that act also used the term “in gestation.”

On the other hand, one could reasonably conclude that UPC section 2-108 does not preclude posthumously conceived children from inheriting. In fact, the drafters of the Restatement (Third) of Property: Wills &

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90 ME. REV. STAT. ANN. tit. 18-A § 2-108 (West, Westlaw through Ch. 447 of the 2011 1st Reg. Sess. of the 125th Leg.); NEB. REV. STAT. § 30-2308 (West, Westlaw through 102nd Leg. 1st Reg. Sess. 2011); TENN. CODE ANN. § 31-2-108 (West, Westlaw through 2011 1st Reg. Sess.). A small number of additional states still include the “conceived before” language in their statutes, but they have recently amended the statutes to clarify that the birth must occur within ten months after the decedent’s death. *See infra* Part II.3.a. Florida’s probate code includes section 108 of the 1969 Uniform Probate Code as well, FLA. STAT. ANN. § 732.106 (West, Westlaw through Ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.), but its legislature passed a separate statute in 2003 specifically addressing posthumously conceived children. *Id.* § 742.17. *See infra* Part 0.0.b.

91 *Unif. Probate Code* § 2-108 (amended 1990). In 2008, this language was revised to read, “An individual in gestation at a decedent’s death is deemed to be living at the decedent’s death if the individual lives 120 hours after birth.” *Unif. Probate Code* § 2-104(a)(2) (amended 2008) (moving the prior section 2-108 to section 2-104(a) and revising the language). However, as discussed next, additional provisions were added to the Uniform Probate Code in 2008 that provided that certain posthumously conceived children after a parent’s death would be deemed “in gestation” at the decedent’s death.

92 *See infra* Part II.A.1.c.
Other Donative Transfers take this position, noting that “[m]ost statutory codifications, including enactments of the Original or Revised Uniform Probate Code . . . do not preclude inheritance by a child conceived after the decedent’s death. They merely provide that a child who is in gestation at the decedent’s death is treated as then living.” In other words, they do not apply to section 2-108 the canon of construction expressio unius, exclusio alterius. In any event, the Commissioners’ intent—regardless of what it may have been—does not necessarily reflect the intent of the legislatures in the states that have adopted the 1990 UPC.

Nine states, Alaska, Arizona, Hawaii, Michigan, Montana, New Jersey, Vermont, West Virginia, and Wisconsin, still have this language from the 1990 UPC in their probate codes. Notably, none of these states adopted the 1988 Uniform Status of Children of Assisted Conception Act. In these nine states, a court may or may not read the statutory language strictly, and, thus, may or may not exclude posthumously conceived children.

93 Mary F. Radford, Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows, 2 EST. PLAN. & CMTRY. PROP. L.J. 33, 43 (2009). The drafters note that, despite Uniform Probate Code section 2-108, a posthumously conceived child may inherit from a genetic parent, so long as the child is “born within a reasonable time after the decedent’s death in circumstances indicating that the decedent would have approved of the child’s right to inherit.” RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. d (1999).

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


97 A federal court considering Arizona state law held that this language excluded posthumously conceived children. See Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002), rev’d on other grounds, 371 F.3d 593 (9th Cir. 2004). That decision, however, does not
c) Uniform Status of Children of Assisted Conception Act (1988)

In 1988, the Commissioners proposed for the first time language that specifically addressed the interests of posthumously conceived children.98 The Uniform Status of Children of Assisted Conception Act (USCACA) provided that a child conceived after a parent’s death is not a child of that parent for any purpose.99 Section 4(b) stated, “An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.” Section 10 clarified that this rule controlled for purposes of intestate succession, “probate law exemptions, allowances, or other protections for children in a parent’s estate,” and determination of class members for donative transfers.

The Commissioners excluded posthumously conceived or implanted children “to avoid the problems of intestate succession which could arise” from posthumous conception.100 The decision to exclude such children in favor of administrative convenience is puzzling, however, given the Commissioners’ child-centric mandate. The Act’s prefatory note stated that the Commission’s singular goal was to provide for the children conceived through assisted reproduction. Specifically, “[t]he Committee was given the responsibility to draft an act, a child oriented act, to provide order and design that would inure to the benefit of those children who have been born as a result of this new modern miracle.”101 Further, the Commissioners noted that “[t]he narrowness of the Act is designed to limit its applicability to what is best for children.”102 Finally, they added, “Children then are the first priority, others can wait, at least until the children are taken care of.”103 However, with respect to intestate succession, the Commissioners chose expediency over the interests of these children.104

necessarily reflect the position of the Arizona Supreme Court and is not binding on an Arizona court. Also, although the New Jersey Superior Court held in 2000 that posthumously conceived children may inherit under the 1969 Uniform Probate Code, In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), the New Jersey legislature later adopted the 1990 Uniform Probate Code language. See 2004 N.J. Laws Serv. 1442 (effective Feb. 27, 2005). Accordingly, it is unclear whether future courts will follow Kolacy.

99 Id.
100 Id. § 4(b) cmt.
101 Id. prefatory note, at 2.
102 Id.
103 Id. prefatory note, at 1.
104 The Commissioners noted, “Of course, those who want to explicitly provide for such children in their wills may do so.” Id. § 4(b) cmt.
The USCACA was not a rousing success, and only North Dakota and Virginia adopted it. In 2000, the Commissioners rolled parts of the USCACA into a revised Uniform Parentage Act and withdrew their recommendation that states enact the USCACA. North Dakota repealed its version of the USCACA in 2005 and replaced it with the revised Uniform Parentage Act. Virginia has kept the act, but its version is a bit different than the USCACA language.


Twelve years later, the Commissioners again addressed posthumously conceived children and, for the first time, provided that they may be treated as children of the deceased parent. In 2000, the Commissioners incorporated parts of the USCACA into the Uniform Parentage Act (UPA), which had not previously addressed the interests of posthumously conceived children. However, the Commissioners did not adopt section 4(b) of the USCACA. Instead, they provided that a child conceived after a parent’s death would be deemed a child of the deceased parent if the deceased parent gave consent. Specifically, section 707 of the UPA provided, “If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the

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107 See 2005 N.D. Laws 719. North Dakota subsequently adopted the 2008 revisions to the Uniform Probate Code, as discussed infra Part II.A.1.e.

108 Virginia’s version provides interests to posthumously conceived children only if the birth occurs within ten months after the death of a parent, V.A. CODE ANN. § 20-164 (West, Westlaw through 2011 Reg. Sess.), and either “(i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.” Id. § 20-158(B).


child.” In 2002, the Commissioners replaced the references to “spouse” with “individual” and made other minor changes.

Thus, for the first time, a model or uniform act recognized a parent–child relationship between a posthumously conceived child and the deceased parent—in at least some circumstances. However, this approach has two significant problems. First, the statute is a parentage act, not a probate act, and it does not clarify whether, or how, it applies in the probate context. Second, if it does apply in the probate context, the provision is so broad that it would create numerous administrative difficulties.

Regarding the first problem, the UPA primarily addresses the rights and responsibilities that flow from a parent–child relationship during the lifetime of the parties, such as child custody, visitation rights, and support obligations. Although the UPA recognizes a parent–child relationship between parties, it does not articulate the effect this relationship has in the probate or class-gift context. It does not grant the child any interests in the deceased parent’s estate, nor does it address the child’s interest in class gifts. Nonetheless, the act states broadly that it “applies for all purposes, except as otherwise specifically provided” by another law of the state. Thus, if a state does not specifically address the status of posthumously conceived children in its probate code, a court may look to the UPA to determine the parties’ relationship.

If a state adopted this provision in its parentage statutes, but it did not amend its probate code to clarify the interests of posthumously conceived children, it is unclear what, if any, interests the child would actually have. Specifically, one could reasonably argue either that this new, broader provision expands (or, more accurately, creates an exception to) the UPC’s “posthumous heirs” provision, or that the “posthumous heirs” language—when read strictly—specifically covers posthumously conceived children and is therefore unaffected by the UPA.

Most likely, this act would not be construed to create probate interests for posthumously conceived children. The Commissioners noted

111 Id. (amended 2002), available at http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.pdf. Notably, although a single use of “spouse” remains in the amended section 707, this appears to be an oversight; the inclusion of “spouse” in that one spot is inconsistent with the balance of section 707 and the stated intent of the Commissioners. Id. prefatory note at 2 (“Article 7 . . . recodifies USCACA (1988), but applies its provisions to nonmarital as well as marital children born as a result of assisted reproductive technologies.”).
113 UNIF. PARENTAGE ACT § 203 (amended 2002); see also Radford, supra note 93, at 39 (noting the scope of the applicability of the UPA).
that these changes to the UPA “recodify” the USCACA, which expressly did not recognize posthumously conceived children, as discussed above.\footnote{See Unif. Parentage Act prefatory note at 2 (amended 2002).} And despite the linguistic change from the USCACA on this issue, the comment to section 707 is almost identical to the comment to section 4(b) of the USCACA:

This section 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. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.\footnote{Id. § 707 cmt.}

Accordingly, a court may conclude that by the addition in the UPA of “unless the deceased spouse consented in a record,” the drafters did not intend to grant new interests, but simply to clarify that a provision for such children in a will would be respected.

This uncertainty highlights a structural problem that legislatures should avoid by addressing posthumous conception in their probate codes, not solely in their parentage acts. Parentage acts and probate codes are entirely different animals with distinct focuses.\footnote{As noted by Professor Lee-ford Tritt, “Estates law and family law have very different goals in defining a parent–child relationship. Many salient concerns regarding various issues evoked from a parent–child relationship during the parties’ lifetime are not necessarily relevant to issues concerning the distribution of one’s estate.” Tritt, supra note 57, at 370; see also In re Estate of Palmer, 658 N.W.2d 197, 200 (Minn. 2003) (stating that, in recognition of the distinct purposes of probate and family law, a state legislature’s decision “not to make the Parentage Act the sole means of establishing paternity for the purposes of probate” was justified).} Parentage acts are concerned primarily with a child’s best interests. For instance, if an individual chooses to have intercourse, parentage acts will hold the individual financially responsible for a resulting child, whether intended or not. Children have a right to such support; a parent cannot opt out of these obligations.\footnote{See Monopoli, supra note 112, at 887.}

On the other hand, the primary goal of intestacy laws traditionally has been to satisfy the decedent’s likely intent.\footnote{See Tritt, supra note 57, at 370–71.} While the United States Supreme Court has recognized that an individual has a right to dispose of her assets,\footnote{See Hodel v. Irving, 481 U.S. 704, 716 (1987) (holding unconstitutional a section of the Indian Land Consolidation Act of 1983 that required that certain undivided fractional interests in land must escheat to the tribe, and stating that “the right to pass on property—to one’s family in particular—has been part of the Anglo–American legal system since feudal times”); but see Irving Trust Co. v. Day, 314 U.S. 556, 562 (1942) (stating that “[n]othing in the
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decedent’s spouse or children—has a constitutional right to inherit assets. Accordingly, legislatures are generally free to dictate the terms of one’s inheritance. Indeed, because the interests are different in the parentage and probate contexts, a legislature may reasonably decide to treat posthumously conceived children differently in each context. In any event, legislatures should avoid any confusion by addressing the issue in both places.

Regarding the second problem, if courts do construe the statute to give posthumously conceived children an interest in the deceased parent’s estate, the statute goes too far. There is no time limitation before which the child must be born. If the husband gave written consent for his sperm to be used after his death, the wife seemingly would have an unlimited time under this statute to become pregnant. This would hold up estate administrations indefinitely (in violation of the stated purpose of the provision) or, depending on the state’s probate laws, expose a per-

Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction.

Rights commonly provided by statute, however, include an elective share for a surviving spouse, a family allowance, and a homestead allowance. See, e.g., UNIF. PROBATE CODE §§ 2-201 to 2-214 (amended 2008) (elective share), 2-404 (family allowance), 2-402 (homestead allowance).


There are other notable instances in which it is unclear whether provisions in a parentage act apply in the probate context. For instance, section 5 of the 1973 Uniform Parentage Act addressed assisted reproduction but not posthumous conception. It recognized a parent–child relationship only in the context of a married couple working with a licensed physician and using sperm from a sperm donor. UNIF. PARENTAGE ACT § 5 (1973) (amended 2002). Even if these requirements were met, it did not address what rights or interests the child would have in the probate context. Similarly, some states require in their parentage acts that paternity be determined during the father’s lifetime, others require that paternity be determined within 300 days after the father’s death, and others do not limit the time for paternity actions. See Kristine S. Knaplund, Equal Protection, Postmortem Conception, and Intestacy, 53 U. Kan. L. Rev. 627, 645–49 (2005); Knaplund, supra note 1, at 97; see also In re Estate of Kolacy, 753 A.2d 1257, 1262–63 (N.J. Super. Ct. Ch. Div. 2000) (declining to apply the 300-day rule in New Jersey’s parentage act in the probate context).
sonal representative to indefinite liability for distributing assets to improper heirs. Further, the statute does not state what this “consent” must entail. For instance, an individual may want the child to be recognized as his own, but he may not want a portion of his estate to go to the child. This could be the case, for instance, if the man had other children—from either a prior marriage or the same marriage—whom he knew and would prefer to benefit.\footnote{While the decedent could address this in a will, intestacy statutes apply, by definition, to those without a will.}

Seven states—Alabama, Delaware, New Mexico, Texas, Utah, Washington, and Wyoming—have adopted the 2000 UPA but do not expressly address posthumously conceived children in their probate code.\footnote{\textit{AL. CODE} §§ 26-17-707 (West, Westlaw through 2011 Reg. Sess.) (parentage), 43-8-47 (afterborn heirs); \textit{DEL. CODE ANN.} tit. 13, § 8-707 (West, Westlaw through 78 Laws 2011, chs. 1–125) (parentage); tit. 12, §§ 310, 505 (posthumous children); \textit{N.M. STAT. ANN.} §§ 40-11A-707 (parentage), 45-2-108 (afterborn heirs) (West, Westlaw through 1st Reg. Sess. of 50th Leg. 2011); \textit{TEX. FAM. CODE ANN.} § 160.707 (West, Westlaw through 2011 Reg. Sess. and 1st Called Sess of 82nd Leg.) (parentage); \textit{TEX. PROB. CODE ANN.} § 41(a) (West, Westlaw through 2011 Reg. Sess. and 1st Called Sess of 82nd Leg.) (parentage); \textit{UTAH CODE ANN.} §§ 78B-15-707 (West, Westlaw through 2011 2nd Spec. Sess.) (parentage), 75-2-104(1)(b) (afterborn heirs); \textit{WASH. REV. CODE ANN.} § 26.26.730 (West, Westlaw through 2011 legis.) (parentage); \textit{WYO. STAT. ANN.} §§ 14-2-907 (West, Westlaw through 2011 Gen. Sess.) (parentage), 2-4-103 (posthumous persons). Notably, Texas, Utah, and Washington each retained the word “spouse” (as in the 2000 revision of the Uniform Parentage Act), rather than using “individual” (as in the 2002 amendments to the Uniform Parentage Act). Also, Texas requires that a licensed physician maintain the record. \textit{TEX. FAM. CODE ANN.} § 160.707 (Westlaw); \textit{see also} Kindregan, Jr., \textit{supra} note 12, at 441–42.} For the above reasons, the interests of posthumously conceived children remain unclear in these states.


In 2008, the Commissioners amended the UPC to address posthumously conceived children. For the first time, the Commissioners expressly provided that, subject to certain conditions, a posthumously conceived child may be included in both intestate succession\footnote{\textit{UNIF. PROBATE CODE} § 2-116 (amended 2008).} and class gifts.\footnote{\textit{Id.} § 2-705(g)(2).}

For probate purposes, a posthumously conceived child will be deemed a child of the deceased parent if two conditions are met. First, the deceased parent must have intended to be “treated as a parent.”\footnote{\textit{Id.} § 2-120(f).} This intent can be shown by a “signed record that, considering all the facts and circumstances, evidences the individual’s consent,”\footnote{\textit{Id.} § 2-120(f)(1).} or by clear and convincing evidence of the deceased parent’s intent.\footnote{\textit{Id.} § 2-120(f)(2)(C).} How-
ever, if a couple was married at the time they contributed their respective genetic material and no divorce proceeding was pending at the first spouse’s death, the UPC presumes such intent unless clear and convincing evidence shows otherwise.130 Second, the child must be “in utero not later than thirty-six months after the individual’s death[, or] born not later than forty-five months after the individual’s death.”131

For class-gift purposes, a posthumously conceived child will be deemed the child of the deceased parent if the first condition described above (decedent’s consent) is met, absent a contrary provision in the governing instrument.132 However, if the class closes due to the deceased parent’s death, then the second condition above (time limitation) applies, as well.133 As a result, a child born ten years after a deceased parent’s death could be a trust beneficiary if the trust remained ongoing. However, if the trust terminated as a result of the deceased parent’s death, the child must be conceived within thirty-six months or born within forty-five months of the parent’s death.134 These class-gift rules apply to governing instruments of any type, including “a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.”135

The Commissioners chose a three-year period for two reasons.136 First, it “allow[s] the surviving spouse or partner a period of grieving,
time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy.”\textsuperscript{137} Second, it mirrors the three-year period that an individual has under section 3-1006 to recover from a distributee the value of assets improperly distributed to that distributee.\textsuperscript{138} In addition, the Commissioners intended for these provisions to apply whether or not the parents were married and whether the deceased parent was the child’s genetic mother or father.\textsuperscript{139}

The 2008 UPC is a significant step forward, but it too has flaws. For one, the “treated as a parent” language regarding consent is vague in the posthumous conception context.\textsuperscript{140} In addition, it does not include any requirement that a surviving spouse or partner notify the fiduciary\textsuperscript{141} that she intends to use the decedent’s genetic material. As explained in Part III.B.2, such a requirement would aid in the efficient administration of estates and reduce the possibility of premature distributions. Furthermore, when a class closes, the act only recognizes posthumously conceived children of the individual whose death “closed” the class. As discussed in Part III.A.2, this limitation in unnecessary and could lead to inequitable results.

To date, only Colorado and North Dakota have adopted these provisions.\textsuperscript{142}

\textsuperscript{137} UNIF. PROBATE CODE \S 2-120(k) cmt.
\textsuperscript{138} Id. \S 2-705(g)(2) cmt. However, the time periods do not truly match up, because the requirement is just that the child be in utero within thirty-six months, not that the child be born—or that the executor be notified of the pregnancy—within thirty-six months.
\textsuperscript{139} These interests apply whether the woman who gives birth to the child is the birth mother or a gestational carrier. \textit{Id.} \S\S 2-120 (addressing the issue in the context of a birth mother), 2-121 (addressing the issue in the context of a gestational carrier). A “gestational carrier” is a woman who gives birth under a gestational agreement and is not an intended parent. \textit{Id.} \S 2-121(a)(2). A “birth mother” is any woman other than a gestational carrier who gives birth to a child, and she is always deemed an intended parent. \textit{Id.} \S 2-120(a)(1). While this typically would be the genetic mother, it need not be. \textit{Id.}
\textsuperscript{140} \textit{Id.} \S 2-120(f). The act does not define “treated as a parent,” but the comment to \S 2-115 provides that “functioning as a parent” includes providing economic support. Accordingly, although it is not expressly stated, the consent likely must be not just that the surviving spouse could use the sperm, but that the decedent intended for a portion of the estate to benefit the child. This should be clarified in the statute, though, not hinted at through the comments.
\textsuperscript{141} This could be a trustee, an executor with respect to probate assets, or a custodian of the decedent’s nonprobate assets.
f) Other Approaches

To complete the picture, two additional approaches merit mention, although no state has adopted either. In 2008, the American Bar Association completed a twenty-year project by proposing the Model Act Governing Assisted Reproductive Technology. With respect to posthumously conceived children, the act simply adopts, almost verbatim, section 707 of the 2000 UPA. Accordingly, like the 2000 UPA (and unlike the 2002 UPA), the act refers to “spouse” rather than “individual,” thereby limiting the class of posthumously conceived children who may be deemed an heir of a deceased parent to children of married partners. It would not apply to engaged individuals or individuals in any other long-term relationship. The act differs from the 2000 UPA in two key regards, though. First, the act specifies that the consent must be (among other requirements) signed and dated by not just the participant, but also by his or her healthcare provider. Second, it defines “spouse” as any couple having a legally recognized relationship that state law accords rights and responsibilities “equal to, or substantially equivalent to, those of marriage.” Thus, it would apply to same-sex couples in states that recognize civil unions, not just gay marriage.

Finally, the drafters of the Restatement (Third) of Property: Wills & Other Donative Transfers have suggested an extremely broad, fact-sensitive approach: “[T]o inherit from the decedent, a child produced from genetic material of the decedent 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 of the child’s right to inherit.” The drafters added, “A clear case would be

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143 For a summary of approaches taken in other countries, see Knaplund, supra note 1, at 100–01.
144 Kindregan, Jr. & Snyder, supra note 30, at 204. This act was prepared by the American Bar Association’s Section of Family Law’s Committee on Reproductive and Genetic Technology and approved by the Section Council. See MODEL ACT GOVERNING ASSISTED REPROD. TECH., prefatory note (2008), available at http://apps.americanbar.org/family/committees/artmodelact.pdf.
145 MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607 provides:
Except 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 record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.
147 MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(21).
148 Id. § 202(1)(b).
149 Id. § 102(21).
that of a child produced by artificial insemination of the decedent’s widow with his frozen sperm.”"151 If born within a reasonable time after the husband’s death, the child “should be treated as the husband’s child for purposes of inheritance from the husband . . . [and] for all purposes of inheritance by, from, or through [any other] intestate decedent who dies thereafter.”152 In addition, the child would be a child of the deceased parent for class-gift purposes.153 While this approach may be fine for a court that is required to wrestle with this issue before its legislature has, legislatures should be more precise in their statutes to provide predictability.

2. States with Statutes Similar to a Model or Uniform Act

Ten additional jurisdictions have provisions in their codes that, on their face, appear to grant or deny interests to posthumously conceived children. However, like the MPC and 1969 UPC provisions above, these statutes were adopted (and last revised) before cryopreservation was available or widely used. Accordingly, despite a literal reading, it is not clear whether courts in these states would apply the statutes in the context of posthumously conceived children.

In six states and the District of Columbia, the statutes appear to recognize posthumously conceived children with no limitations. For instance, Connecticut adopted a statute in 1975 which provides that children born to a married couple and conceived through assisted reproduction will be deemed the child of both parents.154 Further, class designations such as children, issue, heirs, or descendants, “when used in any will or trust instrument, shall, unless the document clearly indicates a contrary intention, include children born as a result of [assisted reproduction].”155 Similarly, the District of Columbia’s intestacy statutes state simply, “[A] child or descendant of the intestate born after the death of the intestate has the same right of inheritance as if born before his death.”156 Illinois’s probate code has long provided, “A posthumous child of a decedent shall receive the same share of an estate as if the child had been born in the decedent’s lifetime.”157 Kansas’s intestacy

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151 Id.
152 Id.
153 Id. § 14.8 cmt. h (Tentative Draft No. 4, 2001).
154 See CONN. GEN. STAT. §§ 45a-771 to -779 (West, Westlaw through Gen. Stat., rev. to Jan. 1, 2011). The act defines “artificial insemination” to include both intrauterine insemination and in vitro fertilization. Id. § 45a-771a(1).
155 Id. §§ 45a-778(a); see also id. § 45a-262.
statute states merely, “‘Children’ means biological children, including a posthumous child . . . .” 158 Missouri’s probate code provides, “All posthumous children, or descendants, of the intestate shall inherit in like manner, as if born in the lifetime of the intestate . . . .” 159 Oklahoma’s probate code states, “Posthumous children are considered as living at the death of their parents.” 160 Finally, Rhode Island’s afterborn-heirs provision states, “No right in the inheritance shall accrue to any persons whatever other than to the children of the intestate, unless such persons are in being and capable in law to take as heirs at the time of the intestate’s death.” 161

Alternatively, three states have adopted provisions similar to the UPC’s “afterborn-heirs” provision that, if read strictly, would—at least by negative implication, or expressio unius, exclusio alterius—exclude posthuminously conceived children. Kentucky’s code provides that children born within ten months of a decedent shall inherit as if the child was living on the date of death, but that provision has not been revised since 1944. 162 Likewise, North Carolina’s version states, “Lineal descendants and other relatives of an intestate born within 10 lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him.” 163 Oregon’s probate code reads, “The relationships existing at the time of the death of the decedent govern the passing of the net intestate estate, but persons conceived before the death of the decedent and born alive thereafter inherit as though they were alive at the time of the death of the decedent.” 164

Finally, the Mississippi and Nevada statutes do not address in any manner posthumous heirs—whether conceived before or after the death of a parent. 165

158 KAN. STAT. ANN. § 59-501 (West, Westlaw through 2010 Reg. Sess.) (section last revised in 1939). Kansas also has had a provision in its parentage act since 1968 that provides that all children conceived through heterologous artificial insemination “shall be considered at law in all respects the same as a naturally conceived child” if the parents are married and both spouses consent. Id. § 23-129.
162 KY. REV. STAT. ANN. § 391.070 (West, Westlaw through 2011 legis.).
163 N.C. GEN. STAT. ANN. § 29-9 (West, Westlaw through ch. 18) (last revised in 1959).
165 See MISS. CODE ANN. §§ 91-1-1 to -31 (West, Westlaw through 2011 Reg. Sess.); NEV. REV. STAT. ANN. chs. 133–34 (through 2009 75th Reg. Sess. and 2010 26th Spec. Sess.). Mississippi has a provision in its probate code regarding “illegitimate children,” defined as “a person who at the time of his birth was born to natural parents not married to each other and said person was not legitimized by subsequent marriage of said parents or legitimization through
3. States with Statutes Not Based On a Model or Uniform Act

Finally, the legislatures in ten states (in addition to Colorado and North Dakota, which adopted the 2008 UPC provisions) have expressly addressed the interests of posthumously conceived children. Six deny status to posthumously conceived children, and four recognize them in certain circumstances.

a) States That Have Excluded Posthumously Conceived Children

The Georgia, Idaho, Minnesota, South Carolina, and South Dakota legislatures recently revised their statutes to clarify that posthumously conceived children have no right to inherit from the deceased parent’s estate. The Georgia, Idaho, South Carolina, and South Dakota statutes state that children must be born within ten months after the death of a parent to inherit from that parent, and the Minnesota statute states that the child must be “in gestation prior to” the parent’s death.

In Georgia, Idaho, and South Carolina, the language appears to be limited to inheritance rights; it is not clear how posthumously conceived children are to be treated for class-gift purposes under a will or other a proper judicial proceeding.” MISS. CODE ANN. § 91-1-15(1)(C) (Westlaw). Such children may inherit through their mother, but may inherit through their father only if there was an adjudication of paternity within the earlier of ninety days after the administrator’s first publication to creditors or one year. Id. § 91-1-15(2)–(3). Although a posthumously conceived child technically would fit this definition, it is unclear whether a court would apply it in this context.

Although Iowa (Model Probate Code) and Minnesota (Uniform Probate Code) have adopted a uniform code, their provisions regarding posthumously conceived children do not follow the uniform codes. Accordingly, I have placed Iowa and Minnesota in this category for purposes of this Article.


168 GA. CODE ANN. § 53-2-1(b)(1) (Westlaw); IDAHO CODE ANN. § 15-2-108 (Westlaw); S.C. CODE ANN. § 62-2-108 (Westlaw); S.D. CODEFIED LAWS § 29A-2-108 (Westlaw). Notably, Kentucky and North Carolina likewise have a ten-month requirement, but in each case, the language was added before cryopreservation was available. KY. REV. STAT. ANN. § 391.070 (Westlaw); N.C. GEN. STAT. § 29-9 (Westlaw).

169 M N N. STAT. ANN. § 524.2-120(10) (Westlaw).
donative instrument. In Minnesota and South Dakota, the rule excludes posthumously conceived children from class gifts, as well.

In 2006, the New York legislature expressly excluded posthumously conceived children from its pretermitted-heir statute. The memorandum supporting the bill notes that the limitation prevents “children born during the testator’s lifetime [from being] unfairly deprived of their expected inheritance by a child with whom the testator had no relationship, a possibility that in all likelihood would have not been foreseen or desired by the testator.” Notably, the legislature did not revise its posthumous-heirs or class-gifts provisions, both of which (like the 1969 UPC summarized above) still refer simply to children “conceived before” the decedent’s death. A New York court held in 2007 that posthumously conceived children may be included in the class of “issue” under a trust agreement. However, the court indicated that a posthumously conceived child would not inherit under New York law.

b) States That Have Included Posthumously Conceived Children

As noted above, Colorado and North Dakota have adopted the 2008 UPC, thereby granting status to posthumously conceived children for inheritance and class-gift purposes. Four additional states, Florida, Louisiana, California, and Iowa, have enacted statutes granting status to posthumously conceived children in limited circumstances.

Florida was the first state to recognize posthumously conceived children in the probate context. In 1993, the Florida legislature provided that posthumously conceived children are eligible for “claim against the decedent’s estate[,]” but only if the decedent provided for the child in

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170 See Mary F. Radford & F. Skip Sugarman, Georgia’s New Probate Code, 13 GA. ST. U. L. REV. 605, 621 (1997) (explaining that the legislative purpose behind the limitation was to provide for the efficient administration of estates); 2005 Idaho Sess. Laws 407 (same); S.C. CODE ANN. § 62-2-108 (Westlaw).
171 MINN. STAT. ANN. §§ 524.2-705, -708 (Westlaw) (incorporating the intestate succession rules into class gifts); S.D. CODED LAWS §§ 29A-2-705, -708 (Westlaw) (incorporating the intestate succession rules into class gifts).
172 2006 N.Y. LAWS 3055 (amending N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)–(b)).
174 In re Martin B., 841 N.Y.S.2d 207, 212 (Sur. Ct. 2007); see also infra Part II.B.6.
175 Id. at 209 (noting that under state law, “the right of a posthumous child to inherit . . . is limited to a child conceived during the decedent’s lifetime.”).
the decedent’s will. The practical effect of the statute, however, is questionable. First, it is in Florida’s parentage act, not its probate code. Second, it does not clarify what “claim” the child may have. A claim could mean the child may inherit as an heir, is entitled to statutory allowances, can be a pretermitted heir, or has some other undesignated interest (or some combination of these). If the purpose is to grant inheritance rights, yet the child must be named in the will, the benefit would be illusory in most instances because an “heir” is only entitled to assets not governed by a will or will substitute, such as a trust or beneficiary designation. In other words, if the decedent had a will, there typically would be little, if any, assets to inherit through intestacy. Third, the statute does not provide any procedure or time limitation for the not-yet-born child (or a representative for that child) to assert any of these claims. If a child were born three years after the decedent’s death, there would not likely be assets remaining to satisfy a claim for an allowance or pretermitted-heir share. Finally, as one court has noted, the statute is not clear whether the reference in the will must be specific, or whether a general reference to “my children” or “my issue” would be deemed to include posthumously conceived children. This is another example of a quick fix in the parentage provisions that creates uncertainty in the probate context.

In 2001, the Louisiana legislature improved on Florida’s effort and provided that a posthumously conceived child is a decedent’s “legitimate child” if (1) the decedent, in writing, authorized the surviving spouse to use the genetic material, and (2) the child was born within two years after the decedent’s death. In 2003, the legislature extended the time limitation to three years and clarified that this included the right to inherit assets:

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

177 FLA. STAT. ANN. § 742.17(4) (Westlaw) (“A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman’s body shall not be eligible for a claim against the decedent’s estate unless the child has been provided for by the decedent’s will.”).

178 Id.


180 See discussion supra Part II.A.1.d.

surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.\(^ {182}\)

Although the statute allows “his surviving spouse to use his gametes,” the comment to this provision notes that the statute is gender neutral with respect to the deceased parent.\(^ {183}\) The comment also notes that the language “allows the child to qualify for Social Security benefits of the deceased parent pursuant to 42 U.S.C. § 416(h)(2)(A).”\(^ {184}\)

The scope of this statute is fairly limited. Because the legislature used “surviving spouse,” a posthumously conceived child will not be recognized as the deceased parent’s child unless the parents were married at the decedent’s death. Also, the statute does not expressly address whether a posthumously conceived child is included in a class of heirs, issue, descendants, or the like for class-gift purposes. Given the broad language used—“with all rights, including the capacity to inherit”—the child seemingly would be included in such a class, but only if born within three years of the parent’s death. As a result, if a surviving spouse had one child within three years after the decedent’s death and one child after three years, the children could be treated differently both for inheritance and class-gift purposes.

In 2005, California adopted the most extensive statute to address posthumously conceived children to date.\(^ {186}\) It provides that a posthumously conceived child will be deemed to have been living at the deceased parent’s death if three conditions are met.\(^ {187}\) First, the decedent must state in writing that his or her genetic material may “be used for posthumous conception.”\(^ {188}\) The writing must be signed and dated, must designate a person to “control the use of” the genetic material, and may be revoked or amended only by a signed and dated writing.\(^ {189}\) Second, the designated person must give written notice to the person with author-

\(^ {183}\) LA. REV. STAT. ANN. § 9:391.1(A) cmt. (West, Westlaw through 2011 1st Extraordinary Sess.).
\(^ {184}\) Id.
\(^ {185}\) Id. § 9:391.1(A).
\(^ {186}\) See CAL. PROB. CODE §§ 249.5–249.8 (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.) (added by 2004 Cal. Legis. Serv. 4551–57 (West), amended by 2005 Cal. Legis. Serv. 2224–26 (West)). In addition to the probate provisions summarized below, the bill included corresponding changes to sections 10172 and 10172.5 of the California Insurance Code.
\(^ {187}\) See id.
\(^ {188}\) Id. § 249.5(a).
\(^ {189}\) Id. § 249.5(a)(1)–(3). The original version did not require that the writing be dated, but did require that it be witnessed by at least one competent witness. 2004 Cal. Legis. Serv. 4555 (West). The California Health & Safety Code further requires that [a]ny entity that receives genetic material of a human being that may be used for conception shall provide to the person depositing his or her genetic material a form for use by the depositor that, if signed by the depositor, would satisfy the conditions
ity to distribute the decedent’s property that the decedent’s genetic material may be used for posthumous conception. This notice must be sent by certified mail within four months from the date the decedent’s death certificate is issued or a judgment is entered declaring the death, whichever occurs first. Third, the child must be in utero within two years from this date. These conditions must be satisfied by clear and convincing evidence.

Once these conditions are met, the person with the power to distribute the assets may not distribute any assets that could become distributable to a posthumously conceived child until the two-year window has closed. The person with the power to distribute assets shall not be liable for any distributions made prior to receiving the written notice or acquiring actual notice that the decedent left genetic material available for posthumous conception. However, for a period of three years after such transfer, the recipient of the property may be personally liable to any posthumous children for the fair market value of the assets distributed.

California’s statute does not expressly extend interests in class gifts to posthumously conceived children. Although California courts would likely recognize such children in a class-gift context, it is not clear whether these conditions would apply when construing a reference to issue, descendants, or the like in a trust agreement of the decedent or a will or trust agreement of another individual.

Most recently, Iowa enacted a 2011 statute that recognizes posthumously conceived children for inheritance purposes if (1) the decedent authorized in writing the posthumous use of the decedent’s genetic material, (2) the material is used by the decedent’s surviving spouse, and (3) the child is born within two years of the decedent’s death. This test also applies in the context of pretermitted heirs under a will or a revocable trust.

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set forth in § 249.5 of the Probate Code, regarding the decedent’s intent for the use of that material.

CAL. HEALTH & SAFETY CODE § 1644.7 (West, Westlaw through ch. 135 of 2011 Reg. Sess. and ch. 8 of 2011–12 1st Ex. Sess.).

190 CAL. PROB. CODE § 249.5(b) (Westlaw). Generally, this person will be the executor, trustee, or custodian of assets subject to a beneficiary designation.

191 Id.

192 Id. § 249.5(c).

193 Id. § 249.5.

194 Id. § 249.6(a)–(b).

195 Id. § 249.6(d).

196 Id. § 249.6(g).

197 Id. § 249.6(e). Further, any person who fraudulently secures the transfer of such property is liable for three times the property’s value. Id. § 249.6(f). The original version of this statute did not include subsections (e), (f), or (g). 2004 Cal. Legis. Serv. 4555–56 (West).

ble trust agreement. The Iowa code also requires a personal repres-
entative to state in the final accounting whether the decedent left genetic
material and, if so, (1) whether the personal representative has set aside
an appropriate amount to fund a potential distribution to a posthumous
child, (2) that the personal representative will wait until two years after
the decedent’s death to make the final distribution, and (3) that the per-
sonal representative will file a supplemental report at that time.

B. Judicial Approaches

The first published decisions regarding posthumous conception oc-
curred in the early 1990s. In those cases, the issues revolved around
ownership of cryopreserved genetic material after a marriage ends or af-
after a contributor’s death. Since then, courts have addressed the inter-
ests of the children conceived from such material in ten published
opinions. Nine of these cases concerned a posthumously conceived
child’s ability to receive survivor benefits under the Social Security
Act—the answer to which depends on state intestacy laws. In the
other case, the court considered whether a posthumously conceived child
may share in a class gift, notwithstanding that the applicable state’s stat-
utes deny posthumously conceived children status for inheritance pur-
poses. This Part will focus first on six of the Social Security cases, and
and it will then address the single case regarding class gifts.

199 Id. §§ 633.267(2), 633A.3106(2). The Iowa code does not expressly address class
gifts, though, and it is not clear whether, or how, this rule would be applied in the class gift
context.
200 Id. § 633.477.
201 See Hall v. Fertility Inst. of New Orleans, 647 So.2d 1348 (La. Ct. App. 1994) (in-
volving a contest between a decedent’s parent and his girlfriend regarding the disposition of
his preserved sperm); Hecht v. Superior Court, 16 Cal. App. 4th 836 (Cal. Ct. App. 1993)
(involving a contest between a decedent’s girlfriend and children regarding the disposition of
his preserved sperm, which he had devised to his girlfriend in his will); Davis v. Davis, 842
S.W.2d 588, 603–04 (Tenn. 1992) (holding that an individual’s interest in destroying embryos
created during marriage outweighed the former spouse’s interest in donating the embryos to a
third party).
202 Although eligibility to receive these benefits depends on one’s status as an heir, the
benefits are available whether the decedent had a will or died intestate. See, e.g., 20 C.F.R.
§ 404.355(b)(1) (2011). Thus, even if a decedent had a will that covered all of her property
and clearly stated her intentions regarding posthumously conceived children, this issue still
may apply.
203 In the other three Social Security cases, the facts “fit” squarely within the state statutes
and the issue was easily resolved. In Schafer v. Astrue, 641 F.3d 49, 52, 55–56 (4th Cir.
2011), the court held that the child was not an heir under the Virginia statute previously dis-
cussed because the child was born more than ten months after the decedent’s death. The court
also addressed in further detail the interpretation of the Social Security Act continued, but it
quickly resolved whether the child was an “heir” under Virginia law. Id. In Vernoff v. Astrue,
568 F.3d 1102, 1109–11 (9th Cir. 2009), the court applied a prior California statute but also
analyzed the facts under the current California statute previously discussed. In Stephen v.
Comm’r of Social Security, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005), the court held that
Before reviewing the cases, it is important to understand the Social Security provisions at issue and their importance to many individuals. Since 1939, the Social Security Act has provided “survivor benefits” to replace the economic support a family loses after a parental death. Specifically, if a worker is currently or fully insured under the Social Security Act at the worker’s death, each of the worker’s children who was dependent on that worker at the worker’s death may receive monthly benefits if the child is not married and (1) is under eighteen years of age, (2) is under nineteen years of age and in high school, or (3) is under a disability the child attained before age twenty-two. In addition, if the worker’s spouse provides primary care for an eligible child, the spouse may also receive monthly benefits until that child reaches age sixteen or is no longer disabled. The amount payable to a survivor equals 75% of the decedent’s primary insurance amount, which is the monthly benefit amount that would have been payable to the worker upon initial entitlement at full retirement age. However, a family maximum provision limits the total benefits to a family to between 150% and 188% of the worker’s primary insurance amount.

This can be a great benefit to a family. In 2010, the average monthly award to an eligible child was $750 ($9,000 annually). Thus, for an “average” family with one child, the annual survivor benefits to the child and surviving spouse would total $18,840. Over eighteen years, these benefits would total $306,000. For a high-earning family,
or a family with multiple children, the benefit can be even greater. For instance, if a thirty year-old worker had paid the maximum Social Security tax since age twenty-one, then died in 2011, the worker’s spouse and dependent children each would receive $1,902 monthly ($22,824 annually), subject to a $4,440 monthly family maximum ($53,287 annually). Over eighteen years, these benefits could total over $900,000. In either scenario, if children conceived years after the worker’s death qualify, the benefits could extend well beyond eighteen years.

With this background, should posthumously conceived children receive survivor benefits? In other words, does the Social Security Act deem them (1) to be children of the worker (2) who were dependent on the worker at his death? To answer the first question, one must look to the intestacy laws of the state where the worker resided at his or her death. Section 216(h) of the Social Security Act, titled “Determination of family status,” provides:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual was domiciled at the time of his death . . . .

The Regulations add, “You may be eligible for benefits as the insured’s natural child if . . . [y]ou could inherit the insured’s personal property as his or her natural child under State inheritance laws . . . .” Thus, if the intestacy laws of the state where the worker lived at his death would recognize a posthumously conceived child as an heir, the applicant is considered a “child” of the worker for benefit purposes.

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214 The benefit also would continue past eighteen years if the decedent had an adult child who was disabled prior to age twenty-two. 42 U.S.C. § 402(d)(1)(B) (2006).

215 Id. § 416(e).

216 Id. § 416(h)(2)(A).


218 Technically, heirs are those individuals who would actually receive a share of the decedent’s estate, not those who would have been next in line. For instance, if a man died with a wife and two children, but the statute provided that the decedent’s entire intestate estate shall be distributed to the wife, the children are not heirs—the decedent’s wife is the only heir. Likewise, if a man died with a will that completely disposed of his estate, he would have no heirs. However, the Code of Federal Regulations requires only that the child could have inherited under the applicable state’s intestacy laws if the decedent did not have a will, not that the individual actually inherit. See id. § 404.355(b)(1).
Regarding the dependency element, common sense dictates that a child born after a parent’s death was not dependent on that parent at the time of his or her death. However, the Act deems all “legitimate” children to be dependent on their parents. Further, the Act also deems any child to be “legitimate” who (1) is deemed legitimate under applicable state law or (2) satisfies the intestacy test set out in section 216(h).

Accordingly, if the intestacy laws of the state where the worker lived at his death would recognize a posthumously conceived child as an heir, that worker’s child will be deemed both a “child” of the worker and “dependent” on that worker for purposes of the Act—and the child and the worker’s spouse may receive survivor benefits. If the state’s intestacy laws do not recognize the child as the decedent’s heir, neither the child nor the spouse can receive those benefits. As the following cases illustrate, however, the answer becomes much murkier when courts construe each state’s intestacy laws—most of which were written decades before this issue crossed any legislator’s mind.

1. *Estate of Kolacy* (New Jersey Law)

In 2000, the New Jersey Superior Court became the first court to publish an opinion that addressed whether a posthumously conceived child may inherit from the deceased parent. The court construed the New Jersey probate code, which mirrored the 1969 UPC, and held that it did not apply because the legislature did not intend for it to cover posthumously conceived children. Rather, the court established its own guidelines under which such children could inherit.

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220 See id.; see also Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004) (“Legitimacy in § 402(d)(3) is determined in accordance with state law.”).

221 42 U.S.C. § 402(d)(3) (citing § 416(h)(3)); see also Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009).

222 If a child does not qualify in this way, the Social Security Administration will also recognize a child as the worker’s child under other methods, including if the worker “had acknowledged in writing that the applicant is his or her son or daughter . . . .” 42 U.S.C. § 416(h)(3)(C)(i)(I). The Social Security Administration’s position is that a child must meet one of the tests in 42 U.S.C. § 416(h). The Third and Ninth Circuits, however, have ruled otherwise. See Capato v. Comm’r of Soc. Sec., 631 F.3d 626 (3rd Cir. 2011); Gillett-Netting, 371 F.3d at 599; see also discussion infra note 282.

223 In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). The issue came before the United States District Court for the Eastern District of Louisiana in 1996. But before the court ruled, the Social Security Commissioner agreed to pay survivor benefits, which made the issue moot, and noted, “’Recent advances in modern medical practice, particularly in the field of reproductive medicine, . . . should involve the executive and legislative branches, rather than the courts.’” Banks, supra note 121, at 256 (quoting News Release from Shirley S. Chater, Comm’r of Soc. Sec. at 1 (Mar. 11, 1996)).

224 Kolacy, 753 A.2d at 1261, 1264.
In *Estate of Kolacy*, a husband had deposited sperm with a sperm bank before he started unsuccessful chemotherapy treatments.\(^{225}\) One year after his death at age twenty-six, his wife used his sperm for IVF and became pregnant.\(^{226}\) Seven months later—nineteen months after her husband died—she gave birth to twin girls.\(^{227}\) The Social Security Administration denied her application for survivor benefits for her daughters on the basis that they were not children of the deceased worker.\(^{228}\) As the case worked its way through the Administration’s appeal process, the wife petitioned the New Jersey Superior Court for a declaration that her daughters were heirs under New Jersey law.\(^{229}\)

New Jersey’s probate code included the following afterborn-heirs provision from the 1969 UPC: “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”\(^{230}\) Because the children were conceived after their father’s death, the children did not fall within the statute’s afterborn-heirs exception.\(^{231}\) Nonetheless, the judge made his own exception. He explained that when the legislature adopted that statute, “it was not giving any thought whatsoever to the kind of problem . . . in this case.”\(^{232}\) The judge added, “It is my view that the general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us.”\(^{233}\) Rather, the legislature had otherwise “manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death.”\(^{234}\)

\(^{225}\) *Id.* at 1258.

\(^{226}\) *Id.* The opinion does not indicate whether the husband consented to the post-death use of his sperm.

\(^{227}\) *Id.*

\(^{228}\) *Id.* at 1259.

\(^{229}\) *Id.* The court strained a bit to accept this case, and it seems the court wanted this opportunity to speak on the matter. The court agreed to hear the matter despite the objection of New Jersey’s Deputy Attorney General and despite that its decision would not bind the Administration or a later federal court. *Id.* The court noted that it was not determining whether the twins were entitled to Social Security benefits, which a federal court could later determine, but simply whether the daughters were heirs under New Jersey law. *Id.* at 1260. The court added that “it would clearly be unfortunate for those federal adjudicatory processes to reach a result based in part upon an incorrect determination by federal tribunals of New Jersey law.” *Id.* at 1259.

\(^{230}\) *Id.* at 1260 (quoting N.J. STAT. ANN. § 3B:5-8). In 2004, the legislature amended the statute to make it consistent with the 1990 version of the Uniform Probate Code. 2004 N.J. Laws 1442 (effective Feb. 27, 2005). It now reads, “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” N.J. STAT. ANN. § 3B:5-8 (West, Westlaw through L. 2011, ch. 124 and J.R. No. 7).

\(^{231}\) See *Kolacy*, 753 A.2d at 1262 (noting that the court would not adopt a restrictive, literal reading of the statute).

\(^{232}\) *Id.* at 1261.

\(^{233}\) *Id.* at 1262.

\(^{234}\) *Id.*
Accordingly, the judge established that posthumously conceived children should be granted “the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.” Because the husband had died with no other children and no probate assets, the court noted that granting heir status would violate neither of these caveats in this case. Therefore, the judge concluded, “I believe it is entirely fitting to recognize that [the twins] are the legal heirs of William Kolacy under the intestate laws of New Jersey.”

This court’s approach to the issue is commendable. Rather than forcing the issue into a statute that was never intended to cover the situation, the court addressed the issue head-on and created a working rule. There is no question that the judge made law here, and he acknowledged that he was doing so, stating, “[I]t would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into the courts seeking redress for present problems.” The judge added, “We judges cannot simply put those problems on hold in the hope that someday (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available.” Notably, over ten years later, the New Jersey legislature still has not addressed the issue.

Furthermore, the court was honest about its reasoning and motivations. After first expressing reservations about encouraging “parents to move precipitously in this area,” the judge added that “once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity[,] and legal protection which that status requires.” Accordingly, the judge concluded, “It seems to me that a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons.”

235 Id.
236 Id.
237 Id. at 1264.
238 Id. at 1261.
239 Id. at 1261–62.
240 Although the legislature amended the statute in 2004 (to make it consistent with the 1990 version of the Uniform Probate Code, see 2004 N.J. Laws 1442 (effective Feb. 27, 2005)), the legislature did not address posthumously conceived children.
241 Kolacy, 753 A.2d at 1263.
242 Id.
While commendable in its honesty, the test established is not ideal. Determining heirship is generally a black-and-white test. This approach introduces a facts-and-circumstances analysis that would require a case-by-case determination. For instance, what if the next couple already has one child and that child would inherit a share but now must wait? Would the delay “unfairly intrude” on that child’s rights or “cause serious problems in the orderly administration of the estate”? If so, is the posthumously conceived child not an heir—and therefore not entitled to survivor benefits (which are independent of the other child’s rights or the administration of the estate)?

Unlike legislatures, however, courts—and particularly trial level courts—are required to rule on the facts before them. They do not have the liberty to establish specific conditions outside of the facts they are presented with. That said, this court could have phrased its holding differently and provided that posthumously conceived children are always heirs of the deceased parent, though in certain circumstances they may be estopped from inheriting. This distinction is important because, in future cases where a posthumously conceived child’s interests may unfairly intrude on another’s inheritance, it would still allow this child, as an heir, to receive Social Security survivor benefits.243

2. Woodward v. Commissioner (Massachusetts Law)

Two years later, a state’s highest court considered for the first time whether a posthumously conceived child may inherit under that state’s intestacy laws.244 As in Kolacy, the Massachusetts’ Supreme Judicial Court also refused to read its state’s statutory language strictly, although in this case the language would have, in fact, allowed the children to inherit.245 Instead, the court also established its own rule that permits posthumously conceived children to inherit in limited circumstances.246

In Woodward v. Commissioner, a husband had his sperm frozen before he began unsuccessful leukemia treatments.247 Two years after he died, his wife gave birth to twin daughters she conceived using his preserved sperm and artificial insemination.248 She then applied for Social Security survivor benefits, was denied, and appealed to the United States

243 See discussion infra Part III.B. The court does suggest that payments made in the routine course of administration before the advent of after-born children could be deemed vested, and those following the birth would be made to both categories of children. Kolacy, 753 A.2d at 1262. While this is a practical approach that responds to this concern, it is only dicta.


245 Id. at 261–63.

246 Id. at 259.

247 Id. at 260.

248 Id.
District Court for the District of Massachusetts. The district court asked the Massachusetts Supreme Judicial Court, by certified question, whether posthumously conceived children may inherit under Massachusetts’ law.

Massachusetts had a statute that, on its face, answered the question directly: “Posthumous children shall be considered as living at the death of their parent.” The court noted, however, that this provision was added to the intestacy statutes in 1836. Furthermore, it codified an 1834 holding that children in utero on the date of their father’s death are deemed “in being” and entitled to inherit. Accordingly, the legislature did not have the present scenario in mind when it adopted that amendment, and the court declined to read the statute literally. Nor was the court willing to hold that the exception was limited to the facts of the earlier case. The court noted that while assisted reproductive technologies have been widely known for several decades, the legislature had not restricted the statute’s broad language in any way.

Instead, the court established a rule under which such children would be deemed “issue” for Massachusetts’ inheritance law in “certain limited circumstances.” Specifically, the child will be granted inheritance rights as the deceased parent’s issue if (1) time limitations do not bar the child’s claim, and (2) the surviving parent (or other representative of the child) can establish three facts: (a) a genetic relationship exists between the child and the decedent, (b) the decedent consented to post-death conception, and (c) the decedent consented to support any resulting child. The court tried to balance the best interests of the children, the

249 Id. at 260–61
250 Id. at 261. The exact question certified was:
If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts’ law of intestate succession?
Id. at 259.
251 Id. at 264 (citing MASS. GEN. LAWS ch. 190, § 8 (1994)).
252 Id.
253 Id. (citing Hall v. Hancock, 15 Mass. 255 (15 Pick. 1934)).
255 Woodward, 760 N.E.2d at 264.
256 Id. at 264–65.
257 Id. at 259.
258 Id. Massachusetts’ probate code requires that, for nonmarital children to be deemed heirs, a paternity action must be commenced and notice given to the executor of that action and all other interested parties, within one year from the decedent’s death. Id. at 267, 271. The court recognized that children conceived after the death of a parent are by definition nonmarital children, but questioned whether this time limitation would apply to posthumously conceived children. Id. at 267–68. The court declined to answer this question, though, be-
reproductive rights of the parents, and all parties’ interests in the orderly and prompt administration of estates. The court did not answer whether the wife in this case had met her burden, but left that to the district court to determine.

As in Kolacy, the court was clear about its approach and motivations. The court urged the legislature to address the issue of posthumously conceived children, noting that:

[T]he complex moral, legal, social, and ethical questions that surround their birth . . . . cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.

The court concluded that “[i]n the absence of statutory directives, we have answered the certified question by identifying and harmonizing the important State interests implicated therein.” Notably, more than eight years later, the Massachusetts legislature still has not addressed the issue.

This approach provides great flexibility for a court but, like the approach set out in Kolacy, provides little guidance or certainty. For instance, it does not state what evidence may be sufficient to establish the decedent’s consent to post-death conception or support, nor does it indicate what length of time may preclude a claim. Rather, it requires that every such situation go before a judge. As noted above (and as the

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259 Id. at 265.
260 Id. at 270–71.
261 Id. at 272.
262 Id.
263 In 2008, an administrative law judge applying Massachusetts law relied on the “limited circumstances” standard set forth in the Woodward decision and granted survivor benefits to a posthumously conceived child and his mother. See Hanson v. Astrue, 733 F. Supp. 2d 214, 215 (D. Mass. 2010). The decedent and his wife had unsuccessfully tried IVF for two years prior to the husband’s unexpected death. Id. Three months after his death, she became pregnant using an embryo they had preserved during the IVF process. Id. In this case, the genetic material included his sperm but an egg from a third-party donor. Id. Following the administrative law judge’s determination, the Social Security Administration Appeals Council reopened the case sua sponte and reversed the decision to grant benefits. Id. at 216. On appeal, the United States District Court for the District of Massachusetts ruled that the Appeals Council exceeded its authority in reopening the case, and the court reinstated the administrative law judge’s decision. Id. at 219. The court, however, did not address the substantive issue of whether the posthumously conceived child and mother were entitled to the benefits. Id. at 215.
264 See Woodward, 760 N.E.2d at 269–70.
265 Id. at 266–67.
court recognized), however, this is probably about the best result a court can come up with given its limited role.\textsuperscript{266}

Woodward marked the end of the road for claimants. In the following string of cases, each court held that statutes similar to those in Woodward and Kolacy expressly excluded posthumously conceived children.


Later in 2002, the United States District Court for the District of Arizona became the first federal court to address this situation in a published opinion.\textsuperscript{267} Unlike the courts in Kolacy and Woodward, this court strictly applied the statutory language to the facts and held that posthumously conceived children may not inherit as heirs under Arizona law.\textsuperscript{268}

In \textit{Gillett-Netting v. Barnhart}, a husband deposited sperm prior to undergoing chemotherapy treatments.\textsuperscript{269} Both his wife and the doctor who assisted the couple stated that the husband agreed that, if he died, his wife could use his sperm after his death.\textsuperscript{270} Ten months after his death, doctors fertilized one or more of her eggs with his sperm by IVF, and she gave birth to twins almost eight months later.\textsuperscript{271} She applied for survivor benefits for the twins, was denied, and appealed to the Arizona federal district court.\textsuperscript{272} The court did not certify the question to the Arizona Supreme Court but analyzed Arizona law itself in a brief discussion.\textsuperscript{273}

Arizona’s probate code was (and still is) based on the 1990 UPC. The court noted that Arizona Statute section 14-2104 requires that all heirs must “survive” the decedent.\textsuperscript{274} The court, citing no authority, construed this survivorship requirement to mean that all heirs “must be in existence at the time of the decedent’s death.”\textsuperscript{275} The court recognized that Arizona Statute section 14-2108 provides an exception for posthumous heirs by stating that “‘[a] child in gestation at a particular time is treated as living at that time if the child lives at least one hundred twenty hours after its birth.’”\textsuperscript{276} However, because the twins were neither in gestation at their father’s death nor born within 120 hours after his death,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{266} See id. at 272.
\item \textsuperscript{267} Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002), rev’d on other grounds, 371 F.3d 593 (9th Cir. 2004). For more information on Gillett-Netting at the Ninth Circuit, see infra note 282.
\item \textsuperscript{268} Gillett-Netting, 231 F. Supp. 2d at 970.
\item \textsuperscript{269} Id. at 963.
\item \textsuperscript{270} Id.
\item \textsuperscript{271} Id.
\item \textsuperscript{272} Id. at 964.
\item \textsuperscript{273} See id. at 966–67.
\item \textsuperscript{274} Id. at 966.
\item \textsuperscript{275} Id. (emphasis added).
\item \textsuperscript{276} Id. (quoting Ariz. Rev. Stat. § 14-2108).
\end{enumerate}
\end{footnotesize}
the court held that “they could not inherit . . . under the plain language of Arizona’s intestacy laws.”

Although the court strictly construed the statute, it ignored—in fact, completely failed to mention—that Arizona’s probate code defines “survive.” The statute provides that a person survives if that person “has neither predeceased an event, including the death of another person, nor is deemed to have predeceased an event under section 14-2104 or 14-2702.” If read literally, this would include a posthumously conceived child, who certainly could not predecease the decedent or any other event in the sections cited. Similarly, the court noted that Arizona Statute section 14-2108 “specifically states that a child must at least be ‘in gestation’ at the time of decedent’s death.” It does not. It simply recognizes that children in gestation at the death of the decedent may inherit—not that the child “must at least be in gestation.” To reach this result, the court strictly construed one section of the statute, ignored one section altogether, and then misstated another.

Finally, the court distinguished its case from Woodward because the Massachusetts legislature (1) used “posthumous children” rather than “in gestation,” and (2) could not have considered this issue when it approved the language in 1836. However, what else could the Massachusetts legislature have been considering in 1836 if not children in gestation? Cryopreservation was still more than a hundred years in the future. Further, the court does not cite any evidence that the Arizona legislature considered this issue when it passed its statute containing this language.

I am not arguing that the court’s decision was right or wrong. Nor am I arguing that the court had a responsibility to create an inheritance right as the courts in Kolacy and Woodward did. What is troubling, however, is that the judge seems to have decided the case on unexpressed moral, public policy, or other grounds, then selectively—and awkwardly—worked backward through the statute to justify the result. This concern applies in any state that has not addressed these issues through its legislature. Although this case is instructive, the decision was reversed on other grounds and was not made by an Arizona state court, and thus did not establish Arizona law. Accordingly, it remains unclear

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277 Id.
279 Gillett-Netting, 231 F. Supp. 2d at 968 (emphasis added).
281 Gillett-Netting, 231 F. Supp. 2d at 968.
282 Even if it were not reversed, a federal court’s decision on a state law issue is not binding on an Arizona court. In its opinion reversing this decision, the Ninth Circuit did not address whether the children were “heirs” under Arizona law. Rather, the Ninth Circuit held that under the plain language of the Social Security Act, all biological children of a decedent are “children” if there is no dispute that the decedent is the biological parent of the child,
today what interests, if any, posthumously conceived children may have under Arizona law.

4. Finley v. Astrue (Arkansas Law)

In 2008, the Arkansas Supreme Court became the first state court to deny heirship status to posthumously conceived children.\textsuperscript{283} The court construed language almost identical to that in Kolacy, but it reached the opposite result. As in Gillett-Netting, this court too seemed to reach its decision on unstated policy grounds, then applied the statutes selectively to support its decision.

In Finley v. Astrue, a young couple produced ten embryos through IVF, and the husband died in an accident shortly thereafter.\textsuperscript{284} Eleven months after his death, the wife had two of the embryos transferred to her uterus, and she gave birth to a daughter nine months later.\textsuperscript{285} She applied for dependent benefits, was denied, and appealed to the United States District Court for the Eastern District of Arkansas.\textsuperscript{286} The district court

which there rarely will be with posthumous conception. Gillett-Netting v. Barnhart, 371 F.3d 593, 596–97 (9th Cir. 2004). The court explained that a state’s intestacy laws are relevant only if there is a dispute regarding the parentage of the decedent, at which point a state’s intestacy laws are one of several options under 42 U.S.C. § 416(h) a claimant has for proving the child was dependent on the decedent. \textit{Id.} at 597. Finally, the court held that because Arizona Revised Statutes section 8-601 provides that “[e]very child is the legitimate child of its natural parents,” and 42 U.S.C. § 402(d)(3) deems all legitimate children to have been dependent on their parents, the children satisfy the dependency element as well. \textit{Id.} at 598–99. Because the Ninth Circuit’s opinion and reasoning address a technical interpretation of the Social Security Act independent of Arizona’s intestacy statutes, \textit{id.} at 599 n.8, that discussion is not directly relevant to the scope of this Article. The Social Security Administration disagreed with the reasoning and holding in \textit{Gillett-Netting}, and its interpretation remains that a child is only a “child” under § 402(e) if the child can demonstrate a connection to the insured under § 416(h)(2)—which includes the intestacy requirement. \textit{See Vernoff v. Astrue}, 568 F.3d 1102, 1106 (9th Cir. 2009); 42 U.S.C. §§ 402(e), 416(h)(2) (2006). Nonetheless, the Social Security Administration has acquiesced to the extent that cases are brought in the Ninth Circuit. SSAR 05-1(9), 70 Fed. Reg. 55,656–57 (Sept. 22, 2005); \textit{see also Vernoff}, 568 F.3d at 1105.

In early 2011, the Third Circuit reached the same conclusion as the Ninth Circuit by holding that where parentage is undisputed, it is unnecessary to look to state intestacy laws to determine whether a child is a “child” of the worker under the Social Security Act. \textit{Capato ex rel. B.N.C. v. Comm’r of Soc. Sec.}, 631 F.3d 626, 629–30 (3d Cir. 2011), \textit{petition for cert. filed}, 2011 WL 3511023 (U.S. Aug. 8, 2011) (No. 11-159). Most recently, however, both the Fourth Circuit and the Eighth Circuit reached the opposite conclusion and held that § 416(h)(2) provides the “exclusive means by which an applicant can establish ‘child’ status under § 416(e) as a natural child.” \textit{Beeler v. Astrue}, 651 F.3d 954, 960 (8th Cir. 2011) (reversing the district court which had followed \textit{Gillett-Netting}); \textit{see also Schafer v. Astrue}, 641 F.3d 49, 63 (4th Cir. 2011) (2–1 decision). In light of the clear split of authority on this issue, it is likely that either the United States Supreme Court or the Social Security Administration itself may address the issue shortly.


\textsuperscript{284} \textit{Id.} at 850.

\textsuperscript{285} \textit{Id.} at 850–51.

\textsuperscript{286} \textit{Id.} at 851. The wife also brought a claim for worker’s compensation benefits for the child under Arkansas Code Annotated section 11-9-527(c) (2002). Finley v. Farm Cat, Inc.,
certified the following question to the Arkansas Supreme Court: “Does a child, who was created as an embryo through *in vitro* fertilization during his parents’ marriage, but implanted into his mother’s womb after the death of his father, inherit from the father under Arkansas intestacy law as a surviving child?”

Arkansas’s intestacy statute is not based on the UPC, but it includes an almost identical afterborn-heirs provision that reads: “Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.” The court first concluded that it is “clear” from the plain language of the statute that a child must be conceived prior to her parent’s death to inherit through intestate succession. Having “resolved” this issue, the court turned to the definition of conception, which the statute left undefined. The wife relied on a medical dictionary that defined conception as the moment that the egg is fertilized. The Commissioner responded that this could not have been the legislature’s intent; rather, it must have intended “conceived” to mean become pregnant. Both parties cited public policy to support their respective interpretations.

The court sidestepped this thorny question altogether, however, and stated that it need not define the term because “we can definitively say that the General Assembly, in enacting . . . Ark. Code Ann. § 28-9-210, did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father’s death, to inherit under intestate succession.” The court reasoned, “Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of in vitro fertilization was developed.”

288 S.W.3d 685, 687 (Ark. Ct. App. 2008). Like the Social Security Act, this statute requires that the applicant be a child of the worker who was “wholly and actually dependent” on the worker at the worker’s death. *Id.* at 688. The statute does not, however, look to the state’s intestacy laws to determine whether a child is the worker’s “child.” The court declined to define child but held that the child was not dependent on the worker at the time of the worker’s death. *Id.* at 689. The court rejected the applicant’s creative argument that by paying storage fees to keep the frozen embryos viable, the worker was in essence “providing shelter” for the embryos and they were dependent on the worker. *Id.*

287 *Finley*, 270 S.W.3d at 850. The United States District Court for the District of Massachusetts faced this scenario—pre-death conception, post-death implantation—just last year, but the court resolved the case on procedural grounds. See *Hanson v. Astrue*, 733 F. Supp. 2d 214, 219 (D. Mass. 2010).


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

290 *Id.* at 851.

291 *Id.*

292 *Id.* at 851–52.

293 *Id.* at 853.

294 *Id.*
ture did not consider the possibility of such children, it intended to treat them differently.

The court also addressed a provision that provided, “‘Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession.’”295 The court determined that this section was irrelevant for two reasons. First, the court noted that the statute addresses the legitimacy of a child.296 Although it does, it does so expressly “for all purposes of intestate succession.”297 Second, the court noted that the statute only addressed children born through artificial insemination, a “completely different procedure[ ]” than in vitro fertilization.298 Technically, the procedures are different. But as the court had explained just two paragraphs earlier, the legislature drafted the statute “well before” in vitro fertilization existed.299 Thus, the legislature was not drawing a distinction between procedures but was simply addressing the assisted reproductive technology as it then existed—and extending rights to children born from that technology.

The court closed by excusing itself from any responsibility for the effect of its decision:

Our role is not to create the law, but to interpret the law and to give effect to the legislature’s intent. In vitro fertilization and other methods of assisted reproduction are new technologies that have created new legal issues not addressed by already-existing law . . . . With this in mind, we strongly encourage the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve.300

The difference in reasoning between the Supreme Court of Arkansas in Finley and the Superior Court of New Jersey in Kolacy, while construing essentially identical language, is telling. The Arkansas court stated:

Were we to define the term “conceive,” we would be making a determination that would implicate many public policy concerns . . . . That is not our role. The determination of public policy lies almost exclusively with

295 Id. at 854 (quoting Ark. Code Ann. § 28-9-209(c) (Repl. 2004)).
296 See id.
297 See id.
298 See id.
299 See id. at 853.
300 Id. at 854–55 (internal citations omitted).
the legislature, and we will not interfere with that determination in the absence of palpable errors.\cite{301}

Alternatively, the New Jersey court recognized, “It would undoubtedly be useful for the Legislature to deal consciously and in a well-informed way with at least some of the issues presented by reproductive technology . . . . In the meanwhile, life goes on, and people come into the courts seeking redress for present problems.”\cite{302} The New Jersey court then concluded, “We judges cannot simply put those problems on hold in the hope that someday (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law which is presently available.”\cite{303}

Both courts, of course, are establishing policy—they have charted the law in their respective states regarding this issue until the legislature takes it up. One court, however, was forthright in its approach; the other hid behind the legislative process.

5. **Khabbaz v. Commissioner** (New Hampshire Law)

In 2007 the Supreme Court of New Hampshire considered whether “a child conceived after her father’s death via artificial insemination [is] eligible to inherit from her father as his surviving issue under New Hampshire intestacy law . . . .”\cite{304} This court, too, held that posthumously conceived children may not inherit.\cite{305}

In **Khabbaz ex rel. Eng v. Commissioner, Social Security Administration**, a young couple banked the husband’s sperm after he was diagnosed with a terminal condition.\cite{306} The husband signed a written consent stating that the wife could use his sperm “to achieve a pregnancy” and that he “desire[d] and inten[ded] to be legally recognized as the father of the child to the fullest extent allowable by law.”\cite{307} Two years after his death, his wife gave birth to their daughter.\cite{308}

New Hampshire is one of three states without an express posthumous-heirs provision in its probate code.\cite{309} Rather, the New Hampshire code simply provides that “surviving issue” shall inherit a share of the estate.\cite{310} The court focused on the “surviving” requirement and adopted

\begin{itemize}
\item[301] *Id.* at 855.
\item[303] *Id.* at 1261–62.
\item[305] *See id.* at 1186.
\item[306] *Id.* at 1182.
\item[307] *Id.*
\item[308] *Id.*
\item[309] *See id.* at 1183 (quoting N.H. Rev. Stat. Ann. § 561:1 (2007)); *see also supra* note 146 and accompanying text (noting that the other two states are Mississippi and Nevada).
the Webster’s dictionary definition for “surviving,” which is “remaining alive or in existence.”311 Because a posthumously conceived child is neither remaining alive nor in existence at the decedent’s death, the court held that the statute does not include posthumously conceived children.312 Notably, the court’s reasoning leaves open whether a child conceived prior to a parent’s death through IVF, but implanted after the death of a parent, is “in existence” and, thus, “surviving” under the statute.

As in Finley, the court claimed that its hands were bound by its limited role in shaping policy. The applicant asked the court to adopt a Woodward-type approach, but the court responded:

[T]he intestacy statute . . . essentially leaves an entire class of . . . children unprotected. However, the present statute requires that result. To reach the opposite result and adopt the reasoning of Woodward would require us to add words to a statute. We reserve such matters of public policy for the legislature.313

A concurring judge added, “I . . . respectfully urge the legislature to examine, within the context of the state’s intestacy statute, the confluence of new, ever-expanding birth technologies and the seemingly arcane language and presumptions attendant to the settlement of decedents’ estates.”314 As in Arkansas, Massachusetts, and New Jersey, the New Hampshire legislature has ignored this appeal.315

6. **Beeler v. Astrue (Iowa Law)**

Most recently, the United States Court of Appeals for the Eighth Circuit addressed the issue under Iowa law.316 Iowa’s afterborn-heirs provision was based on the Model Probate Code’s “begotten before [the intestate’s] death but born thereafter” language.317 In Beeler v. Astrue, a married couple had the husband’s sperm frozen before he started treatment for leukemia.318 The man, in writing, authorized his wife to use his sperm after his death and stated that he intended to support any child.319 With little discussion, the court held that because the child was not con-

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311 Id. at 1183–84 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2303 (unabridged ed. 2002)).
312 Id. at 1184.
313 Id. at 1186 (internal citations omitted).
314 Id. at 1187 (Broderick, C.J., concurring specially).
315 See infra Table 1.
316 Beeler v. Astrue, 651 F.3d 954 (8th Cir. 2011).
317 MODEL PROBATE CODE § 25 (1946); IOWA CODE ANN. § 633.220 (West, Westlaw through 2011 Reg. Sess.).
318 Beeler, 651 F.3d at 954.
319 Id.
ceived until a year after the decedent’s death, the child was not “begotten” before his death, as required by the plain language of the statute.\textsuperscript{320} The court did not address, however, whether the result may have been different had the couple instead used IVF and preserved one or more embryos before the decedent’s death. In any event, the Iowa legislature amended the statute while the case was pending and now specifically recognizes posthumously conceived children in limited circumstances.\textsuperscript{321} However, this opinion may still be instructive for courts in the four states that still have the Model Probate Code language as their afterborn-heirs provision.\textsuperscript{322}

7. \textit{In re Martin B.} (New York Law)

The New York Surrogate’s Court is the only court to issue a published decision regarding posthumous conception outside of the Social Security context.\textsuperscript{323} In 2007, the court held that a posthumously conceived child may share in a class gift for “issue” under an existing trust agreement,\textsuperscript{324} notwithstanding that New York law expressly precludes posthumously conceived children from sharing in their deceased parent’s probate estate.\textsuperscript{325}

In \textit{In re Martin B.}, a grantor had created seven irrevocable trust agreements in 1969.\textsuperscript{326} The agreements (1) authorized the trustee to distribute principal among the grantor’s “issue” and (2) directed the trustee to distribute any assets remaining at the death of the grantor’s wife among the grantor’s issue.\textsuperscript{327} The grantor had two sons, but one, James, died of cancer in 2001 without children.\textsuperscript{328} Before James died, however, he had sperm frozen for his wife’s later use.\textsuperscript{329} Three years after his death, his wife had a child she conceived using James’s sperm.\textsuperscript{330} Five years after his death, she had a second child by this method.\textsuperscript{331} The
trustees asked the court whether James’s children were “issue” of the grantor under the trust agreements. If so, they would be eligible for distributions; if not, only the grantor’s surviving son and his children would be eligible.

New York had amended its probate statutes in 2006 to clarify that a child must be conceived before a parent’s death to be a pretermitted heir of that parent. The court noted, however, that this statute applied only to wills, not trust agreements, and only to the testator’s children, not the children of third parties. Furthermore, the policies supporting the statutes—efficient estate administration and fairness to the living devisees—are irrelevant in the context of an ongoing trust. Accordingly, the court refused to apply the statute and instead looked to the grantor’s intent. However, the court recognized that the grantor likely had no intent regarding this possibility when he created the trusts in 1969. Therefore, the court adopted its own policy, stating, “[W]here a governing instrument is silent, children born of this new biotechnology with the consent of their parent are entitled to the same rights ‘for all purposes as those of a natural child.’” The court added, “[I]f an individual considers a child to be his or her own, society through its laws should do so as well.” Finally, the court stated, “As can be seen from all of the above, there is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology. Accordingly, copies of this decision are being sent to [the legislature].” Here, too, the legislature has not acted further.

If there is one take-home from these cases, it is this: until a legislature addresses this issue clearly, the approach a court will take is anybody’s best guess. In each of the cases above, the courts were required to construe statutes drafted without consideration of posthumous conception. Though the language in each was essentially identical, the outcomes varied widely. A few courts refused to read the statutes literally and established an exception for posthumously conceived children; the others held that they were constrained to read the statutes literally and excluded the children. The former acknowledged that they were es-

332 See id.
333 See id.
334 See id. at 209 (citing N.Y. EST. POWERS & TRUSTS LAW § 5-3.2).
335 Id. at 209–10.
336 See id.
337 Id. at 211.
338 Id. (quoting In re Estate of Park, 207 N.E.2d 859, 861 (N.Y. 1965)).
339 Id.
340 Id. at 212.
341 See supra Part II.B.
342 See supra text accompanying notes 231–34, 256, and 323–24.
343 See supra text accompanying notes 267, 289, 309–11, and 316–322.
establishing policy; the latter denied this, asserting that only the legislature can do so. These decisions chart the law, though, and in so doing establish the state’s policy on these matters. Unfortunately, this policy is not based on the collective and representative will of the legislature after study, deliberation, and debate; rather, it is based on a particular judge’s (or panel of judges’) personal view regarding these morally complex issues.346 Sometimes the judges are open about this; sometimes they are not. This uncertainty is unnecessary, and it is costly for individuals facing these issues as they seek answers. As each of the above courts has implored, it is time for all legislatures to address this issue in a thoughtful, comprehensive manner.

C. Summary of the Existing Approaches

Thirty-three states, plus the District of Columbia, still have not addressed whether a posthumously conceived child has any interest in the deceased parent’s estate, or whether such a child can be included as a child, issue, heir, descendant, or similar term under a class-gift provision in a will, trust agreement, or other governing instrument. Until these legislatures address the issue, the interests of posthumously conceived children will be determined by a court’s construction of statutory provisions that pre-date the present issue. As shown above, how a particular court will resolve the issue is anyone’s best guess.

Of the seventeen states that have addressed the issue, the states are almost evenly split. Eight states have granted status to posthumously conceived children for probate purposes. Six have done so by statute, and two have done so through the courts—though only one was the state’s highest court, and in the other state, New Jersey, the legislature

344 See supra text accompanying notes 237–38, 260–61, and 338.
345 See supra text accompanying notes 298, 312, and 313.
347 See supra Part II.B.
348 See infra Table 1.
349 See supra Part II.B.
350 See infra Table 1.
subsequently amended the statute at issue. Of the six states that have addressed the issue by statute, only two expressly extend the status to both the probate and class-gift contexts. In the other four states, it is unclear whether, or how, the statutes apply to class gifts.

The other nine states have denied status to posthumously conceived children for probate purposes. Seven have done so by statute and two have done so through the courts. Of these seven states, only three have expressly provided that the exclusion applies in both probate and class-gift contexts. In New York, although the legislature provided that posthumously conceived children have no interest in the probate context, the New York Surrogate’s Court held that such children nonetheless may be considered a decedent’s heirs for class-gift purposes.

In the remaining three states, the statute is silent regarding class gifts, and the distinction remains unresolved.

Notably, in the four court cases that have established the law in their respective jurisdictions, the courts split while construing essentially identical provisions. In each case, though, the court urged its respective legislature to address the issue in a thoughtful, comprehensive way.

None of these legislatures has done so.

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353 See supra Part II.B.1 (New Jersey) and III.B.2 (Massachusetts).
354 These states are Colorado (Colo. Rev. Stat. § 15-11-120 (Westlaw)) and North Dakota (N.D. Cent. Code § 30.1-04-19 (Westlaw)). See supra Part II.A.1.e.
355 See supra Part II.A.3.b.
357 These states are Arkansas (Finley v. Astrue, 270 S.W.3d 849 (Ark. 2008)) and New Hampshire (Khabbaz ex rel. Eng v. Comm’r, Soc. Sec. Admin., 930 A.2d 1180, 1182 (N.H. 2007)).
360 See supra Part II.A.3.a.
361 See infra Table 1. I have excluded Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002), rev’d 371 F.3d 593 (9th Cir. 2004), because the decision was reversed, and Beeler v. Astrue, 651 F.2d 954 (8th Cir. 2011), because the Iowa statute it interpreted has been amended and now clearly addresses posthumously conceived children. In addition, though I have included Kolacy, its precedential weight at this time is questionable. See infra note 368.
362 See supra Part II.B.
363 See supra Part II.B.
The following table summarizes which states recognize posthumously conceived children for probate purposes, which states do not, for which states the answer remains unclear, and the source of the law in each scenario.

**Table 1: Approaches to Posthumously Conceived Children for Probate Purposes by Jurisdiction**

<table>
<thead>
<tr>
<th>Source</th>
<th>Includes</th>
<th>Excludes</th>
<th>Unclear</th>
<th>Jurisdiction</th>
</tr>
</thead>
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<tr>
<td>1946 MPC</td>
<td>4</td>
<td></td>
<td></td>
<td>Indiana, Maryland, Ohio, Pennsylvania</td>
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<td>1969 UPC</td>
<td>3</td>
<td></td>
<td></td>
<td>Maine, Nebraska, Tennessee Virginia</td>
</tr>
<tr>
<td>1988 USCACA</td>
<td>1</td>
<td></td>
<td></td>
<td>Virginia</td>
</tr>
<tr>
<td>1990 UPC</td>
<td>8</td>
<td></td>
<td></td>
<td>Alaska, Arizona, Hawaii, Michigan, Montana, Vermont, West Virginia, Wisconsin</td>
</tr>
<tr>
<td>2000 UPA</td>
<td>7</td>
<td></td>
<td></td>
<td>Alabama, Delaware, New Mexico, Texas, Utah, Washington, Wyoming</td>
</tr>
<tr>
<td>2008 UPC</td>
<td>2</td>
<td></td>
<td></td>
<td>Colorado, North Dakota</td>
</tr>
<tr>
<td>Other statute</td>
<td>4</td>
<td>6</td>
<td>12</td>
<td>California, Florida, Iowa, Louisiana</td>
</tr>
</tbody>
</table>

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364 See supra Part II.A.1 (statutes), II.B (caselaw).

365 Virginia law excludes posthumously conceived children for both probate and class-gift purposes. See supra Part II.A.1.c.

366 Although the United States District Court for the District of Arizona held that posthumously conceived children are excluded under Arizona law, the decision was reversed on other grounds. Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961 (D. Ariz. 2002), rev’d 371 F.3d 593 (9th Cir. 2004). In addition, its holding does not necessarily reflect the view of the Arizona Supreme Court and would not have been binding on Arizona courts. See supra Part II.B.3.

367 In Minnesota and South Dakota, the exclusion also applies to class gifts. See supra Part II.A.3.a. In Georgia, Idaho, New York, and South Carolina, the statutes do not state whether the exclusion also applies to class gifts. See supra Part II.A.3.a. In New York, however, the Surrogate’s Court has allowed posthumously conceived children to participate in class gifts. See supra Part II.B.6.
### III. A Blueprint for Future Statutes

Judges across the country have urged their respective legislatures to address the issues raised by posthumously conception in a thoughtful, comprehensive manner.\(^\text{369}\) Few, however, have answered the call. And in those states where legislatures have, the approaches have been diverse and the statutes vague and incomplete.\(^\text{370}\)

The following addresses the key issues a legislature should address when drafting such legislation, the benefits and drawbacks of the various options, and the approach I suggest for each issue. Specifically, legislatures first must decide whether to recognize posthumously conceived children for probate purposes, class-gift purposes, both, or neither. If they decide to recognize such children, they must decide what conditions, if any, should apply. These conditions include whether (1) the decedent’s consent should be required, (2) the surviving parent should be required to provide notice of his or her intent to use the decedent’s genetic material, (3) the surviving parent should be required to have the child within a certain period of time, and (4) the parents must have been married at the decedent’s death.

No consensus has emerged as to the best approach.\(^\text{371}\) Some states have chosen not to recognize posthumously conceived children, placing primary importance on the efficient administration of estates.\(^\text{372}\) Others do recognize these children.\(^\text{373}\) Some commentators advocate that the decedent’s intent should govern;\(^\text{374}\) others assert that the children’s best interests should control.\(^\text{375}\) While a uniform approach may be ideal, the

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<table>
<thead>
<tr>
<th>Caselaw</th>
<th>2</th>
<th>2</th>
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<tbody>
<tr>
<td>Includes: Massachusetts (Woodward); New Jersey (Kolacy)(^\text{368})</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Excludes: Arkansas (Finley); New Hampshire (Khabbaz)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>8</td>
<td>9</td>
</tr>
</tbody>
</table>

\(^{368}\) Although the New Jersey Superior Court held that the posthumously conceived children may be heirs under the 1969 UPC, *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000), it was a trial court decision and the New Jersey legislature subsequently revised the statute’s language from that found in the 1969 UPC (“conceived before”) to that in the 1990 UPC (“in gestation”), 2004 N.J. Law 1442 (effective Feb. 27, 2005). Therefore, *Kolacy* likely has little remaining force. *See supra* Part II.B.1.

\(^{369}\) *See supra* Part II.B.

\(^{370}\) *See supra* Part II.A–B.

\(^{371}\) *See supra* Table 1.

\(^{372}\) *See supra* Part II.A–B.

\(^{373}\) *See supra* Table 1.

\(^{374}\) *See Tritt, supra* note 57, at 404–06.

\(^{375}\) *See Nolan, supra* note 7, at 1068.
lack of uniformity is not the greatest problem. Rather, the bigger problem is that in most states, nobody can say whether such children would be recognized or not. The first priority should be for legislatures to adopt a clear approach—whether or not their approach recognizes posthumously conceived children. Only then will citizens be able to act accordingly. The following provides a roadmap for legislatures to follow as they consider these issues.

A. For What Purposes Should Legislatures Recognize A Parent–Child Relationship?

The first question a legislature must answer is whether to recognize a parent–child relationship between a deceased parent and posthumously conceived child for probate purposes, class-gift purposes, both, or neither. In this context, “probate purposes” includes intestacy statutes and pretermitted-heir statutes. Class-gift purposes include designations of heirs, descendants, issue, children, grandchildren, or similar terms under a will, trust agreement, beneficiary designation, or other donative document. For the reasons set out below, I recommend that legislatures recognize posthumously conceived children for both purposes, subject to the conditions discussed in Part III.B.

1. Probate Context

Nine states do not recognize posthumously conceived children for probate purposes, while eight states do (if certain conditions are met). On its face, the “no recognition” approach has four main benefits: it (1) facilitates the efficient administration of estates, (2) is consistent with the traditional rule that all parties must be living or in gestation at the decedent’s death, (3) promotes the traditional two-parent family, and (4) simplifies the preparation of estate tax returns. In application, however, the purported benefits are minimal and are outweighed by the interest in car-

376 See supra Table 1.
377 Importantly, life insurance companies and retirement account custodians are free as a matter of contract law to draft into their customer agreements their own default rules for the distribution of assets they hold. In most cases, these entities will want to limit any delay in the distribution of assets after the death of an insured or plan participant. Therefore, they may adopt a “no recognition” approach for assets they hold. However, if their contracts or plan documents simply refer to state law regarding determination of heirs, they too may be bound by these statutes.
378 See generally supra Part II. Georgia, Idaho, Minnesota, South Carolina, South Dakota, New York, and Virginia have passed statutes excluding posthumously conceived children, while the Arkansas and New Hampshire courts have interpreted existing statutes to exclude them. California, Colorado, Florida, Iowa, Louisiana, and North Dakota have passed statutes recognizing posthumously conceived children for probate purposes, and the Massachusetts Supreme Judicial Court has held that posthumously conceived children may be heirs for probate purposes. The New Jersey Superior Court has held so as well, although the New Jersey’s legislature later amended the statute at issue. See supra Part II.
rying out the decedent’s likely intent and the best interests of the children.

a) Administrative Ease

The primary reason cited for the “no recognition” approach is that it facilitates the orderly and efficient administration of estates, which helps to prevent fraudulent claims and provides finality for the parties receiving assets. This is an appropriate consideration, and probably the strongest argument in favor of excluding posthumously conceived children altogether. However, a legislature can ameliorate these concerns by requiring that certain conditions be met for a posthumously conceived child to inherit, as proposed below in Part III.B. An absolute exclusion of these children—regardless of the decedent’s intent or interests of the parties in the particular case—is unnecessary.

First, fraudulent claims are a minor concern in the context of posthumous conception. The possibility of a fraudulent claim by a child is almost nonexistent in light of today’s genetic testing capabilities, combined with the medical involvement needed to successfully thaw and transfer genetic material. On the other hand, if a legislature requires that the decedent consented to the posthumous use of his or her genetic material, fraudulent claims by the surviving spouse or partner regarding the decedent’s intent are foreseeable. A legislature can address those concerns, though, by creating time limitations or establishing a heightened standard of proof, as discussed below in Part III.B. The legislature need not rely on a blanket denial to protect against this concern.

Second, concerns regarding an heir’s expectation of a prompt administration appear a bit overblown when considering the issue in the context of existing probate practices and statutes, which already allow for extended administrations in many scenarios. To the surprise (and dismay) of many heirs, the distribution of a decedent’s assets is rarely an immediate event. As a general matter, an executor’s primary responsibility is to ensure that the appropriate parties receive their appropriate share

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380 See Nolan, supra note 7, at 1094 (noting that “an outright denial of establishing the parent–child relationship is not justified” simply to provide for the efficient and accurate administration of intestate estates).

381 Id. at 1095; see also Goodwin, supra note 121, at 275.

382 See infra Part III.B.
of the estate, not that they receive that share immediately. This is a process, and sometimes a quite lengthy process. At a minimum, prudent executors wait to distribute any of the decedent’s assets to the heirs until the period for creditors to file claims has expired. In many states, a decedent’s creditors have four months after the executor publishes notice of the decedent’s death to file a claim. While this is a fairly short window, the executor may delay the distribution of assets much longer until all disputed claims are resolved. In addition, other events often delay the distribution of assets beyond the creditor period, such as the payment of income taxes and estate taxes, the liquidation of real estate, the winding up of a business, difficulty in locating heirs, or will contests. Indeed, there are many situations in which an estate administration is appropriately extended until all issues are resolved. The desire to avoid inconveniencing presumptive heirs should not be elevated above the desire to ensure the appropriate parties receive the appropriate share of the estate—particularly when the parties include a decedent’s potential children.

Furthermore, whenever a decedent is married at his death, a significant portion of the estate could be distributed in the “ordinary course” of administration, notwithstanding the potential that a posthumously conceived child may be later born. For instance, assume a married man dies in the state of Minnesota, which has adopted the UPC with some revisions, and that Minnesota recognizes such children for probate purposes.

383 See 31 Am. Jur. 2d Executors and Administrators §§ 1, 915–917 (2002); see also 76 Am. Jur. 2d Trusts § 562 (2005) (“The trustee cannot make a complete distribution until provision has been made for all the expenses, claims, and taxes the trust may be obligated to pay . . . .”).

384 Certain assets that are not a part of the probate estate (either testate or intestate), however, may be distributed promptly. Generally, this would include property held jointly with a right of survivorship and assets with a beneficiary designation, such as life insurance proceeds and retirement account benefits, provided the designation is not in favor of the decedent’s “estate.” However, life insurance companies and retirement account custodians may provide in their contract or plan documents their own “default rules” for the distribution of assets or interpretation of terms.


386 See, e.g., Unif. Probate Code § 3-801.


388 See id. All estates must pay a decedent’s final income taxes for the year of the decedent’s death, and the preparation of the returns may not be completed until the spring of the following year. Further, if an estate must pay state or federal estate tax, the tax is due nine months after the decedent’s death, I.R.C. § 6075(a) (2006), and, in the author’s experience, the estate typically does not receive a closing letter from the state or federal government until six to nine months after that. Prudent executors hold back an appropriate share of the estate until receiving the closing letter.

389 See supra Part II. The result in any particular state would, of course, depend on that state’s specific provisions, and each legislature would have to consider this under their own
poses. The man’s wife would, at a minimum, be entitled to the first $150,000 of his estate, plus one-half of the remaining balance. As in any other administration, the executor could distribute these amounts to the wife after the estate’s debts and expenses are paid. The birth of a posthumously conceived child would not change this result.

Granted, there are situations where a posthumously conceived child would alter the result, and the executor may wish to retain control of the assets until a child is born or the frozen material is destroyed. For instance, in the example in the prior paragraph, a posthumously conceived child would alter the rights of the recipients of the remaining one-half of the husband’s estate if the decedent or his wife had a child from a prior relationship. Likewise, whenever a couple is not married, a posthumously conceived child would always change the result. The estate would be distributed first to the decedent’s children, then parents, then siblings (and so on).

Specific circumstances. In particular, the results may be more complicated in the few community property states, such as California. See Knaplund, supra note 122, at 634. That said, application of Minnesota law provides a useful example for purposes of this Article.

In 2010, Minnesota adopted a provision precluding posthumously conceived children from having any interest in the deceased parent’s estate. Minn. Stat. Ann. § 524.2-120(10) (West, Westlaw through 2011 Reg. Sess.). However, this example demonstrates that to the extent a goal of the legislation was to facilitate the orderly administration of estates, that goal is only marginally met by the outright preclusion.

For simplicity and consistency, these examples refer to the decedent as male and the surviving partner as female, though the gender of each is interchangeable.


Id. § 524.2-103. If neither spouse had children from a prior relationship, the wife would be entitled to the remaining one-half, as well. If either spouse had a child, the remaining one-half of the assets would be distributed in that case to the decedent’s closest heirs (excluding the wife). Id. Thus, if the decedent had no children living at his death, a posthumously conceived child could “divest” the decedent’s parents or siblings of the share they otherwise would have received. If the decedent had a child living at his death, a posthumously conceived child would reduce the portion of the share distributable to that child. Accordingly, the executor in this case would delay distributing this one-half share of the remaining balance.

Id. Non-relatives of a decedent, including a fiancé or fiancée, never inherit through intestacy.

Id. Alternatively, if the unmarried decedent had a child living (or in gestation) at his death, that child would be entitled to the entire estate. See id. If a posthumously conceived child were born, however, that child also would be entitled to a share of the estate. See id. Even here, though, the distribution of assets need not be unduly delayed. Minors generally do not receive assets from an estate outright until they reach eighteen or twenty-one years of age, depending on the jurisdiction. In the meantime, assets are typically held for that child by an
It is certainly true that in these cases, the potential heirs may be inconvenienced by waiting some period of time to determine whether they will receive a share of the decedent’s estate. However, this is no less true than if there were litigated claims, tax disputes, or other issues that currently delay distributions. In fact, if this “waiting period” is reasonably limited, any delay would be both foreseeable and short term—a luxury not always available to the heirs when other claims remain pending. In addition, the potential heirs are not being deprived of a right to those assets. The state has the authority to control the terms of one’s inheritance. The overriding concern should be the decedent’s likely intent and the best interests of his or her children, not the convenience of other potential heirs.

b) The Principles Underlying the Traditional Rule Do Not Apply Here

A second possible benefit of the “no recognition” approach is consistency: the approach does not disturb the traditional rule that all heirs must be living or in gestation at the decedent’s death. A traditional rule should be extended to a new situation, however, only if the principles underlying the rule apply in the new context. That is not the case here.

While the traditional rule ostensibly covers posthumously conceived children, it was not created to do so. The rule has been traced back to ancient Rome, at which time it adequately covered the possible scenarios regarding procreation. Posthumous conception was a scientific impossibility at that time, and it remained so for over one thousand years. Indeed, the first successful pregnancy from cryopreserved sperm was reported just fifty-eight years ago, and the first child who developed from a cryopreserved embryo was born just twenty-five years ago. The reality that the traditional rule responded to has changed dramatically over the past fifty years, and the traditional rule simply was not intended to address the scenarios possible today.

In other instances, probate law has departed from its roots to keep pace with a changing society. Under common law and early statutes,
states refused to recognize a parent–child relationship between nonmarital children and either parent.\(^{402}\) The law considered them \textit{filius nullius}, the child of no one.\(^{403}\) Statutes referred to them as “bastards” or “illegitimate.”\(^{404}\) Over time, however, society’s view toward nonmarital children changed,\(^{405}\) and the legal focus shifted from affecting a moral judgment on the parents\(^{406}\) to protecting the best interests of the innocent children. Accordingly, the law began to recognize a relationship with the child and mother, but not the father.\(^{407}\) Now, most states recognize a parent–child relationship between the child and both biological parents if paternity is established.\(^{408}\) Likewise, early probate statutes presumed that individuals did not intend for an adopted child to inherit through the adoptive parent.\(^{409}\) Now, however, the probate codes in all states recognize a parent–child relationship between an adopted child and the adoptive parents.\(^{410}\)

In both of these examples, the traditional rule was discarded despite that the underlying facts were no different when the rule was established.

\(^{402}\) See Goodwin, supra note 121, at 241.

\(^{403}\) See, e.g., Weber v. Anderson, 269 N.W.2d 892, 894 (Minn. 1978).


\(^{405}\) See generally Monopoli, supra note 112, at 857 (noting that the number of nonmarital children born each year increased from 89,500 in 1940 to over 1.5 million by 2005).

\(^{406}\) See Joseph C. Ayer, Jr., Legitimacy and Marriage, 16 Harv. L. Rev. 22, 37 (1902) (“It was in the interest of morals that the children born of a valid marriage should have privileges denied children born of illicit unions. Parents were to be punished in their children’s disabilities more effectively than in themselves.”). Additional reasons cited for the exclusion of nonmarital children were to promote marriage, discourage promiscuity, and avoid evidentiary problems when determining heirs. See Laurence C. Nolan, “Unwed Parents” and Their Children Before the Supreme Court From Levy to Michael H: Unlikely Participants in Constitutional Jurisprudence, 28 Cap. U. L. Rev. 1, 7 (1999).

\(^{407}\) Id.; see also Goodwin, supra note 121, at 241.

\(^{408}\) See, e.g., Weber, 269 N.W.2d at 895, n.2. For example, section 2-117 of the Uniform Probate Code now states that “a parent–child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.” Unif. Probate Code § 2-117 (amended 2008). This change mirrors the change in parentage statutes. As noted by Mary Patricia Byrn:

By the early 1970s, however, the Conference [of Commissioners on Uniform State Laws] recognized that such treatment of children was becoming scientifically, socially, and legally untenable and took the ‘revolutionary’ step of promulgating an act that identified two legal parents for both marital and nonmarital children. This choice . . . led to similar changes in the parentage laws of every state in the country. Byrn, supra note 15, at 165, 168–69; Banks, supra note 121, at 322–27.

\(^{409}\) See Restatement (First) of Prop. § 287 (1940); see also, e.g., Wielert v. Larson, 404 N.E.2d 1111 (Ill. Ct. App. 1980) (“The undeniable effect of the 1955 amendment to the [Illinois] Probate Act was to transform a presumption against inclusion of adopted children in written instruments into a presumption in favor of such inclusion.”).

than they are today. What changed was simply society’s attitude toward these situations and its concern for the children, who had no say in the matter. With posthumously conceived children, however, the underlying facts have changed—dramatically—since the traditional rule was established. Society’s view toward posthumous conception will undoubtedly evolve as well, and the law may evolve with it. When legislatures draft their initial response, though, the traditional rule should not be their polestar. Rather, legislatures should feel free to address the issue in a fresh and proactive way, unburdened by the traditional rule.

c) Default Rules Do Not Regulate Behavior

A third benefit cited for not recognizing posthumously conceived children is that this practice promotes socially desirable behavior by encouraging individuals to raise children in a home with two parents—a mother and a father.411 This goal, however, will not be furthered by such statutes. Probate rules are default rules that apply only to individuals who have not thought through the inheritance issues.412 Individuals who are aware of and dislike the applicable intestacy provisions are largely free to write their own rules for the distribution of their assets.413 With few exceptions,414 individuals can “opt out” of probate rules simply by executing a will or trust agreement, by making lifetime gifts, or through beneficiary designations and retitling of assets—into joint tenancy with a right of survivorship, for instance.415 By definition then, intestacy provisions apply only to individuals who are either unaware of the law or are aware but agree with the law.416 Thus, default rules are not an effective

411 See, e.g., Wardle, supra note 60, at 442–44. Others may characterize the benefit as discouraging individuals from participating in socially undesirable behavior. See In re Estate of Kolacy, 753 A.2d 1257, 1263 (N.J. Super. Ct. Ch. Div. 2000). However, the United States Supreme Court has “unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents’ misconduct.” Reed v. Campbell, 476 U.S. 852, 854 (1978). The Court noted, however, that it has upheld distinctions based on legitimacy that have a “substantial relation to the State’s interest in providing for the orderly and just distribution of a decedent’s property at death.” Id. at 855.

412 See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS div. I, ch. 2 introductory note (1999); see also Monopoli, supra note 112, at 886–87.

413 See Monopoli, supra note 112, at 887.

414 In most separate property states, the probate statutes grant the decedent’s surviving spouse (and, in some cases, children) a limited interest in the decedent’s estate that the decedent cannot alter. These interests include a homestead allowance, UNIF. PROBATE CODE § 2-402; the right to personal property under a designated value, id. § 2-403; a modest family allowance, id. § 2-404; and an elective share of the decedent’s “augmented” estate, id. §§ 2-201 to 2-214.

415 See Monopoli, supra note 112, at 887.

416 In my experience practicing law, the cause is often due simply to velleity. In any event, individuals may opt out if they feel strongly enough about the result. See id.
way to regulate behavior. Though the legislation may encourage an individual to create a will, it will not discourage him from allowing his spouse or partner to use his genetic material after his death. Indeed, the United States Supreme Court has “expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.”

However, these statutes could provide incentive to a surviving spouse or partner if they created a financial incentive to have a posthumously conceived child. For instance, by having a posthumously conceived child, a surviving spouse may be entitled to receive additional Social Security survivor benefits or, in some states, a larger share of the decedent’s estate. However, these incentives would apply only if the couple was married. For instance, the additional Social Security benefits are available only to a surviving spouse who provides primary care to a child. Likewise, an unmarried partner has no direct interest in the decedent’s intestate estate under any scenario. Rather, if the couple was not married, any financial benefits would flow solely to the child.

Though the surviving parent may benefit indirectly from assets passing to his or her child, the assets would be protected through a conservatorship or a Uniform Transfers to Minors Act account if the amount is sizable.

Furthermore, even in the few cases where a surviving spouse would receive a direct benefit, the financial gain typically would be extremely modest. Intestacy laws, as default rules, apply only to the extent that an individual did not do any formal estate planning. The larger the decedent’s estate, the more likely it seems that the decedent would have done so. Accordingly, though there may be exceptions, these statutes typi-

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417 There are numerous regulations regarding assisted reproduction in other contexts, however, that serve to promote quality of health care, to ensure that individuals undergoing these procedures do so responsibly and safely, and to encourage traditional family structures. See Wardle, supra note 60, at 416–21; cf. Helene S. Shapo, Assisted Reproduction and the Law: Disharmony on a Divisive Social Issue, 100 Nw. U. L. REV. 465, 474–75 (2006) (summarizing statutory approaches to surrogacy arrangements).

418 Trimble v. Gordon, 430 U.S. 762, 769 (1977); see also Monopoli, supra note 112, at 880 n.149 (quoting Trimble). Professor Monopoli adds, “If, as a matter of social policy, the legislature chooses to encourage marriage, it should arguably privilege the spousal relationship rather than impose burdens on the parent–child relationship.” Id. at 880.

419 Cf. 42 U.S.C. § 402(g) (granting Social Security survivor benefits to a decedent’s surviving spouse who provides primary care to an eligible person).

420 See supra Part III.A.1.a.

421 Id.

422 See UNIF. PROBATE CODE §§ 2-101 to -103 (amended 2008).

423 Id. § 2-103.

424 See id. § 3-915; UNIF. TRANSFERS TO MINORS ACT §§ 5–6 (1986).

425 This is particularly so if the decision to freeze gametes was because the decedent had cancer, was serving in active duty, or faced any other life-threatening scenario.
cally will apply to decedents of modest means. Moreover, under many states’ statutes, the surviving spouse is entitled to at least the first $150,000 of the probate estate, plus one-half of any remaining balance (after the payment of any taxes, administration expenses, and statutory allowances). The possible gain to a surviving spouse by having a posthumously conceived child would merely be the final one-half of the remaining balance (and, again, the estate in these scenarios likely would be modest to start with).

It would be the rare case that a person would take on the physical, emotional, and financial commitment of raising a child as a single parent simply for a modest financial gain. Rather, in most cases, the survivor would take on that commitment for much deeper personal reasons—reasons which default rules would not change. While it is possible to create a hypothetical in which the financial incentive may be large enough to persuade the survivor to conceive the decedent’s child, it would be the rare situation in practice. These hypothetical exceptions should be considered, but they should not be elevated above the other appropriate considerations.

d) Estate Tax Issues

A fourth benefit of the “no recognition” rule is that it may, in some cases, simplify the estate tax return process. For instance, assume a decedent’s will provides that her entire estate shall be distributed into a trust for her children or, if she has no children, to a named charity. The decedent’s representative has nine months from the decedent’s death to file an estate tax return and pay any estate tax due. If the estate goes to the charity, no estate tax would be due as a result of the charitable deduction. If the estate goes to a trust for her children, however, there may be a tax due (depending on the size of the estate). Accordingly, if the representative files a return that shows the assets will be distributed to the charity (and thus pays no tax when filing the return), but a posthu-

427 Regarding the incentive created by Social Security survivor benefits, many may believe that, as a matter of policy, posthumously conceived children (and their surviving parent) should not be entitled to receive survivor benefits in any event. In the author’s opinion, however, that is an issue for the Social Security Administration to address and, until it does so, states should not pass laws that would preclude its residents from receiving federal benefits that may otherwise be available to its residents—particularly to its children.
429 Treas. Reg. § 20.6151-1(a) (2011). Although an estate is allowed an automatic six month extension to file the return, id. § 20.6081-1(b), the estimated tax must still be paid at nine months, id. § 20.6151-1(a).
430 I.R.C. § 2055(a).
431 See id. §§ 2053–2058 (providing deductions only for amounts needed to satisfy bequests to a charity or to a surviving spouse, as well as for amounts needed to pay certain debts, expenses, or taxes).
mously conceived child is born two years later, the estate may incur significant underpayment penalties and interest.432

While one can think of a troublesome hypothetical to almost any scenario, this concern too should be minimal. First, if the person has no will, the estate can only pass to individuals. If the individual was married, the spouse will receive a large share of, if not the entire, estate regardless of whether posthumously conceived children are born.433 If the individual was not married, other family members would receive the estate.434 While the identification of the individuals may change if one or more posthumously conceived children are born, the tax effect would not change because there is no deduction for distributions to any individual other than a spouse.435

Accordingly, this concern only applies in the class-gift context. In light of the current $5 million federal estate tax exemption,436 relatively few individuals will have a taxable estate in the first place.437 For those that do, the penalties and interest could be avoided by instead paying the estate tax at nine months as if the decedent has the child, and, if the child is not born, amending the return before the statute of limitations expires (and recovering the tax paid at that point). While this is certainly not ideal, it would solve the problem for those few estates so affected.438

e) Considerations That Support a Recognition Approach

For the reasons set out above, the perceived benefits to a no-recognition approach may sound compelling in theory, but are minimal in ap-

432 See generally id. §§ 6651 (penalties), 6601 (interest). Notably, the statute of limitations for the Internal Revenue Service to assess an estate tax deficiency is three years after the date the return is filed, id. § 6501(a), and this date cannot be extended by agreement of the taxpayer and IRS, see id. § 6501(c)(4)(A). Because the return must be filed either nine months after the decedent’s death, id. § 6075(a), or fifteen months after the decedent’s death if an extension is requested, Treas. Reg. § 20.6081-1(b) (2011), the representative would have time to supplement the return within the Uniform Probate Code’s forty-five month window, UNIF. PROBATE CODE § 2-120(k) (amended 2008). If a child is born after the statute of limitations expired, the representative would have no obligation to supplement the return. However, if the return is a false or fraudulent return with the intent to evade tax, the statute does not apply, I.R.C. § 6501(c)(1). Thus, a representative should clearly note on the return the contingency that a posthumously conceived child could receive a share of the estate.

433 See, e.g., UNIF. PROBATE CODE § 2-103.

434 See, e.g., id. § 2-103.

435 See I.R.C. §§ 2053–2058 (providing no deduction for amounts that pass to any individual other than a surviving spouse).

436 Id. § 2010(c)(3)(A).


438 Legislatures in states with an estate tax and a significantly lower exemption amount, however, should consider whether that state’s estate tax laws merit consideration on this issue.
plication. Furthermore, the approach wholly ignores two additional interests: respect for the decedent’s likely intent and the children’s best interests. Each of these interests is compelling in its own right, and both support an approach that recognizes posthumously conceived children under certain conditions.

Achieving the decedent’s likely intent has long been the hallmark of probate law. Indeed, intestacy statutes represent a legislative attempt to provide citizens a distributive scheme that mirrors the intent of most decedents. While a blanket “no recognition” rule may reflect the intent of some individuals who freeze genetic material, there is no indication that it reflects that of the majority. Rather, the rule unnecessarily proscribes any inquiry into an individual’s intent—even if the intent to provide for the child is undisputed. As discussed in more detail below in Part III.B.1, an approach that conditions the child’s status as an heir on the decedent’s intent to treat the child as his or her own would satisfy this foundational principle of probate law.

Furthermore, the no-recognition rule wholly fails to consider the best interests of the posthumously conceived children. Not only does it preclude them from receiving a share of their deceased parent’s estate, it prevents them from receiving benefits that are independent from the estate itself but which could otherwise be available to them. For instance, these benefits may include Social Security survivor benefits or inheritance through (rather than directly from) the deceased parent. Instead of punishing these children—who of course had no say in the method by which they were created—with a blanket exclusion, the better approach would be to at least leave the door open to these children to share in assets otherwise available to a decedent’s heirs, subject to the conditions discussed below in Part III.B.

2. Class-gift Context

Of the six state legislatures that have granted status to posthumously conceived children, only Colorado’s and North Dakota’s expressly provide that these children may share in class gifts to descendants, heirs,
issue, or the like.444 In these states, which adopted the 2008 UPC amendments, there is no time limit before which the child must be born, unless the class is closing.445 If the class is closing, the child must be conceived within thirty-six months or born within forty-five months of the event that closed the class.446

In California, Iowa, and Louisiana, the statutes grant status to posthumously conceived children in the probate context if, among other requirements, the child is in utero within two years of the decedent’s death (California and Iowa)447 or born within three years of the decedent’s death (Louisiana).448 Although the statutes do not expressly extend this status to the class-gift context, it is likely that a court would do so in these states. It is unclear, however, whether these time limits would apply in the class-gift context.449

In New York, the Surrogate’s Court held that posthumously conceived children may share in a class gift, notwithstanding that the legislature has provided that posthumously conceived children have no interests in the probate context.450 In Florida, the other state that grants status to posthumously conceived children, the statute is silent regarding the interests of posthumously conceived children in class gifts.451

Whether or not states recognize posthumously conceived children for probate purposes, they should do so for class-gift purposes—at least while the applicable class remains open. While a class remains open, the existing members’ interests are always subject to dilution.452 Further, any concerns regarding finality of administration are inapplicable while the trust is ongoing.453 Accordingly, the only “benefit” that may remain

449 In Massachusetts and New Jersey, courts have recognized posthumously conceived heirs for inheritance purposes. See Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002); In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). Although the issue has not come up in the class gift context yet, the courts likely would include such children in class gifts, as well.
452 See id. at 210.
is to discourage certain behaviors. However, as discussed above in Part III.A.1.c, default statutes such as this are unlikely to affect behavior.

Once the class closes, though, many of the same concerns discussed above in the probate context do apply (finality of administration, determination of beneficiaries, etc.). Thus, a state’s class-gift rules should then mirror its probate rules regarding posthumously conceived children. In this regard, the 2008 UPC provides a good starting point—it imposes no time limitations for the birth of posthumous children while the class remains open, but it incorporates the thirty-six or forty-five month rule once the class closes.454 However, the 2008 UPC is flawed on this issue.

The 2008 UPC provides additional time to allow for posthumously conceived children only if the class-closing event is the death of the posthumously conceived child’s parent.455 This limitation is unnecessary and could create inequitable results. For instance, assume a settlor has a son and daughter and creates a trust for the settlor’s issue that terminates at the death of her last surviving child. If the son dies first, any posthumously conceived children of the daughter would be included in the class if born within forty-five months of the daughter’s death because the class would close at her death. However, no posthumously conceived children of the son born after the daughter’s death would be included—even if he dies immediately before the daughter—because the class-closing event is not his death. Alternatively, if the daughter dies first, her posthumously conceived children would not be included after the son’s death, while the son’s would. This arbitrary result could be avoided if, rather than limiting the time extension to the children of the decedent who “closed the class,” the extension applied to all parties once the class closed.

B. Under What Conditions Should Legislatures Recognize A Parent–Child Relationship?

If a legislature decides to recognize a parent–child relationship for probate or class-gift purposes, it must decide what conditions, if any, should apply. These conditions include whether (1) the decedent’s consent should be required, (2) the surviving parent should be required to provide notice of his or her intent to use the decedent’s genetic material, (3) the surviving parent should be required to have the child within a certain period of time, and (4) the parents must have been married at the decedent’s death. The following proposes a new way of adapting such conditions that would further all three key interests: efficient estate administration, the decedent’s intent, and the children’s best interests.

454 See UNIF. PROBATE CODE § 2-705(g)(2) (amended 2008).
455 See id.
1. Consent

The first condition legislatures should consider is whether the decedent must have consented to the posthumous use of his or her genetic material for reproduction. To date, the answer has been a universal “yes.” Each of the six legislatures that have granted status to posthumously conceived children has required the decedent’s consent. Likewise, the Massachusetts Supreme Judicial Court required the decedent’s consent. In New Jersey and New York, courts granted status but did not discuss whether consent should be required. This should be a threshold question—if the decedent did not consent to the posthumous use of her genetic material, the child should not be deemed an heir for probate or class-gift purposes.

Less clear, however, is to what exactly the decedent must consent in these states. Must the decedent have consented generally to the use of his or her genetic material, to the posthumous use of the material, or to support a posthumously conceived child? The California statute states that the decedent must consent that the genetic material may “be used for posthumous conception.” Similarly, the Iowa statute states that the decedent must authorize his or her spouse to use the “genetic material to initiate the posthumous procedure that resulted in the child’s birth.” Massachusetts’s highest court, on the other hand, required that the decedent consent both to the use of his or her genetic material and to support the child. Other states’ statutes are vague regarding the consent required. The Colorado and North Dakota statutes require that the decedent consented to “be treated as a parent.” In Florida, the decedent must have “provided for” the child in the decedent’s will. The statute

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456 See supra Part II.A.3.b.
458 See In re Estate of Kolacy, 753 A.2d 175 (N.J. Super. Ct. Ch. Div. 2000); In re Martin B., 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007). There is a question of whether the use of a decedent’s genetic material without his or her consent may violate a reproductive freedom right—the right not to have children after your death. Knaplund, supra note 13, at 409. That is a separate question from that addressed by this article, though, whether is whether a parent–child relationship will be recognized for probate and class-gift purposes once such a child has been born.
459 CAL. PROB. CODE § 249.5(b) (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 1 of 2011–12 1st Ex. Sess.).
461 Woodward, 760 N.E.2d at 259.
462 The Commissioners explain in their comments to the 2008 Uniform Probate Code (which Colorado and North Dakota adopted) that being “treated as a parent” includes providing economic support. See UNIF. PROBATE CODE § 2-115 cmt. (amended 2008). Accordingly, a court may (or may not) construe this language to require consent to support the child. In the probate context, this would seem to mean an intent for the child to share in the decedent’s estate.
463 See FLA. STAT. ANN. § 742.17(4) (West, Westlaw through ch. 236 of 2011 1st Reg. Sess. of the 22nd Leg.).
does not clarify, however, whether “provid[ing] for” the child means financially supporting or simply acknowledging the child.464

Scholars uniformly support a consent requirement as well,465 but they too disagree on the specific consent that should be required. Some argue that if a person consents to the posthumous use of his or her genetic material, that person should be deemed to have consented to provide support as a matter of law.466 By analogy, if an individual chooses to have sex with another, that individual will be financially responsible for a child conceived from that act, whether or not either individual intended for conception to occur.467 Similarly, “once one consents to having a posthumously conceived child . . . , one’s estate must bear the consequences [imposed by] the applicable intestacy statute.”468 Others argue that the decedent’s intent should always control and consent should not be presumed. Rather, the posthumously conceived child should share in the estate only if the decedent affirmatively consented to support the child after his death.469 For instance, if a decedent had children during his life, he may authorize his wife or partner to use his genetic material to produce another child, but he may intend to share his estate only with the children he knew.470

Notably, a consent requirement of any kind would be a bit of a break from traditional probate law. The decedent’s likely intent regarding whom he or she would want to support has been the overriding con-

464 See id. The American Medical Association’s position regarding the posthumous use of frozen sperm is:

If the donor left no instructions, it is reasonable to allow the remaining partner to use the semen for artificial insemination but not to donate it to someone else. However, the donor should be advised of such a policy at the time of donation and be given an opportunity to override it.

Am. Med. Ass’n Code of Medical Ethics, Opinion 2.04 (updated December 1994). Regarding embryos, the American Medical Association states, “The gamete providers should have an equal say in the use of their pre-embryos and, therefore, the pre-embryos should not be available for use by either provider or changed from their frozen state without the consent of both providers.” Id., Opinion 2.141 (updated June 1994). See also Knaplund, supra note 1, at 96.


466 Ronald Chester, Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance, 33 Hous. L. Rev. 967, 995 (1996) (asserting that an individual should not even be allowed to escape this obligation by intentionally omitting the child in a will); see also Nolan, supra note 7, at 1094.

467 See Monopoli, supra note 112, at 887.


469 See Tritt, supra note 57, at 404–06.

470 Notably, the consent issue may also apply in situations where a spouse or partner uses another’s genetic material while that individual is living but incompetent. For example, this may occur if an individual is in a long-term coma and his or her partner wants to have another child. See Kindregan Jr., supra note 12, at 435. Consent issues also arise with postmortem sperm retrieval. See generally Radford, supra note 93.
sideration when establishing the framework for inheritance.\footnote{See Tritt, supra note 57, at 374, 379–80.} Legislatures would determine to whom most decedent’s would want their property to pass, and this determination then applied to all decedents who died intestate.\footnote{Id.} Apart from a valid will, there is no other instance in probate law when a decedent’s actual intent regarding support supersedes that framework.\footnote{See \textit{Tritt}, supra note 57, at 374, 379–80.} For instance, it may be undisputed that a decedent intended to give his entire estate to his alma mater, his girlfriend, or to only one of his two children. But if the decedent did not “opt out” of the intestacy provisions by creating a valid, properly executed will, his actual intent is irrelevant.\footnote{Id.} The estate will be distributed to his closest heirs as provided by the statutes.\footnote{When a decedent dies testate, courts will consider the decedent’s intent when asked to construe an ambiguous or vague will or trust agreement. \textit{See, e.g., Restatement (Third) of Prop.: Wills & Other Donative Transfers § 10.2 (1999).}} Indeed, if courts had to determine a decedent’s actual intent in every situation, this would place an enormous burden on probate courts and delay in the administration of estates.

Posthumous conception, however, is not a traditional method of procreation, and the traditional approach to intestacy does not fit. At a minimum, legislatures should require proof that the decedent consented to the posthumous use of his or her genetic material. Absent this requirement, the door would be open to the possibility of improper posthumous use of one’s genetic material—for instance, postmortem sperm retrieval. However, regarding consent to support the child, it is more appropriate for the legislature to establish an objective rule that fits the majority of cases. Though I am not aware of objective data regarding this, I believe that the majority of individuals who have invested the “significant time, effort, and expense of assisted reproduction”\footnote{\textit{Kindregan}, Jr. & \textit{McBrien}, supra note 10, at 20.} and have consented to the posthumous use of their genetic material by their spouse or partner would intend to support the resulting child. Thus, an irrebuttable presumption of intent is appropriate. For the minority of decedents who

\footnote{\textit{Gillett-Netting} v. \textit{Barnhart}, 231 F. Supp. 2d 961, 967 (D. Ariz. 2002) (“The law of intestate succession provides for a specific order of distribution of a decedent’s property when no will exists. The intent of the decedent is not a factor.”), rev’d on other grounds, 371 F.3d 593 (9th Cir. 2004). Individuals may also carry out their intent by a combination of other estate planning vehicles, such as revocable and irrevocable trusts, beneficiary designations, and joint ownership of assets. However, any assets that constitute the intestate estate will be distributed according to the intestacy laws, regardless of intent. \textit{See id.} For instance, about half of the states disregard an unwitnessed holographic will, even though it may clearly state the decedent’s intent in her own handwriting. \textit{See, e.g., Wilson} v. \textit{Speer}, 499 N.W.2d 850, 857 and 857 n.1 (Minn. Ct. App. 1993) (noting that about half of the states do not recognize holographic wills, including Minnesota, “despite the fact holographics can be authenticated as a true desire of a deceased’s intentions”).}
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would not wish to support the child they consented to creating, it would be their obligation to provide otherwise in a will.

Finally, whichever consent is required, the statute should state the required burden of proof and who bears it. For instance, the Iowa, Louisiana, and California statutes require that the consent be in writing.477 In Florida, the writing must be a will.478 In Colorado and North Dakota (the two states that have adopted the 2008 UPC), the consent may be in writing or established by clear and convincing evidence.479 However, if the parents were married at the decedent’s death, their consent will be presumed unless proven otherwise by clear and convincing evidence.480 In Massachusetts and New Jersey, the courts did not discuss the required level of proof.481

A clear and convincing burden of proof is appropriate to protect against the possibility of fraudulent claims by surviving partners. However, a writing requirement is problematic because these are default rules.482 If an individual is thinking about these issues, she typically will create a will or otherwise take steps to address them while living. While that is certainly preferred, these statutes, like all intestacy statutes, would not apply to those individuals. Rather, these statutes are intended to apply to individuals who did not take such steps (possibly because they were unaware of the requirements). If a writing is required, a decedent’s clearly expressed but unwritten intent may not be carried out, even if the decedent’s intent is not otherwise disputed. In any event, the key here is that the legislature be clear in its statute regarding (1) whether consent is

481 See In re Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002). Some parentage acts require that consent for posthumous use be recognized by a licensed physician. It is unclear how such parentage statutes may be applied, if at all, in the probate context. See supra Part II.A.1.d.
482 Alternatively, states may require clinics providing assisted reproductive technology to provide forms to patients that ask their intent regarding posthumous use. See Model Act Governing Assisted Reprod. Tech. § 501 (2008). While this would be helpful, it is more of a regulatory approach regarding assisted reproduction in general and is (or should be) separate from probate considerations. In other words, a posthumously conceived child should not be precluded from inheriting if the decedent’s intent can be proven but the clinic fails to provide the required form.
required, (2) what exactly that consent must address, and (3) what level of proof will be required regarding such intent.

Finally, unlike any other approach proposed to date, consent should be the single condition regarding a child’s status as an heir. If the decedent did not consent to the posthumous use of his or her genetic material, the child should not be an heir for probate or class-gift purposes. If the decedent did consent, the child should be deemed an heir. The conditions discussed in the following Parts would then determine whether it would be equitable, in light of the interests of other potential heirs or beneficiaries, for the child to in fact receive assets from a trust or estate.

This distinction is critical. Under the existing approaches, a child is not an heir unless all conditions are met. However, the remaining conditions (notice requirement and time limitation) really are procedural conditions that relate to the efficient administration of the decedent’s estate and the interests other parties have in that estate. This distinction would allow the posthumously conceived child to still receive benefits that are unrelated to the decedent’s estate. For instance, the child, as an heir, may still inherit through the deceased parent at the death of other family members (e.g., from the decedent’s parents, who would be that child’s grandparents). Additionally, the child, as the decedent’s heir, could still receive Social Security survivor benefits.

For example, compare this to Iowa’s statute. There, a child born twenty-three months after the parent’s death would be an “heir” and eligible to inherit from the decedent, to inherit through the decedent, and to receive Social Security survivor benefits. However, a child born at twenty-five months would not be an “heir” and, thus, not entitled to any of these benefits. If, on the other hand, the statute defined both children as heirs, both children would still inherit through their deceased parent and receive survivor benefits.

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483 See supra Part II.
484 Nolan, supra note 7, at 1092.
485 IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.). In Beeler v. Astrue, 651 F.2d 954 (8th Cir. 2011) (discussed supra Part II.B.6), the child was born one week before the second anniversary of the decedent’s death. Under current law, that child would have been an heir. But if she had been born seven days later, she would not have been an heir.
486 IOWA CODE ANN. § 633.220A (Westlaw).
487 Some may disagree with the policy that posthumously conceived children should receive survivor benefits in any event. That, however, is an issue for the Social Security Administration to address. In the meantime, states should not pass laws that would preclude its residents from receiving federal benefits that may otherwise be available to its residents—particularly to its children. See Banks, supra note 121, at 267. For a discussion of the policies underlying the Act, see Banks, supra note 121, at 305–20.
2. Notice

The second condition legislatures should consider is whether (and if so, by when) the surviving spouse or partner must give notice to a fiduciary or custodian holding the decedent’s assets of the survivor’s intent to use the decedent’s genetic material.\textsuperscript{488} Only California’s legislature has established a notice requirement.\textsuperscript{489} Specifically, the person with “control of” the genetic material must notify each person with control over the decedent’s assets that that person intends to use the genetic material.\textsuperscript{490} This notice must be provided no later than four months from the date of the decedent’s death certificate or the date a judgment is entered declaring the decedent’s death.\textsuperscript{491}

The California approach is desirable for three reasons. First, it places responsibility on the surviving spouse or partner to advise the fiduciary. This is particularly appropriate in the context of retirement assets or insurance proceeds, when the custodian may have no personal connection to the decedent and no knowledge of frozen genetic material. However, it certainly could be the case for estate or trust assets, as well, particularly if a corporate fiduciary is involved. Second, even when a custodian or fiduciary has knowledge, there may be many instances when the surviving spouse or partner has no intention of using the decedent’s genetic material after the death. Without this notice requirement, a careful fiduciary would want to obtain some sort of claim waiver, indemnity agreement, or other protection from the surviving spouse or partner before distributing assets. Third, this would protect the other beneficiaries from transferee liability. It would provide a clear method for the surviving parent to protect the future child’s interests, but, if those simple steps are not taken, it would allow the other recipients to use the assets they receive without facing future liability for doing so. Finally, as with creditor claims, the statute should require that the notice provided to the fiduciary be in writing to avoid questions of fact regarding the fiduciary’s knowledge.

As for the time period for this notice, four months, as California has provided, provides enough time for the survivor to overcome the initial shock of his or her partner’s unexpected death, obtain legal advice if

\textsuperscript{488} In this context, “fiduciary” refers to a personal representative of a decedent’s estate or trustee of a trust, whereas “custodian” refers to a life insurance company, retirement account custodian, or other financial institution with custody of assets but limited fiduciary responsibilities.

\textsuperscript{489} The Massachusetts Supreme Court stated that a claim may be brought if “time limitations do not preclude” the claim, but it did not provide any specific time frame or other procedural requirements. Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257, 259 (Mass. 2002).

\textsuperscript{490} \textsc{Cal. Prob. Code} § 249.5(b) (West, Westlaw through ch. 320 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.).

\textsuperscript{491} \textit{Id.}\textunderscore
necessary, and provide notice. The notice need not state that the individual is actively attempting to have the child (which the survivor may not be emotionally prepared to do after just four months), but simply that the survivor has the decedent’s frozen genetic material and may use it in the future. Further, four months coincides with the period that creditors have in many states to file a claim against the estate. Accordingly, if the fiduciary has not received notice after four months, the fiduciary could confidently advise the heirs or devisees of their respective share of the estate and distribute assets without liability.

Unlike California’s statute, however, the failure to provide this notice should not bar a future child from receiving assets. In other words, the child’s status as an heir should not depend on this procedural condition is met—which neither the child nor the decedent has any control over. Rather, the survivor’s failure to provide such notice should simply limit the fiduciary and recipient’s liability for distributions made after the notice period expires without knowledge by the fiduciary of the survivor’s intent to have the decedent’s posthumously conceived child. Unlike a creditor’s claim (which would be barred absent notice within four months), this is not a business deal or third-party interaction. It is a (potential) future child of the decedent—whom the decedent had consented to support. If the fiduciary does not receive notice that the future parent intends to use the genetic material, the fiduciary may distribute the assets without liability after four months. Furthermore, if the fiduciary does receive written notice after this period has expired, the fiduciary then should have a duty to hold all or an appropriate portion of the assets still in the fiduciary’s possession for a longer period of time, as discussed next.

3. Time Limitations

The third condition a legislature should consider is whether the child must be born within a specific period after the deceased parent’s death. For instance, in Iowa the child must be born within two years after the decedent’s death. In California, the child must be “in utero” within two years after the decedent’s death. In Louisiana, the child must be born within three years after the decedent’s death. In Colorado and North Dakota, the child must be in gestation within three years or born within forty-five months after the issuance of the decedent’s

492 See, e.g., UNIF. PROBATE CODE § 3-801 (amended 2008).
494 More specifically, the limit is two years from the date of the death certificate or of a judgment declaring the decedent’s death. CAL. PROB. CODE § 249.5(b) (Westlaw).
495 LA. REV. STAT. ANN. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.).
death certificate.496 The Massachusetts Supreme Judicial Court provided simply that the posthumously conceived child may be an heir if “time limitations [do not] preclude” this result.497 It did not provide any guidance on what length of time, or other factors, may serve as a bar. Neither the Florida legislature nor the New Jersey Superior Court addressed a time limitation.

It is important to establish a limitation period to provide finality to the administration process in those scenarios where a posthumously conceived child could “divest” others of all or a part of their share of the decedent’s estate. Without this, an estate could remain open indefinitely while the executor waits for a posthumously conceived child to be born—an event which may never happen. If a notice requirement is not adopted, this time limitation also helps to protect fiduciaries who may distribute assets while unaware that the decedent left preserved genetic material.

Similar to the notice requirement—and unlike any approaches proposed or enacted to date—the limitation period should relate to liability for distributions, not a child’s ability to receive distributions. Once the time limitation has passed, a later born child, as an heir, should still be entitled to receive a share of any assets that remain in the estate at the time of that child’s birth.498 In the meantime, however, the fiduciary should be entitled to distribute assets to the devisees or beneficiaries as they then stand, and neither the fiduciary nor the recipient shall have any liability to later-born children for doing so.

Importantly, this distinction would provide the fiduciary with discretion to retain the assets (or some portion of the assets) if the fiduciary knows that the surviving spouse or parent is attempting to use the decedent’s genetic material but has not yet achieved a successful pregnancy. The justifications given for a two- or three-year window are that it (1) provides a grieving spouse or partner time to prepare emotionally to have a child after the decedent’s death, (2) allows a period to become pregnant if an initial attempt is not successful, and (3) creates finality by establishing a cut-off date that fiduciaries and other beneficiaries can rely on. While these are appropriate considerations, each can be satisfied without the absolute cut-off. An approach that limits fiduciary and transferee liability after a certain point, but does not close the door completely, still

498 For an alternative view, see Browne C. Lewis, Dead Men Reproducing: Responding to The Existence of Afterdeath Children, 16 GEO. MASON L. REV. 403, 443 (2009) (“A specific time should be stated in order for the child to be conceived. After that time period has expired, the class of the decedent’s heirs should be closed.”).
satisfies each of these goals. But it also allows (though does not require) a fiduciary to leave the door open for those who have tried unsuccessfully, but continue to try, to have the child.

How long, then, should this limitation period be? As noted above, two or three years allows for a period of grieving, one or two attempts to become pregnant, and a fairly efficient estate administration. In addition, any longer period could create some difficulty from an income tax standpoint. All estates and most trusts are taxpayers for income tax purposes during their administration.499 For an estate, this period starts at the decedent’s death and runs through the “period actually required by the administrator or executor to perform the ordinary duties of administration, such as the collection of assets and the payment of debts, taxes, legacies, and bequests . . . .”500 For a trust, this period includes some time after the duration of the trust ends for the trustee to perform its final duties.501 However, if the administration is “unduly prolonged,” the estate or trust will be considered terminated for federal income tax purposes,502 and the gross income, deductions, and credits of the estate or trust are thereafter considered the gross income, deduction, and credits of the persons succeeding to that property.503

Whether an administration has been unduly prolonged is a question of fact, and the Internal Revenue Service (IRS) will not issue advance rulings on this issue.504 Although an administration may be considered complete if the only task left is to distribute assets to ascertained beneficiaries,505 it is not complete while there is ongoing litigation regarding the identity of the beneficiaries.506 The IRS has not addressed this in the context of posthumously conceived children, but a strong argument could be made that retention of assets until the beneficiaries are finally determined is not “unduly prolonging” the administration. If, however, the IRS disagrees, the income from those estate or trust assets could be charged to (and the tax, therefore, paid by) beneficiaries who may never, in fact, receive the assets. Admittedly, however, this result is unlikely.

499 I.R.C. § 641(b) (2006). Although “grantor” trusts are not taxpayers under Internal Revenue Code sections 641–48, the grantor trust status of a revocable trust ceases at the deemed owner’s death.
500 Treas. Reg. § 1.641(b)-3(a) (2011).
501 Id. § 1.641(b)-3(b).
502 Id. § 1-641(b)-3(a) and (b).
503 Id. § 1-641-3(d).
4. Relationship of Parents

The final condition legislatures must consider is whether the decedent must have been married to the surviving party at the time of the decedent’s death. In Iowa and Louisiana, the parties must be married at the decedent’s death in order for the future child to be deemed his heir.\footnote{Iowa Code Ann. § 633.220A (West, Westlaw through 2011 Reg. Sess.) (referring to “surviving spouse”); La. Rev. Stat. Ann. § 9:391.1(A) (West, Westlaw through 2011 1st Extraordinary Sess.) (referring to “surviving spouse”).} This would exclude engaged couples and, in most states, same-sex couples. The 2008 UPC (adopted in Colorado and North Dakota) and the California statute apply regardless of the decedent’s relationship.\footnote{See supra Part II.A.} The Florida statute does not address the parties’ relationship, nor did the Massachusetts Supreme Court or the New Jersey Chancery Court.\footnote{Id.}

The marital status of the parents should not be a requirement in the probate or class-gift context. First, statutes that distinguish between the marital status of a child’s parents may face equal protection challenges. For instance, the United States Supreme Court has struck down, on equal protection grounds, a statute that permitted only marital children to bring a wrongful death claim\footnote{Levy v. Louisiana, 391 U.S. 68 (1968).} and statutes that permitted a nonmarital child to inherit from the child’s father only if the child’s parents had later married.\footnote{Reed v. Campbell, 476 U.S. 852 (1986) (abrogating a Texas statute); Trimble v. Gordon, 430 U.S. 762 (1977) (abrogating a Illinois statute); see also Monopoli, supra note 112, at 860–68 (reviewing United States Supreme Court cases that have addressed equal protection in the context of non-marital children).} Aside from that, however, this decision boils down to whether the legislature’s primary goal is to (1) regulate or incentivize behavior, (2) carry out the decedent’s most likely intent, or (3) protect the best interests of the child. If the first is the goal, a legislature may require that the couple be married. For the reasons noted above,\footnote{See supra Part III.A.1.c.} however, such default rules will not effectively regulate behavior in this context. If the purpose is to carry out the decedent’s intent, it is purely anecdotal whether more married individuals would consent to the posthumous use of their genetic material than would single individuals in a committed relationship. Alternatively, if the goal is protecting the best interests of the child, then the marital status of the decedent should not be relevant. As explained above,\footnote{See supra Part III.A.1.a.} in the majority of cases a surviving spouse is entitled to the entire estate regardless of whether the decedent had children. Thus, if a statute gave interests only to posthumously conceived children whose parents were married, the statute would, in almost every
case, effectively provide no relief to any children—whether their parents were married or not.

C. Additional Drafting Considerations

In addition, legislatures should keep in mind three specific drafting considerations. First, for the reasons detailed in Part II.A.1.d, legislatures should address these issues in probate statutes, not parentage statutes. Second, legislatures should be sure that any rules of construction relating to posthumously conceived children apply to any testamentary or donative document, not just to wills. This is particularly important as more individuals use revocable trust agreements in place of wills and create irrevocable trusts for their families. This would also capture beneficiary designations (to the extent, at least, the custodial institution does not provide otherwise in its plan documents, insurance contracts, or the like). Third, legislatures should give great care to the words they choose. For instance, the term “conceive” may create an ambiguity when applied to assisted reproduction using thawed sperm or eggs (when conception truly occurs after thawing) and IVF (when conception technically occurs before thawing). Legislatures should define what they mean by conceive or, if appropriate, use terms such as “transferred,” “in gestation,” or “in utero.” Likewise, courts have struggled over whether “survive” and “surviving” means that the child had to be alive at the time of the parent’s death or at any time after the parent’s death. Moreover, legislatures should define assisted reproduction broadly to include the various forms available—and that may be available in the future. Finally, legislatures should be specific regarding the genetic material. For instance, Virginia uses “embryo” in its statutes, which could exclude frozen sperm or eggs (or, possibly, even zygotes or pre-embryos) if read strictly.

514 In 2009, trustees of over 2.6 million irrevocable trusts filed income tax returns. See 2009 SOI Tax Stats, supra note 73.
515 Though this of course is always important for legislatures to do, it is particularly easy to choose a word that creates ambiguity in this context given the rapidly changing technology.
516 For instance, the Iowa statute refers to “a child of the intestate conceived and born after the intestate’s death or born as the result of the implantation of an embryo after the death of the intestate.” IOWA CODE ANN. § 633.220A (West, Westlaw through 2011 Reg. Sess.).
518 For instance, the California statute excludes cloned individuals. CAL. PROB. CODE § 249.5(c) (West, Westlaw through ch. 312 of 2011 Reg. Sess. and ch. 11 of 2011–12 1st Ex. Sess.). In addition to cloning, the next frontier of artificial insemination may include artificial wombs, Knapp, supra note 1, at 99, and the creation of artificial sperm from bone marrow. Tritt, supra note 57, at 393 (citing Charles P. Kindregan, Jr., Thinking About the Law of Assisted Reproductive Technologies, 27 WIS. J. FAM. L. 123 (2007)).
CONCLUSION

Almost ten years ago, Chief Justice Margaret Marshall of the Massachusetts Supreme Judicial Court recognized:

As these [artificial reproduction] technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.519

To date, Massachusetts’s legislature has ignored this appeal—as have the majority of legislatures around the country. Instead, they have passed the cost and burden of sorting out these issues to their citizens and courts. The use of both assisted reproduction and cryopreservation will only continue to increase, however, and the issues they create require the attention of legislatures.

Specifically, legislatures should recognize posthumously conceived children as a child of the deceased parent for probate purposes and for class-gift purposes if the decedent consented to the posthumous use of his or her genetic material for reproduction. Denying status in these contexts would neither regulate their parent’s behavior nor, in most cases, create more efficient estate administrations. Recognizing these children, however, would carry out the decedent’s intent, a hallmark of probate law, and protect the best interests of the innocent children by allowing them to qualify, at a minimum, for benefits unrelated to the decedent’s estate (such as Social Security survivor benefits and inheritance through the deceased parent). However, courts should allow fiduciaries or custodians to distribute assets, without liability to themselves or the recipients, if the surviving spouse or partner does not notify them within four months after the decedent’s death of his or her intent to use the deceased’s genetic material. Further, the fiduciary or custodian should be free (but not required) to distribute the assets to the presumptive beneficiaries if the child is not born within a certain period of time after the deceased parent’s death, such as three years. Importantly, though, the failure of the survivor to provide notice or to have the child within this period of time should not affect the child’s status as an heir. Rather, it should just protect the fiduciary, custodian, and existing beneficiaries. A later-born child would still be eligible to receive other benefits as an

“heir” (such as Social Security survivor benefits), to inherit through the decedent, to be a member of a class that remains open after the decedent’s death, and to share in any assets that remain undistributed when the child is born.