

DEAD MEN REPRODUCING:* RESPONDING TO THE EXISTENCE OF AFTERDEATH CHILDREN

*Browne C. Lewis***

INTRODUCTION

On September 11, 2008, the Third District of the California Appellate Court held that Iris Kievernagel could not use her dead husband's sperm to conceive his child.¹ Even after Joseph was killed in a helicopter accident in July 2005, Iris held out hope that she would conceive Joseph's child.² Iris's dream started in a California fertility clinic years before Joseph died.

After ten years of marriage, Joseph and Iris Kievernagel decided to have a child using in vitro fertilization ("IVF"). Consequently, the couple went to the Northern California Fertility Medical Center, Inc.³ The Center arranged for Iris to be inseminated with Joseph's sperm. As a part of the process, the Center froze a sample of Joseph's sperm to use as back-up in case the insemination with the live sperm was unsuccessful.⁴ At that time, the Center required Joseph to sign an IVF Back-up Sperm Storage and Consent Agreement ("Agreement").⁵ Joseph signed the consent form after Iris filled it out. With regard to the disposition of the sperm upon his death, Joseph opted to have the Center discard the frozen sperm instead of authorizing the Center to release it to Iris.⁶

After Joseph's death, Iris petitioned the probate court for an order to require the fertility center to give her the vial containing Joseph's sperm.⁷

* This title was inspired by *DEAD MAN WALKING* (Havoc/Working Title Films), the 1995 movie starring Susan Sarandon and Sean Penn.

** Assistant Professor of Law, Cleveland-Marshall College of Law, Cleveland State University; B.A., Grambling State University; J.D., University of Minnesota School of Law; M.P.A., Hubert Humphrey Institute of Public Affairs; L.L.M., University of Houston College of Law. I would like to give special thanks to Dean Geoffrey Mearns and the faculty of Cleveland-Marshall for the research support provided to assist in the completion of this Article. I would also like to thank the following persons for their research assistance and comments: Marc Silverman, the Research Fellows at the University of Pittsburgh School of Law, Professor Robert Harper, Professor Sandra Jordan, Professor Jennifer Martin, Professor Andrew Moore, and Professor Bonita Gardner.

¹ *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Kievernagel*, 83 Cal. Rptr. 3d at 312.

However, Joseph's parents objected.⁸ They contended that their son never intended to have his sperm used to father a child after his death. Joseph's parents used the signed Agreement to bolster their argument.⁹ Relying upon the Agreement, the probate court concluded that "Joseph's intent was to stop the fertility process upon his death by discarding his frozen sperm."¹⁰

Iris's story is not unique. It is the story of many women who would like to retain some part of the men they love. More women are choosing to conceive babies with the use of their deceased husbands' or significant others' sperm. This practice is becoming common among spouses of men killed in Iraq. For example, an attorney for Kynesha Dhanoolal filed an emergency motion for a temporary restraining order to prevent the military from embalming her husband, Dayne Darren Dhanoolal, before she could have some of his sperm removed.¹¹ Dayne died on March 31, 2008 from injuries he suffered as a result of an explosion in Baghdad. Kynesha plans to be artificially inseminated with Dayne's sperm.¹² In addition, this phenomenon has not been limited to women who want to conceive children using the sperm of dead men. For instance, in 2007, the parents of a dead Israeli soldier successfully petitioned the court for the right to have their son's sperm used to inseminate a woman they chose to carry their grandchild.¹³ The case was unique because the couple's son, Kevin Cohen, was killed by a sniper in Gaza in 2002, and he never knew the woman who would have his child.¹⁴

The cases involving persons seeking the right to use the sperm of dead men to reproduce are increasing. However, the desire to conceive posthumously is not a new occurrence. One of the first cases of a woman seeking to obtain the sperm of a dead man occurred in France in 1984, when Corinne Parpalaix went to court to get custody of her dead husband's sperm.¹⁵ Prior to undergoing chemotherapy to treat testicular cancer, Alain Parpalaix deposited his sperm in a government-operated sperm bank.¹⁶ He

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 313. The district court affirmed the probate court's decision. *Id.* at 318.

¹¹ Pl.'s Mem. of Law in Supp. of Her Emergency Mot. for a TRO at 2, Dhanoolal v. U.S. Dep't of the Army, No. 4:08-CV-42(CDL) (M.D. Ga. Apr. 4, 2008).

¹² *Id.* at 1-2; *see also* WSBT.com, Wife, Mother Declare Truce over Deceased Soldier's Body (Apr. 7, 2008), <http://www.wsbtv.com/news/15810463/detail.html> (last visited Nov. 6, 2008).

¹³ FOXNews.com, Israeli Court Allows Woman to be Inseminated with Dead Soldier's Sperm Without his Written Consent (Jan. 18, 2007), <http://www.foxnews.com/story/0,2933,244404,00.html> (last visited Nov. 6, 2008).

¹⁴ *Id.*

¹⁵ The factual information about this case was taken from a detailed discussion of the case in a groundbreaking article. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 230 (1986).

¹⁶ *Id.* at 229.

did not consent to the future use of his sperm.¹⁷ At the time he made the sperm donation, Alain was not married to Corinne.¹⁸ When Alain's health deteriorated, he married Corinne. He died two days after the marriage.¹⁹ Then, Corinne contacted the sperm bank and asked the bank to release Alain's sperm.²⁰ She intended to be artificially inseminated with Alain's sperm in order to have his child.²¹ After the sperm bank denied her request, Corinne filed a successful court action to get the sperm.²² The French Parliament responded to this case by placing restrictions on posthumous reproduction.²³

A case with similar facts came before a California court in 1993.²⁴ In *Hecht v. Superior Court of Los Angeles County*, Ellen Hecht, the girlfriend of William Kane, wanted to use his sperm to become pregnant after his death.²⁵ Kane and Hecht lived together for several years before his death, but never married.²⁶ In October 1991, Kane deposited fifteen vials of his sperm with a California sperm bank.²⁷ Later that month, Kane committed suicide leaving a will bequeathing his sperm to Hecht.²⁸ In his will, Kane expressed the hope that Hecht would use the sperm to conceive his child.²⁹ Over the objections of Kane's adult children, Hecht got a court order to prevent the destruction of the sperm and to enforce the settlement agreement that permitted her to receive five vials of Kane's sperm.³⁰

After *Hecht*, American courts were confronted with cases involving children who were actually conceived using the sperm of deceased men.³¹ The cases came before the courts because the mothers of the posthumously conceived children wanted them to be awarded Social Security Surviving Children's benefits.³² In each case, the court concluded the child was only eligible for Social Security benefits if he or she were entitled to inherit from

¹⁷ *Id.* at 229-30.

¹⁸ *Id.* at 230.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Shapiro & Sonnenblick, *supra* note 15, at 230.

²² *Id.*

²³ See Nicole Zwart-Hendrix, *Chilling Aspects of Procreation*, 21 MED. & L. 567, 569 (2002) (citing ART. L. 152-2 of the CODE DE LA SANTÉ PUBLIQUE).

²⁴ *Hecht v. Superior Court of Los Angeles County*, 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).

²⁵ *Id.* at 277-78.

²⁶ *Id.* at 276.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 277.

³⁰ *Hecht*, 20 Cal. Rptr. 2d at 278-79, 291.

³¹ See *infra* Part II.

³² *Id.*

the deceased man under the state's intestacy system.³³ Thus, the courts had to review the intestacy laws of the states where the actions were filed. The courts handling those cases expressed a desire to have the state legislatures set forth guidelines to deal with the existence of posthumously conceived children.³⁴

The law has not kept up with the advances in reproductive technology.³⁵ The existence of posthumously conceived children has the potential to significantly impact the distribution of a man's estate.³⁶ If a man dies with a validly executed will leaving his estate to his children, the question becomes whether posthumously conceived children should be included in the definition of "children."³⁷ In the event a man dies without a will, the question to be resolved is whether posthumously conceived children should be considered heirs under the intestacy system.³⁸ The status of posthumously conceived children will also influence the distribution of certain government benefits, including Social Security.³⁹

The portion of the decedent's property not disposed of by will is covered by the intestacy system.⁴⁰ The intestacy system is a default system for the distribution of property after death.⁴¹ In all fifty states and the District of Columbia, intestate succession is governed by a statutory scheme.⁴² Traditionally, regulating the disposal of real and personal property has been the

³³ See Joseph H. Karlin, Comment, "Daddy Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1320-30 (2006) (discussing key cases); see also *Finley v. Astrue*, 372 Ark. 103, 104-06 (2008).

³⁴ See, e.g., *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1189 (N.H. 2007); *In re Martin B.*, 841 N.Y.S.2d 207, 212 (N.Y. Sur. Ct. 2007) ("[T]here 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 respective Chairs of the Judiciary Committee of the New York State Senate and Assembly."). These cases are discussed in detail in Parts II.C-D. See also Christie E. Kirk, *Assisted Reproduction: Children Conceived Posthumously Entitled to Inheritance Rights*, 30 J.L. MED. & ETHICS 109, 110 (2002).

³⁵ See Shapiro & Sonnenblick, *supra* note 15, at 233 (citing E. Donald Shapiro, *New Innovations in Conception and Their Effects upon Our Law and Morality*, 31 N.Y.L. SCH. L. REV. 37, 38-39, 59 (1986) (discussing the law's failure to adapt to changes caused by advances in the use of artificial insemination)).

³⁶ See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 266 (Mass. 2002) ("Any inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent's death.").

³⁷ See Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 615-20 (2004) (discussing reasons posthumously conceived children usually do not fit the definition of "children").

³⁸ Margaret Ward Scott, Comment, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 EMORY L.J. 963, 974 (2003).

³⁹ *Id.* at 975.

⁴⁰ JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 59-60 (7th ed. 2005).

⁴¹ *Id.* at 60.

⁴² *Id.*

domain of the state.⁴³ The fact that the courts recognize a probate exception indicates that states are considered the primary arbiters of probate matters.⁴⁴ As a consequence, the distribution of estates under the intestacy system is governed by state law.⁴⁵

Most states have statutes dealing with the rights of children conceived by artificial insemination.⁴⁶ Not surprising, only a few states have statutes specifically addressing the inheritance rights of artificially produced children who are conceived during the life of their fathers.⁴⁷ Even fewer state legislatures have enacted statutes addressing the issue of the inheritance rights of posthumously conceived children.⁴⁸ Reproductive technology will improve and, as long as the technology exists, people will continue to use it.⁴⁹ Hence, the number of children conceived after the deaths of their fathers and mothers will probably continue to rise.⁵⁰

The comment to Article 7, Section 703 of the Uniform Parentage Act (“UPA”) asserts that “[g]iven the dramatic increase in the use of [artificial insemination] in the United States during the past decade, it is crucial to clarify the parentage of all of the children born as a result of modern sci-

⁴³ See generally Peter Chase, Note, *The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition*, 6 B.U. INT’L L.J. 317, 329-30 (1988).

⁴⁴ Christian J. Grostic, Note, *A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction*, 104 MICH. L. REV. 131, 132 (2005) (“At its core, the probate exception stands for the proposition that federal courts do not have the authority to probate wills or administer estates.”).

⁴⁵ *Id.* at 133.

⁴⁶ See, e.g., ALA. CODE § 26-17-21(a) (2008) (repealed effective Jan. 1, 2009); ALASKA STAT. § 25.20.045 (2008) (“A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses.”); ARK. CODE ANN. § 9-10-201(a) (2008) (“Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman’s husband if the husband consents in writing to the artificial insemination.”).

⁴⁷ See, e.g., GA. CODE ANN. § 53-2-5 (2008) (“An individual conceived by artificial insemination . . . shall be considered a child of the parents and entitled to inherit under the laws of intestacy from the parents and from relatives of the parents, and the parents and relatives of the parents shall likewise be entitled to inherit as heirs from and through such individual.”). *But see* CONN. GEN. STAT. § 45a-777(a) (2008) (“A child born as a result of A.I.D. may inherit the estate of his mother and her consenting spouse or their relatives as though he were the natural child of the mother and consenting spouse and he shall not inherit the estate from his natural father or his relatives.”); F. Barrett Faulkner, *Applying Old Law to New Births: Protecting the Interests of Children Born Through New Reproductive Technology*, 2 J. HIGH TECH. L. 27, 27-28 (2003).

⁴⁸ These statutes are discussed *infra* Part III. See Kayla VanCannon, Note, *Fathering a Child from the Grave: What Are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent?*, 52 DRAKE L. REV. 331, 351-55 (2004) (discussing the limited legislative response to the existence of posthumously conceived children).

⁴⁹ ROBERT BLANK & JANNA C. MERRICK, HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS 93, 228 (Cong. Quarterly, Inc. 1995).

⁵⁰ Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1006 (2002).

ence.”⁵¹ The current law does not achieve that objective with regard to posthumously conceived children. To address the problem, every state should have a comprehensive statute that balances the interests of the decedent and the state while advancing the best interest of posthumously conceived children.

If the child is successfully conceived prior to the death of his or her legal father, the child is considered to be posthumous.⁵² Under the Uniform Probate Code⁵³ (“UPC”) and every state intestacy statute, the posthumously born or afterborn child is entitled to inherit from his or her father to the same extent as children who were alive before the father’s death.⁵⁴ However, the UPC has not taken into account all advances in reproductive technology, and due to certain advancements in medical science, a man’s sperm can now be successfully frozen for up to ten years.⁵⁵ As a consequence, a

⁵¹ UNIF. PARENTAGE ACT § 703 cmt. (Supp. 2008).

⁵² Typically, a “posthumous child suggests one born after the father’s death.” BLACK’S LAW DICTIONARY 255 (8th ed. 2004). *See also* Keystone Masonry Corp. v. Hernandez, 847 A.2d 493, 510 (Md. Ct. Spec. App. 2004) (“A posthumous child is one ‘born after the death of its father.’” (quoting BLACK’S LAW DICTIONARY 233 (7th ed. 1999))).

⁵³ UNIF. PROBATE CODE § 2-108 (revised 1990) (“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.”); *see also* Amy L. Komoroski, Comment, *After Woodward v. Commissioner of Social Services: Where Do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297, 300 (2002); Erica Howard-Potter, *Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law*, 14 BUFF. WOMEN’S L.J. 23, 53 (2005) (citing the Uniform Probate Code as a commonly used model requiring a child to be “in gestation” and survive “one hundred twenty hours after its birth”).

⁵⁴ *See* James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 796 (1998) (“The question of intestate inheritance by a posthumous child is one of statute rather than common law because every state except Louisiana has codified and modified the intestate succession scheme.”). *See, e.g.*, IOWA CODE ANN. § 633.220 (West 2008) (“Heirs of an intestate, begotten before the intestate’s death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate. With this exception, the intestate succession shall be determined by the relationship existing at the time of the death of the intestate.”); ARK. CODE ANN. § 28-9-210(a) (West 2008) (“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.”); IND. CODE ANN. § 29-1-2-6 (West 2008) (“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.”); DEL. CODE ANN. tit. 12, § 505 (2008) (“Posthumous children, born alive, shall be considered as though living at the death of their parent.”); ALA. CODE § 43-8-47 (2008) (“Relative of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”).

⁵⁵ Jamie Rowsell, Note, *Stayin’ Alive: Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400, 401 (2003) (citing Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 270 (1999)); *see also* John A. Gibbons, Comment, *Who’s Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. CONTEMP. HEALTH L. & POL’Y 187, 188 (1997).

child can be conceived many years after his or her father's death. The inheritance rights of these posthumously conceived children are still evolving.⁵⁶

Every state should enact some type of comprehensive legislation that clarifies the inheritance rights of posthumously conceived children. There are several options available to state legislators. One option is for the state to amend its current intestacy statute to include posthumously conceived children in its definition of children for inheritance purposes. Another option is for the state to enact a separate statute setting forth all of the legal rights, including those related to inheriting under the intestacy system, to be afforded to posthumously conceived children.⁵⁷ A final option is for the state to adopt the UPA and modify it as needed to be compatible with its overall intestacy statutory scheme.⁵⁸ This Article discusses the policies that legislatures should consider when evaluating the inheritance rights of posthumously conceived children. In addition, this Article suggests conditions that should be satisfied before posthumously conceived children are permitted to inherit from their fathers.

This Article addresses the inheritance rights of children conceived using the sperm of dead men. Part I briefly discusses the technology that permits a child to be conceived posthumously. Part II analyzes several key cases that have dealt with the inheritance rights of posthumously conceived children. Currently, only eleven states have statutes directly addressing those rights.⁵⁹ Those statutes are discussed in Part III. Finally, Part IV advocates that all states should strive to adopt legislation on the issue of the inheritance rights of posthumously conceived children and examines the components that should be included in such a comprehensive intestacy statute.

⁵⁶ See Karlin, *supra* note 33, at 1352. In order for a child to be conceived using the eggs of a deceased woman, a surrogate must be involved. A discussion of the legal consequences of surrogate and gestational agreements is beyond the scope of this Article.

⁵⁷ This is the approach taken by some other countries. For example, Western Australia adopted The Human Reproductive Technology Act of 1991 to deal with posthumous reproduction. See Reproductive Technology Council, The Human Reproductive Technology Act of 1991, available at <http://www.rtc.org.au/docs/Human%20Reproductive%20Technology%20Act%201991.pdf> (last visited Nov. 8, 2008).

⁵⁸ States have adopted uniform approaches when a situation dictates that action. For example, a majority of states have adopted a portion of the Uniform Probate Code, while eighteen states have adopted it in its entirety. Browne Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Non-marital Children*, 39 U. TOL. L. REV. 1, 3 n.12 (2007); Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional? Why Compliance with State Testamentary Formality Requirements Remains Essential*, 196 MIL. L. REV. 91, 124 (2008). The approach of the Uniform Parentage Act to dealing with inheritance rights of posthumously conceived children has been adopted by seven states and is currently under consideration by two others. Robert M. Harper, *Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children as Decedents' Issue and Descendants*, 21 QUINNIPIAC PROB. L.J. 267, 272-73 (2008).

⁵⁹ Harper, *supra* note 58, at 272.

I. ARTIFICIAL INSEMINATION

Numerous types of reproductive technology are available to help infertile couples achieve their dreams of having children.⁶⁰ One of the oldest and most common forms of assisted reproduction is artificial insemination.⁶¹ Couples widely use artificial insemination because it is the simplest form of assisted reproduction.⁶² The popularity of artificial insemination may also be attributed to the fact that it is affordable and can be safely done without the benefit of medical personnel.⁶³ Artificial insemination involves sperm being placed into a woman's cervix without sexual intercourse.⁶⁴ Although normally performed by a doctor in a medical facility, the procedure is simple enough that some women have artificially inseminated themselves at home using a turkey baster.⁶⁵ The widespread use of artificial insemination may be the reason why most state legislatures that have enacted statutes dealing with assisted reproduction have focused exclusively on artificial insemination.⁶⁶

The two main types of artificial insemination differ based upon the source of the sperm used to inseminate the woman. If the woman's husband contributes the sperm that is implanted, the process is called homologous insemination.⁶⁷ This type of insemination may also be referred to as homologous artificial insemination ("AIH").⁶⁸ Doctors, in a procedure known as heterologous insemination, sometimes use sperm donated by a man who is not the woman's husband to inseminate the woman.⁶⁹ Another source of sperm has become available to women—the dead male body.⁷⁰ State legis-

⁶⁰ Kristin L. Antall, *Who is My Mother?: Why States Should Ban Posthumous Reproduction by Women*, 9 HEALTH MATRIX 203, 206-11 (1999); see also Ellen J. Garside, Comment, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 713-14 (1996).

⁶¹ BLANK & MERRICK, *supra* note 49, at 86-87.

⁶² Cyrene Grothaus-Day, *From Pipette to Cradle, from Immortality to Extinction*, 7 RUTGERS J.L. & RELIGION 2, 2-3 (2005).

⁶³ Audra Elizabeth Laabs, *Lesbian Art*, 19 LAW & INEQ. 65, 81 (2001).

⁶⁴ MARCIA MOBILIA BOUMIL, LAW, ETHICS AND REPRODUCTIVE CHOICE 5 (Fred B. Rothman & Co. 1994).

⁶⁵ Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1069 n.9 (2003) (citing Daniel Wikler & Norma J. Wikler, *Turkey-Baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5, 5 (1991)).

⁶⁶ See Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1102 (1997).

⁶⁷ Cindy L. Steeb, Note, *A Child Conceived after His Father's Death?: Posthumous Reproduction and Inheritance Rights: An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 140 (2000).

⁶⁸ *Id.*

⁶⁹ Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 997 (1996).

⁷⁰ In 1997, the director of the Center for Bioethics at the University of Pennsylvania, Dr. Arthur Caplan, teamed up with several colleagues to conduct a study of fertility clinics to determine if they had

lators have largely ignored the legal repercussions of this new supply of sperm, and thus, the laws surrounding posthumously conceived children remain uncertain.

In deciding how to divide a man's estate when he dies intestate, the probate court has a directive to carry out his presumed intent.⁷¹ The presumption is that, after his spouse has received her share, a reasonable man would want the remainder of his assets divided among his children.⁷² Thus, the probate system favors children.⁷³ The courts and state legislatures have recognized that equity mandates that non-marital children should be able to inherit from their fathers on an equal par with marital children.⁷⁴ However, those bodies must now deal with the existence of a new class of children—children born as the result of artificial insemination using the genetic material of their deceased fathers. Because the law holds that death ends a marriage, it would be reasonable for the law to treat posthumously conceived children as if they are non-marital children.⁷⁵ This would bring clarity to the situation because every state has an intestacy statute specifically dealing with the inheritance rights of non-marital children.⁷⁶ Nonetheless, the courts and legislatures that have tackled the issue have decided not to follow that path.⁷⁷

removed sperm from dead men. The results of the study indicated that the practice of removing and storing the sperm of dead men was becoming more common. Gina Kolata, *Uncertain Area for Doctors: Saving Sperm of Dead Men*, N.Y. TIMES, May 30, 1997, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0DEFDA103AF933A05756C0A961958260>. See also *Should Dead Men's Sperm Be Stored?*, MIAMI HERALD, Jan. 8, 1997, at 1D (discussing cases of widows having sperm extracted from the corpses of their dead husbands); Graham Tibbetts, *Widow Fights for Baby by Dead Husband*, DAILY TELEGRAPH (London), May 20, 2008, at 4 (discussing a forty-two-year-old English woman who went to court to get permission to have a child using the sperm she had extracted from her dead husband), available at <http://www.telegraph.co.uk/news/1988585/Widow-launches-legal-fight-for-child-using-husbands-sperm.html>; Evelyn Harvey, *Widow Fights for Right to Use Late Husband's Sperm to Conceive*, BioNews, May 26, 2008, <http://www.bionews.org.uk/new.lasso?storyid=3848> (discussing case involving Diane Blood, who successfully fought for the right to use her comatose husband's sperm to conceive a child).

⁷¹ Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 651 (2002) (citing LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 37 (3d ed. 2002)); see also Melissa B. Vegter, Note, *The "Art" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate*, 38 VAL. U. L. REV. 267, 299 (2003).

⁷² See Gary, *supra* note 71, at 651-53.

⁷³ Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 920 (1989).

⁷⁴ *Trimble v. Gordon*, 430 U.S. 762, 776 (1977); Lewis, *supra* note 58, at 18.

⁷⁵ Nolan, *supra* note 65, at 1095; see also Mika & Hurst, *supra* note 69, at 1017; Star, *supra* note 37, at 627.

⁷⁶ Lewis, *supra* note 58, at 18-28 (discussing various state statutory schemes).

⁷⁷ See *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1183-84 (N.H. 2007).

II. JUDICIAL APPROACH

Most state legislatures have not enacted statutes that specifically deal with the inheritance rights of posthumously conceived children.⁷⁸ As a result, the courts have been left to resolve the issue on a case-by-case basis. Courts have not yet entertained a non-Social Security case directly dealing with a posthumously conceived child seeking to inherit from his or her deceased parent utilizing the intestacy system.⁷⁹ Nonetheless, the issue of the intestate inheritance rights of posthumously conceived children often comes up in Social Security cases.⁸⁰ Under the Social Security Act,⁸¹ a person can only receive survivor's benefits if he or she is a dependent child of a deceased insured wage earner.⁸² In order to be classified as a child for Social Security purposes, an individual must be legally entitled to inherit under his or her state's intestacy system.⁸³ Therefore, courts resolving Social Security claims have established the rules governing the inheritance rights of posthumously conceived children.

Three Social Security cases relevant to the discussion at hand are *Kolacy*,⁸⁴ *Woodward*,⁸⁵ and *Khabbaz*.⁸⁶ In all three cases, the courts evaluated the issue of the intestacy status of posthumously conceived children. The final case examined in this section, *In re Martin B.*,⁸⁷ is a non-Social Security case that explores the posthumously conceived child's right to inherit through his or her father.⁸⁸

⁷⁸ Harper, *supra* note 58, at 272.

⁷⁹ See *In re Martin B.*, 841 N.Y.S.2d 207, 211 (N.Y. Sur. Ct. 2007) (discussing the only three courts which have dealt with the status of posthumously conceived children with regards to inheriting from their father via the Social Security Act).

⁸⁰ Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now*, PROB. & PROP., Mar.-Apr. 2005, at 32, 32.

⁸¹ Social Security Act, 42 U.S.C. § 7 (2000); 20 C.F.R. § 404.355 (2008) (discussing under what conditions a child is eligible for Social Security benefits).

⁸² See 20 C.F.R. § 404.355 (2008); Kristine S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 631-32 (2005).

⁸³ See *Gillett-Netting v. Barnhart*, 371 F.3d 593, 598-99 (9th Cir. 2004) (holding that posthumously conceived twins were eligible for Social Security child's insurance benefits because they met the requirements to inherit under Arizona's intestacy system); see also John Doroghazi, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597, 1600 (2005) (proposing that the Social Security Act be amended to permit posthumously conceived children to be eligible for benefits); *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005) (holding that since the posthumously conceived child did not satisfy the requirements necessary to inherit under the Florida intestacy statute, the child was not entitled to child survivor benefits).

⁸⁴ *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

⁸⁵ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

⁸⁶ *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007).

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

⁸⁸ *Id.* at 210.

When adjudicating these cases, courts have considered the multiple competing interests of the state, the posthumously conceived child, the other living heirs involved, and the deceased that are at play when addressing the issue of whether a posthumously conceived child should be allowed to inherit from his or her father's estate. States have an interest in the quick and final administration of probate estates. That interest would be undermined if probate courts left the estate opened indefinitely in anticipation of the births of posthumously conceived children.⁸⁹ In contrast, posthumously conceived children have an interest in the estate being kept open to give them the opportunity to be born, so they can inherit from their parents. Because children have a right to the financial support of their parents, it seems equitable that they be permitted to inherit.⁹⁰ Courts have also taken the interest of other living heirs into consideration.⁹¹ In cases where a deceased father has other living heirs inheriting from his estate, the living heirs have an interest in receiving their inheritances in a prompt manner and in reducing the number of heirs who could claim against the estate.⁹² All of these interests must be considered when states are drafting appropriate legislation concerning posthumously conceived children. The cases discussed below depict how some courts have grappled with trying to use an inadequate state statute to address this complex and emotional issue.

A. Estate of Kolacy

Estate of Kolacy arose in New Jersey and was thus governed by the New Jersey statutes on intestacy.⁹³ The court took the opportunity to adjudicate the posthumously conceived children's status as their fathers' heirs.⁹⁴ On February 7, 1994, doctors informed William Kolacy that he had leukemia. As a consequence, he needed to receive chemotherapy treatments. William worried that, as a result of his chemotherapy treatments, he might be unable to contribute to the creation of children.⁹⁵ Thus, in accordance with William's wishes, prior to undergoing chemotherapy and during the

⁸⁹ *Id.* at 203-04 (counteracting this problem, the court suggests, in dicta, that the legislature could use time limits to restrict the inheritance rights of posthumously conceived children).

⁹⁰ *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* Specifically, the case involved an evaluation of New Jersey's afterborn heirs' then-current statute, which stated, "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." See N.J. STAT. ANN. § 3B:5-8 (amended West 2004) (2008).

⁹⁴ *Kolacy*, 753 A.2d at 1260.

⁹⁵ *Id.* at 1258.

treatment, the doctor harvested William's sperm to be placed in a sperm bank.⁹⁶ Unfortunately, William succumbed to cancer on April 15, 1995.⁹⁷

More than eighteen months after William's death, his wife, Mariantonia Kolacy, gave birth to twin girls as a result of IVF.⁹⁸ In order to receive financial assistance to help care for her children, Mariantonia applied for Social Security dependent benefits.⁹⁹ The Social Security Administration ("SSA") denied Mariantonia's application because the panel determined that the twins were not legally William's children, despite the fact that the twins were William's genetic and biological children.¹⁰⁰ An Administrative Law Judge ("ALJ") issued a written decision upholding the denial of benefits.¹⁰¹

Instead of appealing the ALJ's decision, Mariantonia filed an action in the Superior Court of New Jersey to have her twins declared William's legal heirs, making them eligible for Social Security child's insurance benefits.¹⁰² Thus, Mariantonia planned to use the state court's declaration of heirship to help her win her Social Security appeal.¹⁰³

In order to resolve the case, the Superior Court of New Jersey had to decide whether posthumously conceived children qualified as heirs under New Jersey's intestacy system.¹⁰⁴ The court approached the issue by exploring why the legislature created an intestacy system that gives preference to children.¹⁰⁵ In light of that exploration, the court determined that the general legislative intent when enacting statutory provisions dealing with intestate succession, including the afterborn heirs statute, was to give children the opportunity to inherit from and through their parents.¹⁰⁶ That determination led the court to conclude that the intestacy statutes should be read broadly enough to give a decedent's posthumously conceived child the chance to inherit from his estate.¹⁰⁷

The court also considered the competing interests involved when posthumously conceived children seek to inherit from their parents. After considering all of the aforementioned competing interests, the court held that the twins were legally William's heirs.¹⁰⁸ William did not have any other

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 1259.

¹⁰⁰ *Kolacy*, 753 A.2d at 1259.

¹⁰¹ *Id.*

¹⁰² *Id.* ("Section 216 of the Social Security Act provides . . . that [a] '[c]hild's insurance benefits can be paid to a child who could inherit under the State's interstate laws.'").

¹⁰³ *Id.* at 1260.

¹⁰⁴ *Id.* at 1262.

¹⁰⁵ *Id.* at 1261-62.

¹⁰⁶ *Kolacy*, 753 A.2d at 1261-62.

¹⁰⁷ *Id.* at 1263-64.

¹⁰⁸ *Id.*

heirs who would be disadvantaged by allowing the posthumously conceived twins to inherit from his estate.¹⁰⁹ When balancing the competing interests, the court was persuaded by the fact that the evidence indicated William wanted the children to be conceived posthumously.¹¹⁰ Therefore, he probably wanted them to have all of the legal protections that would come with being his children.¹¹¹

The outcome of this case is in line with most public policy arguments on the issue of posthumously conceived children. Although the court balanced the three important competing interests of the state, the posthumously conceived child, and the living heirs, it appeared to give the interest of posthumously conceived children priority. Once posthumously conceived children are born, they need to be financially supported by their parents. If the father were alive, he would be required to pay child support to finance the child's needs.¹¹² After the father's death, the father's Social Security benefits should be used to take care of his children.¹¹³ In light of the fact that William had no other living children, the court's approach was equitable. Under the current Social Security system, if a man dies without survivors, all of the money that he has paid into the system disappears. The man does not have the right to dispose of the money by will. Further, none of the money becomes part of the man's intestate estate.¹¹⁴ The end result is that the man's money escheats to the federal government. In a case where there are children who are genetically related to the deceased man, it would be unfair for the government to benefit at the expense of those children. In *Kolacy*, if the court had not allowed the posthumously conceived children to receive William's Social Security benefits, all of the money that he paid into the system would have remained with the government. Therefore, William's children might have been forced to rely on public assistance. This is clearly not the outcome William would have wanted.

In addition to considering the multiple competing interests at stake in these cases, there are also sound public policy arguments. For example, because William did not live long enough to recoup the money he paid into

¹⁰⁹ *Id.* at 1263-64.

¹¹⁰ *Id.* at 1263.

¹¹¹ *Id.*

¹¹² Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 299 (1999); see also Ann-Patton Nelson, Casenote, *A New Era of Dead-Beat Dads: Determining Social Security Survivor Benefits for Children Who Are Posthumously Conceived*, 56 MERCER L. REV. 759, 763 (2005).

¹¹³ Nelson, *supra* note 112, at 763.

¹¹⁴ See Richard W. Pingel, Note, *Should Social Security Retire? A Study of Personal Retirement Accounts in the American Probate System*, 20 QUINNIPIAC PROB. L.J. 99, 111 (2006) ("For example, a 64-year-old man may have worked every day since he was 16, paying tens of thousands of dollars of taxes into Social Security. At his death, the retirement benefit into which he has been paying throughout his life is lost unless his family structure fits within the limited qualifications required for survivor benefits. If the man dies unmarried and without minor children his retirement benefits are lost.").

the Social Security system, from a public policy perspective it seems equitable that the court allowed his children to receive the money instead. Moreover, another public policy argument supporting the outcome of this case is that receiving their father's benefits prevented the children from being forced to depend upon public assistance.¹¹⁵

B. Woodward¹¹⁶

The decision in *Woodward* is consistent with the outcome of *Kolacy* and involves a similar set of facts. *Woodward*, however, occurred in Massachusetts, and therefore was governed by the Massachusetts state intestacy statutes.¹¹⁷ In January 1993, Warren Woodward was diagnosed with leukemia and scheduled to undergo treatment.¹¹⁸ Because Warren and his wife, Lauren, did not have any children, they were concerned that Warren might be rendered sterile as a result of the treatment.¹¹⁹ Consequently, the Woodwards had some of Warren's sperm extracted and placed in a sperm bank.¹²⁰

In October 1993, Warren died after an unsuccessful bone marrow transplant.¹²¹ Two years later, Lauren gave birth to twin girls who were conceived through artificial insemination using Warren's sperm.¹²² Lauren submitted an application for Social Security survivor's benefits on behalf of herself and the children.¹²³ Lauren relied on Section 402(g)(1) of the Social Security Act to claim mother's benefits based upon her status as a widow with dependent children.¹²⁴ Lauren's application for benefits for the twins was based on their status as children of a person who had died fully insured under the Social Security Act.¹²⁵ In order to receive mother's benefits, Lau-

¹¹⁵ Vegter, *supra* note 71, at 293.

¹¹⁶ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002). For a thorough discussion of the *Woodward* case, see Ronald Chester, *Inheritance Rights of The Posthumously Conceived Child: What Exactly Does Lauren Woodward v. Commissioner of Social Security Decide?*, 87 MASS. L. REV. 49 (2002).

¹¹⁷ *Woodward*, 760 N.E.2d at 263 n.11 (citing MASS. GEN. LAWS ch. 190, §§ 2 (personal property), 3 (real property) (2008)).

¹¹⁸ *Id.* at 260.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Woodward*, 760 N.E.2d at 260.

¹²⁴ *Id.* at 260 n.3 ("Section 402(g)(1) . . . provides 'mother's' benefits to the widow of an individual who died fully insured under the Act if, inter alia, she has care of a child or children entitled to child's benefits.").

¹²⁵ *Id.* ("Section 402(d)(1) . . . provides 'child's' benefits to dependent children of deceased parents who die fully insured under the Act.").

ren had to convince the SSA that the children were entitled to survivor's benefits.¹²⁶

At the initial stage, the SSA denied Lauren's application after determining the twins were not Warren's children within the meaning of the Social Security Act.¹²⁷ While she was appealing the SSA's decision, Lauren petitioned the Massachusetts Probate and Family Court for an order requiring the clerk of the city to add Warren's name to the twins' birth certificate.¹²⁸ As a result, the Probate and Family Court adjudicated Warren as the twins' father, and issued an order amending their birth certificates to reflect that fact.¹²⁹

Lauren submitted the judgment of paternity and the amended birth certificates to the SSA.¹³⁰ Nonetheless, the ALJ concluded that the twins were not eligible for benefits because they would not be considered Warren's heirs under Massachusetts's intestacy and paternity laws.¹³¹ After an unsuccessful appeal to the Appeals Council of the SSA, Lauren filed an appeal in the United States District Court for the District of Massachusetts.¹³²

The federal court certified the issue to the Supreme Judicial Court of Massachusetts, which had to determine whether posthumously conceived children had a right to inherit under the Massachusetts intestacy system.¹³³ The parties took dramatically different positions.¹³⁴ Lauren argued that posthumously conceived children should always have the right to inherit from their deceased parent as long as there is proof of a genetic connection with the decedent.¹³⁵ The government claimed that posthumously conceived children should never have the right to inherit from their deceased parent because they would not be in existence as of the date of the parent's death.¹³⁶ The court rejected the positions of both parties as too extreme and searched for a middle ground.¹³⁷

In order to resolve the case, the court reviewed Massachusetts's intestacy law. Because, under that law, only a decedent's "issue" had a right to inherit the decedent's property, the court had to determine whether the twins were Warren's issue.¹³⁸ The Massachusetts's legislature did not clear-

¹²⁶ *Id.*

¹²⁷ *Id.* at 260.

¹²⁸ *Id.*

¹²⁹ *Woodward*, 760 N.E.2d at 260.

¹³⁰ *Id.* at 261.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 262.

¹³⁵ *Woodward*, 760 N.E.2d at 262.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 263.

ly define the term “issue.”¹³⁹ Thus, the court looked at the legislative purpose behind the Massachusetts’s intestacy statute to decide if posthumously conceived children should be classified as “issue” for inheritance purposes.¹⁴⁰

As a part of its analysis, the court discussed three competing state interests that need to be considered when addressing the issue of inheritance rights for posthumously conceived children: (1) the state’s interest in promoting the best interest of the children, including both posthumously conceived children and children who were alive or conceived prior to the death of the parent; (2) the state’s interest in preventing fraud and insuring the orderly administration of probate estates; and (3) the state’s interest in protecting the reproductive rights of both genetic parents, including the deceased parent.¹⁴¹

The Massachusetts court acknowledged that children have the right to receive financial support from their parents and to petition their parents’ estate for support.¹⁴² The court determined that the opportunity to inherit should be extended to posthumously conceived children because, in enacting intestacy statutes that gave preference to children, the Massachusetts legislature intended to promote the welfare of all children.¹⁴³ The court also emphasized two key points: (1) although the legislature knew that posthumously conceived children existed, it took no action to prevent them from taking under the intestacy system;¹⁴⁴ and (2) the Massachusetts legislature supported the assisted reproductive technologies that were the only means by which posthumously conceived children could come into being.¹⁴⁵ Thus, once they were born, the Massachusetts legislature was obligated to give them the same rights as other children.¹⁴⁶

The court next addressed Massachusetts’s interest in the prompt and accurate administration of probate estates.¹⁴⁷ Like the court in *Kolacy*, the

¹³⁹ *Id.* See also RESTATEMENT (FIRST) OF PROPERTY § 265 (1940) (“[T]he word ‘issue,’ when used in the phrases ‘die without issue,’ or ‘failure of issue’ or in some other phrase of similar import, denotes all lineal descendants from the designated ancestor who are within the line of inheritance from such ancestor.”). Examples of typical intestacy statutes defining issue are the following: DEL. CODE ANN. tit. 12, § 101 (2008) (“Issue of a person means all of the person’s lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this title.”); MD. CODE ANN., EST. & TRUSTS § 1-209(a) (LexisNexis 2008) (“In construing all provisions of the estates of decedent law and, unless a contrary intention is indicated, in construing the terms of a will, issue means every living lineal descendant except a lineal descendant of a living lineal descendant.”).

¹⁴⁰ *Woodward*, 760 N.E.2d at 264.

¹⁴¹ *Id.* at 264-65.

¹⁴² *Id.* at 264.

¹⁴³ *Id.* at 265-66.

¹⁴⁴ *Id.* at 265.

¹⁴⁵ *Id.*

¹⁴⁶ *Woodward*, 760 N.E.2d at 265-66.

¹⁴⁷ *Id.* at 266.

Woodward court felt that the state was obligated to provide certainty to the decedent's heirs and creditors.¹⁴⁸ Although the court reserved judgment on the resolution of the time constraints in question, the court noted that because posthumously conceived children could be born years after the death of their parent, permitting them to inherit would make it difficult for the state to achieve its administrative goals.¹⁴⁹ Therefore, instead of focusing on the need for finality, the court next dealt with the state's interest in preventing fraud on the probate courts. The court concluded that the probability of fraud would be diminished by the fact that the posthumously conceived children, like other non-marital children,¹⁵⁰ were required to prove paternity before they could inherit.¹⁵¹

Lastly, the court discussed the state's interest in honoring the right of persons to choose if and when to reproduce.¹⁵² The court decided that the person claiming rights on behalf of the posthumously conceived child had to present convincing evidence that the deceased person consented to the posthumous conception and agreed to support the child that resulted from the procedure.¹⁵³ This requirement would protect the reproductive rights of the deceased and further the state's goal of fraud prevention.¹⁵⁴

After balancing the competing state interests of promoting the best interests of the children, preventing fraud and insuring the orderly administration of probate estates, and protecting the reproductive rights of both genetic parents, the court held that it was in the best interests of posthumously conceived children to be given the opportunity to inherit from their deceased parents.¹⁵⁵ However, the court recognized that some precautions were necessary to protect the integrity of the probate system and the reproductive rights of the deceased parent.¹⁵⁶ Therefore, the *Woodward* court established a three-part test that must be satisfied before the posthumously conceived child can inherit from his or her deceased parent:¹⁵⁷ (1) the person representing the posthumously conceived child must provide evidence that the child and the decedent were genetically related; (2) the representative must prove that the decedent affirmatively agreed to the child's posthumous conception; and (3) the representative must show that the decedent

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 268.

¹⁵⁰ Marriage ends at death, so children conceived after the death of one of the parties are non-marital. Scharman, *supra* note 50, at 1020 n.154 (citing *Woodward*, 760 N.E.2d at 266-67).

¹⁵¹ *Woodward*, 760 N.E.2d at 267.

¹⁵² *Id.* at 268.

¹⁵³ *Id.* at 269.

¹⁵⁴ *Id.* at 269-70.

¹⁵⁵ *Id.* at 266.

¹⁵⁶ *Id.* at 272.

¹⁵⁷ *Woodward*, 760 N.E.2d at 270.

affirmatively consented to provide financial support to any child conceived as a result of the posthumous process.¹⁵⁸

The three-part test created by the *Woodward* court serves as a good model for state legislatures seeking to protect the interests of the posthumously conceived child, the pre-existing heirs, the decedent, and the state.¹⁵⁹ The posthumously conceived child will benefit from the court's decision by having the opportunity to inherit from his or her father.

C. Khabbaz¹⁶⁰

Despite the holding by the court in *Woodward*, the posthumously conceived child's right to inherit from his or her father is not always recognized. One of the most recent courts to consider the inheritance rights of a posthumously conceived child was the Supreme Court of New Hampshire. The court had to decide whether a child conceived after her father's death via artificial insemination was eligible to inherit from her father as his surviving issue under New Hampshire intestacy law.¹⁶¹

In September 1989, Donna M. Eng and Rumzi Brian Khabbaz got married.¹⁶² Unfortunately, in April 1997, doctors informed the couple that Khabbaz had a life-threatening illness.¹⁶³ Although the couple already had one child, Khabbaz banked his sperm and executed a consent form authorizing Eng to use the sperm to conceive his child.¹⁶⁴ Khabbaz also indicated that he wanted to be acknowledged as the legal father if Eng conceived a child through artificial insemination using his sperm.¹⁶⁵ On May 23, 1998, Khabbaz died.¹⁶⁶ Eng gave birth to a child, Christine, using Khabbaz's sperm in the summer of 2000.¹⁶⁷

Eng tried unsuccessfully to get Social Security survivor's benefits for Christine.¹⁶⁸ The SSA Commissioner denied benefits based upon a determination that Christine would not be eligible to inherit from Khabbaz under

¹⁵⁸ *Id.*

¹⁵⁹ See Susan C. Stevenson-Popp, Comment, "*I Have Loved You In My Dreams*": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act, 52 CATH. U. L. REV. 727, 758 (2003) (advocating modifying statutory law to line up with the reasoning of the *Woodward* decision).

¹⁶⁰ *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007).

¹⁶¹ *Id.* at 1182.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Khabbaz*, 930 A.2d at 1182.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

New Hampshire's intestacy distribution law.¹⁶⁹ The ALJ and the SSA Appeals Council upheld the Commissioner's decision.¹⁷⁰

In response, Christine appealed the Commissioner's decision to the United States District Court.¹⁷¹ First, Eng argued that Christine should be classified as a "surviving issue" based on the language of the intestacy statute.¹⁷² The court rejected that argument, relying on its interpretation of the meaning of "surviving."¹⁷³ Relying upon Webster's Dictionary, the court concluded that, in order to be considered a survivor, Christine had to be alive or in existence when her father died.¹⁷⁴ The court reasoned that, because Christine was not conceived until after her father's death, she could not be legally recognized as his survivor.¹⁷⁵ The court went so far as to declare that no "posthumously conceived child is a 'surviving issue' within the plain meaning of the [New Hampshire] statute."¹⁷⁶

In the alternative, Eng argued that Christine was a non-marital child because, at the time of Christine's conception, Eng was no longer married to Khabbaz.¹⁷⁷ Eng wanted Christine to be treated as a child born out-of-wedlock so she could avail herself of the process the legislature had established for non-marital children to have the opportunity to inherit from their fathers.¹⁷⁸ The court found Eng's argument to be without merit for two reasons. First, the court opined that the legislature intended the statute to deal with children whose parents were not married prior to their births.¹⁷⁹ Because they were a married couple, Eng and Khabbaz were therefore not among the class of persons intended to be covered by the statute.¹⁸⁰ Second, the court concluded that Christine could not be categorized as an illegiti-

¹⁶⁹ *Id.* See also N.H. REV. STAT. ANN. § 561:1 (2006) [hereinafter "RSA"].

¹⁷⁰ *Khabbaz*, 930 A.2d at 1182.

¹⁷¹ *Id.*

¹⁷² *Id.* at 1183. New Hampshire's intestacy distribution law provides in part: "The part of the intestate estate not passing to the surviving spouse under paragraph I, or the entire intestate estate if there is no surviving spouse, passes as follows: (a) To the issue of the decedent equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degree take by representation." RSA § 561:1(II) (2002).

¹⁷³ *Khabbaz*, 930 A.2d at 1183-84 ("[T]he plain meaning of the word 'surviving' is 'remaining alive or in existence.'" (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2303 (unabridged ed. 2002))).

¹⁷⁴ *Id.* at 1184.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 1185.

¹⁷⁸ *Id.* See RSA § 561:4(II) (2006) ("A child born of unwed parents shall inherit from or through his father as if born in lawful wedlock, under any of the following conditions: (a) Intermarriage of the parents after the birth of the child. (b) Acknowledgement of paternity or legitimation by the father. (c) A court decree adjudges the decedent to be the father before his death. (d) Paternity is established after the death of the father by clear and convincing evidence. (e) The decedent had adopted the child.").

¹⁷⁹ *Khabbaz*, 930 A.2d at 1185.

¹⁸⁰ *Id.*

mate child because, under New Hampshire's statutory scheme, children conceived by the artificial insemination of a married woman are considered legitimate.¹⁸¹

Eng's final argument was based upon public policy. She asserted that a posthumously conceived child who was conceived within a reasonable time after his or her father's death should be permitted to inherit from the father's estate.¹⁸² In putting forth this argument, Eng urged the court to adopt the rationale of the Massachusetts Supreme Judicial Court in *Woodward*.¹⁸³ The Supreme Court of New Hampshire sympathized with Eng, but stated that setting public policy was the job of the state legislature and not the court.¹⁸⁴ Consequently, based upon the language of the New Hampshire statute as established by the New Hampshire legislature, the court was compelled to "leave[] an entire class of posthumous[ly conceived] children unprotected."¹⁸⁵

The Supreme Court of New Hampshire's strict interpretation of the New Hampshire statute in *Khabbaz* was detrimental to the posthumously conceived child and possibly inconsistent with the deceased's wishes. Although the court felt it was the state legislature's role to make public policy, the court's hyper-technical approach was contrary to the goal of the intestacy system because it defeated the intent of the decedent.¹⁸⁶ The steps Khabbaz took prior to his death indicated that he wanted to be legally responsible for any child conceived using his stored sperm.¹⁸⁷ In light of these facts, and in order to ensure that Khabbaz's estate was distributed in a manner consistent with his wishes, the court should have interpreted the intestacy statute broadly enough to give the posthumously conceived child the opportunity to inherit from her father.

In this case, Khabbaz had a biological child prior to the birth of Christine, the posthumously conceived child.¹⁸⁸ Khabbaz's living heir would not be disadvantaged by permitting the child posthumously conceived to inherit from Khabbaz after his death. Nothing in the facts indicated that Khabbaz would not want his children to inherit on an equal basis.¹⁸⁹ Both children were conceived using Khabbaz's sperm; the only difference between the living heir and the posthumously conceived child was the timing of their conception. In essence, the court penalized Christine because of the circum-

¹⁸¹ *Id.* (citing RSA § 168-B:7 (2002)).

¹⁸² *Id.* at 1186.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Khabbaz*, 930 A.2d at 1186 (quoting *id.* at 1188 (Broderick, C.J., concurring specially)) (alteration in original) (internal quotations omitted).

¹⁸⁶ *See id.* at 1182 (indicating that it was Khabbaz's "desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law" (internal quotations omitted)).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

stances of her birth. The Supreme Court has renounced that approach with regard to non-marital children.¹⁹⁰ This differential treatment should be considered to be against public policy. Over the years, legislatures and courts have sought to ensure that all classes of children are treated similarly with regards to inheriting under the intestacy system.¹⁹¹ Moreover, since Khabbaz consented in writing to the use of his sperm to conceive a child, his reproductive rights are protected and there is limited opportunity for fraud.¹⁹² Additionally, it could be argued that not recognizing Khabbaz as the legal father of the posthumously conceived child intrudes upon Khabbaz's right to procreate in the manner in which he desires.¹⁹³

D. *In re Martin B.*¹⁹⁴

In re Martin B., one of the few cases to directly address the inheritance rights of posthumously conceived children, dealt with the children's ability to inherit through their deceased father.¹⁹⁵ The case involved seven trust instruments (six were governed by the law of the District of Columbia and one was governed by the law of New York).¹⁹⁶ On December 31, 1969, Martin B. (identified in the case as the Grantor) executed seven trust agreements.¹⁹⁷ Under the terms of the trusts, Martin B. was entitled to receive income from the trust during his lifetime.¹⁹⁸ The trustees of the trust were instructed to retain the principal while Martin B. was alive. After Martin B.'s death, but before the death of his wife, Abigail, the trustees had the discretion to dispense the principal to and among his issue.¹⁹⁹ The trustees were authorized to distribute the principal after Abigail's death. The distribution was to be to Martin B.'s issue or descendants in accordance with Abigail's directions.²⁰⁰ If Abigail failed to exercise her right to control the division of the trust principal, the trustee was instructed to distribute the principal to or for the benefit of the issue surviving at the time of Abigail's death.²⁰¹ This case dealt with the status of Martin B.'s posthumously conceived grandchildren with regards to the trust.²⁰²

¹⁹⁰ See *Trimble v. Gordon*, 430 U.S. 762, 769-70 (1977).

¹⁹¹ See *Vegter*, *supra* note 71, at 273-82.

¹⁹² *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1182 (N.H. 2007).

¹⁹³ *Id.*; see *Gibbons*, *supra* note 55, at 201-02.

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

¹⁹⁵ *Id.* at 208.

¹⁹⁶ *Id.* at 207-08.

¹⁹⁷ *Id.* at 207.

¹⁹⁸ *Id.* at 208.

¹⁹⁹ *Id.*

²⁰⁰ *Martin B.*, 841 N.Y.S.2d at 208.

²⁰¹ *Id.*

²⁰² *Id.*

In July 2001, Martin B. died.²⁰³ His wife, Abigail, their son Lindsay, and Lindsay's two adult children survived Martin B.²⁰⁴ Martin B.'s other son, James, died in January 2001.²⁰⁵ James's two young sons, conceived by IVF using James's frozen semen, also survived Martin B.²⁰⁶

It was clear that "issue" included Lindsay and his two adult children.²⁰⁷ The dispute arose because of the existence of James's sons. Prior to his death, James deposited a sample of his semen at a laboratory to be frozen.²⁰⁸ He instructed the laboratory that, in the event of his death, his wife Nancy had the authority to make decisions with regard to the use of the semen.²⁰⁹ After James died, Nancy used his semen to have one son in 2004 and another son in 2006.²¹⁰ The trustees went to court to find out if James's posthumously conceived sons were included in the class of trust beneficiaries.²¹¹ The court, therefore, had to decide whether the posthumously conceived children were descendants and issue for purposes of the trust.²¹²

In order to determine if the posthumously conceived children had the right to inherit the trust principal through their father, the court reviewed the intestacy statutes of New York and the District of Columbia.²¹³ Neither jurisdiction had a statute specifically dealing with the rights of posthumously conceived children.²¹⁴ As a result, the court asserted that, in order to resolve the case, it had to rely upon "statutes in other jurisdictions, model codes, scholarly discussions and Restatements of the law."²¹⁵

After that review, the court in *Martin*—much like the courts in *Kolacy*, *Woodward*, and *Khabbaz*—concluded that other state legislatures and courts that had addressed the issue of the inheritance rights of posthumously conceived children had to balance the competing interests of: (1) the public's desire to have a probate system that is efficient, final, and accurate; (2) the state's need to respect the reproductive rights of its citizens; and (3) the rights of the children born as a consequence of artificial insemination.²¹⁶ The court asserted that it is in the best interests of those children to be treated as the heirs of their father.²¹⁷

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Martin B.*, 841 N.Y.S.2d at 208.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 207-08.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Martin B.*, 841 N.Y.S.2d at 207-08.

²¹³ *Id.* at 208.

²¹⁴ *Id.* at 209.

²¹⁵ *Id.*

²¹⁶ *Id.* at 211.

²¹⁷ *Id.*

After analyzing the various statutes and judicial decisions, the *Martin* court opined that other legislatures and courts had recommended two key mechanisms to promote the interest of all the parties: (1) most state intestacy statutes mandated that the man give written permission to have his genetic material used to create a child after his death; and (2) most state laws required that the child be created within a certain time period following the man's passing.²¹⁸ Bearing these two factors in mind, the *Martin* court held that the posthumously conceived children were eligible to inherit through their father because Martin B.'s intent was for all members of his bloodline to get a share of the trust funds.²¹⁹

The court relied upon several factors to justify its holding. First, James satisfied the written consent requirement by leaving instructions with the laboratory telling them that his wife, Nancy, had the right to decide what to do with his semen.²²⁰ Because James gave Nancy such broad discretion, it was not unreasonable to conclude that he would not object to Nancy using the semen to conceive his child.²²¹ Second, the court noted that, after conceiving her two sons, Nancy permitted the rest of James's sperm to be destroyed.²²² Therefore, at the time of the hearing, the class of James's children was closed, and his estate could be closed with certainty.²²³

Finally, the court reviewed the trust instruments and found them silent in regard to the status of posthumously conceived children.²²⁴ The court decided the failure to mention posthumously conceived children indicated, at the time the trust instruments were drafted, that the Grantor could not have contemplated children could be conceived after the death of their fathers.²²⁵ As a result, the court decided to give the posthumously conceived children the benefit of the doubt and concluded their grandfather would want them to be treated the same as his other grandchildren.²²⁶ The court's conclusion was supported by the fact that, in the trust instruments, the Grantor provided that, after Abigail died, the trust funds were to benefit the Grantor's sons and their families equally.²²⁷

The medical community will continue to develop technology to give persons more creative ways to produce children.²²⁸ Because intestacy laws

²¹⁸ *Martin B.*, 841 N.Y.S.2d at 211.

²¹⁹ *Id.*

²²⁰ *Id.* at 208.

²²¹ *Id.* at 211.

²²² *Id.*

²²³ *Id.*

²²⁴ *Martin B.*, 841 N.Y.S.2d at 211.

²²⁵ *Id.* at 212.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ The *Khabbaz* court stated "reproductive technologies will grow and advance, and as they do, the number of children they will produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth." *Khabbaz v. Comm'r, Soc. Sec. Admin.*,

are governed by state statutes, and because states have failed to adopt adequate statutes to address this issue, courts will continue to be forced to deal with the legal issues faced by children who are conceived in non-traditional ways.²²⁹ More than one court has urged the legislature to take affirmative action to address the issues relevant to children created as the result of reproductive technology.²³⁰ In fact, the entire concurring opinion in the *Khabbaz* case is a plea to the New Hampshire legislature to adopt an intestacy statutory scheme that addresses the needs of children created using new birth technologies.²³¹ As the next Part indicates, that guidance has been slow in coming.

III. LEGISLATIVE APPROACH

The state legislatures that have developed laws governing the rights of posthumously conceived children have enacted statutes that attempt to address the issues raised in the court cases discussed above. Some variations exist, however, among these statutes. Approximately eleven states have statutes specifically dealing with the inheritance rights of posthumously conceived children.²³² Six of those states have followed the approach recommended by the UPA²³³ and five states have taken an independent approach.²³⁴ One statute, enacted in Ohio, specifically prohibits a posthumously conceived child from inheriting from his or her father.²³⁵ That approach was also endorsed by the Uniform Status of Children of Assisted

930 A.2d 1180, 1186 (N.H. 2007) (quoting *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002)).

²²⁹ See *id.* at 1187 (Broderick, C.J., concurring specially).

²³⁰ E.g., *In re Estate of Kolacy*, 753 A.2d 1257, 1261 (N.J. Super. Ct. Ch. Div. 2000) (“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.”); *Khabbaz*, 930 A.2d at 1186 (“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.” (quoting *Woodward*, 760 N.E.2d at 272 (internal quotations omitted))).

²³¹ *Khabbaz*, 930 A.2d at 1187-89.

²³² WYO. STAT. ANN. 1977 § 14-2-907 (2007); WASH. REV. CODE § 26.26.730 (2008); TEX. FAM. CODE ANN. § 160.707 (Vernon 2008); DEL. CODE ANN. tit. 13, § 8-707 (2008); CAL. PROB. CODE § 249.5 (West 2008); OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2008); LA. REV. STAT. ANN. § 9:391.1 (2008); N.D. CENT. CODE § 14-20-65 (707) (2008); UTAH CODE ANN. § 78-45g-707 (2008); VA. CODE ANN. § 20-158 (West 2008); FLA. STAT. § 742.17(4) (West 2008).

²³³ UNIF. PARENTAGE ACT § 707 (2008). Those states are Delaware, North Dakota, Texas, Utah, Washington, and Wyoming. See *supra* note 232.

²³⁴ Those states are California, Florida, Louisiana, Ohio, and Virginia. See *supra* note 232.

²³⁵ OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2008) (“Descendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born in the lifetime of the intestate and surviving him; but in no other case can a person inherit unless living at the time of the death of the intestate.”).

Conception Act (“USCACA”).²³⁶ Louisiana is unique in that it gives the existing heirs standing to contest the posthumously conceived child’s right to inherit.²³⁷

Despite these variances, eight of the eleven state statutes outlining the legal rights of posthumously conceived children contain requirements of: (1) the decedent’s consent to produce children with his gametes; (2) written proof of the decedent’s consent; (3) time restrictions on the conception or birth of posthumously conceived children seeking to inherit from their fathers; and (4) marriage between a man and a woman before the woman is able to use the man’s sperm to conceive a child after the man has died.²³⁸ The majority of the statutes specifying the conditions under which the posthumously conceived child can inherit are exclusively applicable to married couples and often do not apply to children born out of wedlock or children of same sex couples.²³⁹

A. *Consent*

In order for the posthumously conceived child to have the opportunity to inherit from his father, most states require at least a minimum level of consent from the man. For example, under the California, Louisiana, and Virginia statutes, the decedent will be legally recognized as the father of the posthumously conceived child if, prior to his death, he consented to the artificial insemination of his wife.²⁴⁰ This approach is consistent with the statutes that deal with children who are conceived through artificial insemination during the life of the woman’s husband. If the woman’s husband consents to the artificial insemination of his wife, he is considered the legal father of the child even if the child was conceived using another man’s genetic material.²⁴¹ Hence, it is reasonable to recognize a consenting spouse as the father of a child created using his genetic material after he dies. This supports the public policy argument that similarly situated children should be treated in the same manner.

Texas and the other states that have adopted the UPA go a step further. In those jurisdictions, in addition to consenting to the use of his genetic

²³⁶ Stevenson-Popp, *supra* note 159, at 734 (“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.” (citing UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT 1988 § 4(b))). In 2000, the language of this act was integrated into the Uniform Parentage Act. *Id.*

²³⁷ LA. CIV. CODE ANN. art. 190 (2008).

²³⁸ *See supra* note 232.

²³⁹ *Id.*

²⁴⁰ LA. REV. STAT. ANN. § 9:391.1 (2008); CAL. PROB. CODE § 249.5(a) (West 2008); VA. CODE ANN. § 20-158(B) (West 2008).

²⁴¹ Mika & Hurst, *supra* note 69, at 1015.

materials, the man must agree to be treated as the parent of the child that is conceived after his death.²⁴² According to the Utah statute, a man must consent to the artificial insemination and to the establishment of the parent-child relationship.²⁴³ These statutes place an additional burden on the mother of the posthumously conceived child, mandating that she prove that the man agreed to the child's conception and to the recognition of his paternity. This requirement, however, appears to be unnecessary. If, while he is alive, a man agrees to have his wife conceive a child using his sperm or the sperm of a donor, most states will consider him to be legally responsible for the child.²⁴⁴ Courts do not permit husbands, who consent to have a child artificially created, to waive their parental rights and obligations.²⁴⁵ Hence, if a man consents to the use of his genetic material after his death, it should be presumed that he is also consenting to be legally recognized as a parent of the resulting child.

Florida's statute does not contain a consent requirement.²⁴⁶ However, because the statute mandates the execution of a will, an additional consent requirement is not necessary.²⁴⁷ In Florida, the man's consent to the conception of the child may be implied by the provision for the child in his will.²⁴⁸

The Restatement of Property does not specifically require a man to consent to the conception in order for the posthumously conceived child to have the right to inherit.²⁴⁹ Nonetheless, the Restatement does provide that the child has to be born in circumstances indicating that the deceased man would have approved of the child's right to inherit.²⁵⁰ That statement implies that some type of indicia of consent must exist. The consent requirement is usually accompanied by the mandate for some type of writing.

B. *The Writing Requirement*

In addition to consent, some state statutes require the actual written consent of the father before a court can award inheritance rights to a posthumously conceived child. With regard to the writing requirement, state legislatures have taken two approaches. The majority of states have kept the language of their statutes general, giving the courts in those jurisdictions more flexibility in determining what qualifies as appropriate written con-

²⁴² TEX. FAM. CODE ANN. § 160.707 (Vernon 2008).

²⁴³ UTAH CODE ANN. §§ 78-45g-707, 78-45g-201 (2008) (discussing the ways to establish the father-child relationship).

²⁴⁴ See, e.g., ARK. CODE ANN. § 9-10-201 (2008).

²⁴⁵ See, e.g., TEX. FAM. CODE ANN. § 160.705.

²⁴⁶ FLA. STAT. § 742.17(4) (West 2008).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ RESTATEMENT (THIRD) OF PROPERTY § 251 (1999).

²⁵⁰ *Id.*; see also Howard-Potter, *supra* note 53, at 44.

sent.²⁵¹ The legislatures in the minority of states have specifically worded statutes that contain detailed directions stating the actions that are necessary to satisfy the writing requirement.²⁵²

1. Majority View: Broad Judicial Discretion

Under the Louisiana statute, the posthumously conceived child can only inherit if, prior to his death, the biological father specifically gave his surviving spouse written permission to use his genetic material to create a child.²⁵³ The Louisiana statute does not give clear directions about the required content or form of writing. The statute only refers to some type of written authorization.²⁵⁴ Virginia's statute also contains a writing requirement that is very general.²⁵⁵ Under the Virginia statute, the required writing must be executed prior to the use of the man's sperm.²⁵⁶ The UPA and the states adopting it allow the posthumously conceived child to inherit from his or her father if the man consents in a record.²⁵⁷ However, "record" is defined broadly in the UPA and statutes, leaving it unclear what type of record would satisfy the writing requirement.²⁵⁸

2. Minority View: Little Judicial Discretion

The California statute gives clear directions. It includes a detailed list of the information the writing must contain to satisfy the statute.²⁵⁹ The

²⁵¹ See, e.g., LA. REV. STAT. ANN. § 9:391.1 (2008).

²⁵² See, e.g., CAL. PROB. CODE § 249.5(a) (West 2008); TEX. FAM. CODE ANN. § 160.705 (Vernon 2008) (stating that the written record must be held by a licensed physician).

²⁵³ LA. REV. STAT. ANN. § 9:391.1.

²⁵⁴ *Id.* (requiring only specific authorization in writing).

²⁵⁵ VA. CODE ANN. § 20-158(B) (West 2008) (requiring only that a donor of sperm or ovum is not a parent unless consenting to serve as a parent in writing).

²⁵⁶ *Id.*

²⁵⁷ See UNIF. PARENTAGE ACT § 707 (2008), 9B U.L.A. 358-59 (2008) ("If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."). See also, e.g., UTAH CODE ANN. § 78B-15-707 (2008) (substituting the term "spouse" for the term "individual").

²⁵⁸ See UNIF. PARENTAGE ACT § 102(18), 9B U.L.A. 303, 305 (defining record as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form"); UTAH CODE ANN. § 78B-15-102(18) (same). See also H.R. 1999, 80th Leg. (Tex. 2007) (proposing amendments to TEX. FAM. CODE ANN. § 160.707 (Vernon 2008) to require that the record mandated by the statute be kept by a licensed physician).

²⁵⁹ Compare CAL. PROB. CODE §§ 249.5(a)(1)-(3) (West 2008) (requiring the decedent to execute the writing by signature and date, amend and revoke the writing through subsequent signings and dates, and to designate an individual to control his or her genetic material) with UTAH CODE ANN. § 78B-15-

writing required by the California statute resembles a will.²⁶⁰ The Florida legislature also opted for a more stringent and articulated approach, asserting that the posthumously conceived child can only inherit from his or her deceased father if the man provided for the child in his will.²⁶¹

C. *Time Restrictions*

As some courts have held, permitting a posthumously conceived child to inherit from his or her father promotes the best interests of the child.²⁶² Nonetheless, keeping the man's estate open to give the child the opportunity to be conceived and born may frustrate the interests of the state and the man's other heirs. In order for the probate system to operate efficiently, the probate court must close estates within a reasonable period of time.²⁶³ Furthermore, the man's heirs should not have to wait indefinitely to receive their inheritance.²⁶⁴

To address those concerns, some state legislatures have placed time restrictions on the birth of posthumously conceived children seeking eligibility to inherit from their fathers.²⁶⁵ For example, in Louisiana, in order to inherit, the posthumously conceived child must be born within three years of the death of his or her father.²⁶⁶ Under California's statute, the child has to be conceived within two years of his or her father's death.²⁶⁷ The Restatement's approach requires the child to be born within a reasonable time after the father's death in circumstances indicating that the decedent would

707 (requiring a deceased spouse to consent in a record to be a parent of a child created by assisted reproduction after the deceased spouse's death), and UTAH CODE ANN. § 78B-15-102(18) (defining "record" as "information that is inscribed in a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form").

²⁶⁰ Compare CAL. PROB. CODE §§ 249.5(a)(1)-(3) (requiring the decedent donating genetic material for posthumous conception to sign and date a writing to execute, amend, and revoke the writing), with CAL. PROB. CODE §§ 6110(a)-(b)(3) (West 2008) (requiring a will to be in writing and signed by the testator, a designee of the testator, or a conservator).

²⁶¹ FLA. STAT. § 742.17(4) (West 2008).

²⁶² See, e.g., *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 265 (Mass. 2002) (recognizing that courts must consider the best interests of the children when considering the distribution of inheritance rights).

²⁶³ See, e.g., *Fazilat v. Feldstein*, 848 A.2d 761, 766 (N.J. 2004) (recognizing that the state has an interest in the prompt settlement of estates).

²⁶⁴ See, e.g., *Woodward*, 760 N.E.2d at 266 (recognizing that posthumously conceived children will draw funds away from other heirs, who have a right to the prompt and accurate administration of estates).

²⁶⁵ See, e.g., CAL. PROB. CODE § 249.5(c) (West 2008) (providing that the genetic material must be used within two years of the decedent's death); LA. REV. STAT. ANN. § 9:391(A) (2008) (requiring the use of the genetic material within three years of death).

²⁶⁶ LA. REV. STAT. ANN. § 9:391(A).

²⁶⁷ CAL. PROB. CODE § 249.5(c).

have approved of the child's right to inherit.²⁶⁸ The Florida and the Virginia statutes do not put time constraints on the conception or the birth of the posthumously conceived child.²⁶⁹ Thus, the estates in those jurisdictions have the potential to remain open indefinitely while the woman decides to use the decedent's sperm to conceive a child.²⁷⁰

D. *Marital Status*

Most statutes addressing the issue of posthumously conceived children are only applicable to married couples. For example, under the Louisiana statute, the child must be born to a surviving spouse.²⁷¹ Likewise, the Texas statute and the statutes of the other states that have adopted the UPA only refer to the rights of spouses.²⁷² Thus, the child's right to inherit from his or her father is dependent upon the relationship between his or her parents.

Nevertheless, in a minority of states that have statutes defining the inheritance rights of posthumously conceived children, the legislatures chose not to limit the scope of those statutes to marital situations. For instance, Florida's statute focuses upon the father-child relationship and does not touch upon the marital status of the parents.²⁷³ Thus, nothing in the statute indicates that a man cannot leave a provision in his will for the benefit of a posthumously conceived child born to a woman who was not his spouse.²⁷⁴ Further, the California legislature did not limit the application of its statute to married couples.²⁷⁵ This approach is in line with the view that the right to inherit from his or her father belongs to the child, not to the mother.²⁷⁶

Virginia's approach to this issue is also worth noting. The provisions of the statute relevant to this discussion address the man's paternal obligations in three separate contexts.²⁷⁷ First, if the conception and birth of the child occurs during the man's lifetime, he is legally recognized as the child's parent.²⁷⁸ The marital status of the parties is relevant in that situa-

²⁶⁸ RESTATEMENT (THIRD) OF PROP. § 2.5 cmt. 1 (1999) (“[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.”).

²⁶⁹ See FLA. STAT. § 742.17 (West 2008); VA. CODE ANN. § 20-158 (West 2008).

²⁷⁰ Scott, *supra* note 38, at 966-67 (noting that technological advances have allowed parents to conceive several years after death).

²⁷¹ LA. REV. STAT. ANN. § 9:391.1(A) (2008).

²⁷² TEX. FAM. CODE ANN. § 160.707 (Vernon 2008) (framing the rights of the deceased spouse as a parent). See also UTAH CODE ANN. § 78B-15-707 (2008) (same).

²⁷³ See FLA. STAT. § 742.17.

²⁷⁴ See *id.*

²⁷⁵ See CAL. PROB. CODE § 249.5 (West 2008).

²⁷⁶ See *id.* § 6400 (providing that the right to inherit belongs to a man's heir).

²⁷⁷ See VA. CODE ANN. § 20-158 (West 2008).

²⁷⁸ *Id.* § 20-158(A)(2). But see *id.* § 20-158(c) (providing different rules in cases of divorce).

tion. Thus, if, while he is alive, the husband consents to the artificial insemination of his wife using his sperm or the sperm of another man, the child is recognized as his legitimate child.²⁷⁹ That recognition gives the child the right to inherit from the man. The plain reading of the statute indicates that a man who agrees to have his sperm used to inseminate a woman who is not his wife is not legally responsible for the child.²⁸⁰ Therefore, in this context, the child's right to inherit is dependent upon the legal relationship that exists between the child's parents.

The second scenario addressed by the Virginia statute involves a situation where the child is conceived by artificial insemination using the man's sperm during his lifetime, but the child is born after the man's death.²⁸¹ The section applying to those types of cases specifically refers to the legal obligations of spouses.²⁸² The third and most pertinent situation anticipated by Virginia's legislators deals with the obligations of the man when both the conception and birth occur after his death.²⁸³ When the statute discusses posthumous conception, it uses broad language that encompasses circumstances involving unmarried persons.²⁸⁴ With regard to a child posthumously conceived, if the statutory procedures are followed, the man is the legal father of the child even if he was not married to the child's mother.²⁸⁵

E. Notice

A notice requirement protects the reproductive rights of the deceased man by making it difficult for him to be classified as the legal father of the posthumously conceived child unless he consents to the child's conception. Further, it protects the man's right to control the distribution of his estate even in the absence of a will. The statutes enacted by both the California and Virginia legislatures have notice requirements that impact the rights of the posthumously conceived child.²⁸⁶ Under the mandates of those statutes,

²⁷⁹ *Id.* § 20-158(A)(2).

²⁸⁰ *Id.* § 20-158(A)(3) ("A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.").

²⁸¹ *Id.* § 20-158(B) ("Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.").

²⁸² VA. CODE ANN. § 20-158(B).

²⁸³ *Id.* ("However, any person who dies before implantation of an embryo . . . whether or not the gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can . . . be communicated to the physician . . . or (ii) the person consents to be a parent in writing executed before implantation.").

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ CAL. PROB. CODE § 249.5(b) (West 2008); VA. CODE ANN. § 20-158(B) (West 2008).

unless there is written consent on the part of the deceased man, notice must be given to an independent third party.²⁸⁷

1. Notice under the California Statute

In California, written notice that the deceased's sperm may be used for posthumous conception must be given to the person in charge of administering the deceased's estate.²⁸⁸ The notice must be given by the person authorized to control the use of the dead man's sperm within four months of the man's death.²⁸⁹ The purpose of the notice requirement appears to be to make sure that the executor of the man's estate knows that there might be another potential heir created. That information will assist the executor in planning the distribution of the man's estate. In addition, the notice requirement promotes the state's interest in the orderly distribution of estates and also protects the interests of the posthumously conceived child by allowing the executor to set aside some of the estate for that child. Further, the notice requirement protects the existing heirs by informing them of persons who might have a potential claim against the estate, giving the existing heirs some idea of the amount of their inheritance.

2. Notice under the Virginia Statute

The Virginia statute appears to be designed to address two different sets of circumstances: (1) cases where the man does not sign a written consent and the insemination is performed during his lifetime; and (2) cases where the man consents in writing to have his sperm used to create a child, and he dies before the insemination is performed.²⁹⁰ In both cases, the man is considered to be the legal parent of the resulting child. Hence, the child has the right to inherit from the man. The notice requirement of the statute deals with the first scenario. For purposes of the Virginia statute, the man is considered to be alive until the physician performing the insemination

²⁸⁷ CAL. PROB. CODE § 249.5(b) (West 2008) (providing that the individual who has the power to control the distribution of the decedent's property or death benefits must receive written notice from the decedent that provides that his or her genetic material is available for posthumous conception); VA. CODE ANN. § 20-158(B) (West 2008) ("[T]he [decedent] consents to be a parent in writing executed before the implantation.").

²⁸⁸ CAL. PROB. CODE ANN. § 249.5(b).

²⁸⁹ *Id.* ("The notice shall have been given to a person who has the power to control the distribution of either the decedent's property or death benefits . . . within four months of the date . . . of the decedent's death.").

²⁹⁰ VA. CODE ANN. § 20-158(A) (discussing the general determination of parentage in cases of assisted conception); *id.* § 20-158(B) (discussing parentage determinations upon the death of a spouse).

knows that he is dead.²⁹¹ Consequently, if the physician performs the insemination before being notified of the man's death, the insemination is treated as being performed during his lifetime. As a result, the posthumously conceived child is recognized as his legal heir. Nevertheless, the Virginia statute appears to state that, absent written consent, if the physician knows or should know of the man's death, he cannot go forward with the procedure.²⁹² In that case, the procedure is treated as if it never occurred and the child does not have the right to inherit from the dead man.

A key shortcoming of the notice requirement in the Virginia statute is that it might encourage persons to take steps to ensure that the physician is not notified of the man's death until it is too late to stop the procedure. This may be true in cases where a woman wants to conceive a child using a dead man's sperm for less than honorable reasons. In such a situation, the woman may be motivated to keep the physician in the dark about the procedure. The solution to the problem would be to strictly enforce the writing requirement contained in the statute. Thus, the physician should not be able to perform the procedure without the man's written consent.

F. *Other Conditions*

Some state statutes place other conditions on the posthumously conceived child's right to inherit. For example, the Louisiana statute gives the decedent's living heirs the opportunity to bring an action to disavow paternity within a year of the birth of the child.²⁹³ That provision gives the man's existing heirs the opportunity to demand proof that the posthumously conceived child has a genetic connection to the deceased man. Some legislatures may feel this provision has merit because it permits the existing heirs to speak for the man when he is no longer able to speak for himself. Hence, the existing heirs are able to protect their interests and those of the deceased man. On the other hand, permitting the existing heirs to challenge the paternity of the posthumously conceived child may increase in-fighting among potential heirs. As a result, the probate process might become slower and more expensive.

Each of the statutes discussed in this section has merit, and legislatures in these states have taken a step in the right direction. However, none of the statutes are comprehensive enough to enable the courts to address the legal consequences of the existence of posthumously conceived children.

²⁹¹ *Id.* § 20-158(B) (“[I]mplantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure.”).

²⁹² *Id.*

²⁹³ LA. REV. STAT. ANN. § 9:391.1(B) (2008).

IV. PROPOSAL

The issue of the paternal inheritance rights of a posthumously conceived child arises in two contexts. Scenario One: A man has his sperm removed and frozen prior to his death, and dies before his sperm is used to conceive a child. Or Scenario Two: A man dies, and then his sperm is extracted and used to conceive a child.²⁹⁴ Both situations lead to the following two issues: (1) Whether the resulting child should have the opportunity to inherit from his or her father; and (2) What, if any, conditions should be placed on the child's right to inherit from his or her father. The answer to the first question should differ depending upon which scenario exists. The answer to the second question should be the same in both cases. In order to properly balance all of the competing interests, states that currently do not have statutes governing the inheritance rights of posthumously conceived children should adopt statutes that contain a written consent requirement, time restrictions, and other appropriate restrictions. States that currently have statutes covering posthumously conceived children should amend them accordingly if they do not already contain these essential elements.

A. *Opportunity to Inherit*

1. Scenario One

If a man has his sperm removed and dies before the child is conceived, the posthumously conceived child should be presumed to be the legal heir of the dead man for intestacy purposes. The presumption should be rebuttable in order to protect the rights of the man's living heirs.²⁹⁵ Giving the posthumously conceived child the chance to inherit from his or her father will not infringe on the man's reproductive rights by forcing parental responsibilities on him. The man's reproductive rights are protected by some action taken by the man during life indicating that he wanted a child to be conceived using his sperm. The man's death should not prevent his repro-

²⁹⁴ See Janet Berry, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 248-50 (1997) (discussing the consequences of permitting sperm retrieval from a dead man).

²⁹⁵ See Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 280 (2005) ("Instead, there should be a presumption that when the decedent leaves his sperm specifically for the use of his surviving spouse, he intended to conceive a child after his death. The burden should be on the party seeking to preclude the child's inheritance to show the decedent did not intend to conceive after death.").

ductive wishes from being fulfilled.²⁹⁶ Furthermore, if the man had his sperm removed when he was facing a life-threatening illness or a situation that would leave him sterile, that affirmative action indicates that the man had his sperm removed because he was contemplating the conception of a child or children using his sperm.²⁹⁷

At a minimum, unless contrary evidence is presented, the court should presume that the man would have wanted any child conceived posthumously using his sperm to inherit from his estate.²⁹⁸ This approach will not discount the man's reproductive rights because, after the withdrawal of his sperm, the man has the opportunity to change his mind and to have the stored sperm destroyed. For instance, the man could make arrangements to have the stored sperm destroyed during his lifetime or he could include a provision in his will ordering the destruction of his sperm.²⁹⁹ The involvement of a neutral third party in the withdrawal of the man's sperm reduces the possibility of fraud or misuse of the sperm. As *Kievernagel* indicates,³⁰⁰ if the man makes his wishes known, the courts will order the medical facility to comply with the instructions that he leaves regarding the use of his sperm. Litigation over the use of a dead man's sperm usually occurs when he does not leave clear instructions about the disposal of his sperm.

2. Scenario Two

In the situation where the man's sperm is extracted from his dead body and used to create a child, the child should also be given the opportunity to inherit from his or her father.³⁰¹ However, the burden should be on the liv-

²⁹⁶ See Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 550-54 (1993) (indicating that, after a man dies, his reproductive decisions may be limited by the state).

²⁹⁷ See Scott, *supra* note 38, at 968 (citing *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 269 (Mass. 2002)).

²⁹⁸ Scharman, *supra* note 50, at 1025 (citing Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL. PROP. PROB. & TR. J. 213, 240 (1996) ("It is illogical to assume that a decedent would desire to prevent a biological child from sharing in his estate.")).

²⁹⁹ See *Hecht v. Superior Court of Los Angeles County*, 20 Cal. Rptr. 2d 275, 276, 289 (Cal. Ct. App. 1993) (finding no reason to interfere with the decedent's decision regarding the use of his gametes after his death); see also Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 597 (2005) ("[P]otential problems can be avoided by creating thorough estate planning documents clearly outlining the intent of the parties.").

³⁰⁰ *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 317-18 (Cal. Ct. App. 2008) (noting that only the decedent has a right to the determination of the use of his sperm, which must be governed by his intent when this is clear).

³⁰¹ See Berry, *supra* note 294, at 232 ("The newest technology allows viable sperm to be surgically extracted from deceased males within twenty-four hours of their death."); see also *id.* at 248-49 (providing examples of sperm extractions conducted after death).

ing parent to prove that the man would have wanted the child to be conceived using his sperm after his death. With regard to Scenario Two situations, state legislatures should make it more difficult for mothers to claim inheritance rights or other survivors' benefits for children who are intentionally created using a dead man's sperm.

Given the number of children who are neglected and in need of family,³⁰² state legislatures should take into consideration the public policy argument against creating fatherless children.³⁰³ Additionally, state legislatures should be wary of women who may be motivated to create children to financially benefit from the man's estate.³⁰⁴ Another public policy consideration that state legislatures should take into account is the fact that most cases involving posthumously conceived children are Social Security cases; the Social Security system may be overburdened by the introduction of another new pool of potential beneficiaries.

B. *Conditions to Inherit*

The opportunity to inherit should not be a guarantee of inheritance rights. Thus, the living parent of the posthumously conceived child should have to satisfy certain conditions in order for the child to actually receive the right to inherit.³⁰⁵ Those conditions should be geared toward protecting: (1) the interests of the posthumously conceived child; (2) the reproductive rights of the deceased man; (3) the interests of the man's other heirs; (4) and the interests of the state. The conditions should apply in both Scenario One and Scenario Two cases.

1. *Written Consent*

As most state statutes on this subject already provide, the posthumously conceived child should not be able to inherit from the deceased man if the man did not consent in writing to the child's conception. Insisting that a woman have written consent from a man authorizing the use of his sperm to create a posthumously conceived child ensures that the man has seriously

³⁰² Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 471 (2003).

³⁰³ Star, *supra* note 37, at 624 (disputing that a posthumously conceived child may be harmed by being fatherless).

³⁰⁴ In its 2008 season, the comedy television show *Ugly Betty* included a storyline about this issue. *Ugly Betty: Bananas for Betty* (ABC television broadcast Dec. 6, 2007). See Knaplund, *supra* note 82, at 634-36 (discussing some of the financial incentives for reproducing using a dead man's sperm); see also Karlin, *supra* note 33, at 1341.

³⁰⁵ Gary, *supra* note 80, at 35; see also Gilbert, *supra* note 296, at 555-58 (providing suggestions for resolving the question of the inheritance rights of posthumously conceived children).

thought about the possibility that his sperm would be used to conceive a child after his death, protects against fraud, and creates a safe harbor which provides the man with the assurance that the court will carry out his wishes.

Additionally, in the case of artificial insemination performed while the man is alive, some jurisdictions permit a man's consent to be presumed or implied.³⁰⁶ In light of the fact that a deceased man will not be around to speak on his own behalf in the context of posthumous conception, the mother of the child should be required to acquire the man's written consent.³⁰⁷ If the woman does not produce proof of the man's written consent to the posthumous conception, the resulting child should not be able to inherit from his estate.

There has been much dispute about whether a man's sperm should be recognized as property.³⁰⁸ The written consent requirement should apply regardless of which view is adopted. If the court decides to treat the dead man's sperm as just another body part, it still should not be extracted without written permission from the decedent. For example, a hospital does not harvest a person's organs unless that person has filled out an organ donor card or the hospital receives written consent from the person's next of kin.³⁰⁹ The harvesting of sperm should be more restricted because sperm has the potential to create a human life that the deceased man's resources may be used to support.³¹⁰ In addition, the decision to be a parent is a personal one that should be made by the man during his lifetime. Consequently, a man's sperm should not be extracted from his body posthumously without some type of written permission from him.

³⁰⁶ See, e.g., MD. CODE ANN., ESTATES & TRUSTS, § 1-206(b) (West 2008); see also, e.g., *In re Baby Doe*, 353 S.E.2d 877, 879 (S.C. 1987) (citing *R.S. v. R.S.*, 670 P.2d 923, 926 (Kan. Ct. App. 1983) ("Husband's consent to his wife's impregnation by artificial insemination may be express, or it may be implied from conduct which evidences knowledge of the procedure and failure to object.")).

³⁰⁷ See *K.S. v. G.S.*, 440 A.2d 64, 66 (N.J. Super. Ct. Ch. Div. 1981); see also *In re Marriage of Witbeck-Wildhagen*, 667 N.E.2d 122, 125-26 (Ill. App. Ct. 1996) (holding that it is against public policy to require a man to provide financial support for a child that his wife conceives by artificial insemination without his consent); Rowsell, *supra* note 55, at 409.

³⁰⁸ Jennifer Long Collins, Note, *Hecht v. Superior Court: Recognizing a Property Right in Reproductive Material*, 33 U. LOUISVILLE J. FAM. L. 661, 673-78 (1995); see also Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57, 57, 66 (1995). But see John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1038-39 (1994) (citing *Moore v. Regents of the Univ. of Calif.*, 793 P.2d 479, 489 (Cal. 1990) (discussing different viewpoints about the treatment of body parts, especially sperm, as property)).

³⁰⁹ Kristin Cook, *Familial Consent for Registered Organ Donors: A Legally Rejected Concept*, 17 HEALTH MATRIX 117, 121-22 (2007); see also Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 19 (1989).

³¹⁰ Bruce Wilder, *Posthumous and Post-Incompetency Reproduction: Legal Ramifications for Family Law and for the Law of Probate*, 13 DIVORCE LITIG. 57, 58 (2001).

The court in *Hecht*³¹¹ indicated sperm should be treated as property a man can dispose of in his will. In jurisdictions that choose to follow that approach, the written consent requirement is still appropriate. Distribution by a written instrument signed by the decedent is the law's preferred method of disposing of property.³¹² The courts and legislatures recognize that a man should have the right to dispose of his property in accordance with his wishes.³¹³ Thus, if a man leaves a will, the court will take steps to honor the instructions that he includes in that instrument. If the man dies without executing a will, the intestacy system is in place to distribute his property in a manner consistent with his presumed intent.³¹⁴ Consequently, a posthumously conceived child should only have the right to inherit from a man's estate if the man intended to have his sperm used to create that child. The most reliable indicator of that intent is a written instrument evidencing the man's consent to the posthumous conception.

Despite its obvious advantages, the writing requirement has some drawbacks. In some states, the statutory language is too broad to provide the court and the parties with much guidance. For instance, the general language contained in the statutes enacted by the legislatures of Louisiana, Virginia, and UPA jurisdictions may result in increased litigation.³¹⁵ A woman who wants to comply with the statute may have to go to court prior to the death of the man to ensure that his signed writing complies with the statutory requirements. Bringing the action at the beginning of the process makes sense because the man will be able to rectify the situation if the court does not approve of his efforts to satisfy the statutory writing requirement. The general language of the statutes also gives the existing heirs the opportunity to object to any writing submitted by the mother of the posthumously conceived child. As a limited jurisdiction court, the probate court is already overloaded.³¹⁶ The legislatures should lessen the court's burden by giving clearer statutory mandates.

In contrast to the general language used in Virginia, Louisiana, and elsewhere, the writing requirements of Florida and California are too stringent.³¹⁷ In Florida, the posthumously conceived child can only inherit if his

³¹¹ *Hecht v. Superior Court of Los Angeles County*, 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993).

³¹² Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 212-13 (2001) (noting that courts allegedly abhor intestacy).

³¹³ See Christine A. Djalleta, Comment, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 TEMP. L. REV. 335, 341 (1994) (citing *Hodel v. Irving*, 481 U.S. 704, 718 (1987)).

³¹⁴ Melissa Aubin, Comment, *Defying Classification: Intestacy Issue for Transsexual Surviving Spouses*, 82 OR. L. REV. 1155, 1172 (2003).

³¹⁵ LA. REV. STAT. ANN. § 9:391.1 (2008); VA. CODE ANN. § 64.1-8.1 (West 2008); UNIF. PARENTAGE ACT § 707 (2008).

³¹⁶ Gary, *supra* note 71, at 653.

³¹⁷ CAL. PROB. CODE § 249.5 (West 2008); FLA. STAT. ANN. § 742.17 (West 2008).

or her father provides for the child in a will.³¹⁸ A substantial number of people die without leaving wills.³¹⁹ The children of those people are protected by the intestacy system.³²⁰ The states do not punish children because their parents die intestate. That makes sense from a public policy perspective because a child cannot force his or her parents to draft a will. The Florida will requirement treats posthumously conceived children differently from other children.³²¹ If a child were born posthumously, Florida would permit that child to inherit under the state's intestacy system without requiring any action from the father.³²² The California statute does not require that the man leave a will.³²³ However, the writing mandated by the statute contains most of the formalities of a will. Thus, the California statute places as much of a hardship on the posthumously conceived child as the Florida statute.

In light of all of these considerations, states looking to adopt a stringent statute governing the inheritance rights of posthumously conceived children should take the following issues into consideration.

a. *Ensuring Adequate Consideration*

The writing requirement, like a will, serves several useful purposes.³²⁴ Requiring a writing forces a man to give serious consideration to his decision to agree to permit the use of his genetic material to create a child. The ritual of reading and signing a document usually impresses upon the person that he is making an important, and often binding, commitment.³²⁵ Therefore, he will be able to give informed consent to the procedure. Given the legal responsibilities that spring from conceiving a child, it is critical that the decision is not hastily made. The writing requirement also serves an evidentiary function.³²⁶ The writing signed by the man will serve as a reliable source of proof. As a result, when the woman petitions the probate court on behalf of the posthumously conceived child, she will be able to

³¹⁸ FLA. STAT. ANN. § 742.17.

³¹⁹ Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 172 (2006).

³²⁰ Mahoney, *supra* note 73, at 920.

³²¹ FLA. STAT. ANN. § 742.17.

³²² *Id.* § 732.106 (“Heirs of the decedent conceived before his or her death, but born thereafter, inherit intestate property as if they had been born in the decedent’s lifetime.”).

³²³ CAL. PROB. CODE § 249.5 (West 2008).

³²⁴ See James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 544 (1990) (discussing policies behind the will formalities, including the writing requirement).

³²⁵ Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941). See also Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 455-57 (2002).

³²⁶ John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 493 (1975).

prove that the man consented to the conception of the child. Since the events all take place after the man is dead, a writing signed by his hand is the best available evidence of his wishes.³²⁷

b. *Protecting Against Fraud*

Moreover, the writing requirement serves a protective function.³²⁸ It enables the probate court to function smoothly by reducing the number of fraudulent claims that are filed. It also protects the reproductive rights of the deceased man by not making him responsible for a child unless he agreed in writing to the conception. The writing provides a safeguard against the misuse of frozen sperm.³²⁹ The man may have frozen his sperm to use at a later time in his life. He may not want the sperm to be used to create a child that he will never know.

c. *Creating a Safe Harbor to Honor the Deceased's Wishes*

The final function of the writing requirement is to create a safe harbor that provides the man with the assurance that the court will carry out his wishes.³³⁰ The probate court is supposed to bring about the presumed intent of the decedent when it comes to distributing his property.³³¹ The writing requirement provides the court with the directions it needs to perform that task. This is especially true in Florida where the writing requirement can only be satisfied by a will.³³² The man's right to decide if he wants to be financially responsible for a child is protected because if he does not provide for the posthumously conceived child in his will, the child is not his heir. This is consistent with the manner in which the testacy system treats all children. A man has a right to disinherit his existing children,³³³ so he should have the right not to provide for his posthumously conceived child.

The writing requirement is fair to all of the parties impacted by the birth of the posthumously conceived child. It promotes the state's interests

³²⁷ Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 51 (1996).

³²⁸ Lloyd Bonfield, *Reforming the Requirements for Due Execution of Wills: Some Guidance from the Past*, 70 TUL. L. REV. 1893, 1907 (1996).

³²⁹ John A. Robertson, *Precommitment Issues in Bioethics*, 81 TEX. L. REV. 1849, 1874 (2003).

³³⁰ C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism*, 43 FLA. L. REV. 167, 269 (1991).

³³¹ Gary, *supra* note 71, at 651.

³³² FLA. STAT. ANN. § 742.17 (West 2008).

³³³ Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 84-85 (1994).

in making sure that the financial needs of minor children are met. Prior to the child's birth, the writing requirement permits the state to have a person it can hold responsible for the support of the child. If the man gives written consent for the child to be conceived, that writing can be used by the state to obtain financial support for the child from the man's estate or his Social Security benefits.³³⁴ The writing requirement helps the child by giving him or her tangible proof of paternity. That proof can be presented to the probate court or the Social Security Administration on behalf of the child. The writing requirement also protects the existing heirs by reducing the number of persons who can make a claim against the man's estate. The writing requirement creates a bright-line rule. If the child does not have the requisite written authorization, he or she does not have a right to inherit from the man's estate.

In order to satisfy the written consent requirement, the writing does not have to be formal. There are several options available that would not be unduly burdensome on the man and his family. The legislature could create a statutory consent form that the man could fill out authorizing the use of his sperm to conceive a child prior to or after his death.

Another option is for the medical facility withdrawing the man's sperm to provide a form for him to fill out prior to the procedure.³³⁵ Currently, before surgery or admittance to a hospital, patients are asked to fill out numerous types of forms, including living wills.³³⁶ Therefore, it would not be a burden for the hospital to generate another type of form to cover situations involving extraction of sperm. In fact, some states already require a licensed physician to obtain a consent form from a woman's husband before inseminating her with donor sperm. Those states could amend their statutes to require the woman to present a written consent form signed by the deceased man prior to releasing his previously stored sperm to the woman or removing sperm from the man's dead body. In addition, the man could be encouraged to leave provisions in his will for the distribution of his sperm to the woman he wants to use it to conceive his child.³³⁷

³³⁴ In the comments to its statute, the Louisiana legislature indicated that it gave posthumously conceived children the right to inherit under the intestacy system so that they could qualify for Social Security survivors' benefits. LA. REV. STAT. ANN. § 9:391.1 cmt. (2003 & 2008).

³³⁵ See, e.g., Rowsell, *supra* note 55, at 406; Stevenson-Popp, *supra* note 159, at 752 n.134.

³³⁶ Carson Strong, *Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 260 (1999) (proposing modifying living wills and durable powers of attorney to serve as evidence of consent for sperm withdrawal and artificial insemination).

³³⁷ Michael K. Elliott, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 65 (2004).

2. Time Restrictions

It is very important that the probate court close the estates of decedents as quickly and efficiently as possible.³³⁸ Therefore, in order to inherit, the posthumously conceived child should have to be conceived within a certain time period.³³⁹ The time restrictions imposed by the Louisiana and the California systems are fair to all the parties involved.³⁴⁰ The time frame permitted affords the woman the opportunity to conceive and give birth to the child. A shorter time period would be unrealistic because it typically takes several fertility treatments for the woman to conceive.³⁴¹ In addition, the woman may have a miscarriage or other complications. The two to three year window of opportunity gives the woman more than one chance to conceive using the dead man's sperm. A longer time period would not be fair to the existing heirs. They should not have to wait indefinitely to receive an inheritance. The Restatement approach permits flexibility because the court can determine what is a "reasonable" amount of time based upon the circumstances of a particular case.³⁴² However, the "reasonable" language is so vague it may not promote judicial economy because the court might be constantly called upon to decide if the child was born within a reasonable period of time.

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. The time limit should be long enough to give the woman a realistic opportunity to conceive and give birth.³⁴³ Nonetheless, the time period should be short enough to prevent numerous additional heirs from being conceived and to allow the existing heirs to receive their inheritance in a timely manner. The time frame can be based upon the average time it takes to probate an estate of that size in that jurisdiction.

³³⁸ Goodwin, *supra* note 295, at 274.

³³⁹ See Joshua Greenfield, Note, *Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, With a Focus on the Rule Against Perpetuities*, 8 MINN. J.L. SCI. & TECH. 277, 291-92 (2007) (discussing guidelines to be considered when selecting a time period for the posthumously conceived child to be born).

³⁴⁰ LA. REV. STAT. ANN. § 9:391.1 (2008); CAL. PROB. CODE § 249.5 (West 2008).

³⁴¹ Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 655 (1991) (discussing success rates of reproductive procedures); see also Monica Shah, Commentary, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 549 (1994); Chester, *supra* note 116, at 52 (discussing the disadvantages of a one-year limitations period for the posthumously conceived child to be created).

³⁴² RESTATEMENT (THIRD) OF PROPERTY § 15.1 (2004).

³⁴³ See Knaplund, *supra* note 82, at 652.

3. Other Limitations

Unlike existing statutes, newly created state statutes dealing with the inheritance rights of posthumously conceived children should apply to situations involving both married and unmarried persons. Statutes that are not limited to married couples are broad enough to cover most circumstances. Therefore, under those types of statutes, more posthumously conceived children will have the opportunity to inherit from their fathers. Hence, this approach appears to be in the best interests of the posthumously conceived children. However, there are other interests that must be balanced.

Nothing in any of the existing state statutes limits the number of times that a man can consent to the afterdeath use of his genetic material to conceive a child.³⁴⁴ Consequently, it is conceivable that several different women can use the man's sperm to conceive children after he dies. The end result could be numerous heirs filing claims against the man's estate. This would put a strain on the probate court and it would be unfair to the man's existing heirs. Therefore, the legislatures need some way to control the number of children posthumously conceived using a man's sperm. One way to achieve that task is to limit the pool of persons who have the right to create a man's heir after his death to his spouse. That decision makes sense because it is reasonable for a man to want his widow to bear his child. In addition, only permitting spouses to file claims against a man's estate will promote judicial economy.

Notwithstanding the benefits of restricting the application of the statutes to only spouses, that approach has some serious drawbacks. First, it is out of step with the evolution of the American family. More and more persons are choosing to have long-term committed relationships without the benefit of marriage, as recognized by the court in *Hecht*.³⁴⁵ Even though Hecht was not Kane's wife, the court acknowledged his right to leave her his sperm so that she could conceive his child after he died.³⁴⁶ By only giving a married man the right to consent to the posthumous use of his sperm, the legislatures disregarded the wishes of men in long-term committed relationship.

Additionally, the statutes appear to punish posthumously conceived children whose parents chose not to marry before their conception. When legislatures enacted statutes that deprived non-marital children of the opportunity to inherit from their fathers, the United States Supreme Court

³⁴⁴ *But see* *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007) (limiting use through IVF forms).

³⁴⁵ *See Hecht v. Superior Court of Los Angeles County*, 20 Cal. Rptr. 2d 275, 285 (Cal. Ct. App. 1993).

³⁴⁶ *Id.* at 287.

found those statutes to be unconstitutional.³⁴⁷ As a result, because death ends the marriage, a child conceived posthumously has a great deal in common with a non-marital child. Thus, a similar Equal Protection argument can be made on behalf of the posthumously conceived children of unmarried couples. That argument might be successful because there appears to be no compelling reason to treat those children differently from the posthumously conceived children of married couples.

CONCLUSION

The wars in Iraq and Afghanistan have impacted the country in numerous ways. There is a possibility that actions taken by some service members fighting in these wars will have an impact on family law in America. Prior to being deployed, military men and women are choosing to have their genetic material frozen.³⁴⁸ Thus, the men and women who do not survive the war still have the possibility of reproducing children. Courts will have to decide how to distribute the veteran benefits and other assets left behind by those persons. To insure that the probate system operates smoothly and fairly, state legislatures must enact comprehensive statutes that focus on the inheritance rights of posthumously conceived children. In particular, as long as the possibility exists for a dead man to reproduce, the courts and the legislatures must take steps to address the rights of the resulting children. Any system put in place must balance the interests of the state,³⁴⁹ the existing heirs, the decedent, and the posthumously conceived child. To guarantee a fair balance, state legislatures must give posthumously conceived children the opportunity to inherit from their deceased fathers. Nonetheless, the opportunity to inherit should not be a right to inherit. State legislatures should only give posthumously conceived children the chance to inherit from their father's estate if the circumstances of their births satisfy certain conditions, and successfully balances the competing interests of the state, the posthumously conceived child, other living heirs, and the father's wishes to procreate, or not procreate, another child after his death.

³⁴⁷ Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 594-98 (2001).

³⁴⁸ Greenfield, *supra* note 339, at 282; *see also* VanCannon, *supra* note 48, at 361.

³⁴⁹ Banks, *supra* note 112, at 296-97 (discussing state interests involved including whether to give posthumously conceived children the opportunity to inherit).