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Beyond our Conception: A Look at Children Born Posthumously through Reproductive Technology and New York Intestacy Law

Erica Howard-Potter
Albany Law School (Student)

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Mr. and Mrs. Gamete were married about a month before Mr. Gamete was to be deployed to Afghanistan to fight the War on Terror. He had been in the armed forces for quite a while, was highly specialized in biochemical warfare, and was being deployed specifically because of his expertise in that area. Knowing there was a substantial risk that he would come into contact with biochemical weapons, and that such risk could render him infertile, he and his wife decided that he should deposit sperm at a sperm bank to be frozen, just in case that did occur, so that they could still conceive a biological child. Mr. Gamete deposited his sperm, and left for Afghanistan shortly thereafter.

A few months later, Mrs. Gamete was diagnosed with cancer, which required her to undergo chemotherapy and radiation treatments. She, too, was fearful that these treatments would render her infertile, so she decided to have her eggs harvested and frozen. She went to the facility where her husband’s sperm was frozen, underwent the procedure, and successfully had her eggs

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1 This hypothetical will be used throughout this paper to illustrate different legal scenarios.

2 A gamete is defined as “[a] reproductive cell having the haploid number of chromosomes, especially a sperm or egg capable of fusing with a gamete of the opposite sex to produce a fertilized egg,” available at http://dictionary.reference.com/search?q=gamete (last visited Feb. 11, 2005).
extracted and frozen. The following day, she began the cancer treatment.

Suppose Mr. Gamete is killed while he is at war. Should Mrs. Gamete be able to use his frozen sperm to conceive a child after his death? Conversely, suppose Mrs. Gamete loses her battle with cancer. Should Mr. Gamete be able to use a surrogate and his wife's eggs to conceive a child after her death? If the answer is yes to these questions, then what result? In particular, will the deceased husband or wife still be considered the father or mother of the resulting children? Will the children be considered heirs of the deceased parent for purposes of intestacy law? Should they be able to? These are the questions that courts and state legislatures are beginning to face in light of advances in assisted reproductive technology.

**INTRODUCTION**

Individuals decide to freeze their gametes for a variety of reasons. One need not be married to deposit gametes at a facility for preservation, and one need not deposit such gametes for his or her own use. Gametes, when frozen, can be successfully used for

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3 There are a number of Constitutional issues that are involved, such as an individual’s right to procreate or not to procreate, that are beyond the scope of this paper. See Sheri Gilbert, *Fatherhood From the Grave: An Analysis of Postmortem Insemination*, 22 Hofstra L. Rev. 521, 531-47 (1993), for a detailed discussion of the Constitutional issues raised by posthumous conception.

4 Although it is more difficult for eggs to be successfully frozen for a long period of time, it is possible to freeze them at least for a period of time. See Michael Elliott, *Tales of Parenthood From the Crypt: The Predicament of the Posthumously Conceived Child*, 39 Real Prop. Prob. & Tr. J. 47, 48 (2004).

5 See Kristine S. Knaplund, *Postmortem Conception and a Father’s Last Will*, 46 Ariz. L. Rev. 91, 91 (2004) (illustrating why men being deployed for war deposit sperm at sperm banks); Elliott, supra note 4, at 48 (explaining that men deposit sperm at sperm banks “for reasons of ‘insurance’ against illness or accident”).

6 For example, many men deposit sperm on an anonymous basis, waiving all parental rights, to be used by another couple. See Gilbert, supra note 3, at 527.
many years,\(^7\) which may be both a blessing and a curse: a blessing because that amount of time gives couples attempting to conceive flexibility; a curse because that amount of time allows for conception after the death of the husband or wife. The conception itself is not the curse, rather, the lack of rights the resulting child has in relation to the deceased parent becomes the curse.\(^8\) Specifically, when an individual who has frozen his or her gametes dies without a will, and a child is subsequently conceived using those gametes, that child’s intestacy rights are unclear in all but a few states.\(^9\) This lack of clarity has other implications for the child as well.\(^10\)

This comment will first discuss the different types of assisted reproductive technologies, common law presumptions of paternity and the law behind posthumous (or after-born) and non-marital children. Next, this comment will look at the United States cases that have dealt with the issue of posthumously conceived children, followed by the approaches taken by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, the American Bar Association and the few state legislatures that have specifically dealt with this issue. A focus on current New York law will follow, including the intestacy statute, a section of the domestic relations law, the non-marital children statute, case law and a look to policy recommendations made by a New York State task force created specifically to discuss children

\(^7\) See, e.g., Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 63 (1994) (discussing how cryopreserved embryos make it possible "for a child to be born years, even decades, after the death of the genetic parents."); Susan Lewis Cooper & Ellen Sarasohn Glazer, *CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL & ETHICAL CONSIDERATIONS*, 153 (Perspectives Press, 1998) [hereinafter Cooper].

\(^8\) This “curse” can most likely be avoided by the use of a will. See discussion of wills infra Part XI.

\(^9\) See the various approaches taken by other states infra Part IX.

\(^10\) See, e.g., 20 C.F.R. § 404.355(a) (1) (1998), a regulation promulgated pursuant to the Social Security Act, stating that a child “may be eligible for benefits [if he or she] ... could inherit the insured’s person property as his or her natural child under State inheritance laws.”
born as a result of assisted reproductive technology. Additionally, current proposed legislation in New York concerning after-born children and children of assisted reproduction will be discussed. There will then be a brief discussion about wills, detailing the difference between posthumously conceived children’s rights under a will versus under intestacy law. Finally, there will be some proposals and suggestions made to the New York State Legislature on how New York should handle this issue.

ASSISTED REPRODUCTIVE TECHNOLOGIES (ART)

ARTIFICIAL INSEMINATION

Artificial insemination ("AI") is the oldest and most common form of assisted reproduction employed. It is typically used to treat male infertility, but also may be "used to combat [other] "male reproductive problems." To perform AI, sperm is placed "in the woman’s vagina, cervix or uterus." More often than not, sperm is placed in the cervix or uterus (rather than the vagina) in an effort to bring the sperm "closer to its ultimate destination," the egg.

There are two types of AI: AID and AIH. AID involves insemination using the sperm of a (typically anonymous) donor. AIH involves insemination using the husband’s sperm. Either procedure may be performed with "fresh semen or semen that has

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11 See Task Force infra Part X (d).
12 See Cooper, supra note 7, at 153. The procedure was first used to breed horses in the fourteenth century, and in 1799 the first “birth of a human conceived by artificial insemination (with the husband’s sperm) was recorded.”
13 Id. at 154 (stating that artificial insemination “has been widely available since the early 1980s and is now employed much more frequently than” other assisted reproduction methods).
14 See McAllister, supra note 7, at 58.
15 Cooper, supra note 7, at 153.
16 Id.
17 McAllister, supra note 7, at 59. AID and other forms of assisted reproductive technologies may also be used by same-sex couples, as these couples are incapable of having a child that is biologically related to both of them.
been thawed after long-term frozen storage." If a husband is "azoospermic"—infertile with no sperm at all—AID is the only AI option. This method enables a couple to have a child, but only the mother will be a biological parent. AIH is usually used when a husband is "oligospermic"—infertile but with "some sperm"—and conceiving through sexual intercourse "is highly improbable." With this method, a couple is given the opportunity to have a biological child when it may not have been otherwise possible.

IN VITRO FERTILIZATION

The steps involved in in vitro fertilization ("IVF") are as follows. First, a woman takes "ovulation inducing drugs" in order to produce multiple "oocytes" (eggs). Next, the eggs are harvested from the ovaries and placed into a petri dish where they are combined with 50,000 pre-selected "motile" sperm. Then, once (if) fertilization occurs, the resulting embryos are transferred to the uterus. The age of the woman will determine how many embryos are transferred.

Eggs, like sperm, may also be donated and used when a woman cannot produce viable eggs but is capable of being pregnant and carrying a child to term. This is analogous to AID, when a couple uses the sperm of an anonymous donor, enabling a couple to have a child where only one parent is the biological parent. Conversely, when a woman is capable of producing viable eggs but incapable of being pregnant, her eggs may be fertilized

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18 Id.
19 Cooper, supra note 7, at 155.
20 Id.
21 Id. at 40.
22 Id. Motile is defined as "[m]oving or having the power to move spontaneously," available at http://dictionary.reference.com/search?q=motile (last visited Feb. 11, 2005).
23 Cooper, supra note 7, at 40-41.
24 Id. at 41. Typically, three embryos are transferred to "women under age 35, four embryos in women 35 to 40 and as many as five or six embryos in women over forty."
25 See McAllister, supra note 7, at 61-62.
and transferred to a surrogate's uterus, allowing a couple to have a biological child.\textsuperscript{26}

\textbf{CRYOPRESERVATION}

Cryopreservation is essentially a branch of IVF.\textsuperscript{27} After the eggs have been fertilized and the embryos have been transferred, there may be excess embryos that couples freeze for later use.\textsuperscript{28} Cryopreservation has many advantages, such as: allowing embryos to be transferred more than once, if the first attempt is unsuccessful or if a couple wants more than one child; permitting a woman to be implanted "during a natural cycle rather than during a drug-stimulated cycle... because drug stimulation makes the uterus less receptive to implantation"; and it may reduce the occurrence of multiple pregnancies.\textsuperscript{29} Once the embryos are thawed, they are transferred to the uterus using IVF.\textsuperscript{30}

\textbf{GAMETE INTRAFALLOPIAN TRANSFER}

Gamete intrafallopian transfer ("GIFT") is another variation of IVF.\textsuperscript{31} But, instead of combining the eggs and sperm in a petri dish, the retrieved eggs are placed "directly into the fallopian tubes with large numbers of sperm."\textsuperscript{32} Because fertilization occurs naturally in the fallopian tubes and it is assumed that the tube is "better incubator than a Petri dish," GIFT is more advantageous than other forms of IVF.\textsuperscript{33} Any extra eggs

\begin{itemize}
  \item \textsuperscript{26} \textit{Id.} at 62.
  \item \textsuperscript{27} See Cooper, \textit{supra} note 7, at 41.
  \item \textsuperscript{28} \textit{Id.} In order to achieve cryopreservation, embryos are cooled and dehydrated—the embryos are "suspended in an aqueous medium and chemically treated with a cryoprotectant [which] replaces the water in the cells." A gradual method is used to cool the embryo "to -80 degrees C, then is transferred to liquid nitrogen where it rapidly cools to -196 degrees C for long-term storage." McAllister, \textit{supra} note 7, at 62-63.
  \item \textsuperscript{29} See McAllister, \textit{supra} note 7, at 62.
  \item \textsuperscript{30} \textit{Id.} at 63.
  \item \textsuperscript{31} \textit{Id.}
  \item \textsuperscript{32} Cooper, \textit{supra} note 7, at 41.
  \item \textsuperscript{33} \textit{Id.}
\end{itemize}
are not discarded, but are "inseminated and cryopreserved for later use."\textsuperscript{34} There are a number of other variations of IVF and GIFT.\textsuperscript{35}

PROBLEMS WITH THE COMMON LAW PRESUMPTIONS OF PATERNITY AND MATERNITY

Before the creation of blood tests that could establish a biological relationship between two individuals, the common law devised legal presumptions to establish such relationships. The two presumptions that are relevant to this paper are those that established parentage.

PATERNITY

In the early nineteenth century, the presumption of paternity that had been in use was finally committed to writing.\textsuperscript{36} \textit{The King v. Luffe} set out the already-accepted rule that "a child born to the wife of a married man is his child, unless evidence showed that he could not have been the father due to lack of access to wife throughout relevant period of gestation or that he was sterile or impotent."\textsuperscript{37} This presumption has been codified with slight variations by many states,\textsuperscript{38} and the statutes have been deemed constitutional by the United States Supreme Court.\textsuperscript{39}

\textsuperscript{34}Id.
\textsuperscript{35}Id.
\textsuperscript{36}For example, Zygote Intrafallopian Transfer ("ZIFT") is when eggs are fertilized in a petri dish, like IVF, but are transferred to the fallopian tube, like with GIFT; Embryo Lavage and Transfer is when a woman egg-donor, instead of having the eggs removed to be fertilized as with IVF, is instead artificially inseminated with the husband's sperm and then the fertilized egg, if retrieved, is "transferred to the uterus of the recipient." McAllister, \textit{supra} note 7, at 63-65.\textsuperscript{37} See \textit{RESTATEMENT (THIRD) OF PROP.: WILLS \\& OTHER DONATIVE TRANSFERS} § 2.5, Statutory Note, cmt. 3c, (citing \textit{The King v. Luffe}, 103 Eng. Rep. 316 (K.B. 1807)).\textsuperscript{38}See ALA. CODE § 26-17-5; ARK. CODE ANN. § 28-9-209; CAL. FAM. CODE §§ 7540, 7541, 7611; COLO. REV. STAT. § 19-4-105; DEL. CODE ANN. tit. 13, § 804; D.C. CODE ANN. § 19-318; HAW. REV. STAT. § 584-4; 750 ILL. COMP. STAT. 45/7; IOWA CODE § 252A.3(4); KY. REV. STAT. § 406.011; LA. CIV. CODE ANN. art. 184; MD. CODE ANN., EST. \\& TRUSTS § 1-206; MICH. COMP. LAWS § 700.2114; MINN. STAT. § 257.55; MO. REV. STAT. § 210.822; MONT.
MATERNITY

Before the use of ARTs, the idea that someone other than the woman who gave birth to a child could be the child’s mother was inconceivable, as illustrated by “the ancient dictum mater est quam [gestation] demonstrate (by gestation the mother is demonstrated).”40 In other words, this belief created the presumption that the gestational mother, the woman who gave birth to the child, was automatically the mother of the child. This presumption is rarely discussed—a woman has always been capable of being impregnated by someone other than her husband, but a woman has not always been capable of giving birth to a child that is not biologically related to her.41

Where these presumptions become problematic is when ARTs are involved. If the ART used is AI, then the presumption can be useful—whether the AI is accomplished by AID or AIH, the woman’s husband is automatically the father, which is not problematic. But, when IVF and a surrogate are used, these presumptions create a number of problems. When a wife’s eggs are extracted and combined with her husband’s sperm in a petri dish, then implanted into a surrogate’s uterus (in the situation where a woman can produce viable eggs but is unable to carry a pregnancy to term), these presumptions create a horrendous result. First, the surrogate, as the gestational mother, will be the

41 See, e.g., Andrea E. Stumpf, Note, Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 YALE L.J. 187, 187 n.1 (1986) (discussing the fact that the maternity “presumption is not articulated as such in the legal field, for the presumption has been so absolute as to have generated no controversy.” She goes on to say that “We really have no definition of ‘mother’ in our lawbooks. . . . ‘Mother’ was believed to have been so basic that no definition was deemed necessary.”).
presumptive mother. Second, and equally as disturbing, is that if the surrogate is married, her husband will presumptively be the father of the child. In that situation, the presumptions have the effect of making a married couple the legal parents of a child that is not biologically theirs without an adoption proceeding—the biological parents’ rights are thus severed against their will. Consequently, the biological parents—the two people who decided to use a surrogate for the sole purpose of enabling them to have a biological child—are left with nothing.

Even more problematic is when a child is conceived posthumously. Particularly, if a husband had his sperm frozen during his lifetime, and the widowed wife uses that sperm to conceive a child after his death, then the child presumptively has no legal father. Biologically, of course, the deceased husband is the father of the child. But legally, since death ends marriage, the woman is no longer married, so there is no husband to presumptively be the father. This problem is compounded when IVF and a surrogate become involved, as exemplified by the following scenario. Suppose the hypothetical Mr. and Mrs. Gamete both die, but their parents are aware that each of them had gametes that were deposited, frozen and preserved. The parents decide that they want a grandchild, created from the frozen sperm and eggs of the now-deceased Mr. and Mrs. Gamete, and arrange to have the sperm and eggs thawed and combined in a petri dish.

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42 The reality of this situation can be illustrated by looking at VA. CODE ANN. § 20-158 (2004). According to the Virginia statute, when a surrogacy contract has not been court-approved, and “if (i) the surrogate is married, (ii) her husband is a party to the surrogacy contract, and (iii) the surrogate exercises her right to retain custody and parental rights to the resulting child pursuant to § 20-162, then the surrogate and her husband are the parents.” Id. This result would occur even if “either of the intended parents is a genetic parent of the resulting child.” Id.


44 This is, of course assuming the mother had not remarried, like the women involved in the case law surrounding this issue. See infra Part VI.
They also arrange for the resulting embryos to be implanted into a surrogate. If a child is born, who are the parents? It would be presumed that the surrogate mother would definitely be the mother, and her husband, if she has one, would be the father. The biological grandparents would certainly not be the parents, even though their intent was not to donate the embryos to the surrogate, but to have the surrogate give birth to the child/children. Clearly, this situation would get complicated very quickly.

Of course, these presumptions are just that: legally created presumptions which may be overcome. Fortunately, the advances in technology that have brought about ARTs have also brought about DNA and other blood testing that can easily prove biological parentage. Although possible, overcoming these presumptions often comes with heavy financial and emotional costs.

POSTHUMOUS (OR AFTER-BORN) AND NON-MARITAL CHILDREN

Posthumously conceived children have factors in common with both posthumous (or after-born) and non-marital children. For this reason, a brief look at the issues surrounding posthumous (or after-born) and non-marital children, specifically how these

45 Although this would be an unusual situation, it is possible. For example, under CAL. PROB. CODE § 249.5 (2005), if a parent of the decedent was designated in the decedent’s written specification as someone who could “use the genetic material for posthumous conception,” the decedent’s parent could most likely use the material in this manner.

46 See, e.g., Johnson, 851 P.2d 776. In this case, a court battle was waged to determine maternity of a three year old child born as the result of an embryo created from a husband’s and his wife’s eggs implanted into a surrogate. When relations between the married couple and the surrogate soured during the surrogate’s pregnancy, the surrogate tried to rescind on the contract between her and the couple. The married couple retained custody of the child throughout the litigation, but the surrogate was awarded visitation rights. The financial and emotional costs that may be incurred by all parties involved in this type of litigation are clearly demonstrated by the facts of this case.

47 The modern term for children who are born out of wedlock is “non-marital.” Previously, and in most of the cases cited in this section, these children were referred to as being “illegitimate.”
children are treated under the law, is necessary in understanding how posthumously conceived children will potentially be treated.

**POSTHUMOUS (AFTER-BORN) CHILDREN**

For hundreds of years it has been recognized that a child who is "in ventre sa mere"\(^48\) at the death of his or her father will be treated as "in esse"\(^49\) so long as the child is later born alive.\(^50\) Such children are referred to as being posthumous or after-born.\(^51\) The traditional rule regarding posthumous children in terms of property law is "that an infant in ventre sa mere," and later born alive, "takes by descent," and thus is treated as though it was in being at the time of the decedent's death.\(^52\)

The obvious similarity between posthumous and posthumously conceived children is the fact that in both situations the children are born after the death of a parent. Of course, there is a major difference as well: there is only a finite time in which posthumous children can possibly be born after the death of a parent, whereas posthumously conceived children can, as previously discussed, be born many years after the death of a parent. Because of this, creating a legal fiction (i.e., that a child in gestation and later born alive will be treated as living at the time of the parent’s death) for posthumous children is relatively simple,

\(^{48}\) This phrase is Latin for "in gestation."
\(^{49}\) "In esse" is defined as: "In actual existence; in being." BLACK'S LAW DICTIONARY 346 (2d ed. 2001) [hereinafter Black’s].
\(^{50}\) See Marsellis v. Thalhimer, 2 Paige Ch. 35, (NY Ch 1830) (citing Doe v. Clarke, 2 Hen Black. R. 399 ("a posthumous child of C was held entitled" to take under the devise "to every child of C"); and Miller v. Turner, 1 Ves. Sen. 85 ("a posthumous child was entitled, under a provision in the marriage articles for every child who should be living at the death of the father.").
\(^{51}\) An after-born child is defined as: "A child born after execution of a will or after the time in which a class gift closes. Black’s, supra note 49, at 97. An after-born heir is “[o]ne born after the death of an intestate from whom the heir is entitled to inherit.” Id. at 319.
\(^{52}\) Marsellis, 2 Paige Ch. (citing 3 Wilson’s R. 526). See also id., stating that “[t]o enable the child after its birth to reap the benefit of these principles, it is necessary it should be born perfectly alive” (citing 5. T. R. 64, Grose, J., quotation made in Doe ex dem. Lancashire v. Lancashire).
and does not unduly burden the administration of estates. This legal fiction does not work well when posthumously conceived children are involved because estates could be held open almost indefinitely waiting to see if a child will or will not be conceived and born alive.

**NON-MARITAL CHILDREN**

According to the Supreme Court of the United States, statutes that discriminate against non-marital children are subject to a heightened scrutiny test under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. This is so because “visiting condemnation upon the child in order to express society’s disapproval of the parents’ liaisons is illogical and unjust.” The Court has also stated that the “[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheretance of illegitimate children whose fathers die intestate.” However, the Court has often deemed intestacy statutes that discriminate against non-marital children to be Constitutional, since “[t]he more serious problem of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers’ estates than that required either for illegitimate children claiming under their mothers’ estates or for legitimate children generally.”

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53 See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) (stating that although “classifications based on illegitimacy are not subject to ‘strict scrutiny,’ they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests.”).


56 *Id.* at 770. The Supreme Court has applied this more demanding standard to uphold a number of state statutes that discriminate against non-marital children. See, e.g., *Lalli*, 439 U.S. 259, 261, 275-76 (holding that a New York statute “which requires illegitimate children who would inherit from their fathers by intestate succession to provide a particular form of proof of paternity” that legitimate children are not required to prove to not be in violation of the Equal Protection Clause); and *Labine v. Vincent*, 401 U.S. 532, 537, 539-40 (1971) (holding that a Louisiana statute where “[c]hildren born out of wedlock and who are never acknowledged by their parents apparently have no right to take property by intestate succession from their father’s estate” and where “[i]n some
"Because death ends a marriage, ... posthumously conceived children" are also non-marital children, and could be treated the same way legally as other non-marital children. First, posthumously conceived children share some significant characteristics with non-marital children. For example, discriminating against posthumously conceived children, like non-marital children, would be "visiting condemnation upon the child in order to express society’s disapproval of the parents’ choice regarding conception. In other words, neither non-marital nor posthumously conceived children are responsible for the circumstances surrounding their births, and penalizing these children for such circumstances is unjust. Likewise, requiring a posthumously conceived child to prove his or her paternity or maternity, thus requiring a more demanding standard than non-posthumously conceived children, also seems like a legal necessity.

CASE LAW

Over the last decade, there have been four cases dealing with the issue of whether posthumously conceived children are entitled to receive Social Security benefits. This issue is relevant for purposes of intestacy law because, under the Social Security Act, one of the only ways to qualify as a "natural child," is the ability to "inherit the insured's personal property as his or her natural child under State inheritance laws." In looking to state laws, the Social Security Administration ("SSA") will make a

58 Matthews, 427 U.S. at 505.
59 See Trimble, 430 U.S. at 770 (stating that "no child is responsible for his birth and penalizing the illegitimate child is an ineffectual – as well as an unjust – way of deterring the parent.").
60 Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004); Hart v. Shalala (E.D. La. 1994) (No. 94-3944); Woodward, 760 N.E.2d 257; and In re Kolacy, 753 A.2d 1257 (N.J. Super. 2000).
61 42 U.S.C. § 416 (e); 20 C.F.R. § 404.355 (a).
qualification decision based on how "State courts would . . . decide whether [he or she] could inherit a child's share of the insured's personal property if the insured were to die without leaving a will." Because of this requirement, courts have been faced with the issue of whether a posthumously conceived child may be considered an heir for state intestacy purposes.

In all of the four cases where this issue arose, the husband was suffering from cancer and deposited sperm at a sperm bank prior to receiving medical treatments that could make him infertile. Each woman had gone through the whole SSA process, only to be denied benefits. Ultimately, each child was deemed eligible to receive Social Security benefits, but the methods used and the reasoning applied by each court were substantially different. Consequently, only the two state courts that dealt with this issue actually decided whether posthumously conceived children would be considered heirs for purposes of their respective states' intestacy laws.

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62 § 404.355 (b) (1).
63 The rules regarding how much each family member is entitled under Social Security is somewhat analogous to the rules for intestacy law. Specifically, when a person dies intestate, there are only a finite number of assets, and a specific amount of money that is available for distribution among surviving spouses and children. Similarly, there is a "family maximum" under the Social Security Act, and benefits to individuals may be reduced "[i]f the total benefits to which all persons are entitled on one earnings record exceed a maximum amount prescribed by law ... so that they do not exceed that maximum." 20 CFR § 404.403. Thus, if a posthumously conceived child is eligible to receive an intestate share of a deceased parent's estate, he or she will reduce the intestate share of others entitled to such shares; likewise, the more family members there are in a family receiving survivor's benefits under the Social Security Act, each individual's share may be reduced to accommodate all family members.

64 See Gillett-Netting, 371 F.3d at 594; Hart, (No. 94-3944); Woodward, 760 N.E.2d at 260; and In re Kolacy, 753 A.2d at 1258.
65 See Gillett-Netting, 371 F.3d at 595; Hart, (No. 94-3944); Woodward, 760 N.E.2d at 261; and In re Kolacy, 753 A.2d at 1259.
66 See Gillett-Netting, 371 F.3d at 599 & n.8; Hart, (No. 94-3944); Woodward, 760 N.E.2d at 272; and In re Kolacy, 753 A.2d at 1262.
The first court in the United States to deal with this precise issue was the United States District Court for the Eastern District of Louisiana in *Hart v. Shalala* in 1994.67 The child in question, Judith Christine Hart, was conceived three months after her father’s death via GIFT.68 Judith was denied Social Security benefits because she “did not qualify as her father’s heir for intestacy purposes under Louisiana law,” and could not otherwise “meet the requirements of the Social Security Act,” even though she was Mr. Hart’s biological child.69 When the case finally reached the District Court level, the Social Security Commissioner “announced that survivor’s benefits would be paid to Judith Hart upon return of the case from the court to the Social Security Administration.”70 Therefore, the court never had to reach the issue of whether posthumously conceived children would be considered heirs for Louisiana intestacy purposes.71

In *Re Kolacy*

Six years later, the Morris County Superior Court of New Jersey was faced with that precise issue in *In Re Kolacy*. The facts of this case are as follows: Mr. Kolacy was diagnosed with leukemia, and deposited his sperm at a bank before starting the chemotherapy treatments that would most likely make him

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67 *Hart*, (No. 94-3944).
69 Id. at 252, 254-55.
70 Id. at 255-56. *See Statement of Shirley S. Chater, Commissioner of Social Security, Regarding the Status of the Judith Hart Court Case* (March 11, 1996) (returning the case back to Social Security for the “immediate payment of benefits to Judith Hart.” This decision was made because the case presented “significant policy issues that were not contemplated when the Social Security Act was passed … [and] it would be inappropriate to deny benefit payments to” her).
71 In response to this case, Louisiana subsequently enacted legislation to deal with this issue. *See infra* text accompanying notes 132-34.
Fourteen months later, he lost his battle with leukemia. A year after his death, Mariantonia Kolacy allowed her husband’s sperm to be released “to the Center for Reproductive Medicine and Infertility at Cornell University Medical College in New York City” so that “[a]n IVF fertilization procedure uniting the sperm of William Kolacy and eggs taken from Mariantonia” could be performed. As a result of the successful procedure, “the embryos ... were transferred into the womb of Mariantonia [and] . . . [t]win girls, Amanda and Elyse, were born. . . more than eighteen months after the death of” their father.

After Mariantonia was denied Social Security benefits on behalf of her daughters as dependents of William Kolacy, she brought an action seeking a declaration that her daughters be given the status of being William Kolacy’s intestate heirs. The court reasoned that “[a]lthough the Legislature has not dealt with the” exact issue involved in this case, “it has manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death.” Furthermore, the judge stated that in his view, “the general intent should prevail over a restrictive, literal reading of statutes,” and therefore held that:

Given that general legislative intent, it seems to me that once we establish, as we have in this case, that a child is indeed the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.

72 In re Kolacy, 753 A.2d 1257, 1258 (N.J. Super. 2000).
73 Id.
74 Id.
75 Id.
76 Id. at 1259.
77 Id. at 1262.
78 In re Kolacy, 753 A.2d 1257, 1262 (N.J. Super. 2000).
The court also held that since estates cannot be held open indefinitely, it would be fair and reasonable "for a Legislature to impose time limits and other situationally described limits on the ability of after born children to take from or through a parent," or, in the absence of such legislation, for a court do so. But, since "there are no estate administrative problems involved" in the present case, and since "there are no competing interests of other persons who were alive at the time of William Kolacy's death which would be unfairly frustrated by recognizing [the twins] as his heirs," the exact time limits need not be delineated here. Thus, in New Jersey, at least for now, posthumously conceived children are considered heirs for intestacy purposes, subject to some potential limitations.

WOODWARD v. COMMISSIONER OF SOCIAL SECURITY

The Supreme Court of Massachusetts was the next court to face this issue in 2002 in Woodward v. Commissioner of Social Security. The facts in Woodward are almost identical to those in Kolacy. When Woodward's twins were denied Social Security benefits, she filed suit in the United States District Court for the District of Massachusetts, and that court certified the following question for the Massachusetts Supreme Court:

"If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?"

79 Id.
80 Id.
82 Id.
In deciding how to answer the question, the court first noted that "[t]he Massachusetts intestacy statute does not... limit[] the class of posthumous children to those in utero at the time of the decedent's death."\textsuperscript{83} The court also points out that "[b]ecause death ends a marriage,... posthumously conceived children are always nonmarital children."\textsuperscript{84} The only difference in the treatment of marital and nonmarital children for purposes of the state's intestacy law is that nonmarital children "must obtain a judgment of paternity as a necessary prerequisite" to being considered heirs because, prior to the death of the parent, "the parentage of such children can be neither acknowledged nor adjudicated."\textsuperscript{85} The same would be true for posthumously conceived children. Additionally, the court points out that since the Massachusetts intestacy statute refers to "issue," which "in the context of intestacy... means all lineal (genetic) descendants," whether they are marital or nonmarital descendents does not affect their status as heirs.\textsuperscript{86} Descendants, in Massachusetts, are defined as "persons who by consanguinity trace their lineage to the designated ancestor."\textsuperscript{87}

After reviewing the intestacy statutes, the court then "answer[s] the question as follows":

In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of "issue" under the Massachusetts intestacy statute. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous

\textsuperscript{83} \textit{Id.} at 262.  
\textsuperscript{84} \textit{Id.} at 266-67.  
\textsuperscript{85} \textit{Id.} at 267.  
\textsuperscript{86} \textit{Id.} at 263.  
\textsuperscript{87} \textit{Woodward}, 760 N.E.2d at 263.
conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.88

Although this court goes further than any other court (before or since) has gone in setting out specific criteria for determining when posthumously conceived children are able to qualify as issue for purposes of intestacy law, there are still a number of questions left unanswered. For example: How does one go about establishing that the decedent “consented to posthumous conception and to support of the resulting child?” Specifically, would a written document be required? And, at what point will “time limitations . . . preclude commencing a claim for succession rights?” None of these questions needed to be answered based on the facts of this particular case,89 but they could become problematic in the future.

GILLETT-NETTING V. BARNHART

The final case to deal with this issue, and the only federal court to rule on this issue, was the United States Court of Appeals, Ninth Circuit in Gillett-Netting v. Barnhart in 2004. Again, the facts were nearly identical to those in Woodward and Kolacy.90 Based on these facts, and on Arizona’s intestate succession laws,

88 Id. at 259. This is also the approach taken by the Restatement. See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5, Statutory Note, cmt. 1 (1999) (stating that posthumously conceived children must “be born within a reasonable time after decedent’s death[,] . . . in circumstances indicating that the decedent would have approved of the child’s right to inherit”).
89 Woodward, 760 N.E.2d. at 260, 267 (stating that the District Court judge “has removed from our consideration the question whether the paternity judgment obtained by the wife in this case was valid” and that it was also unnecessary to “address the timeliness issue”).
90 Gillett-Netting v. Barnhart, 371 F.3d 593, 594-95 (9th Cir. 2004).
the United States District Court for the District of Arizona denied Social Security benefits to Gillett-Netting's twins. The district court's holding centered on its determination that the twins failed to meet the Social Security Act's definition of child since they could not inherit from Robert Netting under Arizona intestacy laws. Looking to Arizona's intestacy statute, the court focuses on the plain language of the statutory phrase "persons who survive the decedent," and declare that language to be "indicative that [heirs] must be in existence at the time of the decedent's death" (with an exception only for an after-born child who was in gestation at the time of death). The court further states that the decedent's intent is irrelevant.

Next, the court rejects Gillett-Netting's argument that since the twins are considered legitimate under Arizona's legitimacy statute, they qualify as dependents under the Social Security Act, and are thus eligible for benefits. The dependency argument put forth by Gillett-Netting was the Supreme Court's holding in Mathews v. Lucas. In that case, the Court stated that, "[u]nless the child has been adopted by some other individual, a child who is legitimate, or a child who would be entitled to inherit personal property from the insured parent's estate under applicable state intestacy law, is considered to have been dependent at the time of the parent's death." The district court says that because the children do not meet the definition of "child" under the Social Security Act, their status as dependents is irrelevant.

Finally, the court turns to the decisions in Woodward and Kolacy, distinguishes them from the present case, and refuses to

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92 Id. at 966.
93 Id.
94 Id.
97 Id. Although this particular issue is not related to the issue of whether posthumously conceived children are considered heirs under intestacy law, it is discussed here because this is how the Ninth Circuit made its decision on appeal. See infra text accompanying notes 100-101.
follow either of them. Since *Woodward* applied Massachusetts intestacy law, which does not have an “after-born heir provision” like the one in Arizona’s statute, and since *Kolacy* applied New Jersey law, neither of those cases were considered persuasive by the district court.99

On appeal, the Ninth Circuit determined that since the twins “are Netting’s legitimate children, they are considered to have been dependent under the Act and are entitled to benefits.”100 However, the court never answers the question of whether posthumously conceived children would be considered heirs for intestacy purposes in Arizona. In fact, the court makes it clear that “[b]ecause [the twins] are Netting’s children under Arizona state law, we need not consider whether they could be deemed dependent for another reason, such as their ability to inherit property from their deceased father under Arizona intestacy laws.”101 Based on this decision, the issue of posthumously conceived children is still unanswered in Arizona.102

**AMERICAN LAW INSTITUTE APPROACH**

**THE RESTATEMENT**

Originally, the American Law Institute (“ALI”) adopted “the traditional view” that, in order to qualify as an heir, the child must have been both conceived and born prior to the death of the

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99 *Id.* The court discusses additional issues, such as an equal protection claim, but the rest of the opinion is not relevant for purposes of the present discussion.
100 *Gillett-Netting*, 371 F.3d at 596.
101 *Id.* at 599 n.8.
decedent. However, in light of the advancements in ARTs, the ALI believes that “this proposition is open to reexamination.” Specifically, the Restatement now “takes the position that, to inherit from the decedent, a child produced from the 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.” No definition or explanation is given regarding what constitutes a “reasonable time” or what type of proof would be sufficient to determine “that the decedent would have approved of the child’s right to inherit.” The only clarification given is that a clear case would be when, after the death of the husband, the decedent’s widow used the husband’s frozen sperm to produce a child. Conversely, if the spouses “were in the process of divorcing when the decedent died,” the requisite approval would be doubtful. Other than those two statements, no parameters are given. And, the Restatement does not discuss the implications of frozen eggs or embryos, except to say that “[s]imilar questions [concerning legal obligations and relationships] could also arise regarding egg donors.” Although the ALI supports the idea of deeming posthumously conceived children heirs, the rule it asserts is very vague and loose, and would be difficult to adopt by any state because of its lack of definite standards.

104 Id. See also RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5, cmt. l (1999).
105 Id., at § 2.5, cmt. l.
106 Id.
107 Id.
108 Id.
109 Id.
110 But see supra, text accompanying note 88, the holding from Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 259 (Mass. 2002), which is very similar to the ALI approach.
ORGANIZATIONAL APPROACHES

A few organizations have issued uniform laws and model acts, or have at least taken a stance, regarding the rights and responsibilities of the parties (donors, surrogates, parents and children) involved in ART. The common thread among all of the approaches that allow for posthumously conceived children to qualify as heirs of their deceased parent is a written requirement—unless an individual consents in writing to the use of his or her gametes or embryos post-mortem, resulting children will never be considered heirs.

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS APPROACH

UNIFORM STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT

In 1988, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") first attempted to define the rights of donors, surrogates, parents and children of assisted reproductive technology through the Uniform Status of Children of Assisted Conception Act ("USCACA").\(^\text{111}\) The Act defines "donor" as "an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child."\(^\text{2}\) Section 4 of the Act then states the rule that "[a] donor is not a parent of a child conceived through assisted conception," and that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child."\(^\text{113}\)

The comment to this section explains that "[i]t is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material

\(^{111}\) UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988) [hereinafter USCACA].
\(^{112}\) USCACA § 1(2).
\(^{113}\) Id. at §4.
could lead to the deceased being termed a parent.”¹¹⁴ The USCACA is certainly clear regarding the intestacy rights of posthumously conceived children, but the result is harsh—posthumously conceived children will never be considered heirs in states that adopt this approach.¹¹⁵

**Uniform Parentage Act**

Over a decade after issuing the USCACA, the NCCUSL issued the Uniform Parentage Act (“UPA”), and slightly revised its attitude towards posthumously conceived children. The UPA allows for the creation of a parent-child relationship between a deceased individual and a posthumously conceived child, but only in limited circumstances. In particular, section 707 states that when “an individual ... consent[s] in a record to be a parent by assisted reproduction,” but then “dies before placement of eggs, sperm, or embryos” the decedent will not be considered “a parent of the resulting child unless the deceased spouse” agreed, in a record, to be a parent of any child resulting from assisted reproduction that “occur[s] after death.”¹¹⁶ The UPA thus has two major limitations: (1) a limit on the use of eggs, sperm and embryos to the decedent’s spouse; and (2) the consent to posthumous conception “in a record.”

The comment to this section explains that if the decedent’s eggs, sperm or embryos are used to either “conceiv[e] an embryo or [to] implant[ ] an already existing embryo into a womb” when such “consent in a record” is absent, this “ends the potential legal parenthood of the deceased.”¹¹⁷ As noted by the comment, this section was “designed primarily to avoid the problems of intestate succession that could arise if the posthumous use of a person’s

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¹¹⁴ *Id.* at §4, cmt. The comment also states that “those who want to explicitly provide for such children in their wills may do so.” *Id.*

¹¹⁵ See N.D. CENT. CODE § 14-18-04. North Dakota is the only state that has adopted this approach.

¹¹⁶ UNIF. PARENTAGE ACT § 707 (2000) (last amended or revised 2002) [hereinafter UPA]. See text accompanying notes 138-40, *infra*, discussing which states have adopted this approach.

genetic material leads to the deceased being determined to be a parent." The NCCUSL approach here is a bit more concise and less vague than the ALI approach (and more generous than the USCACA), but it is still not entirely clear. Significantly, the all-important "consent in record" requirement is not defined, leaving room for multiple interpretations. Again, this is not as problematic as the Restatement, but there is still room for improvement.

**AMERICAN BAR ASSOCIATION APPROACH**

**MODEL ASSISTED REPRODUCTIVE TECHNOLOGIES ACT**

In between the USCACA and the UPA, the American Bar Association's ("ABA") Committee on the Laws of Assisted Reproductive Technologies and Genetics ("Committee") weighed in on the issues surrounding ARTs with the Model Assisted Reproductive Technologies Act (MARTA). Like the NCCUSL, the ABA attempts to define the legal rights of donors, surrogates, parents and children. First, the Act distinguishes between "donor[s]" and "intended parent(s)—an intended parent is the

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118 *Id.* Like the USCACA, the comment of this section goes on to state that a person "who wants to explicitly provide for" posthumously conceived children "in his or her will may do so." *Id.*

119 Theoretically, a parent-child relationship could be established between the deceased parent and the posthumously conceived child, but that child may still not be eligible to take as an heir under intestacy law. *See* Robert J. Kerekes, *My Child ... But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL. PROP. PROB. & TR. J. 213, 221 (1996) (stating that "the posthumously conceived child could establish paternity but be barred from intestate inheritance").

120 For instance, it is not clear whether an actual will would be required, or if a mere letter or other written statement would suffice.

individual who "intend[s] to be legally bound as the parent." Then, there are two sections in the Act dealing with posthumous use of embryos: "Section 1.05 Embryo Transfer and Disposition" and "Section 1.07 Inheritance."

Section 1.05, subsection (c), sets out the rule that written embryo agreements must contain a provision providing the following information: "(1) Intended parent(s) must agree, prior to creating any embryos, whether an intended parent may use the embryos in the event of a divorce, illness, or death of the other intended parent." Subsection (c)(5) also provides that:

Following the death of one intended parent who has previously consented to the posthumous use of cryopreserved embryos, the surviving intended parent may discard, donate or use the embryos for their own parenting purposes. No child born more than three years following the death of an intended parent may be considered that individual’s legal child.

Assuming the parties have entered into a written embryo agreement, this rule could be applied with little difficulty. This rule only applies in situations where embryos are being used.

If the parties have not entered into a written embryo agreement, or if frozen sperm or eggs are involved, then section 1.07, subdivision 1 applies the following rules:

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122 Model Act, § 1.01(13). The definition of “donor” used is “an individual, not an intended parent, who provides egg, sperm, or embryo used for assisted conception.” Id. at § 1.01 (8). “Intended parent(s)” is defined as “an individual or couple, married or unmarried, who enter into a written or oral agreement with a donor, or gestational carrier, under this Act providing that they intend to be legally bound as the parent of a child or children born through assisted conception.” Id. at § 1.01 (13).
123 Model Act, §§ 1.05 & 1.07.
124 Model Act, § 1.05 (c) (1).
125 Model Act, § 1.05 (c) (5).
Subd. 1. In the absence of a testamentary document executed by an intended parent, the following principles apply:

(a) If an intended parent dies before embryo transfer, the resulting child has no rights against the estate of that intended parent.
(b) If one or both intended parents die at any time during the pregnancy of a gestational carrier, the resulting child is an heir of both intended parents.
(c) If an intended parent dies after storage of gametes, or creation or storage of an embryo(s), but before the time of transfer of gametes or embryo(s), then the resulting child is not the heir of the deceased intended parent.
(d) If one or both intended parents die after the transfer of an embryo(s) or gametes, but before birth of the child, the resulting child is the heir of both intended parents.\textsuperscript{126}

Again, this rule could be applied with little difficulty. But, what is problematic about this rule concerning posthumously conceived children is subsection (c)—most individuals who deposit gametes do not have a written agreement, and this section leaves posthumously conceived children with no intestacy rights in relation to their deceased parent. Of course, this is a legitimate approach, and is the same approach taken by the USCACA, but the result is severe.

**Other States’ Approaches**

Intestacy statutes vary from state-to-state. As a result, posthumously conceived children in some states will be considered heirs for purposes of the state’s intestacy laws but children in other states will not. In some states, this decision will not be clear. The differences can be easily demonstrated by looking at existing

\textsuperscript{126} Model Act, § 1.07, subd. 1. “Testamentary document” is not defined, so it is not clear whether it is a will or some other writing that is being referred to.
statutes in Louisiana,\textsuperscript{127} North Dakota,\textsuperscript{128} California\textsuperscript{129} and then looking to the more traditional "conceived/begotten before,"\textsuperscript{130} "in gestation/mother's womb"\textsuperscript{131} and other statutes with similar requirements.\textsuperscript{132}

**LOUISIANA**

Louisiana is one of the only states to have enacted specific legislation that deals directly with posthumously conceived children. Under the Louisiana statute, a posthumously conceived child is "deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time" the deceased parent died, subject to certain limitations.\textsuperscript{133} The limitations are as follows: the decedent must have "specifically authorized in writing his surviving spouse to use his gametes," the child must be "born to the surviving spouse, using the gametes of the decedent," and the child must be born "within three years of the death of the decedent."\textsuperscript{134} The statute also includes a provision for the rights of any other "heir or legatee of the decedent whose interest in the succession of the decedent will be reduced by the birth of" a posthumously conceived child.\textsuperscript{135} Clearly, posthumously conceived children domiciled in Louisiana are definitely considered heirs for purposes of intestacy law, so long as they fit within the statute’s limitations.

\textsuperscript{127} LA. REV. STAT. ANN. § 9:391.1.
\textsuperscript{128} N.D. CENT. CODE § 14-18-04.
\textsuperscript{129} CAL. PROB. CODE § 249.5 (2005).
\textsuperscript{130} See infra text accompanying notes 143-44.
\textsuperscript{131} See infra text accompanying notes 145-46.
\textsuperscript{132} See infra text accompanying notes 147-49.
\textsuperscript{133} LA. REV. STAT. ANN. § 391.1(A). This is similar to the Restatement. See supra Part VII.
\textsuperscript{134} § 391.1(A).
\textsuperscript{135} § 391.1(B).
Although similar in effect to the Louisiana statute, the California law has a slightly different approach. In determining the child's property rights under the California statute, a posthumously conceived child will be treated as though it had "been born in the lifetime of the decedent," if all of the statutory criteria are proved by "clear and convincing evidence." Such criteria includes: (a) a written instrument whereby the decedent "specifies that his or her genetic material shall be used for the posthumous conception of a child of the decedent"; (b) written notice of the existence of the "decedent's genetic material" and its availability "for the purpose of posthumous conception," via certified mail, return receipt, is given to the person controlling the "distribution of either the decedent's property or death benefits ... within four months" of the decedent's death; and (c) the child must be "in utero within two years of" the decedent's death, and the "decedent's genetic material" must have been used. Additionally, the "in writing" requirement of subsection (a) must "be signed by the decedent and at least one competent witness," and any revocation or amendment to the specification must be done in the same manner.

The unique aspect of the California statute is the fact that it allows not only the decedent's spouse "to use the genetic material," but also allows the decedent's "registered domestic partner" or any "other person named in the specification." In other words, so long as the requirements of the written specification have been met, the decedent's "genetic material" can be used by anyone designated to do so in the specification.

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136 CAL. PROB. CODE § 249.5.
137 Id.
138 § 249.5.
139 § 249.5 (a) (3). This statute treats the written specification similar to a will. See discussion on wills, infra Part XI.
140 Id.
STATES ADOPTING THE UPA

In addition to intestacy laws, a number of states have also adopted the UPA approach,\(^\text{141}\) which establishes a parent-child relationship when the "deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child."\(^\text{142}\) Although the UPA merely establishes a parent-child relationship, it may be inferred that this relationship, once established, would apply in the context of intestacy issues as well.\(^\text{143}\)

NORTH DAKOTA

North Dakota law is as clear as Louisiana’s statute, but comes to the exact opposite result. Pursuant to the North Dakota statute, "[a] person who dies before a conception using that person’s sperm or egg is not a parent of any resulting child born of the conception."\(^\text{144}\) Posthumously conceived children domiciled in North Dakota would never be considered heirs for purposes of intestacy law.

VARIATIONS ON THE TRADITIONAL APPROACH

Most state intestate statutes do not provide for posthumously conceived children, only for after-born (or posthumous) children. For example, many states (including New York\(^\text{145}\)) require a child to be "conceived before ... but born

\(^{141}\) See supra Part VIII (a) (ii).


\(^{143}\) See comment to U.P.A. § 707, stating that § 707 "is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a parent."

\(^{144}\) N.D. CENT. CODE § 14-18-04 (2). This is also the approach of the USCACA. See supra Part VIII(a)(i).

\(^{145}\) See N. Y. EST. POWERS & TRUSTS LAW § 4-1.1(c) (McKinney 2005).
thereafter” or “begotten before ... but born thereafter” the death of the decedent in order to be considered an heir. Another commonly used statutory requirement is that the child be “in gestation” and then survive “one hundred twenty hours after its birth,” or be “in mother’s womb” at the time of the decedent’s death and born later (these are essentially the same as the conceived/begotten before requirement). Some states adopt a “ten month” approach, meaning that if the child is born within ten months of the intestate’s death, it will be treated as though it had “been born” or “in being” at the time of decedent’s death. On the other hand, Missouri’s statute states that heirs must be “born and capable in law to take as heirs at the time of the intestate’s death.”

**CURRENT NEW YORK LAW**

New York State does not presently have any laws pertaining to posthumously conceived children. An analysis of

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152 [MO. REV. STAT. § 474.050 (2005)](https://www.moleset.com/).
current New York law, including statutes and case law involving intestate succession and non-marital children, a Task Force’s recommendations for New York law, and current proposed legislation reveals that New York would most likely be opposed to allowing posthumously conceived children to take as heirs of their deceased parent.

**INTESTACY**

**STATUTE**

New York Estates, Powers and Trusts Law ("NY EPTL") section 4-1.1 is New York’s intestate statute.\(^{153}\) According to section 4-1.1, subsection (c): "Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime."\(^{154}\) The legislative history for that section explains that normally, distributees of "intestate property are determined as of the date of decedent’s death."\(^{155}\) However, the history goes on to explain that when a distributee is conceived prior to the death of the decedent, but after the decedent’s death is born alive, "the afterborn distribute will share in the distribution just as if he or she were born prior to decedent’s death."\(^{156}\) It is clear that in New York under this particular provision, posthumously conceived children would not be considered a distributee.\(^{157}\)

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\(^{153}\) N.Y. EST. POWERS & TRUSTS LAW § 4-1.1. New York’s intestate statute is very similar to that of New Jersey’s, and a Superior Court in New Jersey interpreted the New Jersey statute to allow posthumously conceived children to be considered heirs for intestacy purposes. See In re Kolacy, 753 A.2d 1257 (N.J. Super. 2000).

\(^{154}\) § 4-1.1(c) (emphasis added).

\(^{155}\) NY Legislative History.

\(^{156}\) Id.

\(^{157}\) The result would most likely be the same under a will provision that does not specifically provide for posthumously conceived children. See N.Y. EST. POWERS & TRUSTS LAW §§ 2-1.3 and 6.5-7, in which posthumous children are treated the same way for purposes of class gifts and future estate directions as they are treated under intestacy law.
CASE LAW

The approach of section 4-1.1(c) concerning the treatment of posthumous children, even prior to codification of New York’s intestate statute, has been consistently followed in New York. As early as 1830, courts in New York have held that a child who is conceived but not yet born “is in esse for the purpose of taking the remainder or any other estate or interest, which is for the benefit of the infant.”\textsuperscript{158} The only requirement for the unborn child is that it be born alive, at which point the child will be entitled to the same intestate rights as it would have been if it had been born at the time of the decedent’s death.\textsuperscript{159} The law is the same today as it was in 1830.

NON-MARITAL CHILDREN

STATUTE

As previously discussed, all posthumously conceived children are also non-marital children; therefore it is important to look at New York’s approach to non-marital children. Under New York’s “inheritance for non-marital children” statute, NY EPTL § 4-1.2, a non-marital child is automatically allowed to inherit from his or her mother, and no other requirements need to be met.\textsuperscript{160} But, in order to inherit from the father, there are a number of obstacles that need to be overcome. The simplest way to overcome all of the obstacles is for the father, during his lifetime, to make “an order of filiation declaring paternity” or to have both parents of the child to “execute[] an acknowledgement of paternity.”\textsuperscript{161} Otherwise, the second way in which a non-marital child will be entitled to inherit from his or her father is for the father to sign “an instrument acknowledging paternity,” and such instrument must meet three requirements.\textsuperscript{162} First, the instrument must meet the

\textsuperscript{158} Marsellis v. Thalhimer, 2 Paige Ch. 35 (1830).
\textsuperscript{159} Id.
\textsuperscript{160} § 4-1.2(a)(1).
\textsuperscript{161} § 4-1.2(a)(2)(A).
\textsuperscript{162} § 4-1.2(a)(2)(B).
same requirements that are required in order “to entitle a deed to be recorded,” meaning that it must be signed in the presence of, and acknowledged by, one or more witnesses before a notary public.\textsuperscript{163} Next, the instrument must be filed with the putative father registry within sixty days after it is made.\textsuperscript{164} And finally, the mother must receive written notification of the filing of the instrument from the department of social services within seven days of the instrument being filed.\textsuperscript{165}

A third way a non-marital child may inherit from his or her father is if the father has “open and notoriously acknowledged the child as his own,” and this acknowledgement is “established by clear and convincing evidence.”\textsuperscript{166} It should be noted that the practice commentary to this section states that although such evidence can be established theoretically in the case of a posthumous child, “the likelihood of a decedent’s acknowledging a child still in utero is slim.”\textsuperscript{167} This section, and its commentary, has obvious implications for posthumously conceived children, since clear and convincing evidence of acknowledgement is all but impossible when a child is conceived after the death of a parent.\textsuperscript{168}

The final way a non-marital child may establish paternity, thus entitling the child to intestacy rights of his or her father, is through the use of “a blood genetic marker test” in addition to other “clear and convincing evidence” that also establishes paternity.\textsuperscript{169} As will be discussed in the next section on case law surrounding non-marital children, the blood test must be performed during the life of the father, and the deceased father’s remains may not be exhumed for the purposes of such testing.\textsuperscript{170} Because of this

\textsuperscript{163} § 4-1.2(a)(2)(B)(i).
\textsuperscript{164} § 4-1.2(a)(2)(B)(ii).
\textsuperscript{165} § 4-1.2(a)(2)(B)(iii).
\textsuperscript{166} § 4-1.2(a)(2)(C).
\textsuperscript{167} § 4-1.2, Practice Commentaries, by Margaret Valentine Turano (McKinney’s 2004).
\textsuperscript{168} Except, of course, if a will is used.
\textsuperscript{169} § 4-1.2(a)(2)(D).
fact, posthumously conceived children could never use this section to establish paternity.

The pertinent part of the statute concludes by stating that, absent an order of filiation or an acknowledgment of paternity being made, a child-support agreement (whereby the father agreed to support the child) is insufficient to qualify a non-marital child as an intestate heir. What becomes clear when reading this statute as a whole is that New York will allow a non-marital child to receive a portion of his or her intestate father’s estate in only a few limited circumstances. It would be impossible for a posthumously conceived child to meet these requirements.

CASE LAW

There have been a number of occasions on which New York courts have had the opportunity to apply section 4-1.2, and each time have taken a very narrow, literal approach to interpreting the statute. For example, in two separate cases, non-marital children were attempting to establish paternity in order to take an intestate share of their fathers’ estates. In both of those cases, the courts refused to retroactively apply amendments to the statute that may have allowed the children to take an intestate share of their father’s estate, stating that “[i]t has been repeatedly held that the rights of individuals who may have an interest in a decedent’s death are fixed as of the date of death.”

Even with the addition of the 1981 amendments, the date of death will still most likely be the determining date for non-marital children attempting to establish paternity for intestate purposes. Specifically, the added sections pertain to the “blood genetic marker test” and the “clear and convincing” establishment of “open and notorious” acknowledgment requirements previously discussed. Of course, it is axiomatic that a parent would have to

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171 § 4-1.2(a)(3).
173 Gibbons, 566 N.Y.S.2d at 511; Malavase, 520 N.Y.S.2d at 50. The 1981 amendment added sections (C) and (D) to subsection (a)(2) of § 4-1.2.
174 See supra text accompanying notes 166-67.
openly acknowledge his or her child prior to his or her death, which would be not be possible in the case of a posthumously conceived child. Additionally, New York courts have consistently held that any blood test must be administered during the life of the decedent. In two separate cases where non-marital children were attempting to exhume the bodies of their deceased father's in order to administer a blood test on tissue samples to be taken from the exhumed bodies, the courts stated that “EPTL 4-1.2(a)(2)(D), phrased as it is in the past tense, clearly does not contemplate the administration of such a test postmortem.” The courts both go on to say that 4-1.2(a)(2)(D) “should be construed in pari materia with the Family Court Act § 519(c), which explicitly states that such a test had to have been administered ‘prior to [the putative father’s] death.’” Additionally, one court even held that “even if the statute did contemplate post-death testing, the request for exhumation was unreasonable as a matter of law.” Thus, as current law stands regarding non-marital children and intestacy law, the date of death of the deceased parent is going to be the determining date for qualifying as an intestate heir.

Difficult as it may be for non-marital children to establish paternity, especially after the death of the father, imagine the immense challenges a posthumously conceived child would face in order to prevail under this statute. Treating posthumously conceived children for legal purposes as non-marital children would make it all but impossible for them to take any intestate share of their deceased parent’s estate.

176 Sekanic, 653 N.Y.S.2d at 451. The language of Janis is identical, but the court uses the phrase “post death” instead of “postmortem.” Janis, 620 N.Y.S.2d at 343.
177 Sekanic, 653 N.Y.S.2d at 451 (citing Janis, 620 N.Y.S.2d at 343).
178 Janis, 620 N.Y.S.2d at 343.
As previously discussed, New York has codified the “paternity presumption”: a child borne to a married couple is presumptively the child of the husband. An expansion of this presumption is found in New York Domestic Relation Law (“DRL”) § 73. According to the DRL, when a husband and wife consent in writing to the use of artificial insemination (specifically, when the sperm being used is not his own), and the artificial insemination is performed on the wife by a licensed physician, any child born “shall be deemed the legitimate, natural child of the husband and his wife for all purposes.” The written consent must be “executed and acknowledged by both the husband and wife,” and there must also be certification from the physician that he or she performed and rendered the service. This statute is an attempt by the legislature to carry the paternal presumption into the arena of AID. Currently, New York statutory law does not address other types of ART.

There is a possibility that, if the statutory requirements were met, a posthumously conceived child could attempt to assert his or her paternal rights using this statute to determine paternity. But since two individuals cannot be married after the death of one of the individuals, this would be a very difficult argument to make. Furthermore, this statute does not define the status of children born through other forms of ART (whether such children

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179 N.Y.FAM. CT. ACT § 532 (McKinney 2005).
180 N.Y. DOM. REL. LAW § 73 (McKinney 2005).
181 § 73.
182 § 73.
183 But see the Surrogate’s Court Report, infra note 191, proposing legislation to amend this statute to include other forms of ART.
184 This argument would be especially difficult in New York, as New York has a policy of strictly construing written instruments post-mortem, and would most likely not imply a testator’s intent to allow for the establishment of paternity of a posthumously conceived child. Even if paternity could be established, it does not necessarily follow that the child would also be deemed an heir. See Elliott, supra note 4, at 48.
would be deemed legitimate or natural). This statute may be a starting point for establishing the rights of posthumously conceived children, but as currently written would not be sufficient.

**NEW YORK STATE TASK FORCE ON LIFE AND THE LAW**

In April 1998, the New York State Task Force on Life and the Law\(^{185}\) ("Task Force") released its recommendations regarding what laws and policies New York State should adopt involving the issues surrounding ARTs.\(^{186}\) After looking to ethical, religious, constitutional and health issues, the Task Force took the same approach to posthumously conceived children as the USCACA:\(^{187}\) Posthumously conceived children are never to be considered children of their deceased parent.\(^{188}\) The exact recommendation is as follows: "New York law should provide that 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."\(^{189}\) Although the NYSTFLL’s recommendations are by no means binding on the New York State Legislature or on New York State courts, "[s]even of the Task Force’s recommendations for legislation or regulation have been enacted in New York State," including its recommendations on "surrogate parenting."\(^{190}\) This is another indication that currently, New York would not allow

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185 The New York State Task Force on Life and the Law is a group, established in 1985, comprised of "leaders in the fields of law, medicine, nursing, philosophy and bioethics, as well as patient advocates and representatives of diverse religious communities." The Task Force is chaired by the "New York State Commissioner of Health." See Task Force on the Life and the Law - Fact Sheet, available at http://www.health.state.ny.us/nysdoh/taskfce/factsht.htm (last visited Feb. 13, 2005) [hereinafter Fact Sheet].
187 See infra Part VIII (a) (i).
188 Task Force, supra note 183.
189 Id.
190 See Fact Sheet, supra note 182.
posthumously conceived children to qualify as heirs of their deceased parent.

**CURRENT PROPOSED LEGISLATION**

The New York Surrogate’s Court, like other courts in New York State, has an Advisory Committee (“Committee”), that works towards clarifying law in the trust and estate area. In January of 2005, the Committee issued its report, containing proposed legislation to two laws (amongst others) that are relevant for this paper.

**CLARIFICATION OF THE “AFTER-BORN CHILD”**

**CURRENT LAW**

Section 5-3.2 of the EPTL sets out an after-born child’s right in New York when a will has been left by the decedent. The statute states that when, at the time the will is executed, the testator has at least one living child and fails to provide for any after-born children in the will, “an after-born child is not entitled to share in the testator’s estate.”\(^{191}\) The following section goes on to detail how the shares are to be distributed when the will does provide for after-born children.\(^{192}\) If the testator has left a will, and had no other living children at the time of the will’s execution, an after-born child is entitled to “the portion of such testator’s estate as would have passed to such child had the testator died intestate.”\(^{193}\)

**PROPOSED LAW**

The Committee’s Report (“Report”) recommends an addition to section 5-3.2, in order to clarify that the term “after-born” means “only children born after the execution of a last will during the life of the testator, or a child in gestation at the time of

\(^{191}\) N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (a) (1) (A) (McKinney 2005).

\(^{192}\) §5-3.2 (a) (1) (B).

\(^{193}\) §5-3.2 (a) (2).
the testator’s death who is born after the testator’s death.”

This proposal is based on the New York State Task on Life and the Law’s recommendation that where an individual dies prior to an embryo, created from the individual’s egg or sperm, is implanted, that individual will not be deemed the parent of any child born from the embryo. \(^{195}\) The Report goes on to state that this “measure would avoid the possibility that a child born many years after the death of the testator, without the testator’s desire and knowledge, will claim a share of the estate pursuant to EPTL 5-3.2.”

According to the Report, allowing such posthumously conceived children to take under section 5-3.2 would “unfairly deprive” the testator’s already living children and would allow a child that the testator would not have desired or foreseen, and “with whom the testator had no relationship” to take a share of the estate. \(^{196}\)

Furthermore, the Report notes that if a testator “anticipates the possibility of having a posthumous child,” he or she “could readily create a trust for such child under his or her last will.” \(^{197}\) By adopting such legislation, the Report reasons that the State could avoid the undue complication of the administration of estates that would occur by allowing posthumous children to take under section 5-3.2.\(^{198}\)

Although this proposed legislation deals with the effect of after-born children on will provisions, it could easily be carried over into the area of intestacy law. Significantly, the Report indicates how New York is preparing to deal with posthumously conceived children in the area of trusts and estates, and it seems as though the Task Force’s recommendations are being considered most heavily.

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196 Id.
197 Id.
198 Id.
199 Id.
CHILDREN BORN USING ASSISTED REPRODUCTIVE TECHNIQUES TO MARRIED COUPLES

CURRENT LAW

New York DRL § 73, as previously discussed, determines the legitimacy of children born through artificial insemination.\(^{200}\) Also noted was the fact that this statute deals only with artificial insemination, and does not address any other ARTs. This is the exact issue addressed by the proposed legislation.

PROPOSED LAW

The Committee first points out that the current section 73 only provides for children born of artificial insemination, and recommends that this section "be amended to extend such recognition to children who are born to married couples by more advanced means of assisted reproduction."\(^{201}\) Based on the advances in medical technology, artificial insemination is only one method by which infertile couples may choose to attempt to have a child, the Committee deems it necessary to amend section 73 to "include children born by any method of assisted reproduction now in use or developed in the future, so that these children will be deemed the legitimate, natural children of the wife and her consenting husband, regardless of whether their own or donated gametes or embryos are used."\(^{202}\) Once again, the Committee looked to the Task Force’s recommendations and adopted those recommendations when proposing this legislation.

This proposal certainly indicates a possible trend of increased tolerance in New York regarding ARTs, which is a positive step. However, there is no indication that this slight increase in tolerance would assist posthumously conceived children gain any rights in terms of intestacy, or other trust and estate, law. In fact, the proposed legislation to section 5-3.2 indicates the opposite.

\(^{200}\) See supra text related to notes 176-80.
\(^{201}\) Report, supra note 191.
\(^{202}\) Id.
The use of a will to provide for posthumously conceived children, as opposed to relying on intestacy statutes, would most definitely establish the property rights of any resulting posthumously conceived child. In particular, if a will were to devise an express gift to "my posthumously conceived children," the testator’s wishes would most likely be respected, and that gift should be allowed. This theory is consistent with both the Surrogate’s Court Report, which states that an individual should create a trust in his or her will to provide for posthumous children, and the American Law Institute and other organizational approaches, which provide that so long as an individual consents in writing to the use of his or her gametes after his or her death, that consent will be used to provide from the testator’s estate for such children.

In at least one case, an individual placed a provision in his will stating that his frozen sperm should be released to his girlfriend for use after his death. Although the deceased man’s two adult children contested this provision, and wanted to have the frozen sperm destroyed, the court held that the "decedent had an interest, in the nature of ownership" in his sperm, and thus the sperm was "properly part of the decedent’s estate." The holding of this case suggests that a provision providing for the posthumous use of gametes, and any provision providing for the support of any resulting child or children, could be upheld.

But the concept of using a will to allow for posthumous conception or to provide for any resulting children could be

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203 In fact, a Florida statute specifically states that a posthumously conceived child “shall not be eligible for a claim against the decedent’s estate unless the child has been provided for by the decedent’s will.” FLA. STAT. ANN. § 742.17 (West 2005).
204 See Knaplund, supra note 5, at 110 (discussing that “[w]here the testator has expressly included PMC children in his will, the estate should stay open in case such children are born.”).
205 See supra Parts VII and VIII.
207 Id. at 281.
208 Id. at 283.
problematic. Specifically, what if there is a will but no mention of posthumously conceived children? If that were to occur, it would probably leave any resulting posthumously conceived children with no rights at all, especially in New York. Ultimately, unless a will explicitly states that posthumously conceived children are entitled to a particular share of the decedent's estate, the will would not be of much assistance to posthumously conceived children.

**WHY NEW YORK SHOULD ALLOW POSTHUMOUSLY CONCEIVED CHILDREN TO TAKE AS INTESTATE HEIRS**

There are many policy reasons why New York should allow posthumously conceived children to be considered heirs of a deceased parent for purposes of intestacy law. First, since children cannot control the circumstances surrounding their births, it is unfair to deny them an intestate share of a deceased parent's estate based solely on those circumstances. Additionally, stigmatizing a child in such a manner, and singling the child out from the rest of the family by disallowing the child to take as an heir, immediately alienates the child from the rest of the family upon birth. Furthermore, there is the possibility that if the child is not allowed to take an intestate share of his or her deceased parent's estate, the child has an increased likelihood of becoming a ward of the State.

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209 *See Knaplund, supra* note 5, at 111-13 for a discussion about the different scenarios that could arise concerning posthumously conceived children and the use of a will. There could also be problems relating to the Rule Against Perpetuities. Specifically, if a deceased parent is entitled to any type of inheritance through his or her relatives, a posthumously conceived child of that deceased parent could violate the Rule. *See id.* at 113-14, discussing the issues that can arise concerning the Rule Against Perpetuities.

210 *See N.Y. EST. POWERS & TRUSTS LAW* § 5-3.2(a)(1)(A), stating that if, at the time the will is written, the testator has at least one child, and does not make a provision in the will for an after-born child, any resulting after-born child will not be entitled to a share of the testator's estate.
INNOCENT VICTIMS

Children do not control the circumstances surrounding their births. Holding a child responsible for those circumstances by denying a biological child’s intestacy rights based solely on the fact that the child’s birth does not fit into a particular legal time-frame is unfair. Children are the innocent victims of circumstance, and punishing them because of their parents’ choice of when and how to conceive is against public policy. Whether or not the State agrees with an individual’s decision to conceive using a deceased spouse’s gametes should not be a factor in determining a child’s intestacy rights—the legislature was not created to pass moral judgments, but to provide laws that will best-suit the residents of the State. Passing a law that allows posthumously conceived children to take as intestate heirs from their deceased parents would be in the best interests of the citizens of New York State, especially the children.

ALIENATION FROM THE REST OF THE FAMILY

Suppose Mr. and Mrs. Gamete already had one child when Mr. Gamete is killed at war, and after his death Mrs. Gamete chooses to conceive another child using Mr. Gamete’s frozen sperm. Under current New York law Gamete Jr., conceived prior to Mr. Gamete’s death, would be entitled to an intestate share of his father’s estate, but Gamete II would not. In fact, immediately upon birth Gamete II would be treated differently in the law from his older brother, which would stigmatize and alienate him from the rest of the family.\footnote{As pointed out by the attorney for Ms. Kolacy (from In Re Estate of Kolacy), “[i]t is illogical to assume that a decedent would desire to prevent a biological child from sharing in the estate.” Kerekes, \textit{supra} note 118, at 240.} Although Gamete Jr.’s share of his father’s estate would have to be reduced in order to accommodate Gamete II, allowing Gamete II to take an intestate share of his deceased father’s estate would provide equality between the brothers in the Gamete home. Gamete II would not be made to feel inferior or less special than Gamete Jr., and this would promote family harmony. Since New York has always had a
strong focus on the best interests of the child, allowing Gamete II, and other posthumously conceived children to take an intestate share in a deceased father’s estate would promote those interests.

WARDS OF THE STATE

Another policy weighing in favor of allowing posthumously conceived children to take as heirs of their deceased parent is to prevent such children from becoming wards of the State. Even if the decedent did not have much money or other valuable assets that could be passed through intestacy to posthumously conceived children, the decedent’s parents or other relatives may be quite wealthy.

Thus, in the Gamete family example, suppose Mr. and Mrs. Gamete had very little income, little or no savings and no life insurance policies. When Mr. Gamete died, Mrs. Gamete, under EPTL § 4-1.1 would be entitled to his entire estate (assuming they did not have any children at the time of his death). Six months after Mr. Gamete’s death, Mrs. Gamete becomes pregnant using Mr. Gamete’s frozen sperm, and simultaneously Mr. Gamete’s father, Gamete Sr., is told he only has a year to live. Gamete Sr. is a very wealthy man, and a widower, and Mr. Gamete was Gamete Sr.’s only child. If the child born to Mrs. Gamete is considered Mr. Gamete’s heir for intestacy purposes, the child would also be eligible to take an intestate share of Gamete Sr.’s estate. If on the other hand the child is not considered Mr. Gamete’s heir, he will not be entitled to any of Gamete Sr.’s estate (unless Gamete Sr. provided for such child via a will). Again, Mrs. Gamete has very little money, and by not allowing the child to be considered an heir

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212 See, e.g., N.Y. DOM. REL. LAW § 70 (McKinney 1988) (“the court shall determine solely what is for the best interest of the child, what will best promote its welfare and happiness”); Eschbach v. Eschbach, 56 N.Y.2d 167, 172 (1982) (holding that “in adjudicating custody and visitation rights, the most important consideration for the court is the best interests of the children”); and In Re Adoption of Anonymous, 345 N.Y.S.2d 430, 435 (Surr. Ct. 1973) (which case, in the context of artificial insemination, stated that “our liberal policy is for the protection of the child”).
of Mr. Gamete, the child may be forced to seek assistance from the State.

Although this scenario may seem far-fetched, it is a distinct possibility. In a situation where only one parent is alive to provide for a child, financial difficulties are bound to arise, and not infrequently. Allowing posthumously conceived children to be considered an heir of his or her deceased parent opens up that entire family lineage to the child—being an heir for one person means being an heir for the whole family. Moreover, the State would not incur any costs by allowing such children to take as intestate heirs—there would still be only one decedent, and one estate to administer\(^{213}\)—and it could end up saving the State a lot of money by not having to provide public assistance.

**HOW NEW YORK COULD ALLOW POSTHUMOUSLY CONCEIVED CHILDREN TO TAKE AS INTESTATE HEIRS**

In order to allow posthumously conceived children to take as intestate heirs of a deceased parent, it is necessary to set certain parameters. Discussed below are the most important parameters that need to be addressed.

**LOGISTICS**

Regarding New York intestacy law, there are a number of logistical issues that need to be resolved. Such issues include immediacy (from the time of the decedent’s death until the decision is made to use the deceased’s frozen gametes), the intent of the decedent (needing to ascertain that intent), timing (how long after the death of a decedent may a child be born and be considered an heir), limitations (i.e., limiting use to the surviving spouse) and testing (DNA or blood) to establish paternity or maternity.

\(^{213}\) Of course, the administration of the estate may be prolonged by a posthumously conceived child, but there are ways to resolve that problem. *See infra* Part XIII(v).
IMMEDIACY

The purpose of the intestacy statute is to provide a quick and efficient method by which to close an estate when a decedent has not left a will, or has not disposed of all of his or her property by will. As previously discussed, children can be posthumously conceived many years after the death of a biological parent, which could result in an estate being held open indefinitely. In order to avoid this, a number of measures must be taken, the first of which is "immediacy." What is meant by immediacy in this context is that a surviving spouse would be required to declare his or her intent to use the decedent's frozen gametes to conceive immediately upon the decedent's death. The legislature would have to determine exactly what "immediate" would be—although a day or week may be too immediate, two or three months may be reasonable. The idea behind immediacy is to inform the surrogate's court, other potential heirs, and the administrator of the estate (assuming that the surviving spouse was not the administrator) of the likelihood of other possible heirs. As will be discussed, there are measures that can be taken at that time to close the estate but still provide for any resulting child or children.

The advantage to the "immediacy" rule is that the intestacy rights of a posthumously conceived child can start to be established. Also, the estate will be closed, which is in the best interests of the State and the surviving heirs. The negative side to this rule is that it forces an individual who is grieving to make a life-altering decision shortly after losing his or her spouse. Of course, the surviving spouse could always declare his or her intent to use the gametes, thus preserving that option, but then never do so. Overall, this is probably the simplest way to start the posthumous conception process while minimally interfering with current law.

214 NY Legislative History.
215 Unless the decedent already had a child or children at the time of death, the only surviving heir in New York would be the surviving spouse. See N.Y. EST. POWERS & TRUSTS LAW §4-1.1 (McKinney 1967).
INTENT OF DECEDENT

Once immediacy has been established, then the intent of the decedent must be determined. If the decedent filled out a consent form at the time his or her gametes were deposited, such intent should be easily ascertained. However, not all posthumously conceived children are conceived using the frozen gametes of an individual who intended them for such use. In particular, there have been instances in which, within hours after the death of loved-one (husband, son), the decedent’s sperm was retrieved and later used (this is known as “posthumous sperm procurement”). Intent in this situation would not be as clear. Posthumous sperm procurement raises a number of additional legal issues, which are beyond the scope of this discussion, and the legislature would be well-advised to address those issues as well.

The intent of the decedent is “[a]rguably the most important issue involving postmortem insemination.” First, there are constitutional issues surrounding the use of an individual’s frozen gametes without their consent, and those issues do not just disappear upon death. Second, intent becomes important because, when looking to other states that have addressed this issue and the ALI, one common denominator amongst these rules is that the decedent must not have only intended posthumous conception, he or she must also have

216 See infra Part XIII(b) (ii) discussing consent forms.
217 For a discussion on posthumous sperm procurement, see Joshua M. Hurwitz, MD and Frances R. Batzer, MD, A Guest Editorial: Posthumous Sperm Procurement: Demand and Concerns, 59 OBSTETRICAL AND GYNECOLOGICAL SURVEY, SOUNDINGS, Number 12, 806, 806 (2004).
218 Gilbert, supra note 3, at 550.
219 “Since the sperm donor is now deceased, it is not the decedent’s right to procreate that is affected, but his interest in making reproductive decisions while he is alive for a time when he will no longer be living. Thus, the question becomes whether such an interest ‘should be granted the high respect ordinarily granted to core reproductive experiences when conflicts with the interests of others arise,’ thereby creating a fundamental right to make such decisions.” Gilbert, supra note 3. at 551-52.
intended to support any resulting child.\textsuperscript{220} New York should determine if that particular requirement would need to be met as well; this could be resolved by the use of a consent form.\textsuperscript{221}

**Timing**

Another important parameter that needs to be set is timing: How long after the death of a decedent can a posthumously conceived child be considered an heir? Here, the state must weigh the relative rights of the potential children against the State's interest in having complete and final closure of the estate (the estate would be closed, but there may be a trust or bank account established for posthumous children that would need to be closed). The cases, state legislatures and the ALI have determined that the child (or children) must be born within two to three years after the decedent's death.\textsuperscript{222} This amount of time seems fair, but the legislature would have to make the final determination.

The main advantage to having a time limit is final closure—once that time limit has expired, the possibility of considering a posthumously conceived child an heir is eliminated. The primary disadvantage is the fact that any time limit may be difficult to meet because it may not give a surviving spouse enough time to grieve, conceive, and then actually give birth. This fact becomes even more complicated when a surrogate mother is needed (when the decedent is a woman). Of course, in order to create a proper balance between the surviving spouse and the State, some time limit is appropriate.

\textsuperscript{220} See Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 259 (2002) (stating that "[t]he survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child"); and the RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §2.5, cmt. 1 (1999) (stating that a surviving spouse would have to prove that the "decedent would have approved of the child’s right to inherit").

\textsuperscript{221} See infra Part XIII(b)(ii), discussing the use of consent forms.

\textsuperscript{222} See supra notes 78-79, 105, 124 and 133. There have also been suggestions that it should be a "reasonable time." See the ALI approach, supra note 105.
LIMITATION TO SURVIVING SPOUSE

In the area of posthumous conception, establishing a posthumously conceived child’s rights is already sufficiently complicated. Allowing individuals other than the decedent’s spouse to use a decedent’s frozen gametes can complicate matters exponentially. Except in the situation where a surrogate mother is used, and that of course would only be to facilitate a deceased husband’s own use, no one other than a surviving spouse should be allowed to use the decedent’s gametes. Again, this limitation is necessary in order to avoid additional complications in this already complicated area.

TRUSTS

The simplest, most efficient way to provide for posthumously conceived children in the area of intestacy law is through the use of a trust. After a surviving spouse has immediately declared his or her intent to use the frozen gametes of his or her deceased spouse, a trust should be created for the benefit of posthumously conceived children at that time. The trust could be funded by using a portion of the decedent’s intestate estate. For example, under New York intestacy law, a surviving spouse is entitled to the first fifty-thousand dollars of the estate, and one half of the remainder. That amount could be distributed to the surviving spouse by the surrogate court virtually immediately after the death of the decedent. The other half of the estate could be put into a trust for the benefit of posthumously conceived children, if there were no other children of the decedent at that time. If there were other children, then the “posthumous fund” would be the proportional share of the remainder that one child would be

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223 If, in the future, New York allows either civil unions or same-sex marriages, the legislature should allow the surviving partner or spouse in those situations to be included within this limitation.

224 Gary, infra note 237, at 38. Other devices, such as the posting of a bond by the beneficiaries, a bank account, or the use of a guardianship account could work as well. Since trusts are inherently flexible instruments, using them keeps the distribution process relatively simple.

225 N.Y. EST. POWERS & TRUSTS LAW § 4-1.1.
entitled to receive (if there were already two children, each child
would get a third of the remainder, and the trust would get the
other third).

The trust would expire according to the statutory limit for
conceiving such children. If posthumous children were never
conceived, the trust would merely expire, and the amount in the
trust would be distributed as though the fund never even existed (if
there were no other children, the surviving spouse would get the
funds; if there were other children, they would split the fund
amongst themselves proportionally—in the example given, the
children would split the fund in half). If more than one
posthumous child was conceived, the trust would have to be split
amongst them—everyone who already received their share would
not be required to relinquish some of that money in order to
equalize the distribution. Although other methods may be used,
such as establishing a bank account, the trust is the most flexible,
easiest way to accommodate posthumously conceived children
while also protecting other heirs’ rights.

**DNA (or Blood) Testing**

The final important area that must be addressed is a
requirement for DNA or blood testing. In an ideal world, mistakes
and deceit would not exist. Unfortunately, people, including
fertility clinics, make mistakes. The legislature would have to
determine how to deal with a situation in which a surviving spouse
was given the wrong gametes to use (meaning, not the deceased
spouse’s gametes). It would seem unfair for a child to be excluded
as an heir when the intent of the decedent and the surviving spouse

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226 See Perry-Rogers v. Fasano, 715 N.Y.S. 2d 19 (1st Dept. 2000). This is a
case in which an IVF clinic mistakenly implanted a woman with embryos made
up of her and her husband’s embryos and the embryos of another couple. The
woman gave birth to two boys—one was white, which was the woman and her
husband’s biological child; the other child was black, and upon testing it was
determined that that child was the biological child of the other couple.
was to conceive a biological child of their own, which did not occur through fault of another, but that is a possibility.227

In rare situations, an individual may claim that a child is the posthumous child of a decedent, when in fact it is not. For example, a woman may have intercourse with someone else around the same time that she is attempting to be artificially inseminated with her deceased husband’s sperm. She may claim that a child who is born is the child of the decedent, but the child is not. Or, a man may find a surrogate to be implanted with embryos created from his and his wife’s gametes, and unbeknownst to him, an IVF procedure did not work. Around the same time that the intended surrogate goes through the IVF procedure, the surviving husband begins having intercourse with the surrogate. When she gives birth, the child is not the child of the deceased wife. Although the occasion in which one of these situations would occur is rare, it is a possibility, and must be provided for.

As discussed, New York has a strong policy against exhuming a body in order to administer a blood test.228 But, like the situation with non-marital children,229 requiring posthumously conceived children to prove their paternity and maternity is not unreasonable.230 One way this could be accomplished would be to require all individuals who are depositing gametes to also deposit a blood sample that can later be used for genetic testing purposes. If courts were willing to accept blood samples from other family members, that should also be sufficient.231 Or, if any gametes

227 Both the child and the mother would most likely have a cause of action against the clinic in error.
228 See supra text accompanying notes 170-75.
229 See supra text accompanying notes 58; 158-75 and 57-59, discussing burdens placed on non-marital children in order to prove paternity and comparing posthumously conceived children to non-marital children, respectively.
230 This is consistent with some of the other states that have addressed this issue. See Woodward v. Commissioner of Social Security, 760 N.E.2d 257, 259 (2002) (requiring posthumously conceived children to establish a genetic relationship); In re Kolacy, 753 A.2d 1257, 1262 (N.J. Super. 2000) (must determine that a posthumously conceived “child is indeed the offspring of a decedent”).
231 Assuming, of course, that the family members of the decedent would willingly do so.
remain frozen at the time of conception, some of those gametes may be used for testing purposes.

Problems could arise if none of these means for testing could be met (due to mistake or lack of cooperation). The legislature should set up alternative means by which testing can be accomplished if all three of the above-mentioned methods fail.

**REGULATION OF FERTILITY CLINICS**

New York, like the majority of states in this country, has little or no regulation regarding fertility clinics. Currently, there is no law that states whether or not an individual is allowed or not allowed to take the frozen gametes of a decedent and use them to conceive a child. This is clearly problematic: there is nothing in the law preventing such use, but simultaneously there is virtually no law dealing with many of the rights resulting posthumously conceived children will or will not have upon birth.

**RELATED LEGISLATIVE AND REGULATORY ISSUES**

Two other areas of law that New York should consider regulating, both related to ART, are the regulation of fertility clinics and the consent forms used by the fertility clinics.

**FERTILITY CLINICS**

New York, like most states, lacks the proper regulation of its fertility clinics. Some of the issues that need to be regulated, in terms of posthumously conceived children, are as follows. (1) Disclosure. Rules need to be developed that require disclosing to a patient that if he or she chooses to use the frozen gametes of a deceased spouse, the resulting child’s (or children’s) rights are currently unclear. (2) Use. New York needs to decide whether

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233 Currently, clinics do address some ethical issues, such as the “moral status of embryos,” but that alone is insufficient. *See* Albany IVF Fertility and Gynecology, *Statement and Policy on Ethics Related to Assisted Reproduction,*
or not it is legal in New York for a fertility clinic to allow the
posthumous use of frozen gametes (in terms of known donors only. Anonymous donors relinquish all parental rights upon depositing
their gametes). Until posthumously conceived children's rights are
established in New York, perhaps a fertility clinic should not be
allowed to release a spouse's frozen gametes to a surviving spouse
when the deceased spouse has not left a will providing for a
resulting child. (3) Timing. If the issue of use is resolved, and the
legislature allows posthumous use of a decedent's gametes, the
legislature then needs to determine the appropriate amount of time
after the decedent's death that the gametes can be used. 234 (4) To
whom specimens are to be released. When an individual dies with
frozen gametes, who should be allowed to take and/or use those
gametes? Rules need to be established regarding who should be
able to take and/or use these specimens after the death of the
individual who deposited them (i.e., New York could limit use to a
spouse, other family members or perhaps require that such
specimens be either donated to an anonymous individual or
destroyed upon death). What should also be determined is whether
to abide by the testator's intent (via will or other written
instrument) or whether a rule should be established that does not
consider the testator's intent.

Although the legislature cannot plan for every and all
circumstances that are bound to arise in the area of posthumous
conception and fertility clinics, it is in the best position to establish
a set of guidelines that the clinics, the public and the courts can
follow moving forward.

available at http://www.albanyivf.com/PDFs/Ethics%20Statement.pdf (last
visited March 20, 2005).

234 This is to be distinguished from the timing issue regarding intestacy rights of
posthumously conceived children, discussed in Part XIII (a)(iii), supra. With
the timing for purposes of intestacy law, it limits the amount of time, after the
death of a decedent that a posthumously conceived child will be eligible to
qualify as an heir. With the timing issue surrounding use, this is to limit liability
for the fertility clinic itself in terms of keeping the specimens for an unduly
burdensome period of time and any health risks involved to the individual
wanting to use the specimens when using specimens beyond a certain amount of
time after they have been frozen.
CONSENT FORMS

Another important area of legislation to be addressed, related to the first area, is the regulation of consent forms. Such forms are used by fertility clinics at, or just prior to, the time at which an individual is depositing gametes first to establish that both parties who are participating in any procedure are both consenting to such procedure. Consent forms are also used to notify the parties of any risks that are involved in the procedures that they are about to undergo, determine what is to happen to any frozen embryos or pre-embryos in the event of divorce, separation or death of the parties, and to provide options if a couple or individual no longer wishes for the gametes to remain frozen.

For purposes of this discussion, the focus must be on what is to occur upon the death of either (or both) party (or parties). Currently, this is only vaguely addressed in such forms. But, these forms must be changed in order to specifically address how an individual (or, in the case of an embryo, both parties) wishes to proceed in the event of his or her death. First, there should be a number of questions that should be statutorily required to be asked

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235 Risks may result in multiple pregnancy, low birth weight of child, birth defects. There are also risks associated with hormone injections, and “intracytoplasmic sperm injection” (“[i]n this procedure, one sperm is injected into each oocyte.”). See Albany IVF Fertility and Gynecology, Consent Form for In Vitro Fertilization-Embryo Transfer, available at http://www.albanyivf.com/PDFs/IVF%20Consent2004.pdf (last visited March 20, 2005) [hereinafter Consent Form].

236 Id. Parties are asked to notify the clinic in the event of death of one of either party or if the parties divorce or separate. The parties also must “agree to discuss the status of [their] pre-embryos/embryos with [their] respective divorce attorneys as part of [their] formal divorce proceedings.” Id.

237 Couples can either have the embryos destroyed, transferred to an embryo adoption agency or transferred to a research facility. Id.

238 Based on the Albany IVF Consent Form found on their website, a couple desiring to undergo IVF, using both parties’ gametes, merely must agree that “[i]n the event of death of either party ... the sole responsibility and decision-making for our pre-embryos/embryos goes to the undersigned surviving genetic parent.” This gives sole discretion to the surviving party, with no regulation whatsoever. Id.
to individuals, prior to the time when they are to deposit their gametes. Such questions should not have merely a “yes” or “no” answer, but should require an individual to clearly define his or her wishes. The questions should include at least the following. (1) What should be done with your gametes upon your death? (2) Do you authorize your spouse\textsuperscript{239} to use your gametes after your death to conceive a child? Why or why not? (3) Do you have a will? If so, does it include a provision for any children that may be born after your death? If not, do you intend on having a will created that will include a provision for any children that may be born after your death, or do you otherwise intend to financially support any children born after your death?\textsuperscript{240} (4) For how long after your death do you authorize posthumous use of your gametes?\textsuperscript{241}

After full disclosure from the clinic (as previously discussed), a party should understand the implications of their answers to the questions being asked, and should answer such questions accordingly. Again, even with full disclosure and a perfect consent form, problems are bound to arise. But, setting at least minimal standards will avoid a majority of likely problems.

**CONCLUSION**

Posthumous conception has been a reality in the United States for over a decade, and legislatures throughout the country

\textsuperscript{239} In order to avoid more confusion, I have deliberately left out “partners” and other family members. If an individual depositing gametes wishes to allow a partner or family member use his or her gametes after his or her death, that individual would need to create a will for that purpose. See discussion on “Limitation to Surviving Spouse,” supra.

\textsuperscript{240} The will is almost a guaranteed way to avoid the problems with intestacy laws, subject to some limitations (see wills discussion, supra Part XI). As noted by one author, “the possibility of posthumous conception or the existence of frozen embryos at death should be considered at the drafting stage...A client who has stored or plans to store genetic material should address the question of posthumous conception specifically in his or her will.”. Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now*, 19 PROB. & PROP. 32, 37 (March/April 2005).

\textsuperscript{241} The maximum amount of time should be established by statute, but this question gives the depositor the option of limiting the time to less than the statutory amount. See discussion on timing, supra Part XIII(a)(iii).
should start addressing how their respective states plan on dealing with this issue when it arises. Ideally, all 50 states will recognize the intestacy rights of posthumously conceived children, but that is unlikely. Instead, states should at least clearly define what rights, or lack of rights, such children will have upon birth.

When a surviving spouse of a decedent decides to use the decedent’s frozen gametes to conceive a child, he or she does so for a number of reasons. For example, conceiving a child of a deceased loved one may help the widow or widower with the grieving process, may enable the parent(s) of a deceased child to become a grandparent, and may be the only opportunity the surviving spouse has to become a parent. Undoubtedly, the decision to become the parent of a posthumously conceived child is made with the best intentions. Although some will argue that posthumously conceived children should not be entitled to intestacy rights through their deceased parent, looking to the broader concept of the best interest of the child, and the love with which such children are conceived, dictates a different result.

Current New York law indicates that New York would be opposed to allowing posthumously conceived children to take an intestate share of his or her deceased parent’s estate. Based on New York’s history of protecting the best interest of the child, and promoting a strong family unit, this would not be consistent with New York policy. The legislature should instead pass legislation entitling posthumously conceived children to a portion of a deceased parent’s intestate estate, which can be accomplished through the use of a trust.

Of course, many parameters would need to be set surrounding the intestate distribution of deceased parent’s estate such as time limits, limitations regarding surviving spouses, and blood tests. Also, careful attention must be paid to the intent of the decedent, first regarding the intent to posthumous conception, and also possibly determining the decedent’s intent to provide for any posthumously conceived children. These parameters, along with others deemed necessary by the legislature, should be clearly

242 If the surviving spouse is in his or her late 30s or 40s, there may not be enough time to grieve, fall in love again (if ever), remarry and then have a child.
established. So long as this is accomplished, posthumously conceived children will be provided for in the most equitable manner possible, without disrupting the rights of other surviving heirs.