

I CONSENTED TO DO WHAT?: POSTHUMOUS CHILDREN AND THE CONSENT TO PARENT AFTER-DEATH

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I. INTRODUCTION

The consent to parent a child has rarely been an issue in our legal system, or any that came before it. The very act of sexual intercourse for a man, and the act of giving birth to a child by a woman, was more than adequate consent for a person to be considered the rightful parents of a child. Often the focus of parental disputes rested on the issue of paternity, since prior to DNA testing, paternity was not easily established.¹ Mothers have not suffered from the same struggle, since the biology of giving birth innately establishes maternity.

Even with the difficulty of establishing paternity, posthumous children have been recognized since the common law.² Children born outside of this narrow window, for scientific reasons, could not be the child of a decedent

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1. Even with the advent of DNA testing, a married man is presumed to be the father of his wife's children. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) (discussing the difficulty in determining the paternity of an infant when the parents were not married); *Gillespie v. West*, 378 So. 2d 1220, 1224 (Fla. 1979) (discussing the difficulty in establishing paternity of a child, especially where the parents of the child were not married); *Alexander v. Alexander*, 537 N.E.2d 1310, 1311 (Ohio 1989) (discussing that the difficulty in proving paternity should not hinder a child from seeking parental support). Prior to DNA testing and blood grouping, many "primitive" tests were administered to determine paternity. Debi McRae, *Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTAKER J. OF CHILD & FAM. ADVOC. 345, n. 108 (2006). According to McRae, "in the twelfth century, the Japanese pricked the child's finger and a drop of blood was allowed to drop on the skeleton of the deceased and alleged father. If the blood soaked into the skeletal bones, the child was declared the father's biological child." *Id.*
 2. Most states recognize a posthumous child born within a set time frame, normally 280 to 300 days after the death of the decedent father. For obvious reasons, a similar provision does not appear for the birth of a posthumous child to a decedent mother. Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 977-78 (2003).

father.³ However, recent technology makes it increasingly easier for a parent to have a posthumous child. Artificial Reproductive Technology (ART) allows for not just a father to parent a child after death, but for mothers to have postmortem children as well.⁴ By using ART, the traditional methods of conception no longer apply. In the past, sexual intercourse established consent; however, if sexual intercourse is no longer needed to conceive, then what new method should determine parental consent for children born using ART?

The probate courts' handling of posthumous conception and parental consent has been murky at best, particularly when social security benefits are at stake. Although all posthumous cases have thus far revolved around social security benefits, this comment attempts to address the issue of consent on a much broader sphere. Whether the parents are attempting to receive social security benefits or intestate inheritance rights from decedent parents or other family members, the issue of consent is critical to any decision.

The confusion over whether a person has properly consented to parent a posthumous child is clear. States require anything from the marriage of the parents prior to the decedents' death to a written consent form, signed and dated much like a will.⁵ This comment advocates enacting a bright line to determine parental consent; just as sexual intercourse leads to consent to parent a child, the court should establish a similar provision that determines the consent of a posthumous child just as readily. Specifically, Section II of this comment will briefly discuss the technology that allows for the conception of posthumous children. Section III will discuss the cases which have thus far attempted to decipher consent and current law in conjunction

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3. An average pregnancy lasts 40 weeks (or 280 days). Conception often occurs around week 2 of the 40 weeks, and typically pregnancies do not last longer than 294 days or 42 weeks. American Pregnancy Association, *Paternity Questions*, <http://www.americanpregnancy.org/prenataltesting/prenataltesting.html> (last visited Feb. 29, 2008).
 4. Cryopreservation of a woman's eggs would allow her to biologically mother a child after her death. Lifespan, *Lifespan's A-Z Health Information Library*, http://www.lifespan.org/adam/indepthreports/10/000067.html#adamHeading_9 (last visited Feb. 4, 2008). The eggs can be frozen and then fertilized with sperm; ultimately, a surrogate mother is chosen and the fertilized egg is placed in her uterus. Julie E. Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 237 (2005).
 5. *Gillet-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (holding that the child was eligible for social security benefits because his parents were married prior to the decedent father's death, and consent was innately established through the marriage); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) (child not eligible to receive any benefits even though his parents were married prior to the death of his father; the court required unequivocal consent to father and financially support a child posthumously).

with posthumous children. Finally, Section IV will discuss which method the courts should adopt when determining consent.

II. REPRODUCTIVE TECHNOLOGY

Children can be born within 300 days of a father's death; however, for children to be born to a predeceased mother, medical intervention is necessary. ART allows for the birth of children to both fathers and mothers long after the parent's death. The science of artificial reproduction is not new, dating back centuries; however, it is only in the last twenty years that medical personal have been able to use the technology with consistent results.⁶

A. Artificial Insemination

The most common and successful form of ART is artificial insemination,⁷ the means used in *Gillet-Netting* and other similar cases. Sperm, with the aid of medical technology, can be preserved indefinitely⁸ using cryopreservation, which is the "freezing of reproductive materials, including gametes, zygotes, pre-embryos, and embryos: this is the key process that makes assisted reproductive technology possible after one parent has already died."⁹ When using artificial insemination with fertility drugs in the woman, the chances of pregnancy are approximately 17% or one in every six rounds results in pregnancy.¹⁰ Because artificial insemination is the cheapest of the ART procedures, a woman attempting to have a posthumous child would be able to afford more rounds of the procedure, bolstering her chance of giving birth, so long as enough sperm was available for the multiple rounds of treatment.

6. Joseph Karlin, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317 (2006).

7. Julie E. Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 238 (2005).

8. Fertile Hope, *Parenthood Options*, at <http://www.fertilehope.org/learn-more/cancer-and-fertility-info/parenthood-options-men.cfm#TID3> (last visited Feb. 1, 2008).

9. Goodwin, *supra* note 7, at 237.

10. Artificial insemination also includes Intracytoplasmic Sperm Injection, which is used primarily when the male's infertility is the problem. Other types of ART procedures, like embryo lavage and transfer, are available. However, they are not widely used and have not been used in any cases already before the court. Lifespan, *Lifespan's A-Z Health Information Library*, http://www.lifespan.org/adam/indepthreports/10/000067.html#adamHeading_9 (last visited Feb. 4, 2008). This comment will be limited to discussing artificial insemination and in vitro fertilization, although the concepts in this comment would apply to all ART procedures.

B. In Vitro Fertilization

In vitro fertilization allows a decedent mother to have a child long after death. In vitro fertilization extracts eggs from the woman, usually while she takes some type of fertility drugs, and then uses a laboratory to combine the sperm and the eggs.¹¹ After a minimum of 48 hours, the eggs are fertilized and implanted in the female, but the female does not have to be the same as the donor of the eggs.¹² Eggs extracted from a female can also undergo cryopreservation for a number of years, much like sperm.¹³ Many companies now cater to individuals who need a surrogate mother for a variety of reasons, including infertility problems.

The chances of conceiving using in vitro fertilization declines if the eggs have to be frozen,¹⁴ as would be the case for posthumous conception. In vitro fertilization has a success rate somewhere between 25 to 34%, depending on a variety of factors.¹⁵ The success rate for the first three rounds of in vitro fertilization remains the same, but after the third treatment, the success rate falls off dramatically.¹⁶ The chances of conception could greatly limit the amount of rounds a person would have to conceive a posthumous child, therefore helping future legislation or the court limit the amount of time an estate must be held open.

III. BACKGROUND

After three and a half years of marriage, Warren and Lauren Woodward were informed that Warren had leukemia.¹⁷ The couple was childless, and medical professionals informed them that treatment for the leukemia might make Warren sterile.¹⁸ Prior to undergoing a bone marrow transplant, Warren stored sperm at a fertility clinic/sperm bank.¹⁹ Unfortunately, Warren died

11. In vitro fertilization involves two different types of procedures. Gamete Intrafallopian Transfer involves the traditional form of in vitro fertilization where the embryos are implanted in the uterus. Approximately 4,500 cases are performed every year. Zygote Intrafallopian Transfer places the embryos in the woman's fallopian tubes rather than the uterus. Approximately 1,500 procedures are performed annually. *Id.*

12. *Id.*

13. Goodwin, *supra* note 7, at 237.

14. Lifespan, *supra* note 10.

15. *Id.*

16. After the fifth round, the chances of pregnancy are almost zero. *Id.*

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

18. *Id.*

19. *Id.*

approximately ten months later.²⁰ Two years after her husband's death, Lauren Woodward gave birth to twin daughters.²¹ Under Massachusetts law, the children were heirs of Woodward, entitling them to Social Security Benefits and intestate inheritance rights for extended family members.²² Had the Woodwards lived in other states, however, including Florida or California,²³ the children would have not been entitled to SSA benefits or inheritance rights.

Even though the Woodwards knew that Warren's death was a probability, with the exception of a few states, the couple could do nothing to ensure their future children would have inheritance rights. In the majority of states, neither case law nor statute define what a parent must do to "consent" to have a posthumous child. In some states, a verbal consent is enough.²⁴ Other states require a will or a written statement.²⁵ Some states refuse to honor posthumous children, regardless of parental decisions.²⁶ In the Woodwards' case, even though Lauren sought benefits under a federal statute, depending on her geographic location, her children might or might not receive the benefits depending on the evidentiary proof of her husband's consent to father a posthumous child.

At this time, only six cases have been decided involving posthumous children, and all of these cases existed solely to obtain survivor's benefits for the child.²⁷ Benefits were granted in all but one case.²⁸ Other similar cases have come before the Social Security Administration, and if a challenge arose out of these claims, then the issue would be settled in a federal court.²⁹ Despite the fact a claim arises in federal court, state law technically determines the outcome of the case.³⁰

20. *Id.*

21. *Id.*

22. *Id.*

23. See discussion *infra* Part IV.

24. See discussion *infra* Part IV.

25. See discussion *infra* Part IV.

26. See discussion *infra* Part IV.

27. See *Gillet-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004); *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005); *Hecht v. Super. Ct.*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super Ct. Ch Div. 2000); *Hart v. Shalala*, No. 94-3944 (E.D. La. 1996) (dismissed prior to issuance of a final opinion).

28. See *Gillet-Netting*, 371 F.3d at 593; *Stephen*, 386 F. Supp. 2d at 1257; *Hecht*, 20 Cal. Rptr. 2d at 275; *Woodward*, 760 N.E.2d at 257; *Kolacy*, 753 A.2d at 1257; *Hart*, No. 94-3944.

29. Karlin, *supra* note 6, at 1321.

30. *Id.*

A. Case Law

Perhaps the most interesting case, *Hart v. Shalala*, did not reach a decision based on consent because the case was moot before the District court issued a judgment.³¹ In *Hart*, the decedent father intended for his wife to conceive after his death as was evidenced by his decision to leave all rights to his sperm to her.³² When Nancy Hart applied for benefits after the birth of her daughter,³³ the Social Security Administration (hereinafter “SSA”) denied her request. However, on appeal, the administrative law judge found that the assignment of sperm rights evidenced Edward Hart’s intention to father a child.³⁴ The appeals council for the SSA eventually overturned the award of benefits, and when Nancy Hart appealed to the district court, the SSA agreed to award benefits to the child, thus making the case moot and removing it before a decision could be rendered.³⁵ Perhaps the most interesting aspect of the *Hart* case is that the SSA chose to award benefits rather than have the federal Louisiana court render a decision on posthumous children, noting that this type of problem should be left to administrative agencies and the legislative branch, rather than the courts.³⁶

In three other cases, courts awarded social security benefits to a variety of posthumous children conceived using ART.³⁷ In all of the cases, the consent of the decedent parent to have his sperm used to create a child after his death was an issue. In *Woodward*,³⁸ the Massachusetts Supreme Court held that while a posthumous child can inherit, it is the surviving parent’s burden to show that the decedent consented to the posthumous conception.³⁹ In *Kolacy*,⁴⁰ New Jersey law awarded benefits to the posthumous child, but the

31. *Hart*, No. 94–3944.

32. *Id.*

33. Judith Hart was born almost one year after her father, Edward’s death. *Id.*

34. Karlin, *supra* note 6, at 1321.

35. *Id.*

36. *Id.*

37. See *Woodward*, 760 N.E.2d at 257; *In re Estate of Kolacy*, 753 A.2d at 1257; *Gillet-Netting*, 371 F.3d at 593.

38. *Woodward*, 760 N.E.2d at 257.

39. The Massachusetts Supreme Court held that the Massachusetts Intestacy Statute did not require that children be in gestation at the time of death. *Id.*

40. *In re Estate of Kolacy*, 753 A.2d at 1257. William and Mariantonia Kolacy discovered that William had leukemia shortly after their marriage. William stored his sperm at a local sperm bank, and after his death, his wife conceived and gave birth to twin daughters using ART. *Id.*

court found the husband had definitively given consent for his wife to conceive a child after his death.⁴¹

In *Gillet-Netting*,⁴² the Arizona court awarded benefits for the posthumously conceived children, but the court based its ruling on the fact that the couple married prior to the decedent parent's death.⁴³ The *Gillet-Netting* court did not specifically hold that consent was required for the children to receive benefits, but the court took it as fact that Mr. Netting gave his wife permission to use his sperm.⁴⁴

In the *Hart* case, Louisiana law did not have a statute governing posthumous conception using ART; rather the Louisiana statutes governing intestate law at the time only allowed a child to be an heir if the child was born within 300 days of the parent's death.⁴⁵ Since the case was declared moot, we do not know how the court might have interpreted the intestate statute.

In *Woodward*, the Massachusetts Supreme Court found that the intestate law in Massachusetts did not mandate that children be in gestation at the time of the parent's death in order to be considered heirs.⁴⁶ The court did go on to note however, that three key public interests were at stake when determining the rights of posthumous children, and each of the interests must be weighed carefully: "the best interests of the children . . . the orderly administration of estates, and the reproductive rights of the genetic parent."⁴⁷

The Arizona court in *Gillet-Netting* did not interpret the state's intestate statute to determine if posthumous children born more than 300 days after the parent's death could still inherit.⁴⁸ Instead, the court interpreted the SSA to include all children born to a married couple; since *Gillet* and *Gillet-Netting*

41. In the matter of consent, the record is absent on what type of consent Mr. Kolacy gave to his wife. However, the Court notes in the last paragraph of the opinion that it "accept[s] as true Mariantonia Kolacy's statement that her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children." *Id.* at 1263.

42. *Gillet-Netting*, 371 F.3d at 593. Mr. Netting suffered from cancer, and stored his sperm in a local sperm bank. After his death, his wife, Ms. Gillet-Netting used the sperm to conceive and give birth to twin girls using in vitro fertilization. *Id.*

43. *Id.* The court went on to note that had the couple not been married, the benefits would not have been awarded. *Id.*

44. The case states in the background that Netting had reaffirmed his request that she use the sperm to conceive a child. The case does not tell us if this confirmation was in writing, part of his will, or simply a dialogue between the spouses. However, the court takes it as fact Netting agreed for *Gillet-Netting* to use his sperm. *Id.* at 594-95.

45. Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. REV. 251, 252 (1999).

46. *Woodward*, 760 N.E.2d at 264.

47. *Id.* at 264-65.

48. *Gillet-Netting*, 371 F.3d at 599.

married prior to Gillet's death, the court determined the children were entitled to survivor's benefits.⁴⁹ Had Gillet and Gillet-Netting not been married prior to Gillet's death, the court would have been forced to look beyond the Social Security Act and interpret the state's intestate laws.⁵⁰

Finally, in *Kolacy*, the New Jersey court interpreted both intestate laws and the Uniform Parentage Act before it found that the posthumously conceived children were the heirs of the decedent father.⁵¹ The court noted that the intestate laws did not mention posthumous children, and the court refused to "read a reverse presumption of nonpaternity into the existing language."⁵²

In *Stephen v. Commissioner of Social Security*, the Florida court refused to extend benefits to posthumously conceived children.⁵³ However, the court's ruling can be placed in line with the cases granting benefits, because the decedent parent presumably never gave consent for the extraction of his sperm or for the conception of a child using the sperm.⁵⁴ The Florida court noted that while the Florida statute meant excluding a child born more than 300 days after the death of a parent, the parent could circumvent this rule by naming the future child in his or her will,⁵⁵ thereby essentially satisfying the consent requirement imposed by the other courts.

In the final case dealing with posthumous children, the California court in *Hecht v. Superior Court*⁵⁶ did not affirmatively answer whether a posthumous child has any inheritance rights.⁵⁷ *Hecht* had a narrow holding that a decedent had a property interest in his or her biological material.⁵⁸ Using reasoning similar to the *Gillet-Netting* court, the California court questioned the public policy behind marriage and ART.⁵⁹ The California court also held that it was not against public policy for an unmarried woman to become pregnant using sperm from her decedent boyfriend, thereby drawing

49. *Id.* at 598.

50. *Id.* at 597.

51. *Kolacy*, 753 A.2d at 1260.

52. Karlin, 79 TEMP. L. REV. at 1321.

53. *Stephen*, 386 F. Supp. 2d at 1257.

54. In *Stephen*, after Gar Stephen died of a heart attack, his wife had sperm extracted from his body. The Court gives no indication in the record that the couple had planned for such a contingency. Stephen's wife eventually conceived and gave birth to a boy more than four years after the decedent's death. *Id.* at 1259.

55. *Id.* at 1265.

56. *Hecht*, 20 Cal. Rptr. 2d at 275.

57. *Id.*

58. *Id.* at 281.

59. *Id.* at 289.

the logical conclusion that the court might have been more favorable had the couple been married.⁶⁰

The *Hecht* court was not asked to decide whether a posthumous child would have rights under California law.⁶¹ However, the court made several important points in the dicta of the case regarding posthumous conception and the rights of persons wanting to be impregnated by a decedent's sperm.⁶² In California, without express authorization in writing or from a court order, a sperm bank will not inseminate a woman regardless of marital status to the decedent.⁶³ California law specifies that a writing must exist with the express authority for the property rights of the sperm to be transferred to another person, or else the biological material should be destroyed upon the decedent's death.⁶⁴

Some states have adopted specific statutes regarding posthumous children, although the majority have not changed statutes to accommodate changing technology. This comment does not attempt to address whether benefits should be conferred on posthumous children. Rather, it advocates that rules should be established regarding the posthumous children's benefits so that parents may prepare accordingly, much like a person does when drafting a will or making other legal decisions. Whether a child should be able to inherit from his parent or receive social security benefits should not be determined based on a technicality. Parents, both those who know of their impending death and those who are seeking fertility treatments but die unexpectedly, should be able to know whether their posthumous children are entitled to benefits prior to conception, rather than at a social security hearing after the birth of children. A bright line test would allow families to effectively plan for the birth of a posthumous child, or alternatively, to help an adult ensure that he or she does not have a posthumous child.

60. *Id.*

61. In *Hecht*, William Kane died after leaving a sperm deposit at a local storage facility. Prior to Kane's suicide, he had signed a contract with the sperm bank, emphatically giving all rights to his sperm to his girlfriend, Deborah Hecht. Additionally, his will left the rights to the sperm to Hecht as well. His adult children sued and obtained an order to have the semen destroyed. After Hecht's appeal, the order to destroy was reversed and Hecht received rights to Kane's sperm. No child ever resulted from the ART. *Id.* at 276–78.

62. *Id.*

63. *Id.* at 282.

64. *Id.*

IV. DISCUSSION

To best understand the issue of consent within the scope of already existing laws, it helps to examine how each statute would work in a specific scenario. Most statutes are based on some variety of a Uniform Act or Restatement. Obviously, if the child is born in one of the fourteen states⁶⁵ which currently do not have statutes governing inheritance rights and posthumous consent, the outcome is completely unpredictable. Further, as a person is considering whether or not to have a posthumous child, the child's rights could not possibly be known until a case is brought. Even then, the fourteen states are unlikely to arrive at the same result: states which have adopted similar provisions have yet to all decide posthumous rights in the same manner. To better understand the states which do have statutes, they are grouped together below according to each statute's consent provision.

Several uniform acts and guidelines exist that are normally adopted, at least in part, by state legislatures. Although the language of the exact state statute may not identically mirror the uniform acts, the results of the state statutes normally mimic the results of the uniform acts. Therefore, each act or restatement will be addressed on an individual basis in conjunction with the specific states which have adopted some form of the act.

States have adopted provisions regarding posthumous conception in varying degrees, including California and Florida,⁶⁶ which are very specific, to states that have no guidance whatsoever. Currently, fourteen states have no provisions regarding intestacy laws and posthumous children.⁶⁷ Of the thirty-six states with laws regarding posthumous children, twenty-nine of them have adopted some version of the UPC 2-108, including the older versions.⁶⁸ Of

65. Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Mississippi, Missouri, North Carolina, Oklahoma, Rhode Island, Wisconsin, Vermont currently do not have statutes that address posthumous conception and inheritance rights.

66. Both states require specific consent in writing, preferably in a will, before any inheritance rights are considered, either from the estate or from social security. *See generally*, Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257 (M.D. Fla. 2005); Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Cal Ct. App. 1993).

67. States to have passed laws that deal, at least to some degree, with posthumous conception include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. Karlin, 79 TEMP. L. REV. 1317, n.178 (2006).

68. Regardless of the version of the UPC adopted, none of the ones in existence require consent. Only the revision suggested by Chester proposes some sort of consent. The states adopting some version of the UPC are: ALA. CODE § 43-8-47 (1991) (1969 version), ALASKA STAT. § 13.2.108 (2006)

the fourteen states that have statutes specifically designed to cover children born using ART, five of the statutes deny rights to the children,⁶⁹ and nine of them grant rights under certain circumstances.⁷⁰ Of the five states that deny rights, two have specific provisions for posthumously conceived children, and both allow for inheritance rights if the children are provided for in a will or express written consent.⁷¹

(current version), ARIZ. REV. STAT. ANN. § 14–2108 (West 2008) (current version), ARK CODE ANN. § 28–9–210 (2004) (1969 version), CAL. PROB. CODE § 6407 (West 2008) (1969 version, but also has a specific statute), COLO. REV. STAT. § 15–11–108 (West 2008) (1969 version), FLA. STAT. ANN. § 732.106 (West 2008) (1969 Version, but also has a specific statute), HAW. REV. STAT. § 560:2–108 (West 2008) (current version), IND. CODE § 29–1–2–6 (West 2008) (1969 version), IOWA CODE ANN. § 633.220 (West 2008) (1969 version), ME. REV. STAT. ANN. tit. 18–A, § 2–108 (1998) (1969 version), MICH. COMP. LAWS ANN. § 700.2108 (West 2008) (current version), MINN. STAT. ANN. § 524.2–108 (West 2008) (current version), MONT. CODE ANN. § 72–2–118 (West 2008) (current version), NEB. REV. STAT. § 30–2308 (1995) (1969 version), N.J. STAT. ANN. § 3D:5–8 (West 2008) (current version), N.M. STAT. ANN. § 45–2–108 (West 2008) (current version), N.Y. EST. POWERS & TRUSTS § 4–1.1 (1998) (1969 version), N.D. CENT. CODE § 30.1–04–08 (1996) (current version), OR. REV. STAT. § 112.075 (1990) (1969 version), S.D. CODIFIED LAWS § 29A–2–108 (West 2005) (current version), TENN. CODE ANN. § 31–2–108 (2001) (1969 version), UTAH CODE ANN. § 75–2–108 (West 2008) (current version), VA. CODE ANN. § 20–158B (West 2008) (1969 version, also has a specific statute), W. VA. CODE ANN. § 42–1–3f (West 2008) (current version), and WYO. STAT. ANN. § 14–2–907 (West 2008) (1969 version, but also has a statute mirroring UPA section 707).

69. Georgia, Idaho, South Carolina, Virginia, and Florida all have laws in place that deny or attempt to deny rights for posthumously conceived children. According to GA. CODE ANN. § 53–2–1(a)(1) (West 2008), IDAHO CODE ANN. § 15–2–108 (West 2008), S.C. CODE ANN. § 62–108 (West 2008), and VA. CODE ANN. § 20–158(b) (West 2008), a child must be born within 300 days or ten months of a decedent parent’s death. Idaho and Virginia specifically exclude children born from ART: “any person who dies before before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete. . . is not the parent of any resulting child. . . unless the person consents to be a parent in writing before the implantation.” VA. CODE ANN. § 20–158(b) (West 2008). Florida’s annotated code also has a provision that denies rights to anyone born using ART after the parent’s death unless the parent specifically provided for the child within a will. FLA. STAT. ANN. § 742.17(4) (West 2008).
70. Of the states which allow posthumous children to inherit under intestate laws, all require varying degrees of consent. Colorado, Texas, Washington, Delaware, North Dakota, Wyoming, California, and Louisiana all provide for inheritance rights under intestate statutes so long as the decedent gave consent to parent a child prior to his or her death. For specific statutes, see *supra* note 68. Generally the consent must be in writing.
71. Florida and Virginia require express written consent, but both statutes specifically provide for children conceived posthumously. FLA. STAT. ANN. § 742.17(4) (West 2008); VA. CODE ANN. § 20–158(b) (West 2008).

A. Uniform Status of Children of Assisted Conception and the Uniform Probate Code

Approximately four codes have dealt with posthumous conception and the birth of a child after the death of the parent.⁷² The first two proposals, the Uniform Status of Children of Assisted Conception Act (“USCAC”)⁷³ and the Uniform Probate Code (“UPC”)⁷⁴ offer guidelines for posthumous children, but they do not discuss the consent required of a decedent parent. In fact, these two provisions so narrowly construe the rights of a posthumously conceived child, consent is most likely not an issue because the child does not stand to inherit either from the estate or from other benefits, like Social Security survivor benefits.

Ronald Chester is currently discussing a revision to the UPC.⁷⁵ Interestingly, the proposed revision would account for the consent or desire of a parent to have a posthumous child.⁷⁶ The proposed revision would require the consent of the decedent parent: “An individual not in gestation at the death of the putative parent is the child . . . if . . . the putative parent gave consent in a record to posthumous conception.”⁷⁷ Although the proposed revision requires the consent to be “on record,”⁷⁸ Chester does not discuss within the actual revision what consent means. In other words, would the

72. The four proposals include the UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4b, 9C U.L.A. 24 (amended 2001), UNIF. PROBATE CODE § 2–108, 8 U.L.A. 283 (amended 1990), UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (Supp. 2006), and RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (West 2008).

73. The USCAC was originally adopted in 1988 by the National Conference of Commissioners on Uniform State Law. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT hist. n. (withdrawn 2000), 9C U.L.A. 24 (amended 2001). Eventually the UPA § 707 superseded the USCAC, and it was withdrawn. However, the USCAC provided in § 4(b) 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.” *Id.* The wishes of the decedent parent are not taken into consideration so consent is not an issue to be addressed.

74. UPC § 2–108, updated in 1990, provides that “an individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” UNIF. PROBATE CODE § 2–108, 8 U.L.A. 283 (1990). However, this provision does not mention consent. Presumably, the child must be in gestation already at the time of the parent’s death, which would leave out the posthumous child. Much like the USCAC, consent is not needed because the posthumous child does not stand to gain anything. However, gestation can also mean, using alternative dictionaries, when the egg and sperm are joined, even if this means using cryopreservation. If the courts adopted this interpretation, then even under the UPC, posthumously conceived children could have rights. Karlin, *supra* note 6, at 1317.

75. Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727 (2004) (discussing possible revisions to § 2–108).

76. *Id.*

77. *Id.* at 730–31.

78. *Id.*

word of a widow be enough as in the case of *Kolacy*,⁷⁹ or would the court require something more strict, like the California law which provides consent must be in writing, preferably in a will?

1. The UPC in Action: a Ten-month Window

Three states adopted a ten-month window in which all children must be born following the death of a parent in order to inherit intestate, which again would affect social security benefits.⁸⁰ These three states adopted provisions similar to the 1969 version of the UPC § 2-108. All three of these statutes were enacted in 1990. Unlike the statutes in Florida or Virginia,⁸¹ the statute does not provide for a consent or will provision. Even if the father consented to have a posthumous child in his will and attempted to provide for such a child, under the intestate laws, the child would still not be eligible for survivor's benefits if he or she were not born within ten months following the death of his or her parent. Additionally, even if the child did not need survivor's benefits, the child would not be able to inherit from other family relatives who died intestate because under the state law, the child is not legally the child of the decedent parent.

Although it might be possible for a person to conceive and give birth to a child within ten months following the death of a parent using ART, the chances are highly unlikely. Often the procedures take months to establish hormone cycles, and often they are not successful on the first attempt. Additionally, the death of a loved one would also hinder a person from immediately attempting to become pregnant. From a practical perspective, the ten-month window does not provide any real rights to posthumous children.

2. UPC § 2-108

The rest of the states using some version of the UPC have adopted either the 1969 or the 1990 version.⁸² The 1969 version of the UPC provides in pertinent part: "relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."⁸³ The current version of the UPC provides: "an individual in gestation at a

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

80. GA. CODE ANN. § 53-2-1(a)(1) (West 2008), IDAHO CODE ANN. § 15-2-108 (West 2008), S.C. CODE ANN. § 62-108 (2008).

81. California, Virginia, and Florida's specific statutes will be discussed *infra* VI.D.

82. Joseph Karlin, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1321 (2006).

83. UNIF. PROBATE CODE § 2-108, 8 U.L.A. 283 (1969).

particular time is treated as living at the time if the individual lives 120 hours or more after birth.”⁸⁴

Neither of the UPC versions provide for a posthumous child, even with the consent of the decedent parent. Most interpretations based on the plain meaning of the statute would mean that the UPC does not provide for any type of posthumous conception.⁸⁵ However, in *Kolacy*,⁸⁶ the court still found that a child could inherit under this statute: “On first glance, it may seem that this language would eliminate intestate heirs rights of posthumously conceived children, while potentially retaining such rights for children from posthumously implanted embryos who were conceived and then cryopreserved before the parent died.”⁸⁷

If, for example, the Woodwards had been in a jurisdiction with some version of the UPC, the case might have turned out much differently. Assuming the state does not have a specific provision like California or Florida, then the UPC would be the most applicable statute. However, the statute does not necessarily account for posthumous conception, which leaves parents in doubt as to the inheritance rights of their children. Since the twins were not born within ten months, under the plain reading of the UPC, the Woodward children would not have been able to inherit. Whether the decedent parent consented to have the children would not matter.

New Jersey has found that inheritance rights exist, but this is by no means a guaranteed outcome based on the plain meaning of the statute. In fact, the opposite is true. Based on the statute, it is more likely that the court would find the child is not entitled to inherit. Whether the decedent parent consents to parenting a posthumous does not matter based on the face of the statute.

84. UNIF. PROBATE CODE § 2-108, 8 U.L.A. 283 (amended 1990).

85. Only one of the states that are currently guided by the 1969 version of the UPC have tested the claim: New Jersey, although New Jersey has since adopted a provision similar to the 1990 version of the UPC. The other sixteen states have not had a chance to interpret the statute.

86. In *Kolacy* and *Stephen* both interpreted the UPC § 2-108. *Kolacy* was awarded benefits under the statute. *Kolacy*, 753 A.2d at 1257. *Stephen* found that the child did not inherit under the same statute. However, the Florida court found that the UPC did not apply because Florida had a more specific statute designed to deal specifically with posthumous children. *Stephen*, 386 F. Supp.2d at 1263-64.

87. Karlin, 79 TEMP. L. REV. at 1343.

B. The Uniform Parentage Act

The Uniform Parentage Act, most recently revised in 2002, provides rights to posthumous children, but also requires consent from the parent.⁸⁸ The UPA provides that for a parent to be the child of a posthumous conception, the decedent parent must have “consented in a record that if assisted reproduction were to occur after death, the deceased individual would be the parent of the child.”⁸⁹ Much like Chester’s suggested revision, however, the UPA does not provide for the type of consent required by the living parent.

Two versions of the Uniform Parentage Act exist. States have adopted both the 2000 and the 2002 versions. To understand the difference between the two versions, it is easier to begin an examination using the 2000 version.

1. 2000 Version

Four states adopted the 2000 version of the UPA section 707.⁹⁰ The pertinent language reads: no inheritance rights exist “unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be the parent of the child.”⁹¹ In some cases, like in *Hecht* or in a same-sex relationship, the couple may not be legally married. Therefore, even if the father consented to have this child via ART posthumously, so long as the couple was not married, then the child would still not be able to inherit. The *Hecht* court noted that public policy did not dictate that an unmarried woman could not conceive a child using her boyfriend’s sperm,⁹² but clearly the issue is an important one in a variety of states. *Gillet-Netting* was also decided on the issue of marriage between the mother and the decedent father.⁹³

Another issue exists within the UPA section 707. Even if the couple is married, what type of consent is required? The statute on its face simply

88. UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (Supp. 2006). The UPA requires that the parent must give consent. However unlike other codes or state laws, the UPA does not require a time limitation. However, the consent requirement serves as a way to block people from using biological material to interrupt the normal distribution of an estate or to otherwise usurp parts of the estate that would not have normally been distributed in a particular way. The 2000 version only allowed intestate succession if the parents were “spouses.” UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (2000).

89. UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (Supp. 2006).

90. UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (2000).

91. *Id.*

92. *Hecht*, 20 Cal. Rptr. 2d at 289.

93. *Gillet-Netting*, 371 F.3d at 598.

requires that consent be evidenced in the record.⁹⁴ The statutes fail to note what type of consent is necessary; must it be in writing or would the fact the father has previously attempted ART with his spouse be sufficient evidence of consent? This requirement would be entirely up to the interpretation of the courts, which allows for a wide variety of decisions and perhaps inconsistent law.

2. 2002 Version

The 2002 version of the UPA section 707 has been adopted by seven states.⁹⁵ The statute reads: “If an individual who consented in record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased . . . consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.”⁹⁶

Consent is obviously an issue in the 2002 version of the UPA § 707. More importantly, the deceased parent does not just have to consent to having a child; he or she must specifically consent to have a posthumous children using ART. Using this reasoning, as in the previous scenario, consent would not manifest simply because the decedent had been using ART prior to his or her death. The parent must consent specifically to parent a child after death using ART. However, just as in the 2000 version, this version does not specify what type of proof the court will accept regarding consent. Whether it must be written is still uncertain.

C. The Restatement (Third) of Property: Wills and Other Donative Transfers § 2.5

The Restatement does not require consent on the part of the decedent parent nor does it require a time period in which the child must be born.⁹⁷ The only requirement is that the child “must be born within a reasonable time period.”⁹⁸ Certainly the Restatement is the most flexible regarding posthumous conception, but for the purpose of our discussion, it offers little

94. UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (2000).

95. UNIF. PARENTAGE ACT § 707, 9B U.L.A. 53 (Supp. 2006).

96. *Id.*

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

98. *Id.*

guidance. Most courts have required consent of some kind,⁹⁹ whether that comes from the consent of the widow or an express condition, so the Restatement's position has no real credence in our current court system.

D. Posthumous-Specific Statutes

Four states have taken specific action by enacting laws specifically dealing with posthumous conception: Florida, Virginia, California, and Louisiana.¹⁰⁰ None of these states specifically mirror any of the uniform acts. For the purpose of discussion, the states have been grouped according to the rights afforded to posthumous children.

1. Florida and Virginia

Two states adopted statutes specifically dealing with posthumous conception: Florida and Virginia.¹⁰¹ These statutes do not recognize parentage unless the decedent parent expressly provided for the occurrence,¹⁰² as reflected in *Stephen*. However, the expressed consent must come in the form of a will, not simply a signed consent form at the local fertility clinic or a written statement scribbled down briefly from a hospital bed.¹⁰³ For a child to inherit, the parent must literally plan that the child will be conceived posthumously. In some cases, like those in *Kolacy* or *Gillet-Netting*, where the parent knew he or she was dying from a terminal illness, drafting a will is part of the process as one prepares his estate prior to death. Where advanced warning of impending doom is given, requiring a parent to leave express conditions in a will is understandable.

However, what if the situation were different? What if, the parent did not die from a terminal illness but from a car accident? Should his child be deprived inheritance rights simply because the father did not have a will, or if he did have a will, failed to account for the child he was literally in the process of trying to conceive? Further, most of the issues regarding consent arise because of intestate laws. If a father had a will, the child would not

99. See generally *Gillet-Netting*, 371 F.3d 593 (9th Cir. 2004); *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005); *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257; *Hart v. Shalala*, No. 94-3944 (E.D. La. 1996) (dismissed prior to issuance of a final opinion).

100. FLA. STAT. ANN. § 742.17(4); VA. CODE ANN. § 20-158(B); CAL. PROB. CODE § 249.5 (West 2008); LA REV. STAT. ANN. § 9:391.1(A) (West 2008).

101. FLA. STAT. ANN. § 742.17(4); VA. CODE ANN. § 20-158(B).

102. FLA. STAT. ANN. § 742.17(4); VA. CODE ANN. § 20-158(B).

103. *Id.*; See also *Stephen v. Comm'r of Soc. Sec.*, 386 F.Supp.2d 1257 (M.D. Fla. 2005).

likely appeal to the intestate law of the state, which again begs the question: should the child suffer because his parent did not write a will?

Further, while state law in Virginia gives inheritance rights to posthumous children, another statute imposes a ten month time frame during which the birth must occur.¹⁰⁴ So even if the decedent parent attempted to provide for his child in his will, the child would still be deprived of social security benefits, since survivor's benefits are based on intestate law, even where there is a will.¹⁰⁵

2. *California and Louisiana*

Both California and Louisiana provide extensive protection to posthumous children. The California statute¹⁰⁶ requires the parent to prove "by clear and convincing evidence"¹⁰⁷ that the decedent specifies in writing "that his or her genetic material shall be used for posthumous conception of a child."¹⁰⁸ Unlike other statutes, California specifies exactly what must be included for the writing requirement to be satisfied: "the specification must be signed by the decedent and dated . . . A person is designated by the decedent to control the use of the genetic material."¹⁰⁹ The statute also specifies that the person designated in control of the biological material must notify the executor of the decedent's estate within four months,¹¹⁰ and the child must be in utero within two years of the decedent's death.¹¹¹ More than any other state besides Louisiana, California sets out a clear statute that affords posthumous children estate rights and would afford survivor benefits under the SSA. Further, as a result of the California statute, many fertility clinics made the consent form discussed in the statute part of the procedure for depositing biological material. Had the Woodward couple, for example, used a similar form issued by their clinic, then the child would have no trouble establishing parentage and inheritance rights.

104. The accompanying law provides that "a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of. . . [succession]." VA. CODE ANN. § 20-164 (2004).

105. Joseph Karlin, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1321 (2006).

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

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

Louisiana has a similar provision,¹¹² although it is not as specific and does not afford the same amount of protection to unmarried couples. The statute provides that a child conceived posthumously has the same rights as a child conceived before a parent's death provided that the decedent "specifically authorized in writing his surviving spouse's right to use his gametes . . . provided the child was born to the surviving spouse, using the gametes of the decedent."¹¹³ The Louisiana statute provides protection to the child so long as the child is born to the spouse of the decedent, and the child is born within three years of the parent's death.¹¹⁴

Unlike the California statute, no one must notify the administrator of the estate, so presumably this lack of notification could lead to a troubled distribution. However, the law would still allow a child to be considered the heir of his parent for the sake of social security acts or for the distribution of other estates. Much like other statutes, however, the Louisiana provision does not specify what type of consent must be signed. Unlike the specificity of the California provision, the only requirement is that the authorization be in writing. However, what the writing must contain is absent from statute.

E. Recommendations

When deciding how to handle intestate succession based on posthumous children, a number of factors must be considered. First, the welfare of the posthumous child must be considered, followed closely by the welfare of any other children or dependents who would inherit from the estate. The expediency of closing an estate along with financial obligations must also play a very practical role. Both the courts and the legislature have many pressing decisions to make regarding intestate succession and posthumous children, and none of them are best considered through inaction.

States like California, Florida, Louisiana, and Virginia have taken steps to at least address the issue of who can inherit, and perhaps more importantly, who can receive survivor's benefits. However, perhaps the most important element should be the wishes of the decedent parent to father or mother a child. Certainly some of the states take such wishes into account. Perhaps a bright line test, such as the one established in California, satisfies such a requirement.

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

113. *Id.*

114. *Id.*

State statutes, such as Florida, which require a will would overly burden the decedent parent, and would likewise not help in social security claims. While the Florida law could have been effective in the cases tried so far where almost all of the couples knew ahead of time that the spouse was terminally ill, one day this might not be the case. If, for example, the decedent was killed accidentally, in a car accident or any number of other scenarios, then a will is not likely to be helpful.

Rather, the most effective way to ease concerns over posthumous conception is to enact a law that requires written consent. The written consent should include a statement that the decedent wishes a designated person to attempt to conceive his or her child in the case of death. Unlike Louisiana, there would be no need to limit the claims to spouses if the decedent designated a person within the writing. To counter the concerns of the estate, the statute would simply impose two requirements: first, the designated person must inform the executor of the estate, and alternatively, any heirs who would be affected by the birth of a child under the current will or intestate succession. Second, a time limit should be imposed by the court to limit the time the designated person has to conceive and deliver a child.

To ensure that all couples attempting ART are aware of the statute or have properly filled out the consent, much like the majority of ART centers in California, the statute should require all centers that collect or otherwise hold gametes, including facilities which directly perform ART to have patients sign a waiver as standard procedure. Alternatively, if the decedent did not wish to have a posthumous child, this desire could also be made known on the form, allowing for full disclosure of the decedent's wishes. If this consent form were mandatory before any deposits or ART procedures could be completed, then cases would never arise where the decedent did not either give or refuse consent. Additionally, much like a will, the consent forms should be revocable throughout the life of the person giving consent, allowing the signer to change the designated person or have the sample destroyed altogether.

V. CONCLUSION

In conclusion, in order to allow couples to take control of their reproductive futures while also ensuring that a federal statute is administered fairly among all fifty states, Congress or the courts should enact a bright-line rule. Requiring reproductive clinics to have customers sign consent forms before making a deposit would ensure that the decedent's wish was taken into account. Even if the forms do not become standard, a description of what constitutes consent should be made uniform throughout the states.