STUDENT WORKS

INCLUDING THE FROZEN HEIR: EXPANDING THE FLORIDA PROBATE CODE TO INCLUDE POSTHUMOUSLY CONCEIVED CHILDREN'S INHERITANCE RIGHTS

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> *Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless.*[1]

I. INTRODUCTION

As scientific innovation accelerates, courts and legislatures struggle to apply established legal principles to technological breakthroughs.[2] Advances in assisted reproductive techniques (ART), for example, permit conception even after a parent's death.[3] Posthumous conception creates challenges in estate law,

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1. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 266 (Mass. 2002).

2. *See* Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 Minn. J.L. Sci. & Tech. 505, 515–516 (2005) (surveying scholarly criticism of the law's failure to respond to new technology and innovations).

3. Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC J. 154, 155 (2008). The American Bar Association defines posthumous conception as "the transfer of an embryo or gametes with the intent to reproduce a live birth after a gamete provider has died." Model Act Governing Assisted Reprod. Tech. § 102 (ABA proposed dft. 2008) (available at http://apps.americanbar.org/family/committees/artmodelact.pdf). A "gamete" is "a cell containing a haploid complement of DNA that has the potential to form an embryo when combined with

and existing judicial and legislative responses have led to inconsistent solutions.[4] In *Astrue v. Capato ex rel. B.N.C.*,[5] a unanimous United States Supreme Court held that posthumously conceived twins were ineligible for Social Security Administration (SSA) survivors benefits because Florida's legislative scheme did not allow them to inherit through intestate succession.[6] The Court relied on the Social Security Act, requiring an applicant's eligibility for benefits to be based on the decedent's domicile-state inheritance laws.[7] The Court's opinion yields different results among the states because of the wide variety of intestacy statutes.[8]

Posthumous conception raises probate and class-gift issues,[9] resulting in further inconsistencies regarding posthumously conceived children's inheritance rights. American common law and early probate statutes have grappled with probate-related and class-gift issues since at least the 1600s.[10] Model or uniform probate acts have incorporated "afterborn-heirs," those conceived prior to the decedent's death but born within ten months after,

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another gamete. Sperm and eggs are gametes. A gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being." *Id.*

4. *Infra* nn. 61–66 and accompanying text; *see infra* pt. IV (discussing the varied legislative and judicial approaches to the eligibility of posthumously conceived children to inherit from a deceased parent).

5. 132 S. Ct. 2021 (2012).

6. *Id.* at 2034.

7. *Id.* at 2032.

8. *See* Fla. Stat. § 742.17(4) (2013) (requiring a posthumously conceived child to be named in a will to inherit from a deceased parent); La. Rev. Stat. Ann. § 9:391.1.A (Supp. 2008) (allowing for posthumously conceived children to inherit from an intestate parent); 2006 N.Y. Laws 3055 (amending N.Y. Est. Powers & Trusts Law § 5-3.2(a)–(b) to expressly exclude posthumously conceived children from its pretermitted-heir statute).

9. Benjamin C. Carpenter, *A Chip off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 Cornell J.L. & Pub. Policy 347, 359 (2011). Probate involves pretermitted-heir status, intestacy statutes, and other interests, such as Social Security survivors benefits, life insurance policies, and retirement plan benefits. *Id.* Class gifts "concern the interpretation of wills, trust agreements, or beneficiary designations" containing a general provision for decedents' issue, heirs, and descendants. *Id.*

10. Eugene M. Haertle, *The History of the Probate Court*, 45 Marq. L. Rev. 546, 551–552 (1962) (available at http://scholarship.law.marquette.edu/mulr/vol45/iss4/7). "The English colonists who settled the Atlantic coast in the seventeenth century brought with them the common law of England as modified by the Statute of Wills. However, the feudal system was never a part of our law. The power of a testator to dispose of his realty as well as his personalty by last will and testament has always been recognized in the United States, but, nevertheless, it is upon English law that the law of wills in the United States is based." *Id.* at 551.

since 1946.[11] Posthumously conceived children were first addressed in a model act in 1988,[12] but they were excluded from a legally recognized parent-child relationship with the deceased parent.[13] In 2000, the Uniform Parentage Act officially recognized a parent-child relationship when prior to death the decedent–parent provided written consent to be the posthumously conceived child's parent.[14] However, it remained unclear how a parental relationship would impact a posthumously conceived child in the probate context.[15] Establishing a parent-child relationship through the Model Parentage Act did not answer the question of whether posthumously conceived children are

11. Carpenter, *supra* n. 9, at 362–363 (discussing the enactment of the Model Probate Code (MPC) that included a provision enabling after-born heirs to inherit). Traditionally, property law allows a child in gestation at the death of his or her father and later born alive to take by descent and treats an after-born child as though he or she were alive at the time of the decedent's death. Erica Howard-Potter, Student Author, *Beyond Our Conception: A Look at Children Born Posthumously through Reproductive Technology and New York Intestacy Law*, 14 Buff. Women's L.J. 23, 33 (2006). The legal fiction involved (i.e., treating an after-born child as alive while in gestation) "does not unduly burden the administration of estates." *Id.* at 33–34. While both after-born and posthumously conceived children are born after the death of a parent, the timing of their birth differentiates these two categories of children. *Id.* at 33. After-born children are typically born within ten months of the parent's death. *Id.* at 53. Posthumously conceived children, however, can be born years after a parent's death. *See* Christopher Snowbeck, *41 Years Ago, a Sperm Donation. Today, Twins*, http://www.twincities.com/ci_21446706/40-years-after-sperm-donation-baby (Aug. 31, 2012) (reporting the unusual birth of twins from an ART procedure utilizing sperm that was frozen forty-one years earlier); *see also* Kate Snow et al., *Frozen Sperm Still Viable Decades Later*, http://abcnews.go.com/GMA/OnCall/story?id=7303722&page=1 (Apr. 10, 2009) (announcing the birth of a baby girl twenty years after her father froze his sperm). The legal fiction involved with after-born children does not effectively apply to posthumously conceived children because estates could be held open indefinitely, waiting to see if a child will or will not be conceived and born alive. *Infra* nn. 64–66 and accompanying text.

12. The Uniform Status of Children of Assisted Conception Act provided that a child conceived after a parent's death was not a child of that parent for any purpose. Unif. Status of Children of Assisted Conception Act § 4 (ULC 1988) (available at http://claradoc.gpa.free.fr/doc/269.pdf). The Commissioners added specific provisions for posthumously conceived children after frozen embryos, remaining from a couple that died simultaneously in a plane crash, sparked "intense international debate over legal and ethical questions raised by the growing field of test tube, or in vitro, fertilization." *Id.* at § 4 cmt.; Sandra Blakeslee, *New Issue in Embryo Case Raised over Use of Donor*, N.Y. Times (June 21, 1984) (available at http://www.nytimes.com/1984/06/21/us/new-issue-in-embryo-case-raised-over-use-of-donor.html).

13. Unif. Status of Children of Assisted Conception Act § 4.

14. Carpenter, *supra* n. 9, at 368–369. The revision sought 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." Unif. Parentage Act § 707 cmt. (ULC 2002).

15. Carpenter, *supra* n. 9, at 369.

included in state intestacy statutes or whether they could be included in general statements of "my children" or "my issue."[16]

The first court to interpret a state inheritance statute in the context of posthumous conception was the New Jersey Superior Court in 2000.[17] After finding general legislative intent for children—including posthumously conceived children—to inherit from their parents, the court held that a decedent need only to have intended to conceive posthumously for his or her children to be considered his or her heirs.[18] Unfortunately, other state courts' subsequent interpretations lack uniformity, enabling posthumously conceived children in some states to inherit from a deceased parent and excluding inheritance in others.[19] Seeking consistency, the drafters' 2008 revisions to the Uniform Probate Code provided that posthumously conceived children would be considered children of the deceased parent if (1) prior to death the decedent–parent intended to be "treated as a parent;" and (2) the child's birth followed within forty-five months of the decedent–parent's death.[20]

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16. *See infra* nn. 61–66 and accompanying text (explaining the class-gift issues accompanying posthumously conceived children's inheritance rights). A will instrument commonly states, "I leave my estate to my children" or "to my grandchildren" or "to my children, and if a child isn't living, then to his or her children" or "to my issue." Deirdre R. Wheatley-Liss, N.J. Est. Plan. & Elder L. Blog, *What Happens to Your Will When Another Beneficiary Is Born?* http://www.njelderlawestateplanning.com/2010/12/articles/estate-planning/what-happens-to-your-will-when-another-beneficiary-is-born/ (Dec. 27, 2010). Notice that in these examples the will makes no reference to any specific individuals. This allows an executed will to provide for the testator's descendants should the birth of additional children or grandchildren or other descendants occur after the will's execution. *Id.*

17. *In re Est. of Kolacy*, 753 A.2d 1257, 1259 (N.J. Super. Ch. Div. 2000). "[T]he New Jersey Superior Court became the first court to publish an opinion that addressed whether a posthumously conceived child may inherit from the deceased parent." Carpenter, *supra* n. 9, at 386. Although the United States District Court for the Eastern District of Louisiana addressed the issue in 1996, the issue was rendered moot when "the Social Security Commissioner agreed to pay survivors benefits" before the court ruled. *Id.* at 386 n. 223.

18. *Kolacy*, 753 A.2d at 1262, 1264.

19. *Supra* n. 8.

20. *See infra* pt. IV(A)(1) (describing the Uniform Probate Code's Model Act that enables a posthumously conceived child to inherit from a deceased parent). The Commissioners recognized a parent-child relationship for posthumously conceived children to ensure that all parents receive equal parental rights under the law, especially with the increasing number of parents relying on ART methods to conceive. Unif. L. Comm'n, *Part I, Intestate Succession, General Comment, 2008 Revisions* 11 (ULC 2008) (available at http://www.uniformlaws.org/shared/docs/probate%20code/upcamends_final_08.pdf).

Florida became the first state to address the eligibility of posthumously conceived children to inherit from a parent's estate.[21] In 1993, the Florida legislature enacted a statute making posthumously conceived children eligible for a "claim against the decedent's estate" as long as the decedent's will provided for the child.[22] However, this statutory rule lies within the State's parentage act—not its probate code.[23] Florida law recognizes a parent-child relationship between the posthumously conceived child and the decedent, but it does not address the child's eligibility to inherit as a class-gift member or under a trust instrument.[24] In *Stephen v. Commissioner of Social Security*, the United States District Court for the Middle District of Florida recognized the lack of clarity within the statute, especially where a will or trust designation made a general reference to children or issue without defining "child" or "issue."[25] Florida courts have yet to be presented with a case addressing these concerns. Because Florida is ranked as one of the top three states in overall ART births,[26] however, such a case is foreseeable in the near future.

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21. Carpenter, *supra* n. 9, at 379.

22. Fla. Stat. § 742.17(4).

23. Parentage acts deal with the child's best interests, rather than satisfying a decedent's likely intent. Carpenter, *supra* n. 9, at 370. The staff analysis for Section 742 explains that the bill intended to "minimize litigation by providing statutory guidelines to patients, assisted reproductive technology programs, resulting children, and other participating parties concerning parental rights and obligations when involved with various reproductive technology procedures." Fla. H. Comm. on Health Care, *Final Bill Analysis & Economic Impact Statement*, 3 (Apr. 20, 1993). In that vein, the bill attempted to codify "a provision precluding inheritance rights for any unused preembryos absent prior arrangement." *Id.* No additional changes were made to the Florida Probate Code related to posthumously conceived children, and those children's inheritance rights remain tucked within the Florida Parentage Code. Fla. Stat. § 742.17. The limitations from placing this statute within the Parentage Act include (1) identifying and upholding the decedent-parent's intent; (2) protecting rights of traditionally born children to obtain their inheritance in a timely manner; and (3) balancing the interests of any potential posthumously conceived children with the decedent-parent's intent and the rights of other heirs.

24. David Shayne & Christine Quigley, *Defining 'Descendants': Science Outpaces Traditional Heirship*, 38 Est. Plan. 14, 17 (Apr. 2011).

25. 386 F. Supp. 2d 1257, 1265 n. 10 (M.D. Fla. 2005).

26. Saswati Sunderam et al., *Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report, Assisted Reproductive Technology Surveillance—United States, 2009* at "Singleton and Multiple Births" (Nov. 2, 2012) (available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6107a1.htm). In 2009, just over 6,000 ART procedures were performed in Florida, resulting in 2,507 live births. *Id.* at "Table 1." Nationally, approximately 30,000 to 60,000 conceptions each year are attributed to sperm donations, and annual egg donations produce roughly 6,000 children. Shayne & Quigley, *supra* n. 24, at 15.

This Article proposes that the Florida legislature should update the State's parentage, probate, and trust codes. The Parentage Code should refer to the probate code for the inheritance rights of posthumously conceived children. The probate code should do four things: (1) address posthumously conceived children in intestacy statutes; (2) require signed and witnessed parental consent to support any posthumously conceived children; (3) impose time limits on posthumous conception; and (4) place notice requirements on surviving partners to inform the estate administrator of any intent to conceive posthumously with the decedent's reproductive material. Additionally, the language should strive to be gender neutral and ignore the marital status of the couple attempting to achieve pregnancy. These revisions express a policy position on the eligibility of posthumously conceived children to inherit from a deceased parent. The expression of this position via statute provides guidance for the courts, which should prevent a backlog of cases seeking to clarify such inheritance. A well-drafted statute should address both probate-related and class-gift issues, ensure efficient estate administration, recognize the decedent's intent, and consider the child's best interests.[27]

Beginning with a general overview of property succession law and testator intent, Part II discusses the principal of testamentary freedom and its role in establishing testator intent. It further describes the three methods for manifesting intent: wills, will substitutes (revocable and irrevocable trusts, life insurance, payable-on-death accounts or "Totten trusts," and pension plans), and intestacy statutes.[28] Part II also addresses the particular issues raised by posthumously conceived children in property succession, namely probate-related and class-gift issues.

Part III provides a review of assisted reproductive technologies and explores the reasons a parent may turn to posthumous conception. This Part also addresses the anticipated increase in ART use to achieve pregnancy.

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27. Carpenter, *supra* n. 9, at 417.

28. Intestacy statutes, "which provide for distributions of fixed shares in fee to heirs" when a decedent has left no or a partial estate distribution plan, are more about "imputed intent" than pure intent. Mary Louise Fellows, *In Search of Donative Intent*, 73 Iowa L. Rev. 611, 613, 656 (1988). Due to the death of the testator, intestacy statutes can only guess at what a testator might have intended. *Id.* at 613.

Surveying the current approaches to posthumously conceived children's eligibility for inheritance from a deceased parent, Part IV begins with a review of the three statutory approaches available and then moves into a review of federal cases dependent upon the statutory interpretation of state law enacted prior to the development of technology that made posthumous conception possible. This Part concludes with a review of the most inclusive approach—the Restatement (Third) of the Law of Property: Wills & Other Donative Transfers—and cautions against overly inclusive statutory language.

Part V explores Florida's response to posthumously conceived children and inheritance issues. This Part explains Florida's current parentage statute and describes the complications that arise from addressing inheritance rights in this statute rather than within Florida's probate code.

This Article then provides sample statutory language to resolve the outstanding issues related to probate and class-gift inheritance in Florida. Part VI explores the necessary considerations related to probate and class-gift inheritance and provides sample language for revising Florida's parentage, probate, and trust codes.

In conclusion, this Article reiterates that Florida law should allow for donative transfers to posthumously conceived children within its intestacy statute, resolving the probate-related and class-gift issues inherent in the current statutory rule.

II. AN OVERVIEW OF SUCCESSION LAW

American estate law provides that people have the freedom to control the transfer of their property at death.[29] This principle of testamentary freedom stems from the theory that "succession law should reflect the desires of the 'typical person,' both with regard to protecting expressions of desire and anticipating

29. Testamentary freedom is considered to be the overarching jurisprudential foundation of American estate law. *See Restatement (Third) of Property: Wills and Other Donative Transfers* § 10.1 cmt. a (2003) ("The organizing principle of the American law of donative transfers is freedom of disposition."); Jesse Dukeminier & Robert H. Sitkoff, *Wills, Trusts, and Estates* 1 (9th ed., Wolters Kluwer 2013) ("The American law of succession, both probate and nonprobate, is organized around the principle of *freedom of disposition*."); Lee-ford Tritt, *Liberating Estates Law from the Constraints of Copyright*, 38 Rutgers L.J. 109, 111 (2006) ("Testamentary freedom . . . is the hallmark principle of estates law.").

situations where those expressions are inadequately presented."[30] Testamentary freedom incorporates several key property rights, such as "the right to gift or devise property during life or at death, the right to choose who receives such property, the right to place conditions on the donative transfer, the right to choose the character and timing in and at which the beneficiary receives the property, and the right to appoint another person to make these choices."[31] Wills, will substitutes, and intestacy statutes express testator intent.

The term "will" suggests that the instrument should effect a testator's wishes; it was his or her "will" or intention to pass personal and real property in the particular manner outlined in the document.[32] Although legislatures create certain limited situations in which a statutory scheme for wealth transfer overcomes the testator's intent,[33] the intent expressed in the

30. Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 Alb. L. Rev. 891, 912 (1992).

31. Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. Rev. 367, 374–375 (2009).

32. *See* Sir William Blackstone, *Commentaries on the Laws of England* vol. 2, 499–500 (William S. Hein & Co. 1992) (originally published in 1766) (available in HeinOnline, Legal Classics Library) (noting that wills are also referred to as "testaments," which Roman lawyers defined as "the legal declaration of a man's intentions, which he wills to be performed after his death" (internal quotation marks omitted)). Florida law currently recognizes a testator's intentions to provide for a posthumously conceived child by allowing a testator to leave a gift to such children in his or her will. Fla. Stat. § 742.17.

33. Legislatures have instituted statutes, known as pretermitted-heir statutes, to protect spouses from being disinherited—a move made necessary as jurisdictions moved away from enforcing surviving spouses' common law rights of dower and curtesy. Marissa J. Holob, Student Author, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 Cornell L. Rev. 1492, 1501 (2000) ("[D]ower . . . and curtesy have given way to a probate system that includes not only the surviving spouse, but nonmarital and adopted children as well."). For example, statutory schemes in twenty-five states provide for a spousal election of a statutorily determined share of the decedent's estate in lieu of the testator's bequest to the spouse. David E. Wagner, *The South Carolina Probate Code's Omitted Spouse Statute and* In re Estate of Timmerman, 50 S.C. L. Rev. 979, 981–982 (1999). Pretermitted-spouse and pretermitted-child statutes in force in some jurisdictions grant a statutorily defined share of the testator's estate to spouses and children left out of the estate plan with no explanation. *See* Bruce L. Stout, *Planning for Possible Pretermitted Children and Pretermitted Spouses*, 24 Est. Plan. 269, 272 (July 1997) ("The purpose of a pretermitted spouse statute is to protect the surviving spouse of a marriage that was not contemplated when the testator's will was executed."); *see also id.* at 269 ("The purpose of [pretermitted-child statutes] is to provide a share of the testator's estate to a child who is omitted unintentionally from the will."); *but see* Mary Ellen Kazimer, *The Problem of the "Un-omitted" Spouse under Section 2-301 of the Uniform Probate Code*, 52 U. Chi. L. Rev. 481, 497 (1985) ("[The omitted-spouse statute] should not be construed to protect the surviving spouse when that goal conflicts with the testator's intent.").

language of the will document remains the foundation of testamentary interpretation.[34]

A decedent's intent can also be manifested through the use of a will substitute.[35] These documents also distribute a decedent's property at death according to his or her wishes, essentially taking the place of a will.[36] There are four leading will substitutes: life insurance, pension accounts, joint accounts, and revocable trusts.[37]

Similar to wills, life insurance policies name one or several primary and secondary beneficiaries, including unborn children or a trust.[38] Without a named beneficiary, the proceeds generally become a part of the decedent's estate as a probate asset.[39] As a contractual obligation to distribute a decedent's property upon death, insurance policies could be considered "contracts to devise."[40] As early as the 1960s, life insurance began displacing wills.[41] Because the most significant assets of many estates are the proceeds of a life insurance policy, the life insurance benefici-

34. *See e.g.* James Schouler, *A Treatise on the Law of Wills* § 466 (2d ed., 1892) (calling deference to the testator's intent the "cardinal rule of testamentary construction"); George W. Thompson, *The Law of Wills and the Manner of Their Drafting, Execution, Probate and Contest Together with Testamentary Forms*, 136 (Bobbs-Merrill Co. 1918) ("The general rule is that the testator's intention is only to be ascertained from the language of the will, and the courts will supply words only when necessary to carry out the apparent intention of the testator as gathered from the whole will."); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 Duke L.J. 630, 634 (1992) (citing Elias Clark et al., *Cases and Materials on Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts, Future Interests, and Estate and Gift Taxation* 1 (3d ed., West 1985)) (asserting that testators "have the widest possible latitude in disposing of their property in accordance with their own wishes whether they be wise or foolish").

35. Tritt, *supra* n. 31, at 375 n. 20.

36. *Id.*

37. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1109 (1984). A middle- or upper-middle-class American might employ a dozen or more will substitutes, regardless of whether he or she drafted a will. *Id.* Although a posthumously conceived child may not be eligible to inherit through every available will substitute, under the right circumstances he or she may be eligible under a class-gift devise within a revocable trust. *See infra* nn. 111–114 and accompanying text (explaining the Uniform Probate Code requirements for a posthumously conceived child to inherit under a trust document).

38. Scott A.W. Johnson & Karolyn A. Hicks, *Who Receives the Proceeds of Life Insurance?* 37 Real Prop. Prob. & Trust (newsltr. of Wash. St. B. Ass'n) 1, 1 (Winter 2009) (available at http://www.wsbarppt.com/newsletters/2009winter.pdf).

39. *Id.* at 2.

40. Contracts to devise distribute property at the owner's death to named promisee(s) and are subject to the general requirements of contract law. 10 Fla. Jur. Forms Leg. & Bus. § 35:66 (WL current through 2013).

41. Langbein, *supra* n. 37, at 1110–1111.

ary designation has become the "principal 'last will and testament' of our legal system."[42]

Life insurance continues to be a widespread tool to express testator intent. At the end of 2011, the face amount of life insurance in the United States approached nineteen trillion dollars and averaged $162,000 per insured.[43] Payments on death exceeded eighty-one billion dollars nationally, and payments in Florida totaled over five billion dollars.[44]

In addition to life insurance, just under fifty percent of working Americans have acquired rights to one or more pension accounts, depending upon employment history and the employers' plan features.[45] Tax laws have also encouraged workers to create supplementary retirement accounts, such as 401(k) programs, IRA accounts, or Keogh plans.[46] Pension accounts "contain will substitutes—beneficiary designations that pass the owner's interest to the persons of his choice in the event that he dies before exhausting the account in its retirement payout phase."[47] In 2010, the estimated pension plan assets in the United States totaled over seventeen trillion dollars.[48]

Bank, brokerage, and mutual fund accounts also serve as will substitutes, but not all bank-operated accounts imitate the will's

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42. *Id.* (citing Spencer Kimball, *The Functions of Designations of Beneficiaries in Modern Life Insurance: U.S.A.*, in *Life Insurance Law in International Perspective* 74, 75–76 (J. Hellner & G. Nord eds., 1969)).

43. Am. Council of Life Insurers, *Life Insurers Fact Book 2012*, 63 (2012) (available at https://www.acli.com/Tools/Industry%20Facts/Life%20Insurers%20Fact%20Book/Documents/_factbook2012_entirety_020813.pdf).

44. *Id.* at 90–91.

45. *See* Alicia H. Munnell & Pamela Perun, *An Update on Private Pensions*, Initiative on Fin. Sec. 2–3 (Oct. 2007) (available at http://www.aspeninstitute.org/sites/default/files/content/docs/pubs/IFS_PensionsUpdateonPrivatePensions.pdf) (stating that the proportion of full-time workers in the private nonagricultural sector between twenty-five and sixty-four years of age participating in employer pension plans was forty-six percent in 2004).

46. *See* Am. Benefits Council, *Defined Contribution Plans & IRAs: Existing Tax Incentives Effectively and Efficiently Increase Retirement Savings* 1–3 (Oct. 8, 2012) (available at http://www.americanbenefitscouncil.org/documents2012/401k_tax-incentives100812.pdf) (discussing the impact of tax incentives on retirement security).

47. Langbein, *supra* n. 37, at 1111. However, if a plan participant "dies before satisfying vesting requirements in a defined-benefit plan, survivorship rights ordinarily perish with retirement rights." *Id.* at 1111 n. 11. Additionally, survivorship rights are not automatically available in all pension plans. *Id.* For example, "[s]ome government-operated plans feature limited survivorship rights that restrict the participant's choice of beneficiary to certain dependents or (like Social Security) deny him any choice." *Id.*

48. Inv. Co. Inst., *Retirement Assets Total $17.5 Trillion in Fourth Quarter 2010*, http://www.ici.org/pressroom/news/ret_10_q4 (Apr. 13, 2011).

function equally.[49] The accounts most similar to a will, such as pay-on-death accounts, or "Totten trusts,"[50] are those "over which the depositor retains explicit [and exclusive] lifetime dominion while designating beneficiaries to take on his [or her] death."[51] The owner may modify beneficiaries, expressing his or her intent, similar to that of a testator. More commonly, however, "the joint bank account . . . is manipulated to do the work of a will."[52] While joint accounts appear more gift-like than a testamentary document, certain joint accounts, depending on the contract, allow the owner to revoke and modify account cotenants as freely as modifying beneficiaries of other will substitutes.[53]

The revocable trust also falls under the category of a will substitute as a document that names beneficiaries and may be modified during the grantor's lifetime.[54] This type of trust is routinely offered in the banking industry, enabling a grantor to name beneficiaries on a fill-in-the-blank form.[55] The revocable trust expresses a decedent's intent by articulating the transfer of property to intended beneficiaries.

When a person has not engaged in any estate planning, or when such planning fails to devise all of a decedent's property, intestacy statutes determine heirs for class-gift purposes[56] and govern the distribution of property according to the likely intent

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49. Langbein, *supra* n. 37, at 1111–1113.

50. The "Totten trust" is readily available but is merely a deposit account utilizing trust language, naming the depositor as trustee with the ability to reassign beneficiaries. Est. Planners, *What Is a Totten Trust?* http://www.estateplanners.com/articles/what-is-a-totten-trust/ (Mar. 14, 2011).

51. Langbein, *supra* n. 37, at 1111.

52. *Id.* at 1112.

53. *Id.*

54. Fla. B., *The Revocable Trust in Florida Pamphlet*, http://www.floridabar.org/tfb/tfbconsum.nsf/0a92a6dc28e76ae58525700a005d0d53/29619132e623c5ac85256d44006868fc?OpenDocument (last updated Aug. 2009).

55. Langbein, *supra* n. 37, at 1113. The law has a preference for the revocability of trusts. David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 Mo. L. Rev. 143, 186–187 (2002). In Florida, for example, the trust is presumed to be revocable, and the grantor may revoke or amend the trust "[u]nless the terms of [the] trust expressly provide that the trust is irrevocable." Fla. Stat. § 736.0602(1).

56. Tritt, *supra* n. 31, at 379–381. Consequences of the determination of "heir" status reach beyond the probate system, including the Social Security Act's reliance on a state's intestacy law to determine benefit eligibility for dependent children of a deceased parent. *Infra* pt. IV(B).

of the rational[57] testator.[58] In effect, intestacy statutes create a default will[59] and attempt to mimic property distribution choices the decedent likely would have made.[60]

Under property succession law, the issues surrounding posthumously conceived children can be distinguished as either probate related or class-gift related.[61] Probate-related issues involve "pretermitted-heir status under a state probate code, inheritance rights under state intestacy statutes, and other interests dependent upon a person's right to inherit under state intestacy statutes."[62] Class-gift issues "concern the interpretation of wills, trust agreements, or beneficiary designations that include a general provision for a person's issue, heirs, descendants, children, grandchildren, or the like."[63]

Property succession law not only concerns testamentary freedom but also protects the interests of heirs. Such protection is advanced by the requirements for "prompt and orderly adminis-

57. The legislature's understanding of a rational person's estate plan may fail to meet the expectations of the typical, rational Florida resident. For example, "Florida applies a strict per stirpes distribution," equally dividing assets among the decedent's children, "even if there are no surviving children." Donna Litman, *Intestacy in the Context of Estate Planning in Florida: When to Apply the Intestacy Rules and How to Avoid Them*, 76 Fla. B.J. 53, 53 (Oct. 2002). Also, "if an intestate is survived by three grandchildren, one from a deceased son and two from a deceased daughter, the son's child will receive one-half of the intestate estate, while the daughter's children will receive one-fourth each." *Id.* In the event the decedent has no heirs, the intestate estate will escheat to the State. *Id.* at 54.

58. *See* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. & Inequal. 1, 7–8 (2000) ("The most commonly identified goal of intestacy statutes is to create a dispositive scheme that will carry out the probable intent of most testators. To the extent possible, the statute should distribute the property to the persons the decedent would have chosen to receive the property if the decedent were making the decision." (footnote omitted)). An intestate decedent typically has not left a will, has left an invalidated will, or has left a valid will that disposes of only a portion of the decedent's probate property. *Id.* In each case, the express intent of the decedent is unavailable. *Id.*

59. *See Restatement (Third) of Property: Wills and Other Donative Transfers* I 2 introductory note (1999) (stating that intestate succession is "a default regime").

60. *See* T.P. Gallanis, *Default Rules, Mandatory Rules, and the Movement for Same-Sex Equality*, 60 Ohio St. L.J. 1513, 1522 (1999) (asserting that the official comments to the Uniform Probate Code (UPC) state that intestacy rules in the probate code are "explicitly designed to mirror the likely intent of the patient, ward, or decedent" (footnotes omitted)); Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights under the Revised Uniform Probate Code*, 76 Iowa L. Rev. 223, 230 (1991) (concluding that the decedent's intent is the "predominant consideration" behind an intestacy statute).

61. Carpenter, *supra* n. 9, at 359.

62. *Id.* Examples of probate-related issues include eligibility for Social Security survivors benefits and for life insurance policies and retirement plan distributions. *Id.* These contracts often defer to state intestacy statutes. *Id.*

63. *Id.*

tration of estates,"[64] which can be frustrated by a posthumously conceived child born several years after a decedent's death. "[I]f the surviving spouse indicates the intent to conceive a posthumous child in the future, an estate might have to be kept open—and some of the assets of other heirs held back, for ten years, or even longer. And that might deprive existing children of some needed resources."[65] The protection of traditionally born children, those born prior to the decedent–parent's death, is an important state interest.[66] A legislative scheme addressing posthumously conceived children must achieve the diverse goals of identifying and upholding the decedent–parent's intent, protecting rights of traditionally born children to obtain their inheritance in a timely manner and recognizing the interests of any potential posthumously conceived children.

III. AN OVERVIEW OF ASSISTED REPRODUCTIVE TECHNOLOGIES

Posthumous conception is possible through a variety of assisted reproductive technologies (ART) methods. In 1949, freezing sperm became more successful after incorporating the use of glycerol in the freezing process.[67] The advent of glycerol introduced cryopreservation technology, which increased the sperm's survival rate and allowed the sperm to survive for up to ten years.[68] The first conception outside the womb occurred in 1969, and "the first live birth resulting from such a conception occurred in 1978."[69] ART technology provides continually evolving

64. Joseph H. Karlin, *"Daddy, Can You Spare a Dime?": Intestate Heir Rights of Posthumously Conceived Children*, 79 Temp. L. Rev. 1317, 1340 (2006) ("Quickly probating and distributing the estate is in the best interest of the other heirs.").

65. Joanna Grossman, *When a Man Dies, Can Children Subsequently Conceived with His Sperm Collect Survivors' Benefits? A Federal Appellate Court Says Yes*, http://writ.news.findlaw.com/grossman/20040810.html (Aug. 10, 2004).

66. *Woodward*, 760 N.E.2d at 266 ("Any inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent's death.").

67. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & Health 229, 234 (1986).

68. *Id.*

69. Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 Temp. L. Rev. 335, 336–337 (1994) (citing Kamran S. Moghissi & Richard Leach, *Future Directions in Reproductive Medicine*, 116 Archives Pathology & Lab. Med. 436, 436 (1992)).

options for prospective parents, and ART use grows as the procedures steadily improve.[70]

A. Artificial Insemination (AI)

Based on its historically high success rates, AI is the best known and most widely used ART.[71] The average chance of achieving pregnancy per cycle ranges from five to twenty percent, approaching twenty percent if fertility drugs are used in conjunction with the insemination.[72] Likely the easiest method by which a surviving partner could conceive a child by using a deceased partner's sperm, AI does not come without costs. If a woman uses her partner's sperm, the average cost is $300 to $700 per cycle, with costs increasing when utilizing donor sperm.[73]

B. In Vitro Fertilization (IVF)

IVF entails harvesting eggs, adding sperm, and implanting any resulting preembryo(s) into the womb.[74] It is highly probable for a child to be conceived through IVF after the death of a biological parent through implantation in either a female surviv-

70. *See* Ctrs. for Disease Control, *ART 2010 National Summary Report, Section 5: ART Trends 2001–2010*, http://www.cdc.gov/art/ART2010/section5.htm (last updated Feb. 4, 2013) (noting the increase in the use of ART and the improvement in ART success rates from 2001 to 2010). During 2009, more than six thousand ART procedures were initiated in Florida, resulting in over 5,000 embryo transfers, more than 2,200 pregnancies, and almost 1,900 live births. Ctrs. for Disease Control, *Assisted Reproductive Technology Surveillance—United States, 2009*, http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6107a1.htm?s_cid=ss6107a1_e (Nov. 2, 2012).

71. *See* Shapiro & Sonnenblick, *supra* n. 67, at 234–236 (asserting that AI is a relatively "simple medical procedure [wherein] a woman, at the time of ovulation, is inseminated by means of a syringe containing [a donor's] semen").

72. BabyCenter LLC, *Fertility Treatment: Artificial Insemination (IUI)*, http://www.babycenter.com/0_fertility-treatment-artificial-insemination-iui_4092.bc (accessed May 8, 2014).

73. *Id.* at http://www.babycenter.com/0_fertility-treatment-artificial-insemination-iui_4092.bc?page=2. Costs are dependent on clinic fees, geographic areas, utilizing donor sperm rather than a partner's sperm, and insurance options. *Id.* Without insurance coverage, payment is generally required up front. *Id.*

74. To facilitate the process, the woman ingests fertility drugs to increase her egg production. Howard-Potter, *supra* n. 11, at 27. The resulting eggs are fertilized with sperm and placed in the uterus. *Id.* (explaining that "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.").

ing partner or a gestational surrogate.[75] IVF success rates vary drastically depending on fertility factors and the women's age (younger eggs are generally healthier, resulting in higher success rates).[76] The average success rate per treatment cycle is a thirty-five percent chance of achieving pregnancy and a twenty-eight percent possibility of a full-term delivery.[77] Because the procedure generally involves implanting several embryos, multiple fetuses occur in thirty percent of cases, which increases the likelihood of complications and miscarriage.[78] More expensive than AI, each IVF treatment cycle costs approximately $12,400.[79]

C. Gamete Intrafallopian Transfer (GIFT)

GIFT, a process similar to IVF, involves the transfer of sperm and an unfertilized egg into the fallopian tube, allowing fertilization to occur inside a woman's body rather than in the laboratory.[80] Unlike IVF, the procedure requires invasive surgery to harvest the eggs.[81] GIFT only accounts for one percent of ART procedures,[82] and the likelihood that GIFT would be utilized for posthumous conception remains low because of the complicated nature of the procedure and low success rates.[83]

Similar to IVF, GIFT success rates depend on age and health, and the procedure is accompanied by the possibility of multiple babies and complications.[84] Further, choosing this method is an

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75. Although it is generally the case that the intended mother's eggs are used during the fertilization process, modern technology enables the impregnation of a woman with another woman's fertilized eggs. *Id.* (discussing egg donation).

76. BabyCenter LLC, *Fertility Treatment: In Vitro Fertilization (IVF)*, http://www.babycenter.com/0_fertility-treatment-in-vitro-fertilization-ivf_4094.bc?page=2 (accessed Mar. 4, 2014).

77. *Id.*

78. *Id.*

79. *Id.*

80. BabyCenter LLC, *Fertility Treatment: Gamete Intrafallopian Transfer (GIFT)*, http://www.babycenter.com/0_fertility-treatment-gamete-intrafallopian-transfer-gift_4095.bc (accessed May 8, 2014.

81. *Id.* at http://www.babycenter.com/0_fertility-treatment-gamete-intrafallopian-transfer-gift_4095.bc?page=2.

82. *Id.*

83. Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 Real Prop. Prob. & Trust J. 213, 216 (1996) (discussing ART procedures utilized after the death of the mother of a preserved frozen embryo by implanting the frozen embryo or zygote into a compatible surrogate).

84. *Fertility Treatment: Gamete Intrafallopian Transfer (GIFT)*, *supra* n. 80.

expensive decision as the procedure costs on average between $15,000 and $20,000 per cycle.[85]

D. Zygote Intrafallopian Transfer (ZIFT)

ZIFT mirrors the invasive GIFT procedure, but fertilization takes place in the laboratory before implanting the resulting embryos into the fallopian tube of the woman.[86] The ZIFT success rate hovers at twenty-six percent,[87] increasing the possibility of using ZIFT procedures for posthumous conception. As with IVF and GIFT, however, there is a risk of multiple fetuses and complications resulting from the procedure, as well as significant upfront costs ranging between $15,000 and $20,000 per treatment cycle.[88]

E. The Appeal of Posthumous Conception

The four procedures discussed above are not an exhaustive list of the available ART methods. Further, as technology improves, the options available for surviving partners to achieve posthumous conception continue to increase.[89] Now that the technology is available, why might a surviving partner attempt posthumous conception?

In some scenarios a surviving spouse, partner, or intimate friend seeks to use gametes that have been specifically cryopreserved for use prior to the death of the loved one.[90] For example, a soldier or other person engaged in high-risk activity might cryopreserve his or her gametes intending to preserve the

85. *Id.* at http://www.babycenter.com/0_fertility-treatment-gamete-intrafallopian-transfer-gift_4095.bc?page=2.

86. BabyCenter LLC, *Fertility Treatment Zygote Inrafallopian Transfer (ZIFT)*, http://www.babycenter.com/0_fertility-treatment-zygote-intrafallopian-transfer-zift_4096.bc (accessed May 8, 2014).

87. *Id.* at http://www.babycenter.com/0_fertility-treatment-zygote-intrafallopian-transfer-zift_4096.bc?page=2.

88. *Id.*

89. *See* Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. Contemp. Health L. & Policy 332, 336 (2009) ("Not too long ago the issues involving posthumous conception would not have occurred because the medical technology was not there to allow for it. But today, with technological advances each day, it is estimated that there are hundreds of thousands of cryopreserved embryos in the United States alone.").

90. *See e.g. Hecht v. Super. Ct. of Cal.*, 16 Cal. App. 4th 836, 840–841 (2d Dist. 1993) (analyzing the devise of the decedent's gametes to his partner to be used to attempt posthumous conception).

option to have children.[91] In other scenarios, a dying, terminally ill, or seriously ill person might cryopreserve gametes for use by specifically named potential survivors.[92] In *Hecht v. Superior Court of California*, William Kane authorized Deborah Hecht to use his sperm to conceive posthumously and bequeathed his frozen sperm to her with instructions to the sperm bank to allow her to use it to impregnate herself after his death.[93] Kane committed suicide, and Hecht subsequently obtained a court ruling allowing her to be inseminated.[94]

The above examples "represent[ ] the simplest paradigm for determining the inheritance rights of the posthumously conceived child."[95] A sudden death may lead to a situation in which gametes become available, but the decedent did not explicitly consent to the posthumous use of his or her gametes.[96] These scenarios raise more legally troublesome questions.[97] A parent, spouse, or partner, wishing to continue the family's genetic line, may seek

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91. Major Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, Army Law 1, 2–22 (May 2008) (available at http://www.loc.gov/rr/frd/Military_Law/pdf/05-2008.pdf) (reviewing policies of the United States Army involving the collection and use of gametes in posthumous conception); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Ariz. L. Rev. 91, 91–92 (2004) (citing various newspaper reports of United States soldiers cryopreserving their sperm before deployment).

92. *See* Elizabeth Gorman, *Minnesota Woman Trying to Conceive Her Husband's Child—After His Death*, MinnPost.com, http://www.minnpost.com/stories/2008/06/24/2340/minnesota_woman_trying_to_conceive_her_husbands_child_—_after_his_death (June 24, 2008) (noting that a husband cryopreserved his sperm for his wife's use before starting a cancer treatment that was likely to make him infertile); *see also Woodward*, 760 N.E.2d at 260 (involving a husband depositing his sperm in a sperm bank after being diagnosed with leukemia).

93. 16 Cal. App. 4th at 840–841.

94. *Id.* at 841, 861. The court stated in dicta that it was uncertain that the estate would be subject to claims of any resulting children. *Id.* at 859.

95. Margaret Ward Scott, Student Author, *A Look at the Rights and Entitlements of Posthumously Conceived Children: No Surefire Way to Tame the Reproductive Wild West*, 52 Emory L.J. 963, 968 (2003).

96. Ike Flores, *Newlywed Dies in Crash, but Hopes for Children Live in Extracted Sperm*, L.A. Times A10 (July 3, 1994) (available at http://articles.latimes.com/1994-07-03/news/mn-11469_1_rare-surgical-procedure) (relaying the story of a widow who had her deceased husband's sperm harvested and frozen for the option to achieve pregnancy in the future); *Widow Allowed to Use Husband's Sperm*, Sydney Morn. Herald (Jan. 4, 2013) (available at http://www.smh.com.au/action/printArticle?id=3928456) (reporting that a widow, who had been attempting to become pregnant through ART for several years, obtained a court order to have her husband's sperm removed from his body after his suicide).

97. *See* Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?* 3 DePaul J. Health Care L. 39, 58–59 (1999) (questioning the practice and use of gametes from posthumous sperm retrieval).

access to the sperm of a person killed in an accident or in a war.[98] A person may even seek to have a posthumously conceived child to pull a decedent's estate away from his or her other children. Whatever the motivation, technology makes posthumous conception possible, and survivors are opting to attempt it.

Assuming insurance will not cover ART procedures for posthumous conception because infertility is not necessarily at issue, a surviving partner's ability to afford and engage in any of the procedures discussed above could indicate a large estate. While decedents with large estates tend to leave wills,[99] modern trends seeking to avoid probate result in the utilization of will substitutes.[100] Because of the popularity of will substitutes, Florida's Parentage Code, which only allows posthumously conceived children to inherit through a will devise, insufficiently regulates the inheritance rights of posthumously conceived children.

IV. A SURVEY OF POSTHUMOUSLY CONCEIVED CHILDREN'S INHERITANCE RIGHTS

To date, state legislatures enacting statutes on the inheritance rights of posthumously conceived children take one of three approaches—adopt the Uniform Probate Code, develop a customized statutory framework, or expressly exclude posthumously conceived children from inheriting. Part A explores the states applying each approach.

Part B highlights the judiciary's unwillingness to apply a broad interpretation to statutory language when reviewing the inheritance rights of posthumously conceived children.

Reviewing the Restatement (Third) of Property: Wills & Other Donative Transfers, Part C demonstrates the flaws in

98. Aron Heller, *Family Gets OK to Use Dead Man's Sperm*, http://www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012900427_pf.html (posted Jan. 29, 2007, 6:33 p.m.) (relaying the story of an Israeli court order allowing the parents of a deceased soldier to use the sperm removed after their son's death to conceive a child with the assistance of a gestational surrogate).

99. *See* Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. Chi. L. Rev. 241, 250 (1962) (reporting that decedents with estates valued below $5,000 had wills only twenty-five percent of the time, while decedents with estates valued in excess of $100,000 had wills ninety-six percent of the time).

100. Langbein, *supra* n. 37, at 1108 (discussing the decline in probate in favor of will substitutes).

overly inclusive statutory schemes allowing inheritance for posthumously conceived children.

A. Statutory Approaches

1. Uniform Probate Code Amendments

The Uniform Probate Code (UPC) was approved in 1969 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association to consolidate probate law and administration and to encourage uniformity through adoption of the UPC by the states.[101] Currently, seventeen states have enacted UPC provisions.[102] Prior to a 2008 amendment to the UPC, Section 2-114(a) stated that "for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status."[103] Section 2-114(c) prevented a child from inheriting from his or her natural parent "unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child."[104] Nine states—Alaska, Arizona, Hawaii, Michigan, Montana, New Jersey, Vermont, West Virginia, and Wisconsin—maintain probate codes with language from the 1990 UPC.[105]

In 2008, NCCUSL created a new subpart, Section 2-120 to the UPC on parent-child relationships to explicitly address how to

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101. Unif. Prob. Code foreword, *An Act* (ULC 1969).

102. The states that have enacted the UPC include Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Massachusetts, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota, and Utah. Nat'l Conf. Comm'rs Unif. St. Laws, *Legislative Fact Sheet–Probate Code*, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Probate%20Code (accessed May 8, 2014).

103. Unif. Prob. Code § 2-114(a) (ULC 2008) (available at http://www.uniformlaws.org/shared/docs/probate%20code/upcamends_final_08.pdf).

104. *Id.* at § 2-114(c).

105. Alaska Stat. § 13.12.108 (2012); Ariz. Rev. Stat. § 14-2108 (2013); Haw. Rev. Stat. § 560:2-108 (2012); Mich. Comp. Laws § 700.2108 (2013); Mont. Code Ann. § 72-2-118 (2013); N.J. Rev. Stat. § 3B:5-8 (2013); Vt. Stat. tit. 14, § 303 (2010) (enacting the same language as the Uniform Probate Code but not formally adopting it); W. Va. Code §§ 42-1-3f, 42-1-8 (2012); Wis. Stat. §§ 852.03(4), 854.21(5) (2013) (enacting language similar to the UPC but not formally adopting it). Minnesota statutes have similar language, Minn. Stat. § 524.2-108 (2013), but the legislature specifically excluded posthumously conceived children in 2010, *id.* at § 524.2-120(11)(Subd. 10). New Mexico and Utah statutes also contain the 1990 UPC language, but the legislatures adopted the 2000 Uniform Parentage Code provisions addressing posthumously conceived children. N.M. Stat. §§ 40-11A-707, 45-2-104 (2013); Utah Code §§ 78B-15-707, 75-2-104(1)(b) (2013).

treat children created through ART.[106] Section 2-120(k) placed a time limit on when a posthumously conceived child could inherit under intestate succession law.[107] Previously, after establishing that a parent-child relationship exists, a child must survive the deceased parent for 120 hours to inherit from him or her.[108] Because a posthumously conceived child cannot meet that requirement, Section 2-120(k) treats a posthumously conceived child as if he or she were in gestation at the time of the parent's death, as long as the child was "in utero not later than [thirty-six] months after the individual's death; or born not later than [forty-five] months after the individual's death."[109] NCCUSL specified this time period to allow a surviving spouse or partner sufficient time to grieve, decide whether to use assisted reproduction, and ultimately achieve pregnancy and give birth despite unsuccessful attempts.[110]

For class-gift purposes, a posthumously conceived child will be regarded as the child of the deceased parent after proving the decedent's consent,[111] absent intent to the contrary in the governing instrument.[112] If the class closes because of the deceased parent's death, then the time limitation described above applies as well.[113] As a result, a child born ten years after a deceased parent's death could be a trust beneficiary if the trust remained open to additional class members. If the class closed as a result of the decedent's death, however, the child must be conceived within thirty-six months or born within forty-five months of the parent's death to be a trust beneficiary.[114] As of fall 2013, only two states—Colorado and North Dakota—have adopted these provisions.[115]

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106. Unif. Prob. Code tit. page & pt. I cmt.

107. *Id.* at § 2-120(k).

108. *Id.* at § 2-104(a)(2).

109. *Id.*

110. *Id.* at § 2-120(k) cmt.

111. The decedent must have the "intent to be treated as the other parent" as showcased through a "signed [ ] record," or clear and convincing evidence. *Id.* at § 2-120(f), (f)(1), (f)(2)(C). The requisite intent is presumed for a married couple when no divorce proceeding was pending at the first spouse's death, unless clear and convincing evidence shows otherwise. *Id.* at § 2-120(h)(2).

112. *Id.* at § 2-705(b).

113. *Id.* at § 2-705(g)(2).

114. *Id.* at § 2-705(g)(2) cmt.

115. Colo. Rev. Stat. Ann. § 15-11-120 (Lexis 2013); N.D. Cent. Code § 30.1-04-19 (2013).

2. Customized Statutory Frameworks

Within the past decade, various states enacted legislation to address inheritance rights for posthumously conceived children, specifying whether such children can inherit from a deceased parent and under what circumstances. Louisiana, California, and Iowa explicitly recognize inheritance.[116]

Louisiana's statute recognizes a parent-child relationship if the decedent "specifically authorized in writing *his* surviving *spouse* to use *his* gametes."[117] The child may inherit if he or she is born to the surviving spouse within three years of the decedent's death and has the gametes of the decedent.[118] The law was enacted in 2001 and amended in 2003 to clarify that a child could inherit from the decedent as if the child was "in existence" at the time of the decedent's death.[119] However, the language of this statute restricts the inheritance rights of posthumously conceived children to those children born to a surviving wife who has not utilized third-party, male donor gametes. Thus, it prevents inheritance when a surviving husband utilized a deceased wife's gametes and a surrogate. It also prevents inheritance when a child is born from posthumous conception to the survivor of a same-sex couple. Additionally, it bars inheritance when a couple undergoes ART treatments resulting in embryos through the use of third-party donor sperm, the intended father dies, and the surviving partner attempts posthumous conception with the remaining embryo(s)—the resulting child does not have the decedent's gametes and thus no legally recognized parent-child relationships exists under the statutory requirements.

Under the California Probate Code, a posthumously conceived child is considered to have been born during the decedent's lifetime if it is proven, by clear and convincing evidence, that the decedent specified in writing that his or her genetic material could be used for posthumous conception.[120] Additionally, that

116. Carpenter, *supra* n. 9, at 379–383.

117. La. Rev. Stat. Ann. § 9:391.1.A (Supp. 2008) (emphasis added).

118. *Id.*

119. La. Sen. 494, 2001 Reg. Sess. (June 21, 2001); La. Sen. 473, 2003 Reg. Sess. (June 20, 2003). This provision developed out of the requirement under Article 939 that "a successor must exist at the time of the death of the decedent in order to inherit." La. Rev. Stat. Ann. § 9:391.1 cmt.

120. Cal. Prob. Code § 249.5(a) (2013).

writing must name a designee to control the use of the decedent's genetic material.[121] The writing, however, can be revoked or amended if the decedent signs and dates a later document evidencing that intent.[122] Upon the decedent's death, the designee must give notice to the distributor of the decedent's estate within four months after a decedent's death certificate is issued, or after a court determines the fact of a decedent's death, whichever occurs first.[123] Finally, the child must have the decedent's genes and be in utero within two years of issuance of the decedent's death certificate or a judgment on the fact of his or her death, whichever comes first.[124] This statute "does not expressly extend interests in class gifts to posthumously conceived children."[125] Although California courts would likely recognize these children within a class gift, the statute lacks clarity "when construing a reference to issue, descendants, or the like in a trust agreement of the decedent or a will or trust agreement of another individual," such as a grandparent.[126] Additionally, this statute bars posthumously conceived children from inheriting when conception results from donor gametes.

In 2011, the Iowa legislature enacted a statute that allows inheritance by posthumously conceived children if (1) the decedent approved in writing the posthumous use of his or her genetic material; (2) the decedent's surviving spouse is the authorized user; and (3) the child's birth falls within two years of the decedent's death.[127] The same rule applies to pretermitted heirs under a will or a revocable trust agreement.[128] This language bars inheritance by posthumously conceived children born to unmarried parents or conceived from donor gametes.

121. *Id.*
122. *Id.*
123. *Id.* at § 249.5(b).
124. *Id.* at § 249.5(c).
125. Carpenter, *supra* n. 9, at 382.
126. *Id.*
127. Iowa Code § 633.220A (2013).
128. *Id.* at §§ 633.267(2), 633A.3106(2). However, these Sections do not "expressly address class gifts," and the rule is not clear whether, or how, it "would be applied in the class gift context." Carpenter, *supra* n. 9, at n. 199.

3. States Excluding Posthumously Conceived Children

A few states, however, have refused to recognize any intestate succession inheritance rights of posthumously conceived children or have severely curtailed their ability to inherit.[129] The Georgia, Idaho, Minnesota, South Carolina, and South Dakota legislatures revised their statutes to prevent these children from inheriting under a deceased parent's estate.[130] The Georgia, Idaho, South Carolina, and South Dakota statutes require that the child's birth occur within ten months of the death of a parent.[131] The Minnesota statute requires that the child be "in gestation prior to" the parent's death.[132] Based on the ten-month timeframe and legislative intent involved, Georgia, Idaho, and South Carolina statutes remain murky on how a posthumously conceived child might be treated for class-gift purposes under a will or other donative instrument.[133] However, in Minnesota and South Dakota, the statute prevents these children from being incorporated into a class gift.[134]

In 2006, the New York legislature deliberately excluded posthumously conceived children from qualifying as after-born

129. *See* Carpenter, *supra* n. 9, at 378–379 (reviewing the statutory language of the states excluding posthumously conceived children from inheriting under a deceased parent's estate).

130. Ga. Code Ann. § 53-2-1(b)(1) (2012) (relevant language added by 1996 Georgia Laws 529); Idaho Code § 15-2-108 (2013) (relevant language added by 2005 Idaho Session Laws 407); Minn. Stat. § 524.2-120(10) (2013) (relevant language added by 2010 Minnesota Laws 1007); S.C. Code Ann. § 62-2-108 (2012) (relevant language added by 1990 South Carolina Acts 2279); S.D. Codified Laws § 29A-2-108 (2013) (relevant language added by 2007 South Dakota Laws 413); Carpenter, *supra* n. 9, at 378.

131. Ga. Code Ann. § 53-2-1(b)(1); Idaho Code § 15-2-108; S.C. Code Ann. § 62-2-108; S.D. Codified Laws § 29A-2-108. Kentucky and North Carolina also have ten-month requirements for posthumous birth, but the statutes were enacted prior to the development of ART that enables posthumous conception. Ky. Rev. Stat. § 391.070 (2013); N.C. Gen. Stat. § 29-9 (2012).

132. Minn. Stat. § 524.2-120(10).

133. *See* 2005 Idaho Sess. Laws 407 (explaining that the concern over the effective administration of estates influenced legislative intent); S.C. Code Ann. § 62-2-108; Mary F. Radford & F. Skip Sugarman, *Georgia's New Probate Code*, 13 Ga. St. U. L. Rev. 605, 621 (1997) (explaining that the legislative purpose behind the limitation was to provide for the efficient administration of estates).

134. Minn. Stat. §§ 524.2-705, 708 (excluding posthumously conceived children from class gifts by applying intestate succession rules to class-gift requirements); S.D. Codified Laws §§ 29A-2-705, 708 (assigning intestate succession rules to class-gift requirements).

heirs.[135] The amendment prevents "children born during the testator's lifetime [from being] unfairly deprived of their expected inheritance by a child with whom the testator had no relationship, a possibility that in all likelihood would have not been foreseen or desired by the testator."[136] However, the New York posthumous-heirs and class-gifts provisions remained unchanged during this amendment; both still refer simply to children "conceived before" the decedent's death.[137]

B. Judicial Interpretations of State Statutes

In states that have not legislatively addressed posthumously conceived children, the judiciary struggles to interpret statutes enacted prior to the advent of posthumous-conception technology, yielding inconsistent results among the states when answering whether posthumously conceived children can inherit from a deceased parent. Many cases requiring this type of statutory interpretation are filed after the children are denied Social Security survivors benefits and involve federal courts applying state law.[138] Several courts that faced the issue before the state legislatures had addressed the possibility of posthumously conceived children. The courts certified the question of posthumously conceived children's intestate inheritance rights to the states' highest court.

In *Khabbaz v. Commissioner*,[139] the New Hampshire Supreme Court held that based on the interpretation of State intestacy law, a posthumously conceived child was ineligible to receive Social Security survivors benefits.[140] The decedent,

135. 2006 N.Y. Laws 3055 (amending N.Y. Est. Powers & Trusts Law §§ 5-3.2(a)-(b)). "Children produced later by modern scientific techniques will not take an after-born share." N.Y. Est. Powers & Trusts Law § 5-3.2 (McKinney).

136. Memo. from the N.Y. St. Jud. in Support of A10721, http://assembly.state.ny.us/leg/?default_fld=&bn=A10721&term=2005&Summary=Y&Memo=Y (accessed May 8, 2014).

137. Carpenter, *supra* n. 9, at 379. The State surrogate court upheld the legislature's amendment to bar posthumously conceived children from inheriting under a deceased parent's estate. *In re Martin B.*, 841 N.Y.S.2d 207, 209 (Surrog. Ct. 2007) (observing that "the right of a posthumous child to inherit . . . is limited to a child conceived during the decedent's lifetime").

138. *See infra* nn. 139–179 and accompanying text (discussing cases and studies addressing the ability for posthumously conceived children to receive Social Security survivors benefits).

139. 930 A.2d 1180 (N.H. 2007).

140. *Id.* at 1182.

diagnosed with a terminal illness, deposited his sperm and signed a consent form stating he had the "desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law."[141] After he died in 1998, his wife underwent artificial insemination, gave birth to a daughter in 2000, and later sought Social Security survivors benefits for the child.[142] Under the Social Security Act, a child may inherit from a deceased parent if the child is entitled to inherit a child's portion of the decedent's estate under the state's intestacy statutes.[143] The United States District Court for the District of New Hampshire certified the question on the rights of posthumously conceived children to inherit under State intestacy law to the New Hampshire Supreme Court.[144] Under New Hampshire intestacy statutes, if the decedent has no surviving spouse, then the decedent's estate goes "[t]o the issue of the decedent equally [but] . . . [i]f there are no surviving issue, to the decedent's parent or parents equally."[145] The court looked to the plain meaning of the word "'surviving'"—"'remaining alive or in existence'"[146]—and held that no "posthumously conceived child is a 'surviving issue' within the plain meaning of the statute."[147] The court noted that the statute's repeated references to the phrase "surviving issue" demonstrated a "clear legislative intent" to allow those living "at the time of the decedent's death" to inherit and to establish a timely and "orderly distribution process."[148] Thus, the court found that posthumously conceived children could not inherit under New Hampshire intestacy law and were excluded from Social Security survivors benefits.[149]

In *Finley v. Astrue*,[150] the Arkansas Supreme Court held that posthumously conceived children were ineligible to inherit under State intestacy laws.[151] The Finleys froze four embryos from their

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 1183 (quoting N.H. Rev. Stat. § 561:1 (2007)).
146. *Id.* at 1183–1184 (quoting *Webster's Third New International Dictionary* 2303 (unabridged ed., Merriam-Webster 2002)).
147. *Id.* at 1184.
148. *Id.*
149. *Id.* at 1185–1186.
150. 270 S.W.3d 849 (Ark. 2008).
151. *Id.* at 853.

eggs and sperm during the course of fertility treatments.[152] After Mr. Finley died intestate, Mrs. Finley underwent in vitro fertilization treatments and filed for Social Security survivors benefits after her child's birth.[153] The United States District Court for the Eastern District of Arkansas certified the question of intestate succession for posthumously conceived children to the Arkansas Supreme Court.[154]

The Court noted that State intestacy law required a posthumous child to be conceived before the decedent's death to be eligible for inheritance.[155] The issue remained whether an embryo created with the decedent's genetic material before his death could be deemed "conceived before his . . . death."[156] The Court found that the legislature would not have intended such a result, since the statute did not refer to fertility treatments and was enacted before in vitro fertilization technology had developed.[157] Thus, under Arkansas intestacy law, when an embryo is created through in vitro fertilization during the parent's lifetime, but only implanted in a womb after a parent's death, the resulting child cannot inherit as a surviving child.

Both the *Khabbaz* court and the *Finley* court appeared unwilling to apply a broad interpretation to statutory language when reviewing the inheritance rights of posthumously conceived children because of the many different policy interests at stake.[158] In fact, each opinion recognized that the state legislature had not addressed the issue of posthumously conceived children and requested from the legislature the development of a clear rule on the subject.[159]

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152. *Id.* at 850.

153. *Id.* at 850–851.

154. *Id.* at 851.

155. *Id.* at 853. "'Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.'" *Id.* (quoting Ark. Code Ann. § 28-9-210(a) (2004)) (emphasis omitted).

156. *Id.*

157. *Id.* at 853–854 (citing Dena S. Davis, *The Puzzle of IVF*, 6 Houston J. Health L. & Policy 275 (2006); Janet L. Dolgin, *Surrounding Embryos: Biology, Ideology, & Politics*, 16 Health Matrix 27 (2006)).

158. *Finley*, 270 S.W.3d at 854; *Khabbaz*, 930 A.2d at 1184.

159. *Finley*, 270 S.W.3d at 855 (encouraging "the General Assembly to revisit the intestacy succession statutes to address" posthumously conceived children's inheritance rights); *Khabbaz*, 930 A.2d at 1186 (recognizing that "other state legislatures have grappled with these issues" and "leav[ing] it to [the New Hampshire legislature], if it chooses, to do the same").

In *Woodward v. Commissioner of Social Security*,[160] the Massachusetts Supreme Judicial Court held that posthumously conceived children qualified as "children" of the deceased for purposes of receiving Social Security survivors benefits under limited circumstances.[161] Mrs. Woodward was artificially inseminated with her deceased husband's sperm after her husband lost his battle with cancer.[162] She sought Social Security benefits for her resulting twin girls.[163] At issue was whether the children were entitled to inheritance rights under Massachusetts intestacy laws, which "d[id] not contain an express, affirmative requirement that posthumous children must 'be in existence' as of the date of the decedent's death."[164]

The court focused on "the best interests of [the] children, the State's interest in the orderly administration of [the] estates, and the reproductive rights of the genetic parent" to "balance and harmonize these interests to effect the Legislature's over-all purposes."[165] After weighing the various interests involved, the court ruled that a posthumously conceived child may inherit from a deceased parent if the surviving parent or child's legal representative demonstrates (1) "a genetic relationship between the child and the decedent," and (2) that "the decedent affirmatively consented to posthumous conception and to the support of any resulting child."[166]

The *Woodward* court also appeared unwilling to provide a broad statutory interpretation.[167] Instead, the court developed a balancing test to provide a narrow window of inheritance opportunity for posthumously conceived children.[168]

In *Stephen v. Commissioner of Social Security*,[169] the United States District Court for the Middle District of Florida held that Florida intestacy statutes prevented posthumously conceived

160. 760 N.E.2d 257 (Mass. 2002).

161. *Id.* at 272.

162. *Id.* at 260.

163. *Id.*

164. *Id.* at 264 (quoting Mass. Gen. Laws Ann. ch. 190, § 8 (West 1990)) (recognizing that under the Massachusetts statute "'[p]osthumous children shall be considered as living at the death of their parent'").

165. *Id.* at 265.

166. *Id.* at 272.

167. The court was unwilling to create a bright-line rule always either allowing or denying Social Security survivors benefits to posthumously conceived children. *Id.* at 262.

168. *Id.* at 265.

169. 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

children from inheriting.[170] After the decedent's sudden death, his widow extracted[171] and cryopreserved his semen.[172] The widow began in vitro fertilization treatments, gave birth to a son three years later, and filed for Social Security survivors benefits for her child.[173] The court looked to Florida intestacy statutes to determine the child's eligibility to inherit and noted that Florida prohibited any kind of inheritance for a child conceived posthumously, unless the decedent provided for the child in his will.[174] The court found that, because the decedent died intestate, his son could not bring a claim against his estate and was ineligible for Social Security survivors benefits.[175]

In *Gillett-Netting v. Barnhart*,[176] the United States Court of Appeals for the Ninth Circuit reached a broad holding, finding that posthumously conceived children generally qualify as "children" under the Social Security Act and do not have to show actual dependence in order to receive Social Security survivors benefits.[177] After a cancer diagnosis, the decedent froze his sperm in order for his wife to attempt to achieve pregnancy after his death.[178] His widow underwent in vitro fertilization, gave birth to twins, and applied for Social Security survivors benefits.[179] The Ninth Circuit determined that courts need only apply state

170. *Id.* at 1265.

171. Posthumous sperm retrieval (PSR) was first reported in 1980 and involved the case of a thirty-year-old man who became brain dead after a car accident; since then, few pregnancies and births have resulted from this procedure. Shai Shefi et al., *Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm*, 21 Human Reprod. 2890 (available at http://humrep.oxfordjournals.org/content/21/11/2890.full.pdf+html) (Sept. 7, 2006). Currently there is little precedent for the retrieval of sperm and subsequent insemination past thirty-six hours from the time of death. *Id.* at 2892. This is mostly due to unacceptably low sperm motility past this point. *Id.* at 2891. However, ART methods allow for pregnancy from PSR procedures, even with immotile sperm, as long as the sperm remains viable. Jennifer A. Tash et al., *Postmortem Sperm Retrieval: The Effect of Instituting Guidelines*, 170 J. Urology 1922, 1923 (2003) (available at http://mckinneylaw.iu.edu/instructors/orentlicher/Social%20Regulation/Posthumous_Sperm_Retrieval_Guidelines.pdf. "A birth was first reported in 1999, but since then more than 1,000 such requests are made each year." Susan Donaldson James, *Sperm Retrieval: Mother Creates Life after Death*, http://abcnews.go.com/Health/Wellness/mother-murdered-son-hopes-create-grandchild-post-mortem/story?id=9913939 (Feb. 23, 2010).

172. *Stephen*, 386 F. Supp. 2d at 1259.

173. *Id.*

174. *Id.* at 1264 (citing Fla. Stat. § 742.17).

175. *Id.* at 1265.

176. 371 F.3d 593 (9th Cir. 2004).

177. *Id.* at 598–599.

178. *Id.* at 594–595.

179. *Id.* at 595.

intestacy law when the child's parents are unmarried or the child's parentage is disputed.[180] Based on the Ninth Circuit's interpretation of the Social Security Act, any legitimate[181] child could be found dependent on a parent and thus eligible for survivors benefits without looking to intestacy law.[182] The court then looked to Arizona's laws regarding legitimacy and determined that, because the twins were legitimate children, the decedent would have been obligated to support his children, despite the fact that they were conceived through in vitro fertilization.[183] Thus, the Ninth Circuit concluded that posthumously conceived children in Arizona, born to a surviving spouse, were entitled to benefits under the Social Security Act.[184]

However, the Ninth Circuit's review of legitimate-child statutes was abrogated by *Astrue v. Capato*.[185] In *Astrue*, the Supreme Court explicitly required the review of a state's intestacy statutes to determine every posthumously conceived child's eligibility for Social Security survivors benefits, not just those of children of unmarried parents or those whose paternity was in question.[186] The Court reasoned that Congress enacted the Social Security Act to "'provide . . . [for the] dependent members of [a wage earner's] family.'"[187] The Court further reasoned that children eligible to inherit under state intestacy statutes were more likely to be dependent upon the decedent than those children ineligible to inherit through intestacy.[188] The Court concluded that "[r]eliance on state intestacy law to determine who is a 'child' thus serves the Act's driving objective."[189] Therefore, had the court in *Gillett-Netting* applied Arizona intestacy laws,

180. *Id.* at 598 (explaining that, because Title 42 U.S.C. Section 416(h) lets an *illegitimate* child establish eligibility, intestacy statutes do not apply to a *legitimate* child).

181. In Arizona, "[e]very child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock." *Id.* (quoting Ariz. Rev. Stat. § 8–601 (2013)).

182. *Id.*

183. *Id.* at 598–599 (citing Ariz. Rev. Stat. § 25-501) (providing that the genetic father of a child born through artificial insemination is considered the natural parent if the father is married to the mother).

184. *Id.* at 598–599.

185. 132 S. Ct. at 2021.

186. *Id.* at 2026.

187. *Id.* at 2032 (citing *Califano v. Jobst*, 434 U.S. 47, 52 (1977)).

188. *Id.* (citing *Mathews v. Lucas*, 427 U.S. 495, 514 (1976)).

189. *Id.*

the holding would likely have resulted in posthumously conceived children being barred from Social Security survivors benefits.[190]

Nonetheless, the courts' reasoning in *Woodward* and *Gillett-Netting* are persuasive: when a parent consents to posthumous conception and intends to financially support any resulting children, inheritance rights should apply because such rights comport with the parent's wishes and treats posthumously conceived children as those children conceived before a parent's death. Based on *Gillett-Netting*'s abrogation, however, Florida's intestacy statues should directly address the eligibility of posthumously conceived children to inherit from a deceased parent.

C. Restatement (Third) of the Law of Property: Wills & Other Donative Transfers

The Restatement (Third) of Property: Wills & Other Donative Transfers offers an extremely inclusive approach: "to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit."[191] The drafters added, "A clear case would be that of a child produced by artificial insemination of the decedent's widow with his frozen sperm."[192] If born within a reasonable time after the husband's death, the child "should be treated as the husband's child for purposes of inheritance *from* the husband . . . [and] for all purposes of inheritance by, from, or through [any other] intestate decedent who dies thereafter."[193] In addition, the child would be a child of the deceased parent for class-gift purposes, unless a different intent was otherwise

190. *See e.g.* Ariz. Stat. § 14-2104(B) (stating that "[i]f it is not established by clear and convincing evidence that a person who would otherwise be an heir survived the decedent by at least one hundred twenty hours, it is deemed that the individual failed to survive for the required period"). Because a posthumously conceived child always fails to survive a deceased parent for the required timeframe, the child is likely barred from inheriting through intestate succession and also barred from receiving Social Security survivors benefits.

191. *Restatement (Third) of Property: Wills and Other Donative Transfers* § 2.5 cmt. l (1999).

192. *Id.*

193. *Id.*

specified.[194] The Restatement may be considered the most expansive of the model acts and current statutes in that it disregards marital status, does not require consent to be in writing or to be specific to posthumous conception, does not require any consent if it is prevented by death or incapacity, and postpones closing a class to future entrants until the distribution date.[195]

However, this approach likely conflicts with the state interest in providing predictable and efficient estate administration. Without a fixed time limit for claims against the decedent's estate, heirs are not protected from a claim from the posthumously conceived child born after the decedent's death but before the distribution date. While that may not be problematic for a surviving spouse, the Restatement does not require the decedent to consent in a record to being a parent. This could lead to cases where an unknown third party is able to make posthumous-conception claims on the estate.[196] As seen in *Woodward* and *Gillett-Netting*, state interests are best served by narrow exceptions for posthumously conceived children's inheritance rights.[197]

V. FLORIDA'S CURRENT APPROACH TO POSTHUMOUSLY CONCEIVED CHILDREN'S INHERITANCE

Inheritance rights involve many nuances in Florida.[198] In particular, Florida law refers to the State's intestacy statutes to determine adopted and nonmarital children's eligibility for inheritance under the State's probate code and trust code.[199] Florida intestacy statutes fail to address posthumously conceived

194. *Id.* at § 14.8 cmt. h.

195. *Id.* at §§ 14.8 cmt. h–k(1), 15.1 cmt. j.

196. For example, an unmarried decedent's heirs may be unaware of the decedent's attempts to achieve pregnancy through ART with a partner or close friend. The partner could achieve posthumous conception and bring a claim against the estate on behalf of the resulting child or seek to have the child included as a beneficiary of the decedent's trust.

197. *See supra* nn. 160–168, 176–190 and accompanying text (explaining the holding and reasoning in each case).

198. A decedent's child takes an intestate share in a narrow set of circumstances. If the decedent's child or children are a product of his relationship with his surviving spouse, and neither the decedent nor the surviving spouse has any children of his or her own, all of the decedent's property passes to the surviving spouse. Fla. Stat. § 732.102. Heirs take only if there is a "blended" family or if there is no surviving spouse. *Id.*

199. *Id.* at §§ 736.1102, 732.608.

children. Instead, Florida addresses posthumously conceived children's inheritance rights within the State's Parentage Code. The relevant portion of the statute reads:

> A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.[200]

The statute, however, is vague as to what "claim" the child may have.[201] As currently written, the child might inherit as an heir, be entitled to statutory allowances, be considered a pretermitted heir,[202] retain some other undesignated interests, or have a combination of these claims.[203] Additionally, the rule does not identify a procedure or time limitation for bringing a claim.[204] Further, it is unclear whether there must be a specific reference in the will, or whether a general reference to "my children" or "my issue" effectively includes posthumously conceived children.[205]

Should a claim against an estate arise from a posthumously conceived child in Florida, the issues described above would require the judiciary to answer important public policy questions. However, there is well-established judicial wariness to answer such questions.[206]

Other state courts have called on their legislatures to address such policy concerns. In *Finley*, the statute involved did not encompass the technology used to conceive the child in question, and the court "strongly encourage[d] the General Assembly to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will

200. *Id.* at § 742.17(4).

201. Florida Probate Code defines the term "claim" as a decedent's liability, whether arising in contract, tort, or otherwise, and funeral expense. *Id.* at § 731.201(4).

202. A pretermitted child, one born after the execution of a parent's last will, is entitled to a portion of the estate as long as he or she is neither provided for nor mentioned in the will. *Id.* at § 732.302.

203. Carpenter, *supra* n. 9, at 380.

204. *Id.*

205. *Stephen*, 386 F. Supp. 2d at 1265 n. 10.

206. *See supra* n. 159 (discussing court opinions that request legislative action regarding posthumously conceived children's inheritance rights).

likely evolve."[207] The *Khabbaz* court "agree[d] . . . that 'the intestacy statute . . . essentially leaves an entire class of posthumous[ly conceived] children unprotected.' However, the present statute requires that result. To reach the opposite result . . . would require us to add words to a statute . . . . We reserve such matters of public policy for the legislature."[208] Florida courts also routinely decline to answer public policy questions.[209]

Additionally, any resulting judicial ruling may be overly broad or too narrow. An example of a potentially overly broad ruling, the *Stephen* case raised two policy issues surrounding posthumous conception: consent and intent.[210] The *Stephen* court's holding may cut off inheritance where clear consent and intent on the part of the deceased existed despite its absence from a will.[211] For example, suppose a prospective parent, domiciled in Florida, leaves a signed and witnessed agreement with a fertility clinic consenting to be the parent of any child resulting from the ART procedures, including posthumously conceived children, and consenting to support any such child. Should the parent die intestate and a surviving partner proceed with ART procedures resulting in a posthumously conceived child, that child is ineligible for either inheritance or Social Security survivors benefits, regardless of the deceased parent's document on file with the fertility clinic reflecting the parent's intent to support the child. However, if such a document existed it could be enforceable under contract law, and probate proceedings would not be needed.[212]

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207. 270 S.W.3d at 855. The statute did not provide a definition of "conceive," and the court declined to provide one. *Id.* at 854 (stating that "[o]ur role is not to create the law, but to interpret the law and to give effect to the legislature's intent"). The court went on to state that if it were to define the term "conceive," it "would be making a determination that would implicate many public policy concerns, including, but certainly not limited to, the finality of estates . . . . The determination of public policy lies almost exclusively with the legislature." *Id.* at 855.

208. *Khabbaz*, 930 A.2d at 1186.

209. *See e.g. Raford v. State*, 828 So. 2d 1012, 1021 (Fla. 2002) (concluding that distinguishing between corporate punishment and child abuse "is principally a legislative function, better left to the Legislature"); *Davis v. Dollar Rent A Car Sys., Inc.*, 909 So. 2d 297, 316 (Fla. 5th Dist. App. 2004) *decision quashed sub nom. Williams v. Davis*, 974 So. 2d 1052 (Fla. 2007) ("If there should be no liability in cases such as this as a matter of public policy, the Legislature will tell us.").

210. 386 F. Supp. 2d at 1265.

211. *Id.*

212. The Florida Probate Code provides that an "agreement . . . to give a devise . . . [is not] enforceable unless the agreement is in writing and signed by the agreeing party in

Conversely, the analysis in *In re Estate of Kolacy*[213] is fact-specific and does not provide a functional framework for analyzing the rights of posthumously conceived children in subsequent cases. In *Kolacy*, the court found a general legislative intent that children should inherit from their parents and, through their parents, from other relatives.[214] The court stated that if a child is genetically the child of the parent, the child should be the heir of the parent unless such a determination would "unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates."[215] The court only required proof that the decedent intended to conceive a child posthumously and implied that the decedent's intent was not in dispute because "his intentional conduct [of donating sperm at a sperm bank] created the possibility of having long-delayed after born children."[216] The ruling potentially opened the possibility for any sperm bank deposit to satisfy the *Kolacy* requirement regarding a decedent's intent.

Relying on courts to interpret the inheritance rights of posthumously conceived children will likely offer inconsistent and possibly ill-reasoned rulings. Modifying state statutes ensures that the Florida legislature receives the opportunity to thoroughly balance all of the competing interests and policy considerations surrounding posthumous conception.[217] Legislation should

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the presence of two attesting witnesses." Fla. Stat. § 732.701. There are three general categories of contracts to devise: (1) contracts to leave property to a survivor; (2) contracts to leave property to a survivor and for the survivor to leave property to a third party; and (3) contracts to will estate or property in exchange for maintenance or services. 10 Fla. Jur. Forms Leg. & Bus. § 35:66. The second category is likely the most applicable to agreements signed by a parent prior to embarking on ART procedures. Contracts in the second category "are often contained in property settlement agreements between husband and wife, providing that the property be placed in trust for the children of the parties." *Id.* Properly drafted, the ART agreement likely could create a trust for the benefit of any posthumously conceived children and prevent the need for probate.

213. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

214. *Id.* at 1262.

215. *Id.*

216. *Id.* at 1264.

217. Of the three branches of government—executive, legislative, and judicial—the legislative branch generally is considered best equipped to formulate policy because of its ability to implement and monitor what it determines to be a socially desirable policy through legislatively established agencies and through the appropriations process. *See* Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 240–241 (1973). Moreover, a legislative resolution of a problem has worked its way through the political process and thus presumably received some semblance of popular support. *Id.*

be drafted so that individuals in similar situations can predict the likely outcome of their actions and not be left in a *Finley* situation, in which the law does not encompass a known scenario.[218] The existing statute does not allow for courts to engage in an analysis of interests and calls for a bright-line rule dictating stringent results.[219]

VI. SUGGESTED REVISIONS AND ADDITIONS TO FLORIDA LAW

The following modifications to Florida's parentage, probate, and trust codes resolve both probate-related and class-gift issues, ensure efficient estate administration, recognize the decedent's intent, consider the child's best interests, and utilize gender-neutral and marriage-neutral language. The modifications begin with removing inheritance language from Florida's Parentage Code, which would result in appropriately referring to the probate code for resolution of probate-related and class-gift issues surrounding the inheritance rights of posthumously conceived children. The modifications then move into Florida's probate code to allow intestate succession for posthumously conceived children. Once intestate succession is allowed, the modifications impose several requirements to account for (1) a decedent's consent to use genetic material for posthumous conception and his or her intent to be the parent of the resulting child; (2) proper notification to the estate administrator of the intent to use a decedent's genetic material for posthumous conception; and (3) timeframes for conception to ensure the efficient administration of a decedent's estate. Each modification also incorporates gender-neutral language to ensure that all couples seeking ART treatments have predictable outcomes for their resulting children.

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

219. *See Stephen*, 386 F. Supp. 2d at 1265 (holding that posthumously conceived children are never eligible for intestate inheritance). Unlike *Stephen*, there was no bright-line rule in Massachusetts intestacy law, and the *Woodward* court was able to engage in a balancing of interests to determine the best outcome for the posthumously conceived twins while not impinging on the rights of others. *Woodward*, 760 N.E.2d at 265.

A. Modifying the Parentage Code

Florida Statute Section 742.17 was enacted to require a couple, seeking conception through ART procedures, to develop a written plan for the disposal of any leftover or unused reproductive materials.[220] The statute specifically references the need for a written plan to ensure the disposal is in accordance with the couple's wishes should the couple divorce, die, or experience other unforeseen circumstances.[221] Perhaps because of the topic of mortality, the legislature also included the inheritance rights of posthumously conceived children within this statute. According to legislative history, the Section required "a provision precluding inheritance rights for any unused preembryos absent prior arrangement."[222] As discussed, addressing inheritance rights within this Section creates probate-related and class-gift issues.[223] This Section should be modified to refer to Florida's probate code for posthumously conceived children's inheritance rights. Therefore, Section 742.17(4) should be deleted and replaced with the following language:

> The inheritance rights of a child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body *shall be governed by Title XLII, Estates and Trusts*.[224]

B. Children Born out of Wedlock: Nonmarital Children

The common law treated nonmarital children as *filius nullius*, meaning "a child of no one."[225] This draconian status barred inheritance from either parent.[226] This approach stemmed from societal views on marriage, sex, and gender.[227] Legislatures

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220. Fla. H. Comm. on Health Care, *supra* n. 23, at 3.

221. *Id.*

222. *Id.*

223. *See supra* nn. 61–66 and accompanying text (explaining the specific probate-related and class-gift issues involved with posthumously conceived children's inheritance rights).

224. The italicized words and phrases indicate this Author's language added to the original statute.

225. Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 Real Prop. Tr. & Est. L.J. 433, 435 (2008).

226. Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 Utah L. Rev. 93, 103–104 (1996); Rhodes, *supra* n. 225, at 435.

227. Brashier, *supra* n. 226, at 104.

eventually allowed nonmarital children to inherit from the child's mother but still prohibited paternal inheritance.[228] Beginning in the 1960s, the intestacy-taking rights of nonmarital children ultimately changed through a series of United States Supreme Court decisions.[229] Subsequent cases demonstrated that states could implement stricter requirements for nonmarital children to inherit through their fathers, but held blanket provisions as unconstitutional, premising inheritance on the status of legitimacy.[230]

Florida Probate Code currently implements stricter requirements for paternal inheritance by allowing immediate inheritance from the mother, but requiring either marriage, paternity adjudication, or written paternal consent for paternal inheritance.[231] To enact gender-neutral language, the legislature could modify Section 732.108(2) as follows:

> (2) For the purpose of intestate succession in cases not covered by subsection (1), a person born out of wedlock is a descendant of his or her *natural or commissioning parents, as defined in 742.13(2)*,[232] and is one of the natural kindred of *all members of the parents' families*, if:
>
> (a) The natural *or commissioning* parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
>
> (b) The paternity *or maternity of the natural or commissioning parents* is established by an adjudication before or after the death of the *parent*.

228. Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination against Illegitimate Children*, 34 Hofstra L. Rev. 351, 380 (2005).

229. Brashier, *supra* n. 226, at 106 n. 34 (listing a series of eleven United States Supreme Court decisions dealing with nonmarital children).

230. *See e.g. Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding a New York statute requiring a court-ordered declaration of paternity during the father's lifetime for the child to inherit through intestacy).

231. Fla. Stat. § 732.108(2).

232. The Parentage Code currently defines a "commissioning couple" as "the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents." *Id.* § 742.13(2).

> Chapter 95 shall not apply in determining heirs in a probate proceeding under this paragraph.
>
> (c) The paternity *or maternity* is acknowledged in writing by the *natural or commissioning parents*.[233]

This modified section would allow for the intestate inheritance of posthumously conceived children from either parent.

While modifications are underway, additional sections of the Florida Parentage Code can be updated to realize gender-neutral language and ensure that all couples without the ability to use the reproductive genetic material of either individual might also be considered a commissioning couple. Therefore, Section 742.13(2) should be modified to read as follows: "'Commissioning couple' means the intended parents of a child who will be conceived by means of assisted reproductive technology."[234] Section 742.13 should also include a new subsection defining "parent" as "a person acting or intending to act as a mother or father."[235]

C. After-Born Heirs

The Florida legislature enacted a pretermitted-child statute to provide for children inadvertently or mistakenly left out of a decedent's will.[236] The statute allowed for children, including after-born heirs, to inherit from a decedent who likely intended to be the parent of the child.[237] The current statute reads, "Heirs of the decedent conceived before his or her death, but born thereafter, inherit intestate property as if they had been born in the decedent's lifetime."[238] The statute was originally enacted

233. The italicized language reflects this Author's language modifying the original statute.

234. This language removes the need for a mother *and* a father to make up a commissioning couple.

235. This language allows for same-sex and unmarried couples to make up a commissioning couple.

236. *In re Hatfield's Est.*, 16 So. 2d 57, 58–59 (Fla. 1943).

237. *Id.*

238. Fla. Stat. § 732.106.

before technology made posthumous conception a reality.[239] Thus, the legislature likely did not foresee this possibility.

If the original legislative intent—including children who were likely intended to be included but were inadvertently left out by a deceased parent—is applied to posthumously conceived children, such children could potentially inherit from a deceased parent. However, as discussed above, there are several competing state interests involved. First, Florida courts "recognize[ ] the state's paramount interest in the prompt and final settlement of its citizens' estates."[240] Leaving an estate open indefinitely and waiting for the possibility of additional children born through ART is contrary to the State's legitimate interests. Thus, the timing of the estate's closure should be addressed in a revised statutory rule to ensure that legal heirs are not prevented from inheriting.[241]

Along the same lines, a notice requirement, which mandates that any individual with a legal right to a decedent's frozen reproductive material inform the probate court of his or her intent to use the material before the estate is closed, also protects state interests. Retrieval of property is an incredibly difficult and sometimes impossible task once an estate is closed.[242] Giving notice would not obligate the individual to attempt posthumous conception, but rather, it would hold the possibility open until the timing requirement passes.

With this in mind, a timing requirement of twenty-four months for achieving conception is reasonable.[243] This gives a

239. The statute was originally enacted in 1933, *id.*, decades before the first live birth resulting from an ART procedure creating an embryo outside the womb, Djalleta, *supra* n. 69.

240. *U.S. Borax, Inc. v. Forster*, 764 So. 2d 24, 29 (Fla. 4th Dist. App. 1999).

241. Statutorily requiring an estate to be held open is not a revolutionary process. Creditor claims against an estate may leave an estate open for a minimum of three months, but can be extended. Fla. B., *Probate in Florida Pamphlet, How Long Does Probate Take?* http://www.floridabar.org/tfb/tfbconsum.nsf/48e76203493b82ad852567090070c9b9/92f75229484644c985256b2f006c5a7a?OpenDocument (revised July 2011).

242. *See* Helen W. Gunnarsson, *Lawpulse, Probate Court Report #2: Take Care with Heirship*, 90 Ill. B.J. 114, 115 (2002) ("[Cook County Circuit Judge Jeffrey] Malak has even seen cases where judgments had to be entered against heirs in order to get the distributions back after new heirs were found and ruled entitled to a share of the estate.").

243. This timeframe also matches the Florida nonclaim statutes, restricting claims or causes of action against the decedent to within two years of the decedent's death. Fla. Stat. § 733.710(1). Therefore, all claims, including claims from posthumously conceived children, should be resolved and the estate distributed within two years and ten months

grieving partner time to mourn,[244] to decide whether to conceive a child, and to move forward with ART treatments. Additionally, a twenty-four month timeframe protects other heirs from an excessive waiting period before receiving transferred property. Therefore, a revised Section 732.106 should read as follows:

(1) Heirs of the decedent conceived before his or her death, but born thereafter, inherit intestate property as if they had been born in the decedent's lifetime.

(2) *A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall inherit intestate property as if the child had been born in the decedent's lifetime if:*

   (a) *The decedent consented in a signed, witnessed writing to the posthumous use of his or her reproductive material to conceive a child with a named, specified individual who holds title to the intestate's gametes;*

   (b) *The individual holding title to the intestate's gametes and with right of usage notifies the probate court of record, within three months of the issuance of the decedent's death certificate or similar official death notice, of his or her intent to use the gametes to conceive a child prior to the estate being closed; and*

   (c) *The child was in utero within twenty-four months of the intestate's death.*[245]

(allowing for a full-term delivery should the conception occur on the last day of the time period) of a decedent's death.

244. Research indicates that a period of intense grieving ranges from three months to one year, though individual grieving varies significantly. Fam. Caregiver Alliance, *Grief and Loss*, http://www.caregiver.org/grief-and-loss (Jan. 1, 2004).

245. The italicized language is this Author's language added to the original statute (adopted and modified from Cal. Prob. Code § 249.5(a)).

D. Resolving Class-Gift Issues

The new language above enables a posthumously conceived child to be defined as a child in the Florida probate and trust codes. As such, the confusion over whether a posthumously conceived child would inherit under a class gift created by designations of "to my children" or "to my issue" is resolved. The statutory definition of "'[c]hild' includes a person entitled to take as a child under this code by intestate succession from the parent whose relationship is involved, and excludes any person who is only a stepchild, a foster child, a grandchild, or a more remote descendant."[246] The current statutory rule under the Florida Trust Code reads, "The laws used to determine paternity and relationships for the purposes of intestate succession apply when determining whether class gift terminology and terms of relationship include adopted persons and persons born out of wedlock."[247] Both statutes look to intestate statutes, which incorporate posthumously conceived children when modified as above.

This new statutory scheme entitles posthumously conceived children to make claims for Social Security survivors benefits, as well as to inherit property that otherwise would go to other heirs. The decedent's other heirs, namely his or her other children, could be adversely affected by the recognition of a posthumously conceived child's inheritance rights. A decedent may have children from a previous relationship with whom the decedent's surviving partner has no connection or relationship whatsoever. The surviving partner thus might not consider the interests of these other children when deciding whether to use the decedent's preserved gametes to bear a child. If the deceased parent's estate were held open in anticipation of a possible posthumously conceived child, the decedent's other children would have to wait longer to collect their inheritance and would have lingering questions about how much they should expect to take. Further, the shares of other children in the deceased parent's estate would

246. Fla. Stat. § 731.201(3).
247. *Id.* at § 736.1102.

decrease if a statute permitted a posthumously conceived child to inherit through intestacy.[248]

However, the proposed statutory scheme implements a specified reasonable time limitation of two years within which a posthumously conceived child must be conceived.[249] This balances the surviving partner's need to grieve and take steps necessary for balancing posthumous conception with the interests of the decedent's other children, such as preserving their share of the estate and receiving their share "in a timely manner."[250] This timeframe is especially appropriate when paired with a mandatory notice requirement to inform the estate administrator of the intent to attempt posthumous conception. All interested parties are kept abreast of the possibility of a posthumous child, and the window may close before the two-year term expires if the surviving partner decides not to attempt conception.

As for Social Security survivors benefits, a posthumously conceived child's eligibility for benefits does not necessarily reduce the benefit available to a decedent's other, traditionally born children.[251] Here, the argument against posthumously conceived children's eligibility is more likely related to the overall depletion of the Social Security system. However, this argument draws more upon a federal concern rather than a state concern.[252] The State likely benefits from posthumously conceived children receiving survivors benefits because such children will be less likely to require state-sponsored aid, such as food stamps or state insurance programs.[253] This is not to say that states should adopt

248. *See supra* n. 57 (explaining the Florida per stirpes rules in distributing intestate property).

249. *See supra* nn. 235–239 and accompanying text (discussing the State's interests in the efficient administration and closing of an estate).

250. *Supra* n. 239 and accompanying text.

251. However, Social Security survivors benefits are limited to a family maximum payment. Soc. Sec. Administration, *Benefits for Children* 2 (Off. of Research, Evaluation and Statistics 2012) (available at http://www.ssa.gov/pubs/EN-05-10085.pdf). This limit ranges from 150 to 180 percent of the decedent's full benefit amount. *Id.* If the sum paid to all eligible family members exceeds the limit, each family member's benefit is proportionately reduced to the maximum allowable amount. *Id.*

252. Social Security survivors benefits are part of the *federal* program for old-age and survivors insurance. Soc. Sec. Administration, *Federal Program Inventory* 4 (Off. of Research, Evaluation and Statistics 2013) (available at http://www.socialsecurity.gov/pgm/Federal_Program_Inventory%20_fixed.pdf).

253. "In all, Social Security lifted 1.1 million children out of poverty in 2009." Children's Def. Fund, *6.5 Million Children Benefit from Social Security*, http://www.childrensdefense.org/child-research-data-publications/data/65-million-children-benefit.pdf (Aug. 2011).

a liberal approach to intestacy laws so that more people receive survivors benefits, but rather it is unlikely that the Florida legislature would baulk at the suggested statutory modifications based on the implications to Social Security survivors benefits.

The above modifications to Florida's parentage, probate, and trust codes resolve both probate-related and class-gift issues, ensure efficient estate administration, recognize the decedent's intent, consider the child's best interests, and seek gender neutrality for all couples seeking ART procedures. These modifications likely conflict with the legislative intent of the original Section 742.17(4) requiring "a provision precluding inheritance rights for any unused preembryos absent prior arrangement."[254] The updates to the Florida statutes listed above are intended to allow for a narrow inclusion of posthumously conceived children into intestacy inheritance. Intestacy statutes are the opposite of "prior arrangement." However, because Florida intestacy statutes are used to determine the makeup of "heirs," "issue," "children," and "descendants," expanding Florida intestacy to include posthumously conceived children ensures that where a testator intended to include posthumously conceived children in a statement of "to my children" those children will now be included, assuming the timeframe and notification elements are met. Additionally, the requirement to name an intended recipient and authorized user of a decedent's reproductive material is a prior arrangement that, when dealing with the possibility of posthumously conceived children, is arguably more important than naming a possible posthumously conceived child in a will.[255] Ultimately, the required ART agreements executed prior to death and the requirements placed on the surviving partner should fulfill the legislative intent for "prior arrangements," effectively enabling both a will and will substitutes allow a posthumously conceived child to inherit.

VII. CONCLUSION

In response to the new legal challenges created by the existence of posthumously conceived children, the states have

254. Fla. H. Comm. on Health Care, *supra* n. 23, at 3.

255. *See supra* nn. 240–244 and accompanying text (discussing the importance of a timeframe for conception and notice to the estate administrator by the surviving partner).

reacted differently. Some states recognize that these children have rights to inherit consistent with those identified in the Uniform Probate Code, while others do not. Although Florida enacted requirements to allow posthumously conceived children to inherit from a deceased parent, opportunities remain to further the interests of all affected parties. The changes to the current statutes outlined above clarify the rights of posthumously conceived children and better equip the judiciary to handle any issues that arise.

The Parentage Act should refer to the State's probate code for posthumously conceived children's inheritance rights. Moreover, the probate code should allow for posthumously conceived children to inherit from the deceased parent through intestacy. A time limit should be imposed on conceiving posthumously to allow a resulting child to share in a portion of the estate. The decedent's intent to support a posthumously conceived child and his or her acknowledgement of a parent-child relationship with the child should be considered. Finally, the surviving partner must appropriately notify the estate administrator to ensure efficient estate management.

Without these modifications, cases will arise as the practice of posthumous conception becomes more widespread and the use of will substitutes continues to grow. With the cooperation of the legislature, the potential probate and class-gift concerns related to posthumously conceived children can be diminished, allowing for better judicial efficiency and for effective estate administration.