

Chapter 15

Issue of Issue

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Issue of Issue¹

¶ 1500 Synopsis - From Mummification to Cryopreservation

In Ancient Egyptian mythology, Osiris was the God of Life, Death and Fertility, and Isis, his wife, was the Goddess of Magic, Giver of Life, and Protector of the Dead. The Legend of Osiris and Isis is widely regarded to be the most important story of the Egyptian New Kingdom.

Before there was Osiris the god, there was Osiris, the great pharaoh, loved by his people and his queen, Isis. Osiris had a jealous brother, Seth, however, who greatly coveted Osiris' throne. Seth murdered Osiris, sectioned him into twelve² pieces, and scattered him along the shores of the Nile River for a crocodile feast. Overcome by grief, Isis' tears caused the Nile to flood. She searched far and wide for her dead husband's parts. She found all but one piece. She took Osiris' pieces, wrapped them in linen and invoked a magic spell to briefly resurrect Osiris and thereby conceive their son, Horus. Horus later avenged his father's death by killing Seth.

Said to be the first Egyptian mummy, Osiris was raised from the dead by mummification and magic. Twenty-five hundred years later, modern science has found a new way to bring about life after death with liquid nitrogen and Petri dishes. And so the saga of posthumous fatherhood continues. While children naturally conceived just prior to their father's death have for centuries been recognized as the legitimate children of their dead fathers, the possibility of posthumous conception, like that of Horus, has since its time been firmly rooted in myth. But in the twentieth century, modern reproductive technology has since made myth a

1. The author wishes to acknowledge and thank Kwan Ting Ho, (JD expected at the University of Pennsylvania Law School 2009, for her excellent help in researching and writing this article.

2. Some forms of the legend say it was thirteen pieces.

reality. Procedures such as cryopreservation of sperm, ova and embryos, artificial insemination, and in vitro fertilization have now made posthumous conception possible. The question for today's trust and estate planners is whether these offspring will be legally recognized as children for the purpose of making inheritance claims?

Until recently, society has been slow in arriving at an affirmative answer to this question. Illegitimate children, also known as bastards, have for ages been shunned by society, socially unequal to those born within wedlock, and unable to inherit. Gradually over the centuries, society has evolved as it continues to widen its circle of social acceptance, recognizing the rights of more and more groups of people. As social acceptance has grown, so too has the definition of "family," which has expanded to include adopted family members, children born out-of-wedlock, interracial families, same-sex couples, and children born via assisted reproductive technologies (ART). The latter is the concern of this article. In the age of modern reproductive technologies, advances in medicine have split the traditional mother and father into multiple subtypes of parents: genetic parents, surrogate mothers, and intended parents – all belonging to a single child. Worldwide, over 500 babies have been born from previously frozen eggs;³ in 2005, 52 041 children were born in the United States by means of assisted reproductive technology, and 400 000 embryos were cryogenically preserved in U.S. storage houses.⁴ This has in turn given birth to a new and diverse set of family situations that today continue to present legal conundrums to society and its legal system.

The subject of this article is the effects of modern reproductive technologies on the inheritance rights of ART children and related issues. It is divided into six main parts.

3. Egg Freezing Center, <http://www.eggfreezingcenter.com/egg-freezing/questions-to-ask.html>, Accessed Jan. 12, 2008.

4. Center for Disease Control, Assisted Reproductive Technology Home Page, <http://www.cdc.gov/art> . Last accessed November 22, 2007.

Section 1501 provides an overview of the landscape of modern reproductive technologies; it outlines the spectrum of modern reproductive technologies available today and perhaps in the future. Section 1502 briefly discusses how possibilities raised by modern reproductive technologies have complicated traditional legal assumptions. Section 1503 discusses the legal status of reproductive cells; their legal status will determine their fate and therefore the possibility of additional beneficiaries to a trust or heirs to an estate. Section 1504 discusses various states' recognition of posthumous parenthood and the legal status of children resulting from assisted reproduction, with a particular focus on posthumously conceived children. Section 1505 discusses the rights of these children arising from their legal status and how the law has coped with and responded to the new situations up until now. Section 1506 discusses the effects of modern reproductive technologies on the Rule Against Perpetuities. Finally, legal recommendations and the future trajectory of the law of wills, trusts and estates are discussed.

In brief, it is recommended that legislatures should amend parentage and probate laws to take into account the new generation of children born via assisted reproduction; that trust and estate planners should discuss the possibility of posthumous children with their clients; and that wills and trusts should be modified to reflect the new technological realities of the current and future eras of reproduction.

¶ 1501 Modern Reproductive Technologies: Overview⁵

The most commonly used forms of assisted reproduction today are cryopreservation of gametes and embryos, artificial insemination (AI), and in vitro fertilization (IVF).

Cryopreservation includes sperm banking (anonymous and private), and cryopreservation of oocytes, ovarian tissue, and embryos. There are three forms of AI: (i) artificial insemination by

5. See Appendix, Exhibit A, Table I-1, which provides a more detailed summary of modern reproductive technology procedures.

the husband (AIH); (ii) artificial insemination by a donor (AID) or therapeutic donor insemination (TDI); and (iii) artificial insemination by a combination of husband and donor semen (AIC). IVF has spawned a number of derivative techniques. Most notably, they include zygote intrafallopian transfer (ZIFT) and gamete intrafallopian transfer (GIFT). While not very commonly used today, ZIFT, GIFT and cloning may become more common forms of assisted reproduction in the future.

Surrogacy is another form of assisted reproduction. Traditional surrogacy, whereby a fertile woman will bear a child for an infertile woman, has been around for quite a long time; under this arrangement, the surrogate mother is also the genetic mother of the child. Modern reproductive advances have created a new form of surrogacy, gestational surrogacy, whereby the surrogate mother – the gestational carrier – will carry to term a child conceived from the ovum of another woman; under this arrangement, the surrogate mother is not the genetic mother of the child.

Cloning, or more specifically, artificial cloning, creates a child that is genetically identical to its parent. The topic of artificial human cloning is controversial, being wrought with numerous moral and ethical issues.⁶ The law on artificial human cloning is currently unclear.⁷

6. See generally, Human Genome Project Information, Cloning Fact Sheet, http://www.ornl.gov/sci/techresources/Human_Genome/elsi/cloning.shtml#ethics; Glenn McGee, “Primer on Ethics & Human Cloning”, ActionBioscience.org, <http://www.actionbioscience.org/biotech/mcgee.html>, Feb. 2001 (discussing bioethical issues surrounding artificial human cloning).

7. The United Nations General Assembly on December 12, 2001 established an Ad Hoc Committee to draft an international convention against reproductive human cloning. The Committee issued a Report to the General Assembly at its 82nd Session on March 8, 2005; the GA adopted the General Assembly Resolution 59/280 containing the *United Nations Declaration on Human Cloning*; see <http://www.un.org/law/cloning/>, accessed Jan. 12, 2008. The United States Congress is currently considering passing legislation to ban human cloning; for a list of U.S. policy and legislative documents regarding human cloning, see http://www.ornl.gov/sci/techresources/Human_Genome/elsi/cloning.shtml#policy. The American Medical Association and the American Association for the Advancement of Science (AAAS) have issued formal public statements against human cloning: AMA Code of Ethics, E-2.147 Cloning to Produce Children, available at <http://www.ama-assn.org/ama/pub/category/8444.html> (“Given the unresolved issues regarding cloning identified above, the medical profession should not undertake cloning-to-produce-children at this time and pursue alternative approaches that raise fewer ethical concerns”);

Quite a number of people have claimed to have been successful in human cloning, but all such claims have been discredited or at most remain doubtful.⁸

¶ 1502 The Issue of Issue

When it comes to posthumous children, there is a distinction between those conceived before and born after a parent's death, and those conceived or implanted as an embryo and born after a parent's death. This distinction is rooted in time and consequently affects the law.

Children born posthumously within the natural gestational period following death – where a man dies leaving his pregnant partner to give birth to his children after his death – have existed for centuries and have long been recognized by the law as legal heirs. Children conceived posthumously or those resulting from cryopreserved embryos implanted posthumously (both categories of whom are consequently also born posthumously), however, are a product of twentieth century advances in reproductive technology. Not a possibility in the past, it is now possible to conceive children from the cryopreserved sperm, ova or embryos of a dead partner. The law has still not figured out a coherent policy on how to deal with them.⁹

¶ 1502.1 Public Policy

Underlying the analysis of all of the legal issues regarding modern reproductive technologies are ongoing public policy concerns. In interpreting statutes, courts use public policy to guide their decisions. They must balance between the interests of: (a) the children; (b) the parents or donors; (c) other beneficiaries of the estate. Children produced from

AAAS Statement on Human Cloning, *available at* <http://www.aaas.org/news/releases/2002/Cloning.shtml> (“AAAS endorses a legally enforceable ban on efforts to implant a human cloned embryo for the purpose of reproduction.”).

8. *See, e.g.*, Wade N & Sang-Hun C, “Researcher Faked Evidence of Human Cloning, Koreans Report,” *New York Times*, Jan. 10, 2006, *available at* http://www.nytimes.com/2006/01/10/science/10clone.html?_r=1&oref=slogin# (discussing high profile case of scientific fraud involving human cloning and South Korean scientist Dr. Hwang Woo-Suk); “As Human Cloning Advances Ethics Debate Gets Louder,” *San Diego Tribune*, January 17, 2008 (discussing recent development of human embryo cloned by using female egg cells and a male's skin cells).

9. Scott MW, *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 (2003).

posthumous conception or posthumously implanted embryos have – like all other children – the right to have two legal parents and to be provided for. In this regard there is the issue of equal protection under the United States Constitution; under the Equal Protection Clause of the Fourteenth Amendment, it would not be right to deny ART children their rights to be provided for based on the circumstances of their birth.¹⁰ When it comes to donors of reproductive cells or potential parents, there is the issue of parenthood – the right to have children and the right of protection against forced parenthood. Other beneficiaries of an estate have interests in having efficient estate administration, and certainty and finality in the distribution of assets; original heirs do not want to be perpetually vulnerable to a future reduction of their inheritance due to the ongoing possibility of new posthumous heirs. As discussed *infra*, a legal solution to this would be to set a time limit within which children must be born in order to be eligible for inheritance from an estate.

¶ 1502.2 Donor Exception

The only category of people generally well protected from liability under the law is anonymous sperm donors, but even they are not completely immune to estate claims from children resulting from their gamete donations. Most states have laws protecting anonymous donors, but a donor's estate may nevertheless be vulnerable in states that do not have a statute clearly stating the donor's immunity. This issue is even more significant when it comes to anonymous egg donors, who have not been as explicitly protected as sperm donors by state laws. In fact, most states do not have laws expressly protecting anonymous egg donors. Thus if a child produced from an anonymously donated egg later discovered the identity of the egg donor, (s)he could conceivably bring a claim against the donor's estate. Anonymous egg donors could,

10. For an in-depth analysis of the equal protection argument regarding inheritance rights of posthumously conceived children, see Goodwin JE, *Not All Children are Created Equal*, CONN. PUB. INTEREST L.J., Paper 31 (2005), available at <http://lsr.nellco.org/uconn/cpilj/papers/31>.

however, make an equal protection argument under the United States Constitution's Fourteenth Amendment's Equal Protection Clause.¹¹ Embryo donors also face similar issues when it comes to a lack of state statutory protection.¹²

There are a number of factors that are taken into account in determining whether the estate claims of a posthumously conceived child will be successful:

- 1) Genetic relationship between putative parent and child
- 2) Public Policy – Whether the child already has two legal parents
- 3) Intent – Provision for or exclusion of posthumous children in the gamete provider's estate planning
- 4) Consent by gamete provider
 - a) for posthumous use of his/her gametes
 - b) to provide for resulting children
- 5) State laws regarding gamete or embryo donors – whether or not they are protected
- 6) State laws regarding inheritance rights of posthumously conceived children
- 7) Efficiency in Estate Administration
 - a) Notice – Filing claims before the final distribution of an estate
 - b) Timeliness and the Rule Against Perpetuities

¶ 1503 Reproductive Cells: Legal Status & Access

The legal status of reproductive cells is important because it determines who has access and control over them, their fate, and therefore the possibility of additional future heirs who could make claims to a trust or estate. There are two distinct contextual situations

11. Kindregan CP Jr. & McBrien M, *Posthumous Reproduction*, 39 FAM. L. Q., 579, 585 (2005-2006). Oklahoma is one state that has a statute expressly protecting anonymous egg donors: 10 OKLA. STAT. §555 (2004).

12. Kindregan, *supra* note 10, at 7.

stemming from differences in the nature of the cryopreserved specimens: (a) cryopreserved gametes – sperm and ova – which come exclusively from the deceased, and (b) cryopreserved embryos, which are the product of more than one person; the issue of access in embryo cases is therefore also tied to a question of custody. A third contextual situation arises once a child conceived via ART is born – the question of parenthood. This third situation will be discussed in Parts 1504 and 1505. There are several legal approaches to analyzing the issues arising from these three contextual situations: property law, adoption law, and contract law (the latter of which follows an intent-based approach).

¶ 1503.1 Gametes

When first confronted with the issue of classifying the legal status of reproductive cells, existing law provided two distinct and opposing legal concepts with their accompanying bodies of law: property and personhood. The concept of a property right is in fact a group of rights which confer to the possessor of the right the power to exercise control over the property; as defined in *Black's Law Dictionary*, the right of property is the “rights to control, possess, use, exclude, profit from and dispose of assets.”¹³ On the other end of the spectrum, an entity recognized as a person has recognized independence and rights of its own. While the application of property law may be appropriate when it comes to gametes, which are genetic products of an individual, it is not entirely appropriate when it comes to embryos, which are the products of two donors and have greater potential for independent life. The law regarding reproductive cells ultimately settled into an intermediate position.

Historically, corpses had no recognized property interest in their own body. In the context of reproductive cells, the most analogous law was the seventeenth century English common law right of possession conferred to the executor of an estate over human tissue, body

13. *Black's Law Dictionary* 1233 (revised 7th ed. 1999).

parts or a dead body for the purposes of burial and will execution. This was recognized as a right of possession only, not a property right, and has translated into the modern American legal concept of a “quasi-proprietary right” over a deceased’s remains conferred to the surviving spouse or next-of-kin for the purposes of burial or disposal of remains. While there may be deference to the decedent’s wishes, they will not necessarily be followed; rather, it is the surviving family members who decide. But they too are not necessarily the final say either; their decisions must be in accord with societal norms and public health concerns.¹⁴

Only a few cases have addressed the issue of pre-embryos or gametes as property. In 1984, the French court decided *Parpalaix v. CECOS*.¹⁵ In this case, Corinne Parpalaix, a widow, and her parents-in-law sought control of Parpalaix’s deceased husband’s (Alain’s) cryopreserved sperm so that she could conceive his child posthumously. The sperm had been deposited at CECOS, a government-run sperm bank, prior to Alain’s death. CECOS refused to provide the sperm to his widow because Alain had not left instructions regarding the sperm in the event of his death. Plaintiffs contended that the cryopreserved sperm constituted part of Alain’s moveable estate and therefore was to be turned over to the control of the estate’s rightful heirs, his wife and parents. The French court ordered that the sperm be handed over to Corinne based on a theory of bailment. Note, however, that Corinne did not win her case on a property argument. Rather, regarding the legal status of the sperm, the court described it as “the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive.” In this sense, the court took a view more attributed to embryos in the U.S. In any case, the fate of the sperm was to be determined by Alain’s intention – did he intend to use the sperm for the purpose

14. Rubenstein J, *Posthumous Corporeal Rights: Is there sex after death?*, NY State Bar Assoc., Trusts & Estates Law Section, Annual Meeting, Jan. 24, 2001, at 4.

15. *Parpalaix c. Centre d’étude et de Conservation du Sperme (CECOS)*, T.G.I. Creteil, Aug. 1, 1984, *Gaz. du Pal.* 1984, 2, pan. jurispr. 560. CECOS is a sperm bank in France.

of procreation – after surviving chemotherapy or posthumously? Despite the absence of express instructions, the court was able to infer from Alain’s action of banking his sperm prior to beginning chemotherapy that he intended for the sperm to be used to conceive his children. It is worth noting that after this decision, France passed a law prohibiting posthumous conception.

In *Hecht v. Superior Court*¹⁶ the court faced similar issues of first impression. Here, however the sperm donor’s intentions were made clear in his will. William Kane had a mistress, Deborah Hecht, to whom he had bequeathed his cryopreserved sperm for the purpose of conceiving his child. Kane then committed suicide. Following his death, a legal battle ensued between Hecht and Kane’s adult children, each party seeking control of his cryopreserved sperm. Hecht wanted the sperm to conceive Kane’s child pursuant to his will; Kane’s children wanted to destroy the sperm. The court held that at the time of death, the decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the sperm within the scope of policy set by law. Public policy did not prohibit a single/unmarried woman from becoming impregnated with the cryopreserved sperm nor did it prohibit posthumous artificial insemination. The Decedent’s positive act in banking his sperm, his appointment of Hecht as executor, bequeathing the cryopreserved sperm to Hecht, and “Statement of Wishes” all indicated decedent’s intention that Hecht control the sperm.

In summary, *Parpalaix* and *Hecht* indicate that, in general, gametes are recognized by the courts to be somewhat proprietary in nature, and thus possess a quasi-proprietary status under the law. Moreover, the intentions – explicit or implicit – of a deceased person with respect to his/her cryopreserved gametes are important in determining the disposition of the gametes. As these cases illustrate, the legal status of cryopreserved cells has become a significant point of contention between beneficiaries with conflicts of interest when it comes to estate distribution.

16. *Hecht v. Super. Ct. (Hecht I)*, 16 Cal.App.4th 836 (Cal. Ct. App. 1993).

Their legal status determines their disposition which in turn determines the possibility of posthumously conceived children and therefore the possibility of additional heirs to an estate.

¶ 1503.2 Embryos

Just as property law does not fully apply to cryopreserved gametes, neither property nor adoption laws fully apply to embryos. Property law does not apply to embryos because embryos are the product of two people and have potential for life, therefore they should be afforded some degree of independence. On the other hand, because embryos occupy an intermediate status between property and personhood, they cannot appropriately be handled under adoption law either, which applies only to children – full persons with full legal rights. It is the intermediary status of the embryo that is the basis for Supreme Court abortion decisions.¹⁷

As for other statutory developments, other countries are ahead of the U.S. in legally dealing with reproductive technologies. Germany, Sweden, Canada, and Australia forbid postmortem ART.¹⁸ In post *Parpalaix* France, a widow is prohibited from using her dead husband's sperm for posthumous insemination. In Israel, a widow may use her dead husband's sperm to conceive children within one year of her husband's death, even in the absence of his consent. A widower, however, may not use the gamete of his dead wife to conceive children via a surrogate mother.¹⁹ In Great Britain, gametes and embryos may be stored and used posthumously, as long as there is written consent from decedent.²⁰ Embryos must be destroyed after five years unless both parents agree to extend their preservation beyond this time limit.²¹

17. Kindregan CP Jr., *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*, 49 VILL. L. Rev. 169, 207 n. 102 (2004).

18. Scott, *supra* note 9, at 969.

19. *Id.* 970.

20. Human Fertilisation & Embryology Act, 1990, c. 37, §14(1)(c) (“no gametes or embryos shall be kept in storage for longer than the statutory storage period and, if stored at the end of the period, shall be allowed to perish, . . .”)

21. *Id.* sched. 2, §2(3) (“A licence [for storage of gametes or embryos] under this paragraph shall be granted for such period not exceeding five years as may be specified in the licence”).

Thus other countries have been more specific than the U.S. in terms of imposing limitations on the posthumous use of reproductive cells.

¶ 1503.3 Embryos & Adoption

Whereas adoption law is primarily focused on the child's best interest, assisted reproduction on the other hand, is about the parents' desires to have their own children.²² It may be the desire to have children – either as an alternative to adoption or as a way to have one's own genetically related children, or the desire to have children with or without certain characteristics, e.g. genetic diseases. Thus the introduction of assisted reproduction as an alternative to adoption is impacting the social meaning of adoption, at least where ART's are involved – a shift of focus from the child's interests to those of the parents.²³ This shift in focus will have a corresponding impact in the law, including inheritance rights. If the proper focus is on the child's best interests, the law should favor inheritance eligibility in situations of intestacy thus protecting the rightful claims of children to child support and inheritance. If however, the focus is on the parents' interests, the law would favor the protection of parents' intents under the principle against forced parenthood. But of course, the interests of children cannot be entirely divorced from the interests of adopting parents, who without some vested interest, even if it is merely parental instincts to rear children or the psychological reward of performing a civic duty, would not be persuaded to adopt.

Neither statutory nor common adoption law can be applied to embryo transfers. Many state statutes invalidate consent to adoption prior to birth and even in the absence of such statutes, courts have opted not to recognize prenatal agreements to adoption. In light of the differences in interests between traditional adoption and ART alternatives, adoption law would

22. Appleton SF, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEG. F. 393, 394 (2004).

23. *Id.* 395.

therefore not provide an appropriate model for new legislation and drafting of legal documents regarding children conceived through ART's.

¶ 1504 Life After Death: Posthumous Parenthood & Legal Status of ART Children

Having established that gametes possess a quasi-property legal status and that embryos are quasi-independent, the next questions are: (1) Who can claim parental custody of resulting children, particularly those resulting from surplus embryos? (2) What is the legal procedure for transferring custody between “parents”? Determining legal parenthood is the first step; a child's right to inherit is predicated on the presence of a legal parent-child relationship. Such a legal relationship is not strictly based on blood or a biological relationship, however. The social evolution of the family, as discussed in the Introduction, has recognized an increasing variety of parent-child relationships. Declaration of legal parentage would establish the child's inheritance rights to the estate of the child's legal parents while extinguishing such rights in relation to the donors. Delays in declaring a child's legal parents can have legal consequences when it comes to inheritance; an example is in the case where an intended legal parent suddenly dies intestate before the declaration of the child's parentage.

¶ 1504.1 Parenthood: Then & Now

A. In the Past

In the past, motherhood consisted of genetic contribution via an ovum, gestation, and childrearing; thus the genetic mother, the gestational mother, and the legal mother were all one and the same woman. Fatherhood consisted of genetic contribution via sperm, marriage to the mother, and childrearing; thus the genetic father, legal father, and husband to the mother were all one and the same man. Social changes over the centuries created new situations that challenged the traditional notions of parenthood, for example, children born out of wedlock,

divorce, adoption, and domestic partnerships and same-sex marriages. Nevertheless, the legal system was able to adapt to accommodate these new situations, expanding concepts of legal parenthood while maintaining the principle that parenthood arose out of a genetic and/or legal relationship to the child.

B. In the Present

Technological changes, i.e. assisted reproduction, however, have undermined the traditional presumptions of parenthood based on biology and gestation by uncoupling these definitive elements of parenthood, resulting in the possibility that multiple or no people could claim parentage to a child. In the modern concept of motherhood, the genetic mother is not necessarily the gestational mother, and neither woman is necessarily the legal mother. In the modern concept of fatherhood, the genetic father is not necessarily the legal father. This uncoupling of motherhood and fatherhood has raised a number of legal conundrums.

Modern courts have invoked a number of approaches when it comes to determining legal parenthood over children of assisted reproduction. Given the scarcity of statutes directly addressing children born via assisted reproduction, courts often must resort to alternative principles such as contract law and public policy in arriving at case decisions. The various approaches are not mutually exclusive, and courts will take multiple factors into account, such as genetic relationship and intent, in their determinations.

¶ 1504.2 Uniform Parentage Act (UPA)

The Uniform Parentage Act is the most comprehensive legislation to date dealing with the legal ramifications of reproductive technologies. It was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL). UPA 2000 incorporates and repeals UPA 1973, the Uniform Putative & Unknown Fathers Act of 1988, and the Uniform

Status of Children of Assisted Conception Act (USCACA) of 1988.²⁴ The UPA was last revised in 2002; in 2006, a drafting committee was appointed for another revision, which is expected to be completed in 2008. All states have their own UPA, but to date, only eight states²⁵ have incorporated the 2002 version of UPA;²⁶ Alabama and Nevada in 2007 each introduced a bill to incorporate UPA (2002).²⁷

UPA §201 defines a legal parent-child relationship. Subsection (a)(1) begins by setting the default according to the traditional definition: the birth mother is the legal mother; this is the biological or genetic approach, discussed *infra*. Subsection (a) then lists a number of exceptions: (3) adoption; (4) in a gestational surrogacy arrangement, the intended parents are the legal parents (discussed *infra*).

UPA §204 sets out the presumption of paternity. “A man is presumed to be the father of a child if . . . [h]e and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation]; . . .”²⁸ The time limit of 300 days closely conforms to the traditionally recognized gestational period during which a posthumous child must be born in order to be able to inherit. Other sections of the UPA will be discussed *infra*.

24. Morgan LW, “The New Uniform Parentage Act (2000): Parenting for the Millennium”, SupportGuidelines.com, <http://childsupportguidelines.com/articles/art200104.html> (last modified May 19, 2002).

25. UPA States: Colorado, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. See NCCUSL UPA Legislative Fact Sheet, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp, last visited Jan. 19, 2008

26. Bass CM, *What if you die, and then have children?* TRUSTS & ESTATES (April 2006)

27. State 2007 bills to incorporate UPA: HB 298 (Ala. 2007), Ala. Code §26-17-707 (2000) (to be enacted 2008); S.B. 71 (Nev. 2007).

28. Uniform Parentage Act §204(a)(2) (2000).

¶ 1504.3 Legal Approaches to Defining Parenthood

A. Genetic Approach: Blood is Thicker than Water, and Genetic Blood is Thicker than Surrogate Blood

Not surprisingly, a major factor in determining legal parenthood is whether a genetic relationship exists between parent and child. Under the genetic approach, the genetic parents are by default the natural and legal parents. The Restatement (3rd) of Property: Wills & Other Donative Transfers (2007) §2.5 (Parent & Child Relationship) states: “An individual is the child of his or her genetic parents, whether or not they are married to each other, . . .” Thus the emphasis is on genetic relationship, and children born out of wedlock – such as posthumously born children – have equal rights to those born within wedlock. This approach is congruent with the policy of equal protection of non-marital children. Conversely, statutes that explicitly state that genetic children must be children of the marriage of their genetic parents set social progress backwards in terms of equal protection policy. An Ohio court in *Belsito v. Clark*,²⁹ held that the genetic parents are presumed to be the natural and legal parents of the child unless the genetic parents waive their parental rights (as in the case with anonymous donors). Only where the parental rights of the genetic parents have been waived can the birth/gestational mother be presumed to be the legal parent of the child. In New York, *Perry-Rogers v. Fasano*³⁰ was a case of accidental surrogacy where the embryo of an African-American couple (the Rogers’) was mistakenly implanted into the wife of a Caucasian couple (the Fasanos). When Mrs. Fasano gave birth to two babies, one Caucasian and one African-American, DNA tests confirmed that the African-American baby belonged to the Rogers’. The Fasanos sought visitation rights for the Rogers’ baby against the wishes of the Rogers.’ The New York

29. 644 N.E.2d 760 (Ohio Ct. of Com. Pleas 1994).

30. 276 A.D.2d 67 (NY App. Div. 2000).

Appellate Court denied the Fasanos visitation rights, holding that the genetic, intended parents had full legal parental rights over their child. Thus genes trumped surrogacy.

The exception to the biological or genetic rule of parenthood is the anonymous gamete donor. UPA §702 confers protection to donors: “A donor is not a parent of a child conceived by means of assisted reproduction.” The donor’s genetic material is treated as that of the intended parents; consequently, AID, ovum donation, and embryo donation/adoption can be “used to create children without triggering adoption-like regulations and procedures.”³¹ Essentially, the UPA treats these ART’s as an extension of natural sexual reproduction.

1. Adoption – Substitution for Natural/Genetic Parents

Even before there were anonymous sperm donors, there was the traditional exception to the biological rule of parenthood: adoption – the process by which a child’s natural or genetic parents are replaced with a genetically unrelated set of legal parents. Under traditional adoption law, the identities of the biological parents are unknown to the adopted child. In general, open adoption arrangements – where the donor’s identity is known and the biological parents retain some visitation rights – confer greater legal risk than closed adoptions or donations. Over the years, the trend has been towards deregulation and greater privatization of adoption, meaning stronger rights of birth parents, and their greater ability to bargain and gain access to their biological children in the future at the expense of rights and degrees of freedom of adoptive parents.³²

While adoption of children is governed by law, “adoption” / donation / transfer of embryos is not governed by law. Parties involved in a private embryo adoption

31. Appleton, *supra* note 22, at 419.

32. *Id.* 437-38.

agreement could provide for an analogous “open embryo adoption,” but it would be unenforceable by the courts.

As with traditional adoption of children, open donations of gametes and embryos are in general more risky than anonymous donations, especially where the arrangement (i.e. embryo donation) is not protected by law. Sperm donation is regulated by law, and as embryo donation can be seen as a logical / natural legal extension, sperm donation provides a good framework for analysis. Not all states, however, have artificial insemination statutes protecting sperm donors from parental responsibilities and precluding resulting children from any inheritance rights from the biological father.³³ For those that do, most of them apply only to anonymous donors and/or married women, or to AI performed by a physician. Thus even anonymous sperm donors may find themselves with unwanted parental responsibilities where their donated sperm was used to impregnate an unmarried woman or the insemination was not performed by a physician. In light of this, known donors would be subject to even greater legal risk. Donee’s legal rights can also be compromised.

B. Intent-Based Approach

Intended parenthood is a relatively new legal concept. Affirmative use of the doctrine of intent may be useful and beneficial to all parties – parents and children – in a conflict of claims scenario to identify legally enforceable parent-child relationships.³⁴ The intent-based approach is often tied to the genetic factor where the genetic parents are the intended parents who must resort to assisted reproduction to produce their genetic children. In the *Perry-Rogers*³⁵

33. For a list of states with artificial insemination statutes, see Appendix, Exhibit B, Table IV-1: Artificial Insemination Donation, *also available at* <http://www.kentlaw.edu/islt/TABLEI.htm> (last accessed September 23, 2007).

34. Apel SB, *Cryopreserved Embryos: A Response to “Forced Parenthood” and the Role of Intent*, 39 FAM. L. Q. 663, 680 (2005-2006).

35. *Supra*, note 29

holding, the intent factor – that the genetic parents were the intended parents – may in fact have been more significant than the genetic factor. Had the genetic parents not been the intended parents in that case, the outcome may have come out differently.

The recent New York case, *In re Martin B.*,³⁶ provides another good illustration of the intent-based approach. In this case, two children were conceived using cryopreserved semen and born posthumously about three and six years after the death of their father. The issue was whether these posthumous children were considered “issue” or “descendants” to be included as beneficiaries of seven trusts established by their grandfather. The court held that the grantor’s intent in drafting the trust agreement was controlling, and the terms of the trusts, although silent as to posthumously conceived children, indicated the grantor’s intention that posthumous grandchildren be included as beneficiaries.³⁷

1. Gestational Surrogacy

Gestational surrogacy is a situation where intent becomes significant. *Perry-Rogers* was a case of accidental gestational surrogacy where intent influenced the determination of legal parenthood. “Traditional surrogacy” is distinct from “gestational surrogacy” in that in the former, the surrogate mother is genetically related to the resulting baby, while in the latter, there is no genetic relationship between the surrogate mother and resulting baby. In a gestational surrogacy arrangement, the surrogate mother carries to term an embryo created from the gametes of two other people. This agreement is similar to embryo adoption in that the biological and birth mothers are different. The difference is that in gestational surrogacy arrangements, the birth mother relinquishes the baby after birth, whereas in embryo adoption, the birth mother might intend to keep the baby. This would be the case if the adopting mother was

36. 17 Misc.3d 198 (NY Surr. 2007).

37. *Id.* 204-05.

also the gestational birth mother. An alternative situation of embryo adoption, on the other hand, could involve a surrogate mother; in such an arrangement, the intended parents would adopt an embryo, but instead of the adopted embryo being implanted into the intended mother, it would be implanted into a surrogate mother. This would then be a situation of combined embryo adoption plus gestational surrogacy.

When it comes to gestational surrogacy, there are two types of disputes for which courts have invoked an intent-based approach to find a resolution. The first is a competing claim to parenthood. The second type of dispute is the orphan situation, that of potential “parentlessness” where the child could possibly be considered to have no legal parents.

*Johnson v. Calvert*³⁸ illustrates the first type of dispute arising from a surrogacy situation – competing claims to parenthood. Johnson involved a dispute between the biological parents (the Calverts) and the gestational surrogate mother (Johnson) over legal parentage rights over the child. The California court, in finding for the Calverts, established the intent-based approach to parenthood. The court held that it is the intended parents who are the legal parents of a child resulting from a gestational surrogate agreement.

*In re Marriage of Buzzanca*³⁹ is another California case that invoked the intent-based approach, but this time, it involved the second type of dispute arising from a surrogacy arrangement – the potential parentlessness of the resulting child. In *Buzzanca*, a couple had arranged to become parents through embryo donation and a gestational surrogate arrangement. The embryo was donated from a third party couple and implanted into a surrogate mother. When the couple’s marriage dissolved, the husband, not wanting to pay child support, denied that there were any children from the marriage. The court again used the intent-based

38. 5 Cal. 4th 84, 851 P.2d 776 (Cal. 1993).

39. 61 Cal. App.4th 1410 (4th Dist., 1998).

approach in determining that the intended parents were the legal parents of the child, despite the lack of genetic relationship. The *Buzzanca* court was also guided in its decision by the public policy that dictates that wherever possible, a child should have two legal parents, rather than become a ward of the state.⁴⁰

*Culliton v. Beth Israel Deaconess Hospital*⁴¹ dealt with the court's power to issue a pre-birth declaratory judgment of intended parentage. Plaintiffs were genetic parents who entered into a gestational contract with a surrogate mother. Plaintiffs then sought declaratory judgment of paternity and maternity from the Probate & Family Court; they also sought a pre-birth order from the hospital at which the babies were to be born to designate plaintiffs as father and mother on the resulting birth certificates. The Probate & Family Court dismissed the order, citing lack of authority to issue a pre-birth order of parentage. The case went on to appeal and was transferred to the Massachusetts Supreme Judicial Court. The SJC held that: (1) The court had authority to issue the pre-birth declaratory judgment on legal parentage; (2) plaintiffs were the legal parents of the children; and (3) the court should issue an order to the hospital to designate plaintiffs as parents on all legal birth documents.

2. Contract Approach to Intent

Surrogacy arrangements are often memorialized in contractual agreements. Contractual agreements are also becoming more common in embryo adoption. Initially, couples create embryos for the purpose of conceiving children which they intend to raise. Here, the only difference between this situation and traditional conception and gestation is

40. See also, *In the Interest of Olivia Grace McGill*, TEXAS LAWYER (Apr. 19th, 1999) (A married couple used IVF to create an embryo which was then cryopreserved. The couple divorced. The ex-wife had the embryo implanted. She claimed that the ex-husband was not the father, claiming the divorce nullified any paternal rights. The court disagreed with the mother and granted paternity rights to the biological father, citing the interests of the child).

41. 756 N.E.2d 1133 (2001).

the in vitro fertilization; gestation and resulting legal parenthood still reside in the biological parents. But given the surplus of embryos resulting from the procedure, many couples then decide to donate their surplus embryos to infertile couples. When a couple does this, their initial intention with respect to parental rights over the embryos/resulting children should therefore cease. Thus the respective intentions and corresponding rights of the parties involved in such an embryo donation agreement should be laid out in a contract.

However, Kindregan states that an intent-based approach should apply only to situations involving assisted reproduction, not natural conception; the intent-based approach is not meant to give a man a way of avoiding child support where he mistakenly impregnates a woman. Furthermore, prenatal contractual agreements providing only for consent to surrender of embryo custody, without reference to adoption, may be unenforceable, as they are seen as a tactic for getting around adoption laws.⁴²

There are three categories of intent regarding cryopreserved gametes and embryos. The first is the intent for posthumous conception and to become a parent of posthumously conceived children. This is the situation when the decedent has expressed an intention that his/her cryopreserved gametes or embryos be used to conceive children after his/her death. *Hecht I*⁴³ is an example. In *Hecht I*, the decedent's widow and children sought to destroy decedent's gametes and thereby prevent his mistress from using them. The California court held that decedent's intent, as manifested in his positive act of banking his sperm, his appointment of his mistress, Hecht, as executor, his bequest of the cryopreserved sperm to Hecht, and his "Statement of Wishes" all indicated decedent's intention that Hecht control the sperm. In

42. Kindregan, *Embryo Donation*, *supra* note 17 at 184.

43. *Supra* note 16.

this situation, it was fairly clear that decedent intended to become a parent of the posthumously conceived children and so any resulting children should have been eligible to inherit.

The second category of intent is the intent for postponed conception during life, but not posthumous conception. When a couple cryopreserves gametes or embryos for the purpose of conceiving children later on during their lifetime, this intent does not necessarily translate to conceiving children posthumously. A case example is the 1984 case of the Los Angeles couple who died unexpectedly in a plane crash leaving “orphan embryos” and no will instructing as to their disposition.⁴⁴ This is the only reported case where both owners of the frozen embryos died. Note, however, that while the deceased wife, Mrs. Rios, contributed her ova to the embryos, the sperm used to create them came from an anonymous donor. Mr. Rios’ estate attorney argued that the legal question of inheritance therefore applied only to Mrs. Rios’ estate; Mr. Rios’ estate was not affected and his only son would be the sole heir to his estate. When the story hit the news, the Australian clinic housing the frozen embryos was inundated with requests for the orphan embryos and a debate ensued on their disposition – whether to destroy them, donate them to research, donate them to other couples, or implant them for the purpose of inheriting the Rioses’ estate,⁴⁵ valued at about one million dollars.⁴⁶ The Australian government appointed a committee to study the bioethical issues concerned and make recommendations as to the disposition of the embryos. The committee recommended the disinheritance of the embryos and their donation to another couple. The court ruled that any resulting children would be ineligible to inherit from the Rioses since the decedents had not

44. Blakeslee S, *New Issue in Embryo Case Raised Over Use of Donor*, NY TIMES, June 21, 1984 (discussing the Rios case). Available at <http://query.nytimes.com/gst/fullpage.html?res=9D04E3D91739F932A15755C0A962948260&sec=health&spn=&pagewanted=1>.

45. Sperling D, *MANAGEMENT OF POST-MORTEM PREGNANCY: LEGAL AND PHILOSOPHICAL ASPECTS* (Ashgate Publ’g 2006), available at http://books.google.com/books?id=I9pcuiGWP2cC&pg=PA134&lpg=PA134&dq=rios+%26+embryos+%26+1984+%26+request&source=web&ots=6xQszjZBnD&sig=O7LuMP43KCZKY4_4GOIXdakeffA. Accessed June 2007.

46. Blakeslee, *supra* note 45.

expressed any intent that their embryos be used to produce their children postmortem. This policy was meant to prevent people from misappropriating others' cryopreserved gametes and embryos for the purpose of making claims to estates.

The third category of intent is having no intention for parenthood or no intent to become a parent. One example of this is the anonymous sperm donor, where the decedent had his/her gamete cryopreserved, but did not intend to become a parent to any resulting child. In this case, the donor is usually protected from unintended parenthood by law. However, for situations where posthumously conceived children were not contemplated, state laws regarding the rights of these children are in flux.

C. Statutory Approaches to Intent

The Restatement (3rd) of Property: Wills & Other Donative Transfers, discussed *supra*, states that to inherit, a posthumous ART child “must be born within a reasonable time after the decedent’s death *under circumstances indicating that the decedent would have approved* of the child’s right to inherit” (emphasis added).⁴⁷ Thus the Restatement recognizes the inheritance rights of children conceived posthumously via ART, under the conditions of a time constraint and consent or intent by decedent. The Restatement’s Reporter’s Note gives an example of a circumstance that would raise doubt as to the decedent’s approval of a posthumous child’s right to inherit: “if the decedent and his surviving spouse were in the process of divorcing when the decedent died.”⁴⁸

The American Law Institute offers a tripartite approach to deal with unspoken intent. It proposes three categories of parents: (i) “legal parents”; (ii) “parents by estoppel”; and

47. RESTATEMENT (3RD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS §2.5 cmt. 1 (1999).

48. *Id.* §2.5, cmt. 1, n. 8.

(iii) “de facto parents.”⁴⁹ The latter two categories represent unspoken intended parenthood. The ALI’s Principles of the Law of Family Dissolution defines “parenthood by estoppel” as a person not formally recognized as a legal parent yet who “has acted as a parent under certain specified circumstances which serve to estop the legal parent from denying the individual’s status as a parent.”⁵⁰ Such an individual is “afforded all of the privileges of a legal parent.”⁵¹ Section 2.03(1)(c) defines “de facto parent” as an adult who “does not meet the requirements of a parent by estoppel, [yet] may nonetheless have functioned as the child’s primary parent.”⁵²

The American Bar Association’s Proposed Model Act Governing Assisted Reproduction, discusses the situation of a change of intent. Subsection (4)(c) states that “[a]ny written agreement must incorporate the following: . . . In the event of a subsequent disagreement between intended parents, wherein one intended parent no longer wishes to use stored embryos as previously agreed, after written notice of that person’s intent to avoid conception to the other party and the clinic or storage facility, an intended parent may not transfer the embryos into the body of any woman with the intent to create a child. No agreement to the contrary will be enforceable.”⁵³ Subsection (4)(d) states that “[i]n the event of a future disagreement between intended parents, wherein one intended parent no longer wishes to transfer stored embryos as agreed in paragraph 4(c) of this Section, that intended parent will not be the parent of a resulting child.”⁵⁴

49. American Law Institute, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS, §2.03(1) (2002).

50. *Id.* cmt. b.

51. *Id.*

52. *Id.* cmt. c. For more in-depth discussion, see DiFonzo JH. *Towards a Unified Field Theory of the Family: The American Law Institute’s Principles of the Law of Family Dissolution*. 2001 BYU L. REV. 923 (2001).

53. ABA PROPOSED MODEL ACT GOVERNING ASSISTED REPRODUCTION, art. 5, §501(4)(c) (2006) (revised 2007).

54. *Id.* §501(4)(d).

D. The Consent Requirement

The reason behind the consent requirement policy is to prevent people from misappropriating and misusing a decedent's cryopreserved sperm or embryos for the purpose of obtaining rights to a decedent's estate. The authority that sets out the consent requirement for legal parenthood, directly addressing children born via assisted reproduction, is §707 of the UPA, which incorporates the Uniform Status of Children of Assisted Conception Act (USCACA) of (1988) §4.⁵⁵ It states:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of egg, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of that child.⁵⁶

As mentioned *supra*, seven states have adopted the UPA. These seven states – Colorado, Delaware, North Dakota, Texas, Utah, Washington and Wyoming – therefore follow the consent on record policy when it comes to posthumous parenthood.⁵⁷ Alabama and Nevada in 2007 introduced bills to incorporate the UPA (2002); Alabama's incorporated UPA will take effect in 2008.⁵⁸

55. UPA §707 cmt. (2000) (revised 2002).

56. UPA §707 (2000) (revised 2002).

57. State analogues of UPA §707 (2000): COL. REV. STAT. ANN. §19-4-106 (8) (2007); DEL. CODE §13-8-707 (2007); N.D. CENT. CODE §14-20-65 (2007); TEX. FAM. CODE ANN. §160.707 (2007); UTAH CODE ANN. §78-45g-707 (2007); WASH. REV. CODE ANN. §26.26.730 (2007); WYO. STAT. ANN. §14-2-907 (2007).

58. State 2007 bills to incorporate UPA: HB 298 (Ala. 2007), ALA. CODE §26-17-707 (2000) (to be enacted 2008); S.B. 71 (Nev. 2007); see <http://www.leg.STATE.nv.us/74th/Reports/history.cfm?ID=187>.

A number of states take a UPA-like approach requiring consent and additional conditions. Florida requires that consent be specifically given in the will.⁵⁹ This policy is more stringent than the UPA, which recognizes consent outside of the will. However, in Florida, it would still be possible for a posthumously conceived child to inherit from a class gift despite not being specifically named in a will.⁶⁰ The Restatement (3rd) of Property addresses the possibility for a posthumously conceived child to inherit via class gifts.⁶¹

In Virginia, there is a presumption of no posthumous parenthood unless:

(i) there is a genetic relationship between the child and both parents, i.e. the child results from the “insemination of a wife’s ovum using her husband’s sperm”; (ii) written consent; and (iii) the child is born within 10 months of decedent’s death.⁶² So far, this is similar to the traditional approach – the child must be in gestation/in utero/*en ventre sa mere*. But the second half of the same section expands this policy into a qualified UPA-like approach, providing that a child resulting from posthumous implantation of an embryo produced from decedent’s gametes may still inherit, *regardless* of whether the other donor is the surviving spouse, if: (i) implantation occurred before the physician performing the procedure could reasonably be notified of the death, and (ii) there is consent in writing.⁶³ Thus Virginia appears to make a distinction between stored sperm and eggs versus stored embryos.⁶⁴

In Louisiana, the legal requirements are: (i) *written* consent for the spouse to use decedent’s frozen gametes (note that consent to be a parent is *not* required); (ii) the surviving

59. FLA. STAT. ANN. §742.17 (2007).

60. Goodwin, *supra* note 10, at 260.

61. RESTATEMENT (3RD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS, §14.8 (1999) (“Unless the language or circumstances indicate that the transferor had a different intention, a child of assisted reproduction is treated for class-gift purposes as a child of a person who consented to function as a parent of the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity”).

62. VA. CODE ANN. §20-158(B) (2007).

63. *Id.*

64. Bass, *supra* note 26, at 23.

spouse is the user of the gametes; (iii) the posthumous child is born within three years of the death.⁶⁵

In California, in addition to written consent, notice must be given to a testator within four months of death that the decedent's gametes are available for posthumous conception, and the child must be conceived within two years of death.⁶⁶

In New York, a bill was proposed in 2007 to expand the definition of "issue" to include posthumously conceived children. The proposed law would require: (i) written consent by the decedent to be a parent *and* to provide for the posthumously conceived child; (ii) that the child be born within two years after the death; and (iii) that a genetic relationship be established between the child and decedent by "clear and convincing evidence."⁶⁷

Three states – Idaho, Maine and New Jersey – have rejected the UPA approach. These states expressly state that children must be conceived prior to death in order to inherit.⁶⁸ This focus on conception, however, provides a loophole – if a couple wishes to produce children after the death of one (or possibly both) of them, then they must ensure that their ova and sperm are fertilized prior to death. Implantation prior to death, however, is not a statutory requirement in these states, and so the fertilized embryos can be cryopreserved and implanted after death to produce posthumous children who can inherit. Idaho, however, plugged

65. LA. CIV. CODE ANN. §391.1 (2007).

66. CAL. PROBATE CODE §249.5 (2007).

67. Assembly Bill AO 5181.

68. IDA. CODE ANN. §15-2-108 (2007) ("Relatives of the decedent conceived by natural or artificial means *before his death but born within ten (10) months* after the decedent's date of death, shall inherit as if they had been born in the lifetime of the decedent" (emphasis added)) (this provision is meant to preclude the loophole of creating embryos prior to death but implanting them after death); ME. REV. STAT. ANN. tit. 18-A, §2-108 (2007) ("Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent"); N.J. STAT. ANN. §3B: 5-8 (2005) ("An individual *in gestation* at a particular time is treated as living at that time if the individual *lives 120 hours or more* after birth" (emphasis added)).

up this loophole in 2005 when it amended its statute. It added the additional condition that the child be born within ten months after the parent's death.⁶⁹

While the UPA §707 recognizes posthumously conceived children and consent in a variety of forms, §707 still leaves open many questions. Firstly, definitions of terms and phrases such as “placement” or “consent in a record” are left open to interpretation. Secondly, no time limit is delineated for “placement” of sperm, eggs or embryos. Given that cryopreserved reproductive cells can last for years, the later the placement, the more questionable the validity of consent, especially in light of intervening events such as remarriage. Thirdly, there is no limit or required specification on the number of posthumously conceived children.⁷⁰

1. Policy Against Forced Parenthood

In jurisdictions with a policy against forced parenthood, the surviving partner bears the burden of establishing the decedent's (i) consent to have his/her gametes used to produce children, and (ii) consent to provide for such children. This criteria is meant to honor the reproductive rights of parents and to prevent fraud.

- a. Divorce

What happens if a marriage dissolves? Does parenthood or intended parenthood dissolve along with the marriage? If parenthood is affected by divorce, in the long-run, so too will the inheritance rights of children. When it comes to divorce and parenthood over children produced from previously frozen reproductive cells, the law draws the line at implantation, making a distinction between pre-implantation divorce versus post-implantation divorce. Pre-implantation, the UPA and the ABA's Model Act Governing Assisted Reproduction follow the principle against forced parenthood. Thus if marriage dissolves prior to

69. IDA. CODE ANN. §15-2-108 (2007).

70. Scott, *supra* note 9, at 983.

implantation and one of the intended parents no longer wishes to use the frozen gametes or embryos to produce children, then the unwilling party will not become a legal parent.⁷¹ When it comes to the parental status with respect to children produced from cryopreserved reproductive cells, the UPA §706 is the divorce analogue of §707; both follow the principle of no fatherhood without consent. The only difference is whether the father is alive or dead. Under the no fatherhood without consent principle, intent takes precedence over biology⁷² and the interests of the parent take precedence over those of the child (in terms of child support).

Susan B. Apel argues, however, that whether the father is alive or dead is in fact pertinent, as different interests are involved in the two situations. In posthumous situations, the interest involved concerns speed and finality in settling the estate; in divorce situations, although in the long-run the decision will ultimately affect inheritance rights of the child, the main interest while the father is alive is child support. In the latter situation, court orders regarding child support can be modified over time according to circumstantial changes. Thus the distinction between postmortem and divorce cases is the degree of permanence of the decisions.⁷³

71. See UPA §706 (amended 2002) (“Effect of Dissolution of Marriage or Withdrawal of Consent. (a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child. (b) The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or embryos. An individual who withdraws consent under this section is not a parent of the resulting child”); ABA MODEL ACT GOVERNING ASSISTED REPRODUCTION, Art. 5, §§ 501(4)(c) and (d) (amended 2007) (“Parental Rights & Obligations Under Embryo Agreements. In the event of a subsequent disagreement between intended parents, wherein one intended parent no longer wishes to use stored embryos as previously agreed, after written notice of that person’s intent to avoid conception to the other party and the clinic or storage facility, an intended parent may not transfer the embryos into the body of any woman with the intent to create a child. No agreement to the contrary will be enforceable. In the event of a future disagreement between intended parents, wherein one intended parent no longer wishes to transfer stored embryos as agreed in paragraph 4(c) of this Section, that intended parent will not be the parent of a resulting child”).

72. UPA §706, cmt. (2002).

73. Apel, *supra* note 34, at 670-71.

When it comes to post-implantation divorce, however, the legal status of parenthood does not change. Again, this would be analogous to a death situation; for children living or in gestation at the time of death, parenthood – along with the inheritance rights of the children – does not change after the death of a parent.

In post-divorce custody battles over embryos, Apel asserts that giving control of the embryos to the woman while guaranteeing freedom from parental obligations to the man is analogous to the ex-wife releasing the ex-husband from child support obligations in exchange for custody of the child in divorce cases. This practice of bargaining away the child's right to financial support from the father has now been outlawed.⁷⁴ Apel likens children born from cryopreserved embryos, implanted post-divorce, to children born out-of-wedlock. The UPA sought to eliminate legal and social differences between children born in marriage and those born out-of-wedlock, and therefore the law should likewise not deny children born from cryopreserved embryos, implanted post-divorce, the same rights to legal and social equality.⁷⁵

But there is a distinction between children born out-of-wedlock and cryopreserved embryos that centers on control. In the situation of children born out-of-wedlock, the man has intercourse with a woman with the knowledge that he could possibly get her pregnant. Thus the man in having intercourse with a woman out-of-wedlock or post-divorce assumes the risk and therefore the responsibility for any resulting children.

When a man uses his sperm to create embryos that are later cryopreserved, he does it with the intention of creating a limited number of children and most likely within the context of the present relationship with his partner, e.g. marriage. However, the

74. *Id.* 676.

75. *Id.* 677.

procedure requires the production of many embryos and cryopreservation allows them to be viable for many years afterwards. The man uses his sperm to create embryos with the understanding that despite the requirement that multiple embryos be produced in the process, he (and his partner) will be able to decide how many children he will legally father from these embryos and that not all of the embryos will become his children; once the purpose of the assisted reproductive procedure has been accomplished, i.e. the couple bears the child or children they intended, then the surplus embryos – whether discarded or donated – are not to confer any more parental responsibilities on the parents. Thus – pursuant to the policy against forced parenthood – it would be unreasonable to hold the father liable to become a parent for any and all of the embryos that must necessarily be created during assisted reproduction. Furthermore on control, in out-of-wedlock situations, the baby has already been created under the control of both the man and woman, whereas with cryopreserved embryos, they do not have to be implanted and the woman could potentially hold all the control and the man none.

One could argue that if an out-of-wedlock natural conception was to be detected immediately after intercourse, the option for abortion would render the situation the same as those involving cryopreserved embryos – if the man wishes for his partner to terminate the pregnancy but his partner does not, it would lead to forced parenthood. Yet the law does not allow for lack of consent here to abolish the responsibility of fatherhood. Abortion is a much more invasive procedure than denying implantation of an embryo, and would violate the woman's right to control over what happens to her body.

Recognizing the ethical problem of bargaining away a child's right to have two parents and child support from both parents, and recognizing that a woman generally has a more vested interest in cryopreserved embryos, given a woman's more limited

options compared to men when it comes to reproduction, it is nevertheless arguable that where the woman is able to conceive children in other ways and/or with other partners, it would not be right to force a man to become a father.

A number of divorce cases involving disputes over the disposition of cryopreserved reproductive cells illustrate the court's support of the policy against forced parenthood. While these cases are more directly concerned with the legal status of reproductive cells and therefore are dealing with custody issues, these issues are directly related to parenthood, at least when it comes to genetic parenthood. Thus the courts in these cases apply the policy against forced parenthood even to cases of biological parenthood without forced parenthood. In cases where there is no prior contract regarding the disposition of cryopreserved reproductive cells or parenthood resulting from the use of such cells, the policy against forced parenthood will lead to a ruling in favor of the party seeking to destroy the cells. In *Davis v. Davis*,⁷⁶ the court established a balancing test to determine the fate of cryopreserved embryos. The third prong of this test was to consider the relative interests of the parties, weighing in favor of the party against procreation, unless the (pre)embryos in question were the only means by which the other party could beget a child.⁷⁷ The *Davis* court, however, in dicta discussed the role of a contract in divorce cases, stating that had a contract existed between the parties in this case, it would have served as a useful guideline. The court was therefore implying that in divorce cases involving a dispute over the fate or disposition of cryogenically preserved embryos, the terms of any existing contracts between the parties would dictate.⁷⁸ Six years later in 1998, a

76. 842 S.W.2d 588 (Tenn. 1992). This was a major case regarding the legal status of cryopreserved embryos. In this case, a divorced husband and wife each sought control of their cryopreserved embryos created during marriage, the man to destroy them, the woman to donate them to childless couple.

77. *Id.* 604.

78. Apel, *supra* note 34, at 665.

New York court in *Kass v. Kass*⁷⁹ found itself dealing with a *Davis*-type case but with a contract. The *Kass* court followed the *Davis* dicta to uphold the contract.

While the New York court in *Kass* was willing to enforce contractual parenthood, other state courts have nevertheless continued to uphold a policy against forced parenthood, despite the existence of a contract. In *A.Z. v. B.Z.*, a Massachusetts court found itself with another divorce case involving a contract, but the Massachusetts court went against the *Kass* holding and the *Davis* dicta in disregarding the contract terms in favor of the “no forced parenthood” principle.⁸⁰ A New Jersey court in *J.B. v. M.B.* also disregarded a similar contract in following the same principle.⁸¹

2. Strict Liability Theory of Parentage

The opposing principle to that against forced parenthood is the strict liability theory of parentage. Traditionally, the presence of a genetic relationship determined legal parenthood, and lack of intent or consent was an insufficient defense to absolve a man/woman from legal parental obligations. Fatherhood was unavoidable despite the fact that the couple had no intention to produce a child, the man wanting abortion while the woman did not (the man could neither force the woman to get an abortion, nor avoid the consequential parental responsibilities), the woman had tricked the man, the child was produced from the wife’s extramarital affair, or the man was raped.⁸² Under the strict liability theory of parentage, motherhood can also be enforced; this occurs in the 36 states that prohibit late-term abortions.⁸³

79. 696 N.E.2d 174 (N.Y. 1998).

80. 725 N.E.2d 1051, 1057 (Mass. 2000).

81. 783 A.2d 707, 717 (N.J. 2001).

82. *Apel*, *supra* note 34, at 668-669.

83. Guttmacher Institute, *State Policies in Brief: State Policies on Late-Term Abortions*, Jan. 1, 2008, available at http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

The strict liability policy of parenthood despite lack of consent is based on the overriding importance of the child's right to have a father and right to access to child support.⁸⁴

The exception in strict liability parentage states is the anonymous sperm donor – the genetic father who would not be held to legal fatherhood. But this is a very strictly defined category: a “sperm donor” is the provider of male gametes for the purpose of assisted reproduction.⁸⁵ This limited definition of the policy exception is meant to avoid providing a loophole for men who voluntarily engage in sexual intercourse to disclaim parental responsibility.⁸⁶

Thus in states that adopt a strict liability parentage policy, an ex-spouse will become a parent of children resulting from assisted reproduction using his/her frozen gametes or embryos, even against his/her will. In the context of where one of the spouses has died, posthumously conceived children will be able to inherit from their dead parent.

D. Legal Recommendations on Posthumous Parenthood

In terms of recommendations for legislation regarding posthumous parenthood, statutes should eliminate gender specifications by replacing “husband” or “wife” or analogous terms with gender neutral words like “spouse.”⁸⁷

When drafting a will or trust, if an individual has reproductive cells stored in a bank, (s)he should state how such cells should be disposed of in the event of his/her death. If the individual intends for his/her cryopreserved gametes or embryos to be used to produce children

84. Apel *supra* note 34, at 668.

85. *Id.* 669.

86. *Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994). In this case, a man (Straub) agreed to be a “sperm donor” to a woman, with the sole purpose for her to conceive a child and no other parental obligations. However, the manner of his sperm donation was not the traditional method of going through a fertility clinic; it was through sexual intercourse. The court held Straub, despite the contract, to be the legal father of the child. The decision was based on public policy in upholding the child's overriding right to having a legal father and obtaining child support, and to avoid providing a legal loophole through which men could avoid parental responsibilities when voluntarily engaging in sexual intercourse that could result in a child.

87. Rubenstein, *supra* note 14, at 22.

posthumously, the individual should set aside part of his/her estate to be reserved for a certain amount of time to be given to such children. If no child is born within that time period, then this share of the estate can be distributed among the other beneficiaries. A will or trust should explicitly define children, issue, or other similar terms to include or exclude posthumously conceived children. Contracts can be used, e.g. to provide that in the event of a divorce, all embryos created during marriage be destroyed. Contracts should, however, not be allowed to be used to bargain away the rights of the child.⁸⁸

¶ 1505 Rights of ART Children⁸⁹

¶ 1505.1 Four Legal Approaches to Inheritance Rights of ART Children

A. Decedent's Estate Plan

They say that no request is more compelling than the wish of a dying person. The law tends to agree (in most cases). If a decedent in his/her will provides for posthumously conceived children, it should be followed. If gamete or embryo donors do not wish for resulting children to inherit from them, they should clearly state such intent in their wills. Note, however, that there is a distinction between consent provided in a will versus consent provided in another record at the time of gamete or embryo storage. The latter may be an indication of decedent's intent, but is not as strong as an express testamentary statement.

B. Pretermission

Pretermitted child statutes protect biological children not specifically provided for in the wills of their biological parents. Absent express language of exclusion, the law presumes that such children were left out by mistake, and they are therefore considered legal

88. Apel, *supra* note 34, at 680.

89. See Appendix, Exhibit C, TABLE IV-1: Determining Issue for Inheritance.

heirs despite their exclusion. All but one state (Wyoming) recognize inheritance rights for inadvertently pretermitted children.⁹⁰

The Uniform Probate Code (UPC) §2-302 provides for shares of estates to pretermitted children in the absence of express disinheritance. Absent an express statement of disinheritance, posthumously conceived children, although not explicitly referred to in a will, are eligible for inheritance under the principle of pretermission. Such a policy is based on the fact that the decedent's act of cryopreserving his/her gametes or embryos implies intent to include resulting children. This policy is, however, controversial, since, as described in the above discussion on intent, the act of cryopreserving reproductive cells does not necessarily corroborate with intent to become a parent to any and all resulting children. The opposite view is to have a legal presumption of exclusion absent an express testamentary statement of inclusion.⁹¹

Another complication is the application of pretermitted heir statutes to a decedent's grandchildren. Awaiting the birth of a posthumously conceived grandchild could further increase the time delay in estate administration. One way around this would be to limit pretermitted heir statutes to allow posthumously conceived children to inherit from, but not through, their parents.⁹² Thus the best way to avoid unintended pretermission is to specifically address posthumously conceived children in the will.

C. Intestacy

The issue of posthumously conceived children in intestacy situations is ambiguous. Proponents of exclusion cite the need for finality in estate administration. Proponents for inclusion cite equality – the unfairness of denying posthumously conceived children inheritance rights based on the circumstances of their birth, over which they had no

90. Scott, *supra* note 9, at 973 n. 64.

91. *Id.* 973.

92. *Id.*

control. One alternative is to have a statute of limitations, a specified period of time after death within which posthumous children must be conceived or born in order to inherit.⁹³ Where an embryo donor dies intestate, the division of his/her estate is governed by intestacy laws, which extend to cover children resulting from any of decedent's gametes, even donations. Arguably, posthumous children, if not legally adopted, could assert an inheritance claim against their biological parents.⁹⁴

D. Government Support Obligations

This fourth approach actually deals with a different set of rights of posthumously conceived children – government benefit entitlements that are not part of their parent's estate, namely social security benefits under the Social Security Act. Social security benefits, despite their distinction from inheritance rights, are nevertheless also dependent upon the finding of a legal parent-child relationship.

Under the Social Security Act (SSA),⁹⁵ a child is eligible to receive social security benefits if one can establish the child's dependency on the deceased parent *at the time of death*. Section 402(d)(C)(ii) of the Act defines eligible children as those dependent upon decedent *when decedent died*. There are, however, two exceptions. The first is a presumption of dependency for disabled children. The second is if the child *would have been* treated as the decedent's natural child under the *state intestacy laws* in the state where the decedent died. Thus the child's *federal* eligibility is dependent upon *state* law. This dependency of federal rights on varying state laws results in non-uniform treatment of similarly situated applicants.⁹⁶

93. *Id.* 975.

94. Kindregan, *Embryo Donation*, *supra* note 17, at 54-56.

95. 42 U.S.C. Chapter 7.

96. Scott, *supra* note 9, at 976.

In 1965, however, Congress amended the SSA to in an effort to remedy the unequal impact of state law reliance. Congress' concern was the unequal treatment of children born out of wedlock; back then, Congress did not foresee posthumously conceived children.⁹⁷ Therefore as it stands, there is a gap in the SSA provisions of eligibility with respect to posthumously conceived children and the legislation should be amended again to include them and other possible categories of children in the future. Nevertheless, the absence of a Congressional amendment would not necessarily preclude the implementation of a consistent federal policy, as the SSA has preemptive jurisdiction over state courts regarding the SSA.⁹⁸ There are, on the other hand, two limitations to the SSA's preemptive jurisdiction: (1) the SSA is not bound to a state court decision if it was not a party to the litigation; (2) the SSA is bound to respect the decisions of the highest court of a state.⁹⁹

The main social security benefits cases, all taking place within the last few years, are: *In re Estate of Kolacy*,¹⁰⁰ *Woodward v. Commissioner of Social Security*,¹⁰¹ *Gillett-Netting v. Barnhart*,¹⁰² and *Stephen v. Commissioner of Social Security*.¹⁰³ In *Kolacy*, a mother sought a court declaration that her twin daughters, conceived from her dead husband's cryopreserved sperm and born 18 months after his death, were intestate heirs of the deceased husband for the daughters' entitlement to government Social Security benefits. The New Jersey court held that a man who cryopreserves his sperm can instruct in his will, or in other non-testamentary documents referenced in his will, for parts of his estate to be held for future children. This was similar to the "Statement of Wishes" rule in *Hecht*. The court determined

97. *Id.*

98. *Id.* 977.

99. *Id.* notes 101 and 102, citing *Gray v. Richardson*, 474 F.2d 1370, 1373 (6th Cir. 1973); S.S.R. 83-37c (Cum.Ed. 1983).

100. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000)

101. 760 N.E.2d 257 (Mass. 2002).

102. 371 F.3d 593 (Ariz. 2004).

103. 386 F.Supp.2d 1257 (M.D. Fla. 2005).

that the twins were the intestate heirs of decedent; the reasoning was based on the general intent of the New Jersey statute, not its literal words, which did not recognize for inheritance purposes children born more than 300 days (approximately 10 months) after their father's death. In addition to legislative intent, the court also invoked the principle of fairness and a three-pronged test. The three prongs of the *Kolacy* test were: (i) proof of a genetic relationship between the child(ren) and decedent; (ii) decedent's consent or intent to be a parent; and (iii) no interference with legitimate state interests by the granting of the benefits.

Woodward involved the same fact pattern as *Kolacy*. The Massachusetts court in *Woodward* held that "posthumously conceived children born more than nine months after their father's death may" become heirs to their father's estate under certain circumstances. The *Woodward* court used a three-pronged test, similar to the *Kolacy* test, for determining whether a child is "issue" for the purpose of inheritance.¹⁰⁴

In *Gillett-Netting*, the husband of a couple, when diagnosed with cancer, cryopreserved his sperm so that his wife could have their children, whereupon she successfully did following his death. The mother's application for her children's social security benefits was denied on the basis that her posthumous children were deemed to be not dependent on decedent because they were not alive when their father died and, according to the district court, were therefore not the legal children of their father. The district court granted summary judgment for the Social Security Commissioner, stating that the children were not entitled to the social security benefits. The court distinguished *Kolacy* and *Woodward*, stating that in the latter case, Massachusetts intestacy law contained a provision for posthumously conceived children whereas

104. *Woodward*, at 268-269 (3-Prong test: (i) genetic relationship between child and decedent; (ii) consent (affirmative and unequivocal) by decedent to posthumous conception and child support; if no written record of consent, then decedent's intent must be shown for same; (iii) no interference with the administrative goals of legislature).

the case at bar did not; in *Kolacy*, although the fact pattern and legal situation was almost identical to the case at bar, the court simply dismissed it on the ground that because it was a different state, the case was not persuasive.¹⁰⁵ The appellate court reversed the district court's holding and remanded the case, asserting that posthumously conceived children are "children" under the Social Security Act.

The *Gillett-Netting* appellate court used a two-part analysis to determine the eligibility of posthumously conceived children for social security benefits. The first question was to ask whether the applicant (i.e. the posthumously conceived child) satisfied the definition of "child" under the SSA? The Court found that the children did satisfy this definition, which had been interpreted by the SSA and courts to include all natural or biological children of decedent. The Court extended the definition of biological offspring to include biological offspring that are conceived posthumously. The second question was to ask whether the applicant satisfied the definition of "dependent" in relation to decedent under the SSA? The conclusion to this would be predicated upon the definition of legitimacy; under the SSA, any "legitimate" child would automatically be considered "dependent", thus there would be no need to show actual dependence in such cases.

Other states courts might distinguish *Gillett-Netting* on the basis that under Arizona law, all biological or natural children are legitimate, whether or not they are born within wedlock, and all legitimate children are presumed to be dependents; there is no need to show actual dependence.¹⁰⁶ In *Gillett-Netting*, since the children were found to be legitimate (by virtue of their biological relationship) under the first step of the analysis, they were therefore also "dependent" under the SSA and therefore eligible to inherit the social security benefits.

105. *Gillett-Netting* at 969.

106. Goodwin, *supra* note 10, at 270.

In *Stephen v. Commissioner of Social Security*, the Florida court denied the child social security benefits from the deceased parent because decedent had not provided for the child in his will. The *Stephen* Court distinguished this case from Arizona's *Gillett-Netting* in that Florida's statute specifically addresses posthumously conceived children, whereas Arizona's statute does not. Similarly, the laws of New Jersey (*Kolacy*) and Massachusetts (*Woodward*) also do not specifically address posthumously conceived children. Unlike the Massachusetts and New Jersey courts, the Florida court in *Stephen* asserted that when it comes to the legal issues of posthumously conceived children, it is up to the legislature, not the courts, to decide the law.

1. Social Security Cases vs. Intestacy Cases

While instructive with respect to posthumously conceived children's property claims based on claims of parentage, the social security cases are distinguishable from intestacy cases in a number of respects. Firstly, decedent's intent to father posthumously was fairly clear in *Kolacy* and *Woodward*. In both cases, decedent had taken affirmative steps in banking his sperm prior to undergoing cancer treatment that would have left him unable to produce viable sperm afterwards. Secondly, in social security cases, there are no other beneficiaries, and therefore, unlike in intestacy cases, there are no other competing claims to rights deriving from parentage. Thirdly, in *Kolacy* and *Woodward*, there were no complications arising from a blended family, i.e. where there are children from another spouse of a prior marriage.¹⁰⁷

¶ 1505.2 Uniform Probate Code (UPC)

A recent set of proposed amendments to the Uniform Probate Code directly address children of assisted reproduction. Proposed amendments to §2-108 (Afterborn Heirs) state the following criteria for posthumous children to inherit: (a) the child must have been in gestation at

107. Bass, *supra* note 26, at 22.

the time of death and survive 120 hours after birth; (b) if the child was not in gestation at the time of death, the individual is a child of the putative parent if: (1) the individual lives 120 hours after birth; (2) there is a genetic relationship between the individual and putative parent, and the decedent's parental rights or obligations are not terminated under the applicable state laws; (3) decedent provided consent in a record to posthumous conception; (4) there is a filing requirement – the complaint to determine the intestacy status of the posthumously conceived child must be filed in an appropriate court before the final distribution of the putative parent's estate and within three years of death; (5) the court shall determine the child's status within 30 days after the above requirements have been satisfied.¹⁰⁸ Note that this does *not* require that decedent consented to be a parent. The proposed §2-108 takes an opt-in approach – the default is that decedent is not a parent of the posthumously conceived child unless he specifically provided consent on a record.

A. Pre-1990 UPC

Under the pre-1990 version of the UPC, inheritance eligibility was based on conception – a posthumous child was eligible to inherit if she was conceived before but born after death. Thus although not anticipated by the drafters, the pre-1990 UPC could be construed to include children born resulting from cryopreserved embryos created prior to but implanted after death.¹⁰⁹ States that have adopted the pre-1990 UPC §2-108 are: Alabama, Arkansas, California, Florida, Louisiana, Maine, Maryland, Nebraska, New York, Oregon, Tennessee, and Wyoming. Five states have adopted the UPC in part; these states also base inheritance eligibility on conception, but their statutory language is not exactly the same: Colorado, Georgia, South Carolina, Virginia, and Wisconsin.

108. Chester R, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROPERTY, PROBATE & TRUST J. 727 (Winter 2004).

109. Bass, *supra* note 26, 24.

B. 1990 Amendments to UPC

Congress amended the UPC in 1990 to plug up a loophole in the pre-1990 UPC by changing the focus from conception to gestation. A child would be eligible to inherit if it was in utero at the time of her father’s death and it survived for a minimum of 120 hours after birth. The loophole in the old statute was that children resulting from cryopreserved embryos created before death but implanted thereafter would still be qualified to inherit.¹¹⁰ Twelve states have adopted the 1990 amended UPC: Arkansas, Arizona, Hawaii, Idaho, Mississippi, Minnesota, Montana, New Jersey, New Mexico, North Dakota, South Dakota, Utah, and West Virginia. Table V summarizes states and their laws regarding posthumous children.

Statutes on Posthumously Born Children¹¹¹	
Law	States
No statutory provision	CT, MS, VT
Posthumously born children can inherit without further conditions	DE, DC, IL, KS, MA, MO, NV, NH, OK, RI, TX, WA
“Begotten” before death (but born thereafter) can inherit	IN, IO, OH, PA
Conceived before death + Born alive (pre-1990 UPC §2-108 or similar language)	AL, AR, CA, FL, LA, ME, MD, NE, NY, OR, TN, WY
Conceived before death + Born alive + Survive 120+ hours (pre-1990 UPC + survival requirement):	CO, GA, WI
Conceived before death but born thereafter (and children resulting from assisted conception born after decedent’s death who are determined to be relatives of decedent under applicable statute), inherit as if born during decedent’s lifetime	VA
Born within 10 months of death	ID, KY, NC
Conceived before death + Born within 10 months	SC
Gestation at death + Born alive + Survive 120+ hours (UPC §2-108)	AK, AZ, HI, MI, MN, MT, NJ, NM, ND, SD, UT, WV

110. *Id.*

111. Bass, *supra* note 26, at 25 (chart).

In the June 2007 proposed amendments to the UPC's intestacy provisions, §2-118 states that if a child of assisted reproduction other than a child born to a gestational mother is born during the parent's lifetime or within 45 months after the death of a parent, the child can inherit from the intended parents. Although the proposed amendment does not address surrogacy arrangements, it does deal with the inheritance rights and rights to class gifts of ART children. Proposed § 2-119 states that a child born to a gestational surrogate mother may inherit only from the intended parents and under the proposed amendment to §3-916, the distribution of an estate need not be delayed unless the estate administrator has knowledge or notice of intended posthumous conception.

¶ 1506 The Probate Hourglass and Class Gifts

As noted above, posthumously conceived issue via ART create issues with respect to inheritance rights in two primary respects: (a) With respect to estate administration, should there be a time limitation requiring posthumously conceived children to be born within to qualify for inheritance rights; and (b) with respect to the Rule Against Perpetuities (RAP), should it be modified to include the possibility of posthumously conceived children?

The Rule Against Perpetuities sets a time limit within which interests in property must vest. Any interest that lies outside of this time period is void. The justification behind the RAP is to bind the "dead hand" within certain temporal limits of control, a policy meant to prevent a decedent's passing on of property to remote descendants and the resulting concentration of wealth in society.

Another function that the RAP serves is to preserve the market value of property by preventing the excessive fractionalization of ownership over a long period of time. When it comes to future interests in property, only those vested within the RAP time limit will be valid;

all other possible future interests beyond this time are excluded. Of course, on the other hand, the cost of this is the denial of future interests to those who would otherwise be entitled to property ownership. This problem becomes even more poignant in light of the testator's intent. If the RAP striking of a future interest results in the property being conveyed to an unintended recipient, then that recipient is unjustly enriched.¹¹² There is a high risk of this in the case of posthumous children created from cryopreserved reproductive cells. Thus honoring testator intent and preventing unjust deprivation and enrichment are additional justifications for amending the RAP to account for posthumous ART children.¹¹³

While the RAP applies to all property interests, it is most commonly addressed in the areas of wills and trusts. Black's Law Dictionary defines the RAP as "[t]he common law rule prohibiting a grant of an estate unless the interest must vest, if at all, no later than 21 years (plus a period of gestation to cover a posthumous birth) after the death of some person alive when the interest was created."¹¹⁴ The beneficiaries living at the time of death are designated as the "lives in being". This RAP principle excluded afterborns (beyond the traditional 9-month gestational period) on the presumption that executors or settlors knew the facts of life – that it was biologically impossible for women to bear children beyond their fertility stage (usually within the prepubescent-menopausal age window of about 12 to 55 years old).¹¹⁵ But the facts of life have changed. Modern science has made it possible for both the decedent and his/her children to have children via ART long after their deaths. The RAP, on the other hand, did not contemplate

112. Hoffman S & Morriss AP, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 Ga. L. Rev. 575, 589-590 (2003-2004).

113. *Id.*

114. *Black's Law Dictionary*, 8th Ed., "Rule Against Perpetuities."

115. Leach WB, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*. 48 ABA J. 942, 942 (1962).

posthumous conception. Thus advances in society have raised new legal conundrums in the areas of trusts and estates, and the law must now adapt thereto.

A subset of the RAP issues deals with the closing of classes. There are two ways to close a class. Under the first method, a class can close once all persons capable of producing beneficiaries die.¹¹⁶ Under the second method (referred to as the Rule of Convenience) a class can close once the first member of the class becomes entitled to claim his share.¹¹⁷ Such artificial closing of the class thereby excludes other potential class members who may not yet be born.

Testators often devise bequests to a class of persons such as “my children.” Assume the decedent bequeathed his property to his children who attain age 21. Assume that at his death his two children are ten and twelve years old. Since, under traditional circumstances, he can have no more children after his death, the class is closed. And if instead he left a bequest to his grandchildren who reach 21 it would be valid since any grandchild will reach age 21 within 21 years following the death of his last surviving child.

But if we consider the possibility of posthumously conceived children, a class would not close at the time of death and the likelihood of a class gift failing to vest within the RAP period is significant due to the fact that the decedent’s gametes can be used to conceive a child many years after his death, and also more than 21 years after the death of the life in being. If a trustee were to close a class upon the death of all persons capable of producing beneficiaries, the trustee would be liable for premature closing and breach of fiduciary duty to afterborn

116. 20 QUINN. PROB. L. J. 47, 54 (2006).

117. *See e.g.*, *Andrews v. Partington* (1791) 3 BRO CC 401 (unless a contrary intention is expressed, where at the time of the settlement of a trust, the class of beneficiaries is not identified, it will close as soon as the first member of the class becomes entitled to take his share).

beneficiaries.¹¹⁸ Whether such a possibility should mandate a change in the long standing RAP is questionable. It is argued by some that the current rule needs no amendment since in many instances there is one parent surviving whom the child can inherit from and if the decedent wishes to provide for such posthumously conceived child there is no reason why he cannot by providing specifically therefore under his will or trust subject, of course, to the rule. And finally, it would not be in the state's interest of prompt administration of estates to preserve property for an extended period for some child that may be born long after his death.¹¹⁹

Some states have adopted a modified version of the common law RAP. The Uniform Statutory Rule Against Perpetuities (USRAP) adopts a 90-year "wait and see" period. Where frozen embryos may be involved, the question is whether the frozen embryo is a "life in being." The USRAP allows for conditional validation of non-vested interests. Thus interests not vested at the time of death would be valid as long as they satisfied the condition that they vest before the 90th anniversary of the death.¹²⁰ An example of this would be a child conceived posthumously from decedent's frozen sperm fifty years after the death. However, even a 90-year period could leave other potential beneficiaries of a trust or estate uncertain for many years, sometimes beyond their lifetime.

As an alternative, the law could provide for some posthumous children and avoid the undue delay of administration by providing for a time limit within which a child must be born after the genetic or intended parent's death to inherit from the estate. The commentary to the Restatement (3rd) of Property: Wills & Other Donative Transfers, discussed *supra*, suggests that if the child is born within a reasonable time after the parents' death the child should be treated as

118. *Supra* note 116, at 54.

119. Brashier RC, INHERITANCE LAW & THE EVOLVING FAMILY, 190 (Temple Univ. Press 2004).

120. *Id.*

an heir.¹²¹ Although approximately 24 states have repealed or significantly extended the rule, many states still require a trust to terminate within 21 years after the death of those living when the trust was created.

The second issue when it comes to the RAP and class gifts returns to the status of reproductive cells, i.e. frozen sperm, ova and embryos. As discussed *supra*, common law has generally deemed gametes – the product of individuals – to be proprietary, while embryos – the product of two individuals – occupy a quasi-proprietary status. Under these concepts, it is the frozen embryos at issue in the RAP, as they may or may not be eligible to be counted as a “life in being”. Since a life in being is a person, if one defines a “person” as coming into existence at conception, then any frozen embryo existing at the time of death would be eligible to be included as a life in being; if one defines a “person” as coming into existence only after birth, then no embryo would qualify to be a life in being.

Alternatively, the issue of determining “life in being” where frozen embryos are involved could be resolved without having to answer the question of whether an embryo is a person. Hoffman and Morriss propose getting around this by designating an alternative life in being, e.g. the testator or the surviving partner.¹²²

¶ 1507 Legal Recommendations

¶ 1507.1 Legislative Recommendations

States should acknowledge the scientific and technological realities of the present and the future and amend their laws accordingly. Suggested amendments and additions are:

121. Restatement (3rd) of Property: Wills & Other Donative Transfers, §2.5, cmt. 1 (1999).

122. Hoffman & Morriss, *supra* note 112, at 629 (“For example, . . . ‘to such of my children as are born from my stored genetic material within twenty-one years of my death or the death of my spouse, S, whichever comes later.’”)

- States currently lacking laws protecting donors from child support should adopt them to avoid the invalidation of valid protective contracts.
- Amend the UPA to include greater specifications (to replace ambiguous terms such as “placement” and what would constitute valid “consent in record”), a time limit on placement of sperm, eggs and embryos, and a limit on the number of posthumously conceived children that can inherit.¹²³
- Posthumous children of the donor’s widow conceived from the donor’s sperm should be regarded as the legitimate children of the decedent donor, at least if the widow has not remarried prior to conception.¹²⁴ This policy could also be extended to legally recognized partners and widowers.
- Establish a “Window of Fertility”¹²⁵ statute of limitations to provide for a specified period of time after death within which cryopreserved gametes or embryos must be used to produce posthumous children in order for such children to be eligible for inheritance. Great Britain is an example of a country which has adopted this policy. This time limit would be a compromise between not denying any resulting children the right to support from two parents, and preserving efficiency of estate administration and finality for the other beneficiaries to the estate. For example, a “window of fertility” provision could be two years after death or remarriage, whichever comes first.

123. Scott, *supra* note 9, at 983.

124. Leach, *supra* note 1150, at 944.

125. Rubenstein, J. *supra* note 14, at 21 (citing Burkdall, Lisa M).

- Amend the Social Security Act to extend the “equality of treatment under the law” provision that was created for children born out of wedlock to include posthumously conceived children.¹²⁶

¶ 1507.2 Reproductive Clinics

- Encourage donors and clients to consider and record their intentions regarding their cryopreserved sperm, eggs and embryos.
- Require sperm banks and other gamete preservation facilities to have donors sign a document indicating what is to be done with their gametes in the event of death – posthumous conception, anonymous donation, destruction, etc.¹²⁷ However, if a client was to indicate that his/her gametes were to be used for posthumous conception of his/her children, the law should place a time limit - e.g. two years plus 300 days of gestation – within which posthumous children must be born after death in order to be eligible for inheritance.¹²⁸
- Focus should not be so much on the reproductive liberty of the parents (although important), but rather, greater emphasis should be placed by the law on the responsibility of parents for ensuring the rights of their children.¹²⁹

¶ 1507.3 Public Policy Guidelines/Suggestions for Courts to Follow

- Posthumous children of the donor’s widow conceived from the donor’s sperm should be regarded as the legitimate children of the decedent donor, at least if the

126. Scott, *supra* note 9, at 977.

127. Atherton R, *En ventre sa frigidiaire: Posthumous Children in the Succession Context*. 19-2 LEG. STUDIES 139, 161 (June 1999).

128. Chester R. *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*. 33 HOUS. L. REV. 967 (1996).

129. Atherton, *supra* note 127, at 163.

widow has not remarried prior to conception.¹³⁰ This policy could also be extended to legally recognized partners and widowers.

- The “duration of the male ‘life in being’ should be [re]defined as the period of his reproductive capacity, including any postmortem period during which his sperm [or her ova] remains fertile.”¹³¹

¶ 1507.4 Wills & Trust Drafting Recommendations

Likewise, trust and estate planners also need to modernize their practice with the same considerations when it comes to planning with their clients. Some suggestions for trust and estate planners to consider are:

- Add question whether client wishes to benefit posthumously conceived or implanted children to trust drafting checklist. Ask clients to consider and record their intentions with respect to any present or future cryopreserved gametes or embryos – their own and those of their children.
- Include a standard will/trust clause defining “posthumously conceived children.” See Exhibit D in the Appendix for some examples.
- Consider substituting “children” or other issue with alternative “life in beings”, such as the testator or surviving partner.¹³²
- Include in wills and trusts a Perpetuities Savings Clause, i.e. a clause which saves the will or trust from perpetuities violations.¹³³
- Consider whether to set aside a portion of the estate in trust for potential future children. If no children are born after a certain period of time, then that portion

130. Leach, *supra* note 115, at 944.

131. *Id.*

132. Hoffman & Morriss, *supra* note 112, at 629.

133. Leach, *supra* note 120. (citing Leach WB & Logan DJK, 74 HARV. L. REV. 1141 (1961)).

can be redistributed among remaining heirs. This would be a middle-of-the-road approach that would achieve a better balance of reproductive liberty, children's rights, and estate administration by replacing extremely lengthy estate distribution periods with only a slight burden.

¶ 1508 CONCLUSION

As science, technology and society continue to evolve, so must the law. Use of assisted reproductive technologies has been and will continue to expand. Advances in medicine and quality of life have developed new ways to bring about life after death. Likewise, such advances have also created new reasons for depositing reproductive insurance at fertility banks.¹³⁴ In both cases, the new possibilities raised by these advances have created corresponding consequences on parenthood and the Rule Against Perpetuities.

The status of cryopreserved gametes and embryos presents a threshold issue, as it determines the fate of the reproductive cells and the possibility of posthumous children; this in turn confounds the definition of "life in being" for the purpose of measuring the RAP and creates the potential for litigation among heirs.

When it comes to defining parenthood, the law has approached the issue via various mindsets, from the biomedical (genetic approach) to the legal (contractual or intent-based approach), and these approaches are not mutually exclusive. Ultimately, resolving these the issue of issue will entail reforms in drafting wills and trusts and related legislation.

134. For example, chemotherapy or going into space.

APPENDICES

¶ 1509 Exhibit A

Assisted Reproductive Technologies (ART's)	
ART Technique	Procedure*
Cryopreservation	Cells and tissues (sperm, ova, ovaries or embryos) are frozen with liquid nitrogen.
Artificial Insemination (AI)	<ol style="list-style-type: none"> 1. Sperm is taken from husband, donor or both. 2. Sperm is introduced into woman's vagina, cervical canal, or uterus.
In Vitro Fertilization (IVF)	<ol style="list-style-type: none"> 1. The would-be mother is given hormone treatment to produce multiple oocytes (ova or eggs).^{****} 2. Gametes from the parents are extracted – ova from female, sperm from male. 3. Fertilization takes place in a Petri dish, creating a zygote, which is allowed to develop into a pre-embryo. 4. Genetic screening of the pre-embryos; those with genetic abnormalities, e.g. Huntington's disease, are screened out. 5. The pre-embryos are implanted into the female's uterus. 6. Surplus (pre)embryos created are cryopreserved and stored for future use.
Zygote Intrafallopian Transfer (ZIFT)	<ol style="list-style-type: none"> 1. Fertilization in vitro. 2. Implantation of zygote into fallopian tube.
Gamete Intrafallopian Transfer (GIFT)	<p>Similar to IVF. Transfer of unfertilized ovum and sperm into fallopian tube. Recipient woman must have healthy fallopian tubes.</p> <p>Although it is possible to have posthumous children using this technology, GIFT is currently an unlikely choice of assisted reproduction, given its higher risk compared to IVF.</p>
Surrogacy Traditional Gestational	<p>Birth Mother ≠ Legal Parent</p> <p>Traditional: Birth mother = Genetic mother</p> <p>Gestational: Birth mother ≠ Genetic mother</p>
Cloning (Artificial)	Somatic Cell Nuclear Transfer (SCNT) - Ovum is extracted, its nucleus is removed, and then replaced with genetic material from a somatic cell. Like natural cloning (i.e. naturally occurring identical twins), SCNT artificial cloning results in offspring that is genetically identical to one parent who donated the somatic DNA.

* AI, IVF, GIFT, ZIFT sources: VanCannon K, *Fathering a Child from the Grave*, 52 DRAKE L. REV. 331 (2003-2004); Baby Center, www.babycenter.com.

^{****} Kindregan CP, Jr. & McBrien M, *Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos*. 49 VILL. L. REV. 169 (2004).

Artificial Insemination Donation (AID) & State Law ^{§§§§}							
	Written consent of husband required	AI laws make consenting husband legal father	Donor is not the legal father	Physician required to file information with state about AID	Provisions for confidentiality	State requires HIV screening on donor sperm	Felony to knowingly or recklessly donate sperm if known HIV positive
Alabama	X	X	X	X	X		
Alaska	X	X					
Arizona		X*				X	
Arkansas	X [‡]	X					
California	X	X	X		X	X**	X
Colorado	X	X	X	X	X		
Connecticut	X	X	X	X	X	X	
Delaware						X	
District of Columbia							
Florida	X	X				X	
Georgia		X [§]					
Hawaii							
Idaho	X	X	X	X	X	X	
Illinois	X	X	X		X	X	X ^{§§}
Indiana						X ^{††}	
Iowa						X	
Kansas	X	X	X	X	X		
Kentucky						X	
Louisiana		X				X ^{††}	
Maine							
Maryland		X				X	
Massachusetts		X					
Michigan		X				X	
Minnesota	X	X	X		X		
Mississippi							
Missouri	X	X	X	X	X		X
Montana	X	X	X	X	X	X	
Nebraska							
Nevada	X	X	X	X	X		
New Hampshire			X [†]				
New Jersey	X	X	X	X	X		

^{§§§§} Available at <http://www.kentlaw.edu/islt/TABLEI.htm> (last accessed September 23, 2007).

Artificial Insemination Donation (AID) & State Law §§§§							
	Written consent of husband required	AI laws make consenting husband legal father	Donor is not the legal father	Physician required to file information with state about AID	Provisions for confidentiality	State requires HIV screening on donor sperm	Felony to knowingly or recklessly donate sperm if known HIV positive
New Mexico	X	X	X	X	X		
New York	X	X					
North Carolina	X	X				X	
North Dakota		X	X			X	
Ohio	X	X	X		X	X	
Oklahoma	X	X		X	X	X	X
Oregon	X	X	X	X	X		
Pennsylvania							
Rhode Island						X	
South Carolina							X
South Dakota							
Tennessee		X					X
Texas	X	X	X				
Utah							
Vermont							
Virginia	X	X	X [#]			X	
Washington	X	X	X	X	X		
West Virginia						X	
Wisconsin	X	X	X	X	X	X	
Wyoming	X	X	X	X	X		

AID = Artificial Insemination Donation

* If consent to insemination is in writing, there is an obligation to support child.

‡ Prior to conducting artificial insemination the physician must obtain “from the woman and her husband or the donor of the semen a written statement attesting to the agreement to the artificial insemination.”

** State requires sperm donor sperm screening for HIV, viral hepatitis, human T lymphotropic virus-1, and syphilis.

§ Children “are irrebuttably presumed legitimate if both spouses have consented in writing to the use” of artificial insemination.

§§ Is not a felony for HIV positive person to donate, but is a felony if a physician uses HIV-infected semen for insemination purposes.

†† State requires donor sperm screening for HIV, syphilis and hepatitis.

" The sperm donor is not the legal parent of the resulting child “unless agreed to in writing by the donor and the woman.”

‡‡ State requires HIV testing for non-spousal donor sperm.

† Liable for support only if a written agreement with other parties has been signed.

The donor’s legal rights are implicitly terminated unless the donor is the husband of the gestational mother.

Determining Issue for Inheritance *****		
Issue	Legal Status	Legal Rights of Inheritance
Biological Children Alive at Time of Decedent's Death	Natural Issue by default.	Can inherit from estate and class gifts
Biological Children in Utero at Time of Decedent's Death	Natural Issue if born within 9 months of father's death.	Will be included in class gifts if born alive within 9 months
Children of Spouse but not Decedent	a) May be Included b) May be Excluded c) May be Included only if specified (custom drafted will)	Depend on legal status as determined in will
Adopted Children ("Adopted In")	Treated as biological/natural children unless expressly excluded. Adopted relatives treated as natural ones.	Some states require that the person be adopted as a minor to be included in a class gift All states provide that adopted relatives be treated as natural ones for intestacy purposes
Children "Adopted Out"	Not Issue. They become issue of new family into which they are adopted.	Children adopted out are no longer considered descendants for intestacy purposes
Non-Marital Children (i.e., born out of wedlock)	Descendant of Mother. Descendant of Father only with proof of biological relationship & paternity (consent or court ordered). a) Child is issue only if biological parents marry before child reaches majority age b) Child is issue regardless of marriage c) Custom draft the will	Can inherit from mother & her relatives Can inherit from father only if issue status can be established Distinction based on differences in ability to determine mother vs. father, but DNA testing is changing the common law
Nephews & Nieces	Not automatically issue	Must be specified exactly; nephews & nieces of spouse must be specified separately from decedent's biological nephews & nieces
Children of Modern Reproductive Technologies		
Intended Children Conceived via Assisted Reproduction	Treated as naturally conceived issue.	Same as naturally conceived issue

***** Blattmachr JG. & Graham ML, "The Issue of 'Issue.'" 5 INTERACTIVE LEGAL SYS. 2, *available at* http://www.mylegalnews.com/ilsdocs/Archives/04_2007_A1.htm (March-April 2007), accessed May 30, 2007.

Determining Issue for Inheritance *****

Issue	Legal Status	Legal Rights of Inheritance
Posthumously Conceived Children	Descendant only if: (<i>Woodward</i>) i) biological relationship to decedent ii) clear consent to legal fatherhood by decedent iii) clear consent to child support from decedent	Few states have legislated for this situation Most common law treat posthumous children as eligible for class gifts Posthumous child must be born before class closes (Suggested Rule)
Biological Children of Anonymous Donors to Sperm Banks	Not Issue.	Some states have laws protecting anonymous donors

¶ 1512 **Exhibit D** **Will or Trust Clauses to Incorporate Posthumously Conceived Children**

Form 1: Definitions: The terms “children” and “issue” and any variations thereof when used in reference to the Grantor shall mean the children of the Grantor and the Grantor’s spouse identified in this Agreement and their respective issue, and any children of the Grantor and the Grantor’s spouse hereafter born and their respective issue, and shall include persons born or legally adopted after as well as before the execution of this Agreement. The terms “children” and “issue” and any variations thereof when used herein to refer to persons other than the Grantor’s children and issue shall include persons born or legally adopted after as well as before the execution of this Agreement. “Issue” in any context shall include natural and legally adopted descendants of any generation. A child born after the death of its parent shall be deemed living at the time of such death only if such child attains the age of thirty (30) days **and was born within one (1) year of such parent’s death.** Notwithstanding any other provision hereof or of state law, the class of the Grantor’s (or any other person’s) “issue” shall not include an individual who is the Grantor’s (or such person’s) “issue” by virtue of legal adoption if such individual (i) was so adopted after the Grantor’s death and (ii) is older than the oldest other beneficiary of this Trust who was a living member of said class at the Grantor’s death. (Provided by Richard Marone.)

Form 2: An individual who is conceived by utilization of assisted reproductive technology shall be regarded as the child of his or her birth mother, and a child of the man to whom she is (or “was” in the case of a widow) then married, provided: (i) if the man is living when the child is born, he has consented to such assisted reproductive technology (and if the man is deceased when the child is born, such consent shall be presumed); (ii) and in the case of artificial

insemination, only his sperm was used; and (iii) if the man is living when the child is born, he claims the child as his own (or if the man is deceased when the child is born, the child is born within two (2) years of the date of his death and the widow has not remarried).

An individual whose birth mother served as a surrogate for another person shall not be a descendant of that birth mother or her spouse; rather, that individual shall instead be a descendant of the person for whom the birth mother served as the surrogate.

Subject to the above provisions, posthumous children are to be considered living at the death of their parent, provided either: (i) such children are conceived during both parents' lifetime, or (ii) if the children are conceived by utilization of assisted reproductive technology, the children meet the criteria set forth above. (Provided by Sebastian Grassi, Jr.)

Form 3: The term "issue" or "descendant" in this instrument shall include any biological descendant of mine (who is not adopted by a person who is not a descendant of mine unless the adoptive parent is married to a descendant of mine who is the parent of such person or unless the adoptive parent is married to a former descendant of mine who has died prior to the adoption) whose conception has resulted from the use of a frozen gamete of deceased descendant of mine and gamete of my deceased descendant's surviving spouse and that posthumously conceived descendant has been born or is in utero prior to the determination of the issue who would take the property outright or for whom it would be placed in a separate trust for descendants under this instrument. (Provided by Jonathan Blattmachr.)

Form 4 General exclusionary language:

References to descendants of any degree include adopted persons if adopted prior to attaining majority, but not otherwise; provided however, that neither a child born more than ten months

after the death of a person nor such child's descendants shall be deemed to be descendants of such person.

General inclusionary language:

A child born more than ten months after the death of one of its parents through the use of the sperm or eggs, as the case may be, of such deceased parent shall be deemed the child of such deceased parent, provided that (1) a genetic relationship between the child and the deceased parent has been adjudicated in a court of competent jurisdiction; (2) the deceased parent specifically consented in writing to the use of his or her sperm or eggs for the conception of a child after his or her death; (3) the deceased parent specifically consented in writing to the support of a child conceived and born after his or her death; and (4) said child is born within three years of such deceased parent's death, except to the extent the parentage of such child has been altered by legal adoption.

Inclusionary language for will::

References to children of mine shall specifically include any child conceived during my lifetime or within three years after my death through (1) the use of cryopreserved embryos deposited by me and my [wife/[partner/girlfriend], _____, at the XYZ Medical Center for the purpose of conceiving a child utilizing in vitro fertilization ("IVF") and/or (2) the use of the cryopreserved eggs of my [wife, partner/girlfriend] deposited at ABC Medical Center and sperm provided by me and/or (3) the use of any embryos created after the date of this will (but prior to my death), regardless of the date of implantation, using my sperm and the eggs of my [wife/partner/girlfriend].

Limitation on duration of trusts:

(A) Anything in this Trust Agreement to the contrary notwithstanding, each trust created by or pursuant to the provisions of this Trust Agreement which m by its terms, does not terminate at or prior to such time shall terminate (1) Twenty-One years after the death of the last to die of the descendants living on the date of this Trust Agreement of)a) the Grantor's parents, and (b) the Grantor's wife's parents, or (2) upon the expiration of the maximum period permitted by applicable law, if sooner. Upon such termination the Trustees shall distribute the then principal of such trust, together with all net income on hand or accrued, to the eldest person to whom income of such trust was distributable immediately prior to such termination.

(B)For purposes of this Article, the term "living" shall not include a descendant born after the applicable termination date by means of assisted reproductive technology or otherwise, regardless of whether applicable state law would relate the birth of such descendant to the applicable termination date. (Provided by Carole M. Bass)

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