

February 2020

## The New Ice Age: Addressing the Deficiencies in Arkansas's Posthumously Conceived Children Statute

Patrick Grecu  
*University of Arkansas, Fayetteville*

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### Recommended Citation

Patrick Grecu, *The New Ice Age: Addressing the Deficiencies in Arkansas's Posthumously Conceived Children Statute*, 72 Ark. L. Rev. 631 (2020).

Available at: <https://scholarworks.uark.edu/alr/vol72/iss3/3>

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**THE NEW ICE AGE: ADDRESSING THE  
DEFICIENCIES IN ARKANSAS'S POSTHUMOUSLY  
CONCEIVED CHILDREN STATUTE**

Patrick Grecu\*

**INTRODUCTION**

The ability to conceive a child using the preserved genetic material, or gametes, of a deceased person presents a number of legal issues for inheritance, estate planning, Social Security, and parental rights.<sup>1</sup> New medical advancements in assisted reproductive technology (ART) enable individuals to conceive children after their death, complicating the conventional methods of determining heirship of the decedent under state intestacy laws.<sup>2</sup> The purpose of intestacy law is to determine the succession of a decedent that dies without a will, or intestate, with the goal of carrying out the donative intent of the decedent.<sup>3</sup> Intestacy law has failed to keep pace with these technological advancements, which has left the legal status of posthumously conceived children (PCC) uncertain in many states.<sup>4</sup>

The increasing use of ART in human reproduction presents a fundamental issue for the application of intestacy law. These novel methods of reproduction could not be contemplated by lawmakers in decades past, and as a result, the impact of ART on

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\* J.D. Candidate, 2020, University of Arkansas School of Law. The author thanks Professor Steve Clowney for his inspiration to research this topic and his invaluable advice in writing this Note, Professor Danielle Weatherby for her guidance in legal research and writing, the staff of the Arkansas Law Review for their editing assistance, and his wife, Natalie, for her patience and encouragement.

1. Charles P. Kindregan, Jr., *Dead Soldiers and Their Posthumously Conceived Children*, 31 J. CONTEMP. HEALTH L. & POL'Y 74, 74 (2015).

2. Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347, 349-50 (2011).

3. Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 211 (2004).

4. Carpenter, *supra* note 2, at 350.

inheritance law is unavoidable.<sup>5</sup> The failure of many states' intestacy laws to recognize PCC as rightful heirs eliminates the child's ability to inherit through intestacy or receive a class gift through a will or trust.<sup>6</sup> This problem has been the topic of legal scholarship for over half a century, but the American legal system has yet to reach a comprehensive and uniform solution.<sup>7</sup>

In addition, the significance of state intestacy law governing PCC is often not realized until the family, on behalf of the child, seeks to obtain benefits for the child or is denied benefits because of the child's legal status.<sup>8</sup> For example, a child's ability to receive Social Security survivor's benefits can depend upon the child's inheritance rights under state intestacy law.<sup>9</sup> Similarly, life insurance policies and retirement plans that lack a designated beneficiary look to intestacy statutes to determine who receives the plan proceeds.<sup>10</sup> Considering that approximately fifty-eight percent of Americans do not have a will, state intestacy law is particularly important for PCC's inheritance rights.<sup>11</sup>

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5. Melissa B. Vegter, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate*, 38 VAL. U. L. REV. 267, 272 (2003).

6. Carpenter, *supra* note 2, at 401.

7. Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 92 (2004).

8. Carpenter, *supra* note 2, at 359.

9. *Id.* Consider this unfortunate and familiar story. Paula and John, a married couple, learn that John has been diagnosed with cancer. Because chemotherapy treatments could likely cause sterility, the couple decided to have a sample of John's sperm preserved in case they wanted to have children in the future. During this process, John provided legal consent for his wife to use his preserved gametes to conceive a child. Eventually, John succumbed to cancer despite his chemotherapy treatments. Nine months after John's death, Paula conceived a son with John's frozen sperm using ART. Three months after her son was born, Paula applied to the Social Security Administration for survivor's benefits for her child, only to be denied. Because state intestacy law did not address posthumously conceived children, her son could not receive these benefits despite John's lifelong contributions into Social Security. This real-life account was taken from the Arkansas H.B 1904 Presentation to the House Committee on Aging, Children and Youth, Legislative & Military Affairs on March 18, 2015. See *To Permit a Child Conceived Through Assisted Reproduction After the Death of a Parent to Inherit Real or Personal Property of the Parent that Died Intestate: Presentation on HB 1904 Before the House Committee on Aging, Children and Youth, Legislative & Military Affairs*, 2015 Leg., 90th Gen. Assemb. (Ark. 2015), [<https://perma.cc/66UD-65WW>] [hereinafter *Presentation on HB 1904*].

10. Carpenter, *supra* note 2, at 359.

11. Nick DiUlio, *More Than Half of U.S. Adults Don't Have a Will, New Survey Reveals*, HUFFINGTON POST (Feb. 17, 2017), [<https://perma.cc/Q7DL-FP7S>].

Arkansas is among the minority that specifically addresses the inheritance rights of PCC.<sup>12</sup> The Arkansas statute, section 28-9-221, allows PCC to inherit if consent to the posthumous conception is given by the decedent and the child is conceived within twelve months following the parent's death and born within nineteen months after the death of the parent.<sup>13</sup> This consent must be in a writing that is "witnessed by a licensed physician or a person acting under the supervision of a licensed physician."<sup>14</sup>

Although the current statute is laudable in that it confers rights to PCC<sup>15</sup>, it presents a number of practical difficulties. First, a parent must ostensibly seek out a medical professional in order to provide consent to posthumously conceive.<sup>16</sup> Second, the statute's time limitation contains conflicting language that creates the potential for the surviving spouse to meet the time limit for conceiving the child but not satisfy the time limit for the birth of the child.<sup>17</sup> Under the current law, a child could be conceived within twelve months after the death of a spouse and yet still fall outside the time limit of nineteen months for the birth of the child in a typical nine-month pregnancy.<sup>18</sup> Third, the statute lacks a requirement to provide notice to the deceased's estate that the surviving parent plans to use the decedent's gametes for posthumous reproduction.<sup>19</sup> Lastly, the statute is unclear whether it applies only to married parents.<sup>20</sup> Accordingly, the statute should be amended to relax and simplify the consent requirement, increase the time limitation for conception to three years, add a notice requirement, and apply equally regardless of the parents' marital status or sex of the surviving parent.

This Note addresses the Arkansas statute that regulates the inheritance rights of PCC in Arkansas. Part I explains the issues posed by posthumous conception and the technologies that make

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12. See Cassandra M. Ramey, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 NEV. L.J. 773, 782 (2017).

13. ARK. CODE ANN. § 28-9-221 (2015).

14. ARK. CODE ANN. § 28-9-221.

15. See ARK. CODE ANN. § 28-9-221.

16. ARK. CODE ANN. § 28-9-221.

17. ARK. CODE ANN. § 28-9-221.

18. ARK. CODE ANN. § 28-9-221.

19. ARK. CODE ANN. § 28-9-221.

20. ARK. CODE ANN. § 28-9-221.

posthumous conception possible. Part II discusses the current legal approaches to granting inheritance rights to PCC, the policy issues that must be considered, and approaches offered by model laws, state statutes, and notable judicial decisions. Part III examines the current Arkansas statute, section 28-9-221, which governs PCC's intestate rights and proposes new statutory language to address its shortcomings.

### I. INHERITANCE AND THE PREDICAMENT OF POSTHUMOUS CONCEPTION

The process for determining a person's heirs has remained largely the same until the advent of medical technology that makes it possible for individuals to conceive after their death.<sup>21</sup> This technology has created uncertainty concerning how a child can receive property through a testamentary instrument, intestate succession, and through non-probate methods such as a trust or life insurance policy.<sup>22</sup>

When a parent dies without a valid will, the rules of intestate succession determine the inheritance rights of the deceased's children.<sup>23</sup> Traditional parentage and inheritance laws do not contemplate the possibility of posthumous conception, generally limiting inheritance rights to children born during marriage or within 300 days after the death of the father.<sup>24</sup>

Importantly, whether a posthumously conceived child has inheritance rights depends upon the state of residency, and approximately half of the states have not addressed whether PCC have an interest in a deceased parent's estate.<sup>25</sup> Because of this, PCC are often denied inheritance rights despite having a genetic connection to the deceased parent.<sup>26</sup> This uncertain area of the law is likely to become more complex as new technologies allow for novel methods of human reproduction.<sup>27</sup>

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21. Carpenter, *supra* note 2, at 347.

22. *Id.*; Vegter, *supra* note 5, at 272.

23. *Id.*

24. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 108 (Rachel E. Berkow et al. eds., 10th ed. 2017).

25. David Shayne, *Posthumously Conceived Child as Heir Depends on Where*, 42 EST. PLAN. 28, 28 (2015).

26. *Id.*

27. See Sonia Azad, *Same-Sex Couple Carries Same 'Miracle' Baby in What May Be Fertility World First*, USA TODAY (Oct. 29, 2018), [<https://perma.cc/28YW-7ZEK>].

### A. The Complications of Posthumous Conception

A posthumous child “is conceived before, but born after, his father’s death.”<sup>28</sup> Under the common law tradition, children born out of wedlock, or after the death of the father, were considered the child of no one and could not inherit from either parent.<sup>29</sup> As social norms have evolved with societal changes, all states now recognize a posthumous child’s right to inherit and grant posthumous children the same legal status of a child born during the lifetime of the decedent.<sup>30</sup> Although all provide that the child can inherit from the mother, states vary how they permit inheritance from the father.<sup>31</sup>

However, a posthumously conceived child, one not just born but *conceived after* a parent’s death, often faces difficulties not encountered by a traditionally conceived child.<sup>32</sup> PCC are often born into a legal vacuum.<sup>33</sup> A posthumously conceived child’s uncertain status is a result of conventional laws that were enacted long before posthumous conception was a reality.<sup>34</sup> Presently, approximately half of the states have considered the issue,<sup>35</sup> while

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28. SITKOFF & DUKEMINIER, *supra* note 24, at 107.

29. Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 241 (2005).

30. ARK. CODE ANN. § 28-9-210 (1969). The Uniform Parentage Act establishes a rebuttable presumption that a child born to a woman with 300 days after the death of her husband is the child of that husband. UNIF. PARENTAGE ACT § 204(a)(1)(B) (2017). The presumptions of parentage are likely required to apply equally to men and women now that same-sex couples can marry in all states. UNIF. PARENTAGE ACT § 204 cmt. (UNIF. LAW COMM’N 2017).

31. Allison Stewart Ellis, *Inheritance Rights of Posthumously Conceived Children in Texas*, 43 ST. MARY’S L.J. 413, 419 (2012); SITKOFF & DUKEMINIER, *supra* note 24, at 109 (noting that most states allow paternity to be established through “evidence of the subsequent marriage of the parents, acknowledgment by the father, an adjudication during the life of the father, or clear and convincing proof after his death”). With the widespread availability of reliable DNA paternity tests, the modern trend is moving towards allowing posthumous proof of paternity by DNA evidence. SITKOFF & DUKEMINIER, *supra* note 24, at 109.

32. Ellis, *supra* note 31, at 450-51.

33. Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 264 (1999).

34. Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 615 (2004).

35. Shayne, *supra* note 25, at 28.

the remaining state legislatures and the District of Columbia have yet to enact statutes that address the legal status of PCC.<sup>36</sup>

State intestacy laws are particularly consequential for Social Security benefits. The Social Security Administration (SSA) provides benefits to a child of an individual that qualifies for Social Security survivor's benefits.<sup>37</sup> The SSA requires that the child be under eighteen years of age and a dependent at the time of the parent's death.<sup>38</sup> However, a child that can inherit under state intestacy law is presumed to be a dependent child that is eligible to receive survivor's benefits.<sup>39</sup> These survivor's benefits can be valuable to a family that loses a parent. A child receiving these benefits can get up to seventy-five percent of the deceased parent's benefit, or up to fifty percent if other family members also receive benefits.<sup>40</sup> In 2017, the average benefit provided to children of deceased workers was \$856.00 per month.<sup>41</sup> This can provide valuable assistance to families that lose a wage earner.

### B. An Overview of Assisted Reproductive Technology

Recent advances in medical science now enable a person suffering from infertility to conceive a child when he or she would otherwise be unable.<sup>42</sup> "Assisted reproduction is generally defined as any technique," other than sexual intercourse, "used to conceive a child."<sup>43</sup> As the stigma surrounding assisted reproduction fades, these medical technologies are becoming more popular. To illustrate, there were 72,913 babies born in the United States in 2015 using ART, an increase from 54,656 babies

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36. *Id.* at 32. Two of these states, Massachusetts and New Jersey, have relied upon case law to grant inheritance rights to posthumously conceived children.

37. 42 U.S.C. § 402(d) (2015); *see also* Mathews v. Lucas, 427 U.S. 495, 497-98 (1976).

38. 42 U.S.C. § 402(d)(1).

39. *See* 20 C.F.R. § 404.355 (1998) ("To decide whether you have inheritance rights as the natural child of the insured, we use the law on inheritance rights that the State courts would use to decide whether you could inherit a child's share of the insured's personal property if the insured were to die without leaving a will."); 42 U.S.C. § 416(h)(2)(A) (2004).

40. SOC. SEC. ADMIN., BENEFITS FOR CHILDREN 2 (2018), [<https://perma.cc/RH6Y-XLDW>].

41. SOC. SEC. ADMIN., ANN. STAT. SUPPLEMENT TO THE SOC. SEC. BULL., 2018, tbl.6.D5 (2019), [<https://perma.cc/CXP9-QQBB>].

42. *See* Carpenter, *supra* note 2, at 355.

43. Carpenter, *supra* note 2, at 352.

born in 2006.<sup>44</sup> The following section summarizes the primary methods of ART and why some parents might use assisted reproduction to posthumously conceive a child.

### *1. Assisted Reproductive Technology Methods*

ART includes medical procedures that intend to achieve pregnancy through methods other than coitus and are primarily used as fertility treatments for people that have difficulty conceiving a child.<sup>45</sup> There are two categories of ART procedures: internal fertilization and external fertilization.<sup>46</sup>

Internal fertilization methods place the sperm and egg, or gametes, within the woman's uterus who is to become pregnant.<sup>47</sup> These procedures include Artificial Insemination (AI) and Gamete Intrafallopian Transfer (GIFT).<sup>48</sup> AI "occurs when sperm is placed through artificial means into a woman's uterus to facilitate fertilization."<sup>49</sup> In a GIFT procedure, a woman's eggs are retrieved from her ovaries, mixed with sperm, and subsequently placed in the woman to be naturally fertilized.<sup>50</sup>

In contrast, external fertilization occurs when the gametes are extracted and combined to achieve fertilization of the egg outside of the mother's body.<sup>51</sup> External fertilization procedures combine the male and female gametes in a laboratory procedure and then insert the fertilized egg, or embryo, into the woman's

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44. CTR. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPROD. TECH.: NAT'L SUMMARY REP. 3, 50 (2017), [<https://perma.cc/6T54-3DJE>].

45. NAT'L INST. OF HEALTH, *Assisted Reproductive Technology (ART)*, [<https://perma.cc/E8FU-XNDX>] (last visited Sept. 9, 2019).

46. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b (AM. LAW INST. 2011).

47. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b (AM. LAW INST. 2011).

48. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b (AM. LAW INST. 2011).

49. Carpenter, *supra* note 2, at 352-53.

50. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b; Jeffery Walters, *Thawing the Inheritance Rights of Maybe Babies: An Answer to Indiana's Statutory Silence on Posthumously Conceived Children*, 48 VAL. U. L. REV. 1229, 1236 (2014).

51. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b.

uterus.<sup>52</sup> This category of ART is often referred to as In Vitro Fertilization (IVF) and is by far the most common and effective form of ART.<sup>53</sup> The IVF procedure can use the mother's eggs or a donor's eggs to produce a pregnancy.<sup>54</sup>

The driving force behind these technologies is cryopreservation.<sup>55</sup> The process of cryopreservation uses very low temperatures to preserve reproductive materials for later use.<sup>56</sup> This procedure maintains the viability of the preserved gametes for decades and creates the ability to conceive children long after a person's death.<sup>57</sup> The ability to maintain the viability of genetic material for an extended period of time has dramatically altered the possibilities for ART.<sup>58</sup>

Lastly, surrogacy provides another method of utilizing ART to conceive a child. This involves an agreement in which a woman, impregnated through an IVF procedure, carries a child to birth for the intended parent or parents.<sup>59</sup>

## 2. Why Posthumous Conception?

Although the reasons why couples look to ART to achieve pregnancy during their lifetime are obvious, why an individual would use their deceased partner's genetic material to conceive a child is less evident.<sup>60</sup> However, there are myriad reasons why a

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52. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b.

53. See SOC'Y FOR ASSISTED REPROD. TECH., *Assisted Reproductive Technologies*, [https://perma.cc/GRF6-KGKX] (last visited Aug. 22, 2019).

54. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b.

55. Walters, *supra* note 50, at 1234-35.

56. *Id.*

57. Susan L. Barrett & Teresa K. Woodruff, *Gamete Preservation*, NAT'L INST. OF HEALTH (May 3, 2011), [https://perma.cc/ZE7F-WLU2]. A famous example of the viability of decades-old preserved genetic material is the case of a couple that had a daughter using the father's sperm that was preserved for twenty-two years. Kate Snow et al., *Frozen Sperm Still Viable Decades Later*, ABC NEWS (Apr. 10, 2009), [https://perma.cc/5X5Y-UWWH]. In 2017, a child was born using an embryo preserved for twenty-four years. Sarah Zhang, *A Woman Gave Birth from an Embryo Frozen for 24 Years*, THE ATLANTIC (Dec. 21, 2017), [https://perma.cc/V357-R6GN].

58. See, e.g., Zhang, *supra* note 57.

59. Carpenter, *supra* note 2, at 354. The legal ramifications of surrogacy on the inheritance rights of a posthumously conceived child vary greatly by state and are beyond the scope of this Note.

60. *Id.* at 358.

partner would want to conceive his or her deceased partner's child.<sup>61</sup> A person may want to use a loved one's gametes as a tribute to their deceased partner.<sup>62</sup> Others may use the deceased's preserved genetic material for religious reasons to avoid using donated sperm to conceive.<sup>63</sup> Also, a person may want to have a child that is a direct descendent of both parents to know the genetic origins of the child.<sup>64</sup>

Furthermore, financial incentives may lead a surviving partner to use a deceased partner's gametes.<sup>65</sup> The cost of conceiving a child using ART is substantial, and the expense is dramatically reduced if the surviving partner uses the preserved genetic material of the deceased partner.<sup>66</sup> In addition, this method may allow the child to inherit from the decedent or other family members, to be eligible to become a beneficiary of a trust, or to qualify for Social Security survivor's benefits.<sup>67</sup>

## II. CURRENT LEGAL APPROACHES TO POSTHUMOUSLY CONCEIVED CHILDREN

A notable shortcoming of modern probate law is the lack of certainty in the inheritance rights of children outside of the traditional nuclear family.<sup>68</sup> The inheritance rights of an individual are determined by the laws of the state in which they are domiciled at his or her death.<sup>69</sup> These state intestacy statutes are the default rules for disposing of probate property of a decedent who dies without a will.<sup>70</sup> Many state intestacy statutes enacted well before the advent of new reproductive technologies do not address the inheritance rights of PCC.<sup>71</sup>

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61. *Id.*

62. Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393, 398 (2008).

63. *Id.*

64. *Id.* at 399; Carpenter, *supra* note 2, at 358.

65. Carpenter, *supra* note 2, at 359.

66. Knaplund, *supra* note 62, at 399-400.

67. *Id.* at 398, 400-01.

68. Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 94.

69. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 260 (AM. LAW INST. 1971).

70. SITKOFF & DUKEMINIER, *supra* note 24, at 63.

71. Shayne, *supra* note 25, at 28.

Legislatures must consider a number of policy issues when drafting legislation affecting PCC.<sup>72</sup> Broadly speaking, these key interests include the efficient administration of estates, the intent of the decedent, and the best interests of the child.<sup>73</sup> The drafters of the uniform laws have attempted to balance these interests in creating model codes that provide inheritance rights to PCC. An increasing number of states have addressed the issue, often relying on the guidance of the model laws.<sup>74</sup> In a small number of states, case law still governs the legal status of PCC.<sup>75</sup>

### **A. Policy Issues in Determining the Inheritance Rights of Posthumously Conceived Children**

As the use of ART becomes more common, state legislatures in the United States are charged with determining the best approach to address the issues presented by the increased use of ART and the possibility of posthumous conception. States promulgate the rules that govern the probate of testamentary instruments and the distribution of estates with the purpose to carry out the likely intent of the decedent.<sup>76</sup> To achieve that end, state legislatures must consider key issues: (1) whether consent of the deceased parent is required; (2) if notice of intent to use decedent's gametes for posthumous reproduction is needed; (3) what time constraints are appropriate; (4) the parents' marital status and sex of the surviving parent; and (5) the best interests of the child.<sup>77</sup>

#### ***1. Consent***

An essential matter that states must consider is whether a deceased parent must give consent for the posthumous use of his or her preserved genetic material to conceive a child.<sup>78</sup> Requiring

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72. Carpenter, *supra* note 2, at 417.

73. *Id.*

74. *See, e.g.*, COLO. REV. STAT. § 19-4-106 (2009); N.D. CENT. CODE § 30.1-04-19 (2009).

75. *See infra* Part II.D.

76. Vegter, *supra* note 5, at 299.

77. Carpenter, *supra* note 2, at 404; Star, *supra* note 34, at 626-29.

78. Carpenter, *supra* note 2, at 418; Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 427-34 (2009).

the decedent to give consent for posthumous reproduction aligns with the goal of intestacy law, which seeks to fulfill the intent of the deceased.<sup>79</sup> If consent is necessary, it is important to determine the methods of providing consent under the statute, while still carrying out the intent of the deceased.<sup>80</sup> To date, the legislatures that have granted inheritance rights to PCC have overwhelmingly required the consent of the decedent.<sup>81</sup> Yet states vary as to how the consent requirement may be met and what degree of specificity is required.<sup>82</sup>

In addition, legislatures must also consider the impact of a divorce upon the prior consent given by the former spouse. Allowing an ex-spouse to use a former partner's preserved genetic material to conceive a child after his or her death would likely undermine the wishes of the divorced decedent.<sup>83</sup> To avoid such a result, some states have provided for automatic revocation of a spouse's consent to posthumous conception in the event of divorce.<sup>84</sup>

## 2. Notice

Second, legislatures must determine whether the “surviving spouse or partner must give notice” within a specified time to the administrator or executor of the decedent's estate of his or her

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79. Carpenter, *supra* note 2, at 370; Vegter, *supra* note 5, at 299.

80. Carpenter, *supra* note 2, at 420.

81. *Id.* at 418. Although states addressing this issue have required consent for posthumously children to fall within the ambit of their statutes, some scholars argue for a less restrictive approach. See Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction Be Legally Permissible Without the Deceased's Prior Consent?*, 5 J. L. & BIOSCIENCES 329, 354 (2018) (arguing that “posthumous reproduction should be legally permitted, even in the absence of the deceased's prior consent, and [] the default position should be to presume that the deceased consented to posthumous reproduction, unless he or she previously objected to it or there are strong indications ([e.g.] religious beliefs or values) that the person would not have agreed”).

82. See COLO. REV. STAT. § 19-4-106 (2009); N.D. CENT. CODE § 30.1-04-19 (2009) (requiring consent “in a record”); CAL. PROB. CODE § 249.5 (2005) (requiring consent in writing that specifies decedent's genetic material shall be used for posthumous conception that must be signed and dated and designate a person to control the use of the decedent's gametes); ARK. CODE ANN. § 28-9-221 (2015) (requiring the decedent consent in “writing that is either notarized or witnessed by a licensed physician or a person acting under the supervision of a licensed physician”).

83. Ellis, *supra* note 31, at 439.

84. *Id.*

intent to use the decedent's gametes to conceive a child.<sup>85</sup> A notice requirement is advantageous in that it serves to protect the fiduciary from liability if future claims are made on the estate and to protect the beneficiaries that receive property from liability of future claims to the devised assets.<sup>86</sup>

### 3. Time Constraints

Third, state legislatures must consider whether a child conceived after the death of a parent must be in utero or born within a definite time period after the decedent's death.<sup>87</sup> Providing a time limitation allows for the efficient administration of a decedent's estate.<sup>88</sup> Additionally, a time limitation provides finality to estate administration and protects "fiduciaries who may distribute assets while unaware that the decedent left preserved genetic material."<sup>89</sup> States commonly provide time constraints for when the child must be born,<sup>90</sup> in gestation,<sup>91</sup> or both.<sup>92</sup> Some states provide a time limitation of three years,<sup>93</sup> while other states are more restrictive.<sup>94</sup>

Although it is important to provide finality in estate administration, statutes that offer a generous time limitation allow the surviving spouse time to reflect on the choice to pursue a pregnancy with ART while also supplying certainty in the administration of the decedent's estate.<sup>95</sup> Furthermore, a time constraint of two or three years allows the surviving parent to achieve a successful pregnancy with ART if the initial attempt is unsuccessful.<sup>96</sup>

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85. Carpenter, *supra* note 2, at 423.

86. *Id.*

87. *Id.* at 424-26.

88. *Id.* at 425.

89. *Id.*

90. See LA. STAT. ANN. § 9:391.1(A) (2003).

91. See CAL. PROB. CODE § 249.5(c) (2005).

92. See COLO. REV. STAT. § 15-11-120(11) (2010); N.D. CENT. CODE § 30.1-04-19(11) (2009).

93. See, e.g., N.D. CENT. CODE § 30.1-04-19(11).

94. See ARK. CODE ANN. § 28-9-221(a) (2015).

95. Carpenter, *supra* note 2, at 425.

96. *Id.*

#### 4. *Marital Status and Sex of the Parent*

Fourth, states must consider whether to make marriage a prerequisite for a posthumously conceived child to inherit,<sup>97</sup> and whether the statute applies equally to men and women.<sup>98</sup> Many states have restricted inheritance rights of PCC to those born to parents married at the time of death.<sup>99</sup> Likewise, states must decide how intestacy law will apply in situations where a woman dies before a spouse and intends her preserved gametes to be used for posthumous conception.<sup>100</sup> These are major issues to examine, as legislatures that restrict inheritance rights of PCC to children born to married parents may violate the Equal Protection Clause.<sup>101</sup> State restrictions that restrict the ability of PCC to inherit through intestacy law must be substantially related to important state interests.<sup>102</sup> Allowing differential treatment of similarly situated children based on the parents' marital status to preclude children born to unmarried couples from inheriting is unlikely to survive constitutional challenges.<sup>103</sup> In addition, restricting a posthumously conceived child's inheritance rights based on the sex of the parent could also be similarly unconstitutional.<sup>104</sup>

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97. Star, *supra* note 34, at 639.

98. Knaplund, *supra* note 62, at 412.

99. See, e.g., ARK. CODE ANN. § 28-9-221; IOWA CODE § 633.220A (2011); LA. STAT. ANN. § 9:391.1 (2003).

100. Knaplund, *supra* note 62, at 412.

101. See *Astrue v. Capato ex rel.* B.N.C., 566 U.S. 541, 557 (2012); Carpenter, *supra* note 2, at 427; Goodwin, *supra* note 29, at 271 (noting that PCC are “non-marital children” because the death of a spouse ends a marriage and intestacy laws that “categorically deny” all PCC from inheriting would violate the Equal Protection Clause under intermediate scrutiny).

102. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (opining that classifications based on legitimacy are subject to intermediate scrutiny); Carpenter, *supra* note 2, at 427.

103. See *Astrue*, 566 U.S. at 556; *Clark*, 486 U.S. at 461; Carpenter, *supra* note 2, at 427.

104. Linda Kelly Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance*, 13 WM. & MARY J. WOMEN & L. 129, 140 (2006).

### 5. *Best Interests of the Child*

Lastly, state legislatures must consider the child's best interests. A child has the right to parental financial support.<sup>105</sup> Allowing PCC to receive government benefits in the same manner as traditionally conceived children provides uniformity and fairness in the distribution of public resources.<sup>106</sup> The purpose of the Social Security provision for survivor's benefits is to give support to dependents that have lost a wage earner.<sup>107</sup> In this light, the same opportunity to receive these entitlements should apply equally to traditionally conceived children and those conceived using ART. Placing an outright ban on a posthumously conceived child's ability to inherit or receive government benefits would be against the child's best interests and counter to public policy to provide for children "as completely as possible."<sup>108</sup> A child born through untraditional methods should not be punished for the reproductive choices of his or her parents.

#### **B. The Proposed Laws Addressing Posthumously Conceived Children**

A number of uniform model codes address the inheritance rights of PCC,<sup>109</sup> yet they take widely different approaches. Specifically, the model laws vary significantly in how consent of the deceased parent may be established and the duration of the time restrictions.<sup>110</sup> Despite the guidance provided by these codes, presently only half of the state legislatures have promulgated laws addressing the rights of PCC.<sup>111</sup> The remaining

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105. See Vegter, *supra* note 5, at 292-93; *Woodward v. Comm'r Soc. Sec.*, 760 N.E.2d 257, 265 (Mass. 2002).

106. Vegter, *supra* note 5, at 293.

107. Susan E. Satava, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 984 (1996). Providing Social Security survivor's benefits for posthumously conceived children is especially consequential. Child poverty rates vary substantially with respect to marital status. See U.S. DEP'T OF COM., INCOME & POVERTY IN THE U.S.: 2017 13 (2018), [<https://perma.cc/R4S5-DLJT>]. The child poverty rate in a married-couple family is 8.4%, compared with a rate of 40.8% for children living only with their mother and 19.1% for children living only with their father. *Id.*

108. Vegter, *supra* note 5, at 293.

109. Goodwin, *supra* note 29, at 255.

110. See *id.* at 255-59.

111. Shayne, *supra* note 25, at 28.

states have left it to the courts to interpret their intestacy laws to determine the legal status of PCC.<sup>112</sup>

### *1. The Uniform Probate Code*

The Uniform Probate Code (UPC) provides that a posthumously conceived child may inherit through intestate succession and class gifts, subject to certain conditions.<sup>113</sup> If two conditions are met, the UPC considers a child conceived after a parent's death a child of the deceased parent.<sup>114</sup> First, the deceased parent must have "signed a record that, considering all the facts and circumstances, evidences the individual's consent"<sup>115</sup> or "intended to function as a parent of the child."<sup>116</sup> This intent can be established by clear and convincing evidence.<sup>117</sup> Second, the posthumously conceived child must be "in utero not later than 36 months after the individual's death"<sup>118</sup> or "born not later than 45 months after the individual's death."<sup>119</sup>

### *2. The Uniform Parentage Act*

The Uniform Parentage Act (UPA) addresses the parental status of a deceased parent.<sup>120</sup> If two requirements are met, the decedent may be deemed the parent of the posthumously conceived child.<sup>121</sup> First, the deceased individual must have "consented in a record" to be the parent of the child "if assisted reproduction were to occur after the" decedent's death<sup>122</sup> or the deceased's intent to be a parent of a posthumously conceived child is established by clear and convincing evidence.<sup>123</sup> Second, the child must be "in utero not later than 36 months after the

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112. Goodwin, *supra* note 29, at 255.

113. Carpenter, *supra* note 2, at 372.

114. UNIF. PROBATE CODE § 2-120 (UNIF. LAW COMM'N amended 2010).

115. UNIF. PROBATE CODE § 2-120(f)(1).

116. UNIF. PROBATE CODE § 2-120(f)(2)(B).

117. UNIF. PROBATE CODE § 2-120(f)(2)(C).

118. UNIF. PROBATE CODE § 2-120(k)(1).

119. UNIF. PROBATE CODE § 2-120(k)(2).

120. UNIF. PARENTAGE ACT § 708 (UNIF. LAW COMM'N 2017).

121. UNIF. PARENTAGE ACT § 708(b).

122. UNIF. PARENTAGE ACT § 708(b)(1)(A).

123. UNIF. PARENTAGE ACT § 708(b)(1)(B).

individual's death"<sup>124</sup> or "born not later than 45 months after the individual's death."<sup>125</sup>

### 3. *Restatement (Third) of Property*

The *Restatement (Third) of Property: Wills and Other Donative Transfers* suggests a much broader approach to allowing PCC to inherit by intestate succession.<sup>126</sup> The drafters take the position that for a child of ART to inherit from a deceased parent the child "must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit."<sup>127</sup> It also indicates that a "clear case" would be one in which a child was born "by artificial insemination of the decedent's widow with his frozen sperm."<sup>128</sup>

### 4. *Model Act Governing Assisted Reproductive Technologies*

In 2008, the American Bar Association drafted the Model Act Governing Assisted Reproductive Technology.<sup>129</sup> This model legislation adopts the view that a child conceived after a parent's death is recognized as a child of the deceased parent if the individual consented "in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."<sup>130</sup> Additionally, the Act indicates that the consent must be "dated and signed by the [medical] provider and

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124. UNIF. PARENTAGE ACT § 708(b)(2)(A).

125. UNIF. PARENTAGE ACT § 708(b)(2)(B).

126. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (AM. LAW INST. 1999).

127. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. 1. For class gift purposes, the *Restatement (Third) of Property: Wills and Other Donative Transfers* mirrors the UPC's approach to posthumously conceived children, requiring consent in "writing or other record . . . exhibiting intent, in light of all the facts and circumstances, to be treated as the child's other parent." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8(2)(A). Absent a signed writing or record, the child may inherit if the deceased parent either intended to function as a parent and was prevented by death or intended to be treated as a parent of a posthumously conceived child, "but only if that intent is established by clear and convincing evidence." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8(2)(B)(ii)-(iii).

128. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. 1.

129. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (AM. BAR ASS'N 2008).

130. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607.

the participant,”<sup>131</sup> specify the parental rights of all participants,<sup>132</sup> and define the length of time that consent will remain valid.<sup>133</sup>

### C. Statutory Approaches

The following section outlines the approaches taken by state legislatures in addressing the inheritance rights of PCC. A survey of state intestacy laws reveals an unfortunate lack of uniformity. Of the states that have taken up the issue, several states have statutes that specifically include PCC when certain conditions are met,<sup>134</sup> while other states have explicitly excluded them from inheriting from a deceased parent.<sup>135</sup>

#### 1. States Including Posthumously Conceived Children

A minority of states have explicitly granted inheritance rights to PCC.<sup>136</sup> These states have attempted to “foster individual procreative liberty” by relying on an “‘intent-based’ framework in addressing the legal status and rights of children and progenitors involved in assisted reproduction.”<sup>137</sup> In general, the majority of states that recognize the parental relationships between a deceased parent and a child conceived after the parent’s death have placed limitations on the child’s ability to inherit. In

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131. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 202(1)(b).

132. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 202(1)(c).

133. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 202(1)(e).

134. COLO. REV. STAT. § 19-4-106(8) (2009); N.D. CENT. CODE § 30.1-04-19(11) (2009); OR. REV. STAT. § 112.077(4) (2016).

135. MINN. STAT. § 524.2-120(10) (2010); MO. REV. STAT. § 474.050 (1955); OHIO. REV. CODE ANN. § 2105.14 (West 2019).

136. States that have enacted statutes that extend inheritance rights to children conceived after the death of a parent include: California, Colorado, Connecticut, Delaware, Florida, Iowa, Louisiana, New York, North Dakota, Texas, Utah, Washington, and Wyoming. See Kathryn McColl Sargent, *Recent Connecticut Legislation on Inheritance Rights of Children Conceived Posthumously Via In-Vitro Fertilization*, 89 CONN. B.J. 149, 156-57 (2015); CAL. PROB. CODE § 249.5 (2005); COLO. REV. STAT. § 19-4-106; CONN. GEN. STAT. § 45a-785 (2014); DEL. CODE ANN. tit. 13, § 8-707 (West 2019); FLA. STAT. § 742.17 (1993); IOWA CODE § 633.267 (2011); LA. STAT. ANN. § 9:391.1 (2003); N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2019); N.D. CENT. CODE § 30.1-04-19; TEX. FAM. CODE ANN. § 160.707 (West 2019); UTAH CODE ANN. § 78B-15-707 (West 2019); WASH. REV. CODE § 26.26A.635 (2019); WYO. STAT. ANN. § 14-2-907 (West 2019).

137. Banks, *supra* note 33, at 292.

addition, many state laws only apply to situations in which the parents of the child were married.

Some states, such as Colorado and North Dakota, have relied on the UPC for guidance.<sup>138</sup> Colorado grants inheritance rights to children conceived using ART after the death of a spouse if the decedent “consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child” but omits the time limitation.<sup>139</sup> Similarly, North Dakota also recognizes a parent-child relationship between a child conceived after a parent’s death using assisted reproduction but has adopted the more specific provisions of the UPC.<sup>140</sup> The statute follows the UPC’s consent requirement of a signed record or clear and convincing evidence of the deceased’s intent along with the time constraints that require the child to be in utero within thirty-six months and born within forty-five months of the parent’s death.<sup>141</sup>

Other state statutes also include a notice requirement.<sup>142</sup> For example, California’s statute grants inheritance rights to a child conceived after the death of a parent if the child proves by clear and convincing evidence that specific conditions are satisfied.<sup>143</sup> Under California law, the decedent must have specified in writing that his or her gametes were to be used for posthumous conception.<sup>144</sup> This writing must be signed and dated, designate a person to control the use of the gametes, and can only be revoked or amended in writing.<sup>145</sup> In addition, notice that the deceased’s genetic material is available for posthumous use must be given to the executor or administrator of the decedent’s estate within four months of the decedent’s death.<sup>146</sup> Lastly, the child must be “in utero within two years . . . of the decedent’s death.”<sup>147</sup>

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138. See COLO. REV. STAT. § 19-4-106; N.D. CENT. CODE § 30.1-04-19.

139. COLO. REV. STAT. § 19-4-106(8).

140. N.D. CENT. CODE § 30.1-04-19(11) (West 2020).

141. N.D. CENT. CODE § 30.1-04-19.

142. See, e.g., CAL. PROB. CODE § 249.5 (2005); N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2019).

143. CAL. PROB. CODE § 249.5.

144. CAL. PROB. CODE § 249.5(a).

145. CAL. PROB. CODE § 249.5(a)(1)-(3).

146. CAL. PROB. CODE § 249.5(b).

147. CAL. PROB. CODE § 249.5(c).

## 2. States Excluding Posthumously Conceived Children

In contrast, other states have chosen to specifically deny inheritance rights to PCC.<sup>148</sup> For instance, Georgia, Idaho, Michigan, Minnesota, Ohio, South Carolina, and South Dakota are among the states that have excluded these children from inheriting under their intestacy laws.<sup>149</sup> These states rely on the historical presumption that children not alive or in gestation at the time of the parent's death cannot inherit from the decedent.<sup>150</sup> Not only are these children excluded from intestate inheritance, but they are also unable to receive Social Security survivor's benefits from the deceased parent.<sup>151</sup>

In a significant number of states, the legal status of PCC has yet to be addressed and remains unclear.<sup>152</sup> Often, states have overlooked how children born using ART do not fall within the timeline of a typical conception and birth possible by sexual intercourse.<sup>153</sup> As a result, courts are forced to determine whether a child conceived *after* a parent's death falls within the language of the state statutes that apply to children conceived *before* death.<sup>154</sup>

### D. Judicial Decisions

Many courts have been tasked with determining the legal status of PCC by interpreting and applying traditional posthumous children statutes. They are faced with ascertaining the intent of the legislature and construing the language of the statute to apply to nontraditional circumstances. Two influential cases, *In re Estate of Kolacy* in New Jersey and *Woodward v.*

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148. Carpenter, *supra* note 2, at 405

149. *See, e.g.*, GA. CODE ANN. § 53-2-1(b)(1) (West 2019); IDAHO CODE § 15-2-108 (2005); MICH. COMP. LAWS § 700.2104 (2000); MINN. STAT. § 524.2-120 subdiv. 10 (2010); MO. REV. STAT. § 474.050 (1955); OHIO REV. CODE ANN. § 2105.14 (West 2019); S.C. CODE ANN. § 62-2-108 (2014); S.D. CODIFIED LAWS § 29A-2-108 (2007).

150. Carpenter, *supra* note 2, at 405

151. *Id.* at 415.

152. *Id.* at 403-04.

153. Ramey, *supra* note 12, at 778.

154. *See In re Estate of Kolacy*, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 264 (Mass. 2002); *Khabbaz ex rel. Eng v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1183-84 (N.H. 2007); *Finley v. Astrue*, 372 Ark. 103, 110, 270 S.W.3d 849, 853 (2008).

*Commissioner of Social Security* in Massachusetts, allowed for children born after the death of a parent to inherit from the decedent.<sup>155</sup> The court in *In re Estate of Kolacy* held that the general intent of the statute should prevail over the plain language that failed to contemplate new technologies.<sup>156</sup> Similarly, the court in *Woodward* established that PCC could inherit from a deceased parent if certain circumstances are met.<sup>157</sup>

In contrast, in *Khabbaz v. Commissioner, Social Security Administration*, the New Hampshire Supreme Court declined to extend inheritance rights to PCC.<sup>158</sup> The court contended that to interpret the law to include children conceived after a parent's death would require it to "add words to [the] statute" and noted that matters of public policy were best left to the legislature.<sup>159</sup>

It appears that state intestacy law will continue to play a major role in whether a posthumously conceived child qualifies for Social Security benefits. Recently in *Astrue v. Capato ex rel. B.N.C.*, the United States Supreme Court unanimously upheld the validity of the SSA's use of state intestacy laws in determining a child's eligibility to receive Social Security survivor's benefits.<sup>160</sup>

### III. THE INHERITANCE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN IN ARKANSAS

#### A. The History of Arkansas Case Law

In 2008, the Arkansas Supreme Court considered a question of law certified to the Court by the United States District Court for the Eastern District of Arkansas.<sup>161</sup> The case came before the

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155. *In re Estate of Kolacy*, 753 A.2d at 1263-64; *Woodward*, 760 N.E.2d at 272.

156. *In re Estate of Kolacy*, 753 A.2d at 1262.

157. *Woodward*, 760 N.E.2d at 272. The court determined that a child could inherit from a deceased parent if (1) a genetic relationship with the deceased parent was established; (2) the decedent consented before death to posthumous reproduction; and (3) the decedent consented to support the child. *Id.* In addition, time limitation could bar a claim for inheritance, and notice must be given to all interested parties in any action. *Id.*

158. *In re Estate of Khabbaz*, 930 A.2d at 1182. The court considered, "Is a child conceived after her father's death via artificial insemination eligible to inherit from her father as his surviving issue under New Hampshire intestacy law?" *Id.*

159. *Id.* at 1186.

160. *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 555-56 (2012).

161. *Finley v. Astrue*, 372 Ark. 103, 104, 270 S.W.3d 849, 850 (2008). The case was delivered to the Arkansas Supreme Court by a certified question from the United States District Court for the Eastern District of Arkansas. *See Finley v. Astrue*, 601 F. Supp. 2d

District Court as an appeal by Amy Finley from the final decision of the SSA which denied her posthumously conceived child's claim to survivor's benefits.<sup>162</sup> A child's eligibility to receive these benefits depends on whether they are considered an heir under the state's intestacy laws.<sup>163</sup>

In *Finley v. Astrue*, Ms. Finley and her husband pursued fertility treatments during the marriage and decided to participate in the IVF process.<sup>164</sup> Initially, an IVF procedure failed to produce a pregnancy from the implanted embryos.<sup>165</sup> Mr. Finley died intestate the month after the failed procedure.<sup>166</sup> Less than one year later, Ms. Finley became pregnant using the couple's preserved genetic material.<sup>167</sup>

The Arkansas Supreme Court concluded that the language of the existing state statute addressing posthumous heirs as those children "conceived before his or her death" means that only such heirs could inherit under the law.<sup>168</sup> Refusing to define the term "conceive," the Court rejected the argument that the child had been conceived prior to the father's death despite existing as a fertilized embryo during the lifetime of the deceased father.<sup>169</sup> The Court declined to construe the statute to include PCC in part because the "General Assembly, in enacting . . . [the posthumous descendants statute], did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit under intestate succession."<sup>170</sup> Despite refusing to interpret the statute's language to include PCC, the Court noted: "The determination of public policy lies almost exclusively with the legislature. . . . [W]e strongly encourage the General Assembly to revisit the intestacy succession statutes to

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1092, 1097-98 (E.D. Ark. 2009). For a detailed analysis of the *Finley* decision, see generally Buckley W. Bridges, *Statutory Misconception: The Arkansas Supreme Court's Method in Finley v. Astrue Sets New Precedent for Uncertainty*, 63 ARK. L. REV. 419 (2010).

162. *Finley*, 372 Ark. at 105, 270 S.W.3d at 850.

163. 20 C.F.R. § 404.355(b)(1) (1998).

164. *Finley*, 372 Ark. at 105, 270 S.W.3d at 850.

165. *Id.* at 106, 270 S.W.3d at 850.

166. *Id.*

167. *Id.* at 106, 270 S.W.3d at 850-51.

168. *Id.* at 110, 270 S.W.3d at 853.

169. *Finley*, 372 Ark. at 111, 270 S.W.3d at 854.

170. *Id.* at 110, 270 S.W.3d at 853.

address the issues involved in the instant case and those that have not but will likely evolve.”<sup>171</sup>

### B. The Legislature Takes Action

Six years after the *Finley* decision, the State Legislature took up the challenge posed by the Arkansas Supreme Court. In 2015, the General Assembly enacted section 28-9-221, addressing the issue of PCC posed in *Finley*.<sup>172</sup> The statute provides:

(a) Notwithstanding the provisions of any law to the contrary, a child conceived after the death of a decedent who specifically authorized the decedent’s surviving spouse, in a writing that is either notarized or witnessed by a licensed physician or a person acting under the supervision of a licensed physician, to use the decedent’s gametes after the decedent’s death shall be deemed the child of the decedent with the right to inherit from the decedent if the child is conceived within twelve (12) months following the death of the decedent and born within nineteen (19) months following the death of the decedent.

(b) This section is retroactive to December 1, 2009, solely for the purpose of establishing a posthumous child’s entitlement to Social Security benefits under the federal Social Security Act, 42 U.S.C. § 402(d), deriving from the decedent.<sup>173</sup>

This statute is a significant step in recognizing parental relationships and extending inheritance rights to children that are born using ART after the death of a parent. However, this

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171. *Id.* at 112, 270 S.W.3d at 855. *Finley*’s child was also denied Worker’s Compensation benefits. *See Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 296, 288 S.W.3d 685, 689 (2008).

172. ARK. CODE ANN. § 28-9-221 (2015). It should be noted that the *Finley* decision itself was not the motivation for enacting the current law. The current statute was passed after Paula Shelton, noted in the Introduction, *supra*, brought the issue to the attention of Representative Warwick Sabin, the bill’s sponsor. *See Presentation on HB 1904, supra* note 9. The efforts of Representative Sabin to ensure that PCC have inheritance rights are commendable. After investigating the legislative history of House Bill 1904, the most vexatious shortcomings of the current statute were not present in the original bill presented by Representative Sabin but appear to have been the result of amendments made in the Senate. *See S. Amendment No. 2 to H.B. 1904*, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (revising the time limitation for a parent to posthumously conceive a child from ten months after the decedent’s death to twelve months but still retaining the remaining language that required the child to be born nineteen months after the decedent’s death).

173. ARK. CODE ANN. § 28-9-221.

positive advancement in granting PCC inheritance rights is not without its problems.

### C. The Quandary of Arkansas's Posthumously Conceived Children Statute

The current Arkansas statute addressing the intestate inheritance of PCC presents a number of perplexing issues. First, the consent requirement creates practical and legal difficulties by seemingly requiring the involvement of medical professionals.<sup>174</sup> Second, the time limitation is restrictive, and the plain language of the statute itself is conflicting.<sup>175</sup> Third, the statute lacks any requirement to give notice to the fiduciary of the decedent's estate of the possibility of posthumous conception.<sup>176</sup> Finally, the language of the statute appears to apply only to a child that is born to parents that were married at the time of the deceased parent's death.<sup>177</sup>

#### I. Consent

The current statute requires that the decedent give consent to the posthumous use of his or her genetic material for a posthumously conceived child to be considered a legal child of the decedent with the right to inherit from the deceased parent.<sup>178</sup> Under the statute, a decedent manifests consent if the person "specifically authorized the decedent's surviving spouse" to use his or her gametes "in a writing that is either notarized or witnessed by a licensed physician or a person acting under the supervision of a licensed physician."<sup>179</sup>

This provision presents two issues. First, the language of the statute itself creates ambiguity regarding the consent requirement. The words indicating that the writing must be "either notarized or witnessed by a licensed physician" or a person supervised by a

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174. ARK. CODE ANN. § 28-9-221.

175. ARK. CODE ANN. § 28-9-221.

176. ARK. CODE ANN. § 28-9-221.

177. *See* ARK. CODE ANN. § 28-9-221(a).

178. ARK. CODE ANN. § 28-9-221.

179. ARK. CODE ANN. § 28-9-221.

licensed physician presents unanswered questions.<sup>180</sup> Is the writing to be notarized *or* witnessed by a licensed physician or supervised medical staff? Or does this present two different options of giving legal consent by: (1) having the writing notarized by a notary; or (2) witnessed by a licensed physician or staff member? Unfortunately, the surrounding words of the statute fail to resolve the ambiguity.

Second, the law requires a person to seek out a medical professional to provide legal consent to allow a posthumously conceived child to inherit.<sup>181</sup> Although this could conceivably streamline the process for providing consent through a standardized procedure,<sup>182</sup> this creates other concerns. The statute ostensibly requires an individual intending to give legal consent to posthumously conceive a child to seek out a medical professional, instead of a lawyer.<sup>183</sup> Although fertility clinics require individuals to provide consent to perform assisted reproduction procedures,<sup>184</sup> deferring to the medical community to fulfill statutory requirements in determining a child's legal status seems ill-advised. This unwieldy requirement places an unnecessary burden on a parent that may wish for the surviving parent to use his or her genetic material to have a child.

As an initial matter, the legislature should provide clarity for what constitutes consent under the statute. The most expedient approach would be to follow the guidance of the UPA and require the decedent to consent in a record<sup>185</sup> or allow the surviving spouse to prove the decedent's intent by clear and convincing evidence.<sup>186</sup> I argue that the consent requirement should be simplified by allowing an individual to approve of the posthumous use of his or her gametes without formalities that may invalidate the decedent's intent to posthumously conceive. In addition, dispensing with the current language of the statute would resolve the grammatical ambiguity present in the current

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180. ARK. CODE ANN. § 28-9-221.

181. ARK. CODE ANN. § 28-9-221.

182. Ellis, *supra* note 31, at 436.

183. *See* ARK. CODE ANN. § 28-9-221.

184. Debbie K. Lerner, *New Reproductive Technology and Wisconsin Law: Fertility Clinics Making Law*, 75 MARQ. L. REV. 206, 214 (1991).

185. One example would be a fertility treatment facility consent form completed prior to undergoing fertility procedures.

186. Carpenter, *supra* note 2, at 421.

version and eliminate the involvement of medical professionals in the consent process.

Lastly, the legislature should address the effect of a divorce on the prior consent of a spouse. To carry out the likely intent of the decedent, consent should be automatically revoked upon the divorce of a married couple.<sup>187</sup> This would eliminate the possibility that the surviving ex-spouse could undermine the intent of the deceased. Revoking prior consent of the deceased parent would fall in line with other probate law, such as the rule of automatically revoking will provisions devising property to a spouse in the event of a divorce.<sup>188</sup>

## *2. Time Limitation*

Perhaps the most unusual shortcoming is the time limitation to conceive and give birth to a posthumous child after a parent's death. The statute provides that the child must be conceived within twelve months after the spouse's death and born within nineteen months after the death of the parent.<sup>189</sup> The plain language of the statute creates an inconsistency that would allow the surviving spouse to fulfill part of the requirement, yet not satisfy the time of birth requirement. It could easily be foreseeable that a child could be conceived with the decedent's gametes within twelve months following the death of the decedent and yet still be in gestation beyond nineteen months after the death given the typical nine-month gestation period. Curiously, the statute fails to account for the usual duration of pregnancy.<sup>190</sup>

In addition, the time limitation itself is restrictive, requiring those who are grieving to make a very significant decision quickly after losing a loved one. The current law requires a surviving parent to decide to conceive a child within a few months after the death of his or her spouse and then successfully achieve a pregnancy with the decedent's gametes using ART within twelve

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187. This is in accord with the Uniform Parentage Act. UNIF. PARENTAGE ACT § 706 (UNIF. LAW COMM'N 2017).

188. See ARK. CODE ANN. § 28-25-109(b) (1979) (revoking all provisions in a will in favor of the testator's spouse in the event of divorce or annulment).

189. ARK. CODE ANN. § 28-9-221 (2015).

190. ARK. CODE ANN. § 28-9-221.

months of the loss.<sup>191</sup> This forces the person to make a momentous life decision and plan for any complications that may occur, such as the possibility of a failed ART procedure, nearly immediately after the death of a loved one.

These issues must be addressed to provide clarity. First, the legislature must resolve the conflicting language in the statute. The current language that allows a child to inherit “if the child is conceived within twelve (12) months following the death of the decedent and born within nineteen (19) months following the death of the decedent” creates an unresolvable conflict due to the typical nine-month duration of pregnancy.<sup>192</sup> It is imperative for the law to establish readily identifiable time limitations to provide certainty to families pursuing posthumous conception.

Second, the time limitation should be extended to permit the posthumous child to be conceived within three years following the decedent’s death, which aligns with the UPC’s approach.<sup>193</sup> A longer time limitation accounts for a period of grieving and the practical realities of using ART, which can often require multiple attempts to achieve a pregnancy.<sup>194</sup>

### *3. Lack of Notice Requirement*

Furthermore, the current statute does not require a person intending to use the deceased gametes for posthumous reproduction to give notice to the fiduciary of the decedent’s estate. Although this is not essential, providing notice in writing allows the fiduciary to protect assets in which the child has an interest.<sup>195</sup>

To aid in the administration of estates, Arkansas should also consider adding a notice element to the statute. A surviving parent of the posthumously conceived child should provide notice within six months to a fiduciary or custodian managing the decedent’s assets that posthumous conception is a possibility. This protects the fiduciary and the future child’s interest in the decedent’s property. However, the failure to meet this procedural

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191. ARK. CODE ANN. § 28-9-221.

192. ARK. CODE ANN. § 28-9-221.

193. *See supra* Part II.B.1.

194. Vegter, *supra* note 5, at 270.

195. Carpenter, *supra* note 2, at 423.

requirement should not decide the child's status as an heir of the deceased parent. If the fiduciary is not given notice, the fiduciary may distribute assets without liability after the six-month notice period.<sup>196</sup> The effect would be that the child would not receive the property already distributed from the deceased parent's estate if notice is not provided yet would still qualify for Social Security survivor's benefits or other inheritance rights. This would serve to protect the child's interests while allowing for the timely administration of the parent's estate.<sup>197</sup> Furthermore, if notice is given to the fiduciary after the notice period, the fiduciary should have a duty to retain any remaining assets to which the child may have a claim until the end of the three-year time limitation.<sup>198</sup>

#### ***4. Marriage Requirement***

Lastly, the statute may face constitutional challenges under the Equal Protection Clause of the Fourteenth Amendment in limiting inheritance rights based on the marital status of the parents.<sup>199</sup> In this case, the language of the current statute may present an ambiguity with regard to the relationship status of the parents of a posthumously conceived child. The term "decedent" is used to refer to the deceased parent, but the word "spouse" is used in reference to the "decedent's surviving spouse."<sup>200</sup>

Although not wholly evident from the words in the statute, the discussion of the bill during the presentation to the Arkansas House of Representatives Committee on House Aging, Children and Youth, Legislative & Military Affairs indicates that the statute was intended to apply to parents that are married at the time of the death of the decedent.<sup>201</sup> To ensure that the statute applies equally to both married and unmarried parents, this limiting language should be amended to remove the term "spouse," which bars PCC born to unmarried parents from inheriting. By using consistent, inclusive language, the statute can be uniformly applied in all PCC cases, regardless of marital status or sex of the parent.

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196. *Id.* at 424.

197. *Id.* at 422.

198. *Id.* at 424.

199. *Id.* at 427.

200. ARK. CODE ANN. § 28-9-221 (2015).

201. See *Presentation on HB 1904*, *supra* note 9.

#### **D. Proposal to Amend Section 28-9-221**

In response to the problems with Arkansas's PCC statute outlined above, I propose amending the statute to clarify the legal status and inheritance rights of PCC in the state. To resolve the foregoing issues, I propose the following language:

##### **Child Conceived After the Death of a Parent**

A child of the decedent conceived and born after the death of the decedent shall be deemed a child of the decedent if:

(a) either:

(1) the individual consented in a record to the use of his or her genetic material to posthumously conceive a child by assisted reproduction; or

(2) the individual's intent to conceive a child by assisted reproduction after the individual's death is established by clear and convincing evidence; and

(b) the embryo is in utero no later than thirty-six (36) months after the individual's death.

(c) The person designated by the decedent to control the decedent's genetic material should give written notice within six (6) months of the decedent's death to the person with the power to control the distribution of either the decedent's property or death benefits payable upon the decedent's death of the possibility of using decedent's genetic material for posthumous conception. The failure to provide timely notice relieves any fiduciary or other person in control of the decedent's property or death benefits of liability for distributing the decedent's property or benefits to the proper beneficiaries at the end of the six (6) month notice period. In the event that notice of intent to use the decedent's genetic material for posthumous conception is given after six (6) months, the fiduciary of the decedent's estate has the duty to retain any remaining assets of the estate to which the potential child may have valid claim until the end of the three (3) year time period for posthumous conception.

(d) Unless of an agreement to the contrary, the decedent's consent to posthumous conception with a spouse is automatically revoked upon the divorce of the parties.

This proposed statutory language serves to resolve the issues in the current statute by providing lucidity and increasing flexibility. First, the consent requirement is simplified and allows PCC to inherit even in the absence of a formal signed writing. Second, the time limitation of three years provides clarity and additional time for a surviving parent to grieve and consider posthumous reproduction. Third, the proposed statute includes a notice requirement to protect the child's interests in the deceased parent's estate and allow for timely estate administration. Fourth, the suggested language makes it clear that the statute applies to all PCC regardless of the parent's marital status or sex. Lastly, this proposed statute is mindful of the best interests of the child. By relaxing the restrictive consent requirement and time limitations, it provides greater opportunity for PCC to inherit despite their parents' nontraditional reproductive choices.

### CONCLUSION

The advancements in medical technology have altered the traditional timelines of human reproduction. Although many states have failed to update existing intestacy laws to provide inheritance rights to PCC, Arkansas allows these children to become rightful heirs. However, the Arkansas statute governing PCC presents a number of issues that the legislature must address.

First, the consent provision presents practical and legal difficulties because of its ambiguous language and ostensible requirement to seek out medical professionals in order to provide legal consent. Second, the plain language of the statute itself is conflicting, and the time limitation is overly restrictive to the surviving parent. Third, the statute lacks any stipulation to give notice to the fiduciary of the decedent's estate of the possibility of posthumous conception. Finally, the language of the statute appears to apply only to married parents.

To resolve these deficiencies, the Arkansas Legislature should amend the current statute in a number of ways. First, the consent requirement should be revised to require the decedent to provide consent in a record or allow consent to be established by clear and convincing evidence, with divorce automatically revoking prior consent to posthumously conceive. Second, the conflicting language of the statute that allows a posthumously

conceived child to fulfill part of the time limitation and yet fail to meet the time requirement for birth must be resolved. This should be accomplished by extending the time limitation to conceive to within three years of the deceased parent's death. Third, a surviving parent of the posthumously conceived child should be required to provide notice within six months to a fiduciary or custodian managing the decedent's assets that posthumous conception is a possibility. However, this procedural element should not serve to bar a child from inheriting if the surviving parent fails to give notice to the fiduciary of the decedent's estate. Finally, the statutory language should omit the term "spouse" to allow it to apply equally to PCC born to married and unmarried parents. These changes will allow for the timely administration of estates while providing clarity for PCC's inheritance rights and flexibility for those who wish to posthumously conceive a child in Arkansas.