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Inheritance Rights of Posthumously Conceived Children in Texas Comment.

Allison Stewart Ellis

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COMMENT

INHERITANCE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN IN TEXAS

ALLISON STEWART ELLIS

I. Introduction	414
II. Background of the Law.	419
A. Common Law and Posthumous Children.	419
B. Technology Leading to the Existence of Posthumously Conceived Children	422
C. Earliest Cases Introducing Possible Problems	427
III. Legislative Responses and Case Law.	430
A. The Uniform Parentage Act Offers Direction for State Legislatures	430
B. Determination of Parentage for Children Conceived After a Parent's Death	432
C. Inheritance Determinations Based on Parentage Status	433
IV. Analysis and Implications for Texas	435
A. Signed Writing on File with Physician	436
B. Divorce.	439
C. Inheritance.	441
1. Wills	441
2. Intestacy	445
D. Gender Equality and the Texas Family Code	448
V. Conclusion	449

I. INTRODUCTION

As science continues to accelerate innovation, courts and legislatures struggle to find new ways to apply established legal principles within the context of the resulting breakthroughs in technology.¹ Nowhere is this innovation more apparent than in the field of modern reproductive methods.² Artificial reproductive techniques allow many people to have children who otherwise would not be able.³ Specifically, children may be

1. See Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–16 (2005) (criticizing the law for failing to respond to new technology and innovations).

2. Cf. 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, 234 (2005) (“The use of various assisted reproductive technologies has given rise to a variety of legal and morality concerns.”); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 512–13 (2005) (remarking that in vitro fertilization is an example of technological change that troubles legal scholars). Scholars have accused the law of having gaps and not being updated in response to new technologies and issues. Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–16 (2005).

3. Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 410 (2009) (“Numerous types of reproductive technology are available to help infertile couples achieve their dreams of having children.”); see Phillip C. Cato, *The Hidden Costs of Fertility*, 20 ST. JOHN’S J. LEGAL COMMENT. 45, 45 (2005) (recognizing that 10% of American couples experience infertility, which results in a high demand for assisted reproductive technologies); Jean Macchiaroli Eggen, *The “Orwellian Nightmare” Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 GA. L. REV. 625, 631–32 (1991) (listing the types of assisted reproduction and how they benefit infertile couples); 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, 234 (2005) (stating that assisted reproduction allows people to reproduce who otherwise would have been unable); Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 871 (1985) (reporting that 6,000 to 20,000 children are born per year as a result of artificial insemination); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 56–58 (1994) (stating that 15% of Americans are infertile and that infertility is a devastating experience that can be solved via assisted reproduction); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1107 (1997) (indicating that as of 1997, 500,000 children had been born in the United States from artificial insemination); Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 SETON HALL LEGIS. J. 103, 106 n.15 (1998) (saying that 500,000 couples use artificial insemination); Catherine Belfi, Note, *Birth of a New Age: A*

conceived even after the death of one of the parents;⁴ these children are referred to as posthumously conceived.⁵ The ability of parents to posthumously conceive children has created new legal challenges, many of which have not yet been addressed.⁶ Inheritance law is an issue within the province of state regulation,⁷ and the states have reacted differently to the possibility of

Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 118–20 (2009) (identifying the different means of assisted reproduction and the number of people using them).

4. See Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 63 (1994) (“[C]ryopreservation and long-term storage of embryos creates the potential for a child to be born years, even decades, after the death of the genetic parents.”); Raymond C. O’Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL’Y 332, 332 (2009) (noting recent technology allows for conception to occur decades after the death of a parent).

5. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 117 (Vicki Been et al. eds., 8th ed. 2009). A posthumously conceived child is one conceived and born after one or both of the biological parents is deceased. *Id.* Alternatively, a posthumous child is one that is conceived before, but born after, the death of his or her biological father. *Id.* at 115.

6. See Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 412 (2009) (stating that courts must now deal with a new class of children—those born after the death of a parent); see also 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, 255 (2005) (stating that most state legislatures have not addressed the rights of posthumously conceived children, and thus, courts must decide how to interpret their existing intestacy statutes); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–16 (2005) (remarking that legislatures are “lagging behind” in regards to responding to the latest reproductive technologies). Many legislatures have not yet enacted statutes regarding these children, and most courts are resolving the issues “on a case-by-case basis.” Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 412 (2009); see also Brianne M. Star, Comment, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 613 (2004) (referring to the fact that many states have outdated laws and statutes that are inapplicable to new issues raised by the existence of posthumous children). Additionally, with the availability of new reproductive technologies, the President’s Council on Bioethics has recognized that there is a need for many new regulations dictating how technology should and should not be used. Phillip C. Cato, *The Hidden Costs of Fertility*, 20 ST. JOHN’S J. LEGAL COMMENT. 45, 54–55 (2005).

7. Ronald J. Scalise, Jr., *New Developments in United States Succession Law*, 54 AM. J. COMP. L. 103, 103 (2006). See generally Alicia Ouellette et al., *Lessons Across the Pond: Assisted Reproductive Technology in the United Kingdom and the United States*, 31 AM. J.L. & MED. 419, 423 (2005) (noting that states have been more involved in regulating the use of human embryos than the federal government has).

posthumous conception.⁸ As of 2006, only fourteen states had enacted laws regarding these children, some of which only recognize the deceased as the parent if the child is born within ten months of the parent's death.⁹ Since 2006, only two more states

8. See 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, 255 (2005) (stating that few states have addressed posthumously conceived children through legislation, so in most states, the courts must determine how to recognize the rights of these children); Joseph H. Karlin, Comment, "*Daddy, Can You Spare a Dime?*": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006) (stating that only fourteen states have statutes regarding posthumously conceived children).

9. Joseph H. Karlin, Comment, "*Daddy, Can You Spare a Dime?*": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006); accord Jenna M. F. Suppon, Note, *Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children*, 48 FAM. CT. REV. 228, 229 (2010) (arguing that the lack of legislation has forced many courts to resolve this issue with little guidance (citing Joseph H. Karlin, Comment, "*Daddy, Can You Spare a Dime?*": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006))). The states recognizing these children are California, Colorado, Delaware, Florida, Georgia, Idaho, Louisiana, North Dakota, South Carolina, Texas, Utah, Virginia, Washington, and Wyoming. Joseph H. Karlin, Comment, "*Daddy, Can You Spare a Dime?*": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006). These states generally require that the decedent give consent to the reproduction in order for the posthumously conceived child to be recognized. See CAL. PROB. CODE § 249.5 (Deering Supp. 2011) (recognizing a posthumous child as the child of his or her deceased parent if the parent consented to after-death reproduction); COLO. REV. STAT. ANN. § 19-4-106(8) (West 2010) (specifying that a person must consent to the after-death use of his or her reproductive material in order to be considered a parent); DEL. CODE ANN. tit. 13, § 8-707 (2009) (requiring the decedent's consent to posthumous conception); LA. REV. STAT. ANN. § 391:1 (2008) (stating that a posthumously conceived child may inherit from his or her deceased parent if the child is born within three years of the decedent's death, and if the decedent consented to such use of his gametes); N.D. CENT. CODE § 14-20-65 (Supp. 2009) (requiring consent to posthumous reproduction); TEX. FAM. CODE ANN. § 160.707 (West 2008) (specifying that consent to posthumous conception must be in writing and filed with a physician); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2008) (stating that the deceased must consent); VA. CODE ANN. § 20-158B (2008) (requiring consent to posthumous conception in order for the child to be considered the child of the deceased); WASH. REV. CODE ANN. § 26.26.730 (LexisNexis 2011) (requiring consent as a prerequisite to parentage after death); WYO. STAT. ANN. § 14-2-907 (2009) (stipulating that consent is required for parentage after death). *But see* FLA. STAT. ANN. § 742.17 (West 2010) (stating that a child conceived after death may be entitled to inheritance if so specified in the decedent's will); GA. CODE ANN. § 53-2-1(b)(1) (Supp. 2010) (denying inheritance to children conceived after the decedent's death); IDAHO CODE ANN. § 15-2-108 (2009) (requiring that a child be conceived before the decedent's death and born within ten months of the decedent's death in order to inherit); S.C. CODE ANN. § 62-2-108 (2009) (mandating a child be conceived before decedent's death and born within ten months of the decedent's death in order to inherit). Arkansas, Georgia, Idaho,

have enacted legislation recognizing posthumously conceived children.¹⁰

Some of the major issues related to posthumously conceived children involve the determination of parentage and inheritance rights.¹¹ The Texas Legislature has addressed both of these areas, though not as fully as it should.¹² While Texas law specifically

South Carolina, and Virginia only recognize parentage and inheritance for children born within ten months of the deceased parent's death. *See* ARK. CODE ANN. § 28-9-210(a) (2004) (stipulating that a child be conceived before the parent's death and born within ten months in order to inherit); GA. CODE § 53-2-1(b)(1) (same); IDAHO CODE § 15-2-108 (stating that any issue of the deceased must be born within ten months of that parent's death in order to inherit from him or her); KY. REV. STAT. ANN. § 391.070 (LexisNexis 2010) (providing that a child must be conceived before the deceased father's death and born within ten months of the death in order to inherit from him); S.C. CODE § 62-2-108 (stating that an issue of the decedent must be conceived before his or her death and born within ten months of the death); VA. CODE § 20-164 (2008) (requiring that a child be born within ten months of his or her deceased parent's death in order to inherit from the parent); *see also* Joseph H. Karlin, Comment, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006) (referring to states that only recognize inheritance if the child is born within ten months of the parent's death).

10. *See* ALA. CODE § 26-17-707 (LexisNexis 2009) (adopting the Uniform Parentage Act, which requires that a person consent in writing to parentage after death, but with the additional requirement that the record is signed by and filed with a physician); N.M. STAT. ANN. § 40-11A-707 (LexisNexis Supp. 2010) (requiring consent in writing for conception to occur after the death of one of the parties).

11. *See* Gillett-Netting v. Barnhart, 371 F.3d 593, 596–99 (9th Cir. 2004) (looking at parentage and inheritance to determine that children conceived after the death of their biological father were considered the children of their father and were entitled to insurance benefits through him); Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1262–65 (M.D. Fla. 2005) (determining that children conceived after the death of their father were indeed his children, but under state law they were not entitled to survivor benefits through him); Finley v. Astrue, 270 S.W.3d 849, 852–55 (Ark. 2008) (holding, consistent with state law, that posthumously conceived children are the children of the deceased parent but are not entitled to inherit); Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 264–72 (Mass. 2002) (examining both parentage and inheritance issues, but failing to make a final decision on either one); Khabbaz v. Comm'r, Soc. Sec. Admin., 930 A.2d 1180, 1183–86 (N.H. 2007) (ruling that, according to statute, a posthumously conceived child is not the surviving issue of the deceased parent, and the child cannot inherit from the parent); *In re* Estate of Kolacy, 753 A.2d 1257, 1260–64 (N.J. Super. Ct. Ch. Div. 2000) (holding that posthumously conceived children were considered intestate heirs qualified to inherit from the deceased parent).

12. *See* FAM. § 160.204 (West 2008) (identifying presumptions of parenthood, including birth of a child within 300 days of the death of the father); *id.* § 160.707 (requiring that a party consenting to the use of genetic material by his or her spouse sign a writing expressing the consent and file it with a physician); TEX. PROB. CODE ANN. § 38(b) (West 2003) (recognizing intestate inheritance rights of posthumously conceived children); TEX. PROB. § 41(a) (West Supp. 2010) (providing that all intestate heirs must be

grants a posthumously conceived child the right to be considered the child of his or her deceased parent, and provides for both testate and intestate inheritance rights, these provisions create complications when they are applied to actual inheritance disputes.¹³ Texas courts have not yet faced major issues regarding posthumously conceived children and thus have not had an opportunity to interpret the relevant statutes, but it is only a matter of time. The Texas Legislature should update the state's applicable statutes and make an effort to preempt the problems that will soon begin to manifest themselves in the Texas court system.¹⁴

In order to construct a recommendation for modifying the Texas statutes, Part II of this Comment will analyze the progression of the law regarding posthumously conceived children by examining the history of the technology that allows for the creation of these children and by providing an account of several early cases that prompted legislatures to take action to resolve some of the issues posthumous conception might potentially create. This will be followed in Part III by an analysis of statutes and case law from different states and an explanation regarding the position of the Texas Legislature with respect to parentage and inheritance rights of posthumously conceived children. Finally, Part IV will identify

living at the time of the decedent's death *except* children or other lineal descendants); TEX. PROB. § 67 (West Supp. 2010) (mandating that a child born after the execution of a testator's will is entitled to a share of his estate unless the child is otherwise provided for or the will excludes pretermitted children); *see also* FAM. § 160.201(b)(5) (West 2008) (providing the methods of establishing status as a father, including consent to assisted reproduction); TEX. PROB. § 42(b) (West 2003) (allowing for intestate inheritance from and through a child's parents as provided by the Texas Family Code); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–16 (2005) (referring to the fact that many legislatures have not responded properly to the existence of reproductive technology).

13. *See* FAM. § 160.707 (obligating a potential beneficiary to prove that the deceased parent filed a record of consent with a physician in order to be eligible for inheritance); TEX. PROB. § 38(b) (identifying who may take of an intestate estate and in what shares); TEX. PROB. § 41 (stating that a person who is not a descendant may not inherit unless he or she is in being at the time of the decedent's death); TEX. PROB. § 67 (describing how a child may inherit from his or her parent if the child was born after the will's execution).

14. *See* Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–16 (2005) (referring to the fact that legislatures have been criticized for failing to respond to new reproductive technologies).

critical problems in the Texas statutes dealing with posthumous conception and propose a framework of solutions for effectively dealing with these problems.

II. BACKGROUND OF THE LAW

A. *Common Law and Posthumous Children*

At common law, a non-marital child was considered “the child of no one,” which prevented the child from inheriting from either parent.¹⁵ Common law opinions on marriage, sex, and gender formed the basis for this treatment.¹⁶ As a result, the actions of parents of non-marital children forced the children to bear the resulting burdens.¹⁷ This could even include children who were conceived by married parents but born after the father’s death, because upon the father’s death, his marriage to the unborn child’s mother was considered dissolved, and the child simply became a non-marital child.¹⁸

In order to avoid this blatantly unfair treatment of children, all states now recognize inheritance rights from the mother, but differ in their treatment of inheritance from the father.¹⁹ Additionally,

15. 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); Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 172 (2009); accord JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 115 (Vicki Been et al. eds., 8th ed. 2009) (“A child born out of wedlock was *filius nullius*, the child of no one. . .”).

16. Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 172 (2009); see also 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) (identifying feudalism, marital harmony, and fraud prevention as possible reasons non-marital children were not allowed to inherit from either parent).

17. See JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 115 (Vicki Been et al. eds., 8th ed. 2009) (“Although innocent of any sin or crime, children of unmarried parents were given harsh, pitiless treatment by the common law.”); Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 172 (2009) (describing the unfair treatment of non-marital children at common law as “draconian”).

18. Cf. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 117 (Vicki Been et al. eds., 8th ed. 2009) (stating that a posthumously conceived child is considered non-marital due to the death of one of the parents before conception).

19. *Id.* at 115; see also Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 172 (2009) (noting

the United States Supreme Court has deemed the disparate treatment of non-marital children unconstitutional in some circumstances.²⁰ While the classification of non-marital children does not carry the stigma it once did, it is important that states afford inheritance rights to children born after a parent's death.²¹

Today, many states recognize the presumption that when a woman gives birth within 300 days or ten months after the death of her husband, the child is considered a child of the marriage and may thus inherit from the father.²² While some states retain

legislatures began to recognize inheritance rights through mothers, while still prohibiting inheritance from the father).

20. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 116 (Vicki Been et al. eds., 8th ed. 2009); *see also* *Trimble v. Gordon*, 430 U.S. 762, 767–76 (1977) (applying an intermediate scrutiny analysis to determine that a statute denying non-marital children inheritance rights from their father was unconstitutional). *But see* *Lalli v. Lalli*, 439 U.S. 259, 271–76 (1978) (distinguishing *Trimble* and upholding a New York statute that recognized disinheritance of a non-marital child from the child's father under certain circumstances). The United States Supreme Court invalidated states' unequal treatment of marital and non-marital children, specifically in the areas of state inheritance, custody, and tort law. *See* 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, 235 (2005) (arguing that state laws that restrict the rights of posthumously conceived children must meet an intermediate scrutiny, meaning that the state must have an important interest and the law must be substantially related to that state interest).

21. *Cf.* UNIF. PARENTAGE ACT (2000) prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2011) (describing the shift in terminology used to describe non-marital children in order to avoid disparate treatment of such children).

22. 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, 254 (2005); *see* JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 115 (Vicki Been et al. eds., 8th ed. 2009) (stating that courts presumed that a child born 280 days after the father's death was considered a child of the father). The Uniform Parentage Act shifted the 280-day requirement to 300 days, and provided that the presumption of fatherhood is rebuttable. *See* UNIF. PARENTAGE ACT (2000) § 204 (amended 2002), 9B U.L.A. 23 (Supp. 2011) (providing for a rebuttable presumption of paternity if the child is born within 300 days of the father's death); JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 115 (Vicki Been et al. eds., 8th ed. 2009) (discussing the transition from the 280-day requirement to the 300-day requirement imposed by the Uniform Parentage Act); *see also* KY. REV. STAT. ANN. § 391.070 (LexisNexis 2010) (explicitly stating that a posthumous child must be born within ten months to inherit from the father); LA. CIV. CODE ANN. art. 185 (2007) (requiring that the child be born within 300 days to meet the presumption); TEX. FAM. CODE ANN. § 160.204 (West 2008) (providing that a child born before the 301st day after the termination of a marriage is presumed to be a child of the former husband). *But see* ARK. CODE ANN. § 28-9-210(a) (2004) (giving no time limit, but merely requiring that conception occur before the decedent's death).

variations of these laws as the only means of inheriting after a parent's death,²³ others have expanded further to afford rights to children born more than 300 days after the parent's death when conceived by means of assisted reproduction.²⁴

23. See ARK. CODE § 28-9-210(a) (requiring that a posthumous child already be conceived at the time of the deceased parent's death in order to inherit by intestacy); GA. CODE ANN. § 53-2-1(b)(1) (Supp. 2010) (noting that to be a child of the decedent, the child must already be conceived at the time of the decedent's death *and* be born within ten months of the death); IDAHO CODE ANN. § 15-2-108 (2009) (stating that any relatives, not just children, of the decedent may inherit from the decedent if conceived before the decedent's death and born within ten months of the death); KY. REV. STAT. § 391.070 ("A child born of a widow within ten (10) months after the death of the intestate, shall inherit from [the intestate decedent]. . . ."); S.C. CODE ANN. § 62-2-108 (2009) (saying that only the decedent's issue, not other relatives, may inherit from the decedent if conceived before death and born within ten months); VA. CODE ANN. § 20-164 (2008) (providing that a child born more than ten months after decedent's death shall not inherit by intestacy, probate, or through class gifts).

24. See ALA. CODE § 26-17-707 (LexisNexis 2009) (recognizing that a posthumously conceived child is the child of his or her deceased parent if the deceased consented to posthumous conception); CAL. PROB. CODE § 249.5 (Deering Supp. 2011) (stating that a posthumously conceived child may be entitled to inherit if the deceased parent agreed in writing to conception after death); COLO. REV. STAT. ANN. § 19-4-106(8) (2010) (requiring that decedent agree to posthumous parenthood); DEL. CODE ANN. tit. 13, § 8-707 (2009) (following the same method as the Colorado statute); LA. REV. STAT. ANN. § 391:1 (2008) (allowing a posthumous child to inherit if the parent consented to posthumous reproduction *and* the child is born within three years of the decedent's death); N.M. STAT. ANN. § 40-11A-707 (LexisNexis Supp. 2010) (stipulating that a parent must consent to posthumous parentage); N.D. CENT. CODE § 14-20-65 (Supp. 2009) (requiring consent in writing to posthumous reproduction); FAM. § 160.707 (West 2008) (distinguishing its procedures from other states to require a signed consent form on file with a licensed physician); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2008) (mandating a signed writing of consent before parentage of a posthumously conceived child is established); WASH. REV. CODE ANN. § 26.26.730 (LexisNexis 2011) (following the same procedures as Utah); WYO. STAT. ANN. § 14-2-907 (2009) (echoing the same requirements as Utah and Washington). Florida allows for posthumously conceived children to inherit, but only if the deceased parent provided for the possibility of such child in a will. FLA. STAT. ANN. § 742.17(4) (West 2010).

The contours of inheritance through a will are unclear in some states that have addressed the matter in relation to intestacy. In Arkansas, a child must already be conceived at the time of decedent's death in order to inherit by intestacy, but the statute has no specifications as to whether the child may take under a will. See ARK. CODE § 28-9-210(a) ("Posthumous descendants of the *intestate* conceived before his or her death but born thereafter shall inherit in the same manner as if born during the lifetime of the *intestate*." (emphasis added)). Similarly, in Kentucky, a child born within ten months of an intestate decedent's death may inherit from the decedent, but the statute makes no reference to testate decedents. See KY. REV. STAT. § 391.070 ("A child born of a widow, within ten (10) months after the death of the *intestate*, shall inherit from him in the same manner as if he were in being at the time of the *intestate's* death." (emphasis added)). It

B. *Technology Leading to the Existence of Posthumously Conceived Children*

Technology allowing for assisted human reproduction has been in existence for longer than one might think.²⁵ The first recorded success of artificial insemination in humans occurred in 1790; previously, the procedure had only been used in animals.²⁶ Artificial insemination is the easiest and most inexpensive method of assisted reproduction; it involves inserting sperm into a woman's reproductive tract, allowing for fertilization.²⁷ This process can be achieved with the sperm of a woman's significant other or that of a sperm donor.²⁸ The first successful insemination through use of a donor in the United States occurred in 1866.²⁹ It has been estimated that, in the United States, up to 20,000 children

seems that the effect of the Arkansas and Kentucky statutes is similar to that of the Florida statute, despite their very different wording. Compare ARK. CODE § 28-9-210(a) (allowing a posthumous child to take from an intestate decedent if the child is born within ten months of the death), and KY. REV. STAT. § 391.070 (stating that a child born within ten months of an intestate decedent's death may inherit from the decedent), with FLA. STAT. § 742.17(4) (providing that a posthumously conceived child may inherit, but only if the decedent's will expressly provides for such).

25. See Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 118 (2009) (referring to the first use of artificial insemination in the eighteenth century).

26. See *id.* at 117 n.22 (noting that artificial insemination was used for animal husbandry before being used in humans in 1790).

27. See Susan C. Stevenson-Popp, "I Have Loved You in My Dreams": *Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U. L. REV. 727, 728 n.3 (2003) (stating that "artificial insemination is the oldest and most common form" of artificial reproduction, and is also the least expensive); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 117-18 (2009) (remarking that artificial insemination is "the oldest form of non-coital reproduction").

28. Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 117-18 (2009).

29. Kristen E. Koehler, Comment, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 334 (1996). Dr. J. Marion Sims performed the first successful artificial insemination by donor in the United States in 1866. *Id.*; accord Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 118 (2009) (stating that the first successful insemination by donor was not until nearly 100 years after the process was first discovered).

are conceived by artificial insemination per year, and more than 500,000 children total have resulted from this process.³⁰

Artificial insemination may be useful in surrogacy and embryo transfer as well.³¹ Traditional surrogacy occurs when the surrogate agrees to be inseminated with the intended father's sperm and then carries the baby to term.³² Gestational surrogacy is analogous to traditional surrogacy, except instead of using the surrogate's own egg, the egg of the intended mother is used.³³ Similar to surrogacy, embryo transfer occurs when fertilization takes place in one woman's body, and the fertilized embryo is transferred to the body of the intended mother.³⁴ These techniques are useful for couples who cannot physically conceive on their own.³⁵

Another popular method of assisted reproduction is in vitro fertilization.³⁶ Differing from artificial insemination, the fertilization in this technique occurs outside the woman's body,

30. Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 118 (2009); see also Joan Heifetz Hollinger, *From Coitus to Commerce: Legal and Social Consequences of Noncoital Reproduction*, 18 U. MICH. J.L. REFORM 865, 871 (1985) (stating that artificial insemination results in the birth of 6,000 to 20,000 children per year); Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1107 (1997) (indicating that as of 1997, 500,000 children were born from artificial insemination techniques in the United States); Gregory A. Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 23 SETON HALL LEGIS. J. 103, 106 n.15 (1998) (noting that 500,000 couples use these assisted reproduction techniques).

31. See Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 118–20 (2009) (discussing the impact of artificial insemination on surrogacy and embryo transfer).

32. *Id.* at 119.

33. *Id.*

34. *Id.*; accord *Embryo Transfer*, AMERICANPREGNANCY.ORG, <http://www.americanpregnancy.org/infertility/embryotransfer.html> (last visited Sept. 16, 2011) (describing the process of transferring embryos from one body to another).

35. See Phillip C. Cato, *The Hidden Costs of Fertility*, 20 ST. JOHN'S J. LEGAL COMMENT. 45, 45 (2005) (stating that approximately 10% of American couples experience infertility, and assisted reproductive technology is recognized as a possible solution for this problem).

36. See Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 120 (2009) (identifying in vitro fertilization as an alternative to artificial insemination).

and the fertilized egg is then transferred into a uterus.³⁷ Hence, children resulting from this process are often referred to as “test-tube babies.”³⁸ In vitro fertilization is a newer technique than artificial insemination; two British doctors first attempted in vitro fertilization in 1969, though it did not result in the birth of a child.³⁹ The first successful birth from this procedure occurred in the United Kingdom in 1978.⁴⁰ For the technique to be successful, the already-fertilized egg must be transferred to the woman’s uterus and implanted into the uterine walls.⁴¹ Many fertilized

37. See *id.* (noting fertilization occurs outside the body and then the fertilized egg must be transferred into a uterus); In Vitro Fertilization: IVF, AMERICAN PREGNANCY.ORG, <http://www.americanpregnancy.org/infertility/ivf.html> (last visited Sept. 16, 2011) (describing the fertilization process, which takes place in incubators in a laboratory).

38. See Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 60 (1994) (remarking that the product of the first successful in vitro fertilization was a test-tube baby); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 509 (2005) (opining that the notion of a test-tube baby was developed in Aldous Huxley’s *Brave New World* and brought to life with in vitro fertilization (citing ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932))); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN’S J. LEGAL COMMENT. 113, 120 n.42 (2009) (stating that the term test-tube baby is commonly associated with in vitro fertilization (citing Laura D. Heard, Comment, *A Time to Be Born, A Time to Die: Alternative Reproduction and Texas Probate Law*, 17 ST. MARY’S L.J. 927, 934–35 (1986))); Ellen J. Garside, Comment, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 714 (1996) (referring to children resulting from in vitro fertilization as test-tube babies).

39. See Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN’S J. LEGAL COMMENT. 113, 120 (2009) (reporting that British doctors were the first to successfully perform an in vitro fertilization, but the first human birth from this process did not occur until 1978).

40. See Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 60 (1994) (indicating that the first child born by in vitro fertilization was in 1978 in England); Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 509 (2005) (remarking that the first in vitro fertilization birth occurred in 1978); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN’S J. LEGAL COMMENT. 113, 120 (2009) (stating that the first birth from in vitro fertilization did not happen until ten years after the procedure was developed).

41. Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST.

eggs are often transferred in hopes that at least one will properly implant.⁴² It has been estimated that more than 3,000 children are born each year worldwide via in vitro fertilization.⁴³

Furthering the in vitro fertilization technology, cryopreservation provides an opportunity for genetic material to be stored for long periods of time.⁴⁴ Cryopreservation is a process in which the

JOHN'S J. LEGAL COMMENT. 113, 120 (2009); see Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 61 (1994) (indicating that the embryo is transferred to the uterus "at the two to sixteen cell stage"); Lynne M. Thomas, Comment, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection?*, 29 ST. MARY'S L.J. 255, 256-57 (1997) (stating that the embryos must be implanted into the woman's uterus); see also Phillip C. Cato, *The Hidden Costs of Fertility*, 20 ST. JOHN'S J. LEGAL COMMENT. 45, 51 (2005) ("The next step in this assisted process is to transfer the... fertilized egg to the uterus..."); *Embryo Transfer*, AMERICANPREGNANCY.ORG, <http://www.americanpregnancy.org/infertility/embryo-transfer.html> (last visited Sept. 16, 2011) (describing the process of implanting the embryos into the uterus, and how it must be done to be successful). The implantation typically takes place one to six days after fertilization occurs. *Id.*

42. See Phillip C. Cato, Symposium, *The Hidden Costs of Fertility*, 20 ST. JOHN'S J. LEGAL COMMENT. 45, 52 (2005) (stating that multiple embryos are transferred to the woman's body in assisted reproductive procedures, often resulting in multiple births); *Embryo Transfer*, AMERICANPREGNANCY.ORG, <http://www.americanpregnancy.org/infertility/embryotransfer.html> (last visited Sept. 16, 2011) (remarking that the optimal number of embryos transplanted is open to debate because too many embryos could lead to multiple pregnancies and further complications). It is suggested that four embryos be implanted in order to balance the probability of a successful pregnancy with the possibility of multiple pregnancies. *Embryo Transfer*, AMERICANPREGNANCY.ORG, <http://www.americanpregnancy.org/infertility/embryotransfer.html> (last visited Sept. 16, 2011). Implanting fewer than four embryos decreases the chances of success, and implanting more than four embryos is likely to result in multiple births and other complications to the pregnancy. *Id.*; see Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 583-84 (2005) (recognizing that a pregnancy of multiple fetuses poses many potential problems for the mother and the fetuses).

43. Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 60 (1994); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 120 (2009).

44. See Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 580 (2005) (stating that cryopreserved gametes allow for conception after the death of the biological mother and/or father); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 121 (2009) (explaining that cryopreservation "allows for the storage and preservation of reproductive material through cryogenic freezing," which may ameliorate the in vitro fertilization success rate).

reproductive material is gathered, then specially frozen and preserved for in vitro fertilization at a later date.⁴⁵ This procedure allows for the transfer of eggs through in vitro fertilization in small quantities, thus reducing the risk of multiple pregnancies.⁴⁶ The first use of cryopreservation took place in 1983.⁴⁷ Cryopreservation was originally used for sperm and fertilized embryos, but eggs may now be kept by this method as well.⁴⁸ The cryopreservation process makes posthumous conception possible because the genetic material may be stored and used after the death of the donating party or spouse.⁴⁹

45. Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 121 (2009).

46. Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 63 (1994).

47. *Id.* at 64; Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 510 (2005). The method was actually discovered in 1949, when scientists realized that adding glycerol to sperm allows the sperm to be frozen and stored. Summer A. Johnson, *Chapter 775: Babies with Bucks—Posthumously Conceived Children Receive Inheritance Rights*, 36 MCGEORGE L. REV. 926, 926 (2005).

48. See Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 580 (2005) (noting it is increasingly common to use cryopreservation for preserving sperm, and advances in technology have allowed for similar long-term egg preservation); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 64 (1994) (indicating that all of these types of reproductive material may be preserved); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 121 (2009) (indicating that embryos, sperm, and eggs may be cryogenically preserved). Now that preservation of eggs is possible, posthumous conception can be possible after the death of the biological mother. Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 580 (2005). Additionally, in the United States, as many as 400,000 frozen embryos are being stored. Summer A. Johnson, *Chapter 775: Babies with Bucks—Posthumously Conceived Children Receive Inheritance Rights*, 36 MCGEORGE L. REV. 926, 926 (2005).

49. See Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234, 237 (2005) (remarking that cryopreservation theoretically allows for the storage of sperm for up to a hundred years, and is "the key process" that makes conception possible after a parent's death); Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 580 (2005) (noting that sperm harvesting makes it possible to gather sperm after a man's death for cryopreservation and that long-term egg storage enables a child to be born after the biological mother's death); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive*

C. *Earliest Cases Introducing Possible Problems*

In 1993, after the death of her boyfriend, Deborah Hecht petitioned the California Court of Appeals to determine that the cryogenically preserved sperm that the decedent had devised to her was her property.⁵⁰ The court ultimately concluded that the sperm was property subject to testamentary devise, and that it was acceptable for Hecht to attempt to impregnate herself with the sperm since the decedent had consented to this use before his death.⁵¹ However, because the issue in the case was merely whom the sperm should be given to, the issue of inheritance was not addressed.⁵²

Technology: Implications for Inheritance, 29 REAL PROP. PROB. & TR. J. 55, 63 (1994) (indicating that, as a result of cryopreservation, reproductive material can be stored for long periods of time, thus allowing children “to be born years, even decades, after the death of the genetic parents”); Raymond C. O’Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL’Y 332, 332 (2009) (remarking that recent technology allows for conception to occur decades after the death of a parent); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN’S J. LEGAL COMMENT. 113, 121 (2009) (“[T]he advantage offered by cryopreservation that most seriously implicates inheritance law is the potential for posthumous conception of children.”).

50. *Hecht v. Superior Court (Ross)*, 20 Cal. Rptr. 2d 275, 279 (Ct. App. 1993). The decedent had two adult children who were contesting the devise of the sperm to their father’s girlfriend, Hecht, and requested first that it be destroyed, but if that could not be done, they wanted it to be given to them rather than to Hecht. *Id.* The decedent’s children were concerned that Hecht would use the sperm to impregnate herself, thus creating a half-sibling for them. *Id.* They also asserted that because their father was dead, allowing Hecht to bear their deceased father’s child would be contrary to public policy, as the child would not have any hope of being a part of a traditional family. *Id.*

51. *Id.* at 283–84. The court concluded that it was an abuse of discretion for the trial court to order the destruction of the sperm. *Id.* It also made clear that it is not the court’s job to limit the use of reproductive matter when no law exists regarding the issue. *See id.* at 290–91 (“It is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy.” (quoting *Johnson v. Calvert*, 851 P.2d 776, 787 (Cal. 1993) (en banc))). However, courts have held that, even when given consent from the decedent, sperm should not be released. *See Hall v. Fertility Inst. of New Orleans, P.C.*, 647 So. 2d 1348, 1351–52 (La. Ct. App. 1994) (refusing to release sperm to the deceased’s girlfriend on several grounds even though the decedent had signed an agreement before his death authorizing her use of the material).

52. *See Hecht*, 20 Cal. Rptr. 2d at 228 (“We do not have before us the many legal questions raised by the possible birth of a child to Hecht through use of Kane’s sperm[, and t]hus, we do not decide, for instance, whether that child would be entitled to inherit any property as Kane’s heir.”).

Seven years later, the New Jersey courts had the opportunity to address the issue of inheritance for posthumously conceived children.⁵³ In this case, twin girls who were conceived after the death of their father claimed entitlement to Social Security benefits on behalf of their father.⁵⁴ As a case of first impression, the New Jersey court addressed some of the issues involved with allowing such a right⁵⁵ and ultimately decided that the children were the biological children of the deceased, thus entitling them to Social Security benefits.⁵⁶ This case was monumental for posthumously conceived children. The outcome of the case was not greatly publicized, but twenty months later a Massachusetts case with the same result saw high amounts of publicity.⁵⁷

In 2001, Lauren Woodward petitioned the Massachusetts court, on behalf of herself and her twin daughters, to grant Social Security benefits to the girls, despite that they had been born two years after their biological father's death.⁵⁸ Like the New Jersey

53. See *In re Estate of Kolacy*, 753 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 2000) (considering whether twin girls who were conceived after their father's death were entitled to Social Security benefits on behalf of their father).

54. *Id.*

55. See *id.* at 1260–63 (noting that the case's central issue, whether afterborn heirs qualify for inheritance under state intestate law, has not been addressed by "any American appellate court decisions" and recognizing the various problems created by that lack of precedent). The court considered the possibility that if a child is given inheritance rights, he or she would also be able to inherit from the father's relatives. *Id.* at 1262. The court also looked at the possibility that by recognizing inheritance rights for these children, a time limit must be imposed to prevent the widow from holding the estate open indefinitely in hopes of conceiving a child. *Id.*

56. *Id.* at 1263; see 42 U.S.C. § 416(h)(2)(A) (2006) (providing that in order to be entitled to Social Security survivor benefits, a child must be determined to be the child of the decedent according to state law). Additionally, the court found that recognizing the rights of posthumously conceived children furthered public policy by enhancing the rights of human beings. See *Estate of Kolacy*, 753 A.2d at 1263 (stating that recognizing the rights of these children is consistent with public policy).

57. Margaret Ward Scott, Comment, *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, 963–64 (2003); see *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002) (concluding also that twin girls who were conceived with their deceased father's sperm could be entitled to Social Security benefits).

58. *Woodward*, 760 N.E.2d at 260. Lauren Woodward's deceased husband, Warren, was diagnosed with leukemia in 1993, fewer than four years after the couple married. *Id.* After being informed that treatment may leave him sterile, Warren had his semen withdrawn and preserved for later use. *Id.* His treatment was unsuccessful, and Warren died in October of 1993. *Id.* Lauren used his sperm, and her two daughters were born in October of 1995. *Id.*

court, the Massachusetts court examined the state's intestacy law to determine whether the children were heirs of their father, thus entitling them to Social Security benefits.⁵⁹ The court found that the children were considered the issue of their father, and the court proposed a three-part test to determine whether there was an adequate reason the children should not be entitled to the inheritance rights provided by the Massachusetts inheritance statute.⁶⁰ The court balanced the best interests of the children, the state's own interest in efficient estate administration, and the deceased genetic parent's reproductive rights, and determined that the children were entitled to inherit under Massachusetts law as the children of their deceased biological father.⁶¹

Through these few cases and others, it became apparent that this area of law created many new issues that courts had never before addressed.⁶² The major issues are two-fold: (1) whether the

59. *See id.* at 261 (interpreting the Massachusetts intestacy laws to determine whether an afterborn child is entitled to inheritance benefits); *see also* 42 U.S.C. § 416(h)(2)(A) (providing that a child is defined as a child of the decedent according to state law for purposes of Social Security benefits); MASS. ANN. LAWS ch. 209C, § 1 (LexisNexis 2003) (defining who may be considered an issue entitled to a portion of an intestate decedent's estate in Massachusetts).

60. *Woodward*, 760 N.E.2d at 264–65, 272; *see* MASS. ANN. LAWS ch. 209C, § 1 (defining who is entitled to take from an intestate decedent's estate). The *Woodward* court conducted a three-part balancing test in order to determine whether posthumously conceived children should benefit from intestate inheritance rights. *Woodward*, 760 N.E.2d at 265–70. The court looked at: (1) the best interest of the children; (2) the state's interest in efficient estate administration; and (3) the genetic parent's reproductive rights. *Id.* at 265.

61. *Woodward*, 760 N.E.2d at 265–70. It is important to note that the Massachusetts Supreme Judicial Court did not actually make a determination as to whether the children were entitled to the Social Security benefits. *Id.* at 271. That issue was for a federal district court to decide based on the Massachusetts court's determination of parentage and additional evidence indicating whether or not the deceased consented to posthumous use of his reproductive material. *Id.*

62. For example, courts have addressed whether posthumously conceived children are permitted to inherit under state law, and courts are split over whether these children may inherit. *Compare* *Gillett-Netting v. Barnhart*, 371 F.3d 593, 593 (9th Cir. 2004) (holding that posthumously conceived children were considered children of the decedent according to the Social Security Act and could receive benefits if they met the statutory requirements for a child of the decedent under state law), *Woodward*, 760 N.E.2d at 272 (determining that posthumously conceived children may be entitled to inheritance), *and In re Estate of Kolacy*, 753 A.2d 1257, 1263–64 (N.J. Super. Ct. Ch. Div. 2000) (concluding that the plaintiff's children were the heirs of the decedent, and were thus entitled to inherit based on state law), *with* *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1264–65 (M.D. Fla. 2005) (concluding that a posthumously conceived child was not entitled to

posthumously conceived child is recognized under applicable state law as being the child of the decedent; and (2) if the child is the decedent's heir, whether he or she is entitled to inherit from the deceased parent according to state law.

III. LEGISLATIVE RESPONSES AND CASE LAW

A. *The Uniform Parentage Act Offers Direction for State Legislatures*

The National Conference of Commissioners on Uniform State Laws approved the first version of the Uniform Parentage Act in 1973.⁶³ The Act was intended to address the status of non-marital children, and the Commission declared that "all children should be treated equally without regard to marital status of the parents."⁶⁴ In addition, the Act attempted to remove any derogatory language regarding non-marital children, thus changing "illegitimate" to "child with no presumed father."⁶⁵ Nineteen states adopted the

Social Security survival benefits because state law required that the child be provided for in the decedent's will in order to benefit from the decedent's estate (citing FLA. STAT. ANN. § 742.17 (West 2010)), *Finley v. Astrue*, 270 S.W.3d 849, 853 (Ark. 2008) (concluding that a child was not entitled to inherit because he was not born until nearly two years after his father's death, even though fertilization occurred and the embryo was cryogenically frozen during the father's lifetime (citing ARK. CODE ANN. § 28-9-210(a) (2004))), and *Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1182-84 (N.H. 2007) (denying intestate inheritance to a posthumously conceived child because the applicable state statute required that the child be living at the time of the decedent's death in order to be considered an intestate heir (citing N.H. REV. STAT. ANN. § 561:1 (LexisNexis 2006))). See generally *In re Estate of Kievernagel*, 83 Cal. Rptr. 3d 311, 312, 317-18 (Ct. App. 2008) (upholding a fertility center's agreement forbidding the release of the deceased husband's reproductive material to his wife after the husband's death); *Hecht v. Superior Court (Ross)*, 20 Cal. Rptr. 2d 275, 280-84 (Ct. App. 1993) (holding that the decedent's sperm was property subject to testamentary devise); *Hall v. Fertility Inst. of New Orleans, P.C.*, 647 So. 2d 1348, 1348-53 (La. Ct. App. 1994) (considering whether a decedent's girlfriend was entitled to the decedent's frozen sperm absent a specific devise in his will).

63. UNIF. PARENTAGE ACT (1973) prefatory note, 9B U.L.A. 378 (2001). The Uniform Parentage Act was enacted as a follow-up to the 1922 Uniform Illegitimacy Act, the 1952 Uniform Blood Tests to Determine Paternity Act, the 1960 Uniform Paternity Act, and some provisions of the 1969 Uniform Probate Code. *Id.* The Uniform Illegitimacy Act was officially withdrawn and the other acts had not been widely adopted when the Uniform Parentage Act was approved. *Id.*

64. *Id.* at 379.

65. UNIF. PARENTAGE ACT (2000) prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2011). At the time the Uniform Parentage Act was approved, many states differentiated between marital and non-marital children, and non-marital children faced

original Uniform Parentage Act, and many others adopted portions of it.⁶⁶

In 1988, in response to new problems, the National Conference of Commissioners on Uniform State Laws approved both the Uniform Putative and Unknown Fathers Act and the Uniform Status of Children of Assisted Conception Act.⁶⁷ In an effort to unify the different acts, a new version of the Uniform Parentage Act was created in 2000 and amended in 2002.⁶⁸ Today eight states have fully adopted the Uniform Parentage Act.⁶⁹ Some of these states and others have taken parts of the Uniform Parentage Act and modified them as they see fit.⁷⁰

unfair legal treatment. *Id.* at 296–97. The United States Supreme Court expressly invalidated state statutes that disadvantaged non-marital children in the areas of inheritance, custody, and tort law. UNIF. PARENTAGE ACT (1973) prefatory note, 9B U.L.A. 378–79 (2001).

66. UNIF. PARENTAGE ACT (2000) prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2011).

67. *Id.* at 297.

68. *Id.* The new version combines the 1973 Uniform Parentage Act, the Uniform Putative and Unknown Fathers Act, and the Uniform Status of Children of Assisted Conception Act. *Id.* The new Uniform Parentage Act is also consistent with the Uniform Interstate Family Support Act and the Uniform Child Custody Jurisdiction and Enforcement Act. *Id.* at 298; Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 364 (2009).

69. The states that adopted the Uniform Parentage Act are Alabama, Delaware, New Mexico, North Dakota, Texas, Utah, Washington, and Wyoming. ALA. CODE §§ 26-17-101 to -905 (LexisNexis 2009); DEL. CODE ANN. tit. 13, §§ 8-101 to -904 (2009); N.M. STAT. ANN. §§ 40-11A-101 to -903 (LexisNexis Supp. 2010); N.D. CENT. CODE §§ 14-20-01 to -66 (Supp. 2009); TEX. FAM. CODE ANN. §§ 160.101–.763 (West 2008); UTAH CODE ANN. §§ 78B-15-101 to -902 (LexisNexis 2008); WASH. REV. CODE ANN. §§ 26.26.011–.914 (LexisNexis 2011); WYO. STAT. ANN. §§ 14-2-401 to -907 (2009).

70. *See* CAL. PROB. CODE § 249.5(a) (Deering Supp. 2011) (specifying that there be a signed consent to posthumous reproduction as recommended by the Uniform Parentage Act, but not fully adopting the Act); COLO. REV. STAT. § 19-4-106(8) (2010) (following the requirements outlined in the Uniform Parentage Act without fully adopting it); LA. REV. STAT. ANN. § 391.1 (2008) (using the Uniform Parentage Act as a guide, but adding that a posthumous child must be born within three years of the deceased parent's death in order to inherit from the parent); FAM. § 160.707 (adding the requirement that a signed writing be on file with a physician rather than just requiring a signed writing as recommended by the Uniform Parentage Act); VA. CODE ANN. § 20-158B (2008) (providing a provision similar to that of the Uniform Parentage Act, but not fully adopting it).

B. *Determination of Parentage for Children Conceived After a Parent's Death*

The most recent versions of the Uniform Parentage Act have addressed the parentage of children who are conceived after a parent's death.⁷¹ The Uniform Parentage Act specifically allows for parental status to be determined by written consent to assisted reproduction after death.⁷² For example, if a man wants his wife to be able to conceive his child after his death, the man should consent to such in writing so that he will be considered the father of the child even if the child is conceived and born after the father's death.⁷³

The states that have adopted the Uniform Parentage Act, as well as others who have not made the full adoption, have chosen to follow the requirement for consent to posthumous reproduction and parentage; these states include Alabama, California, Colorado, Delaware, Florida, Louisiana, New Mexico, North Dakota, Texas, Utah, Virginia, Washington, and Wyoming.⁷⁴ Interestingly, both Texas and California have modified the Uniform Parentage Act to make the requirements more stringent.⁷⁵ Texas requires that the writing be filed with a licensed

71. UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 358 (Supp. 2011). Sections 701 through 707 specifically address children conceived through assisted reproduction and how the father and mother can be legally determined to be the parents of a resulting child. *Id.* §§ 701-707, 9B U.L.A. 354-58. Parties should consent to reproduction in order to be deemed the parents of any subsequent child regardless of whether the reproductive material is to be used during the parties' lifetimes or after death. *Id.* §§ 703-704, 707, 9B U.L.A. 356, 358.

72. *Id.* § 707, 9B U.L.A. 358.

73. *See id.* (requiring that a person consent to posthumous reproduction in order to be considered the parent of any resulting posthumous child).

74. ALA. CODE § 26-17-707; CAL. PROB. § 249.5(a); COLO. REV. STAT. § 19-4-106(8); DEL. CODE tit. 13, § 8-707; FLA. STAT. ANN. § 742.17 (West 2010); LA. REV. STAT. § 9:391.1 (2008); N.M. STAT. § 40-11A-707; N.D. CENT. CODE § 14-20-65; FAM. § 160.707; VA. CODE § 20-158B; WASH. REV. CODE § 26.26.730; WYO. STAT. § 14-2-907.

The Uniform Parentage Act provides:

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

UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 358 (Supp. 2011).

75. *See* CAL. PROB. § 249.5(a) (requiring that the consent form be signed, dated, and

physician,⁷⁶ and California law specifies that the consent form must be signed, dated, and must designate the person who should control the use of the genetic material after the consenting party's death.⁷⁷ Conversely, other states have chosen not to follow the Uniform Parentage Act, including Arkansas, Georgia, Idaho, Kentucky, and South Carolina.⁷⁸

C. *Inheritance Determinations Based on Parentage Status*

After it is determined that a deceased parent is legally the parent of a posthumous child, the next issue is whether the child is entitled to inherit from the parent. The modern approach supported by the Uniform Parentage Act and the Restatement (Third) of Property is that once parentage is satisfied, the right to inherit is presumed.⁷⁹ As a result, in most of the states following the Uniform Parentage Act, a posthumous child is entitled to

specify the person who has the right to decide how to use the material after the donor's death); FAM. § 160.707 (specifying that the consent be in writing and filed with a licensed physician).

76. FAM. § 160.707.

77. CAL. PROB. § 249.5(a).

78. The only statutes regarding posthumous children in these states are those containing variations on the common law 300-day rule. *See* ARK. CODE ANN. § 28-9-210(a) (2004) (mandating that a child conceived at the time of the decedent's death, yet born thereafter, inherits as if already born at the time of the death); GA. CODE ANN. § 53-2-1(b)(1) (Supp. 2010) (providing the same requirements as Arkansas, but requiring that the child live for at least 120 hours after birth); IDAHO CODE ANN. § 15-2-108 (2009) (stating that any relative may inherit if born within ten months after the decedent's death); KY. REV. STAT. ANN. § 391.070 (LexisNexis 2010) (requiring that a child be born within ten months of the intestate father's death in order to inherit from him); S.C. CODE ANN. § 62-2-108 (2009) (declaring that the issue of the decedent may inherit from him if born "in the lifetime of the decedent").

79. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 (2009) ("Unless the language or circumstances indicate [otherwise], a child of assisted reproduction is treated for class-gift purposes as a child of a person who consented to function as a parent to the child. . . ."). Many states, including Texas, do not specifically address a posthumously conceived child's right to inherit, but specific probate statutes allow for inheritance of descendants or issue. *See* TEX. PROB. CODE ANN. § 38 (West 2003) (explaining who is entitled to take of the deceased's estate in the event of intestacy); *id.* § 42 (mandating when a child may get inheritance from the mother or father); *id.* § 67 (West Supp. 2010) (allowing a pretermitted child to inherit from a deceased parent). When the requirements under the Uniform Parentage Act are met, a posthumously conceived child is treated as any other descendant or issue who is entitled to inherit. *See* FAM. § 160.707 (determining when the deceased is considered a parent of a resulting posthumous child).

inherit as a child of the deceased unless a statute specifies otherwise; states likely to follow this approach are Alabama, California, Colorado, Delaware, Louisiana, New Mexico, North Dakota, Texas, Utah, Washington, and Wyoming.⁸⁰ In other states, including Arizona, Massachusetts, and New Jersey, a right to inherit has been recognized specifically by case law.⁸¹ Still in other states, such as Arkansas, Florida, Georgia, Idaho, Kentucky, South Carolina, and Virginia, a right to inherit is not presumed.⁸²

80. See ALA. CODE § 26-17-707 (LexisNexis 2009) (following the Uniform Parentage Act); CAL. HEALTH & SAFETY CODE § 1644.7 (Deering 2010) (specifying that in order for a posthumous child to be considered an heir for inheritance purposes, the provider of reproductive material must express that intention in writing); CAL. PROB. § 249.5 (requiring, like the Uniform Parentage Act, that in order to be a parent of a posthumous child, consent to such must be in writing); COLO. REV. STAT. § 19-4-106(8) (2010) (providing the same language as the Uniform Parentage Act); DEL. CODE ANN. tit. 13, § 8-707 (2009) (adopting the Uniform Parentage Act); LA. REV. STAT. ANN. § 9:391.1 (2008) (expressing that if the decedent consents in writing, a resulting posthumously conceived child may inherit from him or her if the child is born within three years of the decedent's death); N.M. STAT. ANN. § 40-11A-707 (LexisNexis Supp. 2010) (agreeing with the Uniform Parentage Act); N.D. CENT. CODE ANN. § 14-20-65 (Supp. 2009) (embracing the Uniform Parentage Act); FAM. § 160.707 (requiring that consent to posthumous reproduction be filed with a physician); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2008) (accepting the Uniform Parentage Act); WASH. REV. CODE ANN. § 26.26.730 (LexisNexis 2010) (incorporating the Uniform Parentage Act); WYO. STAT. ANN. § 14-2-907 (2009) (adopting the Uniform Parentage Act); see also Joseph H. Karlin, Comment, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006) (stating that at the time the article was written, only nine states statutorily recognized inheritance rights of posthumously conceived children).

81. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 599 (9th Cir. 2004) (holding that children conceived after the death of their father were considered legitimate under Arizona law, entitling them to collect Social Security as dependents of their father); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 271-72 (Mass. 2002) (concluding that children conceived after their father's death may be entitled to inherit if facts are sufficient to prove the father's consent to the posthumous reproduction); *In re Estate of Kolacy*, 753 A.2d 1257, 1262-64 (N.J. Super. Ct. Ch. Div. 2000) (interpreting New Jersey statutes to determine that children conceived after the death of their father were considered legal heirs of their father and were entitled to Social Security benefits).

82. See ARK. CODE § 28-9-210(a) (stating that a child may not inherit from an intestate parent who died before the child's conception); FLA. STAT. ANN. § 742.17 (West 2010) (providing that a child conceived after the death of a parent may not inherit from that parent unless the parent expressly provided for the posthumous child or children in his or her will); GA. CODE § 53-2-1(b)(1) (requiring that a child be born within ten months of a deceased parent's death in order to inherit from him or her, and survive at least 120 hours after birth); IDAHO CODE § 15-2-108 (specifying that in order for any unborn relative to inherit from a deceased person, the child must be born within ten months of the decedent's death); KY. REV. STAT. § 391.070 (stating that any child born within ten

However, Florida law provides that a right to inherit may still be recognized if a posthumously conceived child is specifically provided for in the will of the deceased parent.⁸³ Additionally, just because a state follows the parentage classifications specified in the Uniform Parentage Act, does not necessarily mean the state presumes a posthumously conceived child's right to inherit.⁸⁴ Virginia, for example, follows the Uniform Parentage Act parentage classifications but provides in another section that any child born more than ten months after a parent's death may not inherit from the parent.⁸⁵

IV. ANALYSIS AND IMPLICATIONS FOR TEXAS

Texas has been successful in supporting the rights of posthumously conceived children by enacting legislation before issues could arise in the courts.⁸⁶ However, there are some

months of an intestate decedent's death may inherit from the estate as if the child was alive at the time of the death); S.C. CODE § 62-2-108 (providing that a decedent's issue may inherit if conceived before the decedent's death and born within ten months of the death); VA. CODE ANN. § 20-164 (2008) (listing ways that children can inherit, but specifying that no child born more than ten months after a parent's death may inherit from that deceased parent); *see also* Joseph H. Karlin, Comment, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006) (describing that some of these states deny inheritance to posthumously conceived children in most circumstances).

83. FLA. STAT. § 742.17. *But cf.* ARK. CODE § 28-9-210(a) (providing that a posthumously conceived child born more than ten months after the intestate decedent's death may not inherit, but not making any specification as to a posthumous child's inheritance from a testate decedent); KY. REV. STAT. § 391.070 (specifying only that a child may not inherit from an *intestate* decedent unless the child is born within ten months of the decedent's death). It is possible that in these states, a posthumous child may be able to inherit if provided for in the will because the statute only prohibits inheritance in regards to intestate decedents.

84. *See* VA. CODE ANN. § 20-158B (2008) (adopting sections of the Uniform Parentage Act, including a provision for parentage of a posthumously conceived child if the parent consented in writing). *But see id.* § 20-164 (stating that even if parentage is met, a child still may not inherit if born more than ten months after the death of a parent).

85. *Compare id.* § 20-158B (adopting the Uniform Parentage Act in regards to parentage of posthumously conceived children), *with* UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 358 (Supp. 2011) (requiring that a person consent in writing in order to be considered a parent after death). *But see* VA. CODE § 20-164 (providing that a child born more than ten months after a parent's death may not inherit from that parent, regardless of statutory parentage classifications).

86. *See generally* TEX. FAM. CODE ANN. §§ 160.706–707 (West 2008) (accommodating the inheritance rights of posthumously conceived heirs generally).

potential problems with these statutes that should be addressed. This section examines the requirement of a signed acknowledgment of paternity on file with a physician,⁸⁷ what happens in the event of a divorce,⁸⁸ and inheritance issues involved with wills and intestacy.⁸⁹

A. *Signed Writing on File with Physician*

Section 160.707 of the Texas Probate Code provides:

If a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record *kept by a licensed physician* that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child.⁹⁰

This is a modification of the Uniform Parentage Act, which recommends that there be a signed writing with no reference as to what must be done with the writing.⁹¹ Of the many states that have adopted the Uniform Parentage Act, Texas appears to be the only state that specifies where the record must be kept.⁹² It is understandable that the legislature would add this modifying language in order to streamline the procedures involved and recognize the authenticity of such documents more easily. Requiring the document to be filed will prevent concerns regarding fraud or forgery. Yet, the added requirement creates other concerns.

First, as with any document requirement, there is the possibility

87. *Id.* § 160.707.

88. *Id.* § 160.706.

89. *See* TEX. PROB. CODE ANN. § 38(b) (West 2003) (defining inheritance by intestate succession in scenarios involving a surviving spouse); *id.* § 41(a) (West Supp. 2010) (prohibiting inheritance to lives not in being unless they are children of the decedent); *id.* § 42(b) (West 2003) (providing for intestate paternal inheritance); *id.* § 67 (West Supp. 2010) (allowing for children born after the execution of a testator's will to be entitled to a portion of the estate).

90. FAM. § 160.707 (emphasis added).

91. *See* UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 358 (Supp. 2011) (making no indication of who should retain the consent record).

92. *See* FAM. § 160.707 (requiring that the acknowledgment be "kept by a licensed physician"). State codes that more closely follow the Uniform Parentage Act do not require the writing to be kept with a physician. *E.g.*, CAL. PROB. CODE § 249.5 (Deering Supp. 2011) (reflecting the language of the Uniform Parentage Act).

that the document cannot be located.⁹³ In other areas of law, courts may permit the introduction of extrinsic evidence to prove the existence of a lost document.⁹⁴ Regardless of whether the document must be kept with a physician or simply with the parties who executed it, the same problems exist. For example, the physician may no longer be practicing, he or she may have moved and be incapable of being located, or the document may be misplaced.⁹⁵ In any such circumstance, the party will have to prove: (1) that the document was executed; (2) that it was indeed on file with a physician; and (3) that the document cannot be located. Hence, the added requirement may be more troublesome than beneficial. Recognizing this potential problem, the statute should be modified. To circumvent the problem, the statute could require the document to be filed with the court.⁹⁶ This way there

93. See *Aegon Ins. USA v. Durham-Gilpatrick*, No. CA 10-647, 2010 WL 4972460, at *1 (Ark. Ct. App. Dec. 8, 2010) (addressing medical records that were allegedly lost when the physician moved to a new office, yet ultimately concluding there was sufficient evidence to support insurance payments by Aegon); *DeLaughter v. Lawrence Cnty. Hosp.*, 601 So. 2d 818, 821 (Miss. 1992) (involving medical records that the hospital could not locate, and their eventual reconstruction as a fact issue for the jury).

94. See JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 289–90 (Vicki Been et al. eds., 8th ed. 2009) (noting lost wills may be admitted to probate with the use of extrinsic evidence to prove their existence). In Texas, when a will cannot be produced in court, it may still be admitted to probate. TEX. PROB. § 85 (West Supp. 2010). The existence of the will and its terms may be proven by extrinsic evidence, such as testimony from the attesting witnesses. *Id.* The reason for the will's unavailability should also be proven in the same manner. *Id.*

95. See *Aegon Ins. USA*, 2010 WL 4972460, at *1 (involving medical records that were allegedly “lost in the shuffle” when the physician moved to a new office); *DeLaughter*, 601 So. 2d at 821 (regarding medical records that could not be located by the hospital and how the jury should be instructed as to the reliability of a reconstructed record and the reasons why it was missing); *Brewer v. Dowling*, 862 S.W.2d 156, 159 (Tex. App.—Fort Worth 1993, writ denied) (referring to a fetal monitor strip that could not be located, thus oral testimony was offered regarding the physicians' recollections as to what was on the strip).

96. See FAM. § 160.402 (West 2008) (establishing rights of putative fathers to file their interest with the court). This allows a man who is the possible father of a child to file a document with the court requiring him to be notified if another man asserts a right of paternity to the child. *Id.* § 160.402(a) (providing that a man may register as a putative father if he wishes to be notified of any action regarding paternity of a child he may have fathered); *id.* § 160.403 (stating that notice must be given to any man timely registered as a putative father in the event of a proceeding regarding termination of parental rights or adoption). Putative fathers are only asserting a possibility of fatherhood. See *id.* § 160.402(a) (providing that a man may register “regarding a child that he *may* have fathered” (emphasis added)). If these men can file with the court only for the mere

is no confusion and no lost time or litigation costs in trying to prove the document actually exists. Additionally, the creation of a standard form⁹⁷ and a notarization requirement will make the process even more efficient.⁹⁸ It is likely that by adding the physician requirement to the statute, the Texas Legislature intended to make the requirements slightly more stringent than the Uniform Parentage Act proposes.⁹⁹ In modifying the statute, such a goal remains fulfilled. It will allow for better administrative efficiency because all similar forms will be filed in the same place and will be easily accessible in the event that conflict arises.

possibility that they are a father, then it only makes sense that someone consenting to actual fatherhood after death should be required to do the same. *Id.* With such a requirement, it will be easy to determine whether someone has followed the statutory requirements without having to locate the physician or clinic where the document was filed. *See id.* § 160.707 (requiring that consent to fatherhood after death be in writing and filed with a licensed physician).

97. *See* CAL. HEALTH & SAFETY CODE § 1644.7 (Deering 2010) (requiring entities receiving genetic material to provide a form to parties who plan to use their reproductive material after death). It is recommended that this form be made available at clinics where people deposit their reproductive material, and that the form be specifically written to meet the statutory requirements so that posthumously conceived children will be permitted to inherit from the consenting deceased parent. *Id.*; *see* CAL. PROB. § 249.5 (describing how to determine whether a posthumously conceived child is entitled to inherit from his or her deceased parent).

98. *See* TEX. PROB. § 59(a) (West 2003) (specifying that in order for a will to be valid via a self-proving affidavit, it must be executed “before an officer authorized to administer oaths under the laws of this State”). If it is necessary for a will to be notarized, then it makes sense that the same should be necessary for a consent form for posthumous reproduction; both a will and a consent form involve actions to be taken after death, either through the distribution of an estate or the use of reproductive material. *See id.* (referring to the requirement that a self-proving affidavit be notarized). The latter even has the potential to affect the former, since the existence of a posthumous child may change the potential estate distribution. *See id.* § 67 (West Supp. 2010) (identifying what a child is entitled to if born after the execution of a parent’s will). Because notarization is required for wills, it is proper that such a requirement also be present for consent to posthumous reproduction. Official certification is also needed for marriage licenses, so requiring the same for consent to posthumous reproduction would not be unreasonable. *See* FAM. § 2.008 (West 2006) (stating that in order to receive a marriage license, the clerk must also administer an oath and certify the license).

99. *See* FAM. § 160.707 (stating that the decedent must have consented in writing to parentage after death *and* the writing must be filed with a licensed physician). *But see* UNIF. PARENTAGE ACT (2000) § 707 (amended 2002), 9B U.L.A. 358 (Supp. 2011) (specifying only that there be a signed writing, with no regard to where it must be kept).

B. *Divorce*

Section 160.706 of the Texas Family Code, also modeled after the Uniform Parentage Act, provides for an automatic revocation of the consent if the husband and wife later divorce.¹⁰⁰ Unfortunately, it only provides that in the event fertilization occurs after the parties divorce, the non-consenting party will not be considered the parent of the resulting child.¹⁰¹ This could be problematic.¹⁰² Instead of merely providing for the parental status, the statute should expressly prohibit the use of the reproductive material after a divorce, unless the parties agree otherwise.¹⁰³

Allowing the use of such reproductive material could undermine the donor's wishes, since he or she likely donated the reproductive material specifically for use of procreation within the marriage. Additionally, the resulting child, posthumous or not, would be born without a parent.¹⁰⁴ A posthumous child is born without one

100. FAM. § 160.706 (West 2008); UNIF. PARENTAGE ACT (2000) § 706 (amended 2002), 9B U.L.A. 358 (Supp. 2011). The Texas Family Code provision adopted the Uniform Parentage Act with a few slight modifications. *See* FAM. § 160.706 (defining the Texas statutory requirements in the event of a divorce); UNIF. PARENTAGE ACT (2000) § 706 (amended 2002), 9B U.L.A. 358 (Supp. 2011) (stating nearly identical provisions to the Texas statute).

101. FAM. § 160.706; *see also* UNIF. PARENTAGE ACT (2000) § 706 (amended 2002), 9B U.L.A. 358 (Supp. 2011) (providing also that a child resulting from embryos used after divorce will not be considered the child of the non-consenting spouse).

102. *See* FAM. § 160.706 (providing that if the reproductive material is used by the ex-spouse, a non-consenting party will not be considered a parent of that resulting child). This may be problematic because the child will be born with only one parent, since the non-consenting party will not be legally considered the child's parent. *Id.*

103. *Cf.* TEX. PROB. § 69(b) (West Supp. 2010) (stating that in the event of divorce, any provisions of either party's will in favor of the ex-spouse or the ex-spouse's relatives will be automatically struck). Just as provisions of the will may be automatically removed in the event of divorce, the same idea should govern reproductive material. *See id.* (providing that in the event of divorce, if provisions of the will favor the ex-spouse, the ex-spouse will be treated as having predeceased the testator, thus preventing any benefit from the testator's estate). Regardless of what was decided during the marriage, the stored, unused sperm and eggs should be destroyed upon divorce, unless the parties stipulate otherwise. *See generally* FAM. § 160.706 (recognizing if the reproductive material is used by the ex-spouse to conceive a child, the non-consenting party will not be considered a parent of that resulting child). This way neither party must worry about a child resulting from the deposited reproductive material without his or her consent.

104. FAM. § 160.706 (stating only that the non-consenting party will not be considered a parent of that resulting child if the reproductive material is used by the ex-spouse). The child may be created by use of the non-consenting party's reproductive

living parent in all circumstances; however, if the deceased parent has agreed to posthumous conception, the child can still benefit from the deceased's estate, and the child is legally considered the child of the deceased.¹⁰⁵ When the deceased parent did not agree to parenthood (as may be the case in a divorce), the child is born without a parent and receives nothing.¹⁰⁶ This is not fair to the child and does not properly honor the wishes of the deceased.¹⁰⁷ There is also the possibility that the posthumous child will not be properly cared for by the living parent, as there can be no financial support from the deceased's estate. In order to protect both the child and the wishes of the deceased, the statute should be modified to require destruction of unused sperm or eggs upon divorce, unless the parties involved stipulate otherwise.¹⁰⁸

material, but the non-consenting party will not be considered the parent. *Id.* Thus, the child does not legally have two biological parents.

105. *See* FAM. § 160.707 (West Supp. 2010) (providing that when the deceased consents to assisted reproduction, he or she is still considered the parent); *accord* TEX. PROB. § 38 (West 2003) (defining how a child takes under intestacy); *id.* § 42(b) (stating that if the child is considered an offspring of the biological father under the Texas Family Code, he or she may inherit from the deceased).

106. *See* FAM. § 160.706 (asserting if the reproductive material is used after a divorce, the non-consenting party will not be the parent of any resulting child). When the child is not legally considered the child of his or her biological parent, the child cannot inherit from that parent since legal parentage is a prerequisite for receiving inheritance. *See* TEX. PROB. § 42 (describing how a child may be qualified to receive maternal and paternal inheritance); *see also id.* § 38 (stating that children may inherit by intestacy).

107. *See* *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 265 (Mass. 2002) ("The protection of minor children, most especially those who may be stigmatized by their 'illegitimate' status . . . has been a hallmark of legislative action and of the jurisprudence of this court." (quoting *L.W.K. v. E.R.C.*, 735 N.E.2d 359, 367 (Mass. 2000)) (internal quotation marks omitted)); UNIF. PARENTAGE ACT (2000), prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2011) (saying that the purpose of the Act was to treat all children equally without any regard to the relationship of the parents).

108. *See* *Roman v. Roman*, 193 S.W.3d 40, 54–55 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (requiring that unused reproductive material be discarded in the event of divorce, based on an agreement the parties signed with the fertility clinic). Presently in Texas, the reproductive material is only required to be destroyed if an agreement between the parties explicitly states so. FAM. § 160.706; *see also Roman*, 193 S.W.3d at 40 (concluding that when such an agreement is executed between the parties, it must be honored as a contract). The destruction of unused sperm or eggs upon divorce should be required by statute, rather than by contract law. *But see* FAM. § 160.706 (containing no provision requiring destruction of reproductive material in the event of divorce, but stating that the non-consenting parent will not be a parent of any resulting child); *Roman*, 193 S.W.3d at 40 (requiring destruction of reproductive material because an agreement between the parties expressly stated such).

C. *Inheritance*

The focus of this Comment is on the inheritance rights of posthumously conceived children. Of course it is important to differentiate between decedents who die with a will and those who die intestate. This distinction can make a large difference in what the child may be entitled to, if anything, and how the child is to go about getting the share he or she is due. This section will examine the laws regarding wills, followed by those regarding intestacy, and will provide similar suggestions for each.

1. Wills

It is common that parents die without specifically providing for their children in their wills.¹⁰⁹ Assuming that a parent did not intend to disinherit a child born after the execution of the will, statutes provide an alternative way to distribute the property so that the after-born child receives a portion of the estate in addition to the named beneficiaries in the will.¹¹⁰ Such children are referred to as pretermitted, and what they are entitled to under the statute may be carved out from that of the other beneficiaries of the estate.¹¹¹ These statutes protect posthumously conceived children, along with children born before the testator's death but after the execution of the will.¹¹² In the context of posthumously conceived children, the statute needs some improvement.

Section 67(c) of the Texas Probate Code provides that a pretermitted child is "a child of a testator who, during the lifetime of the testator, or after his death, is born or adopted after the execution of the will."¹¹³ Consistent with the 300-day rule, when

109. JESSE DUKEMINIER ET AL., *WILLS, TRUSTS, AND ESTATES* 520 (Vicki Been et al. eds., 8th ed. 2009) (pointing out that it is very common for a married testator to leave the entire estate to his or her spouse).

110. See TEX. PROB. § 67(a) (West Supp. 2010) ("Whenever a pretermitted child is not mentioned in the testator's will, . . . the pretermitted child shall succeed to a portion of the testator's estate."). The statute is modeled after the Uniform Probate Code, which also provides for pretermitted children born after the will is executed. UNIF. PROBATE CODE § 2-302 (amended 1993), 8 U.L.A. 135-36 (Supp. 2010). Additionally, the Uniform Probate Code, like the Texas Probate Code, lists different circumstances and what the child would be entitled to in each. *Id.*

111. TEX. PROB. § 67(b).

112. *Id.* § 67(a)(1)-(2).

113. *Id.* § 67(c).

the child was already conceived before the testator's death, this statute is very clear.¹¹⁴ However, now that a child may be conceived after the testator's death, the statute should be adjusted to provide how long after the death the birth or conception must occur. It is not advisable to leave the period of time infinite because it would be very difficult to redistribute someone's estate or wait to probate the will until years later when the child is born.¹¹⁵ For this reason, a time limit stipulating when the child must be conceived in order to benefit from this statute should be imposed.¹¹⁶

Even imposing a time limit raises yet another issue: whether the pretermitted child is entitled to his or her portion of the estate even after the estate has already been distributed. Before the possibility of conception after death, this was not an issue. The mother knew she was pregnant and when the child would be born; therefore, as soon as the child was born, the estate could be distributed according to the will and the statute. Unfortunately, now it is not so easy. The surviving spouse may wait years before conceiving the decedent's child, and by this time, the estate will probably already have been distributed.¹¹⁷ It is only fair to treat the posthumously conceived child like any other pretermitted child, giving these children the absolute right to inherit from the deceased parent regardless of the time they are born—especially

114. See TEX. FAM. CODE ANN. § 160.204(a)(3) (West 2008) (identifying that a child born before the 301st day after a marriage ends, by death or otherwise, is considered the child of the deceased father).

115. See *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000) (exploring the possibilities that could occur if an estate is left open indefinitely). “Now [children] can appear after the death of either a mother or a father and they can appear a number of years after that death. Estates cannot be held open for years simply to allow for the possibility that after born children may come into existence.” *Id.*

116. See *id.* at 1262 (“It would undoubtedly be both fair and constitutional for a [l]egislature to impose time limits and other situationally described limits on the ability of after born children to take from or through a parent.”).

117. Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 63 (1994) (“[C]ryopreservation and long-term storage of embryos creates the potential for a child to be born years, even decades, after the death of the genetic parents.”); Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 332 (2009) (describing that recent technology allows for conception to occur decades after the reproductive material has been extracted).

since timing of their own conception is something children have no control over.¹¹⁸

If it is determined that children born after the distribution of the will are entitled to take from the other beneficiaries in the will, and even if a time period is already established during which children may take after the execution of the will or death of the testator, the statute *still* does not stipulate a time period during which the posthumous child must be born or make a claim in order to take from the other beneficiaries *after the distribution* of the will.¹¹⁹ It is key that a time limit be instituted to prevent this situation. Otherwise, the beneficiaries who received their portions of the estate may be subject to a contingent interest in the estate property because it may be taken away (fully or partially) in the event a child is born to the decedent.¹²⁰ Such interests would

118. See UNIF. PARENTAGE ACT (2000), prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2011) (providing that the defined purpose of the original Uniform Parentage Act was to treat all children equally regardless of the marital status of their parents); see also *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 265 (Mass. 2002) (asserting that “the Legislature has expressed its will that all children be ‘entitled to the same rights and protections of the law’ regardless of the accidents of their birth” (quoting MASS. GEN. LAWS ch. 209C, § 1 (2002))). It seems that the trend in recent years has been toward the protection of children’s rights regardless of their parents’ choices. See UNIF. PARENTAGE ACT (2000), prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2011) (noting also that the Act sought to prevent the use of words such as “illegitimate,” and instead used terms such as “no presumed father”); see also *Woodward*, 760 N.E.2d at 265 (recognizing that all children are entitled to the same protections under the law, without regard to circumstances surrounding their births).

119. The only time limit within the Texas Probate Code dealing with estate distribution under the will is found in section 73. TEX. PROB. CODE ANN. § 73 (West 2003). This provision stipulates that a will may not be admitted to probate more than four years after the testator’s death. *Id.* § 73(a). However, while not making any reference to pretermitted children, the statute provides exceptions to the four-year requirement if the attempted probate was not in bad faith. *Id.* § 73(b). Additionally, four years is probably too long of a time period regarding when a posthumous child should be born in order to take from the estate. Cf. CAL. PROB. CODE § 249.5(c) (Deering Supp. 2011) (stating that in order for a posthumously conceived child to inherit, he or she must be *in utero* within two years of the decedent’s death); LA. REV. STAT. ANN. § 9:391.1 (2008) (requiring that the child be born within three years of the parent’s death to be entitled to inheritance under the statute); UNIF. PROBATE CODE § 2-120(k) (amended 2008), 8 U.L.A. 58–60 (Supp. 2010) (specifying that a posthumously conceived child be *in utero* within thirty-six months of the decedent’s death *or* born within forty-five months of the death in order to inherit from the decedent).

120. See *Woodward*, 760 N.E.2d at 266 (balancing the interests of other heirs against the interest of the after-born child). The Massachusetts court recognized that allowing a posthumously conceived child to inherit would affect the amount of the estate available to

remain contingent as long as the decedent's spouse is living since it is presumed that a person may conceive until his or her death.¹²¹ Allowing such contingencies does not comport with justice, and it is likely not the intent of the testator that the beneficiaries be subject to such conditions.

As a solution, there must be a time requirement written into the statute. Louisiana requires that a child be born within three years in order to be entitled to any rights of inheritance from the decedent.¹²² California has even more stringent requirements, providing that a child must be conceived within two years after the death of the deceased parent in order to inherit from the parent.¹²³ This is a standard way to deal with the situation. A time limit would prevent the spouse from refusing to probate the will until the conception of a child, and it would provide some finality to the probate procedure if the time limit is not met. If the testator wishes to negate the statutory time limit, he or she may provide otherwise.¹²⁴ Because the testator has already given

the others who are expecting to receive from the estate. *Id.*; see also Cameron Krier, *Heir on the Side of Exclusion? Addressing the Problems Created by Assisted Reproductive Technologies to the Inheritance Rights of a Class Named in a Funded Trust or Probated Will*, 20 QUINNIPIAC PROB. L.J. 47, 51 (2006) (stating that keeping an estate open may deprive the other beneficiaries of resources).

121. See Cameron Krier, *Heir on the Side of Exclusion? Addressing the Problems Created by Assisted Reproductive Technologies to the Inheritance Rights of a Class Named in a Funded Trust or Probated Will*, 20 QUINNIPIAC PROB. L.J. 47, 57 (2006) (observing that a person may conceive until his or her death, but recognizing that with new technology, this conclusion is becoming outdated).

122. LA. REV. STAT. § 9:391.1(A). This statute provides that the posthumously conceived child may inherit from the deceased parent if the child is born, after using the reproductive material, within three years of the decedent's death. *Id.*

123. CAL. PROB. § 249.5(c). The Uniform Probate Code has a more relaxed requirement for the timing of the posthumously conceived child's birth. The child must be conceived within thirty-six months of the death of the decedent *or* born within forty-five months of the death. UNIF. PROBATE CODE § 2-120(k) (amended 2008), 8 U.L.A. 60 (Supp. 2010). The Restatement (Third) takes a slightly less concrete approach, requiring only that the child "be born within a reasonable [amount of] time after the decedent's death." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 cmt. 1 (1999).

124. See TEX. PROB. § 58a(c)-(d) (West 2003) (stating different rules in the statute, but providing that the testator may specify otherwise in the will); *id.* § 68(e) (providing that a residuary beneficiary may not take from the estate if the beneficiary predeceases the testator, but noting the testator may provide otherwise); *id.* § 71A(a) (West 2010) (saying that any property with debts attached will pass subject to those debts, unless the testator provides otherwise in the will).

permission for the spouse to conceive after his or her death, it is not unexpected that the testator would explicitly provide for the resulting child in the will. In fact, Florida only allows posthumously conceived children to inherit if the testator expressly provides for them in the will.¹²⁵ Even though Texas does not have such stringent requirements, it is important to allow the testator the opportunity to provide for a potential child as he or she wishes; however, in the event that the testator does not do so, the statutes will provide for the child.¹²⁶

2. Intestacy

While it is necessary to improve existing wills statutes, the Texas intestacy statutes also demand the same type of attention. Section 42 of the Texas Probate Code describes how a child may inherit from his or her parents.¹²⁷ The statute also expressly provides that once a child is determined to be the child of his or her mother or father, the child is also entitled to inheritance from the parents' descendants, ascendants, and collateral relatives, and they from the child.¹²⁸ This means that not only may a posthumously conceived child inherit from the deceased parent, but he or she may also inherit from anyone related to the deceased parent, including grandparents, aunts, uncles, and cousins who may subsequently die intestate.¹²⁹ Intestate distribution may be

125. FLA. STAT. ANN. § 742.17 (West 2010). The statute notes in pertinent part, “[a] child conceived from the eggs or sperm of a person . . . who died before the transfer of [the reproductive material] to a woman’s body shall not be eligible for a claim against the decedent’s estate unless the child has been provided for by the decedent’s will.” *Id.* This is a very fair approach. It clearly establishes that it is not the job of the legislature or the courts to provide for the posthumous child. *See id.* § 742.17(4) (proposing that because the deceased parent has consented to be a parent to the child, it is the parent’s responsibility to provide for the child in the will).

126. *See* TEX. PROB. § 67 (West Supp. 2010) (providing that a child born after the execution of a will may inherit from the testator).

127. *Id.* § 42(a)–(b) (West 2003). Subsection (a) defines who the child’s mother is and how he or she may inherit from her. *Id.* § 42(a). Subsection (b) does the same except with increased possibilities for the determination of a child’s father. *Id.* § 42(b).

128. *Id.* § 42(a)–(b). “[H]e and his issue may inherit from his . . . [maternal and paternal] kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him and his issue.” *Id.*

129. *See* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 92 (Vicki Been et al. eds., 8th ed. 2009) (examining who descendants, ascendants, and collateral kindred are). Descendants are children of the decedent and any descendants from the children.

complex in any situation, but factoring in a child who has not been conceived makes it even more difficult. The Texas Legislature must address these issues.

Similar to the wills statute, the legislature should amend the intestacy statute to add a time limit as to when the child must be born in order to benefit from the statute.¹³⁰ For example, a three-year cut-off, like the Louisiana statute, would be ideal.¹³¹ Additionally, it must be determined whether the child may still take his or her share *after* the distribution of the estate according to intestacy. This is where the division can get extremely complicated. Not only would this require taking from people who were already given their intestate share, but it may also change the outcome of the distribution altogether.¹³² This illustrates the problem of recognizing intestacy rights for children who may be posthumously conceived at any time in the future. This issue was addressed by a New Jersey court, which recommended that legislatures impose time limits to prevent estates from being held open indefinitely.¹³³ There must be a cut-off as to when the

See id. (discussing who qualifies as a descendant). Ascendants are those whom the decedent directly descended from, such as parents and grandparents. *See id.* (defining ascendants). Collaterals are other relatives who are not descendants or ascendants, such as siblings, aunts, uncles, and cousins. *Id.*

130. Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1022 (2002) (identifying that states have an interest in promoting orderly distribution of estates after death (citing *Reed v. Campbell*, 476 U.S. 852, 855 (1986))); *see also In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000) (recognizing that even if posthumously conceived children are entitled to take under the statute, some type of time limit is recommended).

131. *See* LA. REV. STAT. ANN. § 9:391.1(A) (2008) (requiring that the child be born within three years of the parent's death to be entitled to take under the statute).

132. *Compare* TEX. PROB. § 38(b)(1) (West 2003) (describing intestate inheritance when there is a surviving spouse and children or other lineal descendants), *with id.* § 38(b)(2) (explaining intestate inheritance when there are no surviving children or other lineal descendants). If a decedent dies with only a spouse, the spouse will take the entire personal property and one-half of the real property, and the decedent's intestate heirs—parents, brothers, sisters, or others—are entitled to the other half. *Id.* § 38(b)(2). However, if the decedent dies with a child or children, the spouse only takes one-third of the personal property and a one-third life-estate in the real estate, and the child is entitled to two-thirds of both the personal and real property. *Id.* § 38(b)(1).

133. *Estate of Kolacy*, 753 A.2d at 1262. In this case, the court addressed whether twin posthumously conceived girls were entitled to Social Security benefits in their father's name. *Id.* at 1259. The court determined that under the New Jersey statutes, the girls were entitled to the benefits, but that there should be a time limit imposed as to how long after the death such children must be born. *Id.* at 1262.

distribution is considered final.¹³⁴ Consider this example: a man dies intestate in Texas with no children and a wife living. His estate will be distributed as follows: all of the personal estate and one-half of the real estate to his wife and the other half of the real estate to his heirs.¹³⁵ Of course, if a posthumous child were born, this would change everything. The child would be entitled to two-thirds of both the personal and real property, the mother would receive the other third of the personal property, as well as a one-third life estate in all real property of the deceased, and the other heirs would get nothing.¹³⁶ It is unclear whether the law should allow this child to take from these heirs subsequent to a reasonable time period or simply prohibit such taking after the estate has been distributed.

Because having to redistribute an intestate estate can be a major task involving great amounts of litigation and judicial resources, it may be wise for the legislature to prohibit this altogether. Additionally, a time limit should be imposed on how long the estate may be left open before final distribution.¹³⁷ Otherwise, if the administrator of the estate is a wife who intends to conceive, she may try to leave the estate open as long as possible. As the New Jersey court stated, “[e]states cannot be held open for years simply to allow for the possibility that after-born children may come into existence.”¹³⁸ A two-year time limit would probably be sufficient.¹³⁹ Two years would allow the woman to conceive if she wishes, and for the child to take from the estate; but if no

134. See *id.* at 1262 (“Estates cannot be held open for years simply to allow for the possibility that after born children may come into existence.”); see also 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, 264 (2005) (summarizing the *Estate of Kolacy* opinion that in the absence of legislative time limits, the court should impose them).

135. TEX. PROB. § 38(b)(2).

136. *Id.* § 38(b)(1).

137. See *Estate of Kolacy*, 753 A.2d at 1262 (determining that a time limit is necessary); see also *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 266 (Mass. 2002) (recognizing that the distribution will change if additional children are allowed to take a share).

138. *Estate of Kolacy*, 753 A.2d at 1262.

139. See CAL. PROB. CODE § 249.5(c) (Deering Supp. 2011) (stipulating that a posthumously conceived child must be *in utero* within two years of the decedent’s death in order to inherit from the deceased parent).

conception occurs in the time period, the estate will be distributed based on the heirs living at that time.

Further, a time limit must also be imposed if the legislature determines that it is necessary to allow posthumously conceived children to take a share of the estate even after the estate's distribution. Requiring the child to be born within two to three years of the distribution of the estate would prevent the original intestate heirs' interests from remaining perpetually contingent.¹⁴⁰ Much like the effect of such a solution in the law of wills, this would allow for finality of court proceedings and would protect the interests of the intestacy heirs.¹⁴¹

D. *Gender Equality and the Texas Family Code*

With the use of reproductive technology, it is now possible for posthumous conception to occur after the death of either parent—mother or father.¹⁴² Hence, it is important that statutes reflect this possibility. Currently, the Texas Family Code expressly provides that a man can be considered the father of a child by his

140. *See id.* (imposing a two-year window from the date of the deceased parent's death for a posthumously conceived child to share in inheritance); LA. REV. STAT. ANN. § 9:391.1 (2008) (requiring that a posthumously conceived child be born within three years of the deceased parent's death); *Woodward*, 760 N.E.2d at 266 (acknowledging that the other intestate heirs' shares of the estate would be affected by recognizing inheritance rights for posthumously conceived children); UNIF. PROBATE CODE § 2-120(k) (amended 2008), 8 U.L.A. 60 (Supp. 2010) (stating that in order to inherit, a posthumously conceived child must be *in utero* within thirty-six months of the deceased parent's death or born within forty-five months of the deceased parent's death).

141. *See Estate of Kolacy*, 753 A.2d at 1262 (recognizing that estates should not be held open unduly long over the possibility of an afterborn child); 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, 264 (2005) (concluding that courts should impose time limits).

142. Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579 (2005); *see* Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 62–63 (1994) (indicating that eggs, sperm, and embryos may be preserved, opening the door to the possibility of conception after the death of either biological parent); Catherine Belfi, Note, *Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology*, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 121 (2009) (saying that cryopreservation technology allows for conception after the death of the biological father or mother, but such conception is not without difficult implications in inheritance law).

consent to assisted reproduction.¹⁴³ Even if the father is dead, the parent-child relationship can still be recognized. Unfortunately, there is no equivalent for a female being considered the mother based on this same idea.¹⁴⁴ It is recognized in a separate provision that either parent consenting to posthumous conception may be considered the parent of a resulting child.¹⁴⁵ However, inconsistencies between the statutes remain unresolved.¹⁴⁶ It is recommended that this inconsistency be resolved by adding a provision for consent to assisted reproduction to section 160.201(a).

This change is essential regardless of whether a child is conceived before or after the death of the consenting spouse. It is possible that a woman's reproductive material may be used for assisted reproduction even during her lifetime. Thus it is necessary to recognize such a decision as an establishment of maternity, just as the same decision made by a man is considered an establishment of paternity.¹⁴⁷

V. CONCLUSION

In response to the new legal challenges created by the existence of posthumously conceived children, the states have reacted differently.¹⁴⁸ Many states have recognized that these children do

143. TEX. FAM. CODE ANN. § 160.201(b)(5) (West 2008). This statute specifically deals with the establishment of a parent-child relationship. *Id.* § 160.201. Even if the parent is dead, the parent-child relationship can still be recognized, thus creating the need to make it equally applicable to both genders. *See id.* (providing different methods of establishing maternal and paternal parentage).

144. *See id.* § 160.201(a) (providing no provision for assisted reproduction and establishment of the mother-child relationship).

145. *Id.* § 160.707.

146. *Compare id.* § 160.201(a) (lacking any provision for assisted reproduction as a method of establishing the mother-child relationship), *with id.* § 160.707 (recognizing that either parent may be considered the parent of a child after death if he or she consented to such in writing).

147. *Compare id.* § 160.201(a) (missing a provision for a woman's consent to assisted reproduction as a means of establishing the mother-child relationship), *with id.* § 160.201(b)(5) (including a provision for a man's consent to assisted reproduction as a means of establishing the father-child relationship).

148. Joseph H. Karlin, Comment, "Daddy, Can You Spare a Dime?": *Intestate Heir Rights of Posthumously Conceived Children*, 79 TEMP. L. REV. 1317, 1335 (2006) (referring to states with laws regarding posthumously conceived children and to the need for more states to address these issues).

have rights to inherit consistent with those identified in the Uniform Parentage Act,¹⁴⁹ while many others have not.¹⁵⁰ Texas is at the forefront in recognizing the rights of these children, but there is still much to be done. By incorporating changes to the current statutes, the rights of these children will be better protected and the judicial process will be better equipped to handle the issues as they arise.

First, the Texas Legislature should amend section 707 of the Texas Family Code so the signed writing acknowledging possible parenthood after death does not have to be kept on file with a licensed physician.¹⁵¹ In the alternative, the writing should have specific requirements and should be kept on file with the court. Additionally, in the event of divorce, the use of the other party's

149. See ALA. CODE §§ 26-17-607 to -905 (LexisNexis 2009) (adopting the entire Uniform Parentage Act); CAL. PROB. CODE § 249.5 (Deering Supp. 2011) (allowing a posthumously conceived child to inherit from his or her parent if the parent consented to such in writing); COLO. REV. STAT. ANN. § 19-4-106(8) (2010) (providing that a parent may be the legal parent of a posthumously conceived child if the parent consented to such in writing); DEL. CODE ANN. tit. 13, § 8-707 (2009) (requiring that the deceased consent in writing during his or her lifetime to posthumous conception and parentage after death); LA. REV. STAT. ANN. § 9:391.1 (2008) (recognizing a right to inherit if the parent consented to parentage in writing *and* the child was born within three years of the decedent's death); N.M. STAT. ANN. § 40-11A-707 (LexisNexis Supp. 2010) (saying that a parent must consent in writing to conception and parentage after death); N.D. CENT. CODE ANN. § 14-20-65 (Supp. 2009) (stating that a decedent may be the parent of a posthumously conceived child if the parent consented to such in writing); FAM. § 160.707 (providing that a parent must consent in writing and the writing must be filed with a licensed physician); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2008) (requiring that a parent consent in writing); WASH. REV. CODE ANN. § 26.26.730 (LexisNexis 2010) (stating the same provision as the Uniform Parentage Act); WYO. STAT. ANN. § 14-2-907 (2010) (requiring recorded consent for the parent-child relationship to attach to a posthumous conception); see also FLA. STAT. ANN. § 742.17 (West 2010) (prohibiting inheritance unless the deceased provided for a potential posthumous child in the will).

150. ARK. CODE ANN. § 28-9-210(a) (2004) (refusing to recognize inheritance for children born more than ten months after the death of the intestate decedent); GA. CODE ANN. § 53-2-1(b)(1) (Supp. 2010) (providing that a posthumous child born more than ten months after the deceased parent's death may not inherit from that parent); IDAHO CODE ANN. § 15-2-108 (2009) (stating that any relative of the decedent born more than ten months after the decedent's death may not inherit from him or her); KY. REV. STAT. ANN. § 391.070 (LexisNexis 2010) (saying that a child born more than ten months after an intestate decedent's death may not inherit from him); S.C. CODE ANN. § 62-2-108 (2009) (disallowing inheritance to any posthumous child, except issue of the decedent born within ten months of his or her death); VA. CODE ANN. § 20-164 (2008) (forbidding inheritance to any child born more than ten months after the decedent's death).

151. FAM. § 160.707.

reproductive material for use after death should be absolutely prohibited.¹⁵²

Moreover, the laws allowing for posthumously conceived children to inherit from the deceased parent should be clarified.¹⁵³ In both the areas of wills and intestacy, a time limit should be imposed concerning how long after the decedent's death the posthumously conceived child must be born in order to share in a portion of the estate. Additionally, it should be determined whether a child is entitled to a share after the distribution of the estate, and if so, how long after the distribution the child may be born. Allowing children to take a portion of the estate after the estate's distribution could be problematic, so this is something that should be considered.

The issues involved with posthumously conceived children are issues that the Texas courts have yet to face, but cases will arise as the practice of posthumous conception becomes more widespread. As with any type of technological advance, there will always be new issues that the legal field must address.¹⁵⁴ With the cooperation of the legislature, the potential problems can be diminished, allowing for better judicial efficiency and the protection of the rights of the parties involved.

152. *See id.* (stipulating that if the other party's reproductive material is used after the divorce, the party will not be considered the parent of the resulting child).

153. *See* TEX. PROB. CODE ANN. § 38(b)(1)–(2) (West 2003) (describing how an intestate decedent's estate should be distributed); *id.* § 42(a)–(b) (providing who is considered a child's parent and how he or she may inherit from each); *id.* § 67 (West Supp. 2010) (defining the rights of pretermitted children under a will).

154. *See* Lyria Bennett Moses, *Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J. L. SCI. & TECH. 505, 515–16 (2005) (providing that the law must respond to new technologies and address the new issues that may arise).

