

INHERITANCE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN: A PLAN FOR NEVADA

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INTRODUCTION

Consider two young children, both of the same age. One was conceived before her father went off to war and never returned, leaving the mother to carry and raise her daughter alone. The other was conceived after his father died of cancer, his mother left to carry and raise her son alone. Both are posthumous children. Both apply for Social Security Survivor's benefits. The child conceived before her father died receives them. The child conceived after his father died does not.¹

By definition, a posthumous child is a child that is born after the death of one of his or her parents.² There are two scenarios in which a posthumous child can be conceived and born: (1) fertilization occurs prior to the death of the partner, and birth happens after death; or (2) both fertilization and birth occur after the death of the partner through the surviving partner's use of Assistive Reproductive Technologies and the decedent's genetic material.³ The first scenario can occur naturally, and is, therefore, the primary focus of many state statutes addressing the topic. However, advancements in technology have created an opportunity for reproduction that is not considered in nature: a child conceived and born after one, or maybe even both, of its genetic parents has died. Such an opportunity is achieved through the use of Assistive Reproductive Technology, or ART.⁴ The field of ART is comprised of many forms of reproductive assistance—including the cryopreservation of genetic material and in-vitro fertilization procedures—drastically extending the amount of time the average human has to reproduce, in some cases up to twenty-two years after death.⁵ Because of these advancements, “decisions and enactments from earlier

¹ See Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 252 (1999).

² See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 109 (Vicki Been et al. eds., 9th ed. 2013).

³ G. Pennings et al., *ESHRE Task Force on Ethics and Law 11: Posthumous Assisted Reproduction*, 21 HUM. REPROD. 3050, 3050 (2006).

⁴ AM. SOC'Y FOR REPROD. MED., *ASSISTED REPRODUCTIVE TECHNOLOGY: A GUIDE FOR PATIENTS* 4 (2015).

⁵ *Id.*; *Healthy Baby Born 22 Years After Father's Sperm Was Frozen*, NEWS MED. LIFE SCI. (Apr. 15, 2009, 5:59 AM), <http://www.news-medical.net/news/2009/04/15/48357.aspx> [<https://perma.cc/DJZ9-YX98>] [hereinafter *Healthy Baby*].

times—when human reproduction was in all cases a natural and uniform process—do not fit the needs of this more complex era.”⁶

In the United States, only twenty-five states have statutes that address posthumously conceived children and their inheritance rights.⁷ Five of these states have statutes that expressly deny inheritance rights to posthumously conceived children.⁸ The remaining twenty states have statutes that grant inheritance rights to posthumously conceived children.⁹ Currently, the state of Nevada is one of the states that does not have a statute explicitly addressing posthumously conceived children.¹⁰

Although posthumously conceived children are still relatively rare, scholars, judges, and other officials have strongly encouraged updates to state statutes and probate codes, requesting legislative guidance on these issues.¹¹ Some may ask, “if these posthumously conceived children are so rare, then why is it necessary to amend or enact a statute that addresses their inheritance rights?” To start with, enacting such statutes will give certainty to public and judicial officials, and will protect the equal protection rights of posthumously conceived children, who have the immutable characteristic of being conceived after the death of one or more parents.¹² Despite this immutable characteristic, the Supreme Court has left the determination of whether posthumously conceived children can inherit to the states.¹³ The Supreme Court ruled in *Astrue v. Ca-*

⁶ *In re Martin B.*, 841 N.Y.S.2d 207, 209 (N.Y. Fam. Ct. 2007).

⁷ David Shayne, *Posthumously Conceived Child as Heir Depends on Where*, 42 EST. PLAN. 28, 29 (2015).

⁸ These states include Florida, Illinois, Minnesota, Ohio, and Virginia. *Id.*

⁹ The remaining states include Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Iowa, Louisiana, Maine, Maryland, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, Texas, Utah, Washington, and Wyoming. *Id.*

¹⁰ *See id.*

¹¹ Steven H. Snyder, *New Developments in Assisted Reproductive Technology and Their Effects on Estate Planning 2* (May 6–7, 2010) (unpublished manuscript) (on file with the American Bar Association Section of Real Property, Trust, and Estate Law).

We join the chorus of judicial voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent advances in the field of assisted reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some over-all legislative guidelines would allow the participants to make informed choices and the courts to strive for uniformity in their decisions.

Id. (quoting *In re Marriage of Buzzanca*, 72 Cal. Rptr. 280 (Cal. Ct. App. 1998)).

¹² *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 (2005).

Courts should use intermediate scrutiny to determine whether an exclusion of inheritance by posthumously conceived children violates the Equal Protection Clause. Intermediate scrutiny applies because (1) the classification is based on an immutable characteristic; (2) posthumously conceived, like other non-marital children, have a history of being discriminated against; and (3) it is unfair to put the burden on an individual who has no control over the situation.

Id. at 286.

¹³ *See* Nicole M. Barnard, Note, *Astrue v. Capato: Relegating Posthumously Conceived Children to Second-Class Citizens*, 72 MD. L. REV. 1039, 1039 (2013).

pato that the individual state's intestacy statutes determine whether a posthumously conceived child receives the deceased parent's Social Security Benefits.¹⁴

A statute addressing the unique challenges of posthumously conceived children would also assist states in the administration of future interests. In a world where technology creates the possibility that children could be born twenty-two years after the death of their parents,¹⁵ complications could arise involving the rule against perpetuities, or with timely estate administration for those states that simply allow all posthumous children to be considered living at the death of their parents.

In addition to assisting the state's probate courts with estate administration, a statute addressing posthumously conceived children will also help alleviate many private concerns of the surviving parent. Since posthumously conceived children are often born into single parent homes, in many cases, the surviving parent and other family members experience financial strain.¹⁶ "Denying these children intestate inheritance rights and survivor's benefits puts an even greater financial strain on the family, particularly in light of the purpose of such benefits, providing financial resources for those loved ones left without the income of a deceased parent or spouse."¹⁷

Even if the deceased parent does not leave assets that can pass by intestacy, a statute declaring that posthumously conceived children are the heirs of their deceased parents could have implications for their future property rights.¹⁸ For example, a parent dying at a young age could still potentially have assets passed to them at a future date through their ancestors. Identifying a posthumously conceived child as the heir of that deceased parent would enable the child to take by representation (or by other applicable ways of passing property), and it would prevent lengthy and unnecessary probate disputes between the genetic child of the decedent and the decedent's other relatives.

It is for these reasons that this note strongly recommends that the state of Nevada consider enacting a statute that addresses the inheritance rights of posthumously conceived children.

Part I of this note will provide definitions and a brief history of posthumously conceived children, including a discussion of their rights at common law, as well as descriptions regarding the essential technology used in the creation of posthumously conceived children. Part II will include a discussion of current Uniform Acts as well as cases that have addressed the issue of posthumously conceived children. Part III will contain a discussion of current Nevada

¹⁴ *Astrue v. Capato*, 566 U.S. 541, 559 (2012).

¹⁵ *Healthy Baby*, *supra* note 5.

¹⁶ Christopher A. Scharman, Note, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1024 (2002).

¹⁷ *Id.*

¹⁸ See *In re Estate of Kolacy*, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000); *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Fam. Ct. 2007).

law relating to posthumously conceived children, and how a statute, or the lack thereof, will influence that law. Part IV will identify the four necessary factors that lawmakers should consider in drafting a statute granting inheritance rights to posthumously conceived children, address the pros and cons of each of those factors in turn, and make a recommendation based upon those considerations.

I. DEFINITIONS AND HISTORY

A. *Posthumous Children? Posthumously Conceived Children? What Is the Difference, and Why Does It Matter?*

A posthumous child is by definition a child conceived *before* but born *after* the death of a parent.¹⁹ The stereotypical scenario in which a posthumous child is born is when a husband impregnates his wife and then dies sometime during the nine months between conception and pregnancy.²⁰ Imagining an instance in which this could occur is quite simple. A soldier goes off to war, a factory worker becomes fatally wounded in a work-related accident, or perhaps a more natural occurrence, such as a heart attack or stroke, could prevent the father from seeing the birth of his offspring.

Under the common law, these posthumous children were originally considered “non-marital” children, the children of no one, and thus were unable to inherit.²¹ “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.”²² Under the common law, non-marital children were unable to inherit from either parent.²³ Moving away from the common law, all fifty states have now recognized that non-marital children can inherit through their mother—although, they differ in the treatment of inheritance through their father.²⁴ The Supreme Court has recognized that, in some cases, the disparate treatment of non-marital children is unconstitutional.²⁵ Shifting societal norms have altered the stigma surrounding non-marital children, and the statutes and policies of many states reflect this change in values.²⁶

¹⁹ DUKEMINIER & SITKOFF, *supra* note 2.

²⁰ Although most hypothetical scenarios imagine a man reproducing posthumously, technology has now advanced in such a manner where a woman could also reproduce posthumously (this, of course, will require a surrogate). See Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP., PROB. & TR. J. 727, 728 (2004).

²¹ DUKEMINIER & SITKOFF, *supra* note 2, at 110.

²² Allison Stewart Ellis, Comment, *Inheritance Rights of Posthumously Conceived Children in Texas*, 41 ST. MARY’S L.J. 413, 419 (2012).

²³ DUKEMINIER & SITKOFF, *supra* note 2, at 110.

²⁴ *Id.*; Ellis, *supra* note 22.

²⁵ *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

²⁶ These changes in values can be seen through proposed uniform laws, such as the Uniform Parentage Act. “[T]he Act attempted to remove any derogatory language regarding non-

Today, under the Uniform Probate Code, as well as many individual state probate codes, there is a rebuttable presumption that a posthumous child is the legal heir and descendant of the husband, provided that the child is born within a certain number of days after the husband's death.²⁷ These statutes arose out of the belief that a child born to a woman within the general timeframe of nine months after her husband's death would be the genetic child of her husband.²⁸

Because of this belief, legislatures and courts alike created a legal fiction that such children, if born alive, would have been treated as "in being" before their father's deaths, and therefore were able to inherit either through will or intestacy.²⁹ Therefore, even though these fathers never get a chance to see and care for their children, the posthumous children can still receive support from their fathers through their states' intestacy statutes; the presumption that the posthumous child is the legal heir of his or her father permits inheritance through the father's social security benefits, trusts, and other testamentary instruments.³⁰

As progressive as these statutes are compared to the common law governing inheritance by posthumous children, advancements in technology have created a complication that drafters did not foresee: the posthumously conceived child. A posthumously conceived child, unlike the posthumous child, is a child that is both conceived *and* born after the death of a parent.³¹ In this scenario, the child is conceived after the death of a parent through the use of Assisted Reproductive Technology and is then born to the surviving parent, in some cases twenty to twenty-two years after the death of the decedent.³² Due to the circumstances surrounding their birth and conception, and the lack of statutes addressing their rights, posthumously conceived children are not immediately considered the legal heirs of their deceased parent.

"By definition, posthumously conceived children are not legitimate because they are neither born nor conceived during marriage, nor can they be legitimated by a deceased parent."³³ Assisted Reproductive Technology ("ART") can allow for children to be born up to twenty years after the donor's death.³⁴

marital children, thus changing 'illegitimate' to 'child with no presumed father.' " Ellis, *supra* note 22, at 430-31 (citing UNIF. PARENTAGE ACT (2000), prefatory note (amended 2002)).

²⁷ See UNIF. PARENTAGE ACT § 204(a)(2) (amended 2002) (300 days); KY. REV. STAT. ANN. § 391.070 (West 2010) (child must be born within ten months of the death of the father); LA. CIV. CODE ANN. art. 185 (2005) (300 days).

²⁸ See UNIF. PARENTAGE ACT § 204(a)(2); KY. REV. STAT. ANN. § 391.070 (child must be born within 10 months of the death of the father); LA. CIV. CODE ANN. art. 185 (300 days).

²⁹ See DUKEMINIER & SITKOFF, *supra* note 2, at 109-11.

³⁰ See Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP., PROB. & TR. J. 55, 100 (1994).

³¹ DUKEMINIER & SITKOFF, *supra* note 2, at 112.

³² See AM. SOC'Y FOR REPROD. MED., *supra* note 4, at 12.

³³ Brianna M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 615 (2004).

³⁴ AM. SOC'Y FOR REPROD. MED., *supra* note 4, at 12.

As a result, most cases in which posthumously conceived children are born fall outside the nine-month time limit prescribed by traditional posthumous-child statutes.³⁵ Unless posthumously conceived children are born within state-mandated time limits, it is possible that they will receive no benefits or inheritance from their deceased parents. “Technological advances in the reproductive field have reached the point where yesterday’s law cannot account for the consequences of modern technology.”³⁶

B. Assisted Reproductive Technology

ART refers to a broad group of techniques and procedures that include methods of creating pregnancy through means other than sexual intercourse.³⁷ In general, there are two primary types of ART: internal fertilization and external fertilization.³⁸ “Internal fertilization occurs inside the uterus of the woman who is to become pregnant (the birth mother).”³⁹ “External fertilization occurs in a laboratory procedure outside the uterus and is followed by implantation of the fertilized egg (embryo) into the uterus of the woman who is to become pregnant.”⁴⁰

It is important to note that while one would ordinarily imagine a posthumously conceived child being born to his or her mother after the death of the father, it is equally possible for a father to have a child using the genetic material of a deceased mother, conceived by means of ART and carried by a surrogate.⁴¹

1. Assisted Reproductive Technology Procedures

Internal fertilization includes Artificial Insemination (“AI”) and Gamete Intrafallopian Transfer (“GIFT”).⁴² AI “involves the introduction of semen from either the recipient’s husband or an anonymous donor into the recipient’s vagina or uterus.”⁴³ This is not a new technology—AI has been in use for hundreds of years as a way for farmers to breed livestock.⁴⁴ The first reported in-

³⁵ See, e.g., *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Fam. Ct. 2007).

³⁶ Monica Shah, Commentary, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 547 (1996).

³⁷ RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. a (AM. LAW INST. 2011).

³⁸ *Id.* § 14.8 cmts. a–b.

³⁹ *Id.* § 14.8 cmt. b.

⁴⁰ *Id.*

⁴¹ Or even grandparents, in some instances. For an interesting case, see *Woman Wins Appeal to Use Dead Daughter’s Eggs*, BBC NEWS (June 30, 2016), <http://www.bbc.com/news/health-36675521> [<https://perma.cc/YY9L-8HD4>].

⁴² McAllister, *supra* note 30, at 63.

⁴³ *Id.* at 59.

⁴⁴ Shah, *supra* note 36, at 548.

stance of a successful human procedure was in 1790.⁴⁵ On the other hand, GIFT is a comparatively new procedure⁴⁶ where a woman's eggs are removed from her ovaries and are mixed with sperm, but are not allowed to fertilize and create an embryo.⁴⁷ The mixed sperm and eggs are then "injected into the woman who is to become pregnant and placed where they would be in natural fertilization."⁴⁸

External fertilization, also known as In-Vitro Fertilization ("IVF"), is by far one of the most popular types of ART.⁴⁹ IVF is a type of ART treatment that involves combining a woman's eggs and a man's sperm outside of a woman's body in a laboratory dish.⁵⁰ Then, "[o]ne or more fertilized eggs (*embryos*) may be transferred into the woman's uterus, where they may implant in the uterine lining and develop."⁵¹ Transfers during IVF do not always result in a successful pregnancy.⁵² In general, there is a success rate of 40 percent for IVF transfers.⁵³

The American Society for Reproductive Medicine notes that it is important to remember that a successful "clinical pregnancy"⁵⁴ does not mean that the couple took home a live baby or that the woman successfully carried the baby to term.⁵⁵ In a statement released last year, the Society for Assistive Reproductive Technology reported that in 2012, doctors performed "165,172 procedures,

⁴⁵ 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, 117–18 (2009).

⁴⁶ "The first example of GIFT involved primates during the 1970s, however, the technology was unsuccessful until 1984 when an effective GIFT method was invented by Ricardo Asch at the University of Texas Health Sciences Center and the procedure resulted in the first human pregnancy." Hilary Gilson, *Gamete Intra-Fallopian Transfer (GIFT)*, EMBRYO PROJECT ENCYCLOPEDIA (Sept. 26, 2008), <https://embryo.asu.edu/pages/gamete-intra-fallopian-transfer-gift> [<https://perma.cc/JKX6-RWNY>].

⁴⁷ RESTATEMENT (THIRD) OF PROPERTY, *supra* note 37, at § 14.8 cmt. b.

⁴⁸ *Id.*

⁴⁹ See generally *History of IVF*, SOC'Y FOR ASSISTIVE REPROD. TECH., <http://www.sart.org/patients/history-of-ivf/> [<https://perma.cc/73FK-8L99>] (last visited Mar. 18, 2017).

⁵⁰ AM. SOC'Y FOR REPROD. MED., *supra* note 4.

⁵¹ *Id.*

⁵² *Id.* at 13.

⁵³ *Id.*

⁵⁴ A "clinical pregnancy" as defined by the FDA is determined by "[e]vidence of pregnancy by clinical (fetal heartbeat) or ultrasound parameters (ultrasound visualization of a gestational sac, embryonic pole with heartbeat)." *Definitions*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/ohrms/dockets/ac/03/briefing/3985B1_03_Definitions.htm [<https://perma.cc/VZJ2-W9RV>] (last visited Apr. 18, 2017).

⁵⁵ See AM. SOC'Y FOR REPROD. MED., *supra* note 4, at 13 ("It is also important to understand the definitions of pregnancy rates and live birth rates. For example, a pregnancy rate of 40% does not mean that 40% of women took babies home. Pregnancy does not always result in live birth.").

including IVF, with 61,740 babies born as a result of those efforts . . .” in the United States alone.⁵⁶

In the past thirty-five years that fertility clinics have utilized IVF, over five million babies have been born from the use of IVF worldwide.⁵⁷ Because IVF is an external fertilization technique, this procedure is commonly seen in cases of posthumous reproduction and conception, allowing for both mothers and fathers to use their deceased partner’s genetic material to have children.

2. *The Chance for Multiples*

IVF fertility treatments often carry a higher chance for multiple pregnancies (meaning pregnancies where the mother carries twins or triplets).⁵⁸ Because of the low success rates of implantation during IVF, clinicians will often transfer multiple embryos during each IVF cycle, in the hope that one implants successfully.⁵⁹ The number of embryos transferred depends on several factors, including the mother’s age and medical considerations.⁶⁰ The use of multiple embryos during the IVF treatment causes a higher frequency of multiple pregnancies and births.⁶¹

3. *Cryopreservation*

At least “one-half of IVF patients freeze embryos for later use through a process called cryopreservation.”⁶² “Cryopreservation makes future ART cycles simpler, less expensive, and less invasive than the initial IVF cycle, since the woman does not require ovarian stimulation or egg retrieval.”⁶³ After freezing, these embryos can be safely stored for long periods of time, and “live births have been reported using embryos that have been frozen for almost 20 years.”⁶⁴ Cryopreservation applies not only to IVF treatments and preserved embryos,⁶⁵ the eggs and sperm can be cryopreserved separately and then implanted into the

⁵⁶ Jen Christensen, *Record Number of Babies Born Via IVF*, CNN (Feb. 18, 2014, 2:36 PM), <http://www.cnn.com/2014/02/17/health/record-ivf-use/>. [<https://perma.cc/VF52-KK28>].

⁵⁷ Bonnie Rochman, *5 Million Babies Born Through IVF in the Past 35 Years, Researchers Say*, NBC NEWS (Oct. 14, 2013, 4:54 PM), <http://www.nbcnews.com/health/5-million-babies-born-through-ivf-past-35-years-researchers-8C11390532> [<https://perma.cc/R45S-6FAP>].

⁵⁸ Bryce Weber et al., *Postmortem Sperm Retrieval: The Canadian Perspective*, 30 J. ANDROLOGY 407, 407 (2009) (stating “this reproductive technology is expensive, with inherent risks, such as multiple pregnancies”).

⁵⁹ AM. SOC’Y FOR REPROD. MED., *supra* note 4.

⁶⁰ *Id.* at 11.

⁶¹ *Id.* at 11, 16.

⁶² McAllister, *supra* note 30, at 62.

⁶³ AM. SOC’Y FOR REPROD. MED., *supra* note 4, at 12.

⁶⁴ *Id.*

⁶⁵ See Alan Trounson, *Preservation of Human Eggs and Embryos*, 46 FERTILITY & STERILITY, July 1986, at 9.

birth mother through AI or GIFT.⁶⁶ It is the use of the cryopreservation process that allows for children to be conceived and born years after the death of their parents.

II. STATUTES AND ACTS ENACTED IN OTHER STATES

A. Federal Law

There are no federal laws specifically governing the inheritance rights of posthumously conceived children. The single Supreme Court case addressing posthumously conceived children, *Astrue v. Capato*, left it up to state intestacy statutes to determine whether a posthumously conceived child could receive Social Security Survivors' benefits.⁶⁷ Eighteen months after her husband died of cancer, Karen Capato gave birth to twins conceived through IVF using her husband's cryopreserved sperm.⁶⁸ To care for her children, Karen applied for Social Security Survivors' benefits, which the government denied.⁶⁹ The Court held that the twins would qualify for benefits only if they could "inherit from the deceased wage earner under state intestacy law."⁷⁰

Although there is no controlling federal statute, the Uniform Probate Code ("UPC"), adopted by sixteen states,⁷¹ and the Uniform Parentage Act ("UPA"), adopted by ten states,⁷² both offer solutions to these issues. Although several states have adopted either of these Uniform Acts or have written statutes of their own, some states still do not have statutes that even consider posthumously conceived children at all, and some even expressly disinherit them.⁷³

⁶⁶ *Id.*

⁶⁷ *Astrue v. Capato*, 566 U.S. 541, 553 (2012).

⁶⁸ *Id.* at 544.

⁶⁹ *Id.*

⁷⁰ *Id.* at 546.

⁷¹ Although several states have partially adopted the UPC, or modeled some of their provisions after it, only sixteen have adopted the UPC in full: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New Mexico, North Dakota, South Carolina, South Dakota and Utah. *See generally* RACHEL HIRSHBERG, LEWIS, RICE & FINGERSH, UNIFORM PROBATE CODE ADOPTION BY THE STATES, http://www.americanbar.org/content/dam/aba/publications/litigation_committees/trust/50-state-probate-code-survey.authcheckdam.pdf [https://perma.cc/Z6QQ-H4PV] (last visited Apr. 18, 2017).

⁷² Twenty-two states have adopted parts of the UPA, but only ten states have adopted section 707, which deals with posthumously conceived children: Alabama, Illinois, Maine, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Enactment Status Map*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/LegislativeMap.aspx?title=Parentage%20Act> [https://perma.cc/GH8H-J8RW] (last visited Mar. 6, 2017); Shayne, *supra* note 7, at 30.

⁷³ *See Enactment Status Map*, *supra* note 72.

B. *Uniform Acts*

1. *Uniform Probate Code*

Under the UPC, a posthumously conceived child is considered the decedent's heir if the decedent signed a record that, "considering all the facts and circumstances," evidenced the decedent's intent.⁷⁴ In the absence of a record, the decedent can still be considered the parent of a posthumously conceived child if the intent is established by clear and convincing evidence.⁷⁵ Therefore, a surviving parent can show that a deceased parent had the intent to become a parent but died before doing so. "Evidence that the decedent deposited genetic material combined with testimony of the survivor that the two of them discussed using the material to have children will probably suffice."⁷⁶ Further, the posthumously conceived child will be considered a child of the deceased parent "if the child is: (1) in utero not later than 36 months after the individual's death; or (2) born not later than 45 months after the individual's death."⁷⁷ "The UPC definition of the parent and child relationship will likely result in a finding of consent in any posthumous conception case as long as the genetic material was deposited before death and not harvested after death."⁷⁸

2. *Uniform Parentage Act*

A slightly different treatment of posthumously conceived children can be found in the Uniform Parentage Act ("UPA"). "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.'"⁷⁹ Under the UPA,

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.⁸⁰

⁷⁴ UNIF. PROBATE CODE § 2-120(f)(1) (amended 2010).

⁷⁵ *Id.* § 2-120(f)(2)(C).

⁷⁶ Susan N. Gary, *Definitions of Children and Descendants: Construing and Drafting Wills and Trust Documents*, 5 EST. PLAN & COMMUNITY PROP. L.J. 283, 301 (2013).

⁷⁷ UNIF. PROBATE CODE § 2-120(k).

⁷⁸ Gary, *supra* note 76.

⁷⁹ Ellis, *supra* note 22, at 430 (quoting UNIF. PARENTAGE ACT (1973) prefatory note, 9B U.L.A. 378, 379 (2001)).

⁸⁰ UNIF. PARENTAGE ACT § 707 (amended 2002).

*C. Case Law**1. In re Estate of Kolacy*

One of the first recorded cases regarding posthumously conceived children is *In re Estate of Kolacy*.⁸¹ William J. Kolacy and Mariantonia Kolacy were a young couple residing in the state of New Jersey.⁸² On February 7, 1994, William was diagnosed with leukemia and his physician advised him to start chemotherapy treatment as quickly as possible.⁸³ The next day, the couple harvested William's sperm and deposited it at a local sperm bank.⁸⁴ On April 15, 1995, at the age of 26, William Kolacy died of leukemia.⁸⁵ Almost a year later, Mariantonia began an IVF procedure using her deceased husband's sperm.⁸⁶ The treatment was successful, and twin girls were born to Mariantonia on November 3, 1996, slightly more than eighteen months after her husband's death.⁸⁷

To assist with her effort to seek Social Security Survivors benefits from William for her daughters, Mariantonia sought a declaration stating that her daughters were the intestate heirs of her deceased husband.⁸⁸ In the absence of a statute dealing explicitly with posthumously conceived children, the court stated

once we establish . . . that a child is indeed the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in the terms of the orderly administration of estates.⁸⁹

In this case, the court noted, there are no adverse interests or estate administration problems with recognizing the twins as William's heirs.⁹⁰

The New Jersey Parentage Act has a provision stating that a man is presumed to be the biological father of a child if the child is born 300 days after death terminates the marriage.⁹¹ However, here, the court notes that this provision does not necessarily create a reverse presumption that a child born more than 300 days after the death of a man shall be presumed not to be the biologi-

⁸¹ *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

⁸² *Id.* at 1258.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1259.

⁸⁹ *Id.* at 1262.

⁹⁰ *Id.*

⁹¹ *Id.*

cal child of the deceased man.⁹² Therefore, the twins were found to be William's heirs under New Jersey law.⁹³

Although William died without a will and with no assets to pass to the twins under New Jersey intestacy law, the judge stated that it was still appropriate to determine their status as heirs "because of the impact which it may have upon property rights as they evolve over a period of time."⁹⁴ Such a finding may affect other testamentary dispositions, such as trusts from grandparents.

2. *In re Martin B.*

The classic case of posthumously conceived children, found in many wills and trusts casebooks, is *In re Martin B.*⁹⁵ This New York case involves the question of whether Martin's posthumously conceived grandchildren would be considered to be his "issue" and "descendants" under his trust.⁹⁶ Martin had set up a trust designed to "sprinkle principal" on his "issue" during the life of his wife Abigail.⁹⁷ Martin was predeceased by his son James, who died of Hodgkin's lymphoma.⁹⁸ During his life, James deposited his semen at a laboratory with the instructions that it be cryopreserved and, in the event of his death, that his wife Nancy would have full discretion in what to do with the sperm.⁹⁹ At the time of his death, James had no children.¹⁰⁰ Three years after James's death, Nancy underwent an IVF procedure with his semen and gave birth to a boy.¹⁰¹ Two years after the birth of her first son, Nancy underwent another IVF procedure and gave birth to a second son.¹⁰² The question asked of this court is whether these two boys, both genetic grandchildren of Martin and born three and five years respectively after the death of their father, would qualify as "issue" and "descendants" in such a manner as to allow them to be beneficiaries of the trust.¹⁰³

Although New York has since passed a statute giving rights to posthumously conceived children, at the time this case was tried, New York had no such statute. The right of a posthumously conceived child to inherit in intestacy, or as an after-born child in a will, was "limited to a child conceived during

⁹² *Id.* at 1263.

⁹³ *Id.* at 1264.

⁹⁴ *Id.* at 1260.

⁹⁵ *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Fam. Ct. 2007).

⁹⁶ *Id.* at 208.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

the decedent's lifetime."¹⁰⁴ Since New York did not yet have a statute addressing posthumously conceived children, it was necessary for the court to analyze the UPA and statutes from the three states that had already considered the subject to establish the paternity of the decedent's son.¹⁰⁵ The court also considered *In re Kolacy* and *Woodward v. Commissioner of Social Security*,¹⁰⁶ cases where courts determined posthumously conceived children to be the intestate heirs of their fathers despite the lack of an applicable state statute.¹⁰⁷

The court concluded that there were two important interests at stake in this case.¹⁰⁸ First, "certainty and finality are critical to the public interests in the orderly administration of estates."¹⁰⁹ Second, "the human desire to have children, albeit by biotechnology, deserves respect, as do the rights of the children born as a result of such scientific advances."¹¹⁰ To balance these interests, the court says, statutes "require written consent to the use of genetic material after death and establish a cut-off date by which the child must be conceived."¹¹¹

Although it is difficult to imagine that Martin contemplated in 1969 that his "issue" or "descendants" would include grandchildren conceived after his son's death, "the absence of specific intent should not necessarily preclude a determination that such children are members of the class of issue."¹¹² The court then established that the Restatement (Third) of Property considers all children born through the use of assisted reproductive technology to be treated for class-gift purposes as "a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity."¹¹³ Accordingly, the court states "these post-conceived infants should be treated as part of their father's family for all purposes," and children born of biotechnology with the consent of their parent are entitled to the same rights as a natural child.¹¹⁴

3. *Woodward v. Commissioner of Social Security*

Perhaps one of the more important cases for our purposes is *Woodward v. Commissioner of Social Security*.¹¹⁵ This Massachusetts case clearly identifies three essential factors for any statute regarding posthumously conceived children. Lauren and Warren Woodward had been married for three and a half

¹⁰⁴ *Id.* at 209.

¹⁰⁵ *Id.* at 210 (the court used Louisiana, California, and Florida in its analysis).

¹⁰⁶ *See supra* Part II.C.

¹⁰⁷ *In re Martin B.*, 841 N.Y.S.2d at 211.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (citing RESTATEMENT (THIRD) OF PROPERTY § 14.8 (2007)).

¹¹⁴ *Id.*

¹¹⁵ *See generally* *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

years when they were informed that Warren had leukemia.¹¹⁶ Following this diagnosis, the couple decided to have Warren's sperm withdrawn and preserved.¹¹⁷ In October of 1993, nine months after Warren's diagnosis, he died.¹¹⁸ Two years later, Lauren gave birth to twin girls through the process of artificial insemination using Warren's semen.¹¹⁹ A judge in the probate and family court entered a judgment of paternity for the girls, but the SSA still did not accept this as sufficient evidence to consider the twins the decedent's heirs.¹²⁰ A United States administrative law judge concluded that the children were not entitled to Social Security survivor benefits because the children "are not entitled to inherit . . . under the Massachusetts intestacy and paternity laws."¹²¹

Eventually, this case was transferred to the Massachusetts Supreme Court to "determine the inheritance rights under Massachusetts law of children conceived from the gametes of a deceased individual and his or her surviving spouse."¹²² Under Massachusetts law, the term "issue" means all lineal or genetic descendants, both marital and nonmarital.¹²³ However, neither the Massachusetts intestacy statute nor the state's "posthumous children" statute addresses posthumously conceived children.¹²⁴

The Massachusetts intestacy statute does not contain an "express, affirmative requirement that posthumous children must 'be in existence' as of the date of the decedent's death."¹²⁵ The court decided that since the legislature has not acted to limit various forms of assistive reproductive technology within their intestacy and posthumous children statutes, the legislature must intend for these to remain a broad statutory class of children that can inherit after the death of their parents.¹²⁶

The court ultimately decided that "[i]n certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of 'issue' under the Massachusetts intestacy statute."¹²⁷ The court developed a three-part test to identify whether a child would receive these rights: (1) the child must have a genetic relationship to the decedent;¹²⁸ (2) the decedent must have consented for their genetic material to be used to posthumously create a

¹¹⁶ *Id.* at 260.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 260–61.

¹²¹ *Id.* at 261.

¹²² *Id.* (footnote omitted).

¹²³ *Id.* at 263.

¹²⁴ *Id.* at 264.

¹²⁵ *Id.*

¹²⁶ *Id.* at 266.

¹²⁷ *Id.* at 259 (footnote omitted).

¹²⁸ *Id.* at 270 (placing "the burden on the surviving parent . . . to demonstrate the genetic relationship of the child to the decedent").

child;¹²⁹ and (3) there must be a stated time limit during which the child will be born in order to be able to settle the estate promptly.¹³⁰

These various Uniform Acts and judicial decisions establish that there are three basic factors to consider when contemplating a statute for posthumously conceived children: genetic material, consent, and time limits.

III. NEVADA CURRENTLY

Should a person die without a will, that person dies intestate, and their estate will be distributed in accordance with the state intestacy statutes.¹³¹ In *Astrue v. Capato*, the Supreme Court ruled that state intestacy statutes determine whether a posthumously conceived child could receive Social Security Survivors benefits.¹³² Therefore, when analyzing the need for Nevadans to implement a statute addressing the rights of Posthumously Conceived Children, one must first look at what intestacy means in Nevada.

Nevada is a community property state.¹³³ This is significant when looking into revising or adding to the Nevada probate code because intestacy will be different depending upon whether the decedent is married or unmarried at the time of his or her death. Community property is defined in Black's Law Dictionary as "[a]ssets owned in common by husband and wife as a result of their having been acquired during the marriage by means other than an inheritance by, or a gift or devise to, one spouse, each spouse generally holding a one-half interest in the property."¹³⁴ "The basic principle of community property law is that all property a married couple acquires during the marriage other than by gift or inheritance is community property and, therefore, owned by them equally."¹³⁵

Practically, what this means is that within a marriage, each spouse holds "existing and equal interests," or one-half of all property gained during their marriage.¹³⁶ Under Nevada law, each person can only devise or bequeath their one-half share in a will.¹³⁷ Property owned by the spouses before their marriage, or is "acquired [after the marriage] by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof,

¹²⁹ *Id.* at 269 ("The prospective donor parent must clearly and unequivocally consent not only to posthumous reproduction but also to the support of any resulting child.").

¹³⁰ *Id.* at 268 ("[T]he one-year limitations period . . . may pose significant burdens on the surviving parent, and consequently on the child.").

¹³¹ See *Intestate*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of, relating to, or involving a person who has died without a valid will."); *Intestacy*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("The quality, state, or condition of a person's having died without a valid will.").

¹³² *Astrue v. Capato*, 566 U.S. 541, 558 (2012).

¹³³ See NEV. REV. STAT. § 123.220 (2015).

¹³⁴ *Community Property*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹³⁵ M. READ MOORE, ALI-ABA COURSE OF STUDY MATERIALS: ESTATE PLANNING IN DEPTH, COMING SOON TO YOUR STATE: COMMUNITY PROPERTY (June 2004).

¹³⁶ NEV. REV. STAT. § 123.225(1).

¹³⁷ *Id.* § 123.230(1).

is [] separate property.”¹³⁸ Separate property is owned solely by the individual spouses, and they may dispose of that property as they see fit.¹³⁹

If a married individual in Nevada dies without a will, and with no children, his or her undivided one-half interest in the community property goes to the surviving spouse.¹⁴⁰ The decedent's separate property is divided “one-half to the surviving spouse, one-fourth to the father of the decedent and one-fourth to the mother of the decedent, if both are living.”¹⁴¹ One may think that the inheritance received by the surviving spouse would take care of the needs of any posthumously conceived children in the future, but this does not cover inheritances through trusts, and this inheritance by the surviving spouse does not meet the requirements needed for a posthumously conceived child to receive social security benefits.¹⁴²

So far, we have discussed the married person's estate under Nevada law. Unmarried individuals (who have never been married), as one might expect, do not have to worry about community property, as all the property they own is separate property. In this case, should a decedent die intestate, his or her property would distribute per Nevada Revised Statute (“NRS”) section 134.¹⁴³

When a person dies with a will, that person is considered to have died testate, and the will controls how the estate (both the decedent's separate property and the decedent's one-half interest in the community property) will be distributed.¹⁴⁴ In Nevada, children that are born after the making of a will with no provision made for the child in the will:

[are] entitled to the same share in the estate of the testator as if the testator had died intestate, unless: (a) It is apparent from the will that it was the intention of the testator that no provision should be made for that child; or (b) The testator provided for the omitted child by a transfer of property outside of the will and it appears that the testator intended the transfer to be in lieu of a testamentary provision.¹⁴⁵

The sources of this unmentioned child's share shall be taken from the estate not disposed of by the will, and if this is insufficient, “so much as is necessary must be taken from all the devisees in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or other provision in the will would thereby be

¹³⁸ *Id.* § 123.130.

¹³⁹ *Id.* § 123.170.

¹⁴⁰ *Id.* § 134.050.

¹⁴¹ *Id.* As well as additional family members under NRS section 134.050. *Id.* § 134.050(1). See *id.* § 134, for a breakdown of how separate property is distributed in Nevada.

¹⁴² See *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1264–65 (M.D. Fla. 2005) (determining that children conceived after the death of their father are considered his children, but under the state intestacy statute were not entitled to Social Security Survivors benefits).

¹⁴³ See NEV. REV. STAT. §§ 134.005–.210.

¹⁴⁴ *Testate*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“Having left a will at death.”).

¹⁴⁵ NEV. REV. STAT. § 133.160.

defeated.”¹⁴⁶ These statutes contain no time limits for when these unmentioned children can be born, and set no limits on when these unmentioned children can receive their share of the decedents estate.

As discussed earlier, posthumously conceived children can be born up to twenty-two years after the genetic materials enter cryopreservation.¹⁴⁷ Taking this to the extreme, a situation can be devised in which a posthumously conceived child born twenty-two years after the death of his or her parent, attempts to received their entitled share of the deceased parent’s estate. Ostensibly, at this point, this share would then need to be taken in proportion from the other devisees under the will. The fact that such a scenario could exist under current Nevada law shows that a time limit during which a posthumously conceived child could be born is a necessary revision of current Nevada law. On the other hand, this issue can be avoided entirely if the probate court decides that there was no intent from the testator to provide for a posthumously conceived child.

The Nevada probate code does not contain any statute explicitly controlling or defining the inheritance rights of posthumously *conceived* children.¹⁴⁸ Moreover, the only definition of posthumous children at all within the Nevada Revised Statutes is found within the definition to “right of representation,” which reads:

“Right of representation” means the method of distributing property by which, through inheritance or succession, the descendants of a deceased heir take the same share or right in the estate of another person that their parent or other ancestor would have taken if living. A posthumous child is deemed living at the death of his or her parent.¹⁴⁹

This definition has not been updated since its enactment in 1999.¹⁵⁰ Similar to *Kolacy*, *Woodward*, and *Martin B.*, there is no definitive legislative commentary reflecting whether the term “posthumous child” is inclusive of children conceived after the death of their parents, or whether it includes only posthumous children conceived in the traditional sense. However, it should be noted that while not all posthumous children fall within the category of posthumously conceived children, all posthumously conceived children are posthumous children.

The need for a distinction and definition of posthumously conceived children and posthumous children is obvious when looking at Chapter 111 of the NRS. NRS section 111.080 states, “[a] future estate, depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person capable of taking by

¹⁴⁶ *Id.* § 133.180.

¹⁴⁷ *Healthy Baby*, *supra* note 5.

¹⁴⁸ *See generally* NEV. REV. STAT. §§ 132.010–.390; *id.* §§ 134.005–.210.

¹⁴⁹ *Id.* § 132.290.

¹⁵⁰ 1999 Nev. Stat. 2249, 2253.

descent.”¹⁵¹ Additionally, NRS section 111.085, entitled “Estates Tail: Enjoyment by Posthumous Child,” states:

Where an estate shall be any conveyance limited, in remainder, to the son or daughter or issue, or to use of the son or daughter or issue of any person to be begotten, such son or daughter or issue, born after the decease of his or her parent, shall take the estate in the same proportion, and in the same manner, as if he or she had been born in the lifetime of the parent.¹⁵²

Traditionally, when reading the sections of the NRS listed above, one would consider “posthumous child” to mean a child conceived before, but born after, the death of his or her parent. However, as stated earlier, posthumously conceived children also fall under the broad category of “posthumous children.” Taking the definition of “posthumous child” to be “living at the death of his or her parent,”¹⁵³ one could imagine a scenario under these statutes in which a child born twenty years after the death of his or her parent could suddenly lay claim to a future interest that had already been bestowed on another beneficiary.

There is no case law in the state of Nevada that provides insight on how a posthumous child would be treated under this definition. It may be the case that, as in *Kolacy, Woodward, and Martin B.*, judges in Nevada would interpret the words “posthumous child” broadly and grant inheritance rights to a posthumously conceived child despite the lack of an explicit statutory grant.

Examining the statute in which this definition of “by representation” could be put to use, we can see why a statute defining the inheritance rights of posthumously conceived children would be beneficial.

NRS section 134.040(2) states:

If the decedent leaves a surviving spouse and more than one child living, or a child and the lawful issue of one or more deceased children, the estate goes one-third to the surviving spouse and the remainder in equal shares to the children and the lawful issue of any deceased child by right of representation.¹⁵⁴

Several hypotheticals can be used to show why an explicit statute would be necessary to uphold state and public interests in this matter. First, one can imagine a scenario in which the decedent’s intestate estate has already been distributed in accordance with NRS section 134.040(2). The estate has been divided among the surviving spouse and their other living children. However, seven years after the death of the decedent, the surviving spouse conceives and gives birth to a child using the decedent’s genetic material. Using the definition provided in NRS section 132.290, the estate would then have to be reopened and the decedent’s assets redistributed within the new class of heirs in equal shares. Because posthumously conceived children could potentially be born up to

¹⁵¹ NEV. REV. STAT. § 111.080.

¹⁵² *Id.* § 111.085.

¹⁵³ *Id.* § 132.290.

¹⁵⁴ *Id.* § 134.040(2).

twenty-two years after the harvesting of the required genetic material, such a loose definition of “posthumous child” creates problems both in estate distribution and also with the rule against perpetuities.

When using a narrower interpretation of posthumous child, one could also imagine a scenario in which the genetic child of the decedent receives nothing from the parent’s estate. If “posthumous child” is interpreted strictly in the traditional sense, any child born through the use of ART after a parent’s death would be unable to inherit the share of their parent’s estate, and, under *Astrue v. Capato*, would also be unable to claim Social Security benefits.

Both of these scenarios create situations where the results are unfavorable to the state, to the posthumously conceived child, and to any other heirs of the decedent. Nevada’s current definition, which was more than adequate for the traditional definition of posthumous children, has now become vague because of increases in technology allowing for the conception and birth of posthumously conceived children after a parent’s death. A vague statement with regard to posthumous children is not sufficient to give the courts and the people of Nevada the proper guidance needed to achieve a just result that balances the public interest with the interests of the posthumously conceived child. Therefore, a revised statute, or even a new statute, defining posthumously conceived children and granting or excluding their inheritance rights is necessary to prevent the foregoing scenarios that are possible under Nevada’s current statutory scheme.

IV. POLICY CONSIDERATIONS FOR A NEVADA STATUTE

As with any statute, there are several interests that must be considered, weighed, and balanced before a statute becomes law. Here, three main interests are at play in a statute addressing the inheritance rights of posthumously conceived children: (1) the interests of the state in making sure estates are administered in an orderly manner; (2) the interests of the parents, both in their rights to have children and in their duty to provide for them; and (3) the interests of the other heirs and beneficiaries that may have interests in the estate. This section will identify and discuss several policy considerations for a potential statute and will make a recommendation as to how legislators can balance and apply these considerations.

The three factors identified by the *Woodward* court provide particularly useful guidelines for a statute regarding posthumously conceived children. However, there are also other considerations that need to be taken into account for a potential statute, such as procedural issues. For example, should the probate court be notified that the surviving partner is attempting to have a posthumous child? Who has the ultimate control/discretion to use the genetic material to create a child?

Overall, in addition to practical and procedural issues, there are four essential factors that should be addressed in a statute regarding posthumously con-

ceived children: (1) genetic material, (2) consent, (3) a time limit, and (4) who has control over the genetic material. These factors will also need to be balanced against the state's interest in protecting the reproductive rights of parents, closing estates in a reasonable time, and the orderly, timely, and final disposition of estate property.

A. *Genetic Material*

One of the factors identified in the *Woodward* court that all scholars agree on is that the posthumously conceived child must be conceived through the decedent's genetic material.¹⁵⁵ This seems to be a logical conclusion. After all, why should the state force a decedent's estate to provide an inheritance to a posthumously conceived child that is not related to the decedent?¹⁵⁶ Therefore, the proposed statute should have explicit language stating that the child conceived posthumously must be genetically related to the decedent to be considered the decedent's heir.¹⁵⁷

Proving that the child is, in fact, the genetic descendent of the deceased parent should not be a problem. Since all posthumously conceived children are conceived through ART, there should be medical records held by the medical professionals detailing and verifying from where and from whom the genetic material came.¹⁵⁸

Overall, a requirement that a genetic relationship between the decedent and the posthumously conceived child must be shown in order for the child to inherit. This requirement provides assurance to the probate court that they are permitting the actual child of the decedent to inherit since the decedent is no longer around to claim parentage of the child.¹⁵⁹ Because a decedent cannot claim parentage of a posthumous child, the notion of consent given before death is vitally important.

B. *Consent*

One of the most important concepts one can consider when thinking about whether posthumously conceived children will be considered the heirs of the deceased parent is the concept of consent. Consent is particularly important in the case of posthumously conceived children because the decedents no longer have any say in determining what his or her genetic material will be used for, and in the case of inheritance through an intestacy statute, will have no oppor-

¹⁵⁵ *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 270 (Mass. 2002).

¹⁵⁶ This is not to say that there could not be an instance where a deceased partner would have wanted the survivor to create a child through *donated* genetic material, but in such instances they would have to explicitly provide for them through a testamentary instrument.

¹⁵⁷ See *Chester*, *supra* note 20, at 732.

¹⁵⁸ Pennings et al., *supra* note 3, at 3051 (“[T]he option of posthumous reproduction should be offered in the consent form for cryopreservation.”).

¹⁵⁹ See *id.*

tunity to “disinherit” a child they may not have wanted.¹⁶⁰ “[T]he creation of children posthumously is something about which most people hold strong opinions. That is, few would be indifferent about whether their gametes were used after their death to bring children into this world.”¹⁶¹ In an ideal world, there would always be a clear answer to the question of whether or not a person would like to become a parent of a child after his or her death.¹⁶² Unfortunately, we do not live in an ideal world, and often people who are trying to create a life do not consider their own deaths enough to write out a plan for how their genetic material is to be used after their deaths.

Because of this reality, a proposed statute should provide clear guidelines to the court, family, and medical professionals regarding the decedents’ wishes for their genetic material, including whether the decedent consents to becoming the parent of a posthumously conceived child. There are two ways to do this. First, a statute modeled after the UPC would require a showing of clear and convincing evidence of affirmative consent on the part of the deceased donor to demonstrate that the deceased intended to function as the parent of the child.¹⁶³ Second, there could be a written consent requirement, signaling that the deceased affirmatively consented to his or her genetic material being used to reproduce posthumously.¹⁶⁴

1. Clear and Convincing Evidence

Under the UPC, the surviving spouse can prove by clear and convincing evidence that the decedent intended to be the parent of a posthumously conceived child.¹⁶⁵ There are some concerns that even though clear and convincing evidence is not the lowest burden of proof in a courtroom, it could still provide enough wiggle room to lead to struggles in litigation, including the potential for surviving spouses to attempt to introduce offhand comments by the decedent into evidence.

Allowing consent to be proved via clear and convincing evidence would provide an avenue for those who did not have the opportunity to sign a document before their death. However, a potential issue with requiring only clear and convincing evidence to posthumous reproduction is that “a person who

¹⁶⁰ Weber et al., *supra* note 58 (“The ethics advisors’ main concern was that there was no written consent to perform the procedure and that sperm retrieval could conflict with the actual wishes of the deceased man.”).

¹⁶¹ Ethics Comm. of the Am. Soc’y for Reprod. Med., *Posthumous Collection and Use of Reproductive Tissue: A Committee Opinion*, 99 FERTILITY & STERILITY, June 2013, at 1842.

¹⁶² Although in some cases, this may happen. See *Hecht v. Superior Court of L.A.*, 20 Cal. Rptr. 2d 275 (Ct. Ct. App. 1993) (California court of appeals honors decedents wishes for his sperm to be provided to a named woman for the purposes of having his children after his death).

¹⁶³ UNIF. PROBATE CODE § 2-120(f)(2)(C) (amended 2010).

¹⁶⁴ See Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 161.

¹⁶⁵ UNIF. PROBATE CODE § 2-120(f)(2)(C).

consented to assisted reproduction with the intention of functioning as a parent will be treated as a parent regardless of whether the person contemplated posthumous conception.”¹⁶⁶ Further, “[i]n some cases, the only evidence of [the decedents] wishes will be the testimony of a person bearing an apparent conflict of interest, namely the one who wishes to use the deceased’s sperm or eggs to reproduce.”¹⁶⁷

2. *Written Consent*

An answer to the concerns raised by allowing mere clear and convincing evidence to demonstrate a decedent’s intent would be to require a signed writing stating that the decedent affirmatively consented to have posthumously conceived children. A simple way to achieve this would be to require a consent form signed at the beginning of an ART treatment.¹⁶⁸ These consent forms should ask providers of genetic material how they wish their gametes to be used after their death, whether they wish to permit their genetic material to be used to create a child, and with whom that genetic material will be used. Providers should also identify a person who will have control over the gametes in the case of death.

Such a written consent requirement—allowing posthumously conceived children to inherit—is not unheard of.¹⁶⁹ Both the UPA and the UPC require a “record” signed by the decedent to allow a posthumously conceived child to inherit.¹⁷⁰ Additionally, California’s probate code mandates a written consent form, and requires that the form be signed and dated. The form also requires the signatory to identify the designated person who is to control the genetic material after the death of the decedent.¹⁷¹ Texas requires that a licensed physician keep a signed consent form to prove that the decedent consented to the posthumously conceived child becoming his or her heir.¹⁷²

Further, the Ethics Committee for the American Society of Reproductive Medicine suggests that medical professionals keep a copy of this consent form

¹⁶⁶ Susan N. Gary, *Posthumously Conceived Heirs: Where the Law Stands and What to Do About It Now*, 19 PROB. & PROP., Mar./Apr. 2005, at 35.

¹⁶⁷ Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 161, at 1844.

¹⁶⁸ See generally TEX. FAM. CODE § 160.707 (2007); Edilberto Araújo Filho et al., *Postmortem Sperm Retrieval for In Vitro Fertilization Treatment: Care to Be Taken—A Brazilian Case Report*, 18 JBRA ASSIST. REPROD. 85 (2014), www.jbra.com.br/media/html/JBRA1073.html [<https://perma.cc/BMP7-NW44>] (stating that “[p]rior informed consent of the male should be considered as a basic prerequisite for sperm retrieval”).

¹⁶⁹ See TEX. FAM. CODE § 160.707.

¹⁷⁰ See *supra* Part II.

¹⁷¹ CAL. PROB. CODE § 249.5(a) (2006).

¹⁷² TEX. FAM. CODE § 160.707 (“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.”).

for their own records and ethical considerations.¹⁷³ Such a requirement would not particularly burden the medical profession.¹⁷⁴

The benefits of requiring a consent form kept by a licensed physician are twofold. First, this requirement will start a steady and reliable chain of evidence allowing the court to affirm that the decedent wished to posthumously have a child. Second, it would assist medical professionals in knowing who has control over the genetic material and how the material is to be used after the donor's death.

However, the requirement of written consent is not without its problems. For example, the consent form could be lost. "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."¹⁷⁵ It is suggested then, that the record instead be filed with the court rather than with a licensed physician.¹⁷⁶

3. *The Absence of Consent*

Another consideration is what would occur if there was no consent form on record upon the decedent's death. In these instances, the state of Colorado and the UPC both allow for clear and convincing evidence to prove consent.¹⁷⁷ It is possible that this permission could become an issue because "[i]n some cases, the only evidence of their wishes will be the testimony of a person bearing an apparent conflict of interest, namely the one who wishes to use the deceased's sperm or eggs to reproduce."¹⁷⁸

This conflict of interest is why it is ultimately recommended that there be a requirement of a written affirmative consent form to prove that the decedent wished to have a posthumous child, and why ART clinics should also be required to provide such consent forms at the beginning of treatment.

C. *The Problem of Post-Mortem Sperm Retrieval*¹⁷⁹

So far this note has discussed a scenario in which decedents have already provided their genetic material for use by their loved ones before they die. However, this is not always the case. In some circumstances, a person may die

¹⁷³ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 161, at 1844.

¹⁷⁴ *Id.* at 1844; Filho et al., *supra* note 168.

¹⁷⁵ Ellis, *supra* note 22, at 437.

¹⁷⁶ *Id.*

¹⁷⁷ See UNIF. PROBATE CODE § 2-120(f)(1) (2010); COLO. REV. STAT. § 15-11-120(6)(b)(III) (2010).

¹⁷⁸ Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 161, at 1844.

¹⁷⁹ While this section specifically addresses postmortem *sperm* retrieval, as most of the literature on this subject does, it is equally possible that eggs may be retrieved from a deceased woman as well. See generally Jacqueline Clarke, *Dying to Be Mommy: Using Intentional Parenthood as a Proxy for Consent in Posthumous Egg Retrieval Cases*, 2012 MICH. ST. L. REV. 1331 (2012).

before his or her genetic material is preserved, requiring the genetic material to be removed from his or her body after death.¹⁸⁰ In these cases, the survivor has only a twenty-four-hour window of time in which the gametes of the deceased are still viable.¹⁸¹ In the majority of cases, this is not enough time to complete an entire court proceeding to determine whether or not the decedent consented to retrieval.¹⁸² In some countries—such as Israel—there is a presumption that “a man in a loving relationship with a woman would consent to her having his genetic child after death,” and in those countries, postmortem sperm retrieval would be permitted.¹⁸³ Other countries, like the UK, do not allow for postmortem sperm retrieval at all.¹⁸⁴

Medical professionals are rightly concerned with the lack of consent in cases where the survivor asks for postmortem sperm retrieval.¹⁸⁵ The main concern is whether “a surviving partner’s request for the removal of gametes from the deceased is one with which a physician could ethically comply.”¹⁸⁶ The ethical issue here is whether the decedent would have consented to the procedure prior to his or her death. “The American Society of Reproductive Medicine (“ASRM”) guidelines suggested that postmortem retrieval of sperm should only be offered if the deceased had given prior consent or his wishes to retrieve sperm were known.”¹⁸⁷ In contemplating a statute regarding posthumously conceived children, a state must consider whether postmortem sperm retrieval will be allowed, and if so, who can use the material to create posthumously conceived children. As mentioned previously, consent is extremely important in instances where the donor no longer has any say in the matter, and in almost all cases of postmortem sperm retrieval, there is no affirmative consent at all. A potential solution to this would involve requiring consent before death to postmortem sperm retrieval. In Canada, the Assisted Human Reproduction Regulations dictate that there must be a signed writing stating that the donor was aware that his or her genetic material may be used for posthumous reproduction and postmortem sperm retrieval.¹⁸⁸ With regard to postmortem retrieval of ge-

¹⁸⁰ See Filho et al., *supra* note 168 (stating “[p]ostmortem sperm retrieval has been used worldwide in assisted reproduction technology”).

¹⁸¹ *Id.* (stating “[g]uidelines for PMSR in the medical literature suggest that the procedure should be performed within 24 h[ours] after death to obtain motile or vital sperm”).

¹⁸² Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 161, at 1844.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Weber et al., *supra* note 58, at 407–08 (“[I]t might be impossible for the medical team to confirm the man’s true wishes on the basis solely of the information provided by the family.”).

¹⁸⁶ Ethics Comm. of the Am. Soc’y for Reprod. Med., *supra* note 161, at 1844.

¹⁸⁷ Weber et al., *supra* note 58, at 408.

¹⁸⁸ *Id.* (“Before a person removes human reproductive material from a donor’s body after the donor’s death for the purpose of creating an embryo, the person shall have a document signed by the donor stating that, before consenting to the removal, the donor was informed in writing that the human reproductive material will be removed in accordance with the donor’s consent to create an embryo for 1 or more of the following purposes, namely, [] the repro-

netic material, a Nevada statute should follow the Canadian regulations model and require written consent before retrieval of genetic material from a deceased person. The ethical implications of allowing someone, even a parent or spouse, to retrieve genetic material from a deceased person without express consent outweighs the interests of a person wanting to posthumously reproduce with the deceased.

D. Time Limitations

Estates cannot be held open indefinitely on the chance that a child will be conceived and born after a parent's death. To do so would be unfair to the other persons with interests in the decedent's estate, as well as take up the valuable time of courts.¹⁸⁹ "If a child born to a decedent after final distribution of the decedent's estate is entitled to share in the assets, the estate will have to be reopened, the decedent's property retrieved from the other beneficiaries, and the property redistributed, taking into account the interests of the later-born child."¹⁹⁰ Posthumously conceived children can be born up to twenty-two years after their parents donate their genetic material.¹⁹¹ To leave estates open for that long would be inefficient and costly for both the court and the family, and delay the distribution of the estate.¹⁹² As discussed above in Part III, Nevada's current laws could allow children born after the distribution of the will to take from other beneficiaries of the will. Allowing a posthumously conceived child to become a beneficiary of the will twenty-two years after the death of their parent would be patently unfair to the other beneficiaries. Therefore, most scholars agree that the proper and fair solution would impose a time limit in which the posthumously conceived child can inherit from the decedent. Overall, there are two factors to analyze when examining time limitations for a statute regarding posthumously conceived children: the time of conception and the length of the time limit itself.

ductive use to the person who is, at the time of the donor's death, the donor's spouse or common-law partner, [] improving assisted reproduction procedures, or [] providing instruction in assisted reproduction procedures." (quoting ASSISTED HUMAN REPRODUCTION § 8 (Manseau, 2007)).

¹⁸⁹ Gary, *supra* note 166, at 35 ("A decision on the time limit to impose requires balancing the need for a timely disposition of an intestate estate with the need to give a surviving parent adequate time make the difficult decision about whether to attempt posthumous conception.").

¹⁹⁰ Goodwin, *supra* note 12, at 274.

¹⁹¹ *Healthy Baby*, *supra* note 5.

¹⁹² *Id.*

1. *Time of Conception*

Many state statutes require a posthumous child to either be *conceived* or born within a two- or three-year period.¹⁹³ While it is simple to identify exactly when a child is born, it is more difficult to identify when the child was conceived. Merriam-Webster's Medical Dictionary defines conception as: "the process of becoming pregnant involving fertilization or implantation or both."¹⁹⁴ Traditionally, conception would occur when the genetic materials of the mother and father are combined within the mother's uterus, and create an embryo. However, with the use of ART, it is now possible to create embryos outside of the mother's body. It would be prudent for a potential statute to define the precise conditions for the conception of a posthumous child.

Ronald Chester, in his proposed amendments to the UPC, suggests defining conception as "the moment of implantation in the uterus of the gestating female."¹⁹⁵ Utilizing this definition would prevent cases in which embryos are created outside of the uterus (and thus meet the fertilization requirement). Otherwise, it would be easy for some parties to claim that their posthumously conceived child was in being before the statutory limits, even when there is a possibility that the embryo would not be implanted in a uterus and born before the statutory limits ran out. It would be beneficial to establish in a statute that: "a posthumously conceived child is not conceived when it is formed in the laboratory, or preserved for future use; it is conceived when it begins to grow in the uterus of the gestating female."¹⁹⁶

2. *Length*

Many states have imposed a time limit of two to three years for conception and birth of a posthumously conceived child.¹⁹⁷ These imposed time limits give the states and their respective courts a definite timeline during which a posthumously conceived child can have an impact on an estate. This allows the probate courts to distribute estates within a timely manner and gives a degree of certainty to the other beneficiaries of the decedent's estate.

While two- to three-year periods may seem reasonable, and even just in some circumstances, there are many reasons why a slightly expanded period of time benefits the surviving parent attempting to produce a posthumous child.

¹⁹³ See CAL. PROB. CODE § 249.5(c) (2006) (two years); COLO. REV. STAT. § 15-11-120(11)(a) (2010) (three years for conception); IOWA CODE § 633.220A(1)(c) (2011) (two years); LA. STAT. ANN. § 9.391.1(A) (2011) (three years). *But see* CONN. GEN. STAT. § 45a-785(a)(2) (2014) (child must be in utero within one year of death).

¹⁹⁴ *Conception*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/conception> [<https://perma.cc/9GNJ-GVVK>] (last visited Apr. 28, 2017).

¹⁹⁵ Chester, *supra* note 20, at 729.

¹⁹⁶ *Id.*

¹⁹⁷ See CAL. PROB. CODE § 249.5 (two years); COLO. REV. STAT. § 15-11-20 (three years for conception); IOWA CODE § 633.220A (two years); LA. STAT. ANN. § 391.1 (three years). *But see* CONN. GEN. STAT. § 45a-785 (child must be in utero within one year of death).

First, a time limit of only two years may lead surviving partners to “rush” into the process of conceiving a child, without first considering the implications of *having* a child. Second, as stated earlier, ART is not always successful. The low success rates of ART procedures could mean several months of trying before a viable pregnancy occurs, and even then, there is no guarantee that the mother or surrogate would carry the child to term.¹⁹⁸

Members of the Task Force on Ethics and the Law of the European Society of Human Reproduction and Embryology (“ESHRE”) suggest a period of at least one year, and a maximum of five years before grieving family members be allowed to use the genetic material to reproduce.¹⁹⁹ They reason that the grief of the surviving family member, combined with a short statutory time limit, could cause him or her to make a hasty decision.²⁰⁰ Feelings of guilt or idealization of the deceased could lead the survivor to rush into a decision he or she may later regret.²⁰¹ The five year period, they reason, would “assure practical arrangement for the inheritance while giving the surviving partner the possibility to plan a family with more than one child.”²⁰²

Third, the Supreme Court has recognized that “in the context of gender discrimination . . . the Constitution recognizes higher values than speed and efficiency.”²⁰³ These values include protecting vulnerable citizens from the “overbearing concern for efficiency and efficacy.”²⁰⁴ Likewise, here, both legislators considering a potential state statute and probate courts should value the potential benefits to posthumously conceived children, along with the speed and efficiency in which they can close estates.

To reconcile the ethical and policy concerns, it is recommended that a Nevada statute balance the standard tests of three years, with the ESHRE committee recommendation of five years, which states: “[t]o assure a practical arrangement for the inheritance while giving the surviving partner the possibility to plan a family with more than one child, a maximum period of [five] years is proposed within which the child(ren) must be conceived and born.”²⁰⁵ A statute specifically naming a four year period in which the child must be conceived and born is recommended.

This four-year period for conception and birth would allay the fears of physicians concerned with the birth of “grief babies,” as well as give sufficient

¹⁹⁸ Shah, *supra* note 36, at 549 (“It takes an average of seven insemination attempts over 4.4 menstrual cycles to establish pregnancy.”).

¹⁹⁹ Pennings et al., *supra* note 3, at 3052 (“An obligatory minimum waiting period of a year seems necessary to prevent hasty and ill-considered decisions.”).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Goodwin, *supra* note 12, at 275.

²⁰⁴ *Id.*

²⁰⁵ Pennings et al., *supra* note 3, at 3052.

time for ART treatments to be successful.²⁰⁶ This time period would also allow for the family situation to become more stable, and thus would be more beneficial for the health of the posthumously conceived child. Further, this defined requirement prevents posthumously conceived children from being born indefinitely and, in turn, reducing the estate of the decedent into smaller and smaller shares.²⁰⁷ Additionally, a four-year period is not so lengthy that estates and other beneficiaries and heirs of the decedent would be robbed of the benefits of their inheritance.

E. Control of Genetic Material

Now that this note has addressed the issues of what genetic material to use and when to use it, it is now important to discuss *who* may use the genetic material of the deceased to create a posthumously conceived child. Physicians recommend that the “gametes or embryos cannot be directed at or requested by specifically others like parents or other family members of the deceased person(s). Casuistry, especially for requests by parents of a deceased, indicates that they want to hold on to the deceased by means of the newly created grandchild.”²⁰⁸ Therefore, it is necessary that during the consent process, the donor identifies precisely *who* can use his or her genetic material and for what purpose the material may be used.

In general, the recipient of the donor’s preserved genetic material will be the donor’s partner of the opposite sex. However, there may be some instances in which a donor may wish to give control over his or her genetic material to someone who cannot use it to biologically reproduce themselves, such as a same-sex partner.

Many state statutes give the rights to posthumous reproduction only to the decedent’s surviving spouse.²⁰⁹ However, there may be many other scenarios in which a person may wish to have a child outside of marriage, such as the case of a longtime partner.²¹⁰ Ronald Chester has suggested using the term “beneficiary”²¹¹ for a broader statutory scope.

²⁰⁶ The timing for conception and a live birth may vary between individuals, although it is recognized that the chance of successful ART treatments reduces with age. See *ART Success Rates*, CTR. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/9ZL5-X2H7>] (last updated Mar. 8, 2017).

²⁰⁷ As discussed *supra* Part I, the ART techniques used to create posthumously conceived children have a higher chance for multiple births. Although it is highly unlikely, a hypothetical scenario in which twins or triplets are born to the surviving partner every two years until it is physically impossible for them to do so can occur. This gives a new meaning to the term “fertile decedent,” and could lead to estates being reduced to nothing without proper time constraints on the birth of posthumously conceived children.

²⁰⁸ Pennings et al., *supra* note 3, at 3052.

²⁰⁹ See, e.g., TEX. FAM. CODE § 160.707 (2007).

²¹⁰ See Marshal S. Willick, *The Evolving Concept of Marriage and Coming Convergence of Marital and Non-Marital Property and Support Law*, 19 NEV. LAW., May 2011, at 6.

²¹¹ Chester, *supra* note 20, at 732.

In today's modern world, there are many conceptions of "family" outside of marriage in which a person may wish to raise a child. Marriage is not a requirement for parenthood, and as such a statute defining the rights of posthumously conceived children should not limit itself only to "spouses." Use of the term "beneficiaries" in conjunction with naming requirements on the consent form should be sufficient to cover various family structures.

F. Final Practical and Procedural Issues

1. Notice to the Court

It would be practical within a statute allowing for the inheritance of posthumously conceived children to include a section in which notice to the court and interested parties of an attempt to create a posthumously conceived child is required at or near the beginning of probate.²¹² Such a notice requirement would alert the court that there may be a need to set aside a share of the decedent's estate.²¹³ This share could potentially be set aside or flagged at the beginning of probate and put into a trust. In the event that ART treatments are unsuccessful, and a posthumous child is not conceived, this reserved share could then be distributed equally among the rest of the heirs or beneficiaries.²¹⁴

A statutory requirement for notice to the court that triggers a set-aside share would address the rights of the other heirs and beneficiaries that have an interest in an expedited probate process. This requirement would allow them the opportunity to contest the posthumously conceived child's share within the statutory period, and allow them to receive their share promptly, and in the event that the posthumous child is not born, would allow them to recover the rest of their inheritance.

CONCLUSION

Because of the disparate impact that a lack of statute places upon posthumously conceived children versus traditionally conceived children, it is in the best interests of Nevada to enact a statute addressing this issue. *Astrue v. Capato* bases the receipt of Social Security benefits on state intestacy statutes, a state without such a statute places posthumously conceived children at an economic disadvantage. A simple definition of posthumous children within a state intestacy statute without specifically addressing posthumously conceived children's special circumstances is not sufficient to prevent the complicated issues that arise when posthumously conceived children do not have a place within the state's probate code.

²¹² *Id.* at 743.

²¹³ *Id.* at 744.

²¹⁴ *Id.*

While it is obvious that the Author wholeheartedly supports a statute granting inheritance rights to posthumously conceived children, a statute expressly disinheriting posthumously conceived children would also be necessary if the legislature does not wish to grant inheritance rights to posthumously conceived children. Should the state of Nevada consider enacting a statute regarding the rights of posthumously *conceived* children, the following factors must be considered. Such a statute should include a strict definition insisting that it be the decedent's genetic material used to create his or her posthumously conceived heir.

A statute should require the express written consent of the decedent stating that he or she consents to creating and supporting the posthumously conceived child after death. Such consent should be provided at the beginning of ART treatments in the shape of a written form, for maximum consideration by the potential parents, as well as for consistent record keeping.

To balance the state's interests of timely estate distribution and the private interests of providing financial support for a young child, a time limit should be placed on the conception and birth of a posthumous child. To give adequate respect to the grieving process and to account for the inherent difficulties of conceiving a child through ART, a time period of four years is recommended.

Further, a statute must explicitly address who may control the genetic material after the donor's death. The donor should be required to identify who will have control over his or her genetic material and define the scope of usage of the material. A simple definition of "beneficiary" should be used within the statute to be sensitive to today's various family dynamics. Further, the earlier-mentioned consent form should allow the donor to identify this beneficiary.

Finally, the state should consider adding a notice requirement to the statute. The potential parent of the posthumous child would be required to inform the court and the other interested parties that they are actively attempting (or are planning to attempt) to create a posthumous child during the statutory limit. This notice would allow the court to set aside a share in trust for the potential child, and settle the rest of the estate accordingly. If the potential parent is unable to conceive a posthumous child, this share could then be distributed to the rest of the interested parties.

Enacting a statute that addresses posthumously conceived children helps both the state and its citizens. Posthumously conceived children are born with a severe economic disadvantage through no fault of their own. Without a statute expressly granting posthumously conceived children inheritance rights, these children cannot inherit from their genetic parent, cannot be the beneficiaries of life insurance policies, cannot receive Social Security Survivors benefits, and in some cases, may not even be considered the descendants of their genetic parents for the purposes of a trust. In the interest of providing a clear guideline for judges, and giving posthumously conceived children the equal protection of the laws, it is recommended that the Legislature of the State of Nevada enact a statute addressing inheritance rights to posthumously conceived children.

