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DEAD MONEY: A POSTHUMOUSLY CONCEIVED CHILD'S INHERITANCE RIGHTS UNDER THE SOCIAL SECURITY ACT & STATE INTESTACY LAW

I. INTRODUCTION

Jack and Jill were a young married couple. Three months after their wedding,

Jack was diagnosed with an aggressive form of Leukemia. Doctors advised Jack to undergo chemotherapy immediately but indicated he was at a high risk of becoming infertile. Knowing they wanted to have children together someday, Jack and Jill had Jack's sperm frozen and stored in a sperm bank.

Despite aggressive treatment, Jack's prognosis was poor and it was obvious death was impending. The only solace Jack had in his final days was his belief Jill would use his frozen sperm to conceive a child after he died with assisted reproductive technology. Eventually, Jack died at the tender age of twenty six.

Eighteen months after Jack's death, Jill gave birth to twin girls conceived using Jack's frozen sperm. Genetically, the twin girls are Jack's children. Are the twins entitled to receive benefits through Jack from the Social Security Administration? Are the twins entitled to inherit from Jack under intestate succession?

Posthumously conceived children—children conceived after the death of one or both parents—have become increasingly common in recent years.¹ The ability to conceive a deceased individual's child is made possible by assisted reproductive technology (ART) such as in vitro fertilization and artificial insemination.² Furthermore, cryopreservation—a method of freezing reproductive cells for future use—allows sperm, eggs,

¹ See *Assisted Reproductive Technology (ART) Report: National ART Success Rates*, CTRS. FOR DISEASE CONTROL & PREVENTION, nccd.cdc.gov/DRH_ART/Apps/NationalSummaryReport.aspx (last updated August 13, 2013) (detailing national rates of assisted reproductive technology resulting in successful pregnancies in 2012).

² See *infra* Part II.A (elucidating methods of conceive children posthumously).

and embryos to be stored for lengthy periods of time enabling their procreative use for an indeterminate number of years post-death.³

An inherent problem in this process involves the inheritance rights of such offspring in terms of social security benefits and under intestate succession.⁴ Under the Social Security Act, a posthumously conceived child's right to inherit under the applicable state's intestacy statute is dispositive of that child's right to receive social security benefits.⁵ Accordingly, if a child qualifies for intestate succession under the applicable state law, that child can also receive social security benefits through a deceased wage earning parent.⁶ If a child of postmortem conception is ineligible to inherit as an heir at law under the applicable state's intestacy statute, that child is also precluded from receiving social security benefits.⁷

Unfortunately, state legislatures have failed to keep pace with scientific development and only eleven states sufficiently address how to resolve issues dispositive of whether a posthumously conceived child can inherit under intestate succession.⁸ To be specific, the basic rule of intestate succession prescribes that a decedent's closest relatives should inherit first.⁹ Therefore, the existence of a parent-child relationship between a decedent and a posthumously conceived child must be established at the outset.¹⁰ The preceding determination, however, does not end the analysis.¹¹ Traditionally, administration of a decedent's estate occurs at the time of death.¹² Given that posthumously conceived children are not alive at the time of death, it must then be ascertained whether they

³ See *infra* Part II.B (explaining cryopreservation).

⁴ See *infra* Part III.A (describing relationship between social security benefits and state intestacy laws).

⁵ See *infra* Part III.A (expounding how parallel between Social Security Act and state intestacy law is double-edged sword).

⁶ See *infra* Part III.A (discussing how Social Security Act defers to state law for inheritance rights).

⁷ See *infra* Part III.A.i (summarizing *Astrue v. Capato*, which held state law determines claimant's entitlement to social security benefits).

⁸ See *infra* Part III.A.ii.1 (exploring inadequacy of statutes governing inheritance rights of posthumously conceived children).

⁹ See *infra* notes 88-89 and accompanying text (reviewing general rule of intestate succession).

¹⁰ See Andrew S. Felts, Note, *What Sex-Ed Didn't Teach You: Addressing the Inadequacies of West Virginia Code Section 42-1-8 and the Future of Posthumously Conceived Children*, 114 W. VA. L. REV. 239, 253 (2011) (acknowledging importance of establishing parentage to validate inheritance rights under intestate succession).

¹¹ See *infra* notes 57, 92-93 and accompanying text (implying existence of parent-child relationship may not be enough to secure inheritance rights).

¹² See *infra* Part IV.C (advocating importance of expedient conception post-death).

can still inherit through intestate succession.¹³

Without express legislation addressing the inheritance rights of posthumously conceived children for purposes of intestate succession, state courts have been forced to act in the interim.¹⁴ As a result, two predominant approaches have emerged.¹⁵ For example, some states have adopted a broader approach, which gives effect to the intent of the decedent.¹⁶ Alternatively, some states follow a narrower approach, which gives effect to legislative intent.¹⁷ There is, however, some flexibility regarding what state law applies.¹⁸ This is because the Social Security Act provides the state where the decedent was domiciled at the time of his or her death governs, which may be subject to interpretation.¹⁹

Ultimately, for a posthumously conceived child to qualify for social security benefits, it is clear state intestacy legislation must expressly permit such child to inherit, or at least be sufficiently ambiguous to permit that interpretation.²⁰ Ergo, to procreate posthumously and secure inheritance rights for any resulting children, there are various factors that should be considered to enhance the likelihood of success.²¹ For example, marriage, execution of a will, expedient conception, and utilizing the ambiguity of domicile are all ways to help achieve that end.²² Additionally, emphasizing a state's past reliance on uniform acts like the Uniform Probate Code (UPC) and/or Uniform Parentage Act (UPA) may persuade a court to adopt law modeled after such acts until the applicable state legislature responds.²³

This note begins with Part II.A through Part II.B, which discuss the

¹³ See *infra* notes 86-89 (elaborating two-part inquiry critical to ascertain posthumously conceived child's inheritance rights under intestate succession).

¹⁴ See *infra* Part III.A.ii.2 (discussing current case law and role of courts in governing inheritance rights).

¹⁵ See *infra* Part III.A.ii.2 (introducing broad approach and narrower approach adopted by courts).

¹⁶ See *infra* Part III.A.ii.2.b (providing states such as Massachusetts and New Jersey have taken broader approach).

¹⁷ See *infra* Part III.A.ii.2.c (revealing states like Arkansas and Iowa have adopted narrower approach).

¹⁸ See *infra* Part III.A.iii.3 (analyzing ambiguity of "domicile").

¹⁹ See *infra* Part III.A.i (addressing Social Security Act).

²⁰ See *infra* Part III.A (detailing problematic and unsettled state of law controlling inheritance rights of posthumously conceived children).

²¹ See *infra* Part IV (proffering different ways to successfully conceive and provide for children of postmortem conception).

²² See *infra* Part IV (demonstrating why marriage, wills, expedient conception post-death, and forum shopping should be practical considerations).

²³ See *infra* Part IV (elaborating why emphasizing past reliance on uniform acts may be persuasive).

different methods of assisted reproductive technology that allow children to be conceived posthumously, including: In vitro fertilization; Artificial insemination; and Cryopreservation.²⁴ Part II.C evaluates the phenomenon of posthumously conceived children.²⁵ Part III reviews statutes and case law to exemplify the dependent relationship between the Social Security Act and state intestacy law.²⁶ Finally, Part IV analyzes what prospective parents should do when considering posthumous conception to enhance the ability to procreate post-death and provide for any resulting children.²⁷

II. HISTORY

A. Methods of Reproduction Enabling Posthumous Conception—Assisted Reproductive Technology

Assisted reproductive technology includes any effort to achieve pregnancy by means other than sexual intercourse.²⁸ In vitro fertilization (IVF) and artificial insemination, otherwise known as intrauterine insemination (IUI), are two kinds of ART commonly used to conceive children posthumously.²⁹

1. In Vitro Fertilization (IVF)

IVF is when a woman's eggs and a man's sperm are combined in a

²⁴ See *infra* Part II.A (reviewing ART).

²⁵ See *infra* Part II.C (distinguishing between posthumously born and posthumously conceived children).

²⁶ See *infra* Part III.A (evaluating current state of law regarding posthumously conceived children).

²⁷ See *infra* Part IV (suggesting what prospective parents should consider).

²⁸ See *Assisted Reproductive Technologies: A Guide for Patients*, AM. SOC'Y FOR REPROD. MED. (2011), www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/art.pdf (including glossary of commonly used ART terms); see also *Reproductive Health: Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, at 17 (June 20, 2013), www.cdc.gov/reproductivehealth/infertility/ (answering frequently asked questions concerning infertility). Eggs are "[t]he female sex cell[s] (ovum[s]) produced by the ovary, which, when fertilized by a male sperm, produces an embryo." *Assisted Reproductive Technologies: A Guide for Patients*, *supra*, at 23 (defining customary ART language). Sperm is "[t]he male reproductive cells that fertilize a woman's egg." *Id.* at 27 (defining customary ART terms).

²⁹ See *Reproductive Health: Infertility FAQs*, *supra* note 28 (defining ART); see also *Intrauterine Insemination (IUI)*, AM. SOC'Y FOR REPROD. MED. (2012), www.reproductivefacts.org/factsheet_intrauterine_insemination_IUI/ (delineating intrauterine insemination).

laboratory dish outside of the body.³⁰ The fusion of sperm and egg(s) enables fertilization, which creates an embryo necessary to conceive a child.³¹ Subsequently, one or more embryos are inserted into a woman's uterus to facilitate pregnancy.³² If there are excess embryos, they "may be cryopreserved (frozen) for future use."³³ A basic IVF treatment cycle includes five basic steps: (1) ovarian stimulation, (2) egg retrieval, (3) fertilization, (4) embryo culture, and (5) embryo transfer.³⁴

2. Artificial Insemination/Intrauterine Insemination (IUI)

IUI is a process that plants sperm directly into a woman's uterus during ovulation—the time when eggs are released from a woman's ovaries.³⁵ In a natural pregnancy, sperm must travel from a woman's vagina through her cervix, into her uterus, and up into one of her fallopian tubes.³⁶ The amount of sperm that enter a woman's uterus and reach her fallopian tube(s) is generally low.³⁷ By planting sperm directly into a

³⁰ *Assisted Reproductive Technologies: A Guide for Patients*, *supra* note 28, at 4 (providing comprehensible patient's guide to assisted reproductive technologies); *see also* *Assisted Reproductive Technology*, EUNICE KENNEDY SHRIVER NAT'L INST. OF CHILD HEALTH & HUMAN DEV. (July 07, 2013), www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/art.aspx (highlighting contrasting types of assisted reproductive technology).

³¹ *Assisted Reproductive Technologies: A Guide for Patients*, *supra* note 28, at 4 (defining terminology frequently associated with procreation).

³² *Id.* at 23-28 (including list of commonly used ART words).

³³ *Id.* at 4 (summarizing IVF process); *see Intrauterine Insemination (IUI)*, *supra* note 29 (describing cryopreservation as method of fertility preservation).

³⁴ *Assisted Reproductive Technologies: A Guide for Patients*, *supra* note 28, at 4 (describing steps of IVF); *see Assisted Reproductive Technology*, *supra* note 30 (giving brief overview of IVF treatment cycle). Sources slightly differ on the names of each step in the IVF treatment cycle and some sources combine one or more of the steps. *Compare Assisted Reproductive Technologies: A Guide for Patients*, *supra* note 28, at 4 (citing five steps in an IVF treatment cycle), and *IVF Step-by-Step*, UNIV. OF ROCHESTER MED. CTR.: DEP'T OF OBSTETRICS & GYNECOLOGY (2013), www.urmc.rochester.edu/ob-gyn/fertility-center/ivf/ivf-step-by-step.aspx (naming five steps in IVF treatment cycle with slightly different names), with *Assisted Reproductive Technology*, *supra* note 30 (listing only four steps of IVF). The overall procedure, however, is still the same. *See, e.g., Assisted Reproductive Technologies: A Guide for Patients*, *supra* note 28 (describing IVF process); *Assisted Reproductive Technology*, *supra* note 30 (outlining how IVF works); *IVF Step-by-Step*, *supra* (exploring IVF steps).

³⁵ *See Assisted Reproductive Technology*, *supra* note 30 (highlighting types of ART, including IUI); *Intrauterine Insemination (IUI)*, *supra* note 29 (summarizing artificial insemination).

³⁶ *Intrauterine Insemination (IUI)*, *supra* note 29 (briefing what happens during unassisted pregnancy). If sperm reaches a woman's fallopian tube(s) shortly after an egg is released from her ovaries, sperm and egg(s) can meet and fertilize. *Id.* (detailing process by which women become pregnant).

³⁷ *Id.* (describing issues with natural conception).

woman's uterus, the chance of uniting egg(s) and sperm is greatly increased because the trip to her fallopian tube(s) is much shorter.³⁸ Ultimately, artificial insemination enhances a woman's ability to get pregnant.³⁹

3. Cryopreservation

The first reported human birth resulting from the use of frozen sperm was in 1953, and in 1984, the first birth resulting from the use of a frozen embryo was reported.⁴⁰ In 1986, the first birth resulting from the use of a frozen egg was reported; however, the use of frozen eggs to reproduce is still relatively rare because they are the most difficult reproductive cells to preserve for long periods.⁴¹

According to the Centers for Disease Control and Prevention's 2012 Assisted Reproductive Technology Report, out of 456 reporting clinics 38,150 individuals underwent assisted reproduction utilizing frozen embryos from nondonor eggs.⁴² Of those ART cycles, thirty-eight percent resulted in live births.⁴³ There were 8,893 couples who participated in assisted reproductive technology using frozen embryos from donor eggs.⁴⁴ Of those procedures, approximately thirty-seven percent resulted in live births.⁴⁵ In total, reporting clinics claimed 8,730 children were born by means of assisted reproductive technology using frozen embryos in 2011.⁴⁶ This figure does not even account for non-reporting clinics and the number

³⁸ *Intrauterine (Artificial) Insemination (IUI)*, FERTILITY CTR. AT NYU LANGONE (2013), www.nyufertilitycenter.org/infertility_treatment/artificial_insemination (describing intrauterine insemination).

³⁹ See *Intrauterine Insemination (IUI)*, *supra* note 29 (conveying basics of artificial insemination).

⁴⁰ *Id.* at 37 (discussing history of conception using cryopreserved reproductive material).

⁴¹ *Id.* (illuminating history of cryopreservation for reproductive purposes).

⁴² See *Assisted Reproductive Technology (ART) Report: National ART Success Rates*, *supra* note 1 (examining ART success rate using cryopreserved reproductive material); see also Jane Marie Lewis, Note, *New-Age Babies and Age-Old Laws: The Need for an Intent-Based Approach in Tennessee to Preserve Parent-Child Succession for Children of Assisted Reproductive Technology*, 43 U. MEM. L. REV. 479, 480 (2012) (exploring how ART affects parent-child succession).

⁴³ *Assisted Reproductive Technology (ART) Report: National ART Success Rates*, *supra* note 1 (reporting how many couples utilized cryopreservation to conceive); see also Lewis, *supra* note 42, at 480 (discussing growth in births of posthumously conceived children).

⁴⁴ *Assisted Reproductive Technology (ART) Report: National ART Success Rates*, *supra* note 1 (explaining statistics of ART participants).

⁴⁵ *Id.* (indicating number of children born using frozen embryos from donor eggs).

⁴⁶ See *id.* (discussing children conceived using cryopreserved reproductive material from donors and nondonors).

of children conceived posthumously from the use of frozen eggs or sperm.⁴⁷

Cryopreservation of reproductive cells may be desirable to individuals who are diagnosed with a medical condition whereby the recommended treatment may result in infertility.⁴⁸ Individuals who work in high risk professions, like the military, may also view cryopreservation as a viable option to preserve fertility in the event of resultant impotence or untimely death.⁴⁹

4. Posthumous Conception

Due to advancements in ART and the ability to cryopreserve reproductive cells for lengthy periods of time, it is now possible to conceive children post-death.⁵⁰ Initiating pregnancy after the death of one or both biological parents is called posthumous *conception*—distinguishable from posthumous birth, which is when a biological parent dies after the conception of a child but before the child's birth.⁵¹

“Posthumous conception challenges the validity of . . . [parentage] . . . and inheritance laws by blurring the once bright lines between death and life.”⁵² Specifically, the distinction between posthumously conceived and posthumously born children is particularly important in the context of parentage and inheritance.⁵³ This is because in most states, a posthumously

⁴⁷ Cf. *id.* (identifying percentage of children from reporting clinics born using cryopreserved embryos in 2012).

⁴⁸ See *id.* (defining cryopreservation and discussing its purpose).

⁴⁹ See Frank Buckley, *Insurance Policy: Troops Freezing Sperm*, CNN (Jan. 30, 2003, 1:04 PM), <http://www.cnn.com/2003/HEALTH/01/30/military.fertility/index.html?iref=newssearch> (“Troops say having their sperm frozen gives them peace of mind in case of death or infertility.”); see also *Sperm Storage*, FAIRFAX CRYOBANK, <http://fairfaxcryobank.com/sperm-storage.shtml> (last visited Mar. 2013) (indicating their sperm bank gives active duty military one year of free storage).

⁵⁰ Renee H. Sekino, *Posthumous Conception: The Birth of a New Class*, *Woodward v. Commissioner of Social Security*, LEGAL UPDATE (2001), available at <http://www.bu.edu/law/central/jd/organizations/journals/scitech/volume81/sekino.pdf> (forecasting implications of posthumous conception regarding inheritance rights).

⁵¹ *Id.* (defining posthumous conception); see Brianne M. Star, Case Comment, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 613 (2004) (discussing posthumous conception).

⁵² Star, *supra* note 51, at 613 (exploring various dilemmas inherent with posthumous conception).

⁵³ See Felts, *supra* note 10, at 242 (distinguishing between posthumously born and posthumously conceived children); see also Lisa Medford, Note, *Family Law and Estate Law—Reproductive Technology—Use of Artificial Reproductive Technologies After the Death of a Parent*, 33 U. ARK. LITTLE ROCK L. REV. 91, 94 (2010) (discussing issues posthumously conceived children face regarding inheritance rights).

born child is deemed “in being” at the time of conception.⁵⁴ Accordingly, a posthumously born child is considered alive at the time of a parent’s death and will inherit through intestate succession accordingly.⁵⁵ Alternatively, a child conceived after the death of one or both biological parents is typically not considered “in being” at the time death occurs.⁵⁶ Consequently, distinct statutes and case law must be reviewed to establish whether a parent-child relationship exists under the law and what, if any, inheritance rights that child has under intestate succession.⁵⁷

III. FACTS

A. Double-Edged Sword: The Dependent Relationship Between Social Security Benefits and State Intestacy Law

1. Social Security Benefits

To provide a financial safety net for families, Congress enacted the Social Security Act of 1939, which provides conditions under which families can procure benefits through a deceased wage earner.⁵⁸ Two provisions of the Act significantly govern a dependent child’s right to

⁵⁴ Felts, *supra* note 10, at 242 (distinguishing posthumously born and posthumously conceived children); Medford, *supra* note 53, at 94 (maintaining posthumously born children are protected under most state inheritance laws). Some statutes are vague because they fail to distinguish between posthumously born and posthumously conceived children. *See* DEL. CODE ANN. tit. 12, § 505 (West 2013) (“Posthumous children, born alive, shall be considered as though living at the death of their parent [for purposes of intestate succession].”); D.C. CODE § 19-314 (2013) (generalizing rights of posthumous children). Therefore, case law analysis is critical to identify the meaning of “posthumous children” as applied by courts in a jurisdiction with ambiguous statutory law. *See* DEL. CODE ANN. tit. 12, § 505 (West 2013); D.C. CODE § 19-314 (2013).

⁵⁵ Felts, *supra* note 10, at 242 (addressing inheritance rights of children born posthumously); Medford, *supra* note 53, at 94 (noting how state intestacy laws afford protection to posthumously born children).

⁵⁶ Felts, *supra* note 10, at 242 (indicating inheritance and parentage analysis differs depending on when child in question was conceived); Medford, *supra* note 53, at 94 (“[P]osthumously conceived children must overcome[] several burdens to prove they are the lawful heirs of their deceased parent.”).

⁵⁷ *See* Felts, *supra* note 10, at 242 (“Consequently, an entirely different set of descent and distribution legislation and case law is necessary in order to specifically deal with the issues related to the posthumously conceived child.”).

⁵⁸ *See* 42 U.S.C. § 402(d) (2013); *see also* *Astrue v. Capato*, 132 S. Ct. 2021, 2027 (2012) (discussing 1939 amendment to Social Security Act, which included qualifications for child’s receipt of benefits); Andrew Chironna, Case Comment, *Astrue v. Capato: Implications for Posthumously Conceived Children*, NAT’L ITALIAN AM. BAR ASS’N L.J. 2013, at 71 (explaining purpose of Social Security Act of 1939).

benefits upon the death of a wage earning parent.⁵⁹ The first is 42 U.S.C. § 416(e)(1), which provides in pertinent part: “The term ‘child’ means . . . the child or legally adopted child of an individual”⁶⁰ As the provision’s language suggests, the meaning of child under the Social Security Act is highly ambiguous.⁶¹

Consequently, a posthumously conceived child’s right to social security benefits is largely determined by 42 U.S.C. § 416(h)(2)(A).⁶² This provision indicates a child’s right to inherit through intestate succession is dispositive of any right to social security benefits.⁶³ Therefore, if a child qualifies to inherit under an applicable state’s intestacy law, then that child is also entitled to social security benefits.⁶⁴ Conversely, if a child does not qualify to inherit from a deceased parent under intestate succession, then that child is also ineligible to receive social security benefits.⁶⁵

In *Astrue v. Capato*, the Supreme Court unwaveringly declared a child’s right to social security benefits is determined by the intestacy law of the state where the decedent was domiciled at the time of his or her death.⁶⁶ In that case, the decedent, Robert Capato, was married in 1999 and

⁵⁹ See 42 U.S.C. § 416(e)(1) (2012) (defining “child” for purposes of social security benefits); 42 U.S.C. § 416(h)(2)(A) (indicating state intestacy law governs in determining applicants’ eligibility to receive social security benefits).

⁶⁰ 42 U.S.C. § 416(e)(1).

⁶¹ See *id.* (defining “child” under Social Security Act); *Capato*, 132 S. Ct. at 2033 (“As we have explained, § 416(e)(1)’s statement, ‘[t]he term ‘child’ means . . . the child . . . of an individual,’ is a definition of scant utility without aid from neighboring provisions.”).

⁶² See 42 U.S.C. § 416(h)(2)(A) (identifying standard in determining whether child qualifies for social security benefits).

⁶³ 42 U.S.C. § 416(h)(2)(A). In pertinent part, 42 U.S.C. § 416(h)(2)(A) provides the following:

In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

Id.

⁶⁴ See *id.* (deferring to state law to determine eligibility social security benefits); Chironna, *supra* note 58, at 72 (stating 42 U.S.C. § 416(h)(2)(A) is primary method of establishing eligibility for receipt of benefits).

⁶⁵ See 42 U.S.C. § 416(h)(2)(A) (defining how to determine applicants’ eligibility to inherit social security benefits); Chironna, *supra* note 58, at 72 (instructing state intestacy law governs posthumously conceived child’s right to social security benefits).

⁶⁶ *Capato*, 132 S. Ct. at 2033 (concluding deferring to state law is reasonable to determine whether applicants qualify for benefits).

diagnosed with esophageal cancer shortly thereafter.⁶⁷ As a result, Robert and his wife, Karen, arranged to have his sperm cryopreserved and stored for future use.⁶⁸

Notwithstanding Robert's cancer treatments, the Capatos were able to conceive naturally, and Karen delivered their first son in August 2001.⁶⁹ The couple expressed a desire to have more children; however, Robert Capato died in March 2002.⁷⁰ Eighteen months after Robert's death, Karen Capato gave birth to twins who were conceived using Robert's cryopreserved sperm.⁷¹

Subsequently, Karen Capato sought social security benefits for her twins and the request was denied by the Social Security Administration (SSA).⁷² The SSA based their decision on Florida law because that is where Robert Capato was domiciled at the time of his death.⁷³ "The applicable Florida law states that a child born posthumously may inherit through intestate succession only if conceived before the parent's death, thus barring Karen and Robert's posthumously conceived twins from inheriting survivorship benefits through their father."⁷⁴

Karen Capato appealed the SSA's determination all the way to the United States Supreme Court.⁷⁵ Capato argued the meaning of "child" as defined by 42 U.S.C. § 416(e)(1) applied in determining her twins' right to benefits because § 416(h)(2)(A) only applied if paternity was in question.⁷⁶

⁶⁷ *Id.* at 2025 (summarizing facts of case); see Chironna, *supra* note 58, at 72 (outlining factual basis for decision in *Capato*); Kristine Knaplund, *Argument Preview: Who is a Decedent's "Child"?*, SCOTUSBLOG (Mar. 14, 2012), <http://www.scotusblog.com/2012/03/argument-preview-who-is-a-decedents-child/> (discussing factual history of *Capato*).

⁶⁸ *Capato*, 132 S. Ct. at 2026 (discussing what led Karen Capato to conceive children posthumously and seek social security benefits); Chironna, *supra* note 58, at 72 (summarizing facts of *Capato* case). The Capatos froze Robert's sperm to preserve his ability to have a child with Karen if he became infertile from his cancer treatments. Chironna, *supra* note 58, at 72.

⁶⁹ *Capato*, 132 S. Ct. at 2026 (providing factual history of case); see Chironna, *supra* note 58, at 72 (reviewing facts of *Capato* case).

⁷⁰ See *Capato*, 132 S. Ct. at 2026. (revealing decedent's intent to have more children).

⁷¹ *Id.* at 2025 (giving very brief factual history of case); see Chironna, *supra* note 58, at 72 (saying plaintiff conceived twins using deceased husband's cryopreserved sperm); Knaplund, *supra* note 67 (indicating plaintiff gave birth to twins eighteen months after husband's death).

⁷² *Capato*, 132 S. Ct. at 2026 (discussing procedural posture of case); see Chironna, *supra* note 58, at 73 (analyzing *Capato*); Knaplund, *supra* note 67 (giving background of *Capato*).

⁷³ *Capato*, 132 S. Ct. at 2026 (establishing that twins' eligibility was dependent on Florida law); see Chironna, *supra* note 58, at 73 (explaining court's reasoning).

⁷⁴ Chironna, *supra* note 58, at 73.

⁷⁵ *Capato*, 132 S. Ct. at 2027; see Chironna, *supra* note 58, at 73 (describing *Capato*'s procedural history).

⁷⁶ *Capato*, 132 S. Ct. at 2029 (citing Capato's argument 42 U.S.C. § 416(h)(2)(A) irrelevant in determining her twins' right to benefits); Chironna, *supra* note 58, at 74 (noting Karen Capato's argument against the SSA's decision).

The Court responded that Congress intended for § 416(h)(2)(A) to supplement the ambiguous language of § 416(e)(1).⁷⁷ “In upholding the decision to leave the issue to state law, the Court cited the benefit of state law as a workable substitute for a burdening case-by-case determination of whether a child was dependent on his or her parent’s earnings. The SSA has applied the law in this manner for the past seventy years in holding that all applicants for child survivor benefits satisfy § 416(h), which leaves the determination to state intestacy law.”⁷⁸

Karen Capato also made an equal protection argument, asserting the SSA’s reading would only allow natural children to satisfy § 416(h).⁷⁹ Capato alleged the SSA’s interpretation of the Act treated posthumously conceived children as “an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception.”⁸⁰ However, the Court reasoned the construction of the Act was reasonably related to the government’s interest in reserving benefits for dependent children who have lost a parent’s financial support.⁸¹ The Court also expounded that the SSA’s interpretation of the Act was rationally related to minimizing its burden of having to establish a claimant child’s dependency on a case-by-case basis.⁸²

2. Intestate Succession

When a person dies intestate—without a will—state intestacy law applies to manage the decedent’s estate.⁸³ Generally, property is distributed to a decedent’s heirs at law, who are defined by statute and typically include close surviving relatives.⁸⁴ The most common order of distribution is as follows: (1) Spouse, or in some states, domestic partner;

⁷⁷ *Capato*, 132 S. Ct. at 2033 (explaining how § 416(h)(2)(A) and § 416(e)(1) work in tandem); see *Chironna*, *supra* note 58, at 74 (reiterating *Capato*’s holding that § 416(h)(2)(A) supplements ambiguous definition of “child” in § 416(e)(1)).

⁷⁸ *Chironna*, *supra* note 58, at 74-75.

⁷⁹ *Capato*, 132 S. Ct. at 2033.

⁸⁰ *Id.*

⁸¹ See *id.* (citing Ninth Circuit decisions concerning equal protection arguments regarding construction of Social Security Act). The Court applied rational basis review because there was no showing that children of postmortem conception shared the characteristics that had induced the Court’s skepticism of classifications disadvantaging illegitimate children. See *id.*

⁸² See *id.* (delineating that it is practical to look to state law).

⁸³ CORNELL UNIV. LAW SCH., *Intestate Succession*, LEGAL INFO. INST. (Aug. 19, 2010), http://www.law.cornell.edu/wex/intestate_succession (defining intestacy).

⁸⁴ See *Intestate Succession*, *supra* note 83 (offering basic overview of intestate succession); see also *Fraser v. Tenney*, 987 S.W.2d 796, 798 (Ky. Ct. App. 1998) (giving family cemetery plot purchased by intestate decedent to lineal descendants).

(2) Children, also commonly referred to as “issue”; (3) Parents, siblings, nieces and nephews; (4) Next of kin; and (5) When the decedent has no heirs at law, any property escheats (reverts) to the state.⁸⁵

As the general rule of intestate succession implies, determining a posthumously conceived child's eligibility to inherit as an heir at law requires a two-part inquiry.⁸⁶ First, it is necessary to establish a parent-child relationship between the child of postmortem conception and the deceased parent.⁸⁷ If a parent-child relationship is demonstrated, then it is critical to ascertain whether the child is entitled to inherit under the applicable state's intestacy law.⁸⁸ Most states that address the issue condition inheritance rights on conception occurring within a specific time post-death.⁸⁹

a. Statutes

Applying state law to substantiate a child's right to receive social security benefits through a deceased parent is somewhat problematic; most state legislatures have not addressed the parentage and inheritance rights of posthumously *conceived* children at all.⁹⁰ The omission is likely due in

⁸⁵ *Intestate Succession*, *supra* note 83; *see Fraser*, 987 S.W.2d at 798.

⁸⁶ *See Intestate Succession*, *supra* note 83 (“The assets of the estate are passed on to the decedent's heirs.”); *see also Felts*, *supra* note 10, at 253 (summarizing issues involving posthumously conceived children and intestacy).

⁸⁷ *Felts*, *supra* note 10, at 253 (explicating two-part inquiry for determining whether posthumously conceived child can inherit under state law).

⁸⁸ *See Felts*, *supra* note 10, at 253 (noting sometimes there are prerequisites posthumously conceived children must satisfy to inherit, despite established parentage); *see also* IOWA CODE § 633.220A (2013) (providing numerous factors posthumously conceived children must meet to inherit under intestate succession).

⁸⁹ *See, e.g.*, CAL. PROB. CODE § 249.5 (2013) (directing child be in gestation within two years after decedent's death); COLO. REV. STAT. 15-11-120(11) (2013) (demanding child be in gestation no later than thirty-six months after parent's death); D.C. CODE § 19-314 (2013) (establishing child must be alive at death to inherit); IOWA CODE § 633.220A (2013) (mandating child be born within two years); KY. REV. STAT. § 391.070 (2013) (indicating child must be born within ten months after parent's death); MD. CODE, EST. & TRUSTS § 3-107 (2013) (requiring child be in utero within two years); N.M. STAT. § 45-2-120(K) (2013) (stating child must be in gestation no later than thirty-six months); N.D. CENT. CODE, § 30.1-04-19(11) (2013) (requiring child be in utero no later than thirty-six months after parent's death); OHIO REV. CODE § 2105.14 (2013) (providing child be alive at parent's death to inherit).

⁹⁰ *See, e.g.*, ALASKA STAT. §§ 13.12.104, 13.12.108 (2013); ARIZ. REV. STAT. §§ 14-2104, 14-2108 (2013); CONN. GEN. STAT. §§ 45a-774, 45a-777 (2013); GA. CODE § 19-7-21 (2013); HAW. REV. STAT. §§ 584-12, 560:2-108 (2013); IDAHO CODE § 15-2-104 (2013); IND. CODE § 29-1-2-6 (2013); ME. REV. STAT. tit. 19-A, §§ 1561, 1562, & 1563 (2013); MASS. GEN. LAWS ANN. ch. 190B, § 2-114 (2013); MICH. COMP. LAWS § 554.30 (2013); MISS. CODE §§ 93-9-28, 91-1-27 (2013); MONT. CODE §§ 40-6-106, 40-6-113, 72-2-111, 72-2-113, 72-2-114, & 72-2-118 (2013); NEB. REV. STAT. §§ 30-2308, 30-2303, 30-2304, 30-2309 (2013); NEV. REV. STAT. §

large part to the contentious nature of the issue and the inability of state legislatures to foresee the phenomenon of children being conceived after the death of one or both biological parents.⁹¹ A number of states address a child of postmortem conception's inheritance rights; however, a specific means of validating parentage is absent.⁹² To be specific: Florida, Illinois, Kansas, and Missouri only address the inheritance rights of posthumously conceived children.⁹³

Of approximately fifteen states with statutes governing the inheritance rights of posthumously conceived children for purposes of intestate succession, at least four have been influenced by the Uniform Probate Code.⁹⁴ This includes: Colorado, Minnesota, New Mexico, and North Dakota.⁹⁵ At least thirteen other states have been influenced by the Uniform Probate Code in drafting and adopting statutes governing intestate succession; however, these states have not yet adopted provisions addressing posthumously conceived children.⁹⁶

132.290 (2013); N.H. REV. STAT. § 561:1 (2013); N.J. STAT. §§ 9:17-44, 3A:4-10 (2013); N.Y. DOM. REL. § 73 (McKinney 2013); N.Y. EST. POWERS & TRUSTS § 4-1.1 (McKinney 2013); N.C. GEN. STAT. § 29-13 (2013); 10 OKLA. STAT. tit. 10, § 7700 (2013); OR. REV. STAT. §§ 109.243, 112.045, & 112.075 (2013); 23 PA. CONST. STAT. §§ 5103, 2101, & 2104 (2013); R.I. GEN. LAWS §§ 15-8-8, 33-1-4 (2013); S.C. CODE §§ 62-2-101, 62-2-103, & 62-2-108 (2013); S.D. CODIFIED LAWS §§ 29A-2-114, 29A-2-101, 29A-2-103, & 29A-2-108 (2013); TENN. CODE §§ 31-2-105, 31-2-104, & 31-2-108 (2013); VT. STAT. tit. 14, §§ 314, 315 (2013); WIS. STAT. §§ 891.40, 852.01 (2013); WYO. STAT. §§ 14-2-501, 2-3-101, & 2-4-103 (2013).

⁹¹ See *Astrue v. Capato*, 132 S.Ct. 2021, 2026 (2012) ("The technology that made the twins' conception and birth possible, it is safe to say, was not contemplated by Congress when the relevant provisions of the Social Security Act (Act) originated (1939) or were amended to read as they now do (1965).").

⁹² See, e.g., FLA. STAT. §§ 742.11, 742.17 (2013); 750 ILL. COMP. STAT. 40/2, 40/3, & 5/2-3 (2013); KAN. STAT. §§ 23-2301, 23-2302, 23-2303, 59-501, & 59-506 (2013); MO. STAT. §§ 210.824 & 210.836 (2013). As stated previously, there is little benefit to knowing what inheritance rights are available to posthumously conceived children if there is no clear way to ascertain who legally qualifies as the "child" of a decedent. See *Felts supra*, note 57 and accompanying text (discussing issues involved in determining inheritance rights of posthumously conceived children).

⁹³ See *supra* note 92 (citing specific state inheritance statutes that fail to establish parentage for posthumously conceived children).

⁹⁴ See COLO. REV. STAT. §§ 15-11-104, 15-11-120(11) (2013) (permitting posthumously conceived child to inherit under some circumstances); MINN. STAT. § 524.2-120 (2014) (allowing children of postmortem conception to inherit from deceased parent); N.M. STAT. §§ 45-2-104, 45-2-120(K) (2014) (providing posthumously conceived child can inherit if in utero within specified time post-death); N.D. CENT. CODE §§ 30.1-04-04, 30.1-04-19(11) (2014) (permitting posthumously conceived child to inherit under intestate succession if certain conditions are met).

⁹⁵ See sources cited *supra* note 94 (stating deceased person is parent of child conceived postmortem if consented in writing); see also N.D. CENT. CODE § 14-20-65 (2013) (affirming deceased is legal parent of posthumously conceived child if consented to assisted reproduction).

⁹⁶ See, e.g., ALASKA STAT. §§ 13.12.104, 13.12.108 (2013); ARIZ. REV. STAT. ANN. §§ 14-2104, 14-2108 (2013); HAW. REV. STAT. § 560:2-108 (2013); IDAHO CODE ANN. § 15-2-104

Conversely, some states confront the legal parent-child relationship between a posthumously conceived child and his or her deceased biological parent(s) but avoid the issue of inheritance.⁹⁷ For example, Alabama, Delaware, Louisiana, Texas, Utah, and Washington only offer guidance for verifying parentage.⁹⁸ Currently, the District of Columbia and ten states are the only regions that provide a means of determining both the parentage *and* inheritance rights of children conceived post-death.⁹⁹ States adopting means of analyzing both include: California, Colorado, Iowa, Kentucky,

(2013); ME. REV. STAT. tit. 18-A, §§ 2-103, 2-108 (2013); MASS. GEN. LAWS ch. 190B, §§ 2-101, 2-108 (2013); MICH. COMP. LAWS § 554.30 (2013); MONT. CODE ANN. §§ 72-2-111, 72-2-113, 72-2-114, & 72-2-118 (2013); NEB. REV. STAT. §§ 30-2308, 30-2303, & 30-2304 (2013); N.J. STAT. ANN. §§ 3A, 3B (2013); S.C. CODE ANN. §§ 62-2-101, 62-2-103, & 62-2-108 (2013); S.D. CODIFIED LAWS §§ 29A-2-101, 29A-2-103, & 29A-2-108 (2013); UTAH CODE ANN. §§ 75-2-101, 75-2-103, & 75-2-104 (2014); UNIF. PROBATE CODE § 2-120(k) (2014). States that have been influenced by the Uniform Probate Code but have not adopted provisions addressing the inheritance rights of children of postmortem conception include: Alaska, Arizona, Hawaii, Idaho, Maine, Massachusetts, Michigan, Montana, Nebraska, New Jersey, South Carolina, South Dakota, and Utah. *See* sources cited *supra*.

⁹⁷ *See, e.g.*, ALA. CODE §§ 26-17-707, 43-8-43, & 43-8-47 (2013); DEL. CODE tit. 12, §§ 501, 505 (2013); DEL. CODE tit. 13, §§ 8-707 (2013); LA. CIV. CODE art. 939 & 940 (2013); TEX. FAM. CODE § 160.707 (2013); UTAH CODE §§ 78b-15-707, 75-2-101, 75-2-103, & 75-2-104 (2013); WASH. REV. CODE §§ 11.04.015, 26.26.730 (2013).

⁹⁸ *See supra* note 97 (highlighting state statutes where determining inheritance rights of posthumously conceived children is difficult).

⁹⁹ *See, e.g.*, CAL. PROB. CODE § 7613 (2013) (addressing parentage); CAL. PROB. CODE § 249.5 (2013) (addressing inheritance); COLO. REV. STAT. § 15-11-120 (2013) (indicating how to establish parent-child relationship); COLO. REV. STAT. §§ 15-11-104, 15-11-120(11) (2013) (discussing inheritance of posthumously conceived children); D.C. CODE § 16-909(e)(A) (2013) (establishing means of proving parentage between deceased individual and child conceived after deceased individual's death); D.C. CODE § 19-314 (2013) (stating inheritance rights of children of postmortem conception); IOWA CODE § 600B (2013) (discussing parentage); IOWA CODE § 633.220A (2013) (offering posthumously conceived child's right to inherit under intestate succession); KY. REV. STAT. §§ 406.021, 213.046 (2013) (determining parentage); KY. REV. STAT. § 391.070 (2013) (addressing inheritance rights); MD. CODE ANN., EST. & TRUSTS § 1-205 (2013) (stating method of figuring out parent-child relationship); MD. CODE ANN., EST. & TRUSTS § 3-107 (2013) (explaining posthumously conceived child's right to inherit under intestate succession); MINN. STAT. §§ 524.2-103, 524.2-116, & 524.2-120 (2013) (exclaiming parentage and inheritance of children of postmortem conception); N.M. STAT. § 45-2-120 (2013) (adopting Uniform Parentage Act and declaring parent-child relationship between posthumously conceived child and deceased parent(s)); N.M. STAT. ANN. §§ 45-2-104, 45-2-120(K) (2013) (adopting Uniform Probate Code and indicating inheritance rights of child of postmortem conception); N.D. CENT. CODE § 30.1-04-19 (2013) (adopting Uniform Parentage Act to determine parental status of deceased individual); N.D. CENT. CODE §§ 30.1-04-04 & 30.1-04-19(11) (2013) (adopting Uniform Probate Code to provide method of establishing inheritance rights under intestate succession); OHIO REV. CODE ANN. § 3111 (2013) (offering parent-child relationship between posthumously conceived child and deceased parent); OHIO REV. CODE ANN. § 2105.14 (2013) (implying posthumously conceived child is not entitled to intestate succession because no parent-child relationship exists); VA. CODE § 20-158(B) (2013) (stating method of proving parentage); VA. CODE §§ 64.2-200, 64.2-204 (2013) (indicating inheritance rights).

Maryland, Minnesota, New Mexico, North Dakota, Ohio, and Virginia.¹⁰⁰

Of approximately seventeen states that have addressed the legal parent-child relationship between a decedent and a child of postmortem conception, at least ten have been influenced by the Uniform Parentage Act (UPA).¹⁰¹ This includes: Alabama, California, Colorado, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Washington.¹⁰² At least eight other states have been influenced by the UPA; however, they have not yet adopted the Act's provisions on parentage of posthumously conceived children.¹⁰³

b. Case Law

Considering most state legislatures have provided limited direction for establishing the parentage and inheritance rights of posthumously conceived children, the judiciary has played a significant role in the interim.¹⁰⁴ In 1993, a California Court of Appeal decided a landmark case representing a decedent's right to control the use of his or her reproductive cells post-death.¹⁰⁵ Subsequently, two dominant approaches have emerged

¹⁰⁰ See sources cited *supra* note 99.

¹⁰¹ See sources cited *supra* note 99 (listing statutes addressing parentage and inheritance); see also ALA. CODE § 26-17-707 (2013); CAL. PROB. CODE § 7613 (Deering 2013); COLO. REV. STAT. § 19-4-106 (2013); DEL. CODE tit. 13, § 8-707 (2013); N.M. STAT. § 40-11A-707 (2013); N.D. CENT. CODE § 14-20-65 (2013); OKLA. STAT. tit. 10, § 7700 (2013); TEX. FAM. CODE § 160.707 (2013); UTAH CODE § 78B-15-707 (2013); WASH. REV. CODE § 26.26.730 (2013); Medford, *supra* note 53, at 105 (noting several state legislatures have modeled intestacy laws after UPA as ART becomes commonplace).

¹⁰² See sources cited *supra* note 101 (listing statutes modeled after UPA).

¹⁰³ See, e.g., HAWAII REV. STAT. § 584-12 (2013); ME. REV. STAT. tit. 19, §§ 1561, 1562, & 1563 (2013); MISS. CODE § 93-9-28 (2013); MO. STAT. §§ 210.824, 210.836 (2013); MONT. CODE §§ 40-6-106, 40-6-113 (2013); N.H. REV. STAT. § 561:1 (2013); R.I. GEN. LAWS ANN. § 33-1-4 (2013); WYO. STAT. §§ 2-4-101, 2-4-103 (2013). States that have been influenced by the Uniform Parentage Act but have yet to adopt provisions regarding posthumously conceived children include: Hawaii, Maine, Mississippi, Missouri, Montana, New Hampshire, Rhode Island, and Wyoming. See, e.g., HAWAII REV. STAT. § 584-12 (2013); ME. REV. STAT. tit. 19, §§ 1561, 1562, & 1563 (2013); MISS. CODE § 93-9-28 (2013); MO. STAT. §§ 210.824, 210.836 (2013); MONT. CODE §§ 40-6-106, 40-6-113 (2013); N.H. REV. STAT. § 561:1 (2013); R.I. GEN. LAWS ANN. § 33-1-4 (2013); WYO. STAT. §§ 2-4-101, 2-4-103 (2013). Missouri addresses the inheritance rights of posthumously conceived children; however, no other state previously mentioned addresses posthumously conceived children in the context of inheritance either. *Cf.* MO. STAT. §§ 210.824, 210.836 (2013).

¹⁰⁴ See *supra* Part III.A.ii.1 (outlining inadequacy of current statutory law); Felts, *supra* note 10, at 262 (considering inheritance issues innate with posthumous conception); Lewis, *supra* note 42, at 494 (identifying parentage tests developed through case law).

¹⁰⁵ See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 287-90 (Cal. Ct. App. 1993) (finding decedent had property interest in his sperm). While *Hecht* is not binding precedent outside of California, this case has been highly persuasive in other jurisdictions. See, e.g., *Cornelio v.*

in determining a posthumously conceived child's right to inherit from a deceased parent: (1) A broader approach based on the decedent's intent; and (2) A narrower approach that hinges on the language of the intestacy statute in question.¹⁰⁶

i. Right to Regulate Reproductive Cells After Death:
Hecht v. Superior Court

In *Hecht v. Superior Court*, William E. Kane had fifteen vials of his sperm

cryopreserved and signed an agreement with the sperm bank, which stated in pertinent part:

In the event of the death of the client [William E. Kane], the client instructs the Cryobank to: . . . [¶] Continue to store [the specimens] upon request of the executor of the estate [or] [r]elease the specimens to the executor of the estate.' A provision captioned 'Authorization to Release Specimens' states, 'I, William Everett Kane, . . . authorize the [sperm bank] to release my semen specimens (vials) to Deborah Ellen Hecht. I am also authorizing specimens to be released to recipient's physician Dr. Kathryn Moyer.'¹⁰⁷

Deborah Hecht was Kane's live-in girlfriend and when he died they had been together for approximately five years.¹⁰⁸

On October 30, 1991—approximately one month after he had his sperm cryopreserved—William Kane committed suicide in a Las Vegas Hotel.¹⁰⁹ Kane died testate, and indicated in his will:

I bequeath all right, title, and interest that I may have in any specimens of my sperm stored at any sperm bank or similar facility

Stamford Hosp., No. CV 960155779S, 1997 WL 430619, at *5 n.4 (Conn. Super. Ct. July 21, 1997) (noting *Hecht* determined "proprietary rights to sperm"); *Kurchner v. State Farm Fire & Cas. Co.*, 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003) ("Cases from other jurisdictions hold that preserved sperm or eggs constitute personal property."); *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *6 (Ill. App. Ct. Feb. 22, 2005) ("Cases from other jurisdictions have recognized the existence of a property right in materials derived from the human body.") (internal quotation marks omitted); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 261 n.9 (Mass. 2002) (acknowledging *Hecht* addressed whether sperm was "property that could be bequeathed") (internal quotation marks omitted).

¹⁰⁶ See Lewis, *supra* note 42, at 497-99 (describing various courts' diverse positions in interpreting statutory law).

¹⁰⁷ *Hecht*, 20 Cal. Rptr. 2d at 276.

¹⁰⁸ *Id.* (explaining relationship between plaintiff and decedent).

¹⁰⁹ See *id.*

for storage to Deborah Ellen Hecht . . . It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire . . .¹¹⁰ Accordingly, Hecht attempted to obtain Kane's cryopreserved sperm but met resistance from Kane's surviving children from a former marriage.¹¹¹

In opposition to Hecht's use of the cryopreserved sperm, Kane's surviving children initially argued that destroying the sperm would guard a traditional family unit—like theirs—in two distinct ways.¹¹² First, it would prevent the birth of a child who would never know his or her father and, in essence, never experience a traditional upbringing.¹¹³ Second, the sperm's disposal would thwart any disruption traditional families may experience, including psychological, emotional, and financial stress.¹¹⁴

Ultimately, the court acknowledged the value of sperm because of its potential to create human life and concluded that Kane maintained an ownership interest in the use of his sperm for reproductive purposes post-death.¹¹⁵ A factor that substantially influenced the court's decision was Kane's explicit intent for Hecht to use his sperm, which was manifested in his will.¹¹⁶ Finally, the court noted the absence of any public policy or statute indicating its decision was improper.¹¹⁷

ii. Broader Approach

Landmark cases adopting a broader approach in determining the inheritance rights of children of postmortem conception have been decided in states like Massachusetts and New Jersey.¹¹⁸ For example, the Massachusetts Supreme Judicial Court (SJC) decided *Woodward v.*

¹¹⁰ *Id.* at 276-77.

¹¹¹ *See Felts, supra* note 10, at 263 (expounding how issue in *Hecht* developed).

¹¹² *See Hecht*, 20 Cal. Rptr. 2d at 286 (describing arguments proffered by decedent's children in opposition to plaintiff's use of cryopreserved sperm).

¹¹³ *Id.* (outlining argument opposing posthumous conception).

¹¹⁴ *Id.* at 290 (describing argument against posthumous conception).

¹¹⁵ *Id.* at 283. The court based its decision on California's Probate Code section 62, which defined property as "anything that may be the subject of ownership and includes both real and personal property and any interest therein." *Id.* (internal quotation marks omitted).

¹¹⁶ *See id.* at 283-84 (delineating significance of will in proving decedent's intent).

¹¹⁷ *See Hecht*, 20 Cal. Rptr. 2d at 283-84, 289-90 (addressing possible counterargument to court's holding).

¹¹⁸ *See Woodward*, 760 N.E.2d at 259 (allowing children of postmortem conception to inherit if certain conditions are met); *In re Estate of Kolacy*, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000) (emphasizing New Jersey legislature's general intent to amply provide for surviving children of deceased parents).

Comm'r. of Soc. Sec. in 2002.¹¹⁹ In *Woodward*, Lauren and Warren Woodward—a married couple—arranged to have Warren's sperm cryopreserved for future use after he was diagnosed with leukemia in 1993.¹²⁰ Several months later, Warren Woodward succumbed to his illness.¹²¹ In 1995, Lauren Woodward gave birth to twins conceived using Warren's frozen sperm.¹²²

Subsequently, Lauren Woodward applied for social security benefits but was denied because the SSA determined she had not established her twins were Warren's "children" as defined by the Act.¹²³ After a series of appeals, Woodward reached the United States District Court for the District of Massachusetts and the assigned judge certified the question to the Massachusetts SJC.¹²⁴ This is because it was an issue of first impression in the state and determination of the twins' inheritance rights under Massachusetts intestacy law was dispositive of the case.¹²⁵

Woodward's primary argument was that posthumously conceived children—like her twins—must always be allowed to enjoy the advantages of intestate succession by virtue of their genetic connection to the decedent.¹²⁶ The SSA's principal argument was because children of postmortem conception are not "in being" at the time of the decedent's death, they can never qualify as "children" for purposes of intestate succession.¹²⁷ However, the SJC refused to establish any bright-line rules absent some statutory requirement.¹²⁸ Therefore, neither party's argument was tenable.¹²⁹ Ultimately, the court decided:

In certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights

¹¹⁹ *Woodward v. Comm'r. of Soc. Sec.* 760 N.E.2d 257, 259. (Mass. 2002).

¹²⁰ *Id.* at 260. The Woodward's had only been married for three and one-half years and were childless when the decedent was diagnosed with cancer. *Id.* Doctors advised the Woodward's that Warren may become sterile from the cancer treatments. *Id.*

¹²¹ *Id.* (describing facts leading up to birth of posthumously conceived children in question).

¹²² *Id.* at 260.

¹²³ *Id.* at 261 (elaborating on why plaintiff's claim for benefits was denied).

¹²⁴ *Id.* at 261 (explaining procedural history).

¹²⁵ *Woodward*, 760 N.E.2d at 257 (elucidating how important state law was to ascertain eligibility for Social Security benefits). This was the first case in the United States to ever reach a court of last resort regarding a posthumously conceived child's right to inherit under intestate succession. *Id.*

¹²⁶ *Id.* at 262 (articulating arguments presented by each party).

¹²⁷ *Id.* (reiterating Social Security Administration's position).

¹²⁸ *See id.* (rejecting arguments in favor of establishing bright-line rules when not required by Massachusetts intestacy statute).

¹²⁹ *See id.* (disagreeing with arguments presented).

of 'issue' under the Massachusetts intestacy statute. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish that the decedent affirmatively consented to posthumous conception and to the support of any resulting child. Even where such circumstances exist, time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.¹³⁰

Another case of first impression was *In re Estate of Kolacy* decided by the New Jersey Superior Court in 2000.¹³¹ In that case, William J. Kolacy was diagnosed with leukemia in 1994 and advised to undergo chemotherapy immediately.¹³² Consequently, William and his wife, Mariantonia Kolacy, froze William's sperm to preserve his ability to procreate in the future.¹³³ One year later, at the age of twenty six, William Kolacy passed away.¹³⁴

In November 1996, Mariantonia Kolacy gave birth to twins conceived using William's cryopreserved sperm.¹³⁵ Kolacy later applied for social security benefits but her application was denied.¹³⁶ The SSA reasoned the twins were not "children" of William Kolacy, the deceased wage earner.¹³⁷ Whereas the twins were eligible for social security benefits if they could inherit under New Jersey intestacy law, Kolacy sought a declaration her twins qualified under intestate succession in the New Jersey Superior Court.¹³⁸

¹³⁰ *Woodward*, 760 N.E.2d at 259. Only the issue of whether posthumously conceived children could theoretically inherit from a deceased parent under Massachusetts intestacy law was certified to the SJC. *See id.* at 259-60 (clarifying SJC did not decide facts of case). Accordingly, the SJC's conclusion was decided in the abstract, and not based on the specific facts presented in *Woodward*. *Id.*

¹³¹ *In re Estate of Kolacy*, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000) (confronting whether posthumously conceived children were entitled to inherit under intestate succession).

¹³² *Id.* (discussing facts).

¹³³ *Id.*

¹³⁴ *Id.* (providing William Kolacy succumbed to leukemia on April 15, 1995).

¹³⁵ *Id.* (stating twins were born approximately eighteen months after decedent's passing).

¹³⁶ *In re Estate of Kolacy*, 753 A.2d at 1259 (recalling procedural history).

¹³⁷ *Id.* (reviewing why Social Security Administration denied plaintiff's request for benefits).

¹³⁸ *Id.* at 1259 (indicating New Jersey intestacy law was dispositive of case). Plaintiff was still exercising her appellate rights within the Social Security Administration when she brought the issue to the New Jersey Superior Court. *Id.* (citing procedural history).

Kolacy's principal argument was New Jersey's intestacy statute was unconstitutional because "... [its] ... effect ... [on] ... posthumously conceived children ... [was] ... both invidiously and irrationally discriminate ...".¹³⁹ However, the court found Kolacy's argument misplaced, and declined to entertain the issue further.¹⁴⁰ The court acknowledged a practical and legal need to quickly ascertain who can take a decedent's estate and expediently distribute the property they are entitled to.¹⁴¹ Therefore, heirs at law have historically been determined as of the date of the decedent's passing.¹⁴²

The SSA's primary argument was the court should not consider actions dealing with the inheritance rights of posthumously conceived children without specific direction from the New Jersey Legislature.¹⁴³ While the court recognized the desirability of clear legislative guidance, it noted simple justice demands the court work with present legislation as best it can.¹⁴⁴ This is because individuals seeking judicial redress have present problems that cannot afford to be put on hold until the Legislature chooses to act.¹⁴⁵ Moreover, the court observed the Legislature's general intent for children of a deceased individual to be sufficiently supported.¹⁴⁶

Ergo, the court said "general intent should prevail over a restrictive, literal reading of statutes which did not consciously purport to deal with the kind of problem before us."¹⁴⁷ The court expounded, once it is established a child is the offspring of a decedent, that child should benefit as an heir at law.¹⁴⁸ The only exception would be if doing so would unfairly encroach on the rights of others or create serious issues concerning the orderly administration of an estate.¹⁴⁹

¹³⁹ *Id.* at 1260 (citation and internal quotation marks omitted) (outlining arguments presented). The language of the New Jersey statute in question said: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." N.J. STAT. ANN. § 3B:5-8 (West 2013).

¹⁴⁰ *In re Estate of Kolacy*, 753 A.2d at 1260 (rejecting plaintiff's equal protection argument).

¹⁴¹ *See id.* (implying posthumously conceived children create complicated inheritance issues).

¹⁴² *Id.* at 1261 (indicating ability of posthumously conceived children to inherit under intestate succession frustrates tradition).

¹⁴³ *Id.* (examining merits of SSA's argument against awarding twins benefits).

¹⁴⁴ *Id.* at 1261-62 (justifying decision despite no clear-cut guidance from New Jersey Legislature).

¹⁴⁵ *In re Estate of Kolacy*, 753 A.2d at 1261-62 (announcing why court could not wait for direction from New Jersey Legislature).

¹⁴⁶ *Id.* (elucidating legislative intent).

¹⁴⁷ *Id.* (articulating broad approach adopted by court).

¹⁴⁸ *Id.* (recognizing circumstances under which posthumously conceived children can inherit under intestate succession).

¹⁴⁹ *Id.* (recognizing interest in expedient administration of estates).

iii. Narrower Approach

States that have adopted a more conservative approach in dealing with the inheritance rights of posthumously conceived children include Arkansas and Iowa.¹⁵⁰ In 2008, the Arkansas Supreme Court decided *Finley v. Astrue*.¹⁵¹ In that case, Amy and Michael Finley underwent fertility treatments to aid in conceiving a child.¹⁵² In June 2001—using Amy's eggs and Michael Finley's sperm—doctors facilitated the creation of several embryos.¹⁵³ Two embryos were implanted in Amy Finley's uterus and four were cryopreserved.¹⁵⁴ Mrs. Finley became pregnant but later suffered a miscarriage.¹⁵⁵ In July 2001, Michael Finley died intestate while domiciled in Arkansas.¹⁵⁶

Less than one year after Michael Finley died, Amy conceived a child with his cryopreserved sperm.¹⁵⁷ Afterward, Amy Finley applied for social security benefits but her claim was denied.¹⁵⁸ Finley exhausted her appeals at the administrative level and sought relief in the United States District Court for the Eastern District of Arkansas.¹⁵⁹ The District Court certified the question of whether a posthumously conceived child could inherit under Arkansas intestacy law to the Supreme Court of Arkansas.¹⁶⁰

Finley first argued her child was medically "conceived" during the decedent's life when her eggs were fertilized by her husband's sperm.¹⁶¹ Furthermore, she argued there was no Arkansas statute prohibiting a natural child conceived post-death from inheriting from his or her deceased parent.¹⁶² Lastly, Finley argued all children's rights—including rights to property and inheritance—warrant protection as a matter of public

¹⁵⁰ See *Finley v. Astrue*, 270 S.W.3d 849, 853 (Ark. 2008) (stating standard rule of statutory construction is to heed legislative intent); *Beeler v. Astrue*, 651 F.3d 954, 963 (8th Cir. 2011) (providing Iowa's statutory language was clear on its face).

¹⁵¹ *Finley v. Astrue*, 270 S.W.3d 849.

¹⁵² *Id.* at 850 (detailing factual history of case).

¹⁵³ *Id.* (evaluating where cryopreserved embryos came from).

¹⁵⁴ *Id.* (describing how Amy Finley conceived posthumously).

¹⁵⁵ *Id.* (exhibiting how assisted reproduction is not always successful).

¹⁵⁶ *Finley*, 270 S.W.3d at 850 (summarizing facts).

¹⁵⁷ *Id.* at 851 (summarizing facts).

¹⁵⁸ *Id.* (articulating primary cause of dispute).

¹⁵⁹ See *id.* at 850 (expounding procedural history).

¹⁶⁰ *Id.* (highlighting importance of applying appropriate state law).

¹⁶¹ *Finley*, 270 S.W.3d at 851 (relaying plaintiff's assertion her child was posthumously *born* and not posthumously *conceived*); see *supra* notes 53-54 and accompanying text (noting significance of being posthumously born rather than posthumously conceived under intestate succession).

¹⁶² *Finley*, 270 S.W.3d at 851 (citing arguments presented to court).

policy.¹⁶³

The SSA's primary argument was that Arkansas law did not explicitly authorize posthumously conceived children to inherit from a deceased parent.¹⁶⁴ Additionally, the SSA contended that intestate succession warrants finality.¹⁶⁵ Hence, "conceived" for purposes of inheritance meant the onset of pregnancy.¹⁶⁶ This is because it was highly improbable the Arkansas General Assembly would have defined "conception" as broadly as Finley purported in light of its objective.¹⁶⁷ Finally, the SSA alleged public policy was not a matter for the courts, but rather the General Assembly.¹⁶⁸

The applicable Arkansas statute provided in pertinent part: "Posthumous descendants of the intestate *conceived before his or her death* but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate."¹⁶⁹ The court referenced the basic rule of statutory construction: giving effect to the legislature's goal by assigning express words their ordinary meaning.¹⁷⁰ Hence, the court concluded:

[T]he statutory scheme fails to define the term 'conceived' . . . [however,] . . . we find there is no need to do so, as we can definitively say that the General Assembly . . . did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit under intestate succession. Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of in vitro fertilization was developed.¹⁷¹

In 2011, the United States Court of Appeals for the Eighth Circuit interpreted Iowa intestacy law as proscribing a posthumously conceived child's ability to inherit under intestate succession.¹⁷² In that case, Bruce

¹⁶³ *Id.* (outlining Finley's arguments).

¹⁶⁴ *See id.* (reiterating Social Security Administration's rationale for declining to award plaintiff's child social security benefits).

¹⁶⁵ *See id.*; *see also In re Estate of Kolacy*, 753 A.2d 1257, 1260-61 (N.J. Super. Ct. Mar. 30, 2000) (acknowledging practical need for probate to be quick and final).

¹⁶⁶ *Finley*, 270 S.W.3d at 851.

¹⁶⁷ *Id.* (recalling Social Security Administration's position).

¹⁶⁸ *Id.* (recounting SSA's position).

¹⁶⁹ *Id.* at 853 (internal quotations omitted) (delving into analysis).

¹⁷⁰ *Id.* (exploring court's rationale).

¹⁷¹ *Finley*, 270 S.W.3d at 853 (answering district court's certified question regarding inheritance rights of children of postmortem conception).

¹⁷² *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011) (adopting narrow approach).

and Patti Beeler were an engaged couple who planned to marry in May 2001.¹⁷³ Before their wedding, Bruce was diagnosed with acute leukemia and advised to undergo chemotherapy.¹⁷⁴ The couple wanted to have children someday, but the cancer treatments posed a risk of infertility.¹⁷⁵ Bruce's diagnosis was poor; so the Beelers rescheduled their wedding and married in December 2000.¹⁷⁶

Aware of his impending death, Bruce Beeler signed a form that explained Patti Beeler was the only person who could use his sperm if he died.¹⁷⁷ Notably, the form also stated Bruce acknowledged paternity and child support obligations of any child or children resulting from the use of his cryopreserved sperm.¹⁷⁸ In May 2001, at the age of thirty seven, Bruce Beeler died.¹⁷⁹

Patti and Bruce Beeler's mother alleged Bruce was comforted in his final days by his belief Patti would have his children when he was gone.¹⁸⁰ In April 2003, Patti gave birth to a daughter conceived using Bruce's frozen sperm.¹⁸¹ Subsequently, Beeler applied for social security benefits and was rejected.¹⁸² The SSA concluded Beeler's child was not Bruce's "child" under the Social Security Act.¹⁸³ Beeler appealed the SSA's decision until she reached the United States Court of Appeals for the Eighth Circuit.¹⁸⁴

Beeler's argument was § 416(h)—portion of Act deferring to state intestacy law—contains "savings clauses" that permit a claimant who does not meet the definition of "child" under § 416(e)—portion of Act defining "child"—to nonetheless qualify as a "child" for purposes of social security benefits.¹⁸⁵ Under this reading of the Act, a claimant child who is the

¹⁷³ *Id.* (laying out facts of case).

¹⁷⁴ *Id.*

¹⁷⁵ *See id.* Therefore, the Beelers elected to have Bruce's sperm cryopreserved for future use. *Id.*

¹⁷⁶ *See id.* (revealing bone marrow transplant would be decedent's only chance of survival).

¹⁷⁷ *Beeler*, 651 F.3d at 956 (indicating decedent signed hospital's Form 61 bequeathing cryopreserved sperm to wife).

¹⁷⁸ *Id.* at 957 (illustrating decedent's intent).

¹⁷⁹ *Id.* (summarizing what led to child being conceived posthumously)

¹⁸⁰ *Id.* (implying it was decedent's intent to have and provide for any children posthumously conceived).

¹⁸¹ *Id.* (exploring facts of case).

¹⁸² *Beeler*, 651 F.3d at 957 (explaining how case reached Eighth Circuit).

¹⁸³ *Id.* at 957 (exemplifying SSA's reason for declining to award plaintiff's child any social security benefits).

¹⁸⁴ *Id.* (elucidating case history).

¹⁸⁵ *Id.* at 959. Subsequently, in *Astrue v. Capato*, the United States Supreme Court expressly rejected Beeler's argument. *See Astrue v. Capato*, 132 S. Ct. 2021, 2034 (2012) (asserting §

biological offspring of an insured decedent is a “child” within the meaning of § 416(e) and reference to § 416(h) is unnecessary.¹⁸⁶ However, the SSA maintained that § 416(h) was the sole manner by which a claimant could qualify as a “child” under the Act.¹⁸⁷

In determining a posthumously conceived child’s inheritance rights under Iowa law, the court ultimately adopted the SSA’s statutory construction.¹⁸⁸ The Iowa statute relied on by the court declared that for a child to be an heir at law under intestate succession, he or she must have had a relationship with the decedent at the time of death.¹⁸⁹ Posthumously born children were the only exception.¹⁹⁰ The court concluded because Beeler’s child was not conceived until after Bruce died, she did not have the requisite “relationship” required under the statute.¹⁹¹

Beeler argued her child qualified under an alternative Iowa statute that permitted biological children to inherit from a deceased parent if paternity of the child was acknowledged by the decedent.¹⁹² The court said Bruce Beeler did not acknowledge the child before his death because she did not exist when he died; to conclude otherwise would stretch the language of the statute too far.¹⁹³

Beeler further alleged her daughter was nonetheless a “child” under § 416(h)(3)(C)(i)(I), which deemed a child the natural offspring of a decedent if the deceased parent recognized the child as such in writing.¹⁹⁴ The court stated the hospital form did not meet the requirements because the language indicated Bruce Beeler agreed to recognize paternity at some point in the future.¹⁹⁵ Despite Bruce’s intentions, “the statute’s use of the definite article—requiring an ‘acknowledge[ment] in writing that *the* applicant is his . . . son or daughter’—indicates . . . the insured must

416(h) is supplementary to and not exclusive from § 416(e)).

¹⁸⁶ *Beeler*, 651 F.3d at 959 (exploring plaintiff’s arguments).

¹⁸⁷ *See id.* (providing SSA’s interpretation of “child” under Act as basis for its denial of survivor benefits).

¹⁸⁸ *See id.* at 964 (describing courts evaluation of issue).

¹⁸⁹ *Id.* at 959 (discussing relationship requirement).

¹⁹⁰ *Id.* The Iowa statute relied on by the court in *Beeler v. Astrue* explained:

Heirs of an intestate, begotten before the intestate’s death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate. With this exception, the intestate succession shall be determined by the relationships existing at the time of the death of the intestate.

IOWA CODE § 633.220 (2013).

¹⁹¹ *Beeler*, 651 F.3d at 964 (reading statutory language literally).

¹⁹² *Id.* (delineating plaintiff’s argument)

¹⁹³ *Id.* at 965.

¹⁹⁴ *Id.* at 964.

¹⁹⁵ *Id.* (declining to adopt plaintiff’s interpretation of statute).

acknowledge a particular child . . . for that child to be deemed a natural child.”¹⁹⁶ Hence, the provision was held not to apply to children conceived after the death of a decedent.¹⁹⁷

c. Determining What State Law Applies

Under the Social Security Act, receipt of benefits depends on the intestacy law of

the state where the decedent was domiciled at the time of death.¹⁹⁸ Established in *Gordon v. Steele*, the most commonly used standard used for determining an individual's domicile hinges on his or her intent to remain indefinitely.¹⁹⁹

For a person to reside somewhere indefinitely does not mean there is an intent to reside in a new state permanently.²⁰⁰ On the other hand, going to a state to visit is not enough to satisfy the requisite intent for establishing a domiciliary under this test either.²⁰¹ Most often, courts define “indefinitely” as residing in a place with no present intention of moving somewhere else in the future.²⁰²

Courts have frequently purported an individual does not lose his or her domicile by merely moving to a new residence.²⁰³ The general rule is a person does not lose his or her domicile until acquiring a new one.²⁰⁴ In essence, a person does not lose his or her domicile until he or she moves to a new state with an intent to reside indefinitely.²⁰⁵

¹⁹⁶ *Beeler*, 651 F.3d at 964 (citation omitted).

¹⁹⁷ *Id.* (drawing line at posthumously conceived children).

¹⁹⁸ 42 U.S.C. § 416(h)(2)(A) (2013).

¹⁹⁹ See *Gordon v. Steele*, 376 F. Supp. 575, 577-78 (W.D. Pa. 1974) (outlining relevant factors suggestive of someone's intent to remain indefinitely); see also JOSEPH W. GLANNON, ANDREW M. PERLMAN, & PETER RAVEN-HANSEN, *CIVIL PROCEDURE: A COURSEBOOK* 45 (2011) (summarizing test for determining domicile).

²⁰⁰ See *Gordon*, 376 F. Supp. at 578 (indicating permanent intent is not required); GLANNON ET AL., *supra* note 199, at 47 (defining “indefinitely”).

²⁰¹ See CHARLES ALAN WRIGHT ET AL., § 3613 THE REQUIREMENT AND MEANING OF CITIZENSHIP—ACQUISITION OF A NEW DOMICILE, 13E FED. PRAC. & PROC. JURIS. § 3613 (3rd ed. 2014) (acknowledging *Gordon* test is two-pronged).

²⁰² See BARBARA J. VAN ARSDALE ET AL., § 1:88. ELEMENTS OF DOMICILE—INTENTION TO REMAIN INDEFINITELY, 1 FED. PROC. L. ED. § 1:88 (2014); Wright, *supra* note 200.

²⁰³ See GLANNON ET AL., *supra* note 199, at 45 (describing process of losing and gaining domicile).

²⁰⁴ *Id.* (discussing indefinite versus permanent tests for domicile).

²⁰⁵ See *Gordon*, 376 F. Supp. at 577-78 (providing residency must be coupled with requisite intent); GLANNON ET AL., *supra* note 199, at 45 (reiterating test is not merely residence). For example, an individual who resides in Massachusetts for college but plans to return to her home state of California after graduation is a domiciliary of California (assuming it was student's

Although courts generally apply the *Gordon* test, some jurisdictions apply alternative tests.²⁰⁶ To be specific, some courts provide a person is domiciled where he or she resides with an intent to remain for the time at least.²⁰⁷ This test is distinct from the “intent to remain indefinitely” test because, in essence, proof of residency alone would likely satisfy this standard.²⁰⁸ Furthermore, some courts also use an “intent to remain permanently” test.²⁰⁹ For example, in *Mas v. Perry*, the court stated that, “a person’s domicile is the place of his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom.”²¹⁰

IV ANALYSIS

Based on precedent to date, it is clear that in states not expressly granting inheritance rights to posthumously conceived children, the law must be sufficiently ambiguous to allow such an interpretation.²¹¹ If that is the case, there are numerous things that should be considered to enhance the ability to reproduce posthumously and to secure inheritance rights for any resulting children.²¹² Initially, prospective parents should consider getting married to ensure posthumous conception is not precluded on illegitimacy grounds.²¹³ Next, prospective parents should consider the following to substantiate inheritance rights: Executing a will; Minimizing

domicile before moving to Massachusetts), despite residing in Massachusetts. See GLANNON ET AL., *supra* note 199, at 47 (exemplifying domicile). To the contrary, if the college student moved to Massachusetts with no intent to move back to California or to any other location, the student would become a domiciliary of Massachusetts. See GLANNON ET AL., *supra* note 199 (exemplifying domicile). This would be true even if the student subsequently changed her mind and decided to move back to California after graduation. See GLANNON ET AL., *supra* note 199, at 45-47 (expounding meaning of domicile). The student would not become a domiciliary of California again until she moved back with an intent to remain there with no present intent of leaving in the future. See GLANNON ET AL., *supra* note 199 (exemplifying domicile).

²⁰⁶ See *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974) (using intent to remain permanently test).

²⁰⁷ See *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980) (“To establish a domicile of choice a person generally must be physically present at the location and intend to make that place his home for the time at least.”).

²⁰⁸ See GLANNON ET AL., *supra* note 199, at 47-48 (illustrating “intent to remain for the time at least” test).

²⁰⁹ See *Mas*, 489 F.2d at 1399 (applying “intent to remain permanently” test).

²¹⁰ *Id.* (quoting *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954)) (internal quotation marks omitted).

²¹¹ See *supra* Part III.A.ii.2 (discussing case law on inheritance rights of posthumously conceived children).

²¹² See *infra* Part IV.A-E.

²¹³ See *infra* Part IV.A (offering method to avoid illegitimacy claims).

time between death and conception; and Utilizing the ambiguity of domicile.²¹⁴ Moreover, emphasizing a legislature's past reliance on model acts like the Uniform Probate Code and/or Uniform Parentage Act may persuade a court to adopt law modeled after such acts in the interim.²¹⁵

For prospective parents of posthumously conceived children, marriage may preclude illegitimacy arguments by opposing parties and enhance the likelihood of permissible posthumous conception.²¹⁶ In *Hecht*, for example, the defendants argued the decedent's sperm should not be released to the plaintiff for procreative purposes because she was never married to the decedent.²¹⁷ Before rejecting that argument, the California court tested its credence.²¹⁸

The primary reason the court disclaimed the defendants' illegitimacy argument was because the relevant California statute governing artificial insemination excluded the word "married," which meant the statute applied to all women.²¹⁹ More specifically, the court said "[H]ad the Legislature intended to express a public policy concern against procreative rights of unmarried women, it would not have excluded the word "married" from . . . [the statute]."²²⁰ Without pertinent authority suggesting California public policy was to prohibit an unmarried woman from utilizing assisted reproductive technology to procreate, the court refused to ban the release of the decedent's sperm.²²¹

Although there is no public policy in California against unmarried women procreating, the same may not be true in other states.²²² Cases involving posthumously conceived children are consistently non-uniform and complex.²²³ Therefore, prospective parents should make every effort to avoid complications that may arise from potential illegitimacy arguments and marry as soon as possible.²²⁴

Whereas a decedent's intent is a huge factor for consideration

²¹⁴ See *infra* Part IV.B-D.

²¹⁵ See *infra* Part IV.E (assessing how reliance on UPA and/or UPC may be persuasive).

²¹⁶ See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 284-86 (Cal. Ct. App. 1993) (noting illegitimacy argument made in opposition to plaintiff's request for deceased boyfriend's cryopreserved sperm).

²¹⁷ See *id.* at 276, 286 (exclaiming plaintiff was decedent's girlfriend-not wife).

²¹⁸ See *id.* at 284-86 (analyzing different case that addressed similar issue).

²¹⁹ See *id.*

²²⁰ *Id.* at 286.

²²¹ See *Hecht*, 20 Cal. Rptr. 2d at 287 (rejecting illegitimacy argument).

²²² Cf. *id.* at 287 (finding no public policy prohibiting unmarried women from using ART in California).

²²³ See *supra* Part III.A.ii.2 (discussing wide discrepancies among states in dealing with posthumously conceived children).

²²⁴ See *supra* Part III.A.ii.2.a (summarizing *Hecht*).

regarding the parentage and inheritance rights of posthumously conceived children, executing a will is one way to make intent clear.²²⁵ Though *Hecht* involved the right to control the use of reproductive material for procreation post-death, the facts of that case indicate what a court may consider in ascertaining a decedent's intent.²²⁶ The decedent in *Hecht*, for example, went to great lengths to make his intent for the plaintiff to use his sperm for posthumous conception clear, which was largely determinative of the court's decision in that case.²²⁷ Not only did the decedent deposit fifteen vials of his sperm in a bank the month he died, he filed a letter of intent with the sperm bank, as well.²²⁸ Likewise, the decedent made a will that clearly expressed his intended use for the cryopreserved sperm.²²⁹ Largely based on his will, the court concluded the decedent's intent was to have his sperm released to the plaintiff for procreative purposes.²³⁰ Therefore, the court followed his wishes.²³¹

Additionally, the Massachusetts court in *Woodward* determined for a posthumously conceived child to inherit from a deceased parent, the decedent's *intent to procreate* posthumously must be established; an *intent to provide* for any resulting children must be evidenced, as well.²³² By having a will, a plaintiff can better establish a decedent's intent to have and provide for posthumously conceived children.²³³ This, in turn, will increase the likelihood of securing inheritance benefits, particularly in those jurisdictions that have adopted a broader approach in determining the inheritance rights of posthumously children.²³⁴

Another factor that will likely enhance a posthumously conceived child's right to inheritance is expedient conception after the deceased parent's death.²³⁵ Most, if not all states that expressly address the issue

²²⁵ See *supra* Part III.A.ii.2.b (discussing cases that focus on decedent's intent in determining inheritance rights of posthumously conceived children).

²²⁶ See *supra* note 105 and accompanying text (identifying issue in *Hecht*).

²²⁷ See *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993) (elucidating decedent's will was persuasive).

²²⁸ See *id.* (relating steps decedent took to make intent clear).

²²⁹ See *id.* (citing exact language of decedent's will).

²³⁰ See *id.*

²³¹ See *id.* (noting court's holding).

²³² See *Woodward v. Comm'r. of Soc. Sec.* 760 N.E.2d 257, 259-60 (Mass. 2002).

²³³ See *Hecht*, 20 Cal. Rptr. 2d 283-84 (exhibiting influence wills can have on ascertaining decedent's intent).

²³⁴ See *supra* Part III.A.ii.2.b (discussing broad approach adopted by some courts and factors they consider when determining inheritance rights).

²³⁵ See *supra* note 89 and accompanying text (establishing when posthumously conceived children must be in gestation to qualify under intestate succession); see also *Woodward*, 760 N.E.2d at 259-60 (indicating time restrictions may preclude inheritance rights).

require a posthumously conceived child be in gestation within a specific time post-death to qualify under intestate succession.²³⁶ There is, however, great disparity among the states regarding the statutory time period.²³⁷ To be specific, statutes mandate a child be in utero anywhere from ten months to three years after the deceased parent's death.²³⁸ If a child is not in gestation within the requisite period, it will serve as an absolute bar to a child's inheritance rights under both intestate succession and for social security purposes.²³⁹ Ergo, it is imperative to know what, if any, time bar applies.²⁴⁰

Even in states with no statutes specifically governing the inheritance rights of posthumously conceived children, courts have recognized the importance of timely distribution of a decedent's estate, as well.²⁴¹ For example, the Massachusetts Supreme Judicial Court has suggested time limitations may impede a child's ability to inherit from a deceased biological parent.²⁴² Additionally, the Superior Court of New Jersey also noted the significance of timely conception post-death.²⁴³ Specifically, the court indicated there is a practical and legal need to timely ascertain who is entitled to inherit from a decedent's estate and quickly administer property to entitled heirs.²⁴⁴

Accordingly, the sooner a child is conceived after a deceased parent's death, the greater the chance of successfully procuring inheritance rights under state intestacy law and the Social Security Act.²⁴⁵ There is little room for persuasion in cases where a child is conceived after a statutorily mandated period, however case law is less exact as to when

²³⁶ See sources cited *supra* note 89 and accompanying text (describing statutes requiring posthumously conceived children be conceived within specific time frame).

²³⁷ See sources cited *supra* note 89 and accompanying text (illustrating varying time periods).

²³⁸ See sources cited *supra* note 89 and accompanying text (citing various statutes expressly addressing inheritance rights of posthumously conceived children); see also *supra* Part III.A.ii.2b (analyzing cases where court mentioned importance of distributing estates as soon as possible).

²³⁹ See sources cited *supra* note 89 and accompanying text (identifying time bars); see also *supra* Part III.A.i (clarifying how children of postmortem conception qualify to receive social security benefits).

²⁴⁰ See sources cited *supra* note 89 (noting divergent time bars in different state jurisdictions); see also *supra* Part III.A.i (same).

²⁴¹ See *Woodward v. Comm'r. of Soc. Sec.* 760 N.E.2d 257, 259-60 (Mass. 2002) (insinuating expedient distribution of estates may be desirable under some circumstances).

²⁴² See *id.* (listing time limitations).

²⁴³ See *In re Estate of Kolacy*, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000) (acknowledging practical need to timely administer estates).

²⁴⁴ See *id.*

²⁴⁵ See *supra* Part III.A. (explicating statutes and case law governing inheritance rights of posthumously conceived children).

conception must occur where state intestacy law fails to provide for such.²⁴⁶ Nonetheless, conceiving a child with the assistance of reproductive technology may be time consuming and uncertain.²⁴⁷ Thus, it is best to plan ahead for any difficulties that may arise.²⁴⁸

Considering state intestacy law is dispositive of a posthumously conceived child's receipt of social security benefits, it is critical to demonstrate the decedent's domicile was in a state favorable to posthumously conceived children.²⁴⁹ In terms of statutory law, children of postmortem conception must be expressly permitted to inherit from a deceased biological parent or the relevant statute must be sufficiently vague to permit such a reading.²⁵⁰ In states where case law governs, it is critical to establish domicile in a state that applies a broader approach.²⁵¹

The best way to establish domicile in a favorable state is to find a jurisdiction that applies a test based on the decedent's intent to remain in a state for the time at least.²⁵² This way, it need only be proved that the decedent was staying in a state with the intent to be there at the time of his or death.²⁵³ If the decedent was vacationing in California, for example, it is possible to argue the decedent was a resident of California at the time of death because (s)he was staying there with the intent to remain for the time being.²⁵⁴ Consequently, California law would determine whether the posthumously conceived child in question was entitled to inherit under intestate succession, and in turn, entitled to receive social security benefits.²⁵⁵ This would be true even if the decedent never intended to remain in California indefinitely.²⁵⁶ While determining domicile based on an intent to remain for the time at least is a minority test, there are courts that will accept that approach.²⁵⁷

²⁴⁶ See *supra* Part III.A (comparing treatment of statutory time limits to case law).

²⁴⁷ See *supra* Part II.A (introducing methods of ART).

²⁴⁸ See *supra* Part II.A (explaining in vitro fertilization and artificial insemination).

²⁴⁹ See *supra* Part III.A.i (discussing dependent relationship between social security benefits and inheritance rights under intestate succession).

²⁵⁰ See *supra* Part III.A.ii.1-2 (analyzing broad and narrow approaches adopted by courts).

²⁵¹ Compare *supra* Part III.A.ii.2.b (applying broad approach, which primarily focuses on decedent's intent), with *supra* Part III.A.ii.2.c (employing narrow approach, which concentrates on legislative intent).

²⁵² See *Sadat v. Mertes*, 615 F.2d 1176, 1180 (7th Cir. 1980) (recognizing alternative test for establishing domicile).

²⁵³ See *id.* (explaining "intent to remain for the time at least" test).

²⁵⁴ See *id.* (stating "intent to remain for time at least" test).

²⁵⁵ See *supra* Part III.A.i (discussing requisites for posthumously conceived children to receive social security benefits).

²⁵⁶ See *Sadat*, 615 F.2d at 1180 (discussing domicile).

²⁵⁷ See *id.* (referring to application of "intent to remain for time at least" test).

Alternatively, trying to establish domicile in a jurisdiction using the “intent to remain permanently” standard could prove difficult where domicile is questionable.²⁵⁸ To be specific, consider a claimant who wants to establish the decedent’s domicile in Massachusetts.²⁵⁹ The decedent lived in Massachusetts with no intention of returning to his or her home state of New Hampshire; however, New Hampshire is a place the decedent always returned to whenever absent therefrom.²⁶⁰ If Massachusetts employed the intent to remain permanently test, a court would probably find the decedent’s domicile was in New Hampshire and New Hampshire intestacy law would apply.²⁶¹ Notwithstanding, an intent to remain permanently test is also a minority approach, thus, difficulties arising from this test are unlikely.²⁶²

The majority test for establishing domicile is the intent to remain indefinitely approach, which is less flexible than the intent to remain for the time at least test, but more accommodating than the intent to remain permanently test.²⁶³ To show domicile under this test, an individual must exhibit a decedent was living in a particular state with no intention of leaving at the time of death.²⁶⁴ Factors a court may consider in making such a determination may include: billing address; driver’s license; car registration; location of employment, assets, and family; and anything else that would suggest the decedent was residing in a state with the intent to remain indefinitely.²⁶⁵ Under this test, a persuasive advocate may successfully argue a decedent’s domicile is in a state favorable to posthumously conceived children, even if domicile in that state is questionable.²⁶⁶

Ultimately, establishing a decedent’s domicile in a state with laws favorable to children of postmortem conception is critical to ensure inheritance rights under both intestate succession and the Social Security Act.²⁶⁷ While forum shopping is discouraged by courts, some states strictly

²⁵⁸ See *supra* Part III.A.ii.3 (reviewing different tests for domicile employed by different jurisdictions).

²⁵⁹ See *Woodward v. Comm’r. of Soc. Sec.* 760 N.E.2d 257, 258-69 (Mass. 2002).

²⁶⁰ See *supra* Part III.A.ii.1-2 (discussing law governing inheritance rights of posthumously conceived children).

²⁶¹ See *supra* Part III.A.ii.3 (instructing different ways to establish domicile); see also *supra* Part III.A.i (reflecting on requirements under Social Security Act).

²⁶² See *supra* Part III.A.ii.3 (analyzing domicile tests).

²⁶³ See *supra* Part III.A.ii.3 (comparing different tests for domicile).

²⁶⁴ See *supra* Part III.A.ii.3 (assessing majority approach for establishing domicile).

²⁶⁵ See *supra* Part III.A.ii.3 (touching on tests for domicile).

²⁶⁶ See *supra* Part III.A.ii.3 (exemplifying ambiguity of domicile).

²⁶⁷ See *supra* Part III.A.i (assessing how to qualify for social security benefits); see also *supra* Part III.A.ii (appraising relevant statutes and case law).

proscribe posthumously conceived children from inheriting under intestate succession, which means any right to social security benefits is also extinguished.²⁶⁸ Therefore, forum shopping may be the only way to carry out a decedent's intent to provide for his or her child(ren) post-death.²⁶⁹

Emphasizing a state's past reliance on the Uniform Parentage Act and/or the Uniform Probate Code may persuade a court to adopt rules mirrored after them until the legislature expressly takes action.²⁷⁰ To be specific, states that have been influenced by the Uniform Parentage Act in the past but do not have statutes addressing posthumously conceived children include: Hawaii, Maine, Mississippi, Missouri, Montana, New Hampshire, Rhode Island, and Wyoming.²⁷¹ The newest version of the Uniform Parentage Act, which was last amended in 2002, provides:

If an individual who consented in record to be a parent by assisted reproduction dies before the 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.²⁷²

Some states, like Iowa and Arkansas, already have case law dealing with posthumously conceived children.²⁷³ Consequently, even though there are no statutes on point, there is binding precedent making it more difficult to convince a court to adopt a parentage rule similar to the Uniform Parentage Act's.²⁷⁴ Nonetheless, the law is constantly evolving and persuasive advocacy may convince a court existing precedent is erroneous.²⁷⁵

There are also a number of states that have been influenced by the Uniform Probate Code, but have yet to adopt statutes establishing a posthumously conceived child's right to inherit from a deceased parent.²⁷⁶

²⁶⁸ See *supra* Part III.A.ii (evaluating intestate succession).

²⁶⁹ See *supra* Part III.A.i (exhibiting how some statutes and cases strictly proscribe posthumously conceived children from inheriting).

²⁷⁰ See *supra* Part III.A.ii.1 (recognizing influence of uniform acts on different statutes).

²⁷¹ See *supra* note 103 and accompanying text (citing states that have been influenced by Uniform Parentage Act).

²⁷² See Medford, *supra* note 53, at 105 (quoting Uniform Parentage Act).

²⁷³ See *supra* Part III.A.ii.2.c (exploring narrow approach).

²⁷⁴ See *supra* Part III.A.ii.2.c (indicating legislative intent governs).

²⁷⁵ See *supra* Part III.A.ii (shedding light on developments in statutes and case precedent).

²⁷⁶ See *supra* note 96 (listing states influenced by Uniform Probate Code).

For example: Alaska, Arizona, Hawaii, Idaho, Maine, Massachusetts, Michigan, Montana, Nebraska, New Jersey, South Carolina, South Dakota, and Utah have been influenced by the Uniform Probate Code; none of these states have adopted the UPC's provisions regarding posthumously conceived children.²⁷⁷ The Code states:

If . . . an individual is a parent of a child of assisted reproduction who is conceived after the individual's death, the child is treated as in gestation at the individual's death for purposes of . . . [intestate succession] . . . if the child is . . . in utero not later than 36 months after the individual's death . . . or born not later than 45 months after the individual's death.²⁷⁸

Some states, like Massachusetts, have already established case precedent consistent with the Uniform Probate Code's provision on inheritance rights.²⁷⁹ Accordingly, if a persuasive advocate can sufficiently evidence the amount of a state's past reliance on the Uniform Probate Code, a court may be convinced to adopt a similar approach until the state legislature decides to act.²⁸⁰

V. CONCLUSION

In recent years, children conceived after the death of one or both parents have become increasingly more common through means of assisted reproductive technology. An inherent issue with this phenomenon involves the inheritance rights of such children regarding social security benefits and under intestate succession. Under the Social Security Act, a posthumously conceived child's right to benefits is contingent on their right to inherit under state intestacy law. This is problematic because most state legislatures have not specifically defined a posthumously conceived child's right to inherit from a deceased parent. Additionally, most states have not addressed whether a legal parent-child relationship even exists between a posthumously conceived child and a decedent. Consequently, courts have had to resolve these issues on their own.

²⁷⁷ See *supra* note 96 and accompanying text (highlighting states that have not adopted provisions addressing posthumously conceived children).

²⁷⁸ UNIF. PROBATE CODE § 2-120(k) (2014).

²⁷⁹ See *Woodward v. Comm'r. of Soc. Sec.* 760 N.E.2d 257, 259-60 (Mass. 2002) (highlighting broad approach adopted in Massachusetts).

²⁸⁰ See *supra* note 96 and accompanying text (recounting number of states influenced by UPC).

Ultimately, it has become increasingly clear that state law must expressly permit children of postmortem conception to inherit through intestate succession or be sufficiently ambiguous to permit such an interpretation. In such instances, there are many things that should be considered to successfully reproduce posthumously and to secure benefits for any resulting children, such as: Getting married; Executing a Will; Expedient conception post-death; and Taking advantage of the ambiguity of domicile. Moreover, emphasizing a state's past reliance on model acts like the Uniform Probate Code and/or Uniform Parentage Act may persuade a court to adopt similar provisions in the interim.

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