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## ARTICLE

### DEAD HAND PROBLEM: WHY NEW YORK'S ESTATES, POWERS AND TRUSTS LAW SHOULD BE AMENDED TO TREAT POSTHUMOUSLY CONCEIVED CHILDREN AS DECEDENTS' ISSUE AND DESCENDANTS

ROBERT MATTHEW HARPER\*

#### I. INTRODUCTION

Imagine that you are a posthumously conceived child, the product of your mother's decision to impregnate herself with your deceased father's sperm. Your father, a member of the United States Army, deposited sperm samples with a sperm bank before his deployment to Iraq in April 2003.<sup>1</sup> He did so to preserve his sperm in the event that he was infertile when he returned home.<sup>2</sup> However,

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\* Author is an Associate in the Trusts and Estates Litigation and Commercial Litigation Departments at Farrell Fritz, P.C., as well as a Special Professor of Law at Hofstra University School of Law. He would like to thank Professor Martin Guggenheim of New York University School of Law for his thoughtful comments during the editorial process and to dedicate this Article to Professor Kathleen M. Beckett of Hofstra University School of Law.

<sup>1</sup> This was not an uncommon factual scenario inasmuch as many American soldiers deposited semen in sperm banks before they were deployed overseas for service in the Iraq War. See, e.g., Paul Grondahl, *With War a Possibility, Plans for Posterity; Soldiers make sperm bank deposits in case they are shipped to Iraq*, TIMES UNION, Feb. 1, 2003, at A1 ("Last week, [a] 28-year-old Scotia man possibly became the first Capital Region soldier to deposit his semen at a local sperm bank. [He] joined a nationwide trend of U.S. servicemen—anticipating deployment to Iraq—who are putting their sperm in deep-freeze storage, in case chemical or biological weapons make them infertile."). See also Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 91-93 (2004) (discussing the use of artificial reproductive technology among soldiers in the Iraq War).

<sup>2</sup> Larry Tye, *Next Generation; Some GIs Resort to Sperm Banks; War in the*

your father died serving his country, leaving no will or otherwise enforceable testamentary plan. Following your father's death, your mother elected to have a child, you, by impregnating herself with the sperm that your father deposited at the sperm bank. Now, your mother, having given birth to you, seeks to have you recognized as one of your father's issue, so that you can take as a beneficiary of the trust established by your father's parents for his benefit and that of his issue.

This Article addresses whether, and to what extent, New York's Estates, Powers and Trusts Law should be amended to treat posthumously conceived children as the legal, as well as biological, issue and descendants of their deceased parents. In Parts II and III, respectively, this Article discusses the development of assisted reproductive technology and the national trend toward recognizing the inheritance rights of posthumously conceived children. This Article also details the manner in which New York's current inheritance laws treat posthumously conceived children and analyzes the bill concerning the same subject matter that is currently pending before the New York Legislature. Finally, in Part V, this Article proposes that New York's legislature should adopt a statute that recognizes posthumously conceived children as decedents' issue and descendants for inheritance purposes.

## II. TYPES OF ASSISTED REPRODUCTIVE TECHNOLOGY

At the outset of its development, assisted reproductive technology ("ART") has brought hope to those families who cannot procreate by natural means.<sup>3</sup> The increased interest in ART has led to the improvement of previously existing reproductive methods and the development of new techniques, such as artificial insemination, in vitro fertilization, and cryopreservation, among others.<sup>4</sup> Now, as soldiers march off to war, with death a possibility and infertility

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*Middle East*, BOSTON GLOBE, Feb. 17, 1991, at 14 ("Hundreds of soldiers nationwide have made deposits at sperm banks before heading for the . . . Middle East, marking the first conflict in history where warriors have gone to battle leaving behind the potential seeds of a new generation.").

<sup>3</sup> Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 971 (1996) ("In its early years, assisted reproduction seemed a benign intervention of science, helping families bear children who could not do so naturally.").

<sup>4</sup> Michael K. Elliott, *Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child*, 39 REAL PROP. PROB. & TR. J. 47, 51-54 (2004) ("With the monumental breakthroughs in reproductive assistance that emerged over time, the assistance procedures steadily gained acceptance. Today going to the fertility clinic for a procedure is as commonplace as going to one's family doctor for a cold."). See also Monica Shah, Comment, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 548-51 (1996) (detailing the ART methods).

preventing American couples from reproducing by natural means, ART is increasingly becoming a socially acceptable solution to problems of this kind.<sup>5</sup>

Artificial insemination was developed centuries ago and appears to be the most prevalent type of the assisted reproduction techniques that is used.<sup>6</sup> “There are three kinds of artificial insemination, homologous artificial insemination, confused artificial insemination and heterologous artificial insemination.”<sup>7</sup> Homologous artificial insemination involves injecting a woman with her husband’s semen at the time of ovulation.<sup>8</sup> Confused artificial insemination is often used when the husband’s “sperm count is low . . . .”<sup>9</sup> Typically, this procedure involves combining the husband’s sperm with a donor’s sperm, thereby enabling the wife, husband, and delivering doctor to believe that the husband is the resulting child’s biological father.<sup>10</sup> Heterologous insemination entails inseminating the woman with a donor’s sperm rather than her husband’s sperm.<sup>11</sup> To safeguard against unwanted parental rights claims, the donor involved in heterologous insemination is typically “required to sign a written waiver of all parental rights.”<sup>12</sup>

<sup>5</sup> Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 525 (1993) (discussing soldiers’ use of ART during the Vietnam War). See also Michelle L. Brenwald & Kay Redeker, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 605 (1999) (“[I]nfertility among American women has increased 25% from 1988 to 1995.”).

<sup>6</sup> Gilbert, *supra* note 5, at 524-26 (tracing the origins of artificial insemination and explaining that “artificial insemination has gained widespread acceptance and medical technology has made it increasingly available and inexpensive”). See also Renee H. Sekino, Legal Update, *Posthumous Conception: The Birth of a New Class*: Woodward v. Comm’r of Soc. Sec., 8 B.U. J. SCI. & TECH. L. 362, 363 (2002) (“The most commonly known method of assisted reproduction is artificial insemination, defined as ‘the introduction of semen into the vagina other than by coitus.’”).

<sup>7</sup> Gilbert, *supra* note 5, at 526.

<sup>8</sup> *Id.* (“Homologous artificial insemination, commonly known as artificial insemination by husband (“AIH”), is a procedure by which at the time of ovulation, a woman is inseminated using a syringe containing her husband’s semen, which may have been deposited and frozen, or cryopreserved, at another time.”).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 526-27 (“Here, because the husband’s sperm count is low, his semen is mixed with that of an anonymous donor. The reasons for using this method are psychological: ‘it gives the husband some basis for believing that he is the natural father of the resulting child[.]’”(quoting E. Donald Shapiro & Beneden Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 236 (1986-87)).

<sup>11</sup> *Id.* at 527 (“In the third artificial insemination procedure, heterologous insemination, or artificial insemination by donor (“AID”), a woman is artificially inseminated using the sperm of a man other than her husband.”).

<sup>12</sup> *Id.*

The second noteworthy ART method is in vitro fertilization.<sup>13</sup> In order to facilitate the fertilization process, the woman ingests “ovulation inducing drugs” for the purpose of inducing “oocytes.”<sup>14</sup> Once the resulting eggs are secured, they are fertilized with sperm and placed in the uterus following fertilization.<sup>15</sup> In addition, although it is generally the case that the mother’s eggs are used during the fertilization process, modern technology has made it possible for a mother to be impregnated with another woman’s fertilized eggs.<sup>16</sup>

The third type of ART is cryopreservation, the origins of which date back to the 1770s.<sup>17</sup> Cryopreservation is the freezing of sperm in nitrogen for preservation and subsequent use.<sup>18</sup> Since performing the first successful cryopreservation in 1949, scientists have gleaned the following from their experiments: (1) the presence of glycerol increases the survival rate of sperm;<sup>19</sup> and (2) sperm can be frozen for tens, if not hundreds, of years.<sup>20</sup> The requisite temperature for this procedure is -328 degrees.<sup>21</sup>

The fourth example of ART is gamete intrafallopian transfer (“GIFT”), which entails depositing a combination of eggs and sperm in a woman’s fallopian tubes.<sup>22</sup> From a scientific perspective, GIFT is an attractive ART method, inasmuch as a woman’s fallopian tubes are generally considered to be the ideal location for incubation purposes.<sup>23</sup>

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<sup>13</sup> Erica Howard-Potter, Commentary, *Beyond Our Conception: A Look at Children Born Posthumously Through Reproductive Technology and New York Intestacy Law*, 14 BUFF. WOMEN’S L.J. 23, 26-29 (2006).

<sup>14</sup> *Id.* at 27 (“First, a woman takes ‘ovulation inducing drugs’ in order to produce multiple ‘oocytes’ (eggs).”).

<sup>15</sup> *Id.* (“Next, the eggs are harvested from the ovaries and placed into a petri dish where they are combined with 50,000 pre-selected ‘motile’ sperm. Then, once (if) fertilization occurs, the resulting embryos are transferred to the uterus.”).

<sup>16</sup> *Id.* (discussing egg donation).

<sup>17</sup> Gilbert, *supra* note 5, at 525-26 (detailing the history of cryopreservation).

<sup>18</sup> *Id.* (“Currently sperm is frozen and stored in a tank filled with liquid nitrogen at -328 degrees Fahrenheit. Sperm which has been stored for over ten years has produced healthy children.”).

<sup>19</sup> *Id.* at 525 (“It was then discovered that the addition of a small amount of glycerol before freezing would increase the probability that the sperm would survive.”).

<sup>20</sup> Karin Mika & Bonnie Hurst, *One Way to be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 996 (1996) (“Preembryos can be frozen from between two to six hundred years; therefore, a child may be conceived and/or born many years after both its parents are deceased.”).

<sup>21</sup> *Id.* at 995-96.

<sup>22</sup> Howard-Potter, *supra* note 13, at 28-29 (“Gamete intrafallopian transfer (“GIFT”) is another variation of [in vitro fertilization].”).

<sup>23</sup> *Id.* at 28 (“But, instead of combing the eggs and sperm in a petri dish, the retrieved eggs are placed ‘directly into the fallopian tubes with large numbers of sperm.’ Because fertilization occurs naturally in the fallopian tubes and it is assumed that the tube is ‘a better incubator than a Petri dish,’ GIFT is more advantageous than other forms of [in vitro fertilization].”) (quoting Susan Lewis

The underlying theory is that fertilization and incubation typically take place in the fallopian tubes when a woman is impregnated by natural means, such that GIFT is more analogous to the natural fertilization process than other ART methods.<sup>24</sup>

The fifth and final noteworthy type of ART is gestational surrogacy.<sup>25</sup> This approach involves implanting a surrogate mother with a fertilized egg from the biological parents.<sup>26</sup> The surrogate then carries the resulting fetus through the stages of pregnancy and gives birth to the child before handing the child over to the biological parents.<sup>27</sup> Gestational surrogacy arrangements are typically memorialized in writing,<sup>28</sup> and have been known to give rise to litigation concerning parental rights and custody.<sup>29</sup> For example, in *Johnson v. Calvert*, Mark and Crispina Calvert (collectively, the “Calverts”), a husband and wife, entered into a surrogacy agreement with Anna Johnson (the “surrogate”).<sup>30</sup> Pursuant to that agreement, the surrogate contracted to carry the resulting child from the Calverts’ implanted zygote and to forfeit her parental rights to that child in exchange for \$10,000 and a \$200,000 life insurance policy.<sup>31</sup> Eventually, the parties’ relationship soured, and, following the child’s birth, the surrogate asserted parental rights to the child.<sup>32</sup> The Supreme Court of California ruled in favor of the Calverts, finding that they were the child’s natural parents.<sup>33</sup>

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Cooper & Ellen Sarasohn Glazer, CHOOSING ASSISTED REPRODUCTION: SOCIAL, EMOTIONAL & ETHICAL CONSIDERATIONS 41 (Perspectives Press 1998) [hereinafter Cooper].

<sup>24</sup> *Id.* (“This is whether fertilization occurs naturally, and GIFT is advantageous since it is assumed that the tube is ‘a better incubator than a petri dish.’”) (quoting Cooper, *supra* note 23, at 41)).

<sup>25</sup> Laurence C. Nolan, *Posthumous Conception: A Private or Public Matter?*, 11 BYU J. PUB. L. 1, 5 (1997) (“Gestational surrogacy is another method of artificial insemination utilizing in-vitro fertilization.”).

<sup>26</sup> *Id.* (“However, unlike the donor egg or donor embryo methods, the providers of the genetic materials must find a woman to gestate and give birth to their child and then release that child to them.”).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (“The couple and the woman usually enter into an agreement providing for gestational surrogacy.”).

<sup>29</sup> See generally *Arrendondo v. Nodelman*, 622 N.Y.S.2d 181 (N.Y. Sup. Ct. 1994) (adjudicating parental rights claims in the surrogacy contract context); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (discussing the legal and ethical issues that arise from surrogacy agreements).

<sup>30</sup> *Johnson*, 851 P.2d at 778.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (“We conclude that the husband and wife are the child’s natural parents, and that this result does not offend the state or federal Constitution or public policy.”).

### III. THE NATIONAL TRENDS

As it pertains to posthumously conceived children, the law of inheritance is, in many respects, unsettled.<sup>34</sup> Notwithstanding the development of artificial reproductive technology over the past five decades, the vast majority of American states have yet to take any action to resolve whether posthumously conceived children should be permitted to inherit from their deceased biological parents.<sup>35</sup> Of the fifty states, only ten have passed laws that govern the issue discussed in this Article.<sup>36</sup> Absent such statutory guidance, courts have engaged in activism and have adopted progressive positions with regard to the inheritance rights in question.<sup>37</sup>

#### A. THE STATUTORY AUTHORITY

The most popular of the statutory schemes appears to be the one set forth in section 707 of the Uniform Parentage Act ("UPA").<sup>38</sup> Section 707 states that an individual who consents, by written instrument, to the posthumous use of his or her "eggs, sperm, or embryos" for reproductive purposes shall be considered a parent of the resulting child.<sup>39</sup> Absent such written consent, however, the decedent shall not be deemed to be the child's parent for estate and inheritance purposes.<sup>40</sup> To date, the following states have enacted section 707 of

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<sup>34</sup> Cf. Gail Goldfarb & Judith E. Siegel-Baum, *Modern Technology, Entrenched Law and Martin B.*, N.Y. L.J., Feb. 11, 2008, at 3 (discussing that state of the law).

<sup>35</sup> *Id.* ("In the past 50 years, science and technology have made tremendous advances, yet state legislatures have lagged sorely behind.").

<sup>36</sup> *Id.* ("As of 2007, only 10 states have enacted legislation addressing the potential inheritance rights of posthumously conceived children.").

<sup>37</sup> *Id.* at 3-4 ("The sparse statutory law of several states in this country [has] mandated creative and progressive decisional law from our courts to sort out the myriad issues this new technology presents.").

<sup>38</sup> Carole M. Bass, *Planning for Children Conceived After Parent's Death: Law begins to address issues raised by assisted reproductive technology*, N.Y. L.J., Sept. 18, 2006, at S1, ("A majority of these . . . states have adopted the Uniform Parentage Act (UPA), which provides that an individual who consented in writing to be a parent by assisted reproduction, but who dies before the placement of gametes or embryos, is not the parent of any resulting child unless the consent stated that it would be applicable to assisted reproduction occurring after his or her death.").

<sup>39</sup> UNIF. PARENTAGE ACT § 707 (2002) ("If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if the assisted reproduction were to occur after death, the deceased individual would be a parent of the child.").

<sup>40</sup> Goldfarb & Siegel-Baum, *supra* note 34 ("[The UPA] states that if an individual dies before a form of assisted reproduction takes place and the other partner proceeds with it post-death, the child born is not the child of the decedent

the UPA: Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming.<sup>41</sup> Moreover, the UPA approach is under consideration in Alabama and Nevada.<sup>42</sup>

The California, Louisiana, and Florida legislatures have adopted more restrictive statutory measures.<sup>43</sup> For example, section 249.5 of the California Probate Code provides that a posthumously conceived child will only be treated as a decedent's descendant, if (1) the decedent executes a signed writing, (2) the writing states that the decedent's "genetic material shall be used for the posthumous conception of a child[.]" (3) the writing names a representative to control the decedent's genetic material, (4) the representative gives written notice "that the decedent's genetic material [is] available for the purpose of posthumous conception" within four months of the date on which the decedent's death certificate is issued, and (5) the child is "in utero within two years of" the date on which the aforementioned certificate is issued, among other things.<sup>44</sup> In Louisiana, a posthumously conceived child is entitled to assert the same inheritance rights as a child conceived during the decedent's lifetime, if the decedent executes a written instrument authorizing his or her surviving spouse to use his or her genetic material.<sup>45</sup> By contrast, in Florida, a posthumously conceived child shall not inherit from his or her deceased biological father, unless the child's father provides for the child in his will.<sup>46</sup>

The final statutory model of note is memorialized in section 2.5

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unless there is a record of his or her consent to be the parent of the child subsequently born").

<sup>41</sup> *Id.* ("Currently, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming have adopted the . . . UPA . . ."). *See also* DEL. CODE ANN. tit. 13, § 8-707 (2004); N.D. CENT. CODE § 14-20-65 (2005); TEX. FAM. CODE ANN. § 160.707 (Vernon 2007); UTAH CODE ANN. § 78-45g-707 (West 2005); WASH. REV. CODE ANN. § 26.26.730 (West 2002); WYO. STAT. ANN. § 14-2-907 (2003).

<sup>42</sup> *Id.* ("[The UPA] is pending before the legislatures in Alabama and Wyoming.").

<sup>43</sup> *Id.* (summarizing the California, Louisiana, and Florida statutes).

<sup>44</sup> CAL. PROB. CODE § 249.5 (West 2005).

<sup>45</sup> LA. REV. STAT. ANN. § 9:391.1(A) (2003). Section 9:381.1 states, [n]otwithstanding the provisions of any law to the contrary, any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.

*Id.*

<sup>46</sup> FLA. STAT. ANN. § 742.17(4) (West 1993) ("A child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.").

of the Restatement (Third) of Property: Wills & Other Donative Transfers.<sup>47</sup> According to section 2.5, subject to certain conditions, “[a]n individual is the child of his or her genetic parents, whether or not they are married to each other . . . .”<sup>48</sup> One such condition is that a posthumously conceived child “must be born within a reasonable time after the decedent’s death in circumstances indicating that the decedent would have approved of the child’s right to inherit.”<sup>49</sup> Notwithstanding that condition, however, section 2.5 is devoid of a definition for the term “reasonable time.”<sup>50</sup>

## B. THE CASE LAW

There are six reported instances in which courts sitting outside of New York have considered whether posthumously conceived children qualify as the heirs of their deceased biological parents.<sup>51</sup> In all of those cases, the surviving parents of the posthumously conceived children sought judicial recognition for the right of their respective children to inherit under the intestate distribution laws of the state in which the decedents were domiciled at the time of death.<sup>52</sup> They did so out of necessity to secure Social Security survivor benefits under Title 42 of the United States Code.<sup>53</sup>

By way of background, it should be noted that, in the Social Security context, the United States Code provides for the application of the intestate distribution laws of the state in which the decedent is domiciled at the time of his or her death.<sup>54</sup> Thus, where the law of the

<sup>47</sup> RESTATEMENT (THIRD) OF PROP.:WILLS & OTHER DONATIVE TRANSFERS § 2.5 (1999).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at cmt. 1.

<sup>50</sup> Goldfarb & Siegel-Baum, *supra* note 34 (“The Restatement does not define ‘reasonable time.’”).

<sup>51</sup> *Id.* (“Although artificial insemination and in vitro fertilization have become widely used procedures in cases of infertility among couples, there have been only five cases in the United States that have adjudicated the heirship of posthumously conceived children”). In January 2008, the Arkansas Supreme Court decided yet another one of these cases, making the total six. *See* Finley v. Astrue, 372 Ark. 103 (2008).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (“In these cases, a declaration of the posthumously conceived children’s right to inherit in intestacy was necessary for their entitlement to Social Security survivor benefits because proof of paternity and dependency of posthumously conceived children is limited to establishing their entitlement to inherit under the state’s intestacy laws.”).

<sup>54</sup> 42 U.S.C. § 416(h)(2)(A) (2008). Section 416 explains that, 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



state in which the decedent is domiciled at the time of death excludes his or her biological child from the class of intestate beneficiaries, the child is prohibited from receiving Social Security survivor benefits.<sup>55</sup> As such, in *DeSonier v. Sullivan*, the United States Court of Appeals for the Sixth Circuit applied Texas's intestacy statute in order to determine whether the decedent's non-marital child had a colorable claim to Social Security survivor benefits as one of the decedent's biological children.<sup>56</sup>

The first noteworthy decision in which a state or federal court confronted the issues arising from the development of posthumous conception technology and inheritance rights is *In re Estate of Kolacy*.<sup>57</sup> In *Kolacy*, the decedent contracted leukemia and deposited sperm with the Sperm and Embryo Bank of NJ, fearing that his chemotherapy treatments would render him infertile.<sup>58</sup> Following the decedent's death, his widow, impregnated herself with the decedent's sperm samples and subsequently gave birth to twin daughters, born more than eighteen months after their decedent father's passing.<sup>59</sup> The widow then sought an order declaring her daughters to be the decedent's intestate distributees for Social Security insurance purposes.<sup>60</sup> Noting the absence of statutory or decisional authority in New Jersey, the New Jersey Superior Court opined that "the children of a decedent should be amply provided for with respect to property passing . . . as a result of his [or her] death."<sup>61</sup> Accordingly, the court concluded that the decedent father's posthumously conceived daughters were also his intestate heirs.<sup>62</sup>

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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.*

<sup>55</sup> *DeSonier v. Sullivan*, 906 F.2d 228, 231-35 (6th Cir. 1990).

<sup>56</sup> *Id.* It is worth noting that a circuit split exists with respect to the question of whether a court must apply the state intestacy law that is in effect at the time of the decedent's death or the intestate distribution law that is effective as of the date of the application for benefits.

<sup>57</sup> Goldfarb & Siegel-Baum, *supra* note 34.

<sup>58</sup> *In re Estate of Kolacy*, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1258-59.

<sup>61</sup> *Id.* at 1260-63.

<sup>62</sup> *Id.* at 1263-64. The court explained that,

Be all that as it may, once a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status requires. It seems to me that a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the

Similarly, in *Woodward v. Commissioner of Social Security*, the Supreme Judicial Court of Massachusetts considered whether the plaintiffs posthumously conceived children qualified as the intestate distributees of their biological father, the plaintiffs deceased husband.<sup>63</sup> Here, the plaintiff impregnated herself with her husband's sperm more than a year after his death and sought recognition for her daughters as Social Security survivor beneficiaries in the United States District Court for the District of Massachusetts.<sup>64</sup> The district court certified the question of state law discussed in that case to Massachusetts's highest court. The Massachusetts court held that posthumously conceived children could be considered a decedent's intestate beneficiaries, subject to certain conditions.<sup>65</sup> The conditions were as follows: (1) "the surviving parent or... other legal representative [must establish] a genetic relationship between the child and the decedent[.]" (2) the parent or representative must demonstrate that "the decedent affirmatively consented to posthumous conception and to the support of any resulting child[.]" and (3) the parent or representative must seek the requested relief within a reasonable period of time.<sup>66</sup> Upon answering the certified question, the court returned the case to the federal court for adjudication of the plaintiff's claim.<sup>67</sup>

In *Gillett-Netting v. Barnhart*, the United States Court of Appeals for the Ninth Circuit reached a similar conclusion, albeit for different reasons.<sup>68</sup> Like the plaintiffs in *Kolacy* and *Woodward*, the plaintiff in *Gillett-Netting* impregnated herself with her deceased husband's sperm, gave birth to two daughters, and sought Social

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maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons. Given that viewpoint, and given the facts of this case, including particularly the fact that [the decedent] by his intentional conduct created the possibility of having long-delayed after born children, I believe it is entirely fitting to recognize that [the decedent's children] are the legal heirs of [the decedent] under the intestate laws of New Jersey.

*Id.*

<sup>63</sup> *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002) ("If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?").

<sup>64</sup> *Id.* at 259-60.

<sup>65</sup> *Id.* at 259.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 272.

<sup>68</sup> *See generally* *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (reversing the decision of the United States District Court for the District of Arizona, which granted summary judgment in favor of the Commissioner of Social Security).

Security survivor benefits on behalf of her daughters.<sup>69</sup> However, the Commissioner of Social Security opposed the plaintiff's request for relief on the ground that neither of the plaintiff's daughters qualified as a "child" within the meaning of 42 U.S.C. § 416.<sup>70</sup> Noting that there was no dispute as to paternity, the Ninth Circuit rejected the Commissioner's argument and found that the plaintiff's daughters were entitled to Social Security survivor benefits.<sup>71</sup> The court premised its decision on the theory that the term "child" includes any biological child of the insured wage earner.<sup>72</sup>

By contrast, in *Stephen v. Commissioner of Social Security*, the United States District Court for the Middle District of Florida concluded that a posthumously conceived child could not take Social Security survivor benefits, given the status of Florida's intestate distribution law.<sup>73</sup> In *Stephen*, the plaintiff's husband died of a heart attack on November 17, 1999, and the plaintiff had her then-deceased husband's sperm extracted from his corpse the following day.<sup>74</sup> Both the administrative law judge and the federal magistrate judge, who entertained the claim to Social Security survivor benefits that the plaintiff made on behalf of her son, ruled against the plaintiff. The ALJ and federal magistrate opined that, under Florida law, "a child conceived from the sperm of a person who died before the transfer of his sperm to a woman's body is not eligible for a claim against the decedent's estate[.]" absent a writing to the contrary that is signed and dated by the decedent.<sup>75</sup> The district judge adopted the magistrate judge's report and recommendation for the same reason, finding that Florida intestate distribution law governed in that instance.<sup>76</sup>

Likewise, in *Khabbaz v. Commissioner*, the Supreme Court of New Hampshire addressed whether a posthumously conceived child could inherit from his or her deceased parent under the state's intestacy law.<sup>77</sup> In *Khabbaz*, the decedent deposited sperm in a sperm bank "so that his wife could conceive a child through artificial insemination."<sup>78</sup> The decedent "also executed a consent form indicating that the sperm could be used by his wife [to conceive] and

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<sup>69</sup> *Id.* at 594-95.

<sup>70</sup> *Id.* at 596-97.

<sup>71</sup> *Id.* at 597-99.

<sup>72</sup> *Id.*

<sup>73</sup> *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1258 (M.D. Fla. 2005).

<sup>74</sup> *Id.* at 1259.

<sup>75</sup> *Id.* at 1260.

<sup>76</sup> *Id.* at 1259, 1264.

<sup>77</sup> *Khabbaz v. Comm'r*, 930 A.2d 1180, 1182 (N.H. 2007) ("Is a child conceived after her father's death via artificial insemination eligible to inherit from her father as his surviving issue under New Hampshire intestacy law?").

<sup>78</sup> *Id.*

that it was his 'desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law.'"<sup>79</sup> Approximately one year after the decedent's death, his wife conceived a child with the decedent's sperm and subsequently sought Social Security benefits on the child's behalf.<sup>80</sup> Despite the decedent's wishes, however, both the Commissioner of Social Security and the New Hampshire Supreme Court found that the state's intestate distribution law precluded the decedent's child from qualifying as the decedent's surviving issue and taking Social Security survivor benefits.<sup>81</sup> The court reasoned that, under New Hampshire law, the term "surviving issue" implies that the child is "in being" at the time of the decedent's death.<sup>82</sup> Accordingly, the court ruled in favor of the Commissioner of Social Security.<sup>83</sup>

Most recently, in *Finley v. Astrue*, the petitioner commenced an action in the United States District Court for the Eastern District of Arkansas, seeking to overturn the Commissioner of Social Security's ruling that her child was not entitled to Social Security insurance benefits.<sup>84</sup> Following the death of her husband, the petitioner impregnated herself with an embryo, which resulted from the egg and sperm deposits that were made by the petitioner and her husband during their marriage together.<sup>85</sup> After that procedure, the petitioner gave birth to a child and contended that her child should receive Social Security insurance benefits because she conceived the child during her husband's life.<sup>86</sup> In support of her contention, the petitioner argued that she conceived the child at the moment that her husband's sperm fertilized her egg, rather than when the doctors implanted the embryo into her uterus.<sup>87</sup> When the federal district court asked the Arkansas Supreme Court to determine whether the child could inherit from the petitioner's husband under the state's intestate distribution laws, the Arkansas Supreme Court answered that question in the negative.<sup>88</sup> The court concluded that the petitioner did not conceive her child during her husband's life as required for the child to take as the husband's intestate distributee,

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1182-86.

<sup>82</sup> *Id.* at 1183-84 ("Eng argues that her daughter is a 'surviving issue' within the meaning of the [New Hampshire intestacy] statute. However, the plain meaning of the word 'surviving' is 'remaining alive or in existence.' In order to *remain* alive or in existence after her father passed away, Eng would necessarily have to have been 'alive' or 'in existence' at the time of his death.").

<sup>83</sup> *Id.* at 1186 (remanding the case to the United States District Court for the District of New Hampshire).

<sup>84</sup> *Finley v. Astrue*, 372 Ark. 103 (2008).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

and thus declined to usurp the Arkansas legislature's role of defining when conception occurs.<sup>89</sup>

#### IV. NEW YORK'S CURRENT LAW

The question of whether posthumously conceived children qualify as the "issue" and "descendants" of decedents under the New York Estates, Powers and Trusts Law ("EPTL") has only been addressed by one New York court.<sup>90</sup> In *In re Martin B.*, Surrogate Renee R. Roth of the Surrogate's Court of the State of New York answered this question in the affirmative.<sup>91</sup> The court found that the decedent's posthumously conceived children were his issue and descendants for trust distribution purposes.<sup>92</sup>

##### A. THE MARTIN B. DECISION

The facts of *Martin B.* are somewhat analogous to those of the hypothetical discussed in this Article's introduction. In this case, the grantor, Martin B., established seven trusts for the benefit of himself and his issue.<sup>93</sup> The trust instruments authorized the trustees of such trusts to distribute the trust principal to Martin B.'s issue during the life of his wife, Abigail.<sup>94</sup> They further provided for the distribution of the trust principal to Martin B.'s issue and descendants, unless Abigail exercised her special testamentary power to transfer the trusts' assets to other eligible beneficiaries.<sup>95</sup>

Martin B., having died in July 2001, was survived by his wife and an adult son, Lindsay, and predeceased by another adult son, James, who lost his life to Hodgkin's Lymphoma in January 2001.<sup>96</sup> After his diagnosis, James "deposited a sample of his semen at a laboratory with instructions that it be cryopreserved and that, in the

<sup>89</sup> *Id.*

<sup>90</sup> Colleen F. Carew & John R. Reddy, Jr., *Expanding the Class to Include Post-Conceived Children*, N.Y. L.J., Oct. 23, 2007, at 3. (explaining that the law with respect to this issue is "in flux").

<sup>91</sup> *In re Martin B.*, 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007), *available at* 21 QUINNIPIAC PROB. L.J. 25 (2007).

<sup>92</sup> *Id.* at 212.

<sup>93</sup> *Id.* at 208.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* ("All seven instruments give the trustees discretion to sprinkle principal to, and among, Grantor's 'issue' during Abigail's life. The instruments also provide that at Abigail's death the principal is to be distributed as she directs under her special testamentary power to appoint to Grantor's 'issue' or 'descendants' (or to certain other 'eligible' appointees).")

<sup>96</sup> *Id.* ("Grantor . . . died on July 9, 2001, survived by his wife Abigail and their son Lindsay (who has two adult children), but predeceased by his son James, who died of Hodgkin[']s Lymphoma on January 13, 2001.")

event of his death, it be held subject to the directions of his wife Nancy.”<sup>97</sup> Years later, Nancy used James’s sperm to impregnate herself and gave birth to two boys, James Mitchell and Warren, in October 2004 and August 2006, respectively.<sup>98</sup> As a result, the trustees of the trusts created by Martin B. commenced a proceeding in order to determine whether James Mitchell and Warren were James’s issue and descendants under the EPTL.<sup>99</sup>

The court began its analysis of the issue discussed herein by reference to sections 4-1.1(c) and 5-3.2 of the EPTL, noting that “the right of a posthumous child to inherit [in intestacy] or as an after-born child under a will is limited to a child conceived during the decedent’s lifetime.”<sup>100</sup> In pertinent part, section 4-1.1(c) provides for the intestate distribution of a decedent’s property to any child born before or after the decedent’s passing, subject to the requirement that the child be conceived prior to the decedent’s death.<sup>101</sup> Section 5-3.2 is even more restrictive in that it precludes a child conceived after the decedent’s death from inheriting as an after-born.<sup>102</sup> However, the court found these sections inapplicable because the former controls intestate distribution rights and the latter governs the rights of children to inherit as after-borns.<sup>103</sup> The court further reasoned that “the concerns related to winding up a decedent’s estate differ from those related to identifying whether a class disposition to a grantor’s issue includes a child conceived after [a parent’s] death but before the disposition became effective.”<sup>104</sup>

Having deemed sections 4-1.1(c) and 5-3.2 inapplicable, the court then addressed whether New York statutes pertaining to future interests prohibit a posthumously conceived child from inheriting as a

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<sup>97</sup> *In re Martin B.*, 841 N.Y.S.2d at 208.

<sup>98</sup> *Id.* (“Although at his death James had no children, three years later Nancy underwent in vitro fertilization with his cryopreserved semen and gave birth on October 15, 2004, to a boy (James Mitchell). Almost two years later, on August 14, 2006, after using the same procedure, she gave birth to another boy (Warren). It is undisputed that these infants, although conceived after the death of James, are the products of his semen.”).

<sup>99</sup> *Id.* (“The trustees have brought this proceeding because under such instruments they are authorized to sprinkle principal to decedent’s ‘issue’ and ‘descendants’ and thus need to know whether James’s children qualify as members of such classes.”).

<sup>100</sup> *Id.* at 209-210 (internal citations omitted).

<sup>101</sup> N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(c) (McKinney 2008) (“The property of a decedent not disposed of by will shall be distributed [to the distributees] of the decedent, conceived before his or her death but born alive thereafter . . .”).

<sup>102</sup> N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(b) (McKinney 2008) (“[T]he term ‘afterborn child’ shall mean a child of the testator born during the testator’s lifetime or in gestation at the time of the testator’s death and born thereafter.”).

<sup>103</sup> *In re Martin B.*, 841 N.Y.S.2d at 209-10 (“[Section 5-3.2(b)] is by its terms applicable only to wills and to ‘after-borns’ who are children of the testators themselves and no children of third parties.”).

<sup>104</sup> *Id.* at 210.

class member.<sup>105</sup> In this regard, the court first quoted section 6-5.7(a) of the EPTL, which provides that “posthumous children are entitled to take in the same manner as if living at the death of their ancestors,” if “a future estate is limited to children, distributees, heirs or issue . . . .”<sup>106</sup> The court also referenced section 2-1.3(a)(2), the statutory section that permits a posthumous child to take as a member of a class.<sup>107</sup> Thus, the court concluded that the express terms of those sections, when taken literally, appear to permit posthumously conceived children to inherit as the issue and descendants of a decedent.<sup>108</sup>

However, the court, noting that those sections were enacted well before New York’s legislators could have considered, or even imagined, that developments in biotechnology would give rise to posthumous conception, was not persuaded by the statutory interpretation argument, and, therefore, continued its inquiry into the question presented by the trustees.<sup>109</sup> Accordingly, the court directed its attention toward the laws of California, Florida, and Louisiana, as well as the statutes of Delaware, North Dakota, Texas, Utah, Washington, and Wyoming, the seven jurisdictions that approved the Uniform Parentage Act approach to posthumous conception.<sup>110</sup> In doing so, the court recognized that “the legislatures and the courts [of other states] have tried to balance competing interests” in “certainty and finality” against the rights of posthumously conceived children to inherit from their biological parents.<sup>111</sup> Thus, as explained above, many states “require written consent to the use of genetic material after death” and limit the time within which posthumous children can be conceived.<sup>112</sup>

<sup>105</sup> *Id.* (“With respect to future interests, [New York has a statute that] ostensibly bear[s] upon the status of a post-conceived child.”).

<sup>106</sup> *Id.* See also N.Y. EST. POWERS & TRUSTS LAW § 6-5.7(a) (McKinney 2002) (“Where a future estate is limited to children, distributees, heirs or issue, posthumous children are entitled to take in the same manner as if living at the death of their ancestors.”).

<sup>107</sup> *Id.* (“EPTL 2-1.3(2) provides that a posthumous child may share as a member of a class if such child [is] conceived before the disposition [of a decedent’s property becomes] effective.”).

<sup>108</sup> *In re Martin B.*, 841 N.Y.S.2d at 210 (“Each of the above statutes read literally would allow post-conceived children – who are indisputably ‘posthumous’ – to claim benefits as biological offspring.”).

<sup>109</sup> *Id.* (“But such statutes were enacted long before anyone anticipated that children could be conceived after the death of the biological parent. In other words, the respective legislatures presumably contemplated that such provisions would apply only to children *en ventre sa mere*.”).

<sup>110</sup> *Id.* (“We turn now to the jurisdictions in which the inheritance rights of a post-conceived child have been directly addressed by the legislatures, namely, Louisiana, California and Florida and to the seven States that have adopted, in part, the Uniform Parentage Act (2000, as amended in 2002), namely, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming.”).

<sup>111</sup> *Id.* at 211.

<sup>112</sup> *Id.* (“To achieve such balance, the statutes, for example, require written

Turning to the trustees' concerns, the court opined that Martin B.'s failure to consider the possibility that his issue would include James's posthumously conceived children was not dispositive.<sup>113</sup> In support of that proposition, the court cited to a tentative draft of the Restatement (Third) of Property: Wills and Other Donative Transfers,<sup>114</sup> which provides that a posthumously conceived child shall be considered to be a child of his or her biological parent in the class gift context, if the parent agrees to act in a parental capacity and dies before he or she can do so.<sup>115</sup> The court then reasoned that the rationale for that draft, as well as other New York laws, applied with equal force to Martin B.'s trusts, and expounded that, where "an individual considers a child to be his or her own, society... should do so as well."<sup>116</sup> As a result, in attempting to defer to Martin B.'s intentions, the court found that he established the trusts to "benefit his sons and their families equally," and, therefore, held that James's posthumously conceived children were his issue and descendants for trust distribution purposes.<sup>117</sup>

## B. THE CURRENT STATUTORY LANDSCAPE FOR CLASS GIFTS

The plain language of EPTL section 6-5.7(a) appears to permit the recognition of posthumously conceived children as class gift beneficiaries.<sup>118</sup> Indeed, section 6-5.7 states, in pertinent part, that "posthumous children are entitled to take in the same manner as if living at the death of their ancestors" where the "future estate is

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consent to the use of genetic material after death and establish a cut-off date by which the child must be conceived.").

<sup>113</sup> *Id.* ("Although it cannot be said that in 1969 the Grantor contemplated that his 'issue' or 'descendants' would include children who were conceived after his son's death, the absence of specific intent should not necessarily preclude a determination that such children are members of the class of issue.").

<sup>114</sup> *In re Martin B.*, 841 N.Y.S.2d at 211.

<sup>115</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 (Tentative Draft No. 4, 2004) ("[U]nless the language or circumstances indicate that the transferor had a different intention, a child of assisted reproduction is treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity.").

<sup>116</sup> *In re Martin B.*, 841 N.Y.S.2d at 211 ("The rationale of the Restatement . . . should be applied here, namely, if an individual considers a child to be his or her own, society through its laws should do so as well.").

<sup>117</sup> *Id.* at 212 ("In view of such overall dispositive scheme, a sympathetic reading of these instruments warrants the conclusion that the Grantor intended all members of his bloodline to receive their share. . . . Based upon all of the foregoing, it is concluded that James Mitchell and Warren are 'issue' and 'descendants' for all purposes of these trusts.").

<sup>118</sup> *Cf.* Carew & Reddy, Jr., *supra* note 91 ("[In the *Martin B.* case, a] literal reading of both statutes would include the post-conceived grandchildren of Martin B. as class members of the class of issue under his trusts.").



limited to children, distributees, heirs or issue . . . .”<sup>119</sup> Said section does not contain any prohibitive language or otherwise evidence intent on the part of the New York Legislature to limit its application to situations involving posthumously conceived children.<sup>120</sup>

There are, however, a number of problems with a literal construction argument. First, “posthumous children” is a term of art and typically includes only those children who are *in utero* at the time of the decedent’s death.<sup>121</sup> Second, although the clear and unambiguous language of section 6-5.7(a) appears to permit courts to treat posthumously conceived children as the issue and descendants of their biological parents for class gift purposes, New York courts are duty-bound to look beyond the statutory text and consider the legislative history when construing section 6-5.7 or any other statutory text in New York.<sup>122</sup> The underlying rationale for this principle of statutory construction is that the “words men use are never absolutely certain in meaning . . . .”<sup>123</sup>

The text of section 6-5.7, when taken in conjunction with the legislative history, renders the literal statutory construction argument unpersuasive.<sup>124</sup> The New York Legislature enacted section 6-5.7 in 1966,<sup>125</sup> well before the development of artificial reproductive technology and the advent of posthumous conception capabilities.<sup>126</sup> Thus, the Legislature could not have intended to bestow upon posthumously conceived children the right to inherit from their biological parents as beneficiaries of class gifts.<sup>127</sup>

<sup>119</sup> N.Y. EST. POWERS & TRUSTS LAW § 6-5.7(a) (McKinney 2008).

<sup>120</sup> *Id.*

<sup>121</sup> *In re Martin B.*, 841 N.Y.S.2d at 210 (“[T]he respective legislatures presumably contemplated that such provisions would apply only to children *en ventre sa mere*.”); *see also* Margaret Valentine Turano, Commentary, N.Y. EST. POWERS & TRUSTS LAW § 6-5.7 (“This section provides that when a future estate is payable to children, issue or distributees, a child *en ventre sa mere* is a member of the class if he is . . . subsequently born alive.”); *cf.* *Marsellis v. Thalhimer*, 2 Paige Ch. 35 (N.Y. Ch.1830) (“A child in ventre sa mere is, for many purposes, supposed in law to be born: it is capable of being a legatee . . . .”).

<sup>122</sup> *Id.*; *see also* N.Y. STAT. LAW § 124, cmt (“Indeed, the purpose and applicability of a statute cannot be considered without first discussing its legislative history, and it has been held that legislative history is not to be ignored, even if words be clear.”).

<sup>123</sup> *N.Y. State Bankers Ass’n v. Albright*, 343 N.E.2d 735, 738 (N.Y. 1975) (“The words men use are never absolutely certain in meaning; the limitations of finite man and the even greater limitations of his language see to that. Inquiry into the meaning of statutes is never foreclosed at the threshold; what happens is that often the inquiry into intention results in the conclusion that either there is no ambiguity in the statute or that for policy or other reasons the prior history will be rejected in favor of the purportedly explicit statement of the statute.”).

<sup>124</sup> *In re Martin B.*, 841 N.Y.S.2d at 210.

<sup>125</sup> N.Y. EST. POWERS & TRUSTS LAW § 6-5.7(a) (McKinney 1966).

<sup>126</sup> *In re Martin B.*, 841 N.Y.S.2d at 210.

<sup>127</sup> *Id.*

C. THE CURRENT STATUTORY LANDSCAPE FOR AFTER-BORN INHERITANCE AND INTESTATE DISPOSITIONS

By their express terms, EPTL sections 5-3.2 and 4-1.1 prohibit posthumously conceived children from inheriting as the after-born children and intestate distributees of their biological parents.<sup>128</sup> As to the former, section 5-3.2 of the EPTL states that after-born children for whom a decedent does not provide in his or her will shall receive proportionate shares of the decedent's estate, provided that such after-borns are conceived prior to the decedent's death.<sup>129</sup> The motivation for the requirement that the after-born children be conceived before the decedent's death was the desire to protect children born during the decedent's life from having to share their inheritances with the decedent's unknown, or unanticipated, posthumously conceived children.<sup>130</sup>

Similarly, section 4-1.1 of the EPTL provides that the "[d]istributees of [a] decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime."<sup>131</sup> Courts and commentators alike have interpreted section 4-1.1 to proscribe the treatment of posthumously conceived children as beneficiaries for intestate distribution purposes.<sup>132</sup> The primary reason for this limitation is practical in nature; simply put, estates need to close and cannot be held open for indefinite periods of time, pending the birth of potential posthumously conceived children.<sup>133</sup>

<sup>128</sup> Cf. Carew & Reddy, Jr., *supra* note 91.

<sup>129</sup> N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(a)-(c) (McKinney 2006).

<sup>130</sup> Margaret Valentine Turano, Commentary, N.Y. EST. POWERS & TRUSTS LAW § 5-3.2 (McKinney 2006) ("The memorandum in support [of section 5-3.2] explains that developments in reproductive technology make it possible that a child conceived and born long after the testator's death, whom the testator did not know or anticipate, would unfairly deprive the child born during the testator's lifetime of their expected inheritance.").

<sup>131</sup> N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(c) (McKinney 1992).

<sup>132</sup> *In re Martin B.*, 841 N.Y.S.2d at 209 ("At present, the right of a posthumous child to inherit [under EPTL section 4-1.1] . . . is limited to a child conceived during the decedent's lifetime."); See also Margaret Valentine Turano, Commentary, N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 ("For the purposes of intestacy, a child must be conceived during the decedent's lifetime in order to qualify as his [or her] child."); Eileen Caulfield Schwab, *Considering the New York Inheritance Rights of Children Conceived with Assisted Reproduction*, N.Y. L.J., Apr. 3, 2000, at 7 ("For a child to inherit in intestacy from a deceased parent, New York law requires the child to have been conceived before the death of the parent.").

<sup>133</sup> Howard-Potter, *supra* note 13, at 33-34. The commentator explains that, The obvious similarity between posthumous and posthumously conceived children is the fact that in both situations the children are born after the death of a parent. Of course, there is a major difference as well: there is only a finite time in which posthumous children can possibly be born after the death of a parent, whereas posthumously conceived children can, as previously discussed, be

## V. THE AMENDMENT OF THE EPTL

While New York's lawmakers ponder whether to amend the EPTL to include posthumously conceived children in the class of permissible beneficiaries,<sup>134</sup> there are a number of policy-based considerations that warrant consideration. This Part will explain the parameters of the posthumous conception inheritance rights bill that is currently pending before the New York State Legislature and offer an alternative to the solution provided in this bill. As more fully set forth below, this alternative will account for the disinheritance and privacy concerns that oftentimes arise in the context of a discussion concerning the inheritance rights of posthumously conceived children.<sup>135</sup>

### A. THE BILL PROPOSED IN THE NEW YORK ASSEMBLY

On February 13, 2007, Assembly Members N. Nick Perry, Jonathon Bing, William F. Boyland, Jr., Vivian E. Cook, Rubin Diaz, Jr., Deborah Glick, Earlene Hooper, Susan V. John, Ivan Lafayette, Crystal D. Peoples, Adam Clayton Powell, IV, Darryl C. Towns, and Keith L.T. Wright re-introduced a previously un-enacted bill in favor of granting inheritance rights to certain posthumously conceived children.<sup>136</sup> To date, the Assembly has not taken any noteworthy action with respect to this bill other than to refer the proposed legislation to its Judiciary Committee on February 13, 2007 and again on January 9, 2008.<sup>137</sup> The New York State Senate has yet to consider such a bill.<sup>138</sup>

The bill calls for the amendment of the EPTL and proposes the

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born many years after the death of a parent. Because of this, creating a legal fiction (i.e., that a child in gestation and later born alive will be treated as living at the time of the parent's death) for posthumous children is relatively simple, and does not unduly burden the administration of estates. This legal fiction does not work well when posthumously conceived children are involved because estates could be held open almost indefinitely waiting to see if a child will or will not be conceived and born alive.

*Id.*

<sup>134</sup> A. 5181, 2007-2008 Assem., Reg. Sess. (N.Y. 2007), *available at* <http://assembly.state.ny.us/leg/?bn=A05181>.

<sup>135</sup> *See generally* Gail Goldfarb, *Posthumous Conception and Inheritance Rights*, 36 N.Y. STATE BAR ASS'N TRUSTS & ESTATES LAW SECTION NEWSLETTER 43 (Summer 2003) (discussing the policy-based concerns with respect to granting inheritance rights to posthumously conceived children).

<sup>136</sup> A. 5181, 2007-2008 Assem., Reg. Sess. (N.Y. 2007), *available at* <http://assembly.state.ny.us/leg/?bn=A05181>.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

addition of a new section to the EPTL, section 4-1.3.<sup>139</sup> Under section 4-1.3, a posthumous child who is conceived within two years after his or her parent's death will be treated as the decedent's non-marital, but legitimate, child.<sup>140</sup> Such a child will be included in the class of permissible beneficiaries under New York's intestate distribution law, provided that the conditions discussed below are met.<sup>141</sup> The first condition is that the deceased parent's paternity or maternity must be "established by clear and convincing evidence."<sup>142</sup> The second condition is that the decedent must execute a written instrument evidencing his or her desire to parent and support a posthumously conceived child.<sup>143</sup> In addition, the decedent must sign or acknowledge that instrument before a witness who acknowledges the decedent's signature in the presence of a notary public.<sup>144</sup> Once those conditions are met, the posthumously conceived child shall be entitled to the same inheritance rights as those of a non-marital child under New York law, including but not limited to an intestate share of the decedent's estate.<sup>145</sup>

<sup>139</sup> *Id.* ("The estates, powers and trusts law is amended by adding a new section 4-1.3 . . .").

<sup>140</sup> *Id.* The bill states,

(A) For the purposes of this Article:

(1) a child conceived posthumously within two years of the date of death of his or her maternal progenitor shall be considered a non-marital child and the legitimate child of such maternal progenitor, who shall be his or her mother for the purposes of intestate succession; and such child may inherit from his or her mother and from his or her maternal kindred, provided the provisions of paragraph (B) of this section are established.

(2) a child conceived posthumously within two years of the date of death of his or her paternal progenitor shall be considered a non-marital child and the legitimate child of such paternal progenitor, whom shall be his or her father for the purposes of intestate succession; and such child may inherit from his or her father and from his or her paternal kindred, provided the provisions of paragraph (B) of this section are established.

*Id.*

<sup>141</sup> *Id.* (setting forth the conditions necessary for inclusion in the class of posthumously conceived children who can inherit under section 4-1.3, if it is enacted).

<sup>142</sup> *Id.* ("paternity or maternity, of the deceased progenitor, is established by clear and convincing evidence.").

<sup>143</sup> *Id.* ("The deceased progenitor signed an instrument during his or her lifetime indicating his or her intent to parent the future child, and indicating his or her intent to provide support for such future child, provided that such instrument is acknowledged or executed or proved in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public . . .").

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ("Any and all rights, privileges and benefits granted a non-marital child, as defined in section 4-1.2 of this part, including rights to any support payments administered by a state department or agency, shall be granted to a

The Assembly's justification for the bill reflects two important concerns: the evolution of reproductive technology and the reality that brave Americans who are fighting wars in Iraq and Afghanistan may be rendered infertile as a result of their military service.<sup>146</sup> As the legislative memorandum in support of the amendment explains, the bill is designed to ensure that New York's intestate distribution law accounts for the technological advances that have made posthumous conception possible as well as afford soldiers the opportunity to provide for the succession of their respective lineages, even if they themselves die or become infertile while serving their country.<sup>147</sup>

## B. THE LAW THAT NEW YORK'S LEGISLATURE SHOULD ADOPT

Although the bill, if enacted, would be a step in the right direction, it does not go far enough in terms of protecting the rights of posthumously conceived children and it appears to conflict with the state's interest in ensuring that minor children are properly protected. As a result, this Article proposes adding an additional section to the EPTL to permit a posthumously conceived child to inherit from his or her deceased biological parent, even in the absence of a written instrument evincing the parent's intent to procreate and support the child.<sup>148</sup> Such a statutory amendment would ensure that the rights of the parent, child, and state are adequately protected.

### 1. *The Proposal*

This Article proposes that the New York Legislature adopt a bill that is similar to the Restatement (Third) approach discussed above. As explained in Part III, the Restatement (Third) advocates for the inclusion of any child, whether marital or non-marital, who is

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posthumously conceived child provided the requirements of this section are met.”).

<sup>146</sup> A. 5181, 2007-2008 Assem., Reg. Sess. (N.Y. 2007), *available at* <http://assembly.state.ny.us/leg/?bn=A05181>. The New York Assembly explains that,

[t]here is an increasing population of children who have been excluded as heirs of their parents' estates due to the inability of our laws to keep pace with the rapid evolution of technology. Technology has allowed for the miracle of life to begin even after the death of a parent. Many soldiers, going to combat, have utilized this technology by having their sperm frozen and stored, to ensure the continuation of their lineage in the event they do not return from battle or are exposed to sterilizing chemical agents.

*Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5, *supra* note 47.

the genetic product of his or her parent in the class of that parent's intestate beneficiaries.<sup>149</sup> That general principle is qualified by the requirement that the child be born "in circumstances indicating that the decedent would have approved of the child's right to inherit."<sup>150</sup> Essentially, the qualifying statement stands for the proposition that one half of a divorcing couple should not be permitted to use his or her deceased spouse's genetic material to procreate nor shall they be allowed to assert that the resulting child is the decedent's intestate beneficiary, issue, or descendant.<sup>151</sup>

This Article suggests changes to the Restatement (Third) approach to the timing of conception. First, although the Restatement (Third) provides that the child must be born within a reasonable time of the decedent parent's passing,<sup>152</sup> commentators have recognized that there is no definition for "reasonable time" in regard to that assertion.<sup>153</sup> Therefore, to avoid problems associated with the ambiguous language and keeping estates open for indefinite periods of time,<sup>154</sup> the New York Legislature should impose a requirement that a posthumous child be conceived within two years of his or her deceased parent's death in order to qualify as the decedent's descendant for intestate distribution and other purposes, as the members of the Assembly have proposed in the bill that it is currently considering.<sup>155</sup>

Second, with respect to the practice of extracting sperm or eggs from a dying or deceased person's body without that person's consent,

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.* ("This Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit.").

<sup>151</sup> Howard-Potter, *supra* note 13, at 44 ("[I]f the spouses 'were in the process of divorcing when the decedent died,' the requisite approval would be doubtful." (quoting RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5, cmt. 1 (1999))).

<sup>152</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999).

<sup>153</sup> Howard-Potter, *supra* note 13, at 44 ("No definition or explanation is given regarding what constitutes a reasonable time or what type of proof would be sufficient to determine that the decedent would have approved of the child's right to inherit.") (Internal quotation marks omitted).

<sup>154</sup> *Cf.* Bass, *supra* note 38 ("Proposed legislation in New York attempts to address the status of posthumously conceived children under intestacy by dealing with the overarching concerns that have emerged in this area: (i) protection of the deceased parent's reproductive rights by requiring express consent to posthumous reproduction and (ii) facilitation of orderly administration of estates by limiting the length of time and an estate must be left open to provide for the possibility of posthumously conceived children.").

<sup>155</sup> *Cf.* A. 5181, 2007-2008 Assem., Reg. Sess. (N.Y. 2007) (explaining that the posthumous child must be conceived "within two years" of the decedent's death in order to take under section 4-1.3).

the State of New York should proscribe the resulting child from being treated as the person's intestate distributee in the absence of clear and convincing evidence of that person's intent to permit the use of his or her genetic material for procreation purposes following his or her death.<sup>156</sup> In this regard, it is noteworthy that regulators in the United Kingdom have adopted a similar approach and blocked surviving spouses from using the sperm extracted from their deceased husbands to impregnate themselves to the extent that the survivors are unable to produce written consent from their deceased spouses.<sup>157</sup> This rule is premised upon respect for the dying or deceased person's fundamental right to procreate or refrain from procreating.<sup>158</sup> By adopting the Restatement (Third) standard for the inheritance rights of posthumously conceived children and making the changes

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<sup>156</sup> Cf. Laura A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 *RUTGERS L. REV.* 881 (2000) (discussing the dilemma of loved ones who wish to preserve the sperm of their dying or deceased relatives for procreation, but fail to secure the consent of the dying or deceased relatives when they are competent to give such consent).

<sup>157</sup> *Id.* at 886-87. One commentator has explained that, [i]n the United Kingdom, individuals are required to produce the written consent of the sperm donor before sperm can be harvested and stored. In 1995, the British Court of Appeal, Civil Division, dealt with a sperm harvesting case that involved a woman, Diane Blood, whose husband contracted meningitis. While he was in a coma, Mrs. Blood permitted doctors to remove his sperm and store it for her use. Her husband died two days later. Mrs. Blood was later denied the use of the sperm by the Human Fertilisation and Embryology Authority, which was established by the Human Fertilisation and Embryology Act of 1990 ("HFEA").

*Id.*

<sup>158</sup> *Id.* at 888. This commentator has also suggested that, [s]ince procreation and family choices are considered fundamental rights, the most effective solution may be a slight modification of the British rule. To illustrate, if a person does not have the written consent of the decedent whose sperm he or she wants to harvest and use, then he or she should be required to show by compelling evidence that the decedent intended to procreate before his death. Possible examples of clear intent might include: evidence that the man had already begun to store his sperm in a sperm bank; proof of conversations with family members; communications to spouses or lovers; a "donor" card specifying who is to be the recipient of his sperm and for what purpose; or a bequest in his will. If the next of kin can demonstrate the decedent's clear intent to procreate, then the sperm would be available for that purpose. If they fail, his rights are protected by prohibiting the harvesting of his sperm. While intent may sometimes be difficult to prove, it is at least one step toward respecting the decedent and the fundamental right to make decisions regarding procreation. This standard simultaneously protects the next of kin's constitutional procreative rights, the individual's decisions about procreation, and the State's interest in all humans-the deceased, the living, and those with the potential for life.

*Id.*

discussed herein, the New York State Legislature will take steps to ensure that the state's law keeps pace with modern technological advances.<sup>159</sup>

## 2. *The Reproductive Privacy Concerns*

The question of reproductive privacy has two tiers. The first tier concerns the individual right to refrain from procreating and the second tier involves the right to dispose of one's property upon death.<sup>160</sup> As to the first tier, under the federal Constitution, each and every individual has a right to procreate as well as a corollary right not to procreate.<sup>161</sup> In the context of posthumous conception, sperm deposits, and egg deposits, many commentators have suggested that the right to refrain from reproducing should not be infringed upon, unless there is clear and convincing evidence of the decedent donor's intent to procreate in the form of written consent.<sup>162</sup> However, to the extent that the decedent has taken affirmative action by donating sperm or eggs and leaving the power over these deposits to a loved one upon death, the decedent has evidenced an intent to permit procreation by those deposits and the absence of written consent should not serve as an excuse for denying the resulting child's right to inherit from his or her natural parent.<sup>163</sup>

With respect to the second tier, the one that concerns property, there are divergent views in terms of treating sperm and egg donations as property.<sup>164</sup> On the one hand, courts have held that

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<sup>159</sup> Bass, *supra* note 38 ("Scientific advances in assisted reproductive [technology] (ART) are taking place at breathtaking speed. Sperm and embryos are routinely frozen cryogenically and stored for extended periods of time, and advances in technology may soon make egg freezing just as routine. While this technology has enabled thousands of infertile individuals and couples to have children, it has, at the same time, given rise to a plethora of novel legal issues which existing laws, for the most part, are ill-equipped to resolve.").

<sup>160</sup> Jamie Rowsell, Note, *Stayin' Alive: Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400 (2003) (discussing the desire to respect a decedent's intent and some of the concerns associated with the use of a decedent's sperm to procreate). See generally *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002) (opining about reproductive rights and property concerns).

<sup>161</sup> Norman L. Cantor, *The Bane of Surrogate Decision-Making: Defining the Best Interests of Never-Competent Persons*, 26 J. LEGAL MED. 155, 191 n. 134 (2005) ("However, a decision regarding sterilization involves a choice between two fundamental liberty interests—a right to procreate and a right to refrain from procreation.").

<sup>162</sup> Stacey Scriven Bernstein, Comment, *Washington's 2002 Parentage Act: A Step Backward for the Rights of Nonmarital Children*, 30 SEATTLE U. L. REV. 195, 242 (2006).

<sup>163</sup> Gilbert, *supra* note 5, at 551 ("Some commentators contend that the action of depositing sperm in the first place is an indication of the depositor's intent to father a child.").

<sup>164</sup> Stacy Sutton, *The Real Sexual Revolution: Posthumously Conceived*



sperm cannot be classified as the assets of an estate.<sup>165</sup> However, on the other hand, courts and commentators alike have advocated for the recognition of a decedent's right to dispose of his or her genetic material by will.<sup>166</sup> The latter of the two approaches appears to be the more attractive option, inasmuch as it involves placing the impetus on the decedent to be proactive by providing for the disposition of his or her genetic material or otherwise specifically disinheriting a posthumously conceived child in a properly executed testamentary plan.<sup>167</sup> Indeed, by affording the decedent an opportunity to do so, the state will find itself in a better position to establish the default rules put forward herein, namely, the principles that the decedent's genetic material deposits should pass according to New York's intestate distribution law and the decedent's posthumously conceived child should be treated as any other non-marital child would be in the absence of legally enforceable testamentary expressions to the contrary.<sup>168</sup>

### 3. *The Child Support Concerns*

The notion that the legal remedy to the problems discussed in this Article should permit a decedent to disinherit his or her posthumously conceived child before such child reaches the age of majority is troubling on a variety of fronts, not the least of which is the dichotomy such a law would give rise to in the context of child support in life and death.<sup>169</sup> New York's Family Court Act does not permit a parent to skirt his or her parental support obligations during life, and the EPTL should not afford a parent the option to do so upon death, whether that child is born during the parent's lifetime or not.<sup>170</sup>

Under the aforementioned Family Court Act, a parent is

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*Children*, 73 ST. JOHN'S L. REV. 857 (1999) (discussing the legal, ethical, and moral issues involved in the property-rights context).

<sup>165</sup> Hecht v. Super. Ct., 59 Cal. Rptr. 2d 222, 226 (Cal. Ct. App. 1996).

<sup>166</sup> Hecht v. Super. Ct., 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993); *see also* 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.").

<sup>167</sup> Knaplund, *supra* note 1, at 110-15 (discussing the scenarios in which a posthumously conceived child might inherit from a decedent).

<sup>168</sup> Goldfarb, *supra* note 136, at 53 (suggesting how New York's statutory law with regard to posthumously conceived children might evolve).

<sup>169</sup> Brian C. Brennan, Note, *Disinheritance of Dependent Children: Why Isn't America Fulfilling its Moral Obligation?*, 14 QUINNIPIAC PROB. L.J. 125 (1999) (advocating for change in the parental disinheritance context).

<sup>170</sup> *Id.* at 163 ("If, upon death, an individual has failed to voluntarily recognize his obligations to the minor children, it is appropriate for the law to protect both the child and the state by imposing accountability for the burden the individual created and now leaves behind.").

obliged to provide a minor child with support until that child reaches the age of twenty-one.<sup>171</sup> This support obligation arises whether or not the parent intends to have the child, and even extends into the after-life in certain circumstances.<sup>172</sup> For example, in *Commissioner of Social Services v. Abizeid*, the Family Court of the State of New York, Nassau County, found that the Commissioner of Social Services could assert a claim against a deceased biological father's estate because the father died without providing for his son and the son's mother received public aid.<sup>173</sup> The court premised its decision based on the New York's Family Court Act which permits a party to commence a suit against a deceased person's estate to establish, among other things, paternity and support.<sup>174</sup>

As was the case in *Abizeid*, a parent's obligation of support to a posthumously conceived child should continue past the parent's death.<sup>175</sup> Such a rule is necessary in order to ensure that a posthumously conceived child does not become a ward of the state.<sup>176</sup> Absent such support, it is possible that the child will become a ward of the state, if the surviving parent encounters difficulty supporting the child.<sup>177</sup> Given the decedent's decision to preserve his or her genetic material for conception and the injustices associated with permitting that decedent to avoid the economic realities of posthumous conception, it logically follows that the decedent's estate should be required to contribute to the child's support.<sup>178</sup>

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<sup>171</sup> N.Y. FAM. CT. ACT § 413(a) (McKinney 2003) ("Except as provided in subdivision two of this section, the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine.").

<sup>172</sup> See generally *Comm'r of Soc. Servs. v. Abizeid*, N.Y. L.J., Apr. 15, 1996, at 32 ("[Whether] results of a blood genetic marker test administered to a putative father prior to his death in a paternity proceeding relating to a prior child of the same parties sufficiently supports [a] petitioner's standing under Family Court Act § 519(c) to commence a new paternity proceeding involving another child of the same parties.").

<sup>173</sup> *Id.* ("[Commissioner of Social Services had] standing to proceed with the paternity proceeding against [the decedent and the child's mother] pursuant to Family Court Act § 519.").

<sup>174</sup> *Id.* (discussing the New York Family Court's authority to decide issues of paternity and support).

<sup>175</sup> Cf. *Woodward*, 760 N.E.2d at 269-71 (expounding the standards for consent and support in the context of posthumous conception).

<sup>176</sup> Howard-Potter, *supra* note 13, at 67 ("Another policy weighing in favor of allowing posthumously conceived children to take as heirs of their deceased parent is to prevent such children from becoming wards of the State.").

<sup>177</sup> Brianne M. Star, Comment, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 624 (2004) ("[P]osthumous reproduction encourages single-parent support and possible public dependency of posthumously conceived children.").

<sup>178</sup> *Id.* at 624-25 ("However, while the natural economic restraints involved in procreative choices no longer affect the deceased father, these restraints are still faced by the mother.").

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## VI. CONCLUSION

Considering the antiquated manner in which the EPTL addresses the inheritance rights of posthumously conceived children, the New York Legislature must act to amend New York's statute. The proper legislative solution is one that involves providing for the recognition of posthumously conceived children as the legal issue and descendants of their respective biological parents. In doing so, the Legislature will enable the state to strike a balance between competing interests, namely, the decedent's interests in establishing testamentary plans, the government's interest in ensuring that minor children are provided for during childhood, and the interests of consenting adults in reproduction. Such legislative action is appropriate, given the development of ART and the many questions that the EPTL, in its current construction, leaves unanswered.