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Reimagining Postmortem Conception

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REIMAGINING POSTMORTEM CONCEPTION

Kristine S. Knaplund*

ABSTRACT

Hundreds, likely thousands, of babies have been born years after a parent has died. Thousands more people have cryopreserved their sperm, ova, and embryos, or have requested that a loved one's gametes be retrieved after death to produce still more such children. Twenty-three states have enacted statutes detailing how these postmortem conception children can inherit from their predeceased parents.

And yet, few of these children will be able to inherit. The statutes create a bewildering array of standards, with over a dozen definitions of consent, variations in signature and witnessing requirements, and hurdles imposed in one state but not another. With our mobile population, the odds that a consent executed in one place will be accepted in another are small. With one exception—a New York amendment effective in February 2021—the states exclude most LGBT persons from being a postmortem parent. By failing to define when conception occurs, the statutes provoke a fight with those who use in vitro fertilization while both genetic parents are alive.

This Article is the first time that the laws of all 50 states are examined to provide a comprehensive look at whether a postmortem child inherits and determine how wildly disparate the legal standards are from public sentiment. The Article details the precise ways the law fails the problem and proposes four concrete solutions for states to adopt.

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CONTENTS

INTRODUCTION	907
I. THE CURRENT STATE OF AFFAIRS: DEMAND FOR POSTMORTEM CONCEPTION AND THE LAW IN FIFTY STATES	910
A. <i>How Much Reproductive Material Is Now Stored?</i>	912
1. <i>Sperm Banking</i>	912
2. <i>Cryopreserved Embryos</i>	914
3. <i>Cryopreserved Ova</i>	918
B. <i>A Second Data Point: The Increasing Demand for Retrieval of Sperm or Ova from the Recently Deceased or Those in a Persistent Vegetative State</i>	919
C. <i>Current Legal Climate in All Fifty States</i>	920
1. <i>Addressing Orderly Administration of Estates</i>	921
2. <i>A Myriad of Ways to Establish the Decedent’s Consent</i>	928
3. <i>States Without Statutes on PMC Children</i>	930
II. FIVE REASONS THE LAW DOES NOT MATCH PUBLIC SENTIMENT ON POSTMORTEM CONCEPTION	935
A. <i>Stringent Statutory Requirements Make Compliance Difficult</i>	936
B. <i>Few States Define When “Conception” Occurs</i>	938
C. <i>Hospital Standards for Postmortem Gamete Retrieval Are out of Sync with Legal Standards</i>	940
D. <i>All but One Statute Requires a Genetic Connection to the PMC Child</i>	943
E. <i>The Variety of Definitions of “Consent” and Differences in Legal Formalities Mean That One State’s Writing Is Unlikely to Be Accepted in Another</i>	945
III. SOLUTIONS	949
CONCLUSION	954

INTRODUCTION

Postmortem conception¹—the implantation of an embryo months or years after one (or both) of its parents has died—has now resulted in hundreds of children being born in the United States. Thousands of adults have stored their reproductive material for their own later use to potentially create more embryos for later implantation. Americans generally favor the idea of a partner using a loved one’s sperm or eggs after death.² In 2013, a random survey of 857 adults concluded that 76% thought that postmortem conception (PMC) should be allowed if the deceased were married at death, while 66% would approve of it for an unmarried decedent.³ Respondents were even more likely to be supportive if the decedent had consented in writing, with 81% in favor.⁴ Two surveys in 2012 and 2013 found wide support for a partner retrieving sperm or ova from a recently deceased partner to have a PMC child.⁵ Brigham and Women’s Hospital commissioned an online survey of attitudes towards PMC after fielding one or two such requests a year; their 2012 survey of 1,049 U.S. adults found that close to 50% of respondents thought a person should be able to retrieve gametes from a dead or dying partner, most of whom conditioned the request on the decedent’s written consent.⁶ A random survey of 846 adults published in 2013 found even greater acceptance of postmortem sperm retrieval—especially if the decedent was married at death—with 67% of respondents in favor if the couple was married and 51% in favor if

1. Postmortem conception differs from the traditional posthumous conception, long recognized at common law, which allowed a child in utero at the time of a husband’s death to inherit from his estate. *See, e.g.*, S.C. CODE ANN. § 62-2-108 (2009).

2. *See infra* Section I.A.

3. Jason D. Hans & Brigitte Dooley, *Attitudes Toward Making Babies . . . with a Deceased Partner’s Cryopreserved Gametes*, 38 DEATH STUD. 571, 575 (2014).

4. *Id.*

5. Amy Norton, *Public Favors Posthumous Reproduction, with Consent*, REUTERS: HEALTHCARE & PHARMA, <https://www.reuters.com/article/us-posthumous-reproduction/public-favors-posthumous-reproduction-with-consent-idUSBRE86C0ZK20120713> [<https://perma.cc/8G4C-ZYUC>] (July 13, 2012, 2:31 PM); *see also* Jason D. Hans & Erin L. Yelland, *American Attitudes in Context: Posthumous Sperm Retrieval and Reproduction*, 4 J. CLINICAL RSCH. & BIOETHICS (SPECIAL ISSUE), 2013, at 1, 5.

6. Norton, *supra* note 5.

the couple was cohabiting.⁷ Respondents were more likely to be supportive of PMC if the decedent's wishes were known, with 74% in favor regardless of whether the wishes were written or verbal; even if the decedent's wishes were unknown, however, 55% would still support the request for postmortem retrieval.⁸ In another anonymous survey of 106 couples undergoing fertility treatments, 78% supported retrieving sperm or ova after death.⁹

Uniform and model acts have gradually progressed to reflect this acceptance of PMC. The 1988 Uniform Status of Children of Assisted Conception Act (USCACA) barred PMC children from inheriting “to avoid the problems of intestate succession which could arise.”¹⁰ Only two states, North Dakota and Virginia, initially adopted the provision, but both have now replaced it.¹¹ In 2000, the Uniform Parentage Act proposed that a spouse who consented in writing would be a parent of a PMC child; in 2002, “spouse” was changed to “individual.”¹² Finally in 2008, the Uniform Probate Code provided for PMC children in both intestacy and class gifts if the decedent intended to be treated as a parent, which could be shown by a signed record or by clear and convincing evidence.¹³ A person who died married, with no divorce proceedings pending, was presumed to have consented.¹⁴ Thus, in twenty years, the model acts went from a presumption that no PMC child would inherit in the 1988 USCACA

7. Hans & Yelland, *supra* note 5.

8. *Id.*

9. Gary S. Nakhuda et al., *Posthumous Assisted Reproduction: A Survey of Attitudes of Couples Seeking Fertility Treatment and the Degree of Agreement Between Intimate Partners*, 96 FERTILITY & STERILITY 1463, 1463, 1465 (2011).

10. Benjamin C. Carpenter, *A Chip off the Old Ice Block: How Cryopreservation Has Changed Estate Law, Why Attempts to Address It Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347, 367 (2011) (quoting UNIF. STATUS OF CHILD. OF ASSISTED CONCEPTION ACT § 4 cmt. (UNIF. L. COMM'N 1988)).

11. *Id.* at 368. North Dakota repealed the provision in 2005 and replaced it with the Uniform Parentage Act. *Id.* Virginia amended the provision to allow a PMC child born within ten months of the decedent's death to inherit. *Id.*

12. UNIF. PARENTAGE ACT § 708 (UNIF. L. COMM'N 2002) (amended 2017).

13. Carpenter, *supra* note 10, at 372.

14. *Id.* at 372–73. A 2008 model act by the American Bar Association, proposing a return to written consent only limited to a married decedent, was the exception to this presumption, but no jurisdictions adopted the language. *Id.* at 375.

to a presumption that all PMC children of a married decedent would inherit in the 2008 Uniform Probate Code, a position that better reflects current public opinion.

Legislatures in twenty-four states have responded by answering the difficult question of whether these PMC children can inherit from their predeceased parent, with twenty-three statutes allowing the child to inherit if certain conditions are met.¹⁵ Courts in another five states with no current statute governing PMC inheritance have looked at intestacy laws to ascertain if these laws, created at a time when assisted reproductive technology did not exist, include PMC offspring.¹⁶

And yet, even though we have been wrestling with this issue for decades, the problem is by no means solved.¹⁷ State statutes, which often impose rigid requirements, are out of step with public sentiment that PMC children should inherit.¹⁸ Questions arise in attempting to define when “conception” occurs if a couple uses in vitro fertilization (IVF) while both are alive but implants the embryo in a woman’s womb after one parent has died. All but one of the state statutes raise obstacles in consenting to be a parent of a PMC child for both those who are infertile and for lesbian and gay couples.¹⁹ The few hospital protocols that have been adopted for obtaining sperm or ova postmortem do not necessarily comport with the legal standards in their states.²⁰ Perhaps most importantly, in a mobile society where a person may live in one state, undergo costly assisted reproductive techniques in a second state, and die as a domiciliary in a third state, the plethora of state-mandated consent procedures and formalities

15. *Id.* at 362.

16. *Id.*

17. W. Ombelet & J. Van Robays, *Artificial Insemination History: Hurdles and Milestones*, 7 *FACTS VIEWS & VISIONS OBGYN* 137, 137 (2015). Precisely how long this issue has been debated is not known because the first PMC birth was not recorded. *Id.* The assisted reproductive technology to create a PMC child has been available since 1953 when the first human was conceived using frozen sperm. *Id.*

18. Carpenter, *supra* note 10, at 362.

19. *Id.* at 375.

20. See Kathryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 *U. CHI. LEGAL F.* 289, 300.

mean that a document executed according to one state's requirements is unlikely to be accepted in another.²¹

This Article proceeds as follows. Part I describes the current state of affairs by first examining how much reproductive material is now stored and how much is obtained postmortem to determine the likelihood that the number of PMC children will continue to expand. Part I also provides a fifty-state overview of whether a PMC child will be considered “issue” of the predeceased parent and thus inherit from them. Part II examines in detail the many reasons this fifty-state approach is unsatisfactory, such as requiring a PMC child to jump through numerous hoops in short time periods, failing to define when “conception” occurs, and omitting those who need a third person's sperm or ova to reproduce. Part III proposes solutions to the twenty-six states yet to enact legislation and proposes amendments for the states that have.

I. THE CURRENT STATE OF AFFAIRS: DEMAND FOR POSTMORTEM CONCEPTION AND THE LAW IN FIFTY STATES

In hundreds of cases, gametes retrieved either pre- or postmortem have resulted in babies being born years after the genetic parent's death,²² which has been detailed in newspaper accounts,²³ law review articles,²⁴ and requests for survivors' benefits from Social Security.

21. See *infra* Section II.E.

22. A gamete is a “reproductive cell, either a sperm or an egg.” Kristin Brogaard, *A Glossary of Fertility Terms and Acronyms*, PATHFERTILITY, <https://pathfertility.com/fertility-glossary/> [<https://perma.cc/EQP9-E49R>].

23. See, e.g., Keith Oppenheim, *Soldier Fathers Child Two Years After Dying in Iraq*, CNN (Mar. 20, 2007, 10:14 AM), <https://www.cnn.com/2007/US/03/20/oppenheim.btsc/> [<https://perma.cc/9J76-LAM2>].

24. See generally John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027 (1994); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901 (1997); Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251 (1999); Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067 (2003); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008); Mary F. Radford, *Postmortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 EST. PLAN. & CMTY. PROP. L.J. 33 (2009); Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*,

From 1993 to 2015, cases in Arkansas,²⁵ Arizona,²⁶ California,²⁷ Florida,²⁸ Iowa,²⁹ Louisiana,³⁰ Massachusetts,³¹ Michigan,³² Nebraska,³³ New Hampshire,³⁴ New Jersey,³⁵ New York,³⁶ Pennsylvania,³⁷ Utah,³⁸ and Virginia,³⁹ all explored the question of whether a PMC was entitled to inherit. The Social Security Administration declared in 2011 that it had received survivors' claims from more than one hundred children conceived postmortem.⁴⁰ Cases also debated whether a long-ago settlor intended to include postmortem grandchildren in his trust when he provided for his children's "issue."⁴¹ Almost half the states have enacted legislation specifically to deal with this phenomenon.⁴²

16 GEO. MASON L. REV. 403 (2009); Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787 (2012).

25. *Finley v. Astrue*, 270 S.W.3d 849, 850 (Ark. 2008).

26. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 596 (9th Cir. 2004), *abrogated by Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541 (2012).

27. *Vernoff v. Astrue*, 568 F.3d 1102, 1104 (9th Cir. 2009).

28. *Capato*, 566 U.S. 541; *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005).

29. *Beeler v. Astrue*, 651 F.3d 954, 956 (8th Cir. 2011).

30. Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 632 (2004) (citing Complaint at 3, *Hart v. Shalala*, No. 93-3944 (E.D. La. Dec. 12, 1993)).

31. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002); *Hanson v. Astrue*, 733 F. Supp. 2d 214, 214–15 (D. Mass. 2010).

32. *Mattison ex rel. M.M. & M.M. v. Soc. Sec. Comm'r (In re Certified Question from the U.S. Dist. Ct. for the W. Dist. of Mich.)*, 825 N.W.2d 566, 567 (Mich. 2012).

33. *Amen v. Astrue*, 822 N.W.2d 419, 420 (Neb. 2012).

34. *Khabbaz ex rel. Eng v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180, 1182 (N.H. 2007).

35. *In re Estate of Kolacy*, 753 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 2000).

36. *Bosco ex rel. B.B. v. Astrue*, No. 10 CV. 7544, 2013 WL 3357161, at *1 (S.D.N.Y. July 3, 2013); *MacNeil ex rel. A.T.M. & C.E.M. v. Colvin*, No. 14-CV-1398, 2016 WL 11476965, at *1 (N.D.N.Y. Feb. 8, 2016); *MacNeil v. Berryhill*, 869 F.3d 109, 111 (2d Cir. 2017).

37. *Seaman v. Colvin*, 145 F. Supp. 3d 421, 425 (E.D. Pa. 2015).

38. *Burns v. Astrue*, 289 P.3d 551, 553 (Utah 2012).

39. *Schafer v. Astrue*, 641 F.3d 49, 51 (4th Cir. 2011).

40. Anthony T. Selvaggio & Nancy E. Klotz, *Aftereffects: New Legislation Addresses the Inheritance Rights of a Posthumously Conceived Child*, N.Y. ST. BAR ASS'N J., Jan. 2015, at 30, 30.

41. *See, e.g., In re Zhu*, 103 N.Y.S.3d 775, 777 (N.Y. App. Div. 2019).

42. *See* Kristine S. Knaplund, *Survey of State PMC Statutes and Court Decisions (2020)* (on file with the Georgia State University Law Review). Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, New Hampshire, New Mexico, New York, North Dakota, Oregon, Texas, Utah, Vermont, Virginia, Washington, and Wyoming have statutes allowing a PMC child to inherit if certain conditions are met. *Id.* Minnesota's statute precludes all children of assisted reproduction who are not in gestation at a parent's death from inheriting. MINN. STAT. ANN. § 524.2-120 (West 2012).

Are these children rare outliers, or are there indications that many more such children will be born in the future? Two data points—the enormous volume of reproductive material now being stored for a person’s own use and the growing number of requests for retrieval of sperm or ova from those who have recently died or are in a persistent vegetative state—confirm that many more PMC children will be born.

A. *How Much Reproductive Material Is Now Stored?*

1. *Sperm Banking*

Sperm, ova, and embryos can be frozen, thawed, and successfully used years after a person has died. No estimates exist as to how many men have cryopreserved their sperm for later use, but several facts indicate that the number is in the thousands. First, the practice of cryopreservation has been successfully employed by humans for more than fifty years, since liquid nitrogen (rather than dry ice) came into use as a preservative in 1963.⁴³ The first human conceived with frozen sperm was born even earlier in 1953.⁴⁴ No one knows how long cryopreserved sperm remains viable; so far, the longest period between storage and successful use is twenty-two years in one report,⁴⁵ and twenty-eight years in another.⁴⁶

Second, men choose to bank sperm for a wide variety of reasons.⁴⁷ Certain medical procedures will render them either temporarily or

43. Hamoun Rozati et al., *Process and Pitfalls of Sperm Cryopreservation*, 6 J. CLINICAL MED. 1, 1 (2017), <https://ncbi.nlm.nih.gov/Pmc/articles/PMC5615282/> [<https://perma.cc/B8XL-PME8>]. See generally William Perloff et al., *Human Semen, Frozen and Stored in Liquid Nitrogen, Is Used Successfully by Clinical Investigators*, 188 JAMA 39 (1964), <https://jamanetwork.com/journals/jama/article-abstract/1163380> [<https://perma.cc/S3L9-PCGG>].

44. Ombelet & Robays, *supra* note 17, at 140.

45. Kate Snow et al., *Frozen Sperm Still Viable Decades Later*, ABC NEWS, <https://abcnews.go.com/GMA/OnCall/story?id=7303722&page=1> [perma.cc/5X5Y-UWWH] (Apr. 10, 2009).

46. *Sperm Banking FAQs*, NEW ENG. CRYOGENIC CTR. INC., <https://www.necryogenic.com/sperm-banking-faqs> [<https://perma.cc/W5PU-UFSA>].

47. John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 36–37 (2004) (“It is now common practice for married males of reproductive age with cancer to store sperm or testicular tissue prior to treatment.”); Charles P. Kindregan, Jr.,

permanently infertile, and consequently they may cryopreserve sperm in advance of treatments if they wish to have children later.⁴⁸ For example, Eric MacNeil stored his sperm after his diagnosis of non-Hodgkins lymphoma, and his widow used his cryopreserved sperm after his death to give birth to fraternal twins.⁴⁹ William Kolacy, diagnosed with leukemia, banked his sperm on the same day he began chemotherapy, and his widow, using his cryopreserved sperm, gave birth to twin girls eighteen months after his death.⁵⁰ Sperm banking is also useful for those with spinal cord injuries or other conditions that prevent ejaculation.⁵¹ Minors may be advised to bank their sperm before starting treatment. A 2010 childhood cancer survivor study found that 46% of cancer survivors reported infertility compared to only 17.5% of their siblings also reporting infertility.⁵²

Third, even healthy men take steps to preserve their sperm. Before deploying to the Middle East in 1991 and 2003, American soldiers went to sperm banks in the event that exposure to chemical or biological warfare affected their fertility.⁵³ A 2008 U.S. Army pamphlet urged cryopreservation as part of the Soldier Readiness Processing Training.⁵⁴ Those about to undergo gender reassignment

Genetically Related Children: Harvesting of Gametes from Deceased or Incompetent Persons, 7 J. HEALTH & BIOMEDICAL L. 147, 162–64 (2011).

48. Robertson, *supra* note 47, at 35; Rozati et al., *supra* note 43, at 2. For example, a common treatment for Hodgkin's disease and other lymphomas, chlormethine, results in prolonged absence of viable sperm for 90%–100% of patients. Rozati et al., *supra* note 43, at 4.

49. MacNeil *ex rel.* A.T.M. & C.E.M. v. Colvin, No. 14-CV-1398, 2016 WL 11476965, at *3–4 (N.D.N.Y. Feb. 8, 2016).

50. *In re Estate of Kolacy*, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000).

51. Rozati et al., *supra* note 43, at 5. For example, 50%–75% of men with multiple sclerosis report ejaculatory dysfunction. *Id.*

52. *Id.*

53. See, e.g., Kathleen Doheny, *War Prompts Planning for Future Families: Coping: As Men Face Deployment, Couples Turn to Sperm Banks.*, L.A. TIMES (Feb. 4, 1991, 3:00 AM), <https://www.latimes.com/archives/la-xpm-1991-02-04-vw-534-story.html> [https://perma.cc/XKM8-XMKD]; Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY, https://usatoday30.usatoday.com/news/nation/2003-01-26-bank-usat_x.htm [https://perma.cc/38E3-4TM5] (Jan. 27, 2003, 12:44 AM); Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 91 (2004).

54. Charles P. Kindregan, Jr., *Dead Soldiers and Their Posthumously Conceived Children*, 31 J. CONTEMP. HEALTH L. & POL'Y 74, 80 (2015).

may also bank their gametes.⁵⁵ In a 2015 Ethics Committee opinion, the American Society for Reproductive Medicine recommended offering cryopreservation to all individuals undergoing reassignment.⁵⁶ In all these cases, the gametes are not donated to others but are frozen for the person's own later use.⁵⁷

2. Cryopreserved Embryos

The technology to freeze and successfully thaw human embryos was developed about thirty years after the cryopreservation of sperm,⁵⁸ with the first successful human pregnancy using a cryopreserved embryo reported in 1983.⁵⁹ Since then, thousands of embryos have been frozen each year, with estimates that a million or more are now cryopreserved.⁶⁰ The number is so large for at least four reasons. First, IVF, in which a woman undergoes hormone treatment to produce and retrieve eggs that are then fertilized, is

55. Lux Alptraum, *A Startup Looks to Reinvent Sperm Banking — and Serve Trans Women*, ONEZERO (Aug. 20, 2019), <https://onezero.medium.com/a-startup-looks-to-disrupt-sperm-banking-and-serve-trans-women-fefcef54e18a> [<https://perma.cc/UP4N-7N74>].

56. Rozati et al., *supra* note 43, at 5.

57. Ivor Davis, *Posterity Insurance*, CHI. TRIB. (Apr. 26, 1988), chicagotribune.com/news/ct-xpm-1988-04-26-8803110983-story.html [<https://perma.cc/F2SV-42RH>] (reporting that 2,000 of 2,400 depositors at California Cryobank had banked sperm for their own use). Sperm banks routinely post lists of “who should bank” and advertise their storage fees. *See, e.g., Getting a Vasectomy? Consider Storing Your Sperm First*, SEATTLE SPERM BANK, <https://www.seattlespermbank.com/getting-a-vasectomy-store-your-sperm-first/> [<https://perma.cc/GCW6-MUBC>]; *Sperm Banking Price List*, NEW ENG. CRYOGENIC CTR. INC., <https://www.necryogenic.com/sperm-banking-pricelist/> [<https://perma.cc/HGD2-4XBQ>]; *Pricing & Payment Plans*, CRYOCHOICE PRIV. SPERM BANKING, <https://cryochoice.com/pricing-sperm-banking/> [<https://perma.cc/D3FN-LPMP>].

58. Embryo cryopreservation is “[t]he process of freezing one or more embryos to save them for future use. [It] involves in vitro fertilization, a procedure in which eggs are removed from a woman’s ovary and combined with sperm in the laboratory to form embryos.” *Embryo Cryopreservation*, NAT’L CANCER INST., <https://www.cancer.gov/publications/dictionaries/cancer-terms/def/embryo-cryopreservation> [<https://perma.cc/9ZPN-FSBZ>].

59. Carl H. Coleman, *Procreative Liberty and Contemporaneous Choice: An Inalienable Rights Approach to Frozen Embryo Disputes*, 84 MINN. L. REV. 55, 55 (1999).

60. Caroline Lester, *Embryo ‘Adoption’ Is Growing, but It’s Getting Tangled in the Abortion Debate*, N.Y. TIMES (Feb. 17, 2019), <https://www.nytimes.com/2019/02/17/health/embryo-adoption-donated-snowflake.html> [<https://perma.cc/M6AK-U4SV>] (noting estimates between 600,000 and one million); Marilyn Marchione, *In Limbo: Leftover Embryos Challenge Clinics, Couples*, AP NEWS (Jan. 17, 2019), <https://apnews.com/article/046d6fbc4c564caebac7e560cd87a26a> (“One study estimated there were 1.4 million in the U.S.”).

expensive,⁶¹ and it may have side effects.⁶² Cryopreserving some of the resulting embryos means a later attempt at pregnancy will not require the entire cycle of hormones and retrieval.⁶³ Doctors retrieve and fertilize as many eggs as possible in the initial attempt, with the harvesting of about fifteen eggs seen as optimal.⁶⁴ The excess embryos are stored for later use.⁶⁵ In 2017, 31% of those starting IVF said that banking their egg or embryo was one reason they used assisted reproduction.⁶⁶

Second, as IVF becomes more successful, doctors need to implant fewer embryos, leaving more to be stored for future use. In 2000,

61. *IVF Cost: Analyzing the True Cost of In Vitro Fertilization*, CNY FERTILITY, <https://www.cnyfertility.com/ivf-cost/> [<https://perma.cc/2ZB6-CZ5W>] (Oct. 12, 2020). CNY Fertility states that the national average for one IVF cycle is about \$20,000, including medications. *Id.* Total costs for a live birth are generally much higher; one source estimated the cost at between \$66,000 and \$114,000. Katie Falloon & Philip M. Rosoff, *Who Pays? Mandated Insurance Coverage for Assisted Reproductive Technology*, 16 *AMA J. ETHICS* 63, 63 (2014). Currently sixteen states mandate insurance coverage for assisted reproductive technology (ART) procedures. *State Laws Related to Insurance Coverage for Infertility Treatment*, NCSL (June 12, 2019), <https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws> [<https://perma.cc/XVW8-RPVW>].

62. Fact Sheet of *Side Effects of Injectable Fertility Drugs (Gonadotropins)*, AM. SOC'Y FOR REPROD. MED., https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/side_effects_of_injectable_fertility_drugs_gonadotropins_factsheet.pdf [<https://perma.cc/5CMZ-CC8W>]. Ten to twenty percent may see enlarged ovaries and accumulation of fluid in the abdomen, with severe cases resulting in nausea, vomiting, blood clots, and other symptoms. *Id.*

63. Coleman, *supra* note 59, at 59. Hormone stimulation usually results in the retrieval of more eggs than can be safely implanted at one time, so the excess is generally cryopreserved. *Id.*

64. Sesh Kamal Sunkara et al., *Association Between the Number of Eggs and Live Birth in IVF Treatment: An Analysis of 400 135 Treatment Cycles*, 26 *HUM. REPROD.* 1768, 1774 (2011).

65. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 54, 85 (2007), <https://www.cdc.gov/art/pdf/archived/2005ART508.pdf> [<https://perma.cc/MJZ6-XCFL>]. In 2005, even though only 15% of ART cycles used frozen nondonor embryos, 98% of the 422 reporting clinics offered cryopreservation. *Id.* at 85. The following year, with 426 clinics reporting, frozen nondonor embryos were used in 16% of ART cycles, and 100% of the clinics offered cryopreservation. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 54, 89 (2008), https://www.cdc.gov/art/pdf/archived/2006-ART_508tagged.pdf [<https://perma.cc/TPN3-333C>].

66. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., 2017 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 23 (2019) [hereinafter 2017 CDC ART SUCCESS RATES], <ftp://ftp.cdc.gov/pub/Publications/art/ART-2017-Clinic-Report-Full.pdf>.

three or more embryos were implanted in two-thirds of all IVF transfers in the United States.⁶⁷ That proportion declined to 39% by 2008.⁶⁸ In 2002, only 1% of patients under age thirty-five with good prognoses had a single-embryo transfer.⁶⁹ By 2009, after the Society for Assisted Reproductive Technology revised its guidelines,⁷⁰ single-embryo transfers for women under thirty-five rose to 10%, resulting in far more excess embryos.⁷¹ As is the case with cryopreserved sperm, we do not know how long embryos can be frozen. Researchers have speculated that a frozen embryo may still be viable after fifty years.⁷² The longest report so far has been a child born after an embryo was cryopreserved for twenty-seven years.⁷³

Third, cryopreservation allows for preimplantation genetic testing.⁷⁴ The future parent can ascertain if any embryos have certain hereditary diseases or genetic abnormalities before selecting any for implant.⁷⁵ In 2017, 11% of those using assisted reproductive technology (ART) reported preimplantation genetic testing as a reason for using assisted reproduction.⁷⁶ Although approximately 16% of all ART cycles in 2007 used frozen embryos,⁷⁷ that number

67. Am. Soc’y for Reprod. Med., *Elective Single-Embryo Transfer*, 97 FERTILITY & STERILITY 835, 835 (2012).

68. *Id.*

69. *Id.*

70. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUM. SERVS., 2007 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 67 (2009) [hereinafter 2007 CDC ART SUCCESS RATES], https://www.cdc.gov/art/pdf/archived/COMPLETE_2007_ART_508tagged.pdf [https://perma.cc/D72Q-LAFZ].

71. Am. Soc’y for Reprod. Med., *supra* note 67.

72. Coleman, *supra* note 59, at 60.

73. Angeline Jane Bernabe, *Baby Born from 27-Year-Old Frozen Embryo Breaks Record*, GMA (Nov. 30, 2020), <https://www.goodmorningamerica.com/wellness/story/baby-born-27-year-frozen-embryo-breaks-record-74469304> [https://perma.cc/J38V-4T6K]. The previous record, set in 2017, was twenty-four years. Sarah Zhang, *A Woman Gave Birth from an Embryo Frozen for 24 Years*, THE ATLANTIC (Dec. 21, 2017), <https://www.theatlantic.com/science/archive/2017/12/frozen-embryo-ivf-24-years/548876/> [perma.cc/V357-R6GN].

74. Min Liu et al., *Assessment of Clinical Application of Preimplantation Genetic Screening on Cryopreserved Human Blastocysts*, REPROD. BIOLOGY & ENDOCRINOLOGY, Apr. 2016, at 1, 1.

75. *Id.*

76. 2017 CDC ART SUCCESS RATES, *supra* note 66.

77. 2007 CDC ART SUCCESS RATES, *supra* note 70, at 56.

increased to about 69% of ART cycles ten years later.⁷⁸ We now have the technology to not only identify gene mutations but also to correct some of them, particularly those created by a single gene.⁷⁹ Although this gene editing is highly controversial,⁸⁰ some predict that it may become available in as few as ten years,⁸¹ encouraging even more Americans to use ART and store their excess embryos.

Fourth, with more patients cryopreserving their embryos and implanting fewer of them, many patients face the dilemma of what to do with the embryos they do not implant. By all accounts, patients do not appear to be destroying or donating large numbers of them.⁸² A small number of these embryos—perhaps 5% to 7%—have likely been abandoned due to the nonpayment of storage fees.⁸³ Many patients who originally intended to donate them have reconsidered. A 2001 letter to the *New England Journal of Medicine* stated that 82% of couples who initially chose to donate surplus embryos to another couple and 88% of those who said they would donate to research later changed their minds, leaving the embryos in storage.⁸⁴ A study

78. 2017 CDC ART SUCCESS RATES, *supra* note 66.

79. Giovanni Rubeis & Florian Steger, *Risks and Benefits of Human Germline Genome Editing: An Ethical Analysis*, 10 ASIAN BIOETHICS REV. 133, 140 (2018). “[C]ystic fibrosis, sickle-cell disease, and Duchenne muscular dystrophy[] [are] all monogenic diseases that result from a single mutation along the human genome.” Raymond C. O’Brien, *The Immediacy of Genome Editing and Mitochondrial Replacement*, 9 WAKE FOREST J.L. & POL’Y 419, 434 (2019).

80. O’Brien, *supra* note 79, at 443–44 (discussing the birth of twins in China in 2018 following genome editing). A statement issued by the Organizing Committee of the Second International Summit on Human Genome Editing declared that the committee found the claim that the Chinese scientist had altered the genomes to create the twins “deeply disturbing” and that the procedure was “irresponsible” and “failed to conform with international norms.” Statement, Org. Comm. of the Second Int’l Summit on Hum. Genome Editing (Nov. 28, 2018), <https://www.nationalacademies.org/news/2018/11/statement-by-the-organizing-committee-of-the-second-international-summit-on-human-genome-editing> [<https://perma.cc/PFN7-SJMM>]. A recent study found that the technology made “unintended and unwanted changes, frequently eliminating an entire chromosome or large sections of it.” Amy Dockser Marcus, *Crispr Gene Editing Can Lead to Big Mistakes in Human Embryos*, WALL ST. J., <https://www.wsj.com/articles/crispr-gene-editing-can-lead-to-big-mistakes-in-human-embryos-11603983608> [<https://perma.cc/RS5D-8ZBW>] (Oct. 29, 2020, 11:00 AM).

81. Antonio Regalado, *Engineering the Perfect Baby*, MIT TECH. REV. (Mar. 5, 2015), <https://www.technologyreview.com/2015/03/05/249167/engineering-the-perfect-baby/> [<https://perma.cc/CLY8-4ELJ>].

82. See Marchione, *supra* note 60.

83. *Id.*

84. Robert D. Nachtigall et al., *Parents’ Conceptualization of Their Frozen Embryos Complicates*

of forty-two cancer survivors who had cryopreserved their embryos before their treatment found that 56% still had embryos in storage fifteen years later, even though the mean age of the participants was then thirty-nine years old.⁸⁵ One state, Louisiana, severely restricts a couple's options for surplus embryos by prohibiting their destruction.⁸⁶ Thus, a huge percentage of these cryopreserved embryos continue to be available indefinitely for future use.⁸⁷

3. *Cryopreserved Ova*

The successful cryopreservation of unfertilized ova is the most recently developed technology, with the first baby born in 1986.⁸⁸ Thus, the number of cryopreserved eggs is likely small. Still, that number is rapidly growing.⁸⁹ Women without a male partner or women who do not wish a male partner to have a say in the disposition of embryos can choose to freeze ova instead of an embryo. In addition, many women freeze their ova because they are about to undergo either a procedure that will affect their fertility or gender reassignment.⁹⁰ Since the American Society for Reproductive Medicine declared in 2012 that egg freezing was no longer an experimental procedure,⁹¹ an increasing number of women, including

the Disposition Decision, 84 FERTILITY & STERILITY 431, 431 (2005).

85. J. Barcroft et al., *Fifteen Year Follow-Up of Embryos Cryopreserved in Cancer Patients for Fertility Preservation*, 30 J. ASSISTED REPROD. & GENETICS 1407, 1407, 1410 (2013).

86. LA. STAT. ANN. § 9:129 (2018). In Kentucky, public medical facilities may do research on embryos so long as it does not result in their intentional destruction. KY. REV. STAT. ANN. § 311.715(1) (West 2018).

87. See Marchione, *supra* note 60.

88. Carpenter, *supra* note 10, at 356.

89. *Id.*

90. AM. SOC'Y FOR REPROD. MED., FACT SHEET: FEMALE CANCER, CRYOPRESERVATION, AND FERTILITY 1 (2014), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/female_cancer_cryopreservation_and_fertility_factsheet.pdf [https://perma.cc/CWU5-2PSV]; Angie Leventis Lourgou, *Before They Transition, Some Transgender Youth Preserve Fertility by Banking Sperm or Eggs*, CHI. TRIB. (Apr. 3, 2018, 5:00 AM), <https://www.chicagotribune.com/news/ct-met-transgender-reproduction-20180308-story.html> [https://perma.cc/23WU-22Y5]; Julie Compton, *Transgender Men, Eager to Have Biological Kids, Are Freezing Their Eggs*, NBC NEWS (Mar. 5, 2019, 5:18 AM), <https://www.nbcnews.com/feature/nbc-out/transgender-men-eager-have-biological-kids-are-freezing-their-eggs-n975331> [https://perma.cc/WX2K-8B3N].

91. Caitlin Hagan, *Experts: Egg Freezing No Longer "Experimental,"* CNN (Oct. 19, 2012, 2:52

those not ready for motherhood, have stored their ova as fertility insurance, with the market growing about 25% a year.⁹²

B. A Second Data Point: The Increasing Demand for Retrieval of Sperm or Ova from the Recently Deceased or Those in a Persistent Vegetative State

In addition to those who have stored their reproductive material for their own use, there have been many requests to retrieve sperm or ova after a loved one has died or entered a permanent vegetative state. The first reported request for postmortem retrieval of gametes was in 1980.⁹³ By 1995, there were eighty-two requests for postmortem sperm retrieval recorded at forty facilities in the United States, none of which had protocols for dealing with the requests.⁹⁴ New York-Presbyterian Hospital, among other facilities, then adopted guidelines specifying consent procedures.⁹⁵ By 2002, twenty-one facilities had formal policies.⁹⁶ Family members have also made requests to retrieve ova postmortem,⁹⁷ although these requests are much rarer than those for sperm retrieval.⁹⁸

PM), <https://www.cnn.com/2012/10/19/health/egg-freezing/index.html#:~:text=Freezing%20a%20woman's%20eggs%20should,now%20standard%20for%20infertility%20treatment> [<https://perma.cc/BZ7L-BRU7>].

92. Mary Pflum, *Egg Freezing 'Startups' Have Wall Street Talking – and Traditional Fertility Doctors Worried*, NBC NEWS, <https://www.nbcnews.com/health/features/egg-freezing-startups-have-wall-street-talking-traditional-fertility-doctors-n978526> [<https://perma.cc/VCQ4-UX5Y>] (Mar. 4, 2019, 7:16 PM) (reporting that 475 women froze their eggs in 2009 and that 7,300 women froze their eggs in 2016).

93. Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 244 (2000).

94. Frances R. Batzer et al., *Postmortem Parenthood and the Need for a Protocol with Posthumous Sperm Procurement*, 79 FERTILITY & STERILITY 1263, 1263 (2003).

95. *Postmortem Sperm Retrieval (PMSR)*, WEILL CORNELL MED. UROLOGY [hereinafter *PMSR*], <https://urology.weillcornell.org/postmortem-sperm-retrieval> [<https://perma.cc/HQ9Z-G9XF>].

96. Batzer et al., *supra* note 94.

97. David M. Greer et al., *Case 21-2010: A Request for Retrieval of Oocytes from a 36-Year-Old Woman with Anoxic Brain Injury*, 363 NEW ENG. J. MED. 276, 276 (2010); Ryan Jaslow, *Dead Girl's Family Harvests Her Eggs: Was It Unethical?*, CBS NEWS (Aug. 11, 2011, 4:29 PM), <https://www.cbsnews.com/news/dead-girls-family-harvests-her-eggs-was-it-unethical/> [<https://perma.cc/76SA-DY2W>].

98. Shelly Simana, *Creating Life After Death: Should Posthumous Reproduction Be Legally Permissible Without the Deceased's Prior Consent?*, 5 J.L. & BIOSCIENCES 329, 338 (2018) (noting that retrieving and using eggs postmortem is more medically complex than for sperm and that cultural

A key issue in deciding whether to retrieve gametes from someone who has died or is in a vegetative state is consent. In several reported cases, courts examined whether the decedent had completed an organ donor form.⁹⁹ Although judges may regard these forms as germane to the issue of consent, scholars generally see organ donor forms as inapplicable to gamete retrieval.¹⁰⁰ “Solid-organ donation and sperm donation are not practically or ethically equivalent,” argue three bioethicists; sperm is not scarce and cannot cure any medical condition, and the person making the request expects to use it herself.¹⁰¹ Further, the three organ removal purposes authorized by the Uniform Anatomical Gift Act—transplantation, therapy, or research¹⁰²—do not apply to PMC.¹⁰³ If courts in states with no legislation on this matter follow the case law rather than the scholars, the postmortem retrieval of gametes has the potential to skyrocket. As of 2020, more than 156 million American adults, or 60% of those older than eighteen, had registered as organ donors.¹⁰⁴

C. Current Legal Climate in All Fifty States

Twenty-four states have enacted legislation to determine if a child conceived after a parent’s death can inherit.¹⁰⁵ All but one have

attitudes are different regarding postmortem reproduction for men and women); Jennifer S. Bard & Lindsay Penrose, *Responding to Requests for Assisted Reproductive Technology Intervention Involving Women Who Cannot Give Consent*, 25 HEALTH MATRIX 227, 240–41 (2015) (noting that although postmortem retrieval of sperm is “a relatively simple procedure,” women undergoing egg retrieval usually require two weeks of intensive hormone treatment).

99. *In re Zhu*, 103 N.Y.S.3d 775, 776 (N.Y. App. Div. 2019). *Contra* Robertson v. Saadat, 262 Cal. Rptr. 3d 215, 231 (Ct. App. 2020).

100. Katz, *supra* note 20, at 305–06.

101. Batzer et al., *supra* note 94, at 1266.

102. UNIF. ANATOMICAL GIFT ACT § 11 (UNIF. L. COMM’N 2006)

103. Strong, *supra* note 93, at 250.

104. *Organ Donation Statistics*, ORGANDONOR.GOV, <https://www.organdonor.gov/statistics-stories/statistics.html> [<https://perma.cc/26Q2-XXKJ>] (Sept. 2020); DONATE LIFE AM., NATIONAL DONATE LIFE MONTH – APRIL 2020 DONATION AND TRANSPLANTATION STATISTICS (Jan. 15, 2020), <https://www.donatelife.net/wp-content/uploads/2016/06/2020-NDLM-Donation-and-Transplantation-Statistics-FINAL-1.20.pdf> [<https://perma.cc/RK44-NC6Z>].

105. For a list of all fifty states plus the District of Columbia and their statutes or court decisions on PMC, see Knaplund, *supra* note 42.

decided that the answer is yes if certain conditions are met.¹⁰⁶ Another six states have answered the question through court decisions.¹⁰⁷ Both the legislation and the court decisions allowing PMC children to inherit generally address two main concerns: how to allow PMC to inherit while still maintaining the orderly administration of estates, and how to establish that the decedent has consented to the PMC child's inheritance.

1. Addressing Orderly Administration of Estates

Because genetic material is currently stored by thousands of adults, remains viable for decades, and can be obtained after death, the potential to disrupt the orderly administration of estates is real. Legislation has addressed this concern in two ways: by mandating limits on when the genetic material must be used, and by requiring notice to the decedent's personal administrator within a few months of opening the estate so that all assets are not distributed before the child is born.¹⁰⁸

Five states currently have legislation that contains both safeguards: New York, California, Oregon, Connecticut, and Illinois.¹⁰⁹ New York is unique in requiring that a decedent's consent to PMC must be executed within seven years of death with two witnesses present, and the written consent must be recorded after death.¹¹⁰ Otherwise, the statutes of New York, California,¹¹¹ and Oregon are similar.¹¹² If the decedent's genetic material is used,¹¹³ the statutes require: (a) the decedent's written consent to use his or her reproductive material after death and designation of a person to use or control it; (b) that

106. *Id.*

107. *Id.*

108. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2012); CAL. PROB. CODE § 249.5 (West 2002); OR. REV. STAT. § 112.077 (2016).

109. *See* Knaplund, *supra* note 42.

110. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3.

111. CAL. PROB. CODE § 249.5(b)–(c).

112. OR. REV. STAT. § 112.077.

113. If the decedent is not the genetic parent, New York's requirements are slightly less onerous. *See infra* Section II.D.

the designated person notify the decedent's personal representative that such material is available for use either within four months (California and Oregon) or seven months (New York) after the decedent's death or the appointment of the personal representative; and finally, (c) the child to be in utero within two years of decedent's death.¹¹⁴ Oregon further requires that the decedent's will or trust provide for the PMC child.¹¹⁵ A fourth state, Connecticut, has similar requirements but with shorter time periods: the notice that the material is available must be given to the personal representative within thirty days of appointment, and the child must be in utero within one year after decedent's death.¹¹⁶ A fifth state, Illinois, has longer time periods than Connecticut and a presumption that PMC children are excluded.¹¹⁷ Illinois extends the time by which the child must be born to within thirty-six months of the decedent's death.¹¹⁸ Several firms in Illinois reassure clients that a typical probate case takes about six to twelve months to close,¹¹⁹ but the statute requires notice to the administrator within six months of the decedent's death that the decedent's genetic material is available and may be used, thus alerting the administrator that the estate should remain open.¹²⁰

An additional four states do not require notice to the personal representative that the decedent's reproductive material is available, but their statutes impose short enough time limits that the estate might still contain undistributed assets for the child to inherit.¹²¹

114. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5; OR. REV. STAT. § 112.077.

115. OR. REV. STAT. § 112.077(4)(b).

116. CONN. GEN. STAT. § 45a-785 (2019). Connecticut limits the person designated by the decedent to the decedent's spouse, and both the decedent and the spouse must sign the writing. *Id.* Failure to notify the administrator does not affect the PMC child's right to inherit. *Id.*

117. 755 ILL. COMP. STAT. ANN. 5/2-3 (West 2007).

118. *Id.*

119. *See, e.g., How Long Does Probate Take in Illinois?*, LAW OFF. OF KEVIN WILLIAMS, <https://www.kevinwilliamslaw.com/faqs/frequently-asked-probate-questions/how-long-does-probate-take-in-illinois/> [<https://perma.cc/N4AR-VNXB>]; Krause Donovan Estate Law Partners, *Things to Know About the Probate Process in Illinois*, EST. L. PARTNERS LLC (June 11, 2019), <https://www.estatelawpartners.com/the-probate-process-in-illinois/> [<https://perma.cc/UWC7-8BBM>].

120. 755 ILL. COMP. STAT. ANN. 5/2-3.

121. *See* Knaplund, *supra* note 42.

Although only ten or so states have statutory prescriptions on when probate must close,¹²² most estates close within one to two years.¹²³ Thus, assuming probate opens promptly, the child will not be able to inherit from the decedent unless the child is in utero within two years of the decedent's death. Of course, that child might still be able to file for Social Security benefits as the decedent's surviving dependent,¹²⁴ or the child may still inherit *through* the decedent from the decedent's parent's will or trust, for example.¹²⁵

Of the four states that do not require notice to the administrator that a decedent's genetic material may be used postmortem, the one requiring the promptest action is Virginia. Initially, Virginia was one of only two states that adopted the 1988 USCACA, which provided that PMC children had no interest in their deceased parents' estates.¹²⁶ Virginia later amended its statute to provide that a child who was conceived after the death of a parent could inherit from the deceased parent if the child was born within ten months of the

122. See Kristine S. Knaplund, *Survey of State Probate Proceedings (2020)* (on file with the Georgia State University Law Review). Missouri and Ohio have the shortest deadlines. *Id.* Missouri requires a final accounting six months and ten days after first publication of notice of letters of administration unless good cause is shown. MO. ANN. STAT. § 473.540(2)(1) (West 2009). Ohio mandates a final accounting within six months of appointment unless a listed exception applies. OHIO REV. CODE ANN. § 2109.301(B) (LexisNexis 2016). Iowa and North Dakota have the longest deadlines at three years, stating that the final settlement should be filed unless the court orders otherwise or an heir or distributee can petition for the personal representative to show cause why the estate should remain open. IOWA CODE ANN. § 633.473 (West 2014); N.D. CENT. CODE § 30.1-21-03.1 (2010).

123. See, e.g., *Wills, Estates, and Probate*, CAL. CTS.: THE JUD. BRANCH OF CAL., <https://www.courts.ca.gov/8865.htm?rdeLocaleAttr=en> [<https://perma.cc/2S7A-TGXC>] (stating that a typical California probate case can take between nine months to one and a half years, or longer); *Answers to Your Probate Questions*, BPS LAWS., <https://www.bpslawyers.com/estate-planning-probate/faq-death-probate/> [<https://perma.cc/D6R4-BXU7>] (stating that a typical Connecticut probate case can take between “[fifteen] to [eighteen] months [as] a realistic estimate”); Lane V. Erickson, *3 Things to Know About Idaho Probate*, RACINE OLSON (Apr. 1, 2017), <https://www.racinelaw.net/blog/3-things-know-idaho-probate/> [<https://perma.cc/C26A-Y9QW>] (stating that a typical Idaho probate case can take between at least six months and sometimes more than two years). For a list of the probate procedures of all 50 states, see Knaplund, *supra* note 122.

124. See, e.g., *In re Estate of Kolacy*, 753 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

125. See Kristine S. Knaplund, *Children of Assisted Reproduction vs. Old Dynasty Trusts: A New Approach*, 57 SAN DIEGO L. REV. 301, 302–03 (2020). The child may encounter further obstacles if donated gametes or a gestational carrier is used. *Id.*

126. Carpenter, *supra* note 10. North Dakota, which has since repealed the provision, was the other. *Id.*

death.¹²⁷ Arkansas provides that the PMC child must be conceived within twelve months and born within nineteen months of the decedent's death.¹²⁸ In addition to requiring the decedent's written consent, two states, Iowa and Maryland,¹²⁹ specify that the child must be born within two years of the decedent's death. Is this time limit short enough that, even without notice to the personal representative a few months after appointment, the estate might still be open? It may be short enough in Arkansas; a firm in the state estimates probate to take six to nine months and generally not longer than eighteen months.¹³⁰ Iowa's longer time limit is problematic for inheritance. Iowa Legal Aid's *Probate Questions and Answers* notes that "[m]ost estates can be probated in less than one year."¹³¹ Imagine this scenario in Iowa: A decedent is survived by his second wife and a child of his first marriage. He has given his written consent for his second wife to use his cryopreserved sperm to conceive a child postmortem. Iowa intestacy law provides that his wife will receive half of his real property, all personal property "in the hands of the decedent as the head of a family," and half of the remaining personal property;¹³² anything not going to the surviving spouse goes to his issue.¹³³ If probate opens and closes promptly, before his wife finishes grieving and has a PMC child, his "issue" would mean only the child from his first marriage. If probate is still open when his spouse gives birth to PMC twins within two years of his death, those

127. VA. CODE ANN. § 20-164 (2016).

128. ARK. CODE ANN. § 28-9-221 (2012). The writing must be notarized or witnessed by a licensed physician or someone acting under the supervision of a licensed physician. *Id.*

129. IOWA CODE ANN. § 633.220A (West 2019); MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2017). As in Connecticut, the Iowa statute provides that only the surviving spouse can be designated by the decedent to use the gametic material. IOWA CODE ANN. § 633.220A.

130. Audra Bailey Wilcox, *How Long Does the Probate Process Take in Arkansas?*, SEXTON BAILEY ATT'YS PA (Jan. 27, 2014), <https://www.arkansas-estateplanning.com/long-probate-process-arkansas/> [<https://perma.cc/2YFU-VDRE>].

131. *Probate Questions and Answers*, IOWA LEGAL AID, <https://www.iowalegalaid.org/resource/probate-questions-and-answers> [<https://perma.cc/D4TB-8FRZ>] (Oct. 22, 2019).

132. IOWA CODE ANN. § 633.212 (West 2019). If all issue are also issue of the surviving spouse, then the spouse inherits all. IOWA CODE ANN. § 633.211 (West 2019).

133. IOWA CODE ANN. § 633.219(1) (West 2019).

two children will now share with their half-sibling, reducing that child's share to one-third of the remaining property rather than all.¹³⁴

Louisiana's statute,¹³⁵ which extends the time by which the child must be born to within thirty-six months of the decedent's death, may in some cases prevent PMC children from inheriting from the decedent. Five states—Colorado,¹³⁶ Maine,¹³⁷ North Dakota,¹³⁸ Vermont,¹³⁹ and Washington¹⁴⁰—have further extended the deadline for the child to be in utero within thirty-six months or born within forty-five months. The Uniform Probate Code (UPC) chose this deadline based on section 3-1006,¹⁴¹ which allows an heir “to recover property improperly distributed, or its value, from any distributees during the later of three years after the decedent's death or one year after distribution.”¹⁴² Because none of these states mandate earlier notice to the personal representative, it is likely that the decedent's estate will have been closed long before. Thus, a PMC child who wants a share would need to sue another distributee—not a welcome prospect. A Colorado law firm advertises that an “average” Colorado

134. Jane E. Brody, *Some I.V.F. Experts Discourage Multiple Births*, N.Y. TIMES (Oct. 10, 2016), <https://www.nytimes.com/2016/10/11/well/family/experts-advise-minimizing-multiple-births-through-ivf.html> [<https://perma.cc/RMQ2-D9QX>] (“[M]ore than 40 percent of all I.V.F. deliveries in the United States are of twins or higher . . .”).

135. LA. STAT. ANN. § 9:391.1 (2018). The decedent can only designate a surviving spouse to use the genetic material. *Id.*

136. COLO. REV. STAT. § 15-11-120(11) (2019). If the surviving spouse is the birth mother, Colorado presumes that the decedent consented to be a parent. § 15-11-120(8)(b).

137. *See* ME. REV. STAT. ANN. tit. 18-C, § 2-118 (2020). Maine does not expressly require the decedent's consent to postmortem conception. *Id.*

138. N.D. CENT. CODE § 30.1-04-19(6)–(11) (2010). Consent to being a parent of a PMC child can be in a writing or shown by clear and convincing evidence; if the decedent was married at death with no divorce proceedings pending, the decedent is deemed to have consented in the absence of clear and convincing evidence to the contrary. § 30.1-04-19(6)–(7).

139. VT. STAT. ANN. tit. 15C, § 707 (2019). Intent to be a parent of a PMC child can be established by consent in a record or by a preponderance of the evidence. *Id.*

140. WASH. REV. CODE § 26.26A.635 (2019). Washington requires either the decedent's written consent to being a parent of a PMC child or intent established by clear and convincing evidence. *Id.*

141. UNIF. PROB. CODE § 3-1006 (amended 2006).

142. Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 363 (2009). Many states have adopted the UPC provision. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-3936 (2012); COLO. REV. STAT. § 15-12-1006(1)(b) (2019); MICH. COMP. LAWS ANN. § 700.3957 (West 2002); MINN. STAT. ANN. § 524.3-1006 (West 2012); N.D. CENT. CODE § 30.1-21-06 (2010); S.D. CODIFIED LAWS § 29A-3-1006 (2004); S.C. CODE ANN. § 62-3-1006 (2009).

estate remains in probate for nine to twenty-four months.¹⁴³ Because Colorado has adopted its version of UPC section 3-1006,¹⁴⁴ someone acting promptly on behalf of the PMC child could then proceed against a half-sibling, an aunt, or another distributee to recover property from the decedent's estate.

Then there are the states that have adopted the Uniform Parentage Act (UPA), which requires some form of writing by the decedent consenting to parent a PMC child without further legislation regarding whether that child inherits. Seven states currently have a version of UPA section 707, requiring written consent to be a parent of a child conceived postmortem.¹⁴⁵ Four of these seven states have adopted the 2000 version of the UPA, which applies to a spouse who so consented:¹⁴⁶ Alabama,¹⁴⁷ New Mexico,¹⁴⁸ Texas,¹⁴⁹ and Utah.¹⁵⁰ Another three states, Delaware,¹⁵¹ New Hampshire,¹⁵² and Wyoming,¹⁵³ use the 2002 version of the UPA, which does not require the decedent to be a spouse but rather an "individual."¹⁵⁴ If the decedent has consented in writing to be a parent, will the child inherit? The dominant concern of those drafting the UPA was a family law concern—rather than inheritance—to ensure that a nonmarital child would continue to receive support after a genetic parent's death.¹⁵⁵ Thus, these statutes say nothing about when a PMC

143. *Why Does Probate Take So Long?*, HAMMOND L. GRP., <https://coloradoestateplan.com/probate-length> [<https://perma.cc/3BND-A9BV>].

144. COLO. REV. STAT. § 15-12-1006(b). Maine has also adopted the statute. ME. REV. STAT. ANN. tit. 18-C, § 3-1006 (2020).

145. UNIF. PARENTAGE ACT § 707 (UNIF. L. COMM'N 2017).

146. Kristine S. Knaplund, *The New Uniform Probate Code's Surprising Gender Inequities*, 18 DUKE J. GENDER L. & POL'Y 335, 342 (2011).

147. ALA. CODE § 26-17-707 (2016) (requiring additionally that a record be maintained by a licensed assisting physician).

148. N.M. STAT. ANN. § 40-11A-707 (2017) (requiring a "signed record").

149. TEX. FAM. CODE ANN. § 160.707 (West 2014) (requiring that the record be kept by a licensed physician).

150. UTAH CODE ANN. § 78B-15-707 (LexisNexis 2019).

151. DEL. CODE ANN. tit. 13, § 8-707 (2009).

152. N.H. REV. STAT. ANN. § 168-B:2(IV) (2014).

153. WYO. STAT. ANN. § 14-2-907 (2019).

154. UNIF. PARENTAGE ACT § 707 (UNIF. L. COMM'N 2002) (amended 2017).

155. Paula A. Monopoli, *Nonmarital Children and Post-Death Parentage: A Different Path for Inheritance Law?*, 48 SANTA CLARA L. REV. 857, 886 (2008).

child must be in utero or born. However, this section may have had a different purpose. The official comment to section 707 of the 2000 and 2002 UPA states: “This section is designed primarily to avoid the problems of intestate succession[,] which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a parent.”¹⁵⁶ These states may allow a PMC child to inherit, given a decedent’s written consent that complies with the statute.

One recent case bolsters that conclusion. The Utah Supreme Court considered whether a “Semen Storage Agreement” signed by the decedent could constitute the requisite consent to parent a PMC child and determined that, based on the specific language, it did not.¹⁵⁷ The agreement indicated the decedent’s desire to donate his cryopreserved sperm to his wife in the event of his death and operated as a contract between the decedent and the storage facility for the purpose of storing his sperm rather than to determine parentage and, as a consequence, the right to inherit in intestacy as the decedent’s child.¹⁵⁸ This suggests that, given different language of consent in a storage agreement or other writing, Utah would allow a PMC child to inherit.

Although the seven UPA states lack a deadline by which a PMC child must be in utero or born for the decedent to be declared a parent, the usual probate timelines still apply for bringing an action. Two of the seven states have adopted the UPC’s section 3-1006.¹⁵⁹ Thus, while a PMC child born a decade or more after a person’s death might still inherit through the decedent or qualify for Social

156. UNIF. PARENTAGE ACT § 707 cmt. (UNIF. L. COMM’N 2002), *amended by* UNIF. PARENTAGE ACT § 708 (UNIF. L. COMM’N 2017).

157. *Burns v. Astrue*, 289 P.3d 551, 557 (Utah 2012).

158. *Id.* Pursuant to 42 U.S.C. § 416(h)(2)(A), a PMC child is eligible as a dependent of the decedent if entitled to inherit pursuant to the state’s intestacy law. 42 U.S.C. § 416(h)(2)(A). While there are other ways for a nonmarital child to prove dependency, the Social Security Administration states that inheritance by intestacy is the only way a PMC child can establish that she is a “child.” SSAR 05-1(9), 70 Fed. Reg. 55,656 (Sept. 22, 2005).

159. *See* N.M. STAT. ANN. § 45-3-1006 (2017); UTAH CODE ANN. § 75-3-1006 (LexisNexis 2019).

Security benefits, the child would not disrupt the orderly distribution of the estate.

The most recent of the twenty-three states to adopt legislation, Florida, recognizes only one form of written consent to parent a PMC child: a provision for the child in the decedent's will.¹⁶⁰ Unlike Oregon, which similarly requires that the child be provided for in a will or trust,¹⁶¹ Florida has no further requirements, such as notice to the personal representative that the material is available or a timeline for the child to be born.¹⁶²

2. *A Myriad of Ways to Establish the Decedent's Consent*

The second requirement of virtually all of the legislation is consent by the decedent in some form in order for a PMC child to inherit. The one exception is Maine, whose statute declares an individual a parent if the child is in utero no later than thirty-six months or is born no later than forty-five months after that person's death.¹⁶³

Seventeen states require the decedent to consent in writing to *something*: to be a parent of a PMC child, to be its genetic parent, to authorize a person or a spouse to use or control their genetic material after death, or some combination of these.¹⁶⁴ In the seven states that have adopted the UPA, the decedent must agree that if assisted reproduction were to occur after death, the deceased would be a parent.¹⁶⁵ Illinois's language is similar but adds that the resulting child must be born using the decedent's gametes.¹⁶⁶ Four states (California, Arkansas, Iowa, and Louisiana) take a different route: rather than require the decedent to consent to be a parent, they require the decedent to authorize the use of his or her gametes

160. FLA. STAT. ANN. § 742.17(4) (West 2016).

161. OR. REV. STAT. § 112.077(4)(b) (2016).

162. FLA. STAT. ANN. § 742.17.

163. ME. REV. STAT. ANN. tit. 18-C, § 2-118 (2020).

164. Carpenter, *supra* note 10, at 401.

165. ALA. CODE § 26-17-707 (2016); N.H. REV. STAT. ANN. § 168-B:2(IV) (2014); N.M. STAT. ANN. § 40-11A-707 (2017); TEX. FAM. CODE ANN. § 160.707 (West 2014); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2019); DEL. CODE ANN. tit. 13, § 8-707 (2009); WYO. STAT. ANN. § 14-2-907 (2019).

166. 755 ILL. COMP. STAT. ANN. 5/2-3 (West 2007).

postmortem. California mandates that the decedent specify in writing that his genetic material shall be used posthumously for the conception of the child of a decedent,¹⁶⁷ while the Arkansas,¹⁶⁸ Iowa,¹⁶⁹ and Louisiana statutes state that the writing must specifically authorize the decedent's surviving spouse to use his gametes.¹⁷⁰ Connecticut and Oregon combine the two standards, requiring both consent to postmortem use of the genetic material and authorization of the spouse (in Connecticut) or a person (in Oregon) to control the material.¹⁷¹ Oregon also mandates that the decedent provide for the PMC child in the decedent's will or trust.¹⁷² New York and Maryland likewise require the decedent's consent on two matters. In New York, the decedent must consent that if assisted reproduction were to occur after the death of the intended parent, the decedent would be a parent of the child.¹⁷³ In addition, the decedent must authorize a person to make decisions about the use of the material postmortem.¹⁷⁴ In Maryland, the decedent must consent to both being a parent of a child conceived posthumously using the deceased's genetic material and also to the use of the genetic material after death.¹⁷⁵ As noted earlier, Florida's required writing is a will: the decedent must specifically provide for the PMC child in order for the child to inherit.¹⁷⁶

In five states, the consent need not be in writing.¹⁷⁷ In Colorado and North Dakota, following the UPC language, consent to be treated as a parent of a PMC child can be shown by a signed record or by

167. CAL. PROB. CODE § 249.5 (West 2002).

168. ARK. CODE ANN. § 28-9-221(a) (2012).

169. IOWA CODE ANN. § 633.220A(1)(b) (West 2019). Iowa requires that the writing "authorize the intestate's surviving spouse to use the deceased's genetic material to initiate the posthumous procedure that resulted in the child's birth." *Id.*

170. LA. STAT. ANN. § 9:391.1(A) (2018).

171. CONN. GEN. STAT. § 45a-785 (2019) (requiring that a writing authorize the spouse to exercise control, custody, and use of sperm or eggs); OR. REV. STAT. § 112.077 (2016).

172. OR. REV. STAT. § 112.077(4)(b).

173. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2012).

174. *Id.*

175. MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2017).

176. FLA. STAT. ANN. § 742.17(4) (West 2016).

177. *See* Knaplund, *supra* note 42.

clear and convincing evidence.¹⁷⁸ However, consent is presumed if the decedent died married with no pending divorce proceedings.¹⁷⁹ In Vermont and Washington, following the UPA, the decedent can either consent in a record that if assisted reproduction were to occur postmortem, the decedent intended to be a parent of the child, or the decedent can establish consent by a preponderance of the evidence (in Vermont)¹⁸⁰ or by clear and convincing evidence (in Washington).¹⁸¹ In Virginia, the decedent must consent to being a parent in writing, unless implantation occurs before the death can reasonably be communicated to the physician.¹⁸²

Finally, only one state has amended its statute to make clear that a child conceived after a person's death cannot be considered "issue" and therefore does not inherit from or through the decedent. Minnesota's statute states that a parent-child relationship does not exist unless the ART child "is in gestation prior to the death" of the parent.¹⁸³

3. *States Without Statutes on PMC Children*

We then turn to the twenty-six states whose legislatures have not yet addressed PMC children. Nine states have statutes that define a "posthumous child" as one conceived before the death of the decedent and born thereafter, or contain similar language.¹⁸⁴ A tenth state, Idaho, has updated its statute to make clear that a posthumous child can be conceived by natural or artificial means, so long as the

178. COLO. REV. STAT. § 15-11-120(6)–(11) (2019); N.D. CENT. CODE § 14-20-65 (2017).

179. Carpenter, *supra* note 10, at 421; § 15-11-120(6)–(11) (2019); N.D. CENT. CODE § 14-20-65 (2017).

180. VT. STAT. ANN. tit. 15C, § 707 (2019).

181. WASH. REV. CODE ANN. § 26.26A.635 (2019).

182. VA. CODE ANN. § 20-158(B) (2016).

183. MINN. STAT. § 524.2-120(10) (West 2012).

184. O.C.G.A. § 53-2-1(b)(1) (2011 & Supp. 2020); IND. CODE ANN. § 29-1-2-6 (West 2010); NEB. REV. STAT. § 30-2308 (2016); 20 PA. STAT. AND CONS. STAT. ANN. § 2104(4) (West 2016); S.C. CODE ANN. § 62-2-108 (2009) (“[C]onceived before his death but born within ten months thereafter”); S.D. CODIFIED LAWS § 29A-2-108 (2004); TENN. CODE ANN. § 31-2-108 (2015); W. VA. CODE ANN. § 42-1-8 (LexisNexis 2019) (“Any child in the womb of its mother”); WIS. STAT. ANN. § 854.21(5) (West 2019) (“[‘I]ssue,’ [or] ‘children,’ . . . [includes] a person conceived at the time the membership in the class is determined and subsequently born alive”).

child is conceived before the decedent dies.¹⁸⁵ Mississippi lacks a statute but has defined posthumous child in its case law. The Mississippi Supreme Court declared in 1925 that a child born within ten months of the timeframe during which a devisee must be living to take under a will is “*in esse*” and thus inherits.¹⁸⁶

In these eleven states where legislation or case law defines a traditional posthumous child, courts have differed on whether PMC children can inherit if they are not in gestation at the time of the decedent’s death, with one court in New Jersey holding they can inherit, and three courts (in Arkansas, Nebraska, and Pennsylvania) holding they cannot.¹⁸⁷ New Jersey’s statute originally declared: “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”¹⁸⁸ The court in *In re Estate of Kolacy* found that this statute was a “carryover of earlier statutes going back to at least 1877,” and that the legislature, when it adopted this provision in 1981, “was not giving any thought” to PMC.¹⁸⁹ The court then declared that twin girls conceived after the decedent’s death with his cryopreserved sperm were entitled to inherit under New Jersey intestacy law, even though not conceived before his death.¹⁹⁰

Three other courts have parsed similar statutes and reached the opposite conclusion.¹⁹¹ In *Finley v. Astrue*, the Arkansas Supreme Court was asked to interpret its statute: “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

185. IDAHO CODE § 15-2-108 (2019).

186. *Scott v. Turner*, 102 So. 467, 467 (Miss. 1925).

187. See Knaplund, *supra* note 42.

188. *In re Estate of Kolacy*, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000) (quoting N.J. STAT. ANN. § 3B:5-8 (amended 2004)). The statute was amended in 2004 to adopt the revised language of UPC section 2-108: “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” N.J. STAT. ANN. § 3B:5-8 (West 2007).

189. 753 A.2d at 1261.

190. *Id.* at 1262.

191. *Finley v. Astrue*, 270 S.W.3d 849, 853 (Ark. 2008); *Amen v. Astrue*, 822 N.W.2d 419, 420 (Neb. 2012); *Seaman v. Colvin*, 145 F. Supp. 3d 421, 425 (E.D. Pa. 2015).

intestate.”¹⁹² In the court’s view, that clearly meant that “the child must have been conceived before the decedent’s death” and thus excluded the PMC child.¹⁹³ Nebraska’s statute, enacted in 1974, states: “Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.”¹⁹⁴ In *Amen v. Astrue*, the Nebraska Supreme Court was asked whether a child conceived via assisted insemination seven days after her father’s death could inherit from him as his issue.¹⁹⁵ The court answered that she could not because she was not conceived before his death as the statute implicitly required.¹⁹⁶ In the third case, the U.S. District Court for the Eastern District of Pennsylvania construed Pennsylvania’s statute, which states that “[p]ersons begotten before the decedent’s death but born thereafter[] shall take as if they had been born in his lifetime.”¹⁹⁷ The court agreed that the Pennsylvania legislature could not have meant to include children conceived years after a decedent’s death using a technology that had not been invented when the statute was enacted.¹⁹⁸ The orderly administration of estates was a concern in all these cases. As Judge Stanton noted in *Kolacy*, “[e]states cannot be held open for years simply to allow for the possibility that after born children may come into existence.”¹⁹⁹ Twins in another Pennsylvania case, for example, were conceived via assisted insemination using his cryopreserved sperm eleven years after their father’s death.²⁰⁰

Three states define an “afterborn heir” as a child or descendant who is born within either 300 days or ten months of the intestate’s death, without specifying that the child must be conceived before the

192. 270 S.W.3d at 853 (quoting ARK. CODE ANN. § 28-9-210(a) (2012)).

193. *Finley*, 270 S.W.3d at 853.

194. NEB. REV. STAT. § 30-2308 (2016).

195. 822 N.W.2d at 421.

196. *Id.* at 421, 423.

197. 20 PA. STAT. AND CONS. STAT. ANN. § 2104(4) (West 2016).

198. *Seaman v. Colvin*, 145 F. Supp. 3d 421, 428 (E.D. Pa. 2015).

199. *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000); accord *Mattison ex rel. M.M. & M.M. v. Soc. Sec. Comm’r (In re Certified Question from the U.S. Dist. Ct. for the W. Dist. of Mich.)*, 825 N.W.2d 566, 571 (Mich. 2012) (Kelly, J., concurring).

200. *MacNeil v. Berryhill*, 869 F.3d 109, 110 (2d Cir. 2017).

intestate died.²⁰¹ A person who acted quickly after the death might meet the deadline. Jeffery Mattison, for example, died January 18, 2001; his widow successfully used his cryopreserved sperm to become pregnant twelve days later and gave birth to twins on October 8, 2001—less than nine months after his death.²⁰²

Seven states have now adopted the 1990 revision of UPC section 2-108, which eliminated the terms “begotten” or “conceived”²⁰³ to mandate that someone “in gestation” at a particular time is treated as alive at that time if he or she lives at least 120 hours after birth.²⁰⁴ The Michigan Supreme Court, asked to interpret this language in 2012, held that the statute implicitly required an heir to be either alive or in gestation at the decedent’s death, and thus a PMC child could not inherit.²⁰⁵

A few states fail to define an afterborn or posthumous heir.²⁰⁶ For example, in 2002 Massachusetts’ statute provided: “Posthumous children shall be considered as living at the death of their parent.”²⁰⁷ Because the legislature had not expressly required an heir to be in existence when the decedent died, the Massachusetts Supreme Court

201. KY. REV. STAT. ANN. § 391.070 (West 2017); N.C. GEN. STAT. § 29-9 (2019); OHIO REV. CODE ANN. § 2105.14 (LexisNexis 2016) (requiring that the child live at least 120 hours after birth).

202. *Mattison*, 825 N.W.2d at 567, 570. Similarly, the child in *Amen* was conceived via assisted insemination seven days after her father’s death and born within nine months of his death. *Amen v. Astrue*, 822 N.W.2d 419, 421 (Neb. 2012).

203. Carpenter, *supra* note 10, at 365; UNIF. PROB. CODE § 2-108 (amended 1990).

204. ALASKA STAT. § 13.12.108 (2018) (“An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.”); HAW. REV. STAT. ANN. § 560:2-108 (LexisNexis 2015); MASS. GEN. LAWS ANN. ch. 190B, § 2-108 (West 2012); MICH. COMP. LAWS ANN. § 700.2108 (West 2002); MONT. CODE ANN. § 72-2-118 (2019); N.J. STAT. ANN. § 3B:5-8 (West 2007); W. VA. CODE ANN. § 42-1-3f (LexisNexis 2019); ARIZ. REV. STAT. ANN. § 14-2108 (2012) (“A child in gestation . . .”).

205. *Mattison*, 825 N.W.2d at 570 (construing MICH. COMP. LAWS ANN. § 700.2108).

206. KAN. STAT. ANN. § 59-501 (2005) (“‘Children’ means biological children, including a posthumous child . . .”); MO. ANN. STAT. § 474.050 (West 2009) (“All posthumous children, or descendants, of the intestate shall inherit . . . as if born in the lifetime of the intestate . . .”); NEV. REV. STAT. ANN. § 132.290 (LexisNexis 2019) (“A posthumous child is deemed living at the death of his or her parent.”); OKLA. STAT. ANN. tit. 84, § 228 (West 2013) (“Posthumous children are considered as living at the death of their parents.”); WIS. STAT. ANN. § 852.03(4) (West 2019) (defining “posthumous heirs” as those “born after the death of the decedent”). The District of Columbia has a similar provision: “[A] child or descendant of the intestate born after the death of the intestate has the same right of inheritance as if born before his death.” D.C. CODE § 19-314 (2012).

207. MASS. GEN. LAWS ANN. ch. 190, § 8 (repealed July 1, 2011).

determined that a PMC child could inherit if she demonstrated a genetic connection to the decedent and showed that the decedent had consented both to postmortem reproduction and to support of any child that resulted.²⁰⁸

The Rhode Island statute excludes *all* posthumous issue from inheriting, whenever conceived, although its courts have not yet ruled directly on the issue.²⁰⁹ Its statute says: “No right in the inheritance shall accrue to any persons whatsoever other than the children of the intestate, unless such persons are in being and capable in law to take as heirs at the time of the intestate’s death.”²¹⁰ In a 2008 case in which an heir apparent argued that a mentally handicapped woman was not “capable in law to take as an heir” pursuant to the statute, the court stated that the statute “extinguishe[d] the inheritance rights only of posthumous children and other such persons born after a decedent’s death.”²¹¹

Finally, there are states whose only clue to inheritance of a PMC child is a statutory survival requirement.²¹² If the statute says one who “fails to survive” does not inherit and “surviving issue” do inherit, does that imply that one must be alive or in utero when the decedent died? The New Hampshire Supreme Court decided that the answer was yes, and therefore a PMC child did not inherit.²¹³ The court relied on Webster’s Dictionary to define “surviving issue” in its intestacy statute:

[T]he plain meaning of the word “surviving” is “remaining

208. *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 264, 270 (Mass. 2002). Massachusetts has since enacted UPC section 3-1006, limiting the time in which a PMC child may sue a distributee of the estate to the latter of three years after the decedent’s death or one year after distribution. MASS. GEN. LAWS ANN. ch. 190B, § 3-1006.

209. *See In re Estate of Downes*, No. WP-2007-0503, 2008 R.I. Super. LEXIS 66, at *7 (Super. Ct. May 23, 2008).

210. 33 R.I. GEN. LAWS § 33-1-4 (2011). Missouri has a similar statute that allows for posthumous children and descendants of the intestate to take, but no others that are not in being and capable of taking when the intestate dies may take. MO. ANN. STAT. § 474.050.

211. *Downes*, 2008 R.I. Super. LEXIS 66, at *7, *8.

212. *See, e.g., Khabbaz ex rel. Eng v. Comm’r of Soc. Sec.*, 930 A.2d 1180, 1183–84 (N.H. 2007) (construing N.H. REV. STAT. ANN. § 561:1 (2019)).

213. *Id.*

alive or in existence.” . . . In order to *remain* alive or in existence after her father passed away, [the PMC child] would necessarily have to have been “alive” or “in existence” at the time of his death. She was not. She was conceived more than a year after his death.²¹⁴

II. FIVE REASONS THE LAW DOES NOT MATCH PUBLIC SENTIMENT ON POSTMORTEM CONCEPTION

So far, twenty-four states have enacted legislation to clarify whether a PMC child inherits, and just one has concluded that it does not.²¹⁵ Court decisions in two states without specific legislation have also allowed PMC children to inherit under certain conditions.²¹⁶ It would appear, therefore, that these statutes and decisions have made it easier for parents to decide on postmortem reproduction by resolving this key legal issue, but in many ways they have not. These laws and cases have had the paradoxical effect of making it more difficult for parents to have PMC children for five reasons.

First, some states have enacted a series of requirements that few are likely to complete.²¹⁷ Other states have ridiculously short time periods in which to create a PMC child.²¹⁸ Second, few states define when “conception” occurs.²¹⁹ Third, hospital protocols for postmortem gamete retrieval are non-existent or tougher than the legal standard, so survivors may not be able to start the process. Fourth, all but one statute require a genetic connection to the PMC child.²²⁰ Fifth, the variety of definitions of “consent” and differences

214. *Id.* (citation omitted) (quoting *Surviving*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2303 (unabr. ed. 2002)).

215. Carpenter, *supra* note 10, at 362.

216. For a list of all fifty states plus the District of Columbia and their statutes or court decisions on PMC, see Knaplund, *supra* note 42.

217. *See supra* Section I.A.

218. *See, e.g.*, ARK. CODE ANN. § 28-9-221(a) (2012); CONN. GEN. STAT. § 45a-85 (2019).

219. *See infra* Section II.B.

220. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2021).

in legal formalities mean that one state's writing is unlikely to be accepted in another.

A. *Stringent Statutory Requirements Make Compliance Difficult*

Statutes on PMC children attempt to balance the orderly administration of estates with the surviving partner's need for time to grieve the decedent's death. Thus, as noted *supra* Part I, five states require the person with control of the decedent's reproductive material to notify the personal representative that such material is available.²²¹ If no such notice is given by the statutory deadline, the personal representative can proceed to distribute the estate without fear that a PMC child might make a claim.²²² However, several statutes go beyond the mere notification requirement. New York requires that the authorized representative not only be given written notice but also that notice be recorded in the surrogate's office within seven months.²²³ New York also requires the decedent to expressly authorize a person to use the decedent's gametes to create a PMC child so that we know who is required to notify the representative and record the consent.²²⁴ In contrast, Illinois requires only that "[t]he decedent had provided consent in writing to be a parent of any child born . . . posthumously" using the decedent's gametes.²²⁵ Still, the unnamed person who plans to use the gametes to create and parent the decedent's PMC child must serve the writing on the Illinois administrator.²²⁶ Illinois also makes clear that this imposes no duty on the administrator "to provide notice of death to any person"—presumably the person who plans to use the gametes.²²⁷ If the person named in the decedent's storage agreement is an unmarried partner not provided for in the decedent's will, and thus not otherwise

221. See *supra* Section I.C. **Error! Reference source not found.**

222. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5 (West 2002); OR. REV. STAT. § 112.077 (2016).

223. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(c)(2)–(3).

224. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(c)(1).

225. 755 ILL. COMP. STAT. ANN. 5/2-3(b)(3) (West 2007).

226. 755 ILL. COMP. STAT. ANN. 5/2-3(b)(4).

227. *Id.*

entitled to notice that probate has opened, that person may have no idea that the clock has begun ticking. The statute goes on to state that using terms in a will, trust, or other instrument such as “children” or “issue,” even if modified by phrases including “genetic” or “of the body,” do not allow PMC children to take.²²⁸ The statute cautions: “An intent to exclude posthumous children not in utero at the decedent’s death shall be presumed with respect to any instrument that does not address specifically how and when the class of posthumous children are to be determined”²²⁹

Though “written notice” in Oregon will suffice so long as the decedent’s personal representative meets the statutory time limit,²³⁰ California requires the “person designated by the decedent to control the use of the genetic material” to give the notice by certified mail, return receipt requested.²³¹ California strictly construes its requirements. For example, the U.S. Circuit Court of Appeals for the Ninth Circuit held that a cryopreservation consent form in which a decedent authorized use of embryos created in his lifetime did not constitute consent to use his sperm after his death.²³² The statutes include a bewildering array of requirements as to whether the decedent must sign or date the writing, whether the spouse must sign it, and whether witnesses must be present.²³³

To promote orderly administration of the estate, states have also set deadlines by which the PMC child must be in utero or born.²³⁴ To allow adequate time for psychological counseling and grieving, bioethicists and guidelines for postmortem retrieval recommend that the gametes remain stored for at least six months to a year after the decedent’s death.²³⁵ Arkansas and Connecticut, however, require the

228. 755 ILL. COMP. STAT. ANN. 5/2-3(e).

229. *Id.*

230. OR. REV. STAT. § 112.077 (2016).

231. CAL. PROB. CODE § 249.5(b) (West 2002).

232. *Delzer v. Berryhill (ex rel. C.O.D.1 & C.O.D.2)*, 722 F. App’x 700, 701 (9th Cir. 2018).

233. *See discussion infra* Section II.E.

234. ARK. CODE ANN. § 28-9-221(a) (2012); CONN. GEN. STAT. ANN. § 45a-785(a)(2) (2019).

235. Batzer et al., *supra* note 94, at 1268 (recommending six-month storage); *PMSR*, *supra* note 95 (recommending one-year storage). The University of Virginia Medical Center policy for postmortem sperm retrieval also advises a one-year bereavement period. N. Waler & R. Ramasamy, *Policy on*

PMC child to be in utero within a year.²³⁶ If the surviving partner is female, she may need to start fertility treatments soon after the funeral to meet such a short deadline.²³⁷ A study from 2003 to 2012 following more than 157,000 women using IVF found that only 29% were successful in having a live birth on their first try, so time must be allowed for several cycles.²³⁸

B. Few States Define When “Conception” Occurs

Several states have statutes that define a “posthumous child” as one conceived (or begotten) before the decedent died.²³⁹ For those using IVF, the question arises: when is the child conceived? If we use the traditional definition, when the egg is joined with the sperm,²⁴⁰ that occurs in a laboratory, and the resulting embryo is then frozen.²⁴¹ The plaintiffs in *Finley v. Astrue* and *Seaman v. Colvin*, who each

Posthumous Sperm Retrieval: Survey of 50 Major Academic Centers, 106 FERTILITY & STERILITY 2, 44 (2016).

236. ARK. CODE ANN. § 28-9-221(a); CONN. GEN. STAT. ANN. § 45a-785(a)(2).

237. *In Vitro Fertilization (IVF)*, MAYO CLINIC [hereinafter *IVF Overview*], <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716#:~:text=IVF%20involves%20several%20steps%20%E2%80%94%20ovarian,one%20cycle%20may%20be%20required> [https://perma.cc/5E35-PTFM]. If the surviving partner plans to use the decedent’s sperm for IVF, she will need several weeks of hormone treatments to induce ovulation and time to allow the sperm and retrieved egg to join and successfully implant in the womb. *Id.* IVF may require more than one of these cycles to be successful. *Id.* If the surviving partner is implanting a cryopreserved embryo, the process may be shorter because hormone treatments are often not required, but multiple cycles may still be needed. Robert L. Barbieri, *Fresh or Frozen Embryo Transfer in IVF?*, NEJM J. WATCH: WOMEN’S HEALTH (Mar. 20, 2019), <https://www.jwatch.org/na48672/2019/03/20/fresh-or-frozen-embryo-transfer-ivf>. One large study found success rates of 50% in live births for frozen embryo transfers. *Id.*

238. Andrew D.A.C. Smith et al., *Live-Birth Rate Associated with Multiple In Vitro Treatment Cycles*, 314 JAMA 2654, 2654 (2015), <https://jamanetwork.com/journals/jama/fullarticle/2478204> [https://perma.cc/A97U-NSGE].

239. O.C.G.A. § 53-2-1(b)(1) (2011 & Supp. 2020); IND. CODE ANN. § 29-1-2-6 (West 2010); NEB. REV. STAT. § 30-2308 (2016); 20 PA. STAT. AND CONS. STAT. ANN. § 2104(4) (West 2016); S.C. CODE ANN. § 62-2-108 (2009) (defining an “afterborn heir” as one “conceived before [a decedent’s] death but born within ten months thereafter”); S.D. CODIFIED LAWS § 29A-2-108 (2004); TENN. CODE ANN. § 31-2-108 (2015); WIS. STAT. ANN. § 854.21(5) (West 2019) (providing that “issue” or “children” include “a person conceived at the time the membership in the class is determined and subsequently born alive”).

240. See, e.g., William C. Shiel, Jr., *Medical Definition of Conception*, MEDICINET, <https://www.medicinenet.com/script/main/art.asp?articlekey=31242> [https://perma.cc/H3WR-6Q3S] (Dec. 21, 2018).

241. *IVF Overview*, *supra* note 237.

used cryopreserved embryos, argued that their children were conceived the moment the sperm fertilized the egg, while their spouses were still alive.²⁴² The court in *Seaman* foresaw chaos in that path: “[S]uch an interpretation would mean that, as long as any cryopreserved embryos from the decedent exist as a result of IVF, there would be no definite time-limit after the death of the decedent during which the number of intestate heirs could be known.”²⁴³

Several states have tried to clarify the issue. The UPC changed its language from “conceived” or “begotten” to “in gestation.”²⁴⁴ Oregon’s statute declares that an embryo outside of a woman’s body is not considered to be conceived until implanted in a woman’s body,²⁴⁵ and the statute further defines a PMC child as one who was “conceived from the genetic material of a decedent who died before the transfer of the decedent’s genetic material into a person’s body.”²⁴⁶ Illinois’s statute has one set of requirements for a posthumous child in utero at the decedent’s death and a different set of requirements for one not in utero at the decedent’s death.²⁴⁷ But not all the statutes allowing a PMC child to inherit have been drawn this carefully. Arkansas’s statute refers to a PMC child as one “conceived after the death of a parent.”²⁴⁸ Connecticut requires the child “posthumously conceived using the decedent’s sperm or eggs” to be “in utero not later than one year after” the decedent’s death.²⁴⁹ Because states such as Arkansas and Connecticut do not define when

242. *Finley v. Astrue*, 270 S.W.3d 849, 851 (Ark. 2008); *Seaman v. Colvin*, 145 F. Supp. 3d 421, 424 (E.D. Pa. 2015).

243. *Seaman*, 145 F. Supp. 3d at 433.

244. UNIF. PROB. CODE § 2-108 (amended 2006); *see also* ALASKA STAT. § 13.12.108 (2018) (“An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.”); HAW. REV. STAT. ANN. § 560-2-108 (LexisNexis 2015) (same); MASS. GEN. LAWS ANN. ch. 190B, § 2-108 (West 2012) (same); MICH. COMP. LAWS ANN. § 700.2108 (West 2002) (same); MONT. CODE ANN. § 72-2-118 (2019) (same); N.J. STAT. ANN. § 3B:5-8 (West 2007); W. VA. CODE § 42-1-3f (LexisNexis 2019) (same); ARIZ. REV. STAT. ANN. § 14-2108 (2012) (replacing the term “individual” with “child”).

245. OR. REV. STAT. § 112.077(1) (2016).

246. OR. REV. STAT. § 112.077(4).

247. 755 ILL. COMP. STAT. 5/2-3(a), (b) (West 2007).

248. ARK. CODE ANN. § 28-9-221(a) (2012); *accord* COLO. REV. STAT. § 15-11-120(11) (2019) (replacing the term “parent” with “individual”).

249. CONN. GEN. STAT. § 45a-785(a)(2) (2019).

conception occurs, this raises a question for those who use IVF while both intended parents are alive but implant the embryo after one or both parents have died. Was the child “conceived” when IVF was successful or after the embryo was implanted?

C. Hospital Standards for Postmortem Gamete Retrieval Are out of Sync with Legal Standards

The decision to retrieve sperm or ova postmortem is most likely to be made in an emergency room and must be made quickly.²⁵⁰ The Weill Cornell Medicine’s *Guidelines for Postmortem Sperm Retrieval (Weill Cornell Guidelines)*²⁵¹ advise harvesting sperm within twenty-four hours after death, which “results in a high likelihood of viable sperm (86%, with a mean time to retrieval of 20.4 hours after death).”²⁵² A second study found viability up to thirty-six hours after death.²⁵³ Harvesting ova is more complicated. Ideally, doctors first give the woman hormone treatments for several weeks, requiring her to remain alive while in a permanent vegetative state.²⁵⁴ Because time is of the essence, hospitals and emergency facilities should have policies in place as to when a request for gamete retrieval should be granted, but a 2017 survey of forty-one major centers found that only eleven of those centers (or 27%) had such policies in place.²⁵⁵ “Few emergency departments . . . have policies for [postmortem sperm retrieval, or] PMSR, and many emergency physicians . . . are unaware that PMSR is even a

250. See generally Andrew R. Zinkel et al., *Postmortem Sperm Retrieval in the Emergency Department: A Case Report and Review of Available Guidelines*, 3 CLINICAL PRAC. & CASES EMERGENCY MED. 405 (2019).

251. *PMSR*, *supra* note 95.

252. Zinkel et al., *supra* note 250, at 407.

253. Shai Shefi et al., *Posthumous Sperm Retrieval: Analysis of Time Interval to Harvest Sperm*, 21 HUM. REPROD. 2890, 2892 (2006).

254. Greer et al., *supra* note 97, at 282. If the patient is quite young, the eggs might be retrieved immediately without hormone treatment. Jaslow, *supra* note 97.

255. Nicholas J. Waler et al., *Policy on Posthumous Sperm Retrieval: Survey of 75 Major Academic Medical Centers*, 113 FERTILITY & STERILITY 45, 46 (2018); accord Waler & Ramasamy, *supra* note 235.

possibility, leaving them ill-prepared to respond to these requests in an informed and timely manner.”²⁵⁶

Those few facilities that have policies may be out of step with legal requirements. For example, the *Weill Cornell Guidelines*, covering hospitals such as New York-Presbyterian, provide that only the wife of the deceased can make the request.²⁵⁷ Under these guidelines, the wife must have both convincing evidence that her husband would have wanted to conceive children after his death and the unanimous support of the available members of the immediate family.²⁵⁸ Like many states, however, New York does not require that the decedent designate his or her spouse to control the gametic material; New York’s statute simply specifies “a person to make decisions about the use of the . . . genetic material” and says nothing about the decedent’s family.²⁵⁹

The policies at Tufts University, the University of Iowa, and the University of Virginia (UVA) all require that the decedent has consented in writing to postmortem gamete retrieval with a specified recipient,²⁶⁰ but bioethicists have noted that it is “extremely uncommon” to have a written advance directive for such retrieval and instead urge a standard of reasonably inferred consent.²⁶¹ Tufts and UVA also require the surviving partner to get judicial authorization for the retrieval,²⁶² adding more pressure given the lack of time. But again, these policies do not reflect the state’s laws in which the medical centers are located. Tufts Medical Center is in Massachusetts,²⁶³ a state that does not require a writing to parent a PMC child.²⁶⁴ Although the University of Iowa’s medical centers will

256. Zinkel et al., *supra* note 250, at 405.

257. *PMSR*, *supra* note 95.

258. *Id.*

259. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b)(1)(B) (McKinney 2021).

260. Waler & Ramasamy, *supra* note 235.

261. Batzer et al., *supra* note 94, at 1265.

262. Waler & Ramasamy, *supra* note 235.

263. *Contact Tufts Medical Center*, TUFTS MED. CTR., <https://www.tuftsmedicalcenter.org/Contact-Us> (last visited Mar. 31, 2021).

264. *Woodward v. Comm’r of Soc. Sec.*, 760 N.E. 2d 257, 269 (Mass. 2002); *Hanson v. Astrue*, 733 F. Supp. 2d 214, 218 (D. Mass. 2010).

allow a “surviving partner” to make a request, only a “surviving spouse” can be the other parent of the PMC child under Iowa’s statute.²⁶⁵ Virginia’s statute similarly specifies a “surviving spouse.”²⁶⁶ Of course, the patient in the emergency room may not be domiciled in that state at the time of death. If the medical center’s policy does not match the state’s requirements, it is better that the medical policy be broader than the state’s (as with the University of Iowa and UVA), rather than narrower (as with Tufts).

In two states, if the patient in the emergency room is married, her consent to be a parent of a PMC child is presumed.²⁶⁷ One state simply requires the PMC child to be in utero or born within a specified time of the death but does not require evidence of consent.²⁶⁸ Another state assumes consent based on the genetic connection unless doing so would disrupt others’ rights or administration of the estate.²⁶⁹ Thus, if the emergency room patient is domiciled at death in Colorado,²⁷⁰ Maine,²⁷¹ New Jersey,²⁷² or North Dakota,²⁷³ a hospital requiring clear evidence of consent for postmortem gamete retrieval will go further than the legal standard, preventing a person from starting the process for PMC.

265. Waler & Ramasamy, *supra* note 235; IOWA CODE § 633.220A(1)(b) (West 2019). Iowa requires that the writing must “authorize[] the intestate’s surviving spouse to use the deceased parent’s genetic material to initiate the posthumous procedure that resulted in the child’s birth.” IOWA CODE § 633.220A(1)(b).

266. VA. CODE ANN. § 20-158(B) (2016).

267. COLO. REV. STAT. § 15-11-120(8)(a) (2019); N.D. CENT. CODE § 30.1-04-19(6)–(11) (2010).

268. ME. REV. STAT. ANN. tit. 18-C, § 2-118 (2012).

269. *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000).

270. COLO. REV. STAT. § 15-11-120(8)(b). If the surviving spouse is the birth mother, Colorado presumes that the decedent consented to be a parent. *Id.*

271. ME. REV. STAT. ANN. tit. 18-C, § 2-118. In Maine, the decedent is considered a parent of the PMC child if the child is in utero no later than thirty-six months or born no later than forty-five months after the decedent’s death. *Id.*

272. *Kolacy*, 753 A.2d at 1262.

273. N.D. CENT. CODE § 30.1-04-19(6)–(11). Consent to be a parent of a PMC child in North Dakota can be in a writing or shown by clear and convincing evidence. *Id.* If the decedent were married at death with no divorce proceedings pending, in the absence of clear and convincing evidence to the contrary, the decedent is deemed to have consented. N.D. CENT. CODE § 30.1-04-19(6), (8).

D. All but One Statute Requires a Genetic Connection to the PMC Child

The vast majority of statutes—all but one²⁷⁴—recognizing PMC make clear that the decedent must be the genetic parent of the child. Ten states include express language in their statutes referring to the decedent’s genetic material or gametes.²⁷⁵ The seven states adopting section 707 of the 2000 or 2002 UPA referring to an individual who “dies before placement of eggs, sperm or embryos” omit that specificity,²⁷⁶ but the official comment clarifies that the section refers to the decedent’s gametes:

Absent consent in a record, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased.²⁷⁷

New York is the exception as of February of 2021. New York has amended its statute to change “genetic parent” to “intended parent,” thereby allowing a non-genetic parent to consent to a PMC child.²⁷⁸ Prior to February 15, 2021, the statute clearly required a genetic connection.²⁷⁹ Definitions referred to a “genetic child” and a “genetic parent,” and in the required writing, the decedent consented to use of

274. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b)(1)(B) (McKinney 2021).

275. ARK. CODE ANN. § 28-9-221(a) (2012); CAL. PROB. CODE § 249.5(a) (West 2002); CONN. GEN. STAT. § 45a-785 (2019); FLA. STAT. ANN. § 742.17(4) (West 2016); 755 ILL. COMP. STAT. 5/2-3(a) (West 2007); IOWA CODE § 633.220A(1)(b) (West 2019); LA. STAT. ANN. § 9:391.1(A) (2018); MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2002); OR. REV. STAT. § 112.077(1) (2016); VA. CODE ANN. § 20-158(B) (2016).

276. ALA. CODE § 26-17-707 (2016); N.H. REV. STAT. ANN. § 168-B:2(IV) (2014); N.M. STAT. ANN. § 40-11A-707 (2017); TEX. FAM. CODE ANN. § 160.707 (West 2014); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2019); DEL. CODE ANN. tit. 13, § 8-707 (2009); WYO. STAT. ANN. § 14-2-907 (2019).

277. UNIF. PARENTAGE ACT § 707 cmt. (UNIF. L. COMM’N 2002), *amended by* UNIF. PARENTAGE ACT § 708 (UNIF. L. COMM’N 2017).

278. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3.

279. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b)(1)(B) (McKinney 2012), *amended by* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b)(1)(B) (McKinney 2021).

their genetic material to create a child after death.²⁸⁰ The new version now divides PMC children into two sections. Section (b) says that an instrument created by the decedent that provides for his issue, children, heirs, etc., will include a PMC child if he completes the required form within seven years of death and if the child is in utero or born within the statute's time limits.²⁸¹ The sample form for section (d) requires the decedent to "consent to the use of assisted reproduction to conceive a child or children of mine after my death," with no stipulation that the decedent's gametes be used.²⁸² Section (c) applies "[i]f the child was conceived using the genetic material of the intended parent," with additional requirements such as notice to the personal administrator.²⁸³ A second sample form requires the decedent to consent to the use of their sperm or ova to conceive a child postmortem and to authorize a specific person to control the decedent's genetic material.²⁸⁴ Thus, it appears that a person can consent to being the parent of a PMC child conceived with donated gametes by complying with section (d) of the statute.²⁸⁵

Otherwise, except in New York, a decedent cannot consent to be the parent of a PMC child who is not their genetic child. Yet every year, thousands of people use donated gametes to conceive children because they are infertile or do not have an opposite sex partner.²⁸⁶ The Centers for Disease Control and Prevention reported 24,300 ART cycles with donated eggs in 2016.²⁸⁷ About ten million

280. *Id.*

281. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3(b)(1)(B) (McKinney 2021).

282. *Id.*

283. *Id.*

284. *Id.*

285. *See id.*

286. AM. SOC'Y FOR REPROD. MED., FACT SHEET, GAMETE (EGGS AND SPERM) AND EMBRYO DONATION 1 (2014), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/gamete_eggs_and_sperm_and_embryo_donation_factsheet.pdf [https://perma.cc/T325-MH2W].

287. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUM. SERVS., 2016 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 46 (2018), <https://www.cdc.gov/art/pdf/2016-report/ART-2016-National-Summary-Report.pdf> [https://perma.cc/LJ6H-3P7W]. A "donor egg cycle" is an ART cycle in which an embryo is formed from the egg of one woman (the donor) and then transferred to another woman (the recipient). *Id.* at 63.

American adults identify as lesbian, gay, bisexual, or transgender.²⁸⁸ The U.S. Census Bureau estimates that more than half a million same-sex couples are married and 469,000 are cohabiting, with 191,000 children in their households.²⁸⁹ To have a child, same-sex couples need donated gametes, but the existing statutes in all states except New York do not allow infertile or many LGBT decedents to be the parent of a PMC child.

E. The Variety of Definitions of “Consent” and Differences in Legal Formalities Mean That One State’s Writing Is Unlikely to Be Accepted in Another

How does one ensure the decedent’s consent to being a parent of a PMC child? In many cases, when a person cryopreserves his sperm or her ova, or when a couple freezes their embryos, the clinic will present a form detailing various choices for the genetic providers to select, including the disposition of the material if one or both die.²⁹⁰ Can we rely on the clinics to provide a comprehensive form that will satisfy the legal niceties and ensure that a PMC child will inherit from the decedent if that is the desire? The answer is no for several reasons.

First, for those states whose statutes require the decedent to consent to being a parent of a PMC child, the language in the clinic form is designed for an entirely different purpose. In *Burns v. Astrue*, the decedent and his wife signed a “Semen Storage Agreement” in which the decedent specified that, in the event of his death, he would like his vials of semen maintained in storage for future donation to his wife, who would assume all of the obligations and terms described in the contract.²⁹¹ In another section, he indicated that his

288. *Counting LGBT Communities: SAGE and the 2020 Census*, SAGE: BLOG (Feb. 14, 2020), <https://www.sageusa.org/counting-lgbt-communities-sage-and-the-2020-census/> [<https://perma.cc/MZG3-HAG2>].

289. Press Release, U.S. Census Bureau, U.S. Census Bureau Releases CPS Estimates for Same-Sex Households (Nov. 19, 2019), <https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html> [<https://perma.cc/47WM-PLE7>].

290. Hans & Dooley, *supra* note 3, at 573.

291. 289 P.3d 551, 551–53 (Utah 2012).

purpose for storing the semen was “[p]rior to . . . chemotherapy,” rather than “[p]rior to artificial insemination.”²⁹² Utah’s statute, based on the UPA, requires the decedent’s consent in a record “that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child,”²⁹³ but the Utah Supreme Court found no such consent here:

The purpose of the Agreement is stated in the first sentence: “to act as an agreement to store semen” Additionally, although the Agreement is based on the premise that the purpose of storing semen is to create children, the contract is dedicated to the legal obligations regarding storage, not use.²⁹⁴

However, in states such as Arkansas and Louisiana, whose statutes require only that the decedent authorize their spouse to use the gametes postmortem, the storage agreement might be enough if executed with the correct formalities.²⁹⁵

Second, suppose a clinic did choose to modify its form to comply with the language needed to constitute sufficient consent to parent a PMC child. Presumably, the clinic would use the language of the statute in the state where the clinic is located, so any clinics in the states without such legislation or case law would have no guide. But even in the seventeen states that require the decedent’s written consent, the language would be helpful only if the person storing the genetic material and signing the agreement ended up dying domiciled in that state because state law at the time of the decedent’s death applies to determine who inherits.²⁹⁶ In addition, because of the high cost of IVF and the lack of insurance, many seek treatment outside of

292. *Id.* at 557.

293. UTAH CODE ANN. § 78B-15-707 (LexisNexis 2019).

294. *Burns*, 289 P.3d at 557.

295. *See* ARK. CODE ANN. § 28-9-221 (2012) (requiring that writing be notarized or witnessed by a licensed physician or a person acting under the supervision of a licensed physician); LA. STAT. ANN. § 9:391.1(A) (2018).

296. *Seaman v. Colvin*, 145 F. Supp. 3d 421, 425 (E.D. Pa. 2015).

their home state. Only sixteen states mandate some insurance coverage for infertility, with the result that “thousands of women each year . . . opt to travel to clinics in other states (and sometimes other countries) in search of affordable [IVF] . . . procedures.”²⁹⁷ If the laws were consistent, this might not be a problem, but the statutes and cases vary widely in what constitutes “consent.”²⁹⁸

To satisfy the statutory language in the greatest number of these states, the decedent would need to (1) expressly consent to being a parent of a child conceived with the decedent’s gametes, if assisted reproduction were to occur after the decedent’s death; (2) authorize a specific person (preferably the spouse to comply with the requirements of most states) to use the gametes for posthumous conception; and (3) authorize a person (again, preferably the spouse) to control the genetic material postmortem;²⁹⁹ and (4) provide for the child in his or her will.³⁰⁰ Expressly providing for a PMC child in one’s will would satisfy the law in Florida, where the only writing accepted is the decedent’s will;³⁰¹ it would also comply with Oregon law.

A further wrinkle is presented by Massachusetts, which does not require a writing but does require evidence that the decedent not only consented to be a parent but also that the decedent agreed to support the PMC child.³⁰² We do not yet know what evidence will satisfy this support standard; none was presented in *Woodward*, where the standard was declared.³⁰³ In a second case allowing another PMC child to inherit, the federal court accepted an amended declaratory judgment by the probate court that the decedent intended to support

297. Megan Leonhardt, *Women Are Traveling Far and Wide for Affordable IVF—Here’s Why It Is So Expensive*, CNBC: MAKE IT (Aug. 13, 2019, 3:09 PM), <https://www.cnbc.com/2019/08/13/women-are-traveling-far-and-wide-for-affordable-ivf.html> [<https://perma.cc/XS8W-VTTM>].

298. *See supra* Section I.C.2.

299. Carpenter, *supra* note 10, at 401.

300. OR. REV. STAT. § 112.077(4)(b) (2016).

301. FLA. STAT. ANN. § 742.17(4) (West 2016) (providing that a PMC child “shall not be eligible for a claim against the decedent’s estate unless the child has been provided for by the decedent’s will”).

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

303. *Id.* at 270–72.

the child without further details.³⁰⁴ Executing a will that provides expressly for a PMC child might indicate such intent to support the child. Alternatively, we could add to the language in the writing that not only did the decedent intend to parent the child but also that the decedent intended to support her.

What formalities would be required for this writing to be accepted in the maximum number of states? Although six states simply require a writing or record,³⁰⁵ three others require the writing to be “signed”;³⁰⁶ two require it to be “signed and dated”;³⁰⁷ and one requires it be signed and dated by both the decedent and the decedent’s surviving spouse.³⁰⁸ Two states require the writing to be kept or maintained by “the licensed assisting physician”³⁰⁹ or “a licensed physician,”³¹⁰ and one state requires it to be either notarized or witnessed by a licensed physician or by a person under the supervision of a licensed physician.³¹¹ New York requires two adult witnesses, neither of whom can be named in the instrument to make decisions about the decedent’s genetic material; in addition, the document must be executed within seven years of the decedent’s death.³¹² Ideally then, adding to the four requirements stated *supra*, the writing would be (5) signed by both the decedent and his or her spouse, (6) dated within seven years of the decedent’s death, (7) witnessed by two adults (one of whom is a licensed physician or a person under her supervision), and (8) maintained by the licensed assisting physician.

304. *Hanson v. Astrue*, 733 F. Supp. 2d 214, 216 (D. Mass. 2010).

305. DEL. CODE ANN. tit. 13, § 8-707 (2009) (requiring a record); 755 ILL. COMP. STAT. ANN. 5/2-3(b)(3) (West 2007) (requiring a writing); LA. STAT. ANN. § 9:391.1(A) (2018) (requiring a writing); VA. CODE ANN. § 20-158(B)(ii) (2016) (requiring a writing); UTAH CODE ANN. § 78B-15-707 (LexisNexis 2019) (requiring a record); WYO. STAT. ANN. § 14-2-907 (2019) (requiring a record).

306. IOWA CODE § 633.220A(1)(b) (West 2019); MD. CODE ANN., EST. & TRUSTS § 3-107(b)(1) (LexisNexis 2017); N.M. STAT. ANN. § 40-11A-707 (2017).

307. CAL. PROB. CODE § 249.5(a)(1) (West 2002); OR. REV. STAT. § 112.077(4)(b)(A) (2016).

308. CONN. GEN. STAT. § 45a-785(a)(1) (2019).

309. ALA. CODE § 26-17-707(2016).

310. TEX. FAM. CODE ANN. § 160.707 (West 2014).

311. ARK. CODE ANN. § 28-9-221(a) (2012).

312. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2021).

If the clinic's storage agreement or some other writing was executed with the recommended language and all of the formalities and if a valid will made a specific bequest to a PMC child, the decedent would likely be a parent in Massachusetts and all sixteen states requiring written consent or a record. It would also satisfy the requirements in the four states where a writing indicating consent is one option but not the only way to prove consent,³¹³ in Maine (whose statute makes no mention of consent),³¹⁴ and in Florida (whose statute requires a valid will providing for the PMC child).³¹⁵ It is unlikely to satisfy the standard announced in New Jersey, however. In *In re Estate of Kolacy*, the court opined:

[O]nce we establish, as we have in this case, that a child is indeed the offspring of a decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or . . . the orderly administration of estates.³¹⁶

Unlike all of the other statutes and cases, New Jersey's analysis does not include an inquiry into the decedent's consent to be a parent. Rather, the state looks at entirely distinct factors that would not be addressed by either the written consent or the decedent's will.

III. SOLUTIONS

If we want to allow decedents to parent PMC children, as surveys indicate, we need legislation with four key features.³¹⁷ First, because of the mobile nature of our population, we need either uniform

313. COLO. REV. STAT. § 15-11-120(6), (8) (2019); N.D. CENT. CODE § 30.1-04-19(6), (8) (2010); VT. STAT. ANN. tit. 15C, § 707 (2019); WASH. REV. CODE § 26.26A.635 (2019).

314. ME. REV. STAT. ANN. tit. 18-C, § 2-118 (2020).

315. FLA. STAT. ANN. § 742.17(4) (West 2016).

316. 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000).

317. Norton, *supra* note 5.

legislation or statutes that will accept consent as valid in the place where executed or where the deceased was domiciled. Second, we need a standard that allows not just genetic parents but also the medically and socially infertile to choose to be parents of a PMC child.³¹⁸ Third, to allow time for grieving without disrupting the orderly administration of the decedent's estate, the statutes need to adopt a provision for reasonable notice to the decedent's personal representative, plus a more extended time for the PMC child to be in utero or born. Finally, the statutes need to avoid ambiguous and outdated terms such as "conceived" or "begotten," or if such terms are included, the statutes need to define them precisely.

The uniform or model act that best reflects Americans' support for PMC is the 2008 UPC, which allows consent to being a parent of a PMC child to be shown in three ways: in a signed record, by clear and convincing evidence, or via a presumption of consent because the decedent died married with no divorce proceedings pending.³¹⁹ The UPC has several shortcomings, however. Only two states, Colorado and North Dakota, have adopted its provision on PMC children.³²⁰ The UPC does not define "conceived after an individual's death," although it does require the child to be "in utero" or "born" within a particular time to be treated as if in gestation at the decedent's death.³²¹ Further, a provision on notice to the personal representative would need to be added to the statute.

Legislation should address four key issues with PMC statutes. First, the main obstacle to the UPC language may be the presumption that a person who dies married has consented to be the parent of a PMC child. Is that assumption valid? It will be tested if either (1) the decedent has cryopreserved gametes or embryos before their death,

318. "Social infertility" is one definition that would include "specific life circumstances, like being a man with a same-sex partner, [that] rendered them unable to conceive or carry a child to term without medical intervention." David Kaufman, *The Fight for Fertility Equality*, N.Y. TIMES, <https://www.nytimes.com/2020/07/22/style/lgbtq-fertility-surrogacy-coverage.html> [<https://perma.cc/6RUM-KK6X>] (July 24, 2020).

319. Carpenter, *supra* note 10, at 372–73 (citing UNIF. PROB. CODE § 2-120 (amended 2008)).

320. COLO. REV. STAT. § 15-11-120 (2019); N.D. CENT. CODE § 30.1-04-19(6)–(11) (2010).

321. Carpenter, *supra* note 10, at 373 (citing UNIF. PROB. CODE § 2-120(k)).

or (2) the decedent's gametes are obtained after death. In the first scenario, in which the decedent has actively participated in assisted reproduction and cryopreserved reproductive material, the decedent will likely have completed a storage agreement directing disposition at death; that agreement may serve to either confirm or refute the presumption of consent. Courts have demonstrated a willingness to follow the decedent's directions in the agreement rather than a conflicting demand by a surviving partner or parent.³²² The second scenario—in which the decedent has not cryopreserved any material but rather the material is obtained postmortem—raises many more issues. Should we presume simply because the decedent died married with no divorce proceedings pending that she would want this? In certain cases, the decision will not simply be legal but medical. If the patient is a woman older than thirty, retrieving her ova will require a two-week regimen of hormones. In a case reported by the Massachusetts General Hospital, a husband's request for oocyte retrieval from his wife was denied in part because subjecting her to the hormonal procedure would have hastened her death.³²³ The team also considered the fact that the patient was on birth control and had not expressed to her gynecologist any desire to become pregnant, indicating to them a lack of consent.³²⁴ In a state adopting the UPC, these might be factors in rebutting the presumption.

Alternatively, if a state preferred its own statute rather than the UPC version, language of comity could be added to recognize written consent valid in another state but not in the present one. Such language is typical in a wills statute. California, for example, accepts a will as validly executed if “[t]he execution of the will complies with the law at the time of execution of the place where the will is executed” or “complies with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place

322. See, e.g., *Estate of Kievernagel v. Kievernagel*, 83 Cal. Rptr. 3d 311, 316 (Ct. App. 2008); *Speranza v. Repro Lab Inc.*, 875 N.Y.S.2d 449, 454 (App. Div. 2009).

323. Greer et al., *supra* note 97, at 282.

324. *Id.* at 277, 279.

of abode, or is a national.”³²⁵ A similar clause added to a state’s statute would at least expand the number of states accepting a decedent’s written consent for PMC.

Second, statutes should allow non-genetic parents who have participated in ART and wish to be parents of a PMC child to do so, allowing those with fertility challenges to be on an equal footing.³²⁶ These are people who have used a third person’s gametes to conceive a child and then cryopreserved extra reproductive material. They may already have children using those third person’s gametes. Suppose A and B use A’s sperm and C’s ova to create fifteen embryos, implanting two to have twins and cryopreserving the rest. As long as B is alive when the embryos are implanted, B will be a parent of the resulting children in many states.³²⁷ But if B dies before the embryos are implanted, B can no longer consent to being a parent of the PMC children (except in New York) because B is not a genetic parent. As a 2005 survey showed, those without a genetic connection may feel strongly about cryopreserved embryos; some interviewees referred to the stored material, all created using donor oocytes, as “siblings of their living children.”³²⁸ This reform is easily accomplished by simply substituting “intended parent” for “genetic parent” and eliminating any requirement that the decedent’s sperm or ova be used to conceive the PMC child.

Third, the proposed statute needs to strike a reasonable balance between allowing the surviving partner time to grieve and permitting the estate to close without leaving the PMC child with a choice of

325. CAL. PROB. CODE § 6113(b), (c) (West 2009).

326. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008) (arguing that the government can ban a certain ART across the board, but once it allows a certain one, it should not forbid it in other contexts).

327. If B is the birth mother, she will be deemed the mother by the act of giving birth. *See, e.g.*, CAL. FAM. CODE § 7610(a) (West 2013); N.D. CENT. CODE § 30.1-04-19(3) (2010). If a gestational carrier were used, B can be declared a parent in a pre-birth order in states such as Delaware and New Hampshire. DEL. CODE ANN. tit. 13, § 8-611(b) (2009); N.H. REV. STAT. ANN. § 168-B:12 (2014). In other states, such as Nebraska, B must adopt the child in order to be a parent. *Gestational Surrogacy in Nebraska*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/nebraska/> [<https://perma.cc/F9NQ-SHEL>].

328. Nachtigall et al., *supra* note 84, at 433.

either receiving no assets in the estate or trying to recover them from other distributees. With a recommended bereavement time of six months to a year and the fact that assisted reproduction often requires several cycles to be successful, the best approach is two-fold. Initially, the statute should require the person who plans to use the reproductive material to notify the decedent's personal representative within a few months of appointment that the material is available. In most cases, no such notice will be given, and probate can proceed. If notice is given, however, the representative can take into account the possible birth of a PMC child and withhold distribution of some assets. Notifying the personal representative should be sufficient without the additional step of recording the decedent's written consent, as required by New York's statute.³²⁹ The recording requirement has two significant drawbacks: it adds an additional hurdle—making it less likely that the PMC child will inherit—and it makes the decedent's consent a public document without adding any discernible benefit. As for the time when the PMC child must be in utero, the minimum should be two years, as in California,³³⁰ New York,³³¹ and Oregon.³³² This would allow a year for grieving and a year for several attempts to achieve pregnancy.

Finally, statutes should avoid using terminology such as “conceived” or “begotten” and instead carefully define a PMC child as one who is not in utero when the decedent dies. Looking to the future, we may want to avoid even the language in West Virginia's statute, which requires that the child be “in the womb of its mother” rather than “conceived.”³³³ Since 2014, women have successfully gotten pregnant and given birth following a uterus transplant.³³⁴ Is the baby “in the womb of its mother” if the mother was born without

329. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2021).

330. CAL. PROB. CODE § 249.5(a)(1) (West 2002).

331. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3.

332. OR. REV. STAT. § 112.077 (2016).

333. W. VA. CODE ANN. § 42-1-8 (LexisNexis 2019).

334. Denise Grady, *Woman with Transplanted Uterus Gives Birth, The First in the U.S.*, N.Y. TIMES (Dec. 2, 2017), <https://www.nytimes.com/2017/12/02/health/uterus-transplant-baby.html> [<https://perma.cc/RD2Z-HZ54>].

a uterus? There is also the possibility in the far future of an artificial womb; researchers in the Netherlands hope to develop one in the next decade that would not completely replace the womb but would function as one for babies born prematurely.³³⁵

CONCLUSION

Americans favor postmortem conception. They have said so in surveys; they have demonstrated their support by cryopreserving their sperm, ova, and embryos for use following their deaths; they have made numerous requests to obtain a loved one's gametes after that person has died; and they have filed more than one hundred requests for survivors' benefits to Social Security for PMC children.³³⁶ Legislatures in twenty-three states have responded by enacting laws that allow these children to inherit if certain conditions are met, producing a bewildering array of requirements.³³⁷ Despite the mobile nature of our population, the forms of consent imposed by these laws are unlikely to be accepted in a state other than the one in which they are executed. Hospitals have lagged far behind in adopting guidelines for determining when sperm or ova should be retrieved after death, and the few guidelines that have been adopted are often out of step with legal requirements.

If a state adopts legislation to allow a PMC child to inherit, that statute should allow the child to inherit—not create unsurmountable roadblocks, as many of these statutes do. Legal standards that define consent by the decedent in more than a dozen different ways, that mandate multiple variations of “dated and signed,” and that by and large exclude anyone who uses donated gametes make it unnecessarily difficult to comply. States and courts claim that they are concerned with balancing the orderly administration of estates

335. Amit Malewar, *World's First Artificial Womb for Humans*, TECH EXPLORIST (Oct. 17, 2019), <https://www.techexplorist.com/worlds-first-artificial-womb-humans/27131/> [<https://perma.cc/3CUV-MN67>].

336. See *supra* notes 6–9, 40 and Sections I.A, I.B.

337. See *supra* note 15.

2021]

REIMAGINING POSTMORTEM CONCEPTION

955

with the grieving of a surviving partner. Yet, these states and courts proceed to impose deadlines that require the partner to use the gametic material immediately or alternatively include a deadline so long that the estate is almost certain to be closed by the time a PMC child appears.

These problems can be solved. This Article has proposed four concrete ways to improve these statutes to comport with our avowed goal.