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# Not Without My Father: The Legal Status of the Posthumously Conceived Child

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## I. INTRODUCTION

Twins Amanda and Elyse were born to William and Mariantonia Kolacy of New Jersey on November 3, 1996.[1] At this ordinarily joyous occasion, only Mariantonia was able to welcome the two girls into the world; their father, William, had passed away some eighteen months before their birth—nearly a year before the girls were conceived.[2]

When William and Mariantonia were a young married couple, doctors diagnosed William with leukemia and advised him to begin chemotherapy immediately.[3] Fearing the treatment or the disease would render him sterile, William preserved some of his sperm for later use.[4] Regrettably, William did not survive the disease and died on April 15, 1995, at the young age of twenty-six.[5] Nearly a year later, on April 3, 1996, Mariantonia underwent an in vitro fertilization procedure in which William's sperm was united with her eggs, and the resulting embryos were implanted into her uterus.[6] Some seven months later, on November 3, 1996, Amanda and Elyse were born[7] into the world and into a legal conundrum: despite being William's undisputed genetic offspring, whether they had a right to be legally recognized as his children faced great uncertainty.[8]

This uncertainty surfaced when the Social Security Administration denied Mariantonia's petition to obtain dependent benefits

1. *In re* Estate of Kolacy, 753 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *See id.* at 1259.

for Amanda and Elyse based on William's Social Security contributions during his life.[9] The Administration denied the petition because the girls did not qualify as dependents under the Social Security Act,[10] which, in part, provides that benefits "can be paid to a child who could inherit under the State's intestate laws."[11] Under New Jersey law, children born after the father's death can inherit only if "conceived before his death."[12] Since Amanda and Elyse were conceived almost a year after William died, a strict reading of the statute would leave them unable to claim heirship and, consequently, they would be denied the Social Security benefits to which dependents are normally entitled.[13] In further pursuit of the children's claim for dependent benefits, Mariantonia sought to have Amanda and Elyse declared "among the class of persons who are . . . intestate heirs"[14] of William under New Jersey law. Searching in vain for guidance, the court was unable to find any "American appellate court decisions dealing with [the] central issue" of the legal status of children conceived posthumously.[15] Despite this void, the court reasoned that the children were nonetheless "entitled to have their status as heirs of their father determined for a variety of state law purposes,"[16] and accordingly, recognized Amanda and Elyse as the legal heirs of William.[17]

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The *Kolacy* case exemplifies an important legal problem created by advances in technology. In the past, conception was possible only through sexual intercourse, thus death represented the ultimate finality.[18] Today, new reproductive technologies have made

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9. *Id.*

10. *Id.*

11. *Id.* (quoting § 216 of the Social Security Act). Under the Social Security Act, a child can also qualify for survivor's benefits by showing an actual or a statutory presumptive dependence on the deceased wage-earning parent, which posthumous children cannot do because they were not alive during the parent's life, and thus, could not have been dependent on the parent. For a comprehensive discussion of Social Security benefits and posthumous children, see generally 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).

12. *Kolacy*, 753 A.2d at 1260 (quoting N.J. STAT. ANN. § 3B:5-8 (West 2001)).

13. *See id.* at 1259-60.

14. *Id.* at 1259.

15. *Id.* at 1260. Since the *Kolacy* case, however, the Supreme Judicial Court of Massachusetts became the first court of last appeal in the country to decide this issue. *See infra* Part II.C.

16. *See Kolacy*, 753 A.2d at 1260; *see also infra* Part II.B.2.b (dicussing *Kolacy*).

17. For more discussion of the *Kolacy* case, see *infra* Part II.B.2.b.

18. *See* Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 902 (1997) ("Throughout human history, death has always signified an

noncoital reproduction commonplace and have even made it possible to conceive from the grave.[19] Posthumous conception—the application of reproductive technology to conceive a child after the death of one or both of the genetic parents—would certainly have seemed oxymoronic only a short time ago.[20] Today, however, it is a real matter that creates doubt about the legal status of this unique class of children.[21]

To date, the *Kolacy* case is one of only three reported cases involving actual posthumous children.[22] Yet, while the legal status of posthumous children is a seemingly exceptional concern, it will not remain so. By some estimates, roughly 2.3 million couples in the United States seek some form of treatment for infertility problems every year.[23] At least 40,000 of these couples use some type of assisted reproductive technology.[24] Viewed in the context of reproductive technology's historical growth, the situation becomes immediately more striking. By 1980, some 250,000 babies had been conceived by artificial insemination.[25] Less than ten years later, in 1987, more than 172,000 women had used artificial insemination, resulting in the birth of about 65,000 babies in that year alone.[26] The 1995 National Survey of Family Growth revealed that two percent of the nearly sixty million women of reproductive age in the United States, approximately 1.2 million women, had had an infer-

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awesome finality. The conclusive demise of the body necessarily led to the concomitant extinguishing of the procreative process.").

19. *Id.* at 902-03.

20. Banks, *supra* note 11, at 256 ("The uncertainty of the rights and status of this newly created class of children is a direct consequence of the advancements in medical technology that have made tremendous inroads in assisted reproduction in the last ten years. These inroads have plagued the legal community with a myriad of novel issues and controversies that, before this time, could never have been contemplated by lawmaking bodies.")

21. This Note will refer to children conceived after the death of one or both of the genetic parents as "posthumous children." This term should not be confused with the common law usage, which refers to the situation where a father dies after conception but before the child's birth, which would not require the use of an assisted reproductive technology. *See infra* Part II.A.1.

22. *Hart v. Chater* and *Woodward v. Commissioner of Social Security*, 760 N.E.2d 257 (Mass. 2002), are the other two cases concerning the legal status of posthumous children. For further discussion of *Hart*, see Banks, *supra* note 11, at 251-56; Gibbons, *infra* note 25, at 193-94; Garside, *infra* note 29, at 720-22; Kerekes, *infra* note 29, at 232-40; Shah, *infra* note 48, at 561-62; and *infra*, Part II.B.2.a. For further discussion of *Woodward*, see *infra* Part II.B.2.c.

23. Banks, *supra* note 11, at 268.

24. *Id.*

25. John A. Gibbons, *Who's Your Daddy?: A Constitutional Analysis of Post-Mortem Insemination*, 14 J. CONTEMP. HEALTH L. & POL'Y 187, 187 (1997).

26. *Id.*

tility-related medical appointment in the previous year.[27] An additional thirteen percent had received infertility treatments at some time in their lives.[28]

Just as reproductive technologies have become common options to overcome infertility, posthumous conception will naturally grow as well.[29] The stage is already set as directors of sperm banks

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27. CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVS., 1998 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2000), *available at* http://www.cdc.gov/nccdphp/drh/art.htm.

28. *Id.*

29. Several forms of assisted reproductive technology in combination with a process known as cryogenic preservation can be used in posthumous conception. These common forms include artificial insemination, in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and intracytoplasmic sperm injection.

Cryopreservation is a freezing process used to preserve gametes and even fertilized embryos for later use. The gametes or embryos are placed in tanks of liquid nitrogen at very low temperatures, as low as negative 328 degrees Fahrenheit, which creates the possibility that they can be used several years after their initial preservation. Indeed, healthy children have been conceived from sperm that was frozen and stored for more than ten years. Accordingly, cryogenically preserved reproductive material can be used many years after the death of the provider, resulting in a posthumous child who is unequivocally the genetic offspring of a person long passed away. Banks, *supra* note 11, at 270; Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 525-26 (1993).

Artificial insemination ("AI") is the most well-known and most widely used form of assisted reproductive technology, with literally hundreds of thousands of such procedures conducted in the United States alone. It involves a syringe being used to insert sperm into the woman's vagina or uterus during her ovulation. It is also perhaps the simplest method, typified by the fact that women have been known to use a simple "turkey baster" to inseminate themselves. Ellen J. Garside, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 715 (1996); Michelle L. Brenwald & Kay Redeker, Note, *A Primer on Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 606, 612 (1999).

Another, more sophisticated, form of artificial insemination is intrauterine insemination, in which sperm is inserted directly into the uterus with the use of a catheter, which bypasses the cervix and vagina. Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213, 217 (1996).

In vitro fertilization ("IVF") consists of extracting eggs from the woman and fertilizing them outside her body in a lab. Once this process is completed, the fertilized ova are inserted into the woman's uterus through her cervix, where they will develop according to the natural process and rate of pregnancy. This process gave rise to the so-called "test tube baby" and has become an increasingly popular method of assisted reproduction. *Id.* at 216; Garside, *supra*, at 714.

Gamete intrafallopian transfer ("GIFT") is a procedure that also requires removing eggs from the woman's ovaries. Once extracted, the eggs are combined with sperm, and then the mixture is inserted into the woman's fallopian tubes using a fiberoptic instrument known as a laparoscope. Once inserted, the sperm and eggs will have a chance to develop naturally in the fallopian tubes, which, in some cases, offers a greater chance of success. Any resulting embryo would then move into the uterus and develop as in a normal pregnancy. Garside, *supra*, at 715; Kerekes, *supra*, at 216-17; Centers for Disease Control and Prevention's Reproductive Health Information Source, *at* http://www.cdc.gov/nccdphp/drh/art96/apdx.htm.

Zygote intrafallopian transfer ("ZIFT") is a technique in which eggs are extracted from the woman and fertilized outside her body. Then, like GIFT, the resulting zygote is inserted into the woman's fallopian tubes with a laparoscope. Garside, *supra*, at 715; Kerekes, *supra*, at 217.

report that widows of cancer victims often request their husbands' preserved sperm "in the hopes of having a child by their husband."[30] Sperm banks have also reported increased donation activity during military conflict[31] by soldiers attempting to preserve their ability to become fathers.[32] Many additional reasons could motivate people to preserve their gametes for possible use in posthumous conception: the threat of sterility caused by chemotherapy or other treatments; the desire of persons undergoing sterilization procedures to preserve their ability to become parents; and the same desire among those anticipating suicide.[33] Whatever the reason, the groundwork certainly exists for increasingly common use of assisted reproductive technologies in the posthumous conception context.[34]

Yet, while posthumous conception will certainly become more prevalent, longstanding common law and statutory presumptions that are used to determine paternity fail to take into account the phenomenon of posthumous children. Furthermore, few states have enacted legislation that specifically addresses the status of children born posthumously.[35] The states that have addressed this issue have denied posthumous children the possibility of establishing a legal relationship with their deceased parent.[36] Without this legal recognition of parenthood, posthumous children cannot inherit by intestate succession from their deceased parent or receive survivor's benefits, such as from insurance or social security. Moreover, because these children are not considered the legal children of the deceased parent, they cannot inherit through intestate succession from the deceased parent's own parents or siblings—the children's grandparents, aunts, and uncles. Intestate inheritance rights are granted automatically to legitimate children, and illegitimate chil-

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Intracytoplasmic sperm injection ("ICSI") is a form of reproductive technology often used when dealing with male infertility problems. This procedure involves injecting a single sperm into an egg that has been previously extracted from the would-be mother. The fertilized egg is then placed into the woman's uterus. Banks, *supra* note 11, at 271; Kerekes, *supra*, at 217.

30. Gilbert, *supra* note 29, at 523.

31. *Id.* at 525-26 (noting increased donation by soldiers during the Vietnam War and more recently during the Persian Gulf conflict).

32. Gibbons, *supra* note 25, at 190. Even the Apollo astronauts had the opportunity to preserve their sperm in case space travel harmed their reproductive capacity. Gilbert, *supra* note 29, at 525.

33. Gibbons, *supra* note 25, at 190.

34. *See* Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 96 (1994) (noting congressional survey reporting that some men preserve sperm specifically out of a desire to procreate after death and that many sperm banks would honor such donors' wishes).

35. *See infra* Part II.A.

36. *See infra* Part II.A.3.

dren can obtain such rights if they properly filiate with their nonmarital parent.[37]

As posthumous conception becomes more prevalent, current statutory schemes will increasingly prove inadequate, and the law will need to take into account this new class of children properly. This Note proposes a general framework for resolving the legal issues raised by posthumous children.[38] This Note argues that, at a foundational level, any determination of the rights of posthumous children should be grounded in three important constitutional doctrines: (1) the constitutional status of the family, which protects childrearing decisions; (2) the constitutional right of privacy, which protects childbearing decisions; and (3) the constitutional rights of illegitimate children, which protect the interests of nonmarital children. Although these constitutional protections do not directly anticipate posthumous conception,[39] they do nonetheless provide an apt paradigm for carefully delineating the rights of posthumous children. Consequently, any treatment of posthumous children should be consistent with these constitutional principles. This Note draws from and analogizes to these constitutional doctrines to derive an analytical framework that protects posthumous children and simultaneously accommodates important state interests.[40]

Part II of this Note examines common law and statutory presumptions of paternity, which fail to anticipate the posthumous child, and outlines existing legislative and judicial responses to posthumous conception. Part III describes the primary policy concerns raised by posthumous conception that have informed the various current approaches to the issue. Part IV sets the foundation for delineating the rights of posthumous children by outlining the constitutional status of the family, the constitutional right of privacy as it relates to reproductive rights, and the constitutional rights of nonmarital children. Because states have unique interests

37. For a thorough discussion of inheritance issues in several contexts, including those raised in this Note, see generally Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93.

38. This Note examines posthumous conception in the more typical context represented in the *Kolacy* case, that of an established couple choosing to conceive through artificial means but where the father dies before they are able to complete the process, and the mother nevertheless conceives and bears a child using the father's gametes. The situation in which the woman dies and the man decides to use her gametes to conceive would require a surrogacy arrangement, which raises additional complexities due to a third-party's involvement. The overall framework this Note recommends, however, is equally applicable to that situation and would merely require additional measures to account for those complexities.

39. *See infra* Parts IV, V.

40. *See infra* Parts IV, V.

and concerns that they would need to address in resolving the issues raised by posthumous conception, this Note does not propose specific legislative measures or decisional rules. Instead, in Part V, this Note recommends an analytical framework to guide policymakers in addressing the rights of posthumous children in a way that is consistent with important constitutional constructs. As rapid technological developments have helped create this legal problem, an overall guiding framework is necessary to adopt specific measures that will inevitably need revision over time to remain consistent with evolving technology.[41]

## II. POSTHUMOUS CONCEPTION AND THE LAW

In contrast to initial antagonism towards the first successful human artificial insemination procedure in America,[42] assisted reproductive technologies today have become commonplace.[43] Americans' use of fertility technology has helped create a multibillion-dollar industry[44] that shows no signs of abating.[45] These reproductive technologies, however, have also created new legal questions that traditional jurisprudence has not anticipated.[46] Posthumous conception strains existing legal categories in ways that leave posthumous children like Amanda and Elyse vulnerable,[47] but few state legislatures have addressed the issue. Likewise, few courts have had an opportunity to comment on the issue. The following is a discussion of the various legislative approaches and court cases that have attempted to analyze posthumous conception.

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41. As one writer has noted, "While the law should be responsive to technological developments, it should not be captive to them." Kerekes, *supra* note 29, at 242.

42. The first successful artificial insemination performed on a human in the United States was conducted in 1866 by Dr. Marion Simms, nearly 100 years after the surgeon John Hunter successfully performed the same procedure in England, in 1770. Dr. Simms, however, was forced to forego further experimentation due to community opposition to what was considered a disdainful act. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 234 (1985-1986).

43. *Id.*; *see also* Brenwald & Redeker, *supra* note 29, at 605-06.

44. Brenwald & Redeker, *supra* note 29, at 623.

45. *See id.* at 606.

46. *See* James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 744-46 (1998); *see also* Karin Mika & Bonnie Hurst, *One Way to Be Born? Legislative Inaction and the Posthumous Child*, 79 MARQ. L. REV. 993, 994 (1996).

47. *See* Bailey, *supra* note 46, at 744-46; Mika & Hurst, *supra* note 46, at 994.

### *A. Legislative Responses*

#### 1. Intestate Inheritance Rights of Posthumous Children

The starting point for understanding the law concerning posthumous conception is in the common law presumption of paternity. Under the common law, if a husband and wife conceive a child but the husband dies during the pregnancy, the resulting child is presumed to be the legitimate child of the deceased father and entitled to intestate succession rights if born within 280 days of the father's death.[48] The Uniform Parentage Act extends the common law presumption to 300 days.[49] This presumptive period accounts for typical gestation[50] and is intended to protect the deceased father's estate against fraudulent claims.[51] Before the advent of cryopreservation,[52] this presumption adequately protected the rights of such children because it was not possible to postpone the gestational period beyond which the presumption would no longer apply. Thus, if the children fit within the presumption, they were deemed legitimate and entitled to intestate inheritance from their deceased parent.[53] Cryopreservation, however, has nearly rendered this presumption "quaint and disturbingly arbitrary," since children can now be born many years after their genetic parents have died.[54] The presumption does not encompass posthumous children because their birth could occur well beyond the 280- or 300-day presumptive period. Therefore, posthumous children are not deemed legal heirs and are denied intestate inheritance rights from their deceased genetic parents.[55]

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48. Bailey, *supra* note 46, at 745; Kerekes, *supra* note 29, at 214; Monica Shah, Comment, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 559 (1996).

49. UNIF. PARENTAGE ACT § 4, 9B U.L.A. 377 (1973). Eighteen states have legislatively adopted this presumption: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. *Id.* at 397.

50. *See* Brashier, *supra* note 37, at 117-18 (discussing how this presumption, the Lord Mansfield rule, applied). The presumption was irrebuttable if the mother's husband "had access to her within the gestation period and was capable of procreating." *Id.*

51. For a good discussion of this presumption of paternity, see Brashier, *supra* note 37, at 117-21.

52. *See supra* note 29 (providing a definition of cryopreservation).

53. Kerekes, *supra* note 29, at 214-15.

54. Bailey, *supra* note 46, at 745.

55. Garside, *supra* note 29, at 723-25.

2. The Uniform Status of the Children of Assisted Conception Act

The most direct legislative treatment of posthumous conception is the Uniform Status of Children of Assisted Conception Act ("USCACA").[56] The National Conference of Commissioners on Uniform State Laws approved the USCACA in 1988 to address the concerns created by reproductive technologies and to "clarify the rights of children born under the new technology," who "because of accident of birth . . . have been denied of certain basic rights."[57] Although not widely adopted,[58] the Act nonetheless provides an important and likely model for states to consult. The Act defines assisted conception as "a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo, but the term does not include the pregnancy of a wife resulting from fertilizing her egg with sperm of her husband."[59] The Act's definition of assisted conception, thus, generally excludes married couples. Section 4(b) of the Act, however, applies directly to married persons attempting posthumous conception and is, in fact, "the only provision in the Act which would deal with procreation by those who are married to each other."[60] Section 4(b) bars posthumous children from establishing legal status as children of the deceased parent.[61] The section provides that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[62] Therefore, the Act denies a child born through posthumous conception rights of intestate inheritance in the estate of the deceased parent.

3. Various State Approaches

To date, only two states, North Dakota and Virginia, have adopted versions of the USCACA.[63] Two other states, Florida and Louisiana, have enacted their own legislation that addresses post-

56. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT ("USCACA"), 9C U.L.A. 363 (2001).

57. *Id.* at 364.

58. Only two states, North Dakota and Virginia, have adopted versions of the Act. *See infra* Part II.A.3.a- .b.

59. USCACA, *supra* note 56, § 1(1), at 368.

60. *Id.* § 4(b), at 372.

61. *Id.* § 4(b), at 371.

62. *Id.*

63. *Id.* § 1(1), at 363.

humous conception.[64] With the exception of Virginia, in certain narrow circumstances,[65] each of these legislative responses prevents posthumous children outright from establishing a legal relationship with their deceased genetic parents, which consequently denies the children intestate inheritance rights and any survivor's benefits from their deceased parents.

*a. North Dakota*

North Dakota was the first state to adopt the USCACA, and the legislature essentially followed the original Act.[66] Under the North Dakota law, assisted conception is defined as "a pregnancy resulting from insemination of an egg of a woman with sperm of a man by means other than sexual intercourse or by removal and implantation of an embryo after sexual intercourse but does not include a pregnancy resulting from the insemination of an egg of a wife using her husband's sperm."[67] In the case of posthumous conception, "[a] person who dies before conception using that person's sperm or egg is not a parent of any resulting child born of the conception."[68] This statutorily defined parent-child relationship governs for purposes of intestate succession.[69] Therefore, a child born through posthumous conception is denied a legal relationship with the deceased parent and is consequently denied inheritance rights from the deceased parent or that parent's other family members.

*b. Virginia*

In 1991, Virginia adopted a version of the USCACA that has important differences from the original Act.[70] Like the USCACA, the Virginia statute sets forth the status of the posthumous child by specifying that "any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child."[71] Virginia's version of the Act, however, includes two important concessions. First, the Virginia statute allows a posthumous child to obtain legal

64. *See infra* Parts II.A.3.c, d.
65. *See infra* Part II.A.3.b.
66. North Dakota adopted the USCACA in 1989. N.D. CENT. CODE § 14-18-01 to -07 (1995).
67. *Id.* § 14-18-01.
68. *Id.* § 14-18-04.
69. *Id.* § 14-18-07.
70. VA. CODE ANN. §§ 20-156 to -165 (Michie 1995).
71. *Id.* § 20-158B.

status as the deceased parent's child if that parent dies prior to "implantation [but] before notice of the death can reasonably be communicated to the physician performing the procedure."[72] Second, and more importantly, the Virginia statute also allows a deceased parent to affirmatively claim a legal relationship with the child if he "consents to be a parent in writing executed before the implantation."[73] This element differs significantly from the USCACA and gives parents some control over their procreative options. Thus, a person can claim legal status as parent of the posthumous child by clearly expressing such an intent while still alive. This legal status, however, does not entitle the posthumous child to intestate inheritance and other rights, unless the child was born within ten months of the parent's death.[74] This effectively negates the unique features of Virginia's approach that at first glance appear to provide greater protections to the posthumous child.[75]

### *c. Florida*

Florida has adopted legislation similar to the USCACA, which provides that "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."[76] Thus, while Florida's statute does allow the child to take under a decedent's will, the law does not allow a posthumous child to establish a legal parent-child relationship with the deceased parent.[77] Therefore, because the child is not the legal heir of the deceased parent, the child would still be ineligible to inherit through intestate succession.[78]

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72. *Id.*

73. *Id.*

74. *Id.* § 20-164 ("A child whose status as a child is declared or negated by this chapter is the child only of his parent or parents as determined under this chapter . . . for all purposes including, but not limited to, (i) intestate succession; (ii) probate law exemptions, allowances, or other protections for children in a parent's estate; and (iii) determining eligibility of the child or its descendants to share in a donative transfer from any person as an individual or as a member of a class determined by reference to the relationship. *However, a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of subdivisions (i), (ii) and (iii) of this section.*" (emphasis added)).

75. *Id.*

76. FLA. STAT. ANN. § 742.17 (West 1997); *see also* Banks, *supra* note 11, at 292 (discussing the Florida statute).

77. Banks, *supra* note 11, at 292.

78. *Id.*; *see also* FLA. STAT. ANN. § 742.17.

### *d. Louisiana*

Under Louisiana law, posthumous children have no inheritance rights.[79] A posthumous child cannot inherit either by intestate or testate succession because Louisiana law requires that the heir "must exist at the death of the decedent."[80] The law further specifies that to receive a causa mortis gift,[81] the capacity of the heir to receive the donation "must exist at the time of death of the testator."[82] Similarly, an heir's capacity to receive an inter vivos gift[83] under Louisiana law must "exist at the time the donee accepts the donation."[84] The law specifically addresses the situation of unborn children and requires that, at the very least, the child must be in utero before the donation or the testator's death.[85] Accordingly, because only the father's sperm or a cryopreserved embryo would exist when the father dies, a posthumous child in Louisiana is ineligible to inherit.[86]

## *B. Judicial Responses*

### 1. Reproductive Rights and Posthumous Conception

Few cases have specifically dealt with reproductive issues involving a deceased person; five are discussed here to illustrate the importance of establishing legal standards for determining the rights of posthumous children. The first two cases address an individual's right to have some control over his or her reproductive prerogatives even in death. The remaining three cases involve actual

79. For a good discussion of Louisiana law as it relates to posthumous conception, see generally Garside, *supra* note 29, and Shah, *supra* note 48, at 565.

80. LA. CIV. CODE ANN. art. 939 (West 2000).

81. A causa mortis gift is one "made in contemplation of the donor's imminent death." BLACK'S LAW DICTIONARY 696 (7th ed. 1999).

82. LA. CIV. CODE ANN. art. 1472 (West 2000).

83. An inter vivos gift is one "made during the donor's lifetime and delivered with the intention of irrevocably surrendering control over the property." BLACK'S LAW DICTIONARY 697 (7th ed. 1999).

84. LA. CIV. CODE ANN. art. 1472.

85. LA. CIV. CODE ANN. art. 1474 (West 2000) ("To be capable of receiving by donation inter vivos, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation mortis causa, an unborn child must be in utero at the time of the death of the testator. In either case, the donation has effect only if the child is born alive."); *see also* Shah, *supra* note 48, at 565 (discussing Louisiana law).

86. Shah, *supra* note 48, at 565; *see also* Garside, *supra* note 29, at 717-26.

children conceived through posthumous conception seeking to establish a legal relationship with their deceased parents.[87]

### *a.* Parpalaix c. CECOS

The case that ushered in the "post-mortem insemination era"[88] was *Parpalaix c. CECOS*, decided in 1981 by the French Tribunaux de grand instance.[89] Doctors diagnosed Alain Parpalaix with testicular cancer at age twenty-four.[90] Before undergoing chemotherapy, Alain deposited sperm at the Centre d'Etude et de Conservation du Sperme ("CECOS") but left no instructions as to how the sperm should be disposed of if he died.[91] When Alain deposited the sperm, he was living with Corrine Richard, whom he later married in a hospital ceremony when his cancer worsened.[92] Two days after the wedding, Alain died.[93] Later, CECOS denied Corrine's petition to release Alain's sperm to her on the basis that it owed a contractual obligation only to Alain, generating the world's first case to address the issue of how to determine the dispositional rights of a dead man's sperm.[94] The court refused to apply contract principles to the case, describing sperm as "the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive."[95] The court determined that the outcome of the case must turn on the intent of the person who donated the sperm in the first instance, and thus, decided in Corrine's favor, believing that it was Alain's intent to have Corrine bear his child.[96] This left Corrine free to conceive a child posthumously using Alain's sperm, which she attempted to do in 1984.[97] Because the sperm quantity was too small and of poor quality, however, her insemination procedure failed.[98]

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87. *See infra* Part II.B.2.

88. Gibbons, *supra* note 25, at 193 n.61 (noting that this designation "represents the time frame since the *Paraplaix* [sic] case and refers to an era where the law has been surprised by the increased popularity of post-mortem insemination and the resultant legal challenges").

89. This case is unreported, but is discussed at length in Gihbons, *supra* note 25, 192-93; Mika & Hurst, *supra* note 46, at 1008-11; and Shapiro & Sonnenblick, *supra* note 42, at 229.

90. Mika & Hurst, *supra* note 46, at 1008-09.

91. *Id.* at 1008-09.

92. *Id.* at 1009.

93. Gibbons, *supra* note 25, at 193.

94. *Id.* at 193.

95. Shapiro & Sonnenblick, *supra* note 42, at 232.

96. Mika & Hurst, *supra* note 46, at 1011.

97. Shapiro & Sonnenblick, *supra* note 42, at 233.

98. *Id.* at 233.

### *b.* Hecht v. Superior Court

The *Parpalaix* case later influenced the California Court of Appeal in its American counterpart,[99] *Hecht v. Superior Court.*[100] In *Hecht*,[101] the court considered a deceased person's right to bequeath sperm at death.[102] Only days before committing suicide,[103] William Kane preserved sperm for the express purpose of having his partner of five years, Deborah Hecht,[104] bear his child posthumously.[105] To make this purpose known, Mr. Kane executed a will, stating: "I bequeath all right, title, and interest that I may have in any specimens of my sperm . . . to Deborah Ellen Hecht."[106] The will further provided that Mr. Kane wished that Ms. Hecht "become impregnated with my sperm" and made financial arrangements for "our future child or children."[107] Mr. Kane also explicitly demonstrated his intent to have Ms. Hecht bear his child posthumously in a letter he wrote to his two adult children of an earlier marriage[108] and to his "posthumous offspring, . . . with the thought that I have loved you in my dreams, even though I never got to see you born."[109] The court rejected the claim of Mr. Kane's living children that allowing an unmarried woman to undergo artificial insemination using a dead man's sperm violated public policy.[110] The court held that protecting the fundamental right to procreate superceded concerns of psychological harm that may theoretically result to existing children.[111] Consequently, the court upheld Ms. Hecht's claim and ordered that the sperm be released to her.[112]

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99. Gibbons, *supra* note 25, at 193.

100. 20 Cal. Rptr. 2d 275, 287-88 (Cal. Ct. App. 1993) (discussing *Parpalaix*).

101. For a good discussion of *Hecht*, see Gibbons, *supra* note 25, at 193-94, and Shah, *supra* note 48, at 555-57.

102. The trial court in *Hecht* acknowledged the uniqueness of this issue, explaining, somewhat frustratingly, the legal basis of its ruling: "It really does not matter, does it? If I am right, I am right and if I am wrong, I am wrong. . . . This is something that is going to have to be decided by the appellate courts. Let's get a decision. . . . Obviously we are all agreed that we are forging new frontiers because science has run ahead of common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories." 20 Cal. Rptr. 2d at 280 n.3.

103. *Id.* at 277.

104. *Id.* at 276.

105. *Id.* at 283-84.

106. *Id.* at 276.

107. *Id.* at 277.

108. *Id.*

109. *Id.*

110. *Id.* at 289.

111. *Id.*; Mika & Hurst, *supra* note 46, at 1014.

112. *Hecht*, 20 Cal. Rptr. 2d at 276.

### 2. The Status of the Posthumous Child

In only three reported cases have courts been faced with an actual posthumous child. These cases illustrate the legal issues future posthumous children will face and the potential for litigation in this area, particularly with respect to survivor's benefits and inheritance rights.[113] In these cases, the children were eventually recognized as the legal heirs of the deceased parent, but in each case, the route to this end was circuitous and uncertain.

#### *a.* Hart v. Chater

The first U.S. case involving an actual posthumous child was brought before an administrative law judge in 1991. In *Hart v. Chater*,[114] Nancy Hart had used an assisted reproductive technology to conceive a daughter using the preserved sperm of her deceased husband, Edward Hart.[115] Before his death, Mr. Hart specifically told his wife that "[t]here could always be a child for you," referring to the possibility of using his preserved sperm.[116] When her daughter, Judith Christine, was born, Ms. Hart filed for Social Security survivor's benefits and her request was initially granted.[117] The Social Security Appeals Council, however, subsequently overturned the grant, finding that Judith did not fall within any of the categories of dependent children who qualify for benefits under the Social Security Act.[118] Because the Act relies on state law to make such determinations, the Appeals Council based its denial on the fact that under Louisiana law, Judith could not be considered Mr. Hart's legitimate heir because she was conceived after his death.[119] Due to the unusual nature of Ms. Hart's petition, however, the Social Security Commissioner later agreed to grant the petition and pay survivor's benefits to Judith, acknowledging that posthumous conception and related policy issues could not have been contemplated when the Social Security Act was passed.[120]

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113. *See* Shah, *supra* note 48, at 562.

114. This case is cited and discussed in Banks, *supra* note 11, at 251-56; Garside, *supra* note 29, at 720-22; Gibbons, *supra* note 25, at 193-94; Kerekes, *supra* note 29, at 232-40; and Shah, *supra* note 48, at 561-62.

115. Gibbons, *supra* note 25, at 193-94. Edward Hart had died previously of non-Hodgkins lymphoma of the esophagus. *Id.* at 194.

116. *Id.*

117. Shah, *supra* note 48, at 561-62.

118. *Id.* at 562.

119. *Id.* at 561-62; *see also supra* Part II.A.3.d (discussing the Louisiana law).

120. Shah, *supra* note 48, at 562.

### b. *In re* Estate of William J. Kolacy

The case of William Kolacy,[121] discussed in Part I, represents only the second time that a court has addressed the legal status of a posthumous child. In *Kolacy*, the court granted Amanda and Elyse legal status as William Kolacy's children and heirs for a number of reasons.[122] One important reason was that a person's property rights are not static, but evolve over time.[123] Although William died without any assets that could pass under New Jersey's intestate laws, the court recognized that in the future, assets from William's parents or siblings could pass to him through intestate succession, which would then transfer to his surviving heirs.[124] In refusing to apply a literal reading of the New Jersey statute,[125] the court noted that estate law had long recognized certain exceptions to the rule that the takers of a decedent's estate must be identified at the date of death.[126] Out of fairness, then, the process of identifying takers from a decedent's estate must be held open long enough to identify all eligible takers.[127] The court identified two such exceptions: first, when the decedent impregnates a woman, but dies before the child is born;[128] and second, when a female relative of the decedent is pregnant with a child who will qualify as a member of a class entitled to inherit from the decedent.[129]

Reviewing New Jersey's succession scheme, the court noted that the legislature had not specified any public policy reason regarding posthumous conception, but it had identified a general legislative intent that children "should be amply provided for" in the event of their parent's death.[130] Accordingly, the court found that this general intent to sufficiently provide for children should prevail over a "restrictive, literal reading" of the statute.[131] Given that the legislature had demonstrated that public policy favors providing for children in the event of a parent's death, the court believed that Amanda and Elyse's petition to be declared their father's legal chil-

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121. *In re* Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).
122. *Id.* at 1264.
123. *Id.* at 1260.
124. *Id.*
125. *Id.* at 1262. The statute, section 3B:5-8 of the New Jersey Statutes Annotated, provides: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." *Id.* at 1260.
126. *Id.*
127. *Id.* at 1261.
128. *Id.*
129. *Id.*
130. *Id.* at 1262.
131. *Id.*

dren and heirs was appropriate, despite the unusual nature of their conception and birth.[132]

### *C.* Woodward v. Commissioner of Social Security

On January 2, 2002, the Supreme Judicial Court of Massachusetts became the first state court of last appeal to rule on the rights of posthumous children and held that such children can gain status as the legal heirs of their deceased parents.[133] In *Woodward v. Commissioner of Social Security*, the Massachusetts high court, answering a certified question from the U.S. District Court for the District of Massachusetts,[134] held that "[i]n certain limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of 'issue' under the Massachusetts intestacy statute."[135]

The case involved Lauren Woodward, who was seeking Social Security survivor's benefits for herself, as mother, and on behalf of her two children after the death of her husband.[136] Three and a half years after Warren and Lauren Woodward were married, Warren was diagnosed with leukemia.[137] Before undergoing leukemia treatments, Warren preserved some of his sperm after being advised that the treatments might render him sterile.[138] Warren died ten months after being diagnosed, leaving Lauren a childless widow.[139] Two years later, however, Lauren gave birth to twins who were conceived through artificial insemination using Warren's preserved sperm.[140] The Social Security Administration denied Lauren's application for Social Security benefits because "the twins were [not] the husband's 'children' within the meaning of the

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132. *Id.*

133. Kathleen Burge, *Those Conceived Posthumously Can Be Legal Heirs, SJC Rules*, BOSTON GLOBE, Jan. 3, 2002, at A1 ("The state's highest court yesterday became the first in the country to rule that children who are conceived with the frozen eggs or sperm of a deceased parent can be considered legal heirs.").

134. The question certified by the federal district court was as follows: "If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts's law of intestate succession?" 760 N.E.2d 257, 259 (Mass. 2002).

135. *Id.*

136. *Id.* at 260.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

Act."[141] Lauren then presented her claim to a federal administrative law judge, who likewise held that the children could not qualify for Social Security survivor's benefits because they were not "entitled to inherit from [the husband] under the Massachusetts intestacy and paternity laws."[142] Lauren thereafter appealed to the U.S. District Court for the District of Massachusetts, which certified this question to the Massachusetts Supreme Judicial Court because of the rare[143] yet important[144] nature of this legal issue, and because "no directly applicable Massachusetts precedent exists."[145]

In addressing the inheritance rights of posthumous children, the Massachusetts court framed the issue as specifically implicating three important areas of concern: the best interests of the child, the state's interest in the orderly administration of estates, and the reproductive rights of the deceased parent.[146] The court stressed that its role is to "balance and harmonize these interests to effect the Legislature's over-all purposes."[147] Ascertaining the legislature's purposes regarding the best interests of the child, the court specifically identified two issues. First, the court found that both the judiciary and the legislature[148] have maintained an overriding concern that all children should enjoy the same rights, regardless of the circumstances of their birth.[149] Consistent with this commitment to equal treatment, the court identified the legislative policy that wherever possible, children should be supported by their parents to avoid potential dependence on public assistance.[150] Second, the court noted that because the legislature has "in great measure affirmatively supported the assistive reproductive technologies that

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141. *Id.*

142. *Id.* at 261.

143. *Id.* ("We have not previously been asked to consider whether our intestacy statute accords inheritance rights to posthumously conceived genetic children. Nor has any American court of last resort considered, in a published opinion, the question of posthumously conceived genetic children's inheritance rights under other States' intestacy laws.")

144. The *Woodward* court noted that the issues raised by posthumous conception are "unsettled" and "far reaching." *Id.* at 262.

145. *Id.*

146. *Id.* at 264-65.

147. *Id.* at 265.

148. *Id.* ("The protection of minor children, most especially those who may be stigmatized by their 'illegitimate' status . . . has been a hallmark of legislative action and of the jurisprudence of this court." (citation omitted)).

149. *Id.* ("Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be entitled to the same rights and protections of the law regardless of the accidents of their birth." (citation and internal quotation marks omitted)).

150. *Id.* ("It is the public policy of this commonwealth that dependent children shall be maintained, as completely as possible, from the resources of their parents, thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth." (citation omitted)).

are the only means by which these children can come into being,"[151] it would be irrational for the legislature to then allow "children who are the fruit of that technology . . . to have fewer rights and protections than other children."[152]

The court noted, however, that the interests of the posthumous child, while important, are not alone decisive and must be balanced against the state's interest "to provide certainty to heirs and creditors by effecting the orderly, prompt, and accurate administration of intestate estates."[153] The court concluded that the state's intestacy statute attempts to preserve this important state interest by requiring "certainty of filiation between the decedent and his issue"[154] and also by establishing relevant limitation periods for bringing a claim against the estate.[155]

Addressing the decedent's reproductive rights, the court stated that posthumous conception necessarily implicates those rights because "individuals have a protected right to control the use of their gametes."[156] Therefore, the court held that in order for a posthumous child to be eligible to gain inheritance rights, the deceased parent must have consented both to the posthumous conception and to supporting the child.[157] The court stated that this two-pronged requirement is necessary because the mere act of preserving gametes does not, of itself, indicate a desire to conceive posthumously.[158] Furthermore, the court argued that without this consent

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151. *Id.*

152. *Id.* "Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be entitled, in so far as possible, to the same rights and protections of the law as children conceived before death." *Id.* at 266 (citation and internal quotation marks omitted).

153. *Id.* (citation omitted).

154. *Id.* "Because death ends a marriage, posthumously conceived children are always nonmarital children. And because the parentage of such children can be neither acknowledged nor adjudicated prior to the decedent's death, it follows that, under the intestacy statute, posthumously conceived children must obtain a judgment of paternity as a necessary prerequisite to enjoying inheritance rights in the estate of the deceased genetic father." *Id.* at 266-67 (citations omitted).

155. *Id.* at 266. In the case of posthumous children, the court identified two potential problems with the application of Massachusetts's one-year statute of limitations, but declined to address the issue head on because the procedural posture of the case did not allow its full consideration. *Id.* at 268. The first problem with such a short limitations period is the consequent requirement that the surviving spouse would be forced to "make a decision to bear children while in the freshness of grieving." *Id.* The second problem arises from the difficulty of some artificial reproductive procedures, which can take, on average, seven attempts "over 4.4 menstrual cycles to establish pregnancy." *Id.* (citation and internal quotation marks omitted).

156. *Id.* at 269.

157. *Id.*

158. *Id.* ("It will not always be the case that a person elects to have his or her gametes medically preserved to create 'issue' posthumously. A man, for example, may preserve his semen for

requirement, "a court cannot be assured that the intestacy statute's goal of fraud prevention is satisfied."[159]

Therefore, to effectuate the balancing of these three important interests, the *Woodward* court provided a three-factor test to determine whether a posthumous child can qualify as the legal heir of a deceased parent. The surviving parent (or legal representative of the child) must satisfy three requirements: (1) prove a genetic relationship with the decedent; (2) demonstrate the decedent "affirmatively consented" to posthumous conception; and (3) demonstrate that the decedent consented "to the support of any resulting child."[160] The court favored this approach over a rule always (or never) granting posthumous children inheritance rights because in this "developing and relatively uncharted area of human relations, bright-line rules are not favored."[161]

## III. COMPETING POLICY CONCERNS

As *Kolacy* and *Woodward* illustrate, there is something awkward in refusing to recognize posthumous children as the legal offspring of their deceased fathers when it is indisputable that he is the genetic parent.[162] Accordingly, the *Kolacy* court found ways to work around a literal reading of the New Jersey statute in order to declare the children the legal heirs of their deceased father.[163] The court was confident in making this decision, because in that particular case, there were no estate administration problems and there were "no competing interests of other persons who were alive at the time of William Kolacy's death which would be unfairly frustrated by recognizing Amanda and Elyse as his heirs."[164]

The *Woodward* court likewise interpreted Massachusetts law generously to establish the possibility that posthumous children

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myriad reasons, including, among others: to reproduce after recovery from medical treatment, to reproduce after an event that leaves him sterile, or to reproduce when his spouse has a genetic disorder or otherwise cannot have or safely bear children. That a man has medically preserved his gametes for use by his spouse thus may indicate only that he wished to reproduce after some contingency while he was alive, and not that he consented to the different circumstance of creating a child after his death."). *But see infra* note 188 and accompanying text.

159. *Woodward*, 760 N.E.2d at 270.

160. *Id.*

161. *Id.* at 262.

162. As one commentator has noted, "Without legislative action, these children will remain the legal child of no father, a most anomalous concept in modern jurisprudence." Kerekes, *supra* note 29, at 243.

163. *In re* Estate of Kolacy, 753 A.2d 1257, 1262-64 (N.J. Super. Ct. Ch. Div. 2000).

164. *Id.* at 1262.

could be considered "issue"[165] for intestate inheritance purposes because they are the lineal, genetic offspring of the deceased parent.[166] The court reasoned that because the Massachusetts intestacy law did not contain "an express, affirmative requirement that posthumous children must 'be in existence' as of the date of the decedent's death,"[167] it could consider whether posthumous children should be afforded the same inheritance rights as children conceived before the decedent's death.[168] While the *Woodward* decision goes a long way toward a more equitable solution to some of the unique issues created by reproductive technologies, posthumous conception raises important policy concerns that will increasingly demand a more complete response from legislatures.

### *A. Orderly Administration of Estates*

States have an important interest in the orderly administration of estates and the distribution of property at death.[169] The U.S. Supreme Court has affirmed that this area of law is "particularly within the competence of the individual states."[170] Consistent with this interest, legislative responses to posthumous conception have focused narrowly on protecting the stability of estate administrations.[171] The USCACA clearly identifies this policy justification. The Act establishes that the primary purpose of denying a legal parent-child relationship to posthumous children is to "provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after death."[172] According to the drafters of the Act, such finality is necessary to "avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent."[173] Although the comment to section 4(b) acknowledges that parents can "explicitly provide for such children in their wills,"[174] posthumous children cannot take in the parent's estate through in-

165. While "issue" was not defined in the intestacy statute, the court noted that the term generally refers to "lineal (genetic) descendants," including marital and nonmarital. 760 N.E.2d at 263.

166. *Id.* at 262-64.

167. *Id.* at 264.

168. *Id.*

169. Reed v. Campbell, 476 U.S. 852, 855 (1986).

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

171. *See supra* Part II.A.

172. USCACA, *supra* note 56, § 4 cmt., at 372.

173. *Id.*

174. *Id.*

testate inheritance because "implantation after the death of any genetic parent would not result in that genetic parent being the legally recognized parent."[175]

The *Kolacy* court specifically acknowledged this concern, stating that "[e]states cannot be held open for years simply to allow for the possibility that after born children may come into existence. People alive at the time of a decedent's death who are entitled to receive property from the decedent's estate are entitled to receive it reasonably promptly."[176] The *Woodward* court also identified the important state interest in "provid[ing] certainty to heirs and creditors by effecting the orderly, prompt, and accurate administration of intestate estates."[177] To address these and similar concerns, those states that have faced this issue have chosen to prevent posthumous children from establishing a legal relationship with their deceased parents.[178] This ensures stability by preventing posthumous children from interfering with the administration of the deceased parent's estate after it has been closed. The distribution of a decedent's estate will therefore remain undisturbed, even if that person's genetic material is subsequently used to conceive a posthumous child.

### *B. The Welfare of the Child*

A competing area of important policy concern involves the welfare of posthumous children.[179] All children have a real need for

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175. *Id.*

176. *In re* Estate of Kolacy, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000). Although the court did not provide an adequate framework for dealing with this issue in a broader way, it did identify some specific measures that could reduce estate problems. *See infra* note 398.

177. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266 (Mass. 2002) (citation omitted):

> [T]he best interests of the posthumously conceived child . . . must be balanced against other important State interests, not the least of which is the protection of children who are alive or conceived before the intestate parent's death. In an era in which serial marriages, serial families, and blended families are not uncommon, according succession rights under our intestacy laws to posthumously conceived children may, in a given case, have the potential to pit child against child and family against family. Any inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent's death. Such considerations, among others, lead us to examine . . . the orderly, prompt, and accurate administration of intestate interests.

178. *See supra* Part II.A.

179. The *Woodward* court considered the best interests of the child to be a very important element in their treatment of this issue. "First and foremost, we consider the overriding legislative concern to promote the best interests of children." 760 N.E.2d at 265. In other areas of domestic law, courts view the child's welfare as a top priority because of the impact any particular decision might have on the child. For example, in child custody disputes, courts apply a "best interests of the child" standard that considers several factors to determine what is best for the

emotional and financial support, and posthumous children are, of course, no different.[180] The parent-child relationship is the primary means of fulfilling these needs, so denying posthumous children the right to establish a legal relationship with their deceased parents has consequential implications.[181] Since posthumous children will typically be born into a single-parent home, it is reasonable to assume that in many cases the family resources will be limited.[182] Denying these children intestate inheritance rights and survivor's benefits puts even greater financial strain on the family, particularly in light of the purpose of such benefits, providing financial resources for those loved ones left without the income of a deceased parent or spouse. The USCACA attempts to address this problem by allowing parents to provide for posthumous children in their wills.[183] While this may provide relief for some posthumous children, it is not an effective measure since most people die intestate.[184] Also, those people who would typically resort to posthumous conception are likely to be younger and at a stage in their lives where estate planning might not yet be a major concern.[185] Even if a prospective parent of a posthumous child did create a will, however, such a parent cannot bequeath insurance or Social Security benefits to the posthumous child, which are likely the most significant assets many such young people would have.

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child's well being in that situation. As articulated in section 402 of the Uniform Marriage and Divorce Act, the best interests test states:

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.
> The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1988).

180. *See supra* note 152 and accompanying text.

181. *Woodward*, 760 N.E.2d at 265 ("Among the many rights and protections vouchsafed to all children are rights to financial support from their parents and their parents' estates.").

182. Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1158 (1997) ("[C]hildren of single parents are often in need of public support or, at least, are economically disadvantaged.").

183. USCACA, *supra* note 56, § 4 cmt., at 372.

184. Kerekes, *supra* note 29, at 225 (citing JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 67 (5th ed. 1995)).

185. *Id.* at 225-26 (commenting that the USCACA's provision for a parent to provide for a posthumous child in a will as "altogether facile" because it would "confer little benefit to the intestate non-heir").

Moreover, intestate inheritance statutes are intended to "approximate a decedent's wishes" when that person did not have the opportunity to express those wishes in life.[186] Statutes setting forth the inheritance rights of posthumous children that do not take into account the parent's perspective,[187] which would undoubtedly be to support the children,[188] are thus inconsistent with the longstanding purpose of intestate succession. As one commentator has noted, it is "illogical to assume a decedent would desire to prevent a genetic child from sharing in the estate."[189] Furthermore, this situation denies posthumous children the less tangible benefits of having a legally and socially recognized parent. This is no small matter given the paramount importance of the family in society[190] and the bonds of family that are widely felt to transcend death.[191] Denying posthumous children the right to establish a legally recognized relationship with their deceased parent could therefore have significant emotional consequences in addition to those financial ones.[192]

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186. McAllister, *supra* note 34, at 101.

187. *Id.*

188. Indeed, even when the parent refuses to acknowledge a parent-child relationship, in cases that do not involve posthumous conception, courts require a parent to provide support to a biological child. *See, e.g., In re* L. Pamela P. v. Frank S., 449 N.E.2d 713, 716 (N.Y. 1983) (requiring father to provide child support even when mother purposely deceived him regarding her use of contraceptives); *see also* Straub v. B.M.T. *ex rel.* Todd, 645 N.E.2d 597, 599 (Ind. 1994) (citing the "utmost importance" of Indiana's public policy of protecting the welfare of children, the court deemed void a preconception contract intended to absolve the father of future support obligations, and commenting that "[n]either parent has the right to contract away . . . support benefits. The right to the support lies exclusively with the child.")

189. Kerekes, *supra* note 29, at 240.

190. *See infra* Part IV.A.

191. The expansive interest in genealogy reflects the deep importance people place on identifying with and relating to their deceased family members. *See, e.g.*, Peter T. Kilborn, *In Libraries and Cemeteries, Vacationing with Ancestors*, N.Y. TIMES, Aug. 19, 2001, at A1 (citing a recent survey reporting that sixty percent of Americans are interested in tracing their family roots). The level of interest in genealogy has grown over the years, but it is not something new. *See, e.g.*, David Gelman et al., *Everybody's Search for Roots*, NEWSWEEK, July 4, 1977, at 26 (noting the intorest in researching family histories among diverse ethnic groups in America around the time of the country's bicentennial).

192. For example, in a high-profile case in England, Diane Blood fought for nearly two years to have her husband's name registered as the father on her son's birth certificate. *Posthumous Fathers to Be Recognized*, BBC NEWS ONLINE, *at* http://news.bbc.co.uk/hi/english/health/newsid_895000/895544.stm (Aug. 25, 2000). Her husband had previously died, and Ms. Blood used his sperm to conceive and bear a son posthumously. *Id.* Under British law, however, a posthumous child was registered as fatherless. *Id.* In response to this case, the British government established a review of relevant law and subsequently recommended that men who become fathers by posthumous conception can have their names registered on their babies' birth certificates. *Id.* As Ms. Blood stated, "It is very important for these children and their mothers because it means that the biological facts will be recorded as they truly are. Until now mothers have effectively had to lie when asked whether they knew the father of their child." *Id.*

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As the incidence of posthumous conception increases, courts and legislatures will need to address these competing policy concerns more fully. Both the indeterminate approach taken by the *Kolacy* court[193] and the absolute ban approach taken by states[194] will prove inadequate to accommodate and balance fairly the interests of posthumous children with the interests of states.[195] Furthermore, because posthumous conception relates to some of society's most basic values concerning the family and reproduction, any balancing of these competing interests should be consistent with longstanding constitutional doctrines that protect the family.[196] The *Woodward* decision, therefore, points courts and legislatures in the right direction.[197]

## IV. CONSTITUTIONAL FOUNDATION

The family occupies a uniquely important place in society and warrants constitutional status and protection.[198] The U.S. Supreme Court has recognized this importance and has developed a substantial body of jurisprudence that firmly establishes "the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[199] The Court also has estab-

193. Although the *Kolacy* court recognized some of the potential inheritance problems that could arise from recognizing posthumous children as legal heirs of their deceased parents, the court did not provide an analytical framework for deciding these issues. *See supra* note 176. Instead, the court noted New Jersey's legislative prerogative in this area and referred to a judicial authority that in the absence of legislation "[i]t would undoubtedly be fair and constitutional for courts to impose limits on the ability of after born children to take in particular cases." *In re* Estate of Kolacy, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000). The court essentially took a "do no harm" approach, but this approach lacks consistency and would not produce fairness because it does not provide reliable guidance to balance the state's and the child's competing interests. *Id.*

194. *See supra* Part II.A.3.

195. Kathryn Venturatos Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27, 45 (1996) ("Regardless of the state's articulated position on posthumous reproduction, the rights of any resulting child must be considered. For even if the state were to prohibit posthumous conception or posthumous implantation of the embryos, some children may still be born as a result of the techniques.").

196. *See infra* Part IV.

197. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 264-65 (Mass. 2002) ("The question whether posthumously conceived genetic children may enjoy inheritance rights implicates three powerful State interests: the best interests of children, the State's interest in the orderly administration of estates, and the reproductive rights of the genetic parent. Our task is to balance and harmonize these interests to effect the Legislature's over-all purposes.").

198. *See infra* Part IV.A.

199. Troxel v. Granville, 530 U.S. 57, 66 (2000).

lished that this fundamental right of parents to control the upbringing of their children must encompass the prerequisite condition necessary for parents to exercise that right, namely to have children in the first place.[200] The Court has also addressed the status of nonmarital children.[201] Because family circumstances often create additional burdens for such children, the Court has established important protections for them.[202] The cases dealing with nonmarital children are instructive in developing an analytical framework for determining the rights of posthumous children, because they provide a closely analogous situation to posthumous children, who are also left without at least one parent's support. Although the Court may not have directly anticipated the many advances in reproductive technology, posthumous conception nonetheless implicates the meaning and potency of these constitutional protections. Posthumous conception represents a new means by which hopeful parents can exercise the right that is at the heart of the Court's decisions—the right to create a family by conceiving children. Without posthumous conception, many parents would be denied this opportunity. Therefore, issues raised by posthumous conception should be viewed against the backdrop of the Court's "extensive precedent"[203] in these areas of parental liberties, and any determination of the rights of posthumous children should be consistent with these constitutional doctrines.

### *A. The Constitutional Status of the Family*

The constitutional status of the family is not an inflexible distinction but, rather, one that recognizes the underlying importance of the family's role in society and has adapted to changing circumstances.[204] This bears directly on the issue of posthumous conception, because it is yet another way the family is adapting to a changing society. Posthumous children belong to a family in which both of their parents chose to conceive them in the only way they were able to do so in their individual circumstances.

As early as 1877, the Supreme Court began expressly to affirm, as a matter of constitutional law, the importance of the family

200. *See infra* Part IV.B.1.

201. *See infra* Part IV.C.

202. *See infra* Part IV.C.

203. *Troxel*, 530 U.S. at 66.

204. *See id.* at 64; *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 504-06 (1977) (discussing the constitutional status of the family).

in society.[205] In 1923, the Court decided the seminal case of *Meyer v. Nebraska*,[206] which is the foundation of the Court's modern jurisprudence on the family and the right of privacy.[207] In *Meyer*, the Court struck down a Nebraska criminal statute that prohibited the teaching of foreign languages to children who had not completed the eighth grade, in part, because it unconstitutionally interfered with the right of parents to direct the education of their children.[208] The Court declared that the liberty guaranteed under the Fourteenth Amendment[209] included "the right . . . to marry [and] establish a home and bring up children."[210] As the Court has subsequently asserted, this fundamental right of parents "is perhaps the oldest of the fundamental liberty interests recognized by this Court."[211]

Two years later, in *Pierce v. Society of Sisters*, the Court held unconstitutional an Oregon statute that mandated compulsory attendance at public schools for all children between eight and sixteen years of age because it "unreasonably interfere[d]" with parental liberties.[212] The Court asserted that "[t]he fundamental theory of liberty . . . excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[213] *Meyer* and *Pierce* form the foundations of the Court's subsequent decisions involving the family and punctuate any inquiry of government intrusions into the family.[214] An important

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205. Meister v. Moore, 96 U.S. 76, 78-81 (1877) (sustaining the validity of a marriage despite being entered into contrary te Michigan law, and holding that, although it is the "policy of the state to encourage" marriage, the state does not "confer the right" to enter marriage because "marriage is a thing of common right"); *see also* Maynard v. Hill, 125 U.S. 190, 211-12 (1888) (describing marriage, hyperbolically, as the most important relationship "affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress" and the "foundation of the family and society, without which there would be neither civilization nor progress" (quoting Adams v. Palmer, 51 Me. 480, 484-85 (1863))).

206. 262 U.S. 390 (1923).

207. *Troxel*, 530 U.S. at 65; *see also* Griswold v. Connecticut, 381 U.S. 479, 481-84 (1965) (discussing privacy rights).

208. 262 U.S. at 400-01.

209. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

210. *Meyer*, 262 U.S. at 399.

211. *Troxel*, 530 U.S. at 65.

212. 268 U.S. 510, 534-35 (1925).

213. *Id.* at 535.

214. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents. . . . [I]t is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter.").

principle running throughout the Court's decisions is the *Pierce* Court's admonition against attempting to "standardize" children or the family.[215] This is relevant to posthumous conception, because the various statutory approaches to this issue amount to an attempt to restrict the constitutional protections of the family to only those created by traditional means, denying posthumous children the ability to assert their legal status as members of the family that brought them into the world.

In *Loving v. Virginia*, the Court further recognized that a state cannot attempt to standardize the family by restricting an individual's right to determine whom to marry.[216] In striking down Virginia's miscegenation statute, which prohibited interracial marriage,[217] the Court noted that "the freedom to marry or not marry a person of another race resides with the individual and cannot be infringed upon by the State."[218] Indeed, the Court's cases have consistently demonstrated, in a wide variety of circumstances, that the Constitution provides a high degree of protection for the family,[219]

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215. 268 U.S. at 535.

216. 388 U.S. 1, 12 (1967).

217. *Id.* at 4.

218. *Id.* at 12. In finding that the statute violated the Fourteenth Amendment's equal protection guarantee, the Court affirmed the principle that marriage, the traditional means of creating a family, is a "fundamental freedom" that "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." *Id.*

219. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the liberty specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, [and] to marital privacy." (internal quotation marks omitted)); Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989) (upholding the marital family against assertion by natural father of parental rights over child conceived adulterously with married woman, in part, because "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition" (internal quotation marks omitted)); Turner v. Safley, 482 U.S. 78, 96 (1987) (holding that the right to enter the "constitutionally protected marital relationship" survives even the prison context); Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."); Parham v. J.R., 442 U.S. 584, 603 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition."); Zablocki v. Redhail, 434 U.S. 374, 386 (1978) ("It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right of privacy which respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 842, 845-47 (1977) (holding that the Constitution does not allow for an unduly narrow conception of the family, as a mere "creation of state law," but that the liberty interest in family privacy is an "intrinsic human right," which protects it from unjus-

which importantly distinguishes it from "mere[ ] . . . shifting economic arrangements.'"[220]

In *Moore v. City of East Cleveland*, the Court struck down a city ordinance that restricted the occupancy of a dwelling to an "unusual and complicated" definition of family that included only certain categories of related persons.[221] In noting the *Pierce* Court's admonition that the Constitution denies the states any power to standardize children through mandatory public school attendance,[222] the Court stated that "the Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns."[223]

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tified governmental interference); Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (holding that a state's police power can be constitutionally exercised to establish zoning ordinances that promote "family values"); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); Paris Adult Theater I v. Slaton, 413 U.S. 49, 65 (1973) ("Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty. This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing." (internal quotation marks omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (holding Wisconsin's compulsory education law unconstitutional, and further affirming that the "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children," and that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that an Illinois statute which presumed unwed fathers as unfit to raise their children after the biological mother's death violated the Equal Protection Clause because the "private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection," and stating that "[i]t is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come(s) to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements' " (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring))); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."); Poe v. Ullman, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.").

220. *Yoder*, 405 U.S. at 651 (internal quotation marks omitted).

221. 431 U.S. 494, 495-96 (1977). Furthermore, the Constitution protects the sanctity of the family because it is deeply rooted in America's history and tradition and because the family is the social institution through which "we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04.

222. *Id.* at 506.

223. *Id.*

The Court's recent decision in this area, *Troxel v. Granville*,[224] firmly rests on this foundation. In *Troxel*, the Court held unconstitutional a Washington state visitation law that allowed a court to grant visitation of a child to anyone, whenever the court found it to "serve the best interest of the child."[225] The Court found the statute "breathtakingly broad"[226] in that it allowed any third party to subject a parent's decision regarding the associations of her children to judicial review.[227] The Court held that the statute infringed upon the "fundamental constitutional right [of parents] to make decisions concerning the rearing" of their own children,[228] which must be given "special weight."[229]

As Justice Souter noted in his concurrence, "[o]ur cases, it is true, have not set out exact metes and bounds to the protected interest of a parent in the relationship with his child, but *Meyer*'s repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by 'any party' at 'any time' a judge believed he 'could make a "better" decision' than the objecting parent had done."[230] Justice Souter then further reaffirmed the Court's commitment to the paramountcy of the family: "To say the least (and as the Court implied in *Pierce*), parental choice in such matters is not merely a default rule."[231]

These family cases establish the lens through which to view the issue of posthumous conception, since it falls within the realm of family and parental prerogatives that children are desired and eventually brought into the world, even if through unconventional means. Furthermore, the Court has consistently maintained that the family is not a static social institution but one that adapts as society changes. The constitutional protections of the family are likewise flexible in that they do not apply merely to a narrowly defined family pattern,[232] but recognize the underlying importance of the role that family plays both in society and in the lives of indi-

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224. 530 U.S. 57 (2000).

225. WASH. REV. CODE § 26.10.160(3) (1998).

226. *Troxel*, 530 U.S. at 57.

227. *Id.*

228. *Id.* at 69.

229. *Id.* The Court further stated that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 72-73.

230. *Id.* at 78 (Souter, J., concurring).

231. *Id.* at 79.

232. *See, e.g.*, *id.* at 62-67, 72-73; Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977); Loving v. Virginia, 388 U.S. 1, 12 (1967).

viduals.[233] By allowing people to establish families where they would otherwise have been unable, reproductive technologies, including posthumous conception, are contributing to some of the changes in family structure that the Court has recognized. Consequently, the rights of posthumous children must not be viewed merely from an economic perspective for the determination of property distribution at death, but must also incorporate the richer and deeper bond that inheres in the parent-child relationship, which the Court's family cases have recognized.

### *B. The Fundamental Liberty Interest to Procreate*

The U.S. Supreme Court has addressed only two instances in which a person's affirmative liberty to procreate was threatened.[234] While only one of these cases supports the existence of a fundamental right to procreate,[235] the Court's subsequent cases delineating the right of privacy under the Fourteenth Amendment clearly establish such a right.[236] This right to procreate also extends to procreation through artificial reproductive technologies.[237]

#### 1. Constitutional Right to Make Procreative Choices

The Court's earliest opinion touching on procreation is the 1927 decision *Buck v. Bell*.[238] In *Buck*, the Court upheld a Virginia statute that allowed the compulsory sterilization of certain "mental defectives."[239] The statute targeted institutionalized persons afflicted with "hereditary forms of insanity, imbecility, etc.,"[240] to prevent them from propagating offspring who would inherit such afflictions and to promote the patient's health and the "welfare of society."[241] While *Buck* does not support an affirmative right to procre-

233. *Moore*, 431 U.S. at 503-04.

234. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942); Buck v. Bell, 274 U.S. 200 (1927).

235. *See Skinner*, 316 U.S. at 538.

236. *See infra* Part IV.B.1.

237. *See infra* Part IV.B.2; *see also* Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990). Many others have argued that the existence of such a fundamental right to procreate can clearly be inferred from the Court's right of privacy decisions, and that this right to procreate should encompass the right to use artificial reproductive technologies to effectuate pregnancy in order to fulfill this right. *See, e.g.*, Bailey, *supra* note 46, at 778-79; Gibbons, *supra* note 25, at 195-202; Gilbert, *supra* note 29, at 531-38; Mika & Hurst, *supra* note 46, at 1000-07.

238. 274 U.S. 200 (1927).

239. *Id.* at 205.

240. *Id.* at 206.

241. *Id.* at 205.

ate, the Court's reasoning and subsequent cases demonstrate its holding as anachronistic.[242]

Only fifteen years later, in *Skinner v. Oklahoma*,[243] the Court provided strong support for an affirmative right to procreate. While straining to not expressly overturn its decision in *Buck*,[244] the Court announced that procreation is "fundamental to the very existence and survival of the race"[245] and "one of the basic civil rights of man."[246] The Court held that Oklahoma's Habitual Criminal Sterilization Act, which allowed the state to sterilize persons "convicted two or more times for crimes amounting to felonies involving moral turpitude,"[247] violated the Equal Protection Clause of the Fourteenth Amendment because it infringed upon the fundamental "right to have offspring."[248]

In *Griswold v. Connecticut*, the Court asserted that the specific rights set forth in the Bill of Rights are made more secure by recognizing "peripheral" or penumbral rights, which "create zones of privacy"[249] upon which the government cannot infringe without a compelling interest that is narrowly tailored to effectuate only that interest.[250] One such zone of privacy inheres in the marriage relationship, which the Court recognized as specifically encompassing procreative decisions.[251] The Court held that a Connecticut statute, which barred the use and distribution of

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242. For example, Justice Holmes, speaking for the Court, provided the following rationale for the decision:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

*Id.* at 207 (citation omitted). This reasoning is simply unsustainable in light of changes in societal attitudes and the Court's own cases bearing on procreation.

243. 316 U.S. 535 (1942).

244. *See, e.g., id.* at 542 (stating that *Buck* had at least one "saving feature[:] It applied only to feeble-minded persons in institutions of the State. But it was pointed out that 'so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.' " (quoting *Buck*, 274 U.S. at 208)).

245. *Id.* at 541.

246. *Id.*

247. *Id.* at 536 (quoting OKLA. STAT. ANN. tit. 57, § 173 (1935)).

248. *Id.*

249. 381 U.S. 479, 483-84 (1965).

250. *Id.* at 496-97 (Goldberg, J., concurring).

251. *See, e.g., id.* at 485-86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."); *see also id.* at 497 (Goldberg, J.,

which barred the use and distribution of contraceptives, violated this fundamental right to privacy in marriage because of the "maximum destructive impact"[252] that it had on the "intimate relation of husband and wife."[253]

While *Griswold* established a fundamental right to privacy in the marriage relationship only, the Court extended this protection to the individual in *Eisenstadt v. Baird*.[254] The Court reasoned that because the marital privacy recognized in *Griswold* protects two independent and distinct individuals, this protection should apply equally to a single person.[255] The Court announced that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[256] Accordingly, the Court invalidated the Massachusetts statute that prohibited the distribution of contraceptives to unmarried persons.[257]

Fusing these earlier holdings, the Court, in *Carey v. Population Services International*, firmly settled the right of an individual to make procreative decisions as fundamental.[258] The Court announced that such decisions are "at the very heart of . . . constitutionally protected choices."[259] Therefore, regulations infringing upon

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concurring) (responding to the dissenters in *Griswold* who would have upheld the law because no constitutional provision "specifically prevents the Government from curtailing the marital right to bear children," Justice Goldberg stated: "While it may shock some of my Brethren that the Court today holds that the personal liberty guaranteed by the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts."). Justice Harlan argued in concurrence that the statute infringed upon the Due Process Clause of the Fourteenth Amendment because it violated "basic values 'implicit in the concept of ordered liberty.' " *Id.* at 500 (Harlan, J., concurring) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

252. *Id.* at 485.

253. *Id.* at 482.

254. 405 U.S. 438 (1972).

255. *Id.* at 453 ("It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.").

256. *Id.*

257. *Id.* at 454-55.

258. 431 U.S. 678, 688-89 (1977) (noting that laws limiting access to contraceptives must pass strict scrutiny "not because there is an independent fundamental 'right of access to contraceptives,' but because such access is essential to exercise of the constitutionally protected right of decision in matters of childbearing that is the underlying foundation of the holdings in *Griswold*, *Eisenstadt v. Baird*, and *Roe v. Wade*").

259. *Id.* at 685.

"decisions whether to accomplish or to prevent conception"[260] must be justified by a compelling state interest.[261] This language is important because the Court clearly established that decisions to "accomplish" conception—and not merely prevent or terminate pregnancy—are protected by the right of privacy.[262]

2. The Right to Procreate and Reproductive Technology

The Court in *Carey* specifically recognized that the right of privacy protects "independence in making certain kinds of important decisions,"[263] of which procreative determinations are central, but that the "outer limits of this aspect of privacy have not been marked by the Court."[264] Accordingly, lower courts have interpreted the fundamental right of privacy to encompass not only the right to prevent or terminate pregnancy through artificial means, but also the right to bring about pregnancy through artificial means.[265] In *Lifchez v. Hartigan*,[266] the U.S. District Court for the Northern District of Illinois invalidated a provision of Illinois's abortion law that prohibited experimentation on a human fetus unless the experimentation was therapeutic to the fetus.[267] The court held the statute unconstitutional because it was vague[268] and, more importantly, because it infringed upon a woman's "fundamental right . . . to make reproductive choices free of governmental interference."[269] The court noted that one so-called experimental procedure likely prohibited by the statute, "embryo transfer,"[270] was designed specifically to enable an infertile woman to "bear her own child."[271] Holding that this procedure clearly fell within the zone of privacy recognized by the Supreme Court, the *Lifchez* court stated that it

260. *Id.*

261. *Id.* at 685-86.

262. *Id.* at 686.

263. *Id.* at 684 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

264. *Id.*

265. As one writer has commented, "If the right of a woman to privacy, as construed by the Court, is broad enough to encompass a woman's decision whether or not to *terminate* [or prevent] her pregnancy by artificial means, the right by analogy is sufficiently broad to encompass a woman's decision to *initiate* pregnancy by artificial means." Joseph A. Silvoso II, Note, *Artificial Insemination: A Legislative Remedy*, 3 W. ST. U. L. REV. 48, 55-56 (1975) (emphasis added), *quoted in* Gilbert, *supra* note 29, at 536.

266. 735 F. Supp. 1361 (N.D. Ill. 1990).

267. *Id.* at 1376.

268. *Id.* at 1364.

269. *Id.* at 1376.

270. Embryo transfer is a procedure that involves removing a fertilized embryo from a woman's uterus and then implanting it into an infertile woman. *Id.*

271. *Id.*

"takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy."[272]

The California Supreme Court, in *Johnson v. Calvert*,[273] also explored the boundaries of the fundamental right to procreate and endorsed the position that reproductive technologies fall within the zone of privacy. In holding that the gamete providers in a surrogacy arrangement were the child's natural and legal parents,[274] not the surrogate mother, the court stated that "any . . . effort [to inhibit the use of reproductive technology] would raise serious questions in light of the fundamental nature of the rights of procreation and privacy."[275] Furthermore, rejecting the surrogate mother's argument that by tradition she should be declared the child's natural and legal parent because she is the "birth mother," the court viewed reproductive technology as a means to exercise long-recognized, constitutionally protected rights.[276] The court held that "[t]o the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures."[277]

In *Davis v. Davis*, the Tennessee Supreme Court likewise provided support for the view that the right of privacy protects the use of reproductive technology.[278] In *Davis*, the court faced the first impression issue of the disposition of cryogenically preserved embryos in a divorce case.[279] An ex-husband objected to the initial intent of his ex-wife to use the embryos in a post-divorce attempt to become pregnant[280] and her subsequent desire to donate the embryos to a childless couple for the same purpose.[281] Noting the unique nature of the case,[282] the court recognized the right of pri-

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272. *Id.* at 1377.
273. 851 P.2d 776 (Cal. 1993).
274. *Id.* at 777-78.
275. *Id.* at 787.
276. *Id.* at 786.
277. *Id.*
278. 842 S.W.2d 588, 600-02 (Tenn. 1992).
279. *Id.* at 589.
280. *Id.*
281. *Id.* at 590.
282. The court noted that, despite more than 5,000 babies born through in vitro fertilization and more than 20,000 cryogenically preserved embryos in the U.S., "we have no case law to guide us to a decision in this case." *Id.*

vacy was implicated by the ex-husband's objection to using the embryos.[283] The court asserted the father's desire to avoid "genetic parenthood" was "significant enough to trigger the protections afforded to all other aspects of parenthood."[284] The court held in favor of the ex-husband, since his "liberty to procreate or avoid procreation" was directly involved.[285] The Court further stated that "however far the protection of procreative autonomy extends, the existence of the right itself dictates that decisional authority rests in the gamete providers alone, at least to the extent that their decisions have an impact upon their individual reproductive status."[286]

The holdings of *Lifchez*,[287] *Johnson*,[288] and *Davis*[289] combined with the holdings of *Skinner*,[290] *Griswold*,[291] *Eisenstadt*,[292] and *Carey*[293] establish that the fundamental right to procreate encompasses the use of reproductive technology to "bring about, rather than prevent, pregnancy."[294] Courts have yet to determine whether this principle is broad enough to encompass posthumous conception as an exercise of the deceased father's fundamental right to procreate.

Admittedly, the Court has never held that a person's constitutional rights survive death.[295] Nevertheless, taken together, *Parpalaix*[296] and *Hecht*[297] (and to some extent, *Davis*[298]) lead to the conclusion that a nonanonymous donor of sperm has dispositional rights over his preserved sperm both during his life and, if intent can be clearly shown, after his death.[299] In this way, courts have already recognized and honored the intent of a deceased person concerning his procreative choices, which are protected by the constitutional right of privacy. Indeed, in the last iteration of the *Hecht* case, the California Court of Appeal, in an unpublished opinion,

283. *Id.* at 603-04.
284. *Id.* at 603.
285. *Id.* at 597.
286. *Id.* at 602.
287. 735 F. Supp. 1361 (N.D. Ill. 1990).
288. 851 P.2d 776 (Cal. 1993).
289. 842 S.W.2d at 588.
290. 316 U.S. 535 (1942).
291. 381 U.S. 479 (1965).
292. 405 U.S. 438 (1972).
293. 431 U.S. 678 (1977).
294. Lifchez v. Hartigan, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990).
295. Bailey, *supra* note 46, at 779.
296. *See* Shapiro & Sonnenblick, *supra* note 42, at 229.
297. 20 Cal. Rptr. 2d 275 (Cal. Ct. App. 1993).
298. 842 S.W.2d 588 (Tenn. 1992).
299. *See* Kerekes, *supra* note 29, at 220 (arguing this point).

explicitly spoke of "the decedent's 'fundamental interest' in procreation."[300]

Standing alone, of course, a decedent's singular intent to sire a child posthumously cannot be an exercise of the fundamental right to procreate. When the decedent's partner fulfills this intent by actually conceiving the child, however, the law should view this as an attempt by both the decedent and his partner to exercise their constitutionally protected right to create a family.[301] Accordingly, the law should recognize the resulting child as the legal child of that union. To do otherwise requires a semantic distinction—that the child is a child of no father—which is illogical given that the child is indisputably the genetic offspring of the deceased father who demonstrated his intent to conceive the child.[302]

Regardless of whether the fundamental right to procreate encompasses posthumous conception to the extent that it gives the father a right to determine paternity,[303] the existence of a general right to procreate establishes the constitutionally inscribed importance of any decision "whether to bear or beget a child."[304] This should prompt states and courts to view the rights of posthumous children generously in this light and to allow them to establish a legal parent-child relationship. Indeed, this relationship is so important that some courts have held that a child has a "constitutionally protected interest in an accurate determination of paternity."[305]

### *C. Constitutional Protections of Illegitimate Children*

The traditional marriage vows that are intended to endure "until death do us part" help set the framework for establishing the rights of the posthumous child. Because the death of a spouse ter-

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300. 59 Cal. Rptr. 2d 222, 226 (Cal. Ct. App. 1996) (ordered not published).

301. *But see* Kristin L. Antall, Note, *Who Is My Mother?: Why States Should Ban Posthumous Reproduction by Women*, 9 HEALTH MATRIX 203 (1999) (arguing that the potential negative results of women conceiving posthumously, as opposed to men, should prompt states to ban the practice by women).

302. As one commentator has argued regarding posthumous conception, "[I]f the decision to bear a child is a constitutionally protected choice, then it is logical to assume that the manner in which that child is conceived is also a constitutionally protected decision, whether the child is conceived through traditional coital means or by utilizing an artificial method of conception." Kerekes, *supra* note 29, at 227.

303. *See* Gibbons, *supra* note 25, at 202-04 (arguing the fundamental right to procreate does not include the right to determine paternity).

304. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

305. State *ex rel.* Henderson v. Woods, 865 P.2d 33, 37 (Wash. Ct. App. 1994); *see also* McMichael v. Fox, 937 P.2d 1075, 1082 (Wash. 1997) ("A child has a constitutional right to a swift and accurate determination of paternity.").

minates the marital relationship, children born of posthumous conception are born outside of their parents' marriage covenant. Consequently, posthumous children are viewed as illegitimate,[306] and are thus properly brought within the scope of the Court's jurisprudence dealing with nonmarital children.[307]

The "deeply rooted"[308] importance of the family that has long protected it against unacceptable governmental intrusions has not provided the same level of inclusion for nonmarital children.[309] Society and the law have historically denied nonmarital children the same protections extended to marital children, deeming the illegitimate child to be *filius nullius*, the child of no one.[310] The Supreme Court, however, has increasingly minimized the common law's discriminatory treatment of nonmarital children and accorded them greater constitutional protections. In 1968, the Court decided two companion cases[311] that mark the initial development of the modern view of the nonmarital child.[312] The primary of these two cases, *Levy v. Louisiana*,[313] rejected the common law conception of nonmarital children and declared that "illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[314]

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306. Bailey, *supra* note 46, at 784.

307. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266-67 (Mass. 2002) ("Because death ends a marriage, posthumously conceived children are always nonmarital children." (citations omitted)).

308. Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977).

309. Alexander v. Alexander, 537 N.E.2d 1310, 1311-12 (Ohio Prob. Ct. 1988) ("Historically, both the English common law and society itself perceived illegitimate children to be a disgrace, a stigma, and labeled this class with the title 'bastards.' Through no fault of his own, the bastard was a social outcast. The bastard was a product of an illicit, immoral, and promiscuous relationship. Because the child was not conceived within the legal constraints of marriage, the child could not enjoy legal rights, liberties, and benefits of a child who was in fact conceived within the bond of marriage. The right of an illegitimate child to inherit was nonexistent. . . . This status continued in the common law and was eventually carried over to the United States.").

310. 1 WILLIAM BLACKSTONE, COMMENTARIES 459 ("[H]e cannot be heir to any one, neither can he have heirs, but of his own body; for, being nullius filius . . . ."), *cited in* Charles Nelson Le Ray, Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747, 750 n.25 (1994) (providing an excellent discussion of illegitimacy and filiation issues).

311. *See* Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 74 (1968) ("We granted the petition for a writ of certiorari [in this case] in order to hear the case along with *Levy v. Louisiana*." (citations omitted)).

312. Brashier, *supra* note 37, at 105.

313. 391 U.S. 68 (1968); *Glona*, 391 U.S. at 76 (holding, in the companion case to *Levy*, that the mother of an illegitimate child was denied equal protection when the state refused to grant her relief in a wrongful death action merely because her "child, wrongfully killed, was born to her out of wedlock").

314. *Levy*, 391 U.S. at 70.

Applying rational basis scrutiny,[315] the Court overturned a Louisiana district court's and the Louisiana Court of Appeal's interpretation of a Louisiana statute that allowed only legitimate children to bring a cause of action for the wrongful death of a parent, which denied the same cause of action to illegitimate children.[316] While noting that the legislature has "broad power" and "great latitude" to make classifications for the purpose of "social and economic legislation,"[317] the Court stated that it has "been extremely sensitive when it comes to basic civil rights and ha[s] not hesitated to strike down an invidious classification even though it had history and tradition on its side."[318] The Court held that because the "rights asserted [in *Levy*] involve the intimate, familial relationship between a child and his own mother,"[319] and because "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother,"[320] the classification relied on by the lower courts was "invidious discrimination."[321] The Court asked rhetorically, "Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen. . . . How under our constitutional regime can he be denied correlative rights which other citizens enjoy?"[322]

The Court in *Labine v. Vincent*,[323] decided three years later, retreated somewhat from *Levy* and gave greater weight to legislative prerogative. The Court upheld a Louisiana statute against an equal protection challenge that denied the right of intestate inheritance to a nonmarital child, even when the father had openly acknowledged the child before a state agency.[324] The Court stated that its prior decisions did not support the argument that "a State can never treat an illegitimate child differently from legitimate offspring."[325] The Court further stated that the statute at issue merely reflected the policy choices of the state legislature, which were "within the power of the State to make."[326] The Court recognized

315. *Id.* at 71; *see also infra* note 333 (describing types of judicial scrutiny).
316. *Levy*, 391 U.S. at 69, 72.
317. *Id.* at 71.
318. *Id.*
319. *Id.*
320. *Id.* at 72.
321. *Id.* at 71.
322. *Id.*
323. 401 U.S. 532 (1971).
324. *Id.* at 533.
325. *Id.* at 536.
326. *Id.* at 537.

that the power to enact laws to "strengthen family life" and "regulate the disposition of property" was "committed by the Constitution . . . to the legislature."[327] The Court reasoned that the statute was acceptable because it did not "create[ ] an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate child from inheriting from her father[,] . . . had he bothered to follow the simple formalities of executing a will."[328]

Over the next six years, the Court decided several additional cases[329] involving "alleged discrimination on the basis of illegitimacy,"[330] increasingly moving away from the high degree of judicial deference shown to the legislature in *Labine*.[331] These cases established that the Court would apply a heightened level of scrutiny,[332] later recognized as intermediate scrutiny,[333] to statutory classifications based on illegitimacy.[334] Therefore, in order for a statutory

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327. *Id.* at 538.

328. *Id.* at 539.

329. *See* Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Beaty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *summarily aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *summarily aff'd*, 409 U.S. 1069 (1972).

330. Trimble v. Gordon, 430 U.S. 762, 766 n.11 (1977).

331. *See, e.g., id.* at 767-68 n.12 (Powell, J.) ("*Labine v. Vincent* . . . is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent. In *Weber v. Aetna Cas. & Sur. Co.*, . . . we found in *Labine* a recognition that judicial deference is appropriate when the challenged statute involves the 'substantial state interest in providing for the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents'. . . . We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination. Although the proposition is self-evident, *Reed v. Reed*, 404 U.S. 71 (1971), demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny." (internal quotation marks and citations omitted)).

332. *Weber*, 406 U.S. at 172 ("Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny.").

333. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988):

> In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. Classifications based on race or national origin and classifications affecting fundamental rights are given the most exacting scrutiny. Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy. (internal citations omitted).

334. *See, e.g., Trimble*, 430 U.S. at 767.

> As we recognized in *Lucas*, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations. We nevertheless concluded that the analogy

classification based on legitimacy of birth to satisfy equal protection scrutiny, it must be "substantially related to an important governmental objective."[335] The Court's subsequent cases shed light on how this level of scrutiny is applied and what is required for a government objective to be sufficiently important to justify "discriminatory classifications based on . . . illegitimacy."[336]

In *Trimble v. Gordon*, decided in 1977, the Court completed its retreat from *Labine*.[337] *Trimble* involved an Illinois statute that allowed nonmarital children to inherit by intestate succession only from their mothers, but allowed legitimate children to inherit from both their mothers and their fathers.[338] The Court's central concern in analyzing the statute focused on whether it "broadly discriminate[d] between legitimates and illegitimates."[339] The Court acknowledged the special competence of the legislature in setting the proper legal framework for the orderly disposition of property at death,[340] but noted that courts play an important role when the legislative scheme infringes upon a constitutional right.[341] When such rights are implicated, the statute should be scrutinized under a standard that is not "toothless"[342] to determine whether it is "carefully tuned to alternative considerations."[343] Applying this standard, the Court invalidated the statute, finding that Illinois had failed to consider a scheme falling between a complete ban on illegitimates inheriting from their fathers and an individual case-by-case determination.[344] The Court noted that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[345]

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was not sufficient to require 'our most exacting scrutiny.' Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' *Lucas* also establishes that the scrutiny 'is not a toothless one,' a proposition clearly demonstrated by our previous decisions in this area.

*Id.*

335. *Clark*, 486 U.S. at 461.

336. *Id.*

337. 430 U.S. 762, 776 n.17 (1977) ("To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls.").

338. *Id.* at 763.

339. *Id.* at 772 (quoting Mathews v. Lucas, 427 U.S. 495, 513 (1976)).

340. *Id.* at 771.

341. *Id.*

342. *Id.* at 767 (quoting *Mathews*, 427 U.S. at 510).

343. *Id.* at 772 (quoting *Mathews*, 427 U.S. at 513).

344. *Id.*

345. *Id.*

The Court then rejected the "insurmountable barrier" analysis applied in *Labine*,[346] stating that the existence of any hypothetical alternative to intestate succession the parents could have taken to provide for the child is irrelevant as to whether the statutory differentiation on the basis of legitimacy violates the Equal Protection Clause.[347] This analysis is important in light of the USCACA's assertion that parents can "explicitly provide for such children in their wills,"[348] because such an option does not cure the complete exclusion of posthumous children from establishing a legal relationship with their deceased parent.[349] A year later, the Court in *Lalli v. Lalli* upheld a New York statute that permitted an illegitimate child to inherit by intestate succession from his father only if he had obtained a court order of filiation during the father's lifetime.[350] The Court held that the statute's court-ordered filiation requirement was unconstitutional because it was substantially related to the government's important interest in the orderly disposition of property at death.[351] The Court asserted that in light of the "peculiar problems of proof" that are involved in determining paternity when the father is not part of a family unit,[352] the filiation requirement helped substantially to prevent spurious claims or fraudulent assertions of paternity.[353]

In distinguishing *Lalli* from *Trimble*, the Court provided important guidance for determining the legal status of posthumous children. The Court noted that the Illinois statute in *Trimble* was unconstitutional because it provided a "total statutory disinheritance" of illegitimate children who were not subsequently legitimated by the marriage of their parents.[354] The New York statute, conversely, barred inheritance only where there had been no paternity determination during the father's lifetime.[355] The Court noted that this "is not a requirement that inevitably disqualifies an unnecessarily large number of children born out of wedlock."[356] By

346. *See* 401 U.S. 532, 539 (1971); *see also supra* notes 327-28 and accompanying text.

347. *Trimble*, 430 U.S. at 774.

348. USCACA, *supra* note 56, at § 4(b) cmt., at 372.

349. *See Trimble*, 430 U.S. at 773 (noting that the Court's distinction of *Labine* in *Weber* was "based in part on the fact that no such alternatives existed, as state law prevented the acknowledgement of the children involved").

350. 439 U.S. 259, 261-62 (1978) (plurality opinion).

351. *Id.* at 275-76.

352. *Id.* at 268-69.

353. *Id.* at 271-72.

354. *Id.* at 273.

355. *Id.*

356. *Id.*

contrast, the statutory responses to posthumous conception not only disqualify a large number of posthumous children from filiating with their deceased parent, but they also deny this opportunity to all such children.[357] Furthermore, posthumous conception does not present the problems of proving paternity that were sometimes present in traditional illegitimate child cases,[358] because paternity can be established indisputably at the time that the gamete material is preserved.[359] Moreover, current DNA tests are sufficiently accurate to render such a concern insignificant.[360] In sum, because posthumous children have no possibility of filiating during their father's lifetime, they deserve special consideration and should not be visited with the long-rejected treatment the law historically extended to illegitimate children.[361]

Under equal protection analysis, a state cannot discriminate against similarly situated persons.[362] Nonmarital children and nonmarital posthumous children are similarly situated as they are both indisputably the genetic offspring of the parent, differing only in the timing and circumstances of their birth.[363] Accordingly, granting nonmarital children the opportunity to establish a legal relationship with their genetic parents while simultaneously denying that opportunity to nonmarital posthumous children is inconsistent with equal protection principles.[364] The Court provided support for this argument in *Clark v. Jeter*, in which it held that a Pennsylvania statute of limitations for filing paternity actions violated the Equal Protection Clause because it allowed a longer statute of limitations in analogous situations.[365] The Court found that Pennsyl-

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357. *But see supra* Part II.A.3.b (discussing Virginia's approach).

358. *Lalli*, 439 U.S. at 271-72.

359. *But see supra* note 345 and accompanying text.

360. *See* Le Ray, *supra* note 310, at 747-48; *see also* Clark v. Jeter, 486 U.S. 456, 465 (1988); Alexander v. Alexander, 537 N.E.2d 1310, 1311 (Ohio Prob. Ct. 1988) (taking judicial notice that, with the accuracy of DNA tests, "the problems of proof inherent to an action in which paternity is alleged should no longer deprive an illegitimate child of proving his paternity").

361. *See supra* notes 308-10 and accompanying text.

362. *See* Kerekes, *supra* note 29, at 227-28.

363. *See supra* note 152 and accompanying text; *see also* Shah, *supra* note 48, at 569 (arguing that treating posthumous children differently from children born through normal reproduction is "tantamount to treating children who are born by Cesarean section differently from those who are born vaginally").

364. *See* Kerekes, *supra* note 29, at 227-28 (arguing same point); *see also* note 149 and accompanying text.

365. 486 U.S. 456, 464 (1988); *see also* Mills v. Habluetzel, 456 U.S. 91, 97 (1982) (holding that the time permitted to bring a filiation claim "must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf despite the difficult personal, family, and financial circumstances that often surround the birth of a child outside of wedlock").

vania's six-year statute of limitations for filing a paternity claim was not substantially related to the state's asserted purpose of preventing stale or fraudulent claims because, for example, claims to obtain child support were allowed until the children reached the age of eighteen.[366]

The Court then outlined the proper framework for evaluating equal protection challenges to such time limitations. First, the statute of limitations must provide a reasonable opportunity to assert a claim.[367] Second, any time limitation must be substantially related to the state's interest.[368] Applying this standard to posthumous conception, all of the current statutory responses to the posthumous child prove inadequate.[369] While each reflects the important state interest in the orderly disposition of property at death, which is the province of the state legislature,[370] none provides a reasonable opportunity for a posthumous child to bring a filiation action. Instead, they impose a complete ban, denying posthumous children any possibility of filiating,[371] despite the fact that posthumous children differ from other nonmarital children only in the timing and circumstances of their births.[372] The viability of these statutes is dubious in light of the Court's equal protection analysis in the nonmarital children cases.[373] According to the drafters of the USCACA, the purpose of denying posthumous children the opportunity to establish a legal relationship with their deceased parent is to avoid the problems that would exist if a posthumous child had a legal basis to make a claim on the parent's estate.[374] This is an impermissibly one-sided approach, however, as it considers only the government's interest and does not balance that interest with the rights of the child. Moreover, it pays no heed to the *Trimble* Court's directive that any legislative constraint placed on nonmarital children be "carefully tuned to alternative considerations."[375] The court in *Kolacy* also acknowledged the need for such balancing that care-

366. *Clark*, 486 U.S. at 463-64.

367. *Id.* at 462 (citing *Mills*, 456 U.S. at 99-100).

368. *Id.*

369. *See supra* Parts II.A.2, 3.

370. Lalli v. Lalli, 439 U.S. 259, 268 (1978) ("We have long recognized that [the disposition of property at death] is an area with which the States have an interest of considerable magnitude."); *see also* Trimble v. Gordon, 430 U.S. 762, 771 (1977) ("The orderly disposition of property at death . . . is a matter particularly within the competence of the individual states.").

371. *See supra* Part II.A.3.

372. *See supra* notes 151-52, 362-64.

373. *Trimble*, 430 U.S. at 771.

374. USCACA, *supra* note 56, § 4(b) cmt., at 372.

375. *Trimble*, 430 U.S. at 772.

fully considers the rights of the child, stating that "we should routinely grant the child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates."[376] The *Woodward* court specifically required such balancing as well.[377]

## V. A CONSTITUTIONALLY GROUNDED FRAMEWORK

Three overriding principles can be derived from these important areas of constitutional jurisprudence that form the basis of a framework for analyzing posthumous conception. First, states must protect the parent-child relationship. Second, any determination of the rights of posthumous children must accommodate the state's important interest in the administration of estates. Third, states need to adopt measures that protect the welfare of posthumous children. This framework can guide policymakers in adopting specific measures to resolve the issues raised by posthumous conception in ways that are consistent with the constitutional protections that the Supreme Court has affirmed for the family.

### *A. Protecting the Parent-Child Relationship*

The right of privacy of family and procreation is a crucial fixture in constitutional law.[378] The focus of this privacy is on the "protected intimate relationship" and extends beyond any particular place as "required to safeguard the right to intimacy involved."[379] One of the most important intimate relationships is between parent and child.[380] This parent-child relationship is at the very heart of

376. 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000).

377. 760 N.E.2d 257, 265-66 (Mass. 2002) (noting that the "best interests" of posthumous conceived children "must be balanced against other important State interests"); *see also supra* note 197 (discussing *Woodward*).

378. *See supra* Parts IV.A, B.

379. Paris Adult Theatre I v. Slaton, 423 U.S. 49, 66 n.13 (1973) ("[T]he constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved.").

380. "To be sure, [*Meyer* and *Pierce*] did not expressly consider the family relationship presented here. They were immediately concerned with freedom of choice with respect to childbearing, . . . or with the rights of parents to the custody and companionship of their own children, . . . or with traditional parental authority in matters in child rearing and education. . . . But unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid apply-

the Supreme Court's decisions regarding the family[381] and does not disappear in the context of posthumous conception. The fact that the father is deceased does not extinguish the parental bond for a posthumous child, a bond that will most assuredly be further nurtured by the mother as she relates her memories of the deceased father to the child.[382] Accordingly, it takes no leap of faith to argue that the fundamental right to establish a family, so crucial in constitutional law, at the very least informs a posthumous child's interest in establishing a legal relationship with the parent with whom he or she shares a genetic heritage.[383]

States should honor and protect this parent-child relationship in two principal ways. First, states should establish a formal method for fathers to expressly demonstrate their intent to conceive and claim a legal relationship with a posthumous child. This could easily be accomplished at the time of preservation, as hopeful parents could specify whether they would want their gametes to be used posthumously to conceive a child and exactly by whom.[384] States could statutorily require sperm banks to stipulate such a disclosure.[385] This has additional importance because an individual also has a constitutional interest in not procreating and should be allowed to prevent the use of his gametes for unauthorized posthumous conception.[386] Second, in the absence of an express showing of intent, posthumous children should have access to an alternative method of establishing a legal relationship with their deceased parents. Some people who clearly desire and intend to sire a child may not anticipate their own death as a factor in the decision; therefore, posthumous children should be allowed to demonstrate their father's intent by some means other than an express showing.[387]

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ing the force and rationale of these precedents to the family choice involved in this case." Moore v. City of E. Cleveland, 431 U.S. 494, 500-01 (1977).

381. *See supra* Part IV.A.

382. *See supra* note 191 and accompanying text.

383. *See supra* notes 295-303 and accompanying text.

384. Courts have already recognized the right of a gamete provider to have dispositional control over his reproductive material. *See supra* Part II.B.1.

385. *See* Lorio, *supra* note 195, at 51 (suggesting that at the time of preservation the prospective parent should provide "specific written indication of intent").

386. Schiff, *supra* note 18, at 943 ("Although a person who has a child posthumously obviously will have no rearing responsibilities and, consequently, will not have any ongoing emotional or social relationship with the child, the fact that a person will not be present to experience the manifold emotions and events associated with parenthood does not mean that he or she has no interest in preventing procreation. To foist parenthood upon an individual after death knowing that this contravenes the deceased's explicit wishes infringes upon the autonomy of the pre-mortem individual, by depriving him or her of control over a highly significant interest.").

387. The *Kolacy* court acknowledged the importance of this possibility, noting that William Kolacy "by his intentional conduct created the possibility of having long-delayed after born chil-

States could prescribe specific factors that would satisfactorily indicate a person's intent to conceive a child posthumously, clearing the way for a posthumous child to claim a legal relationship with the deceased parent. For example, letters, oral statements, or other preparations typically taken by hopeful parents could indicate a person's intention to beget a child, even if posthumously.[388]

### *B. Protecting Important State Interests*

States have an important interest in the orderly administration of estates. This has been the primary justification for denying posthumous children the right to establish a legal relationship with a deceased parent.[389] The state's interest in estate administration, however, must yield when it unduly infringes upon the well-established constitutional status of the family,[390] and particularly upon the liberty interest of the child to be a part of that family.[391] Orderly estate administration is not a sufficient justification to deny posthumous children their rightful place in the family when the "Constitution recognizes higher values than speed and efficiency."[392]

This is not, however, a zero-sum proposition. States can choose from a wide variety of procedures that appropriately balance these seemingly competing interests. For example, states could establish a reasonable statute of limitations,[393] during which the po-

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dren." 753 A.2d 1257, 1263-64 (N.J. Super. Ct. Ch. Div. 2000). The court also accepted as true Mariantonia's statement that "her husband unequivocally expressed his desire that she use his stored sperm after his death to bear his children." *Id.* at 1263.

388. The *Woodward* court seemingly gave approval of a list of items the administrative law judge, who first heard the case, would have considered to determine the decedent's intent to conceive a child posthumously, including "additional declarations or written statements from the decedent's family, [the wife's] family, financial records or records from the fertility institute that demonstrate acknowledgement [of the children] made by [the husband]." 760 N.E.2d 257, 271 (Mass. 2002).

389. *See supra* Part III.A.

390. As the Supreme Court has affirmed, "[A] law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (internal quotation marks omitted).

391. *See supra* notes 303-05 and accompanying text.

392. Stanley v. Illinois, 405 U.S. 645, 656 (1972) ("Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.").

393. *See supra* notes 364-68 and accompanying text; *see also* Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Repro-*

tential mother could provide notice of her intent to bear a posthumous child with the deceased father's sperm. This would provide notice to the deceased father's estate to anticipate the birth of a posthumous child and act accordingly.[394] Distribution of the estate's assets could be postponed for the limitation period or until the birth of the posthumous child.[395] Alternatively, the estate's distribution could allow a pro rata share to be reserved for the prospective posthumous child. If the mother eventually decides to forgo conceiving the child or if for some other reason the child is not born, the estate could then redistribute the reserved share to the remaining heirs according to their respective entitlements. The Uniform Probate Code already contains a four-year limitation period for claims against a decedent's estate, thus such an approach is not unimaginable or unworkable.[396] A number of commentators have proposed additional procedures designed to balance the needs for estate administration and the rights of posthumous children.[397] The *Kolacy* court likewise suggested a possible means of balancing the competing interests of efficient estate administration and posthumous children.[398]

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*ductive Technology*, 67 TEMP. L. REV. 335, 365 (1994) (suggesting the possibility that a statute of limitations could resolve this problem).

394. *But see* Brashier, *supra* note 37, at 214 & n.410 (noting that the disadvantage of solutions such as a statute of limitations "is their potential for tremendously complicating and delaying estate administration" and arguing that the best solution to inheritance issues for posthumous children is for parents to provide for the child through a will).

395. Other writers have suggested similar approaches as a sensible solution to these problems. *See, e.g.*, Shah, *supra* note 48, at 569-70 (suggesting intestacy laws could be modified to allow a prospective parent to designate how the estate is to be distributed specifically regarding a future posthumous child and state an amount that could be reserved for that child and for how long).

396. *See* Djalleta, *supra* note 393, at 368-69 (discussing the Uniform Probate Code and suggesting possible amendments that would specifically address the status of posthumous children); *see also* Mika & Hurst, *supra* note 46, at 1018-19.

397. *See* Garside, *supra* note 29, at 731-32 (proposing a public registry in which the potential mother and potential father can provide notice of intent, through a notarized act, to engage in posthumous conception, putting interested third parties on notice, or requiring by clear and convincing evidence that the deceased parent intended for the child to be posthumously conceived within two years of his death and that this intent was realized); Kerekes, *supra* note 29, at 242-43, 248-49 (suggesting the possibility, though imperfect, of expanding the definition of a pretermitted heir to include posthumous children or, alternatively, directing by statute procedures for reserving a portion of an estate for a potential posthumous child and for distributing the estate assets in the event of an actual posthumous child).

398. 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000) ("Even in situations where competing interests such as other children born during the lifetime of the decedent are in existence at the time of his death, it might be possible to accommodate those interests with the interests of after born children. For example, by statutory provision or decisional rule, payments made in the course of routine estate administration before the advent of after born children could be treated

Put simply, depriving posthumous children of the opportunity to establish a legal relationship with their deceased parents just to avoid complications with estate administrations is an inadequate response to this important issue. State legislatures, with their collective resources, experience, and wisdom, could develop any number of methods for achieving a balance between the interests of the state and the interests of the posthumous child. For, if the family is "deeply rooted in America's history and tradition" and is the social institution through which "we inculcate and pass down many of our most cherished values, moral and cultural,"[399] then certainly the child's right to establish legal membership within that family is more important than mere administrative convenience.

### *C. Protecting the Welfare of the Posthumous Child*

Resolving posthumous children's capacity to claim a legal relationship with their deceased parents clears the way for taking further measures to protect the welfare of the posthumous child. As the *Kolacy* and *Woodward* courts recognized, states have an important policy interest in ensuring that children are amply provided for.[400] This is also an important principle underlying the Supreme Court's decisions regarding illegitimate children.[401] Granting posthumous children intestate inheritance rights is one method of providing for the physical needs of children left without a parent's support.[402] Granting survivor's benefits to these children is another option.[403]

Posthumous children face the same financial and other burdens that any child would face upon losing a parent.[404] If posthumous children are denied inheritance and survivor's benefits, however, they could face even greater financial burdens because other children would be entitled to such benefits. Denying posthumous children the very benefits that are intended to help support children upon losing a parent could also raise the possibility that post-

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as vested and left undisturbed, while distributions made following the birth of after born children could be made to both categories of children.").

399. Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977).

400. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 265-66 (Mass. 2002); *Kolacy*, 753 A.2d at 1262.

401. *See supra* Part IV.C.

402. *Kolacy*, 753 A.2d at 1262 (noting that the New Jersey legislature had "manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as a result of death").

403. *See supra* notes 179-85 and accompanying text.

404. *See supra* note 182 and accompanying text.

humous children might face an increased potential of dependence upon public assistance.[405] To resolve this predicament, states should enact legislation that extends inheritance and survivor's benefits to posthumous children. Because estate assets and survivor's benefits are earned and accrued by the parent during life,[406] this would allow the parents an opportunity to support their own children, which undoubtedly would be their desire.[407] This would consequently reduce the financial burdens faced by posthumous children and the potential need for society to provide for such children.[408] Furthermore, because inheritance rights evolve over time, recognizing posthumous children as the legal heirs of the deceased father would allow them to gain intestate inheritance rights from their father's family and relatives, thereby enhancing their financial support.[409] Moreover, this would provide the additional advantage of allowing the father's family to acquire custody rights in the event of the mother's death. Thus, if the mother dies, the father's parents could readily step in to take care of the child, if needed, since they would already be recognized as the posthumous child's legal grandparents.

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405. *See* Shah, *supra* note 48, at 569 (focusing on how not allowing posthumous children to inherit by intestate succession would take the responsibility of providing for children from their parents and place the burden on taxpayers).

406. Although Shah recognized the increased potential of posthumous children to create a financial burden on society, she suggested that the intestate laws should be changed to allow parents to provide for posthumous children and argued that Social Security should not be paid to posthumous children, claiming that it would otherwise become comparable to a "government subsidy" like welfare. *Id.* at 570. This argument, however, fails to recognize the deceased parent's contributions to social security made during life for this very purpose. Naturally born children are entitled to Social Security survivor's benefits; thus, arguing that posthumous children are not likewise entitled to this source of support is invalid because posthumous children should be no different from naturally born children for equal protection purposes. *See supra* note 372; *see also supra* note 136 and accompanying text (describing Lauren Woodward's efforts to obtain Social Security survivor's benefits for her posthumously conceived children).

407. The father in life will have a significant interest in the future well-being of the child. "For the donor [father], 'it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.' " Djalleta, *supra* note 393, at 364 (quoting E. HALBACH, DEATH, TAXES AND FAMILY PROPERTY 5 (E. Halbach ed., 1977)); *see also supra* notes 186-89 and accompanying text.

408. Shah, *supra* note 48, at 569; *see also supra* note 150 and accompanying text.

409. *In re* Estate of Kolacy, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000) (noting that the children's status as legal heirs "could also be significant in determining their rights under the wills of their father's relatives").

This framework has two important features. First, it respects the constitutional safeguards the Supreme Court has recognized for the family and parental liberties. The Court has clearly established that the family enjoys constitutional status[410] and that the right to conceive children is constitutionally protected.[411] This framework recognizes and recommends that these constitutional protections, at the very least, animate posthumous children's interests in establishing a legal relationship with their deceased parents. Second, this framework allows flexibility to adopt a wide range of measures to resolve the competing policy interests of the state and the rights of posthumous children. By recognizing the outer perimeter of important constitutional principles in the area of family and procreation, states can adopt measures to balance their particular and diverse policy concerns while remaining consistent with those principles.

## VI. CONCLUSION

As new technologies transform the nature of reproduction, the law must continue to adapt to new realities.[412] Posthumous conception is one of these new realities that promises to become more prevalent.[413] A total denial of posthumous children's right to establish a legal relationship with their deceased parents is an inadequate response to this new reality.[414] The posthumous child represents the desire of parents—made possible by technology—to create a family in the only way possible in their individual circum-

410. *See supra* Part IV.A.

411. *See supra* Part IV.B.

412. The *Woodward* court clearly recognized this point:

> As these technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.

760 N.E.2d 257, 272 (Mass. 2002).

413. Kerekes, *supra* note 29, at 227 ("It is highly unlikely that the problem [of posthumous children] will simply go away in light of the burgeoning number of alternative methods of assisted conception.").

414. The admonition of the *Kolacy* court that granted Amanda and Elyse's petition to gain legal recognition as William's children is powerfully relevant in this regard: "[O]nce a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status requires. It seems to me that a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons." *Kolacy*, 753 A.2d at 1263.

stances.[415] The right of privacy and the paramount importance of the family should be interpreted as being broad enough to, if not encompass, then certainly to inform the procreative choices of these hopeful parents. Furthermore, denying posthumous children the opportunity to establish a legal relationship with their deceased parents based solely on the circumstances and timing of their birth is inconsistent with the principles of equal protection.[416] The practical realities of denying posthumous children in this way create legal and financial burdens that are unrelated to the children's actions.[417] As the *Trimble* Court noted, "[I]mposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility."[418] The same is equally true for posthumous children.[419] A hopeful parent's desire to bear a child is one of society's most cherished values[420] and has received the highest constitutional protections.[421] Therefore, as courts and legislatures are increasingly called upon to

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> [T]he Legislature has in great measure affirmatively supported the assistive reproductive technologies that are the only means by which these children can come into being. We do not impute to the Legislature the inherently irrational conclusion that assistive reproductive technologies are to be encouraged while a class of children who are the fruit of that technology are to have fewer rights and protections than other children.

*Woodward*, 760 N.E.2d at 265.

416. *See supra* Part IV.C.

417. *Cf.* Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.").

418. *Id.* at 769-70; *see also* Levy v. Louisiana, 391 U.S. 68, 72 n.6 (1968) (using the words of Shakespeare from KING LEAR act I, sc. 2, to express the impropriety of placing burdens on a child because of the circumstances of birth: "Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?" (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

419. "Denying [posthumous] children legal rights of inheritance based on the theory that such denial would deter people from posthumously reproducing is the moral equivalent of denying illegitimate children inheritance rights in order to deter people from having children out of wedlock." Lorio, *supra* note 195, at 45; *see also* Reed v. Campbell, 476 U.S. 852, 854-55 n.5 (1986) ("It is true, of course, that the legal status of illegitimacy, however defined, is, like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society. The Court recognized in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), that visiting condemnation upon the child in order to express society's disapproval of the parents' liaisons 'is illogical. . . . Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.' " (internal quotation marks omitted) (quoting Mathews v. Lucas, 427 U.S. 495, 505 (1976)).

420. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The right to have offspring is "one of the basic civil rights of man." *Id.*

421. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); *see also supra* Part IV.B.

determine the status of children born through posthumous conception, they should approach their task with this perspective in mind.

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