Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children

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I. INTRODUCTION

The use of various assisted reproductive technologies has given rise to a variety of legal and morality concerns.[1] Assisted reproductive technology may be used for several reasons, such as by couples who cannot have children,[2] by same-sex couples who want children,[3] or by

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[1] For example, there are questions regarding the legal rights of men and women to bequeath reproductive material, such as sperm and eggs, the duties of clinics with respect to stored embryos, whether embryos are persons or property, and who owns unused embryos. *See* FAMILY BUILDING THROUGH EGG AND SPERM DONATION: MEDICAL, LEGAL, AND ETHICAL ISSUES 120 (Machelle M. Seibel & Susan L. Crockin eds., 1996) [hereinafter FAMILY BUILDING]; WOMEN & REPRODUCTIVE TECHNOLOGIES: MEDICAL, PSYCHOSOCIAL, LEGAL, AND ETHICAL DILEMMAS 103, 159-60 (Judith Rodin & Aila Collins eds., 1991).

Another issue that arises from the use of assisted reproductive technology is the question of how family is defined. FAMILY BUILDING, *supra* note 1, at 113. Theoretically, using various technologies, a child can have more than two parents, and up to six in some cases. For example, surrogate motherhood can result in six individuals with potential parental interests: (1) the man whose sperm is used, (2) the woman whose egg is used, (3) the woman who carries the baby (surrogate mother), (4) the surrogate mother's husband, (5) and the two parents who contracted to raise the child. F. Barrett Faulkner, *Applying Old Law to New Births: Protecting the Interests of Children Born through New Reproductive Technology*, 2 J. HIGH TECH. L. 27, 31 (2003), *at* http://www.jhtl.org/V2N1/BFAULKNERV2N1N.pdf (last visited Apr. 22, 2005).

[2] FAMILY BUILDING, *supra* note 1, at 113. For example, helping infertile men have children accounts for the most frequent use of artificial insemination. Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications For Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 58 (1994).

[3] FAMILY BUILDING, *supra* note 1, at 113.

individuals who want to be single parents.[4] It has also been used when one spouse has predeceased the other and the surviving spouse wants to have a child who is genetically related to both spouses. One of the concerns surrounding posthumous conception is whether the child who is conceived after the death of one parent should be able to inherit from the deceased parent's estate. Most states' laws do not explicitly address whether posthumously conceived children[5] can inherit from a parent who has died prior to the child's conception. In addition, the few courts and legislatures that have dealt with this issue have ignored the Equal Protection rights of these posthumously conceived children.

This article analyzes the rights of posthumously conceived children to inherit from a deceased father's[6] estate under the Equal Protection Clause of the Fourteenth Amendment[7] of the United States Constitution.[8] The article asserts that state classifications that restrict the rights of posthumously conceived children to inherit must satisfy intermediate scrutiny—that is, the state law must be substantially related to important state interests. Existing state classifications fail to satisfy this standard. The article thus proposes a statutory framework that will allow a posthumously conceived child to inherit from a deceased parent's estate under most circumstances, while balancing important state interests with concerns of the child.[9]

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[4] *Id*. The desire of single women to have children accounts for five percent of artificial insemination requests. McAllister, *supra* note 2, at 58.

[5] "Posthumously conceived children" are children who are not just born, but also conceived, after a parent's death. On the other hand, a child conceived before, but born subsequent to, a parent's death may be referred to as a "posthumous child." Posthumous children do not have the same difficulty in inheriting from a predeceased parent because many states' laws allow for inheritance of one who is "in gestation" at the time of the parent's death. *See, e.g.*, ARIZ. REV. STAT. § 14-2108 (1995).

[6] Although it is possible through modern reproductive technology for a child to be conceived after the death of the mother, this article focuses on posthumous conception from a predeceased father because that is the more common situation, and does not require a discussion of the implications of surrogacy, which are beyond the scope of this Article.

[7] The Fourteenth Amendment Equal Protection Clause provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[8] *See infra* Part V. The Equal Protection Clause can also be applied against the federal government through the Due Process Clause of the Fifth Amendment. Bolling v. Sharpe, 347 U.S. 497, 500 (1954). The Due Process Clause of the Fifth Amendment states, "No person shall … be deprived of life, liberty, or property, without due process of law . . . " U.S. CONST. amend. V.

[9] *See infra* Part VI.

Part II of the article reviews modern reproductive technology that makes posthumous conception possible. Part III discusses the inheritance rights of non-marital children under traditional common law, as well as under modern state statutes and uniform codes. This section focuses specifically on several Supreme Court cases that established an intermediate level of scrutiny under which to evaluate Equal Protection claims of non-marital children.

Part IV describes current statutes, and court decisions that address the rights of posthumously conceived children to inherit from their deceased parents. Several states have enacted legislation that specifically speaks to the inheritance rights of these individuals. However, courts in most states must construe out-dated general intestacy statutes to decide whether posthumously conceived children may inherit from their deceased parents. So far, four cases have arisen on this subject, and in all four of these cases the courts had to resort to general intestacy statutes to determine whether the children could receive social security benefits from the deaths of their predeceased fathers.

Part V then offers an Equal Protection framework under which to analyze the issue of inheritance by posthumously conceived children, and asserts that current restrictions are not substantially related to important state interests.

Part VI of this article proposes an approach that satisfies Equal Protection scrutiny and allows a posthumously conceived child to inherit from his/her deceased father's estate as long as several requirements are met. The child must be biologically related to the father, and either the father must have provided consent to have a posthumously conceived child or the surviving spouse must be the intended beneficiary of his reproductive material. In addition, certain time requirements must be met.

II. REPRODUCTIVE TECHNOLOGY AND POSTHUMOUS CONCEPTION

Several methods of assisted reproductive technology can result in conception of a child after a parent's death. Because of the increase in the use of these technologies, the issue of inheritance rights of posthumously conceived children is likely to arise more often in the future.

A. Cryopreservation

Cryopreservation is the general term used to describe the process of freezing different reproductive material, including gametes,[10] zygotes,[11] pre-embryos,[12] and embryos.[13] It is the key process that makes assisted reproductive technology possible after one parent has already died.[14] Through cryopreservation, sperm can be preserved for at least ten years,[15] and, according to some, can theoretically be preserved for as long as one hundred years.[16] Cryopreservation is used in various

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[10] Gametes are single unfertilized reproductive cells, either sperm or eggs. ADAM H. BALEN & HOWARD S. JACOBS, INFERTILITY IN PRACTICE 369 (2d ed. 2003). A gamete cannot by itself become a human being, but can be later fertilized, thus resulting in the possibility of posthumous conception. James E. Bailey, *An Analytical Framework For Resolving the Issues Raised by the Interacting Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 747 (1998).

[11] A zygote is the single-celled entity that results when an egg is fertilized by sperm. BALEN, *supra* note 10, at 369.

[12] "Pre-embryo" is the general term used for the entity before it begins to undergo cell division, which occurs about fourteen days after fertilization. INFERTILITY: A COMPREHENSIVE TEXT 764 (Machelle M. Seibel ed., 2d ed. 1997); *see also Glossary of Infertility Terms*, *at* http://www.nlm.nih.gov/medlineplus/infertility.html (last visited Mar. 2, 2005). It is during the pre-embryo stage that implantation occurs for assisted reproductive methods such as in vitro fertilization. GOOD CLINICAL PRACTICE IN ASSISTED REPRODUCTION 139 (Paul Serhal & Caroline Overton eds., 2004). Then, at the point the cell begins to divide, it has become an embryo. *Glossary of Infertility Terms*, *supra* note 12. Finally, the fetus is created after cell differentiation and specialization has occurred in the embryo. Faulkner*, supra* note 1, at 29 n.22.

[13] *See* INFERTILITY: A COMPREHENSIVE TEXT, *supra* note 12, at 793-803; INFERTILITY AND CONTRACEPTION: A TEXTBOOK FOR CLINICAL PRACTICE 168-69 (Otto Rodríguez-Armas, et al. eds., 1998) [hereinafter INFERTILITY AND CONTRACEPTION].

[14] Besides using frozen sperm, eggs, zygotes, and pre-embryos for conception, it is also possible to transfer fresh samples of such reproductive materials. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., 2002 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 4 (2004), *available at* http://www.cdc.gov/reproductivehealth/ART02/PDF/ART2002.pdf (last visited Apr. 22, 2005). Of course, the use of fresh samples cannot result in posthumous conception because in order for posthumous conception to occur, the reproductive materials must have been obtained prior to death and subsequently preserved. Cryopreservation is thus the key to posthumous conception. *See* McAllister, *supra* note 2, at 63 ("[T]he cryopreservation and long-term storage of embryos creates the potential for a child to be born years, even decades, after the death of the genetic parents.").

[15] American Foundation for Urologic Disease, *Sperm Banking*, *at* http://www.afud.org/education/ infertility/spermbank.asp (last visited Mar. 2, 2005).

[16] *See* Bailey, *supra* note 10, at 745 (citing Michael D. Lemonick, *The Sperm that Never Dies*, TIME MAGAZINE, June 10, 1996, at 69).

methods of reproductive technology, including in vitro fertilization.[17] This process is widespread, with thirteen thousand embryos thawed and implanted into American women in 1993 alone.[18]

B. Artificial Insemination

Artificial Insemination (AI) is the most successful and least expensive of all the reproductive technology procedures, and has existed the longest.[19] The first successful AI in humans took place in England in 1770, and the first successful human AI in the United States was in 1866.[20] It is estimated that about twenty thousand American women each year are artificially inseminated,[21] with a success rate of one in every seven attempts.[22]

In AI, sperm is inserted either into the vagina, uterus, or fallopian tubes of a woman with a syringe.[23] The sperm can be fresh or thawed, cryopreserved sperm.[24] It may come from an anonymous donor or from the husband of the woman being inseminated.[25] Because the sperm used in AI may have been cryopreserved, posthumous conception is possible.

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[17] *See* INFERTILITY: A COMPREHENSIVE TEXT, *supra* note 12, at 722.

[18] Bailey, *supra* note 10, at 816. This technology has only recently resulted in births, with the first successful birth resulting from a frozen embryo occurring in 1983. McAllister, *supra* note 2, at 63.

[19] Jamie Rowsell, *Stayin'Alive*, 41 FAM. CT. REV. 400, 401 (2003). AI was supposedly first used in the fourteenth century by Arab tribesmen to inseminate enemy horses with the sperm of inferior breeds. Bailey, *supra* note 10, at 746.

[20] Christopher A. Scharman, *Not Without My Father: The Legal Status of the Posthumously Conceived Child*, 55 VAND. L. REV. 1001, 1008 n.42 (2002).

[21] Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 183 (1996).

[22] McAllister, *supra* note 2, at 59. Close to three thousand children are conceivably born in the United States through AI each year.

[23] *Glossary of Infertility Terms*, *supra* note 12.

[24] American Foundation for Urologic Disease, *supra* note 15.

[25] When the sperm is donated anonymously, it may be referred to as "artificial insemination by donor" (AID) or "donor insemination" (DI), and when the sperm comes from the woman's husband, it may be known as "artificial insemination by husband" (AIH). *See* REPRODUCTIVE MEDICINE FROM A-Z 7 (Herbert Reiss ed., 2d ed. 1998); INFERTILITY: A COMPREHENSIVE TEXT, *supra* note 12, at 813. There are different legal implications depending on whose sperm is used in the insemination. *See* McAllister, *supra* note 2, at 59-60.

C. *In Vitro Fertilization*

In vitro fertilization (IVF) is a process in which eggs are extracted from a woman's ovaries, the extracted eggs are fertilized in a lab with sperm, and the fertilized eggs are then inserted back into the woman's uterus through the cervix.[26] The sperm used in this procedure may have been frozen through cryopreservation, so this process can also be used to create a posthumously conceived child.[27]

The success rate of IVF is not as high as that of AI. In IVF, twenty to forty percent of the eggs fail to be fertilized on average, and most fertilized eggs do not result in a pregnancy.[28] The first child born of IVF was Louise Brown, in 1978 in England.[29] Since then, over thirty thousand children have been born through IVF.[30]

D. *Gamete Intrafallopian Transfer*

In gamete intrafallopian transfer (GIFT), the eggs are extracted in the same way as in IVF.[31] Then, the unfertilized eggs, along with sperm, are inserted into the woman's fallopian tubes through an incision in the

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[26] REPRODUCTIVE HEALTH: WOMEN AND MEN'S SHARED RESPONSIBILITY 105 (Barbara A. Anderson ed., 2005) [hereinafter REPRODUCTIVE HEALTH]. In IVF, the resulting zygote or pre-embryo may be reinserted into the woman whose eggs were used, or may be inserted into a second woman. ASSISTED HUMAN REPRODUCTION: PSYCHOLOGICAL AND ETHICAL DILEMMAS 51 (Dani Singer & Myra Hunter eds., 2003). Moreover, like in AI, the sperm may come either from an anonymous donor or from the woman's husband. *Id*.

[27] INFERTILITY: A COMPREHENSIVE TEXT, *supra* note 12, at 722. There is speculation that under certain state statutes, a child born of IVF, unlike AI, may be able to inherit from a predeceased parent because the child may be considered "in being" for the purposes of intestate succession once the embryo is created. However, the Uniform Probate Code (UPC) requires the child be "in gestation," which likely means the pre-embryo or zygote must already be implanted into the mother. Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1154 (1997). Likewise, the proposed revision of Section 2-108 of the UPC would not define the moment of conception until after the zygote or pre-embryo has been implanted into the woman. *See infra* note 155.

[28] McAllister, *supra* note 2, at 61. Only about twelve to nineteen percent of IVF attempts result in pregnancy. INFERTILITY: A COMPREHENSIVE TEXT, *supra* note 12, at 727.

[29] ASSISTED REPRODUCTIVE TECHNOLOGIES 218 (Richard P. Marrs ed., 1993).

[30] Shapo, *supra* note 27, at 1130.

[31] REPRODUCTIVE HEALTH, *supra* note 26, at 105.

abdomen.[32] After fertilization, any resulting embryo naturally moves into the uterus.[33] This process can result in posthumous conception, as it did in the case of Judith Hart.[34] There are an estimated 4,200 GIFT procedures performed per year with a twenty-five to thirty percent average success rate.[35]

E. Zygote Intrafallopian Transfer

Like IVF, zygote intrafallopian transfer (ZIFT) involves fertilizing extracted eggs in the lab, but unlike IVF, once the eggs are fertilized, they are implanted into the woman's fallopian tubes rather than uterus.[36] This process can also result in a posthumously conceived child when frozen sperm is used from a deceased man.[37] ZIFT is rarer and less successful than IVF and GIFT, with an estimated 1,500 procedures done per year and a twenty-four percent overall success rate.[38]

F. Embryo Lavage and Transfer

This procedure is slightly analogous to IVF, except that instead of the egg being fertilized in a lab, it is fertilized in a donor's body.[39] Then, the resulting embryo is removed and transferred to the recipient.[40] Because frozen sperm from a deceased man may be used, this process

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[32] *Id*.; AM. SOC'Y FOR REPRODUCTIVE MEDICINE, ASSISTED REPRODUCTIVE TECHNOLOGIES: A GUIDE FOR PATIENTS 10 (2003), *available at* http://www.asrm.org/Patients/patientbooklets/ART.pdf (last visited May 2, 2005) [hereinafter AM. SOC'Y FOR REPRODUCTIVE MEDICINE].

[33] FAMILY BUILDING, *supra* note 1, at 5.

[34] Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 251-256 (1999) (discussing Hart v. Shalala, No. 94-3944 (E.D. La. 1994). *Hart* is examined in greater detail later in this article. *See infra* notes 174-181 and accompanying text.

[35] *Id.* at 271 n.105; INFERTILITY: A COMPREHENSIVE TEXT, *supra* note 12, at 727; INFERTILITY: A PRACTICAL GUIDE FOR THE PHYSICIAN 249 (Mary G. Hammond & Luther M. Talbert ed., 3d ed. 1992).

[36] REPRODUCTIVE HEALTH, *supra* note 26, at 105.

[37] 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).

[38] Banks, *supra* note 34, at 271 n.106.

[39] McAllister, *supra* note 2, at 64.

[40] *Id*. This process, thus, involves two women: the woman who donates her fertilized egg and the woman who receives the transfer.

can likewise result in the creation of a posthumously conceived child through cryopreservation.

III. LEGAL BACKGROUND—NON-MARITAL CHILDREN

A. Non-Marital Children at Common Law and the Modern Approach

At common law, children born out of wedlock[41] were considered filius nullius, or children of no one, and as such, could not inherit from either parent's estate.[42] There are several theories regarding the origin of this rule. First, it may be a reflection of the feudalist society that existed at common law. If non-marital children could not inherit from their parents, then the property would escheat to the state, or more likely, to the lord, and therefore, feudal lords promoted this idea.[43] A second theory is this rule was designed to discourage sex outside of marriage and, in that way, promote the marital family.[44] Third, there were problems of proof of parentage of non-marital children, so this rule prevented fraudulent claims of inheritance.[45] A similar approach prevailed into the 1940s, where the testator included class gifts to "children" in a will, in which case courts traditionally presumed the intent of the testator was to exclude non-marital children.[46]

By the eighteenth century, it was established that non-marital children could inherit intestate from their mothers, but they still could not inherit from their fathers.[47] One of the reasons for this distinction was the difficulty of proof of paternity.[48] However, with the

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[41] The term "non-marital" will be used in this article rather than the harsher-sounding "illegitimate" to refer to children born out of wedlock.
[42] Trimble v. Gordon, 430 U.S. 762, 768 (1977).
[43] WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 82-83 (2d ed. 2001).
[44] *Id*. at 83. This rationale was later rejected by the Supreme Court. *See infra* text accompanying notes 109-10.
[45] MCGOVERN & KURTZ, *supra* note 43, at 83-84.
[46] *Id*. at 90. A class gift is a gift in an instrument left to a certain general group or class of individuals, and in order to determine who the beneficiaries of that class are, a court must look to the state's probate code. For example, in a class gift "to my children," the court would have to determine whom the testator intended the term "children" to include.
[47] *Id*. at 84.
[48] *Id*. As Blackstone stated in the eighteenth century, with regard to non-marital children, "the mother [is] sufficiently certain, though the father is not." *Id*.

advancement of scientific technology, it has become much easier to prove paternity, even after the father has died.[49]

During the second half of the twentieth century, society began to view illegitimacy more liberally, and constitutional and legal developments reflect these societal changes. Between 1968 and 1983, the Supreme Court decided more than thirty cases regarding the Equal Protection and Due Process rights of non-marital children.[50] Many of the Equal Protection cases dealt with the issue of inheritance. In these cases, the Supreme Court invalidated as unconstitutional a number of state statutes that discriminated on the basis of illegitimacy.[51]

B. Equal Protection Rights of Non-Marital Children: Varying Levels of Scrutiny

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying to any person within their jurisdictions "the equal protection of the laws."[52] Courts and commentators have interpreted this language as requiring that similarly-situated individuals and groups be treated alike.[53]

The Supreme Court has applied three different levels of scrutiny to determine whether the two groups that are distinguished are similarly-situated, and thus must be treated alike, under the Equal Protection Clause. If, after applying the appropriate level of scrutiny, a court determines the two groups are similarly-situated, then the differential treatment constitutes a violation of the Equal Protection Clause.

The three standards of scrutiny are rational basis scrutiny, intermediate scrutiny, and strict scrutiny.[54] The appropriate level of

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[49] *Id*.
[50] HARRY D. KRAUSE & DAVID D. MEYER, FAMILY LAW IN A NUTSHELL 108 (4th ed. 2003).
[51] *See infra* notes 74-141 and accompanying text.
[52] U.S. CONST. amend. XIV, § 1.
[53] *See*, *e.g.*, Trimble v. Gordon, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting) (stating Equal Protection requires "persons similarly situated . . . be treated similarly."). By contrast, where two groups are not similarly situated "and a statutory classification is realistically based upon the differences in their situations, [the] Court has upheld its validity." Parham v. Hughes, 441 U.S. 347, 354 (1979). Furthermore, in order to find a violation of the Equal Protection Clause, the class that is allegedly discriminated against must suffer a "significant deprivation of a benefit or imposition of a substantial burden." Califano v. Boles, 443 U.S. 282, 295 (1979).
[54] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 645 (2d ed., Aspen Law & Business 2002).

scrutiny to be applied in any given case depends upon the nature of the statutory classification.[55]

Rational basis is the lowest level of scrutiny and is the default level that applies to all categories not subject to one of the stricter levels.[56] Under the rational basis test, the government may distinguish between two groups as long as the distinction is rationally related to a legitimate governmental interest.[57] This low threshold is thus very deferential to government action. By contrast, intermediate scrutiny is a heightened level of scrutiny that is used to evaluate classifications based on gender or illegitimacy.[58] To withstand intermediate scrutiny, the classification must be substantially related to an important governmental interest.[59] Finally, strict scrutiny is applied to classifications based on race or national origin.[60] To justify such classifications, the government must show that the distinction is necessary to meet a compelling purpose.[61] Under this highest level of scrutiny, the challenged classification will almost always be invalidated.

The Supreme Court has identified several factors that justify a heightened level of scrutiny. First, the Court has applied a heightened level of scrutiny to classifications based on immutable characteristics.[62] For example, distinctions based on one's race, nationality, gender, or the marital status of one's parents warrant stricter levels of scrutiny than mere rational basis.[63] The reason for this heightened standard is that it is unfair to place a burden upon someone based on a characteristic or circumstance that person cannot control.[64] Second, the Court has looked at whether the group discriminated against has been able to protect itself through the political process.[65] For instance, women and members of minority racial groups are often underrepresented in political offices. Third, the Court has considered the history of discrimination against the

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[55] *Id*.
[56] *Id*.
[57] *Id.* at 646; Pennel v. City of San Jose, 485 U.S. 1, 14 (1988).
[58] Clark v. Jeter, 486 U.S. 456, 461 (1988).
[59] *Id*.
[60] Loving v. Virginia, 388 U.S. 1, 11 (1967).
[61] *Id*.; Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).
[62] Kahn v. Shevin, 416 U.S. 351, 357 (1974); *see also* Mathews v. Lucas, 427 U.S. 495, 505 (1976).
[63] *Kahn*, 416 U.S. at 357; Frontiero v. Richardson, 411 U.S. 677, 686 (1973).
[64] *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).
[65] *See Frontiero*, 411 U.S. at 686, 686 n.17.

particular group.[66] The Court has also considered whether the classification in question has historically been based on prejudice or stereotype, rather than on permissible governmental interests.[67]

C. Intermediate Scrutiny

To satisfy intermediate scrutiny under the Equal Protection Clause, a governmental action must serve an important governmental interest, and must be substantially related to that important interest.[68] Thus, a law that either fails to meet an important governmental interest, or uses means that are not substantially related to that interest will be declared unconstitutional.

Moreover, in determining whether a particular classification is substantially related to its stated purpose, the Court will look at whether the law is over-inclusive or under-inclusive.[69] A law is over-inclusive if it applies to more individuals than are necessary in order for the government to meet its purpose.[70] On the other hand, a law is under-inclusive if it fails to apply to all of the people who fit the purpose of that law.[71] The Court is unlikely to invalidate a law simply because it is over- or under-inclusive, but, the stricter the level of scrutiny that the Court applies, the less variation the Court will tolerate.[72]

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[66] *Id*. at 689 n.22.
[67] Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).
[68] *Jeter*, 486 U.S. at 461.
[69] CHEMERINSKY, *supra* note 54, at 647.
[70] *Id*. For example, a law that requires all females under the age of eighteen to obtain parental consent before having an abortion, without regard to the particular situation and the individual's level of competence in making this decision, may be over-inclusive.
[71] *Id*. For instance, a law that forbids only individuals under the age of sixteen who are of Asian ancestry from driving, but allows people of all other races under the age of sixteen to drive, would likely be found under-inclusive because the risks and levels of inexperience are generally the same in all young drivers, regardless of race.
[72] *Id*. at 648. In other words, when the court uses strict or intermediate scrutiny, there must be a "closer fit" between the law and its purpose than when the court uses rational basis.

D. Supreme Court Non-Marital Children Cases

1. The Establishment of Intermediate Scrutiny as the Appropriate Level of Scrutiny.

The Supreme Court has applied an intermediate level of scrutiny to laws that distinguish between marital and non-marital children.[73] The Supreme Court's decisions in this area establish two principles: (1) laws that provide benefits to all marital children, while excluding all non-marital children, are always unconstitutional, but (2) laws that benefit some non-marital children, while denying benefits to other non-marital children, must be evaluated on a case-by-case basis under intermediate scrutiny to determine whether they are constitutional.[74] The Supreme Court has offered several reasons for using intermediate, as opposed to rational basis, scrutiny with regard to classifications based on illegitimacy.

In *Mathews v. Lucas*, [75] the Court applied a stricter level of scrutiny than the rational basis test in part because the non-marital classification was based on an immutable characteristic.[76] In this case, the Court declared constitutional the Social Security Act provision that allowed all marital children to obtain social security from the death of their insured fathers.[77] However, that created a presumption of dependency. Under that dependency, non-marital children could obtain payments from their insured fathers under one of four circumstances: (1) where, before death, the father had married the mother, (2) if the father had acknowledged in writing that the child was his, (3) if a court had determined the father to be the child's father, or (4) if a court had ordered the father to pay child support.[78] In justifying the application of heightened scrutiny, the Court stated, "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

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[73] *Id*. at 748. *See* Clark v. Jeter, 486 U.S. 461 (1988).
[74] CHEMERINSKY, *supra* note 54, at 749.
[75] 427 U.S. 495 (1976).
[76] Illegitimacy is immutable because children born out of wedlock cannot control the status of their birth and cannot force their parents to legitimate them through subsequent marriage.
[77] *Mathews*, 427 U.S. at 499.
[78] *Id*.

participate in and contribute to society."[79] The Court upheld the statutory provision because the stated purpose of administrative convenience was an important governmental interest. Moreover, the classification was substantially related to that interest because it still created a presumption of dependence in non-marital children under certain circumstances, and did not exclude them altogether.

The Court also noted in *Mathews*, as a second justification for applying a heightened level of scrutiny, that there has been a long history of discrimination against non-marital children. The Court stated, "the law has long placed the illegitimate child in an inferior position relative to the legitimate in certain circumstances."[80] However, the Court declined to apply an even higher level of scrutiny to classifications based on illegitimacy because historically non-marital children have never been as severely or pervasively discriminated against as women or individuals of minority races.[81]

In *Weber v. Aetna Casualty & Surety Co.*,[82] the Supreme Court stated a third justification for applying intermediate scrutiny to non-marital children classifications: it is unfair to penalize non-marital children solely because of the status of their birth, which they cannot control, especially because legal burdens should be placed on parties that are responsible for their actions.[83] In *Weber*, the Court struck down a Louisiana state law that defined "children" for the purpose of obtaining worker's compensation from an injured or deceased parent as including "only legitimate children, stepchildren, posthumous children, adopted children, and illegitimate children acknowledged under the provisions of [the relevant Louisiana statute]."[84] Under the statute, a non-marital child was "acknowledged" only if the parents could contract a legal marriage with each other.[85] Furthermore, while marital children and acknowledged non-marital children could recover on an equal basis, unacknowledged non-marital children had the status of "other

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[79] *Id*. at 505.
[80] *Id*. at 505-06.
[81] *Id*. at 506 ("[T]his discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.").
[82] 406 U.S. 164 (1972).
[83] *Id*. at 175.
[84] *Id*. at 167.
[85] *Id*. at 171 n.9. In this case, the decedent fathered two non-marital children with one woman while he was still married to another woman. *Id*. Therefore, the decedent and the mother of the non-marital children could not legally contract to marry.

dependents," and could recover only if the maximum allowable benefits under the Social Security Act were not already exhausted by other surviving children.[86] The decedent in *Weber* was a father of four marital children and two unacknowledged non-marital children.[87] The marital children exhausted the maximum allowable benefits, so the non-marital children were unable to obtain any benefits.[88]

The *Weber* Court found that the distinction drawn against unacknowledged non-marital children violated the Equal Protection Clause because the classification was not sufficiently related to the asserted state interests of protecting "legitimate family relationships" and minimizing problems of proof of parentage.[89] In applying a heightened level of scrutiny, the Court stated that although it is important to deter illegitimacy,

> visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. 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.[90]

In addition, the Court noted that it is unfair to deny benefits to unacknowledged non-marital children because "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged."[91] Moreover, in this case, there was reason to believe that the unacknowledged non-marital children were just as much dependent on

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[86] *Id*. at 168.
[87] *Id*. at 165.
[88] *Id*. at 167.
[89] *Id*. at 175. In this case, the Court had not yet formally established intermediate scrutiny for classifications based on illegitimacy. While the Court refused to apply strict scrutiny, and purported to apply only a rational basis test, it in effect applied a higher level than mere rational basis, which is shown by the fact that the Court did not give the legislature the deference it is usually granted under the rational basis test.
[90] *Id*. Likewise, the Court later in *Clark* noted, "we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parents." *Clark*, 486 U.S. at 461.
[91] *Weber*, 406 U.S. at 169.

and had just as much affection for their father as did the marital children.[92]

2. Important State Interests in Non-Marital Children Cases

The Supreme Court has recognized two important state interests that are relevant to inheritance in the context of laws that distinguish based on illegitimacy. First, the Court has recognized the need to prevent spurious or fraudulent claims against the deceased father's estate by purported non-marital offspring. In *Lalli v. Lalli*,[93] the Court found it acceptable to limit the ability of non-marital children to inherit from their fathers, even though these limitations were neither imposed on marital children nor on any children in inheriting from their mothers.[94] The Court noted that paternal inheritance by illegitimate children involved "peculiar problems of proof," whereas "[e]stablishing maternity is seldom difficult."[95] *Lalli* concerned a New York state statute that required non-marital children to provide proof of paternity before they could inherit from their fathers by intestate succession.[96] Under the statute, the only way to prove paternity was to obtain a court order of filiation during the putative father's lifetime and within two years of the child's birth.[97] Marital children did not have any such requirement. The Court upheld this law as constitutional under the Equal Protection Clause because it served the state interest of prevention of fraudulent claims of paternity, and because the requirement was "substantially related" to this important state interest.[98] That is, the limitation helped prevent fraudulent claims, which the court determined would be harder to expose among non-marital than marital children asserting a paternal relationship with the decedent.[99]

Lalli also recognized that the statute served a second important state interest: the interest in orderly and efficient estate administration.[100] Allowing inheritance claims of non-marital children after the death of a parent delays the probate process and adds cost and inconvenience to the

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[92] *Id*.
[93] 439 U.S. 259 (1978).
[94] *Id*. at 268.
[95] *Id*.
[96] *Id*. at 261.
[97] *Id*. at 262.
[98] *Id*. at 275-76.
[99] *Id*. at 271-72.
[100] *Id*. at 268.

court and all of the parties involved. For example, the non-marital child, like all other beneficiaries of an intestate estate, must be given notice of his/her interest in the estate, and served with process.[101] However, it is difficult to locate such a child when the family and personal representative may not even know of the child's existence.[102] To take this one step further, the administration of an estate may never be completed if the possibility of a non-marital child always exists, and the estate must remain open until the child is located.[103]

However, if the estate is still open when the non-marital child makes his/her claim, the Court will reject the orderly and efficient administration justification as sufficient for restricting the inheritance rights of the non-marital child. In *Reed v. Campbell*,[104] the Court overturned as applied a Texas inheritance statute that prohibited a non-marital child from inheriting from his/her father unless the parents had subsequently married after the child's birth.[105] The Court recognized that the state's interest in providing for an orderly and just distribution of the decedent's property was an important state interest when the estate's final distribution had already occurred.[106] However, in this case, because the estate was still open when the child asserted her inheritance rights, this state interest was not implicated, and therefore, orderly and just distribution was not a sufficient justification for distinguishing between marital and non-marital children.[107]

The Court has rejected as unimportant the asserted state interest of promoting legitimate family relations. In *Trimble v. Gordon*[108] the Court dismissed this goal outright. The Court stated, "we 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."[109] Thus, the desire to promote the marital family would not hold up today as a sufficient justification for distinguishing between marital and non-marital children.

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[101] *Id*. at 270.
[102] *Id*.
[103] *Id*.
[104] 476 U.S. 852 (1986).
[105] *Id*. at 853.
[106] *Id*. at 855.
[107] *Id* at 856.
[108] 430 U.S. 762 (1977).
[109] *Id*. at 769.

3. The Substantial Relation Component in Non-Marital Children Cases

In addition to serving an important governmental interest, a classification that distinguishes between marital and non-marital children must be substantially related to that interest. The Supreme Court has upheld some such classifications as substantially related but has overturned others. When a law is over- or under-inclusive, the Court is likely to rule that it is not substantially related to its goal.

The Court tends to overturn a classification as not sufficiently related to its goal when the classification distinguishes between marital children and all non-marital children. For example, in *Trimble*, the Court struck down an Illinois statute that precluded all non-marital children from inheriting from their fathers through intestate succession, while allowing all marital children to do so.[110] The Court accepted the purported state interests of establishing accurate and efficient disposition of property and avoiding problems of proof of paternity. [111] However, it found the distinction between marital and non-marital children was not reasonably related to these state interests.[112] The Court noted in *Trimble* that the exclusion was over-inclusive because "[f]or at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates."[113] In particular, the Court explained that difficulties of proving paternity in some situations do not justify exclusion of all non-marital children from inheritance from fathers who die intestate.[114] Therefore, a classification based on illegitimacy may serve important governmental interests, but if it is over-inclusive, it is not likely to be substantially related to those interests.

By contrast, when a law disadvantages only some groups of non-marital children, it is more likely to be upheld as substantially related to the important state interest. For example, in *Lalli*, the Supreme Court

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[110] *Id*. at 771. The Illinois intestacy statute required that before a non-marital child may inherit from his/her father, the parents must have married prior or subsequent to the birth of that child, and the father must have acknowledged the child as his own. *Id*. at 764-65. However, once the parents subsequently marry, the child would be legitimated and therefore would no longer be a non-marital child. Therefore, the Illinois statute in *Trimble* actually excludes *all* non-marital children.

[111] 430 U.S. at 771.

[112] *Id*. at 772.

[113] *Id*. at 771.

[114] *Id*. at 772.

upheld the statutory scheme that allowed non-marital children to inherit from their fathers if they provided certain proof of paternity.[115] Therefore, the law excluded only some non-marital children: those who had not obtained proof of paternity prior to their fathers' deaths. The Court reasoned that this requirement was substantially related to the important state interests of orderly distribution of estates and prevention of litigation of fraudulent claims. First, the Court found paternity determination is more accurate when paternity disputes are placed in a judicial forum during the lifetime of the father.[116] Second, a man can defend his reputation against "unjust accusations in paternity claims" when the claim is adjudicated during his lifetime.[117] Third, the estate administration is facilitated and there is less possibility of delay and uncertainty when the non-marital child is given the opportunity for notice and participation before the process begins.[118] The Court distinguished *Lalli* from *Trimble* because in *Trimble* there was a "total statutory disinheritance" of non-marital children who were not legitimated by subsequent marriage, but here, non-marital children were barred from inheritance only where there was no proof of paternity.[119] Therefore, the statute in *Lalli*, unlike in *Trimble*, was substantially related to its asserted purposes.

Similarly, the Supreme Court distinguished the statute in *Levy v. Louisiana*,[120] which created a categorical exclusion of all non-marital children, from the law in *Labine v. Vincent*,[121] which did not create a categorical exclusion. *Levy* involved a wrongful death statute.[122] At the time *Levy* was decided, the Louisiana courts had traditionally defined "children" as including only legitimate children, so that a non-marital child could never recover for the wrongful death of either a mother or father.[123] The Court found that construing the term "children" to include only legitimate children violated the Equal Protection Clause, and that the status of illegitimacy bore no relation to the wrong allegedly inflicted on the mother in this case.[124] In particular, the Court noted that no act of

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[115] *See supra* text accompanying notes 94-100.
[116] Lalli v. Lalli, 439 U.S. 259, 271 (1978).
[117] *Id*.
[118] *Id*.
[119] *Id*. at 273.
[120] 391 U.S. 68 (1968).
[121] 401 U.S. 532 (1971).
[122] 391 U.S. at 69.
[123] *Id.* at 70.
[124] *Id*. at 71-72.

the non-marital children in *Levy* was relevant to the harm done to their mother, so the classification between all marital and all non-marital children was unconstitutional.[125]

In *Labine*, by contrast, the Louisiana intestacy law allowed a non-marital child to inherit from the child's father if the child was acknowledged by the father as his natural child, was legitimated by both parents through a marriage subsequent to birth of the child, or was specifically provided for in the father's will.[126] The Court held this law constitutional because, unlike in *Levy*, the legislature did not create an "insurmountable barrier" to inheritance.[127]

The Supreme Court has invalidated statutes of limitations applicable to establishment of paternity as not substantially related to any important state interest.[128] In *Clark v. Jeter*,[129] the Court held that a state law that created a six-year statute of limitations for determining paternity of non-marital children violated the Equal Protection Clause.[130] The Court reasoned that the six-year statute of limitations was not substantially related to Pennsylvania's important interest in avoiding fraudulent paternity claims for several reasons. First, Pennsylvania provided exceptions where paternity can be litigated beyond six years after the child's birth.[131] Second, Pennsylvania did not place limits on

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[125] *Id.* at 72.

[126] *Labine*, 401 U.S. at 537. However, under this law, a parent could not bequeath property under a will to a child born from an incestuous or adulterous relationship except to the extent necessary to support that child. *Id*. at 537 n.13.

[127] *Id*. at 539-40. While the restrictive laws in *Lalli* and *Labine* passed constitutional muster in their day, they would likely not hold up today as constitutional under the Equal Protection Clause. Both cases were decided while the Supreme Court was still purportedly using its rational basis test for classifications based on illegitimacy, which is more deferential to legislation. As stated in *Clark*, the Court now requires intermediate scrutiny. *Clark*, 486 U.S. at 461. Therefore, while *Labine* found Louisiana's restrictions on inheritance by non-marital children were rationally related to legitimate state interests, 401 U.S. at 538, they may not be substantially related to important state interests.

[128] *E.g.*, Pickett v. Brown, 462 U.S. 1, 18 (1983) (holding that a two-year statute of limitations for filing of paternity and child support not substantially related to legitimate state interest); Mills v. Habluetzel, 456 U.S. 91, 101 (1982) (striking down a one-year statute of limitations); *Clark*, 486 U.S. at 464.

[129] 486 U.S. 456 (1988).

[130] *Id*. at 463.

[131] *Id*. at 464. For example, as long as the suit is brought within two years after the father has made a support payment, it may be brought more than six years after the child's birth. *Id*. It is interesting to note that even though this exception results in a non-categorical exclusion in that only some non-marital children must adhere to the six-

other types of suits where paternity may be at issue.[132] Third, no statute of limitations applied to a father's action to establish paternity.[133] Finally, Pennsylvania had recently established an eighteen-year statute of limitations to supersede the old six-year limitation period, which shows that the legislature did not believe a six-year limitation was necessary to prevent problems of proof.[134] Furthermore, the Court also noted that today there are fewer problems of proof with regard to paternity because of scientific advances in DNA testing.[135]

Similarly, in *Pickett v. Brown*,[136] the Court found a two-year statute of limitations for establishing paternity of non-marital children was not substantially related to Tennessee's interest in avoiding litigation of fraudulent claims. The court reached this conclusion in part because there was no reason to believe that the passage of two years would increase the likelihood of fraudulent paternity claims.[137] In addition, the state's assertion that the limitations period was substantially related to the interest in avoiding litigation of fraudulent claims was undermined by the existence of another Tennessee statute that created an exception to the statute of limitations for non-marital children who are, or are likely to become, public charges.[138] Moreover, Tennessee tolled most other actions until a child reached the age of majority, which led to the question of "whether the burden placed on illegitimates [was] designed to advance permissible state interests."[139] Finally, the relationship between having a statute of limitations for paternity suits and the state's interest in preventing litigation of fraudulent claims had become attenuated because of the possibility of proving paternity through DNA tests.[140]

E. Modern State Legislation

In the years since the Supreme Court decided its non-marital children cases, states have amended their intestacy laws to provide for a presumption of paternity under certain circumstances. Currently, many

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year statute of limitations, the Court still struck down this statute as unconstitutional.
[132] *Id*.
[133] *Id*.
[134] *Id*. at 465.
[135] *Id*.
[136] 462 U.S. 1 (1983)
[137] *Id*. at 15.
[138] *Id*. at 14.
[139] *Id*. at 15-16.
[140] *Id*. at 17.

states' intestacy laws allow parents to legitimate their non-marital children for inheritance purposes. For example, in Maryland, a non-marital child may inherit from his/her father if the father: (1) has been judicially determined to be the father in a paternity action; (2) has acknowledged himself, in writing, as the father; (3) has openly and notoriously recognized the child as his child; or (4) has subsequently married the mother and acknowledged himself, either orally or in writing, to be the father.[141] However, under Maryland law, like the laws of other states, a non-marital child may always inherit from his/her mother because there are not the same problems of proof.[142]

IV. LEGAL BACKGROUND—POSTHUMOUSLY CONCEIVED CHILDREN

At common law, heirs had to be ascertained at the time of the decedent's death in order to inherit.[143] However, children who were born subsequent to the decedent's death, but who were in gestation at the time of the decedent's death, were treated as alive and ascertained at the time of death.[144] This presumption applied at common law only if children were born within nine months of a deceased father's death; otherwise, they were considered to be illegitimate and could not inherit from him.[145] Today, the Uniform Parentage Act (UPA) and most modern state statutes have expanded this presumption to ten months or three hundred days within the decedent's death.[146] Therefore, in most states, if a child is born within three hundred days of the father's death, that child can inherit from the father's estate. However, this presumption cannot apply to a posthumously conceived child except under very narrow circumstances.[147]

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[141] MD. CODE ANN., EST. & TRUSTS § 1-208 (2004). Thus, in Maryland, the non-marital child must be legitimated or acknowledged during the father's lifetime in order to inherit from him.

[142] *Id*. *See also* ALA. CODE § 43-8-48(2) (2004); DEL. CODE ANN. tit. 13, § 1303 (2004); FLA. STAT. ch. 732.108(2) (2003); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(1) (2004); VA. CODE ANN. § 64.1-5.1(3) (2004).

[143] Faulkner, *supra* note 1, at 32.

[144] *Id*.

[145] *Id*.

[146] Kerekes, *supra* note 37, at 214. *See* UNIF. PARENTAGE ACT § 204(a)(2) (amended 2001), 9B U.L.A. 14 (Supp. 2003). Instead of specifically providing for a ten-month presumption, some states instead simply provide that if the child is "in being" or is "conceived" before the decedent's death but is born afterwards, the child will be treated as alive at the time of the decedent's death. *E.g.*, ALA. CODE § 43-8-47 (2004).

[147] In order for a posthumously conceived child to be born within the required three

A. Modern Legislation Addressing Inheritance Rights of Posthumously Conceived Children

Several uniform model acts address the subject of inheritance by posthumously conceived children. Only a few states have explicitly addressed this issue through legislation, so courts in the majority of the states must construe those states' general intestacy provisions in deciding whether posthumously conceived children can inherit from predeceased parents.[148]

1. Model Acts Explicitly Addressing Posthumously Conceived Children

Several uniform acts address the inheritance rights of posthumously conceived children. For example, the Uniform Status of Children of Assisted Conception Act (USCACA), adopted in 1988 by the National Conference of Commissioners on Uniform State Laws (NCCUSL), does not allow such a child to inherit from his/her predeceased parent when that parent dies intestate. Section Four states in part, "an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using that individual's egg or sperm, is not a parent of the resulting child."[149] Thus, the USCACA takes an opt-in approach: because a posthumous child is not considered a child of the parent, the parent must specifically provide for the child in a will.

Article Seven of the revised UPA is more favorable towards posthumously conceived children than is the USCACA.[150] Specifically,

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hundred days, that child must be conceived immediately after the father's death. Therefore, the surviving spouse must have already planned on conceiving the child before the deceased spouse's death and even then, the first attempt at reproduction must be successful. It is thus extremely unlikely that a posthumously conceived child would be able to inherit under the three-hundred-day presumption alone.

[148] For example, North Dakota, Florida, Virginia, Texas, and Louisiana have intestacy provisions that expressly address to the inheritance rights of posthumously conceived children. *See infra* notes 166-73 and accompanying text.

[149] UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (hereinafter "USCACA") § 4(b), 9C U.L.A. 371 (2001). The USCACA was adopted by the NCCUSL in 1988. Kerekes, *supra* note 38, at 223-24. The primary purpose of the USCACA is to "provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death." USCACA § 4 cmt., 9C U.L.A. 372.

[150] UNIF. PARENTAGE ACT Art. § 701 cmt., 9B U.L.A. 354.

Section 707 provides that in order to be considered a parent of a posthumously conceived child, the decedent must have "consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."[151] The NCCUSL states this rule was "designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent."[152] The comment in this Section further provides that if the deceased parent wants to include the resulting child in his/her will, the parent may do so.[153] Thus, like the USCACA, the UPA takes an opt-in approach, but one that is more lenient. In the case of a posthumously conceived child, a deceased parent need not necessarily create a will, providing for the child. The child may also inherit intestate if the parent gave consent in a document to be the parent of a posthumously conceived child.

The approach that is most generous towards posthumously conceived children is Ronald Chester's proposal for a revised Section 2-108 of the Uniform Probate Code (UPC).[154] This proposal states first

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[151] *Id.* § 707, 9 B.U.L.A. 354.
[152] USCACA § 4 cmt., 9 C U.L.A. 372.
[153] *Id.* ("[O]f course, a spouse who wants to explicitly provide for such children in his or her will may do so.").
[154] Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727 (2004). Professor Chester's proposal for Section 2-108 states:

§ 2-108 Afterborn Heirs

(a) An individual in gestation at the death of a parent is the child of that parent for the purposes of intestate succession if the individual lives 120 hours or more after the death of that parent.
(b) An individual not in gestation at the death of a putative parent is the child of that parent for purposes of intestate succession if:
  (1) The individual lives 120 hours or more after birth; and
  (2) The putative parent donated the gametic material that resulted in the individual's birth and that parent's rights and/or obligations have not been terminated according to applicable state law; and
  (3) The putative parent gave consent in a record to posthumous conception that would include the individual; and
  (4) A complaint for determination of that individual's status as a posthumously conceived child for intestacy purposes is filed in the appropriate court before final distribution of the putative parent's estate and within three years of the putative parent's death. Such a complaint may be filed even if the individual is only in gestation at the time filed, but final determination by the court of the individual's status as a posthumously conceived child shall, in that case, be subject to later fulfillment of the conditions stated in subsections (b)(1) and (b)(2).

that a person is a child of the deceased parent who may inherit if that

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(5) Determination by the court of an individual's status as a posthumously conceived child shall be made within 30 days after such individual has satisfied all relevant criteria in subsection (b).

(c) In any proceeding to admit the estate of the putative parent to intestate administration, the beneficiary of the preserved gametic material that has resulted or may result in an embryo or pre-embryo shall have standing to intervene either for the purposes described in subsection (b)(4) or to give notice to the court before final distribution of the putative parent's estate of an ongoing attempt to create a posthumously conceived child. Upon determination by the court that there exists either a posthumously conceived child or children as described in subsection (b)(4) or an ongoing attempt to create such a child or children, the court shall enter an order directing the personal representative to set aside for any balance of the three-year period described in subsection (b)(4), or in case such a posthumously conceived child or children is or are in gestation and is the subject of a complaint timely filed under subsection (b)(4), until the court has made its final determination that the individual is a posthumously conceived child within the 30 day period specified in subsection (b)(4), an amount equal to fifty percent of whatever the descendants of the decedent parent would have been entitled to under this statute. If at the conclusion of the said three-year period, no such intervention as described herein shall have occurred, the personal representative shall without further order of the court make such a distribution of the estate as required by the applicable intestacy statute and shall incur no liability for making such distribution.

If such intervention has occurred, but no posthumously conceived child is *in utero* at the end of such three year period, any fifty percent set aside as described herein shall be distributed forthwith to any appropriate non-posthumously conceived descendants at law of the decedent pursuant to the applicable intestacy statute. If such child is *in utero* at the end of such period or has otherwise not been determined by the court to meet the requirements for the status of posthumously conceived child under subsection (b), such distribution shall take place at such time as it has been determined by the court pursuant to subsection (b)(5) that no such status has been achieved.

(d) If the status of posthumously conceived child has been accorded to one or more individuals pursuant to subsections (b)(1)-(4), said child or children shall share in the estate of the individual thereby determined to be the parent for purposes of intestate succession, in accord with the applicable intestacy statute. If the claim of such child, or claims of such children shall exceed fifty percent of the estate, that child or those children, through an appropriate legal representative or representatives, shall be entitled to such additional assets and traceable proceeds in proportion to the percentage of such assets or proceeds to which each child is entitled under the applicable intestacy statute.

Id. at 743-44 (italics in original). By contrast, the current version of this Section states only, "An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." UNIF. PROBATE CODE § 2-108, 9B U.L.A. 87 (1998). The current Section 2-108 thus does not specifically provide for the outcome of posthumous conception.

person is in gestation at the time of, and lives 120 hours or more after, the death of the parent.[155] Second, a person not in gestation is still considered to be a child of that parent for inheritance purposes if (1) the person lives 120 hours or more after birth; (2) the putative parent donated the gametic material[156] that resulted in the birth of the individual and the putative parent's rights have not been terminated; (3) the putative parent gave consent in a record[157] to posthumous conception;[158] (4) a claim for inheritance was filed in the appropriate court before final distribution of the putative parent's estate and within three years[159] of the putative parent's death; and (5) the court determines the person is a posthumously conceived child within thirty days[160] of the other criteria being met.[161] Moreover, the beneficiary of the preserved gametic material may petition[162] the court for an inheritance claim on behalf of

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[155] Chester, *supra* note 154, at 743.

[156] "Gametic material" as used in the proposal refers to preserved sperm or eggs that will later be used to conceive a child, and may also include pre-embryos. *Id.* at 732.

[157] According to Professor Chester, consent in a record is necessary because this provides clear evidence of the intent of the putative parent to posthumously conceive a child. *Id.* at 734. On the other hand, mere evidence of consent through testimony of the surviving spouse and statements made by the decedent are not sufficiently clear and will lead to confusion and litigation, and may even be fraudulent. *Id.* at 734. Unlike the *Woodward* decision, this rule does not require consent also to support the child, only consent to have the child. *Id.* at 735. Furthermore, "record" means "information 'inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.'" *Id.* at 733 (quoting UNIF. PARENTAGE ACT § 102(18) (amended 2002), 9B U.L.A. 304-05 (Supp. 2004)).

[158] Under the proposed rule, "conception" is defined as the moment a zygote or pre-embryo is implanted in the uterus of the mother, and not at the point in which the zygote or pre-embryo is created in the lab. *Id.* at 729.

[159] The author chose three years as the appropriate limitation period because the *Woodward* court had suggested one year may be too short of a time in which to allow the posthumously conceived child to bring a claim, but, on the other hand, the interest of the state and family in efficient and timely estate distribution requires something shorter than ten years. *Id.* at 736. Moreover, three years is appropriate because, according to the author, that allows for a one-year grieving period plus an additional two years, which is the average amount of time necessary for a successful insemination. *Id.* at 737-38.

[160] The reasoning behind the thirty-day requirement is to prevent delay in estate distribution. *Id.* at 736.

[161] *Id.* at 743.

[162] The beneficiary of the gametes may petition the court whether the use of gametic material has resulted in or "may" result in the creation of an embryo or pre-embryo. *Id.* at 743. In asserting that one "may" use the gametic material to produce a posthumously conceived child, the beneficiary of the material must provide more than a statement of intention; there must also be "an ongoing attempt." *Id.* at 739. For example, there is an

the resulting child prior to conception as long as the beneficiary gives notice to the court before final distribution of the putative parent's estate within three years of the putative parent's death.[163]

A posthumously conceived child has a stronger likelihood of inheriting from a parent under this proposal than under the other model acts. Unlike the USCACA, a posthumous child may inherit intestate from a parent even if the parent has not written a will. Furthermore, although the Chester proposal contains more requirements than the revised UPA, such as the requirement that the child live 120 hours or more after the parent's death and after child's birth, and that a claim must be filed within three years of the parent's death and before final distribution of the estate,[164] this proposal actually provides for additional circumstances under which a posthumously conceived child may inherit. For example, the decedent need not give consent to be a parent of the particular posthumously conceived child; he only needs to provide consent to posthumous conception. There are, however, still many restrictions that will bar inheritance. This proposal takes an opt-in approach to the extent that a parent must specifically give consent in a record for posthumous conception. Thus, unless the parent has taken the time to think about the possibility for post-death use of his/her gametic material *and* to provide written consent in a record, the child may not inherit. Moreover, the complaint to determine the status of the child as a "posthumously conceived child" must be filed prior to final distribution of the estate.

2. State Legislation Providing Specifically for Posthumous Conception

North Dakota, Florida, Virginia, Texas, and Louisiana have legislation that specifically addresses inheritance by posthumously conceived children. North Dakota has adopted the USCACA.[165] That state's law provides, "[a] person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the

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ongoing attempt if the beneficiary signs a contract with the fertility clinic to attempt insemination and the procedure is performed within a "reasonable period." *Id.* This requirement is necessary in order to justify the interference with efficient estate administration that occurs in setting aside fifty percent of the assets that go to the decedent's issue. *Id.*

[163] *Id.* at 743-44.

[164] *Id.* at 743.

[165] Scharman, *supra* note 20, at 1011.

conception."[166] Thus, in North Dakota, a posthumously conceived child cannot inherit from his/her biological father, whether intestate or through a class gift. This statute, however, does not prevent the child from inheriting from the deceased father if specifically provided for under a will.

Florida's law is stricter than that of the UPA and, like North Dakota's statute, is closer to the USCACA. The relevant statute provides:

> 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.[167]

Therefore, Florida law allows for a child conceived posthumously through reproductive technology to inherit from the deceased parent, but only if the child is provided for in the will. This means the child may not inherit intestate. Nevertheless, the statute leaves open the question of whether the posthumously conceived child can inherit under a class gift without being named specifically in the will.[168]

The remaining three states allow for the possibility of intestate inheritance by posthumously conceived children to varying degrees of leniency. Virginia's law states with respect to posthumous conception:

> [A]ny 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 that the other gamete is that of the person's spouse, is not the parent of any resulting child unless (i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person

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[166] N.D. CENT. CODE § 14-18-04(2) (2003). This rule controls for purposes of intestate succession. *See id*. § 14-18-07.

[167] FLA. STAT. ANN. § 742.17(4) (West 2004).

[168] For example, under the Florida statute, what exactly does it mean for a child to be "provided for"? Must the child be specifically named in the will, or is a class gift sufficient?

> consents to be a parent in writing executed before the implantation.[169]

Thus, under Virginia law, it is possible for a posthumously conceived child to inherit from his/her deceased father, but only if the father was aware of the possibility of posthumous conception and clearly consented in writing to become a parent after his death of any child conceived of his gametic material and born to his wife, or if the doctor performing the implantation procedure mistakenly believed the father was still alive at the time the procedure was performed. This rule applies to the inheritance rights of the posthumously conceived child whether the decedent leaves a class gift in a will or dies intestate.

Texas is very similar to Virginia, and to the UPA. The Texas law states:

> If a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child.[170]

Thus, as long as there is documented proof that a deceased man consented to become a parent of a child conceived after his death from his sperm and his surviving wife, the resulting child may inherit from him intestate or through a will, and will be recognized as his child.[171]

Louisiana is more favorable toward posthumously conceived children than Texas, Virginia, and the UPA. Under Louisiana law, the decedent need not provide written consent to be a parent. Rather, the decedent need only give written consent for the surviving spouse to use his gametes, and the child must be born to both parents within three years of the deceased parent's death. The law states:

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[169] VA. CODE ANN. § 20-158(B) (West 2004). The second option under this rule is very similar to the UPA rule that the posthumously conceived child may only inherit if the decedent consented in writing to be a parent of such a child. *See supra* note 152.

[170] TEX. FAM. CODE ANN. § 160.707 (Vernon 2001).

[171] Unlike Virginia, though, Texas does not allow the child to inherit on the sole basis that the doctor performing the assisted reproduction procedure mistakenly believed the decedent was still alive at the time.

> [A]ny child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of the death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent.[172]

B. State Cases Determining Inheritance Rights of Posthumously Conceived Children

In the absence of legislation, courts in most states must rely on the general intestacy provisions of each state to assess the ability of posthumously conceived children to inherit from the deceased parent. Four cases on this subject demonstrate the difficulty of applying a state's general inheritance law.

In *Hart v. Shalala*,[173] the posthumously conceived child was eventually granted social security survivor's benefits for the death of her predeceased father, but was not considered to be his "child" under the Louisiana law that existed at the time. Judith Hart was conceived of the gametes of Nancy Hart and her husband Edward Hart, Jr. through GIFT three months after Edward's death.[174] Approximately one year after Judith's birth, Nancy applied for social security survivor's benefits on behalf of Judith based on Edward's earnings.[175] However, the Social Security Administration denied Judith's request because Judith was not considered to be a "child" of Edward's.[176] At the time, in order to be considered a "child" under Louisiana law, one had to born during the decedent's lifetime or within three hundred days of the decedent's

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[172] LA. REV. STAT. ANN. § 9:391.1(A) (West 2004). This statute was amended in 2003; it previously required the child to be born within two years of the decedent's death.
[173] No. 94-3944 (E.D. La. 1994). *See* Banks, *supra* note 38, at 251, and Scharman, *supra* note 20, at 1016 for more discussion on this case.
[174] Banks, *supra* note 38, at 251.
[175] *Id*. at 251-52.
[176] *Id.* at 252. Note that this case occurred before Louisiana adopted its current rule regarding posthumous conception, which was adopted in 2001. *See* LA. REV. STAT. ANN. § 9:391.1 (2004).

death.[177] Furthermore, the Social Security Act provided that in determining whether an applicant is a child of the insured, the law of the applicant's state will be applied.[178] Because Judith was born thirteen months after Edward's death, she could not qualify. In addition, as a non-marital child, Judith could neither inherit under Louisiana law nor receive benefits under the relevant provisions of the Social Security Act because both required proof of paternity. Under both laws, she could prove paternity only if she had obtained an order of paternity within one year of her father's death or was acknowledged by her father during his lifetime, both of which were impossible.[179]

In a hearing before the Social Security Administration, the hearing officer awarded Judith survivor's benefits, using evidence that Edward was aware of the possibility of Nancy using his sperm to create a child as proof of his intent to acknowledge paternity.[180] However, the Appeals Council of the Social Security Administration overturned this award, finding that the fact that Judith's father had donated his sperm to his wife for her own use did not conclusively prove Edward intended to become a father or that he acknowledged any resulting posthumously conceived children as his own. While the case was before the United States District Court for the Eastern District of Louisiana on appeal, the Social Security Commissioner decided to pay survivor's benefits to Judith because the Commissioner found that the public policy issues in this case "should involve the executive and legislative branches, rather than the courts" in light of "[r]ecent advances in modern medical practice, particularly in the field of reproductive medicine."[181] However, as precedent, this case indicates that another child in Judith's situation would not be able to receive survivor's benefits under the same Louisiana statute.

In *Estate of Kolacy*,[182] the New Jersey Superior Court held the posthumously conceived children should be considered children of the decedent, but stated that, in light of the state's interest of efficient estate administration, the legislature or a court could impose a time limit within which such children must assert their claims. William Kolacy, married to Mariantonia Kolacy, was diagnosed with leukemia and told he would

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[177] Banks, *supra* note 38, at 252.
[178] *Id.*
[179] *Id.* at 252-53.
[180] *Id.* at 254.
[181] *Id.* at 254-56.
[182] 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

have to begin chemotherapy.[183] Fearing that he would become infertile, he deposited some of his sperm in a sperm bank on two separate occasions so that he and Mariantonia could have a child in the future.[184] William died a little over one year after beginning chemotherapy treatment.[185] One year after his death, Mariantonia began efforts to conceive a child from his sperm and her eggs through IVF.[186] The procedure was successful, and eighteen months after William's death, twins Amanda and Elyse were born.[187] Mariantonia then filed for survivor's benefits under the Social Security Act for her daughters, but the Social Security Administration denied this request because the girls were not considered William's "children" under New Jersey's intestacy laws.[188]

On appeal, the New Jersey Superior Court held the children should be considered to be William's heirs under New Jersey intestacy law because this outcome would support the fundamental policy of the law, which is 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."[189] However, the court also considered the interests against allowing posthumously conceived children to inherit, such as the rights of ascertained heirs to receive their shares of the decedent's property relatively quickly and the interests of the state in an efficient administration of the decedent's estate.[190] The court suggested that the legislature could constitutionally impose a time limit under which a posthumously conceived child must establish his/her claim, and in the absence of legislation, it would be appropriate for courts to impose such time limits.[191]

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[183] *Id*. at 1258.
[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *Id*. at 1259. New Jersey's intestacy statute provided with respect to after-born heirs, "[r]elatives 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.; N.J. STAT. ANN. § 3B:5-8 (West 2005).
[189] Estate of Kolacy, 753 A.2d 1257, 1263 (N.J. Super. Ct. Ch. Div. 2000). Furthermore, the court found legislative intent to allow children to take property from and through their parents. *Id*. at 1262.
[190] *Id*. at 1262. For example, the court stated, "Estates cannot be held open for years simply to allow for the possibility that after born children may come into existence." *Id*.
[191] *Id*.

In *Woodward v. Commissioner of Social Security*,[192] the Massachusetts Supreme Judicial Court held that posthumously conceived children qualified as "children" of the deceased for purposes of receiving social security survivor's benefits only under limited circumstances. Three-and-one-half years after Warren and Lauren Woodward married, they were informed that Warren had leukemia and would have to begin treatment that might leave him sterile.[193] Warren decided to preserve some of his sperm so that he and Lauren might still have children in the future.[194] Warren died less than one year later, and exactly two years after his death, Lauren gave birth to twin girls, who were conceived through artificial insemination, using Warren's sperm.[195] Lauren applied for social security survivor's benefits for her children, but the Social Security Administration rejected her application on the grounds that her children were not considered Warren's "children" within the meaning of the Social Security Act in part because they could not inherit intestate from Warren under Massachusetts law.[196]

When the case came before the Supreme Judicial Court, the issue of whether a posthumously conceived child in Massachusetts could inherit from a deceased father hinged on the definition of "posthumous children."[197] Under Massachusetts law, a "posthumous child" is considered to be living at the time of the parent's death.[198] However, it was not clear whether the twins could be considered "posthumous children" because that phrase was not expressly defined in the statute, and the Massachusetts intestacy statute did not include a provision applying specifically to posthumously conceived children.[199]

The Massachusetts Supreme Judicial Court found posthumously conceived children may be considered "posthumous children" under this statute only where a genetic relationship is established between the child and decedent, it is shown that the decedent affirmatively consented to posthumous conception and to the support of the resulting child, and

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[192] 760 N.E.2d 257 (Mass. 2002).
[193] *Id*. at 260.
[194] *Id*.
[195] *Id*.
[196] *Id*. at 261 n.4; *see* 42 U.S.C. § 416(e) (2004).
[197] MASS. GEN. LAW ANN. ch. 190, § 8 (West 2003).
[198] *Id.* Therefore, this is unlike a state statute that specifically states a person must be "in gestation" or "conceived" before a parent's death, in which case a posthumously conceived child would be precluded from inheriting under all circumstances.
[199] *Id.; see also Woodward*, 760 N.E.2d at 264.

notice is given to all interested parties.[200] In addition, time limitations may be imposed that may foreclose the opportunity to assert a claim against the decedent's estate.[201]

In reaching this conclusion, the *Woodward* court considered and balanced the interests of the state, the genetic parent, and the posthumously conceived children. The court stated:

> The question whether posthumously conceived genetic children may enjoy inheritance rights under the intestacy statute 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.[202]

In looking to the best interests of the children, the court noted that major policy concerns of the legislature have been the protection of non-marital children from stigmatized illegitimate status, the desire to treat marital and non-marital children equally under the law, and the rights of children to receive support and resources from their parents.[203] The court also noted that in the decades since posthumous conception has become possible through assisted reproductive technologies, the legislature has not taken any action to restrict the rights of posthumously conceived children to inherit through intestacy.[204] Furthermore, the court acknowledged that the legislature has supported the assisted reproductive technologies.[205] This shows that construing the statute to

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[200] *Woodward*, 760 N.E.2d at 272.

[201] *Id*. The court declined to discuss whether the one-year statute of limitations for bringing a paternity claim was too short in this case because the court found this issue was not relevant to the question of whether the twins were considered "natural children" under the statute. *Id*. at 268. Nevertheless, the court noted that a one-year time limit "may pose significant burdens on the surviving parent, and consequently on the child" because it requires that the surviving parent decide right after the decedent's death whether to have children and also requires that the first attempts at conception be successful. *Id*.

[202] *Id*. at 264-65.

[203] *Id*. at 265. In looking at this last right, the court referred to various provisions of the Massachusetts intestacy statute that support and establish inheritance rights of children generally. *See id*.

[204] *Id*.

[205] *Id*.

allow for such children to inherit from predeceased parents would not be counter to legislative intent.

The *Woodward* court then balanced the interests of posthumously conceived children against the protection of children who are already ascertained at the time of the intestate parent's death, and against the need to provide certainty to other heirs and creditors through orderly and prompt estate administration.[206] Increasing inheritance rights of posthumously conceived children would decrease the intestate shares available to children already alive at the time of the decedent's death in families that have both kinds of children.[207] The court noted the Massachusetts intestacy statute furthers such administrative goals by requiring proof of genetic relationship between the decedent and his issue and by establishing a limitations period under which claims must be filed against the estate.[208]

With regard to the reproductive rights of the parent, the court noted that Lauren's rights were not infringed upon because she was free to conceive after her husband's death, but the court stated that in all cases the claimant must prove that the deceased parent provided consent both to reproduce after death and to support any resulting child.[209]

The court in *Woodward* reasoned that these requirements support the three powerful state interests. The requirements of an established genetic relationship between the child and the decedent, and consent of the decedent to father and support the child maintain the interests in fraud prevention and reproductive rights of parents.[210] Furthermore, the notice requirement supports the state's interest in efficient estate administration and in providing certainty to all heirs and creditors.[211]

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[206] *Id*. at 266.
[207] *Id*.
[208] *Id*. The Massachusetts intestacy law requires that in order for a non-marital child to inherit from the father's intestate estate, the father must acknowledge paternity, the father must marry the mother of the child, or the child must obtain a judicial determination of paternity. *Id*.
[209] *Id*. at 269. This requirement also supports the state's interest in avoidance of fraud. *Id*. at 270. The court cited to an earlier Massachusetts case in which it refused to enforce a written agreement between a woman and her ex-husband that permitted her to implant pre-embryos created during the marriage from the couple's gametes in the event of a divorce. *Id*. at 269. There, the court had held, "forced procreation is not an area amenable to judicial enforcement." *Id*. (quoting A.Z. v. B.Z., 725 N.E.2d 1051, 1058 (Mass. 2000)). Therefore, in order to protect the reproductive rights of the parent, the court requires consent of the parent to conceive posthumously.
[210] *Id*. at 271.
[211] *Id*. at 271-72.

The court declined to require acknowledgment of paternity or judicial determination of paternity even though a posthumously conceived child is a non-marital child[212] because it is not possible for parentage of a posthumously conceived child to be acknowledged or adjudicated prior to the decedent's death and because modern testing techniques allow for accurate determination of genetic paternity.[213]

In *Gillett-Netting v. Barnhart*,[214] the United States Court of Appeals for the Ninth Circuit reached a broad holding, finding that posthumously conceived children generally qualify as "children" under the Social Security Act and do not have to show actual dependence in order to receive social security survivor's benefits.[215] In 1994, Robert Netting was diagnosed with cancer and was told he would have to begin chemotherapy.[216] However, his wife, Rhonda Gillett, had been having trouble getting pregnant or carrying a child to term, and even prior to Robert's diagnosis she had begun fertility treatments using her husband's sperm.[217] Robert put off treatment for his cancer until after he had a chance to bank his sperm for use in her fertility treatments.[218] He died less than two months after his diagnosis.[219] After his death, Rhonda was finally able to conceive using IVF; she gave birth to twins Juliet and Piers eighteen months after his death, in August 1996.[220] Robert's estate was distributed in March 1997, with each of the three children from his previous marriage receiving one-sixth of his retirement account and Rhonda receiving the rest of the account and the remainder of his estate.[221] Shortly afterwards, Rhonda filed a claim for child's survivor benefits under the Social Security Act.[222]

The administrative law judge assigned to the case denied her children benefits, finding they were not dependent on Robert at the time

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[212] *Id*. at 266-67.
[213] *Id*. at 267.
[214] Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).
[215] *Id*. at 596-97.
[216] Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002), *rev'd*, 371 F.3d 593 (9th Cir. 2004).
[217] *Id*.
[218] *Id*. at 963. A doctor testified during trial that Robert was aware his sperm could be used by his wife to conceive a child after his death and that he agreed to this. *Id*. Furthermore, Rhonda asserted that Robert wanted her to continue trying to conceive a child even after he died. *Id*.
[219] *Id*.
[220] *Id*.
[221] *Id*. at 963, 964.
[222] *Id*. at 964.

of his death because they were not then in existence.[223] Rhonda then appealed to the United States District Court for the District of Arizona, claiming the twins should be considered "children" and "dependents" of Robert under the Social Security Act, and that the twins' Equal Protection rights were violated when they were denied the benefits.[224] The court held that the twins were not "children" under the Act because under Arizona intestacy law they must be in existence at the time of the decedent's death,[225] and the court held that the twins' Equal Protection rights were not violated because the rational basis test applies,[226] and under this test it was rational for the Administration to condition dependency on the intestacy laws of the applicable state.[227] The district court then found that the children could not show dependency because they were not in existence at the time of Robert's death.[228] The Ninth Circuit then reversed the district court, holding the twins were Robert's legitimate "children" within the meaning of the Social Security Act, and the twins were dependent upon Robert at the time of his death, and thus, they were entitled to receive benefits under the Act.[229]

The Ninth Circuit first noted that neither the Social Security Act nor Arizona family law directly addressed the issue of whether posthumously conceived children could receive survivor's benefits from a predeceased parent.[230] However, the relevant section of the Social Security Act[231] did state that unmarried minor children who are dependent upon an insured parent at the time of the parent's death might receive benefits.[232]

In addressing the first major issue, the Ninth Circuit determined that the children met the Act's definition of "children" for the purposes of receiving benefits because the fact that they were Robert's biological

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[223] 371 F.3d at 595.
[224] 231 F. Supp. 2d at 964. On the Equal Protection claim, Rhonda did not argue that Arizona's intestacy laws were unconstitutional, but instead asserted that the Commissioner's incorporation of the laws into the requirements for survivor's benefits under the Social Security Act was unconstitutional. *Id*. at 969 n.8.
[225] *Id*. at 966.
[226] *Id*. at 970.
[227] *Id*.
[228] *Id*. at 967.
[229] Gillett-Netting v. Barnhart, 371 F.3d 593, 596 (2004). Because the Ninth Circuit found that the children could receive benefits, it did not address the Equal Protection issue that the court below had addressed.
[230] *Id*. at 595-96.
[231] 42 U.S.C. § 416(e) (2004).
[232] 371 F.3d at 596.

children was not in dispute, and all biological children of the decedent, including posthumously conceived children, are considered to be "children" under the Act.[233]

Second, the Ninth Circuit found that Juliet and Piers were dependent upon Robert's earnings at the time of his death because they were his legitimate children, and the Act automatically deems all legitimate children to be dependent on the insured parent, absent narrow circumstances.[234] The children were technically born out of wedlock, and thus would be considered by some courts as illegitimate;[235] however, the Ninth Circuit stated that the law of the state in which they reside governs, and Arizona law treats all natural children as legitimate children.[236] Next, the court noted that the Act statutorily deems all legitimate children to be dependent on the insured parent, and therefore, it did not matter that the children could not show actual dependence.[237] Thus, they were allowed to receive benefits under the Act.[238]

The Ninth Circuit did limit its holding with respect to posthumously conceived children, stating that where the insured parent is a sperm donor, the children would be considered legitimate, and thus automatically assumed to be dependent upon the parent, only if the sperm donor had been married to the children's mother.[239]

V. ANALYSIS

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[233] *Id*. at 596-97 ("[C]ourts and the [Social Security Administration] have interpreted the word 'child' . . . to mean the natural, or biological, child of the insured.").

[234] *Id*. at 598. Without elaborating, the court stated that such "narrow circumstances" did not exist in this case. *Id*.

[235] *See, e.g.*, Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 266-67 (Mass. 2002).

[236] 371 F.3d at 598-99; *see also* ARIZ. REV. STAT. § 8-601 (2004) (providing that "[e]very child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock"); Hurt v. Superior Court, 601 P.2d 1329, 1331 (Ariz. 1979) (noting Arizona's policy to "protect innocent children from the omissions of their parents"); State v. Mejia, 399 P.2d 116, 117 (Ariz. 1965) (stating that Arizona "has eliminated the status of illegitimacy").

[237] 371 F.3d at 598.

[238] The opinion in this case differed from the other three cases because the Court of Appeals did not look at whether the children would have been able to inherit intestate from Robert under Arizona law in deciding whether they could receive Social Security benefits. Instead, the court stated that the issue of inheritance by posthumously conceived children is different than the issue of receiving social security benefits. Therefore, contrary to the Commissioner's argument, the children did not need to show they would be able to inherit from their father in order to illustrate legitimacy and dependence for purposes of receiving benefits under the Social Security Act. *Id*. at 599.

[239] *Id*. at 599 n.7.

Courts should apply intermediate scrutiny in addressing whether a state law treats inheritance rights of posthumously conceived children constitutionally. First, posthumously conceived children are non-marital children. Second, the same reasons underlying the use of intermediate scrutiny in non-marital children cases exist in the context of posthumously conceived children. In addition, state laws that categorically deny all posthumously conceived children the right to inherit from predeceased parents, without first considering the individual facts of each case, violate the Equal Protection Clause under this heightened level of scrutiny. Professor Chester's proposal for the UPC Section 2-108 largely satisfies intermediate scrutiny, but would be stronger with some changes, such as not requiring consent in a record in all cases.

A. The Courts Should Apply Intermediate Scrutiny to Issues Involving Posthumously Conceived Children

To determine whether posthumously conceived children must be treated similarly to other children for purposes of inheritance, courts should apply the same level of scrutiny that is applied to non-marital children because the same reasons for applying intermediate scrutiny there exist in the context of posthumously conceived children.

First, posthumously conceived children are a class of non-marital children, and thus, statutes that deny benefits to them should receive the same level of scrutiny under Equal Protection analysis. *Woodward* recognized that death of a spouse ends the marriage, and thus children born subsequent to a spouse's death are born outside of the marriage.[240] Admittedly, the exclusion of posthumously conceived children from equal inheritance rights is not a categorical exclusion of *all* non-marital children. However, the Supreme Court has recognized that even when a statute excludes only some, but not all, non-marital children, intermediate scrutiny applies. For example, in *Mathews*, where the statutory scheme disadvantaged only some non-marital children, the Court acknowledged "[t]hat the statutory classifications challenged here discriminate among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children."[241] Thus, although the differential treatment of

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[240] *Woodward*, 760 N.E.2d at 266-67.
[241] *Mathews,* 427 U.S. at 504 n.11.

posthumously conceived children does not distinguish between all marital and all non-marital children, intermediate scrutiny will still apply because the statute still disadvantages a class of non-marital children.

Moreover, the three main reasons the Supreme Court advanced for applying intermediate scrutiny to distinctions between marital and non-marital children also apply to posthumously conceived children. First, posthumously conceived children, like non-marital children, have no control over the circumstances of their birth, and thus, posthumous conception is an immutable characteristic. As the Court recognized in *Mathews*, when a classification is based on an immutable characteristic that "bears no relation" to one's ability to contribute to society, the Court will apply a heightened level of scrutiny above rational basis.[242] Posthumously conceived children have no control over the circumstances of their births, and they will always be posthumously conceived children because they cannot change the fact that they were conceived after the death of a parent. In fact, the trait of posthumous conception is even more immutable than illegitimacy in general because the parents of other non-marital children can still change the children's status by legitimating their birth, but the surviving parent of a posthumously conceived child has no such opportunity to change the child's status. Therefore, because posthumous conception is an immutable characteristic, a statute that treats a posthumously conceived child differently based on that characteristic is subject to intermediate scrutiny.

Second, and related to the issue of immutable characteristics, intermediate scrutiny should apply when a person is disadvantaged based on the actions of another person. As the Court in *Weber* recognized, legal burdens should be placed on the responsible party.[243] Posthumously conceived children, like other non-marital children, cannot control the circumstances of their birth.

Third, like all non-marital children, posthumously conceived children have some history of discrimination. Posthumously conceived children are non-marital children and thus share the same history of discrimination.[244] Furthermore, posthumously conceived children share the same familial circumstances as other non-marital children, by growing up outside the confines of a "traditional" marital family. Therefore, posthumously conceived children may experience the same social stigma as other non-marital children, especially if raised by single

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[242] *See supra* notes 75-79.
[243] *See supra* note 90.
[244] *Woodward*, 760 N.E.2d at 266-67.

parents who do not remarry. Even if they are not socially stigmatized by others, posthumously conceived children may experience negative emotional consequences from the knowledge that they and their families are different than the traditional family. Additionally, in the short time that posthumous conception has been possible due to new assisted reproductive technologies, such resulting children have been treated differently by agencies, courts, and state legislatures, with respect to inheritance rights. The few states that have enacted legislation dealing specifically with posthumous conception have placed limitations on the ability of such children to inherit.[245] Similarly, the four cases that have addressed the question of inheritance by posthumously conceived children have upheld restrictions on the ability of such children to inherit from predeceased parents.[246] Therefore, like non-marital children in general, posthumously conceived children have a history of being treated differently, and thus, the same standard of intermediate scrutiny should apply.

B. Analysis Under the Equal Protection Clause

Under intermediate scrutiny, differential treatment of posthumously conceived children is not permissible unless the exclusion from inheritance is substantially related to important governmental interests. In analyzing whether a specific exclusion violates the posthumously conceived child's right to inherit from the deceased father, a court must first consider whether the alleged governmental interests are important. If so, the court must decide whether the statutory classification is substantially related to any of those interests such that they justify an exclusion or limitation of inheritance rights. Furthermore, in determining whether the exclusion is substantially related to the state's goal, the court must consider the interests of the children in question. This analysis indicates that categorical exclusion of all posthumously conceived children from inheritance without looking to the specific

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[245] For a discussion of the legislation in these states regarding inheritance rights of posthumously conceived children, s*ee supra* notes 165-72.

[246] As noted above, the Social Security Administration attempted to prevent posthumously conceived children from receiving social security survivor's benefits from a deceased parent in *Hart*, *Kolacy*, *Woodward*, and *Gillett-Netting*. Furthermore, the *Kolacy* and *Woodward* courts placed restrictions on the circumstances in which posthumously conceived children could receive such benefits. *See supra* notes 173-239.

circumstances of a particular case will likely be over-inclusive, and thus, not substantially related to any important state interest.

1. Possible State Interests

Four possible state interests may support the exclusion of posthumously conceived children from inheritance as "children" of the deceased under states' intestacy laws: (1) the interest in orderly and efficient administration of estates; (2) the interest against litigating fraudulent paternity claims; (3) a policy against double-dipping; and (4) protection of the children of the decedent who were already conceived at the time of the decedent's death. However, statutes that categorically exclude all posthumously conceived children from inheritance are not substantially related to any of these interests. In order to satisfy intermediate scrutiny, inheritance statutes must consider the particular facts of each case, and in particular, the intent of the parties and the timing of the claims.

The state interest in orderly and efficient administration of estates emphasizes the importance of finality.[247] As the *Kolacy* court asserted, heirs who are already ascertained at the time of death are entitled to receive their shares of the decedent's property reasonably quickly.[248] If a child born to a decedent after final distribution of the decedent's estate is entitled to share in the assets, the estate will have to be reopened, the decedent's property retrieved from the other beneficiaries, and the property redistributed, taking into account the interests of the later-born child. Because preserved semen can remain viable for at least ten years, and maybe even longer, allowing all posthumously conceived children to inherit from the deceased parent without a time limitation will cause an estate to remain open for at least that many years while waiting for potential beneficiaries to be born of the decedent's sperm. Leaving an estate open this long will prove inefficient and costly for the probate court and the family, delay other beneficiaries' abilities to take from the decedent's estate, and also cause confusion if the property has to be retrieved from previously-identified beneficiaries.

However, a categorical rule that excludes all posthumously conceived children from inheriting from deceased parents is not substantially related to this interest. For example, the facts of a particular case may reveal that the estate has not yet been distributed,

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[247] *See* Reed v. Campbell, 476 U.S. 852, 855-56 (1986).
[248] *Kolacy*, 753 A.2d at 1262.

and thus, including the posthumously conceived child in the intestacy scheme will not delay administration of the estate. Furthermore, in the context of gender discrimination, the Court has stated that "the Constitution recognizes higher values than speed and efficiency."[249] These "higher values" include protection of "the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy."[250] Therefore, while efficient estate administration is an important interest, it should not be held so paramount to other concerns that it infringes too heavily on the rights of citizens.

Second, the state interest in preventing fraudulent claims may justify limitations on inheritance by posthumously conceived children. This is an important state interest because litigation of fraudulent claims will tie up the court system and such litigation will further delay estate administration and cause uncertainty to other beneficiaries with regard to distribution of the decedent's assets.

However, total exclusion of inheritance rights of posthumously conceived children is not substantially related to this interest. It is true that, like other non-marital children, posthumously conceived children could assert paternity fraudulently in order to inherit from people they are not genetically related to. However, today, there are not the same "peculiar problems of proof"[251] with establishing paternity that existed at the time the Supreme Court non-marital children cases were decided. Paternity can be proven through DNA tests with substantial certainty.[252] Furthermore, a biological relationship between the parent and child can be proven by a comparison between the DNA of any additional sperm or egg samples that remain at the clinic and the DNA of the child, or through records in the clinic. In addition, other ways to show such a relationship may include testimony from a surviving spouse who is also the child's biological other parent or writings left behind by the decedent. Only in the absence of any of these possibilities would the exclusion of the child's right to inherit be substantially related to this important interest. Therefore, because modern testing genetic testing techniques can now clearly and accurately establish paternity[253] the important interest in avoiding litigation of fraudulent paternity claims

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[249] Stanley v. Illinois, 405 U.S. 645, 656 (1972).
[250] *Id*.
[251] Lalli v. Lalli, 439 U.S. 259, 268 (1978).
[252] *Woodward,* 760 N.E.2d at 267.
[253] *Id*.

does not warrant a categorical exclusion of all posthumously conceived children.

Third, many states intestacy laws are designed to discourage double-dipping, for example, by allowing a child to inherit from more than two parents.[254] Such double-dipping could result if the mother of the posthumously conceived child remarries and the child is able to inherit from both the deceased father and the step-father.[255] States have long supported the idea of limiting the number of parents to two. Therefore, if the child is able to inherit from his/her deceased father, new father, and mother, the child will have three parents from whom to inherit. However, this case is no different than if the father died during an ante-mortem child's lifetime, that child inherited from him, then that child's mother remarried, and the child was able to inherit from the mother's new husband as well.[256] Therefore, even if the interest against double-dipping were deemed an important state interest, exclusion of posthumously conceived children is not substantially related to this interest because a categorical exclusion would be under-inclusive.

Fourth, the state has an interest in protecting the inheritance rights of other children who are already born to the decedent.[257] However, as long as the decedent intended his sperm to be used to create another child after his death, this situation is the same as if he had had another child while he was still living; under both circumstances, all of the other children's expected shares would be similarly reduced in

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[254] *See* Brashier, *supra* note 21, at 145 (suggesting that if our goal is to treat all children equally and a child of a "traditional" family may only inherit from two parents, then the posthumously conceived child should likewise only be able to inherit from two parents).

[255] A stepparent has the opportunity to adopt the child of his/her spouse, and this is even easier where the child's previous parent of the same sex as the stepparent has died, since adoption requires cutting off parental rights of one parent. *See* Bailey, *supra* note 10, at 785-86 (noting that if a posthumously conceived child's mother has remarried, that child will be presumed to be the child of the second marriage and can thus inherit from the stepfather. However, if the paternity of the deceased father is proven, then the posthumously conceived child will not be considered to be the child of the mother's new husband).

[256] The child would be able to inherit from the stepfather if either the stepfather adopted the child, or the stepfather named the stepchild as a beneficiary in his will without actually adopting the child.

[257] *See Woodward*, 760 N.E.2d at 266 (stating that the best interests of the child includes protection of children born prior to the deceased parent's death). Any inheritance rights reserved for the posthumously conceived child will necessarily reduce the intestate or class gift shares of the ante-mortem children.

size.[258] Therefore, if the deceased parent had provided consent for his sperm to be used to create additional children after his death, categorically prohibiting resulting posthumously conceived child from inheriting from the decedent's estate would not be substantially related to this state interest.

To the extent that effectuating the intent of the decedent is an important state interest, this interest is not served by excluding posthumously conceived children if the decedent intended to conceive children posthumously.[259] Intestate statutes are designed to effectuate a decedent's intent, [260] which is especially important because most people do not leave wills to express their own intent at death. A man may preserve his sperm with the intention of allowing his spouse to conceive a child after his death who is then genetically related to both parents.[261] This is especially likely where the man knows he may die, but still wants to leave his spouse the option of conceiving a child who will be of both of them.[262] Furthermore, where a man intends to have children after his death, he is unlikely to want to prevent the child from inheriting.[263] Therefore, it makes little sense to construe an intestate provision to preclude inheritance by posthumously conceived children in all cases. Rather, a statute or the construction of a statute that automatically

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[258] *See* Rowsell, *supra* note 19, at 411.

[259] Adherence to the decedent's intent may be alleged by some to be a state interest. That it rises to the level of an *important* state interest, like efficient estate administration, is doubtful. However, the goal of intestacy statutes is to effectuate the decedent's intent, and to that extent, the state has an interest in adhering to such intent. *See* Kerekes, *supra* note 37, at 240; Shapo, *supra* note 27, at 1094. *But see* Chester, *supra* note 154, at 735 (arguing that the distribution scheme of intestate succession is based on the state's decision as to which children should be supported, and "should not be deemed to flow from . . . an expression of intent.").

[260] *See* LAWRENCE H. AVERILL, JR., UNIFORM PROBATE CODE IN A NUTSHELL 33 (5th ed. 2001) ("The theoretical purpose of intestate succession statutes is to distribute a decedent's wealth in a pattern that represents a close facsimile to that which an average person would have designed had that person's desires been properly manifested [through testamentary instruments].").

[261] Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 1003 n.204 (1996) (noting that in a 1987 survey of sperm banks, one in fifteen surveyed reported one reason for men applying to sperm banks was the desire to have children after death). *But see Woodward*, 760 N.E.2d at 269 ("It will not always be the case that a person elects to have his or her gametes medically preserved to create 'issue' posthumously.").

[262] *E.g.*, Hecht v. Superior Court, 20 Cal. Rptr.2d 275 (1993).

[263] *See* Kerekes, *supra* note 37, at 240.

excludes all posthumously conceived children from inheriting from deceased parents, regardless of decedent's intent, is over-inclusive, and not substantially related to this state interest.

Finally, it is possible that a state may assert morality concerns against using reproductive technology to create a posthumously conceived child who can then inherit from a predeceased parent. However, under prior Supreme Court cases, it is unlikely that a preference for a traditional family will justify treating the posthumously conceived child differently when that child is neither responsible for nor can control the circumstances of his/her birth.[264] As *Weber* stated, a basic concept of our legal system is that legal burdens should bear some relationship to individual responsibility, so it makes little sense to impose disabilities on those who cannot control the situation.

2. Exclusion of Posthumously Conceived Children Undermines Children's Interests

In considering the constitutionality of intestacy rules that affect the rights of posthumously conceived children, courts should also consider the interests of posthumously conceived children and balance these interests against other state concerns.[265] The interests of the posthumously conceived children strongly support inclusion in a deceased parent's estate.

One interest in support of allowing inheritance of a posthumously conceived child from his/her deceased father is the welfare of the child. Children need both financial and emotional support.[266] First, a legal parent-child relationship is necessary in order for the child to get financial support, such as through social security survivor's benefits or by inheriting property from the parent's estate. It is especially important to provide support for such a child who is likely to grow up in a single-family household with limited resources and funds.[267] Children should be able to receive support from their parents so they do not have to rely on state funds.[268]

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[264] *See supra* note 90.
[265] Brashier, *supra* note 21, at 143-44; *see also Woodward*, 760 N.E.2d at 265 ("Our task is to balance and harmonize [the best interests of children, the state's interest in orderly administration of estates, and the reproductive rights of the genetic parent] to effect the Legislature's over-all purposes.").
[266] Scharman, *supra* note 20, at 1023-24
[267] *Id*.
[268] *Woodward*, 760 N.E.2d at 265.

Second, establishing a legal parent-child relationship between the deceased parent and the posthumously conceived child through inheritance will provide beneficial emotional support for the child.[269] The Supreme Court has acknowledged the importance of family in society.[270] Indeed, one purpose of inheritance laws is to strengthen family ties and emotional bonds.[271] One commentator noted, moreover, that recognition of family through property distribution would benefit a person not only financially, but also psychologically.[272] Thus, enabling a posthumously conceived child to inherit from his/her deceased parent will provide psychological benefits for the child. It may enable the child to feel connected with the deceased biological parent he/she never got to know. In addition, the child may feel more than a mere genetic connection with the deceased parent; for example, as the mother tells the child about his/her father, the child may form an emotional bond with the father.[273] Denying inheritance effectively denies the child that bond, and it is illogical to deny the child the right to a legal relationship when the genetic and emotional relationships already exist.

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[269] Scharman, *supra* note 20, at 1025 n.191 (asserting that the widespread interest in genealogy shows the importance to people of identifying with their deceased family members); *see also* Anne MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 514 (1991) (asserting that legal rights in a parent-child relationship, such as support, guardianship, and inheritance are important to a child's psychological well-being); Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In] Security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 324 (1999) (suggesting that the lack of legal recognition of parent-child relationships may affect the emotional well-being of the individuals in these relationships).

[270] *See* Troxel v. Granville, 530 U.S. 57 (2000) (overturning a Washington statute that allowed visitation of a child to anyone if it served the best interests of the child, as unreasonably infringing upon the constitutional rights of parents to raise their children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding unconstitutional an Oregon statute that required attendance at a public school for all children under age sixteen as interfering with parents' liberty interests under the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a Nebraska statute that forbade the teaching of foreign languages to children who had not yet completed eighth grade as interfering with the liberty right to raise children under the Fourteenth Amendment).

[271] Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 12 (2000). Gary further states that succession laws have been seen as "an attempt to express family in terms of property." *Id*. (quoting John T. Gaubatz, *Notes Toward Truly Modern Wills*, 31 U. MIAMI L. REV. 497, 501 n.10, 507 (1997)).

[272] Gary, *supra* note 271, at 12.

[273] Scharman, *supra* note 20, at 1047.

Furthermore, excluding posthumously conceived children from inheriting from one parent may also stigmatize them. It will, at the very least, let them know they are different than other children. This can create a feeling of isolation, especially if the child is born into a household of ante-mortem children who are genetically related to the same father, but can, unlike the posthumously conceived child, inherit from that parent and be recognized as that parent's child.

VI. PROPOSED RULE

The ideal rule regarding inheritance rights of posthumously conceived children would address the important state concerns and balance those concerns against the interests of the child, thus meeting the requisite level of scrutiny under the Equal Protection Clause. The revised Section 2-108 of the UPC proposed by Professor Chester[274] substantially satisfies Equal Protection concerns. However, this rule should be further refined in order to satisfy intermediate scrutiny under the Equal Protection Clause, so that it will allow posthumously conceived children to inherit under additional circumstances, yet still satisfy important state interests.

Professor Chester's proposal requires that for one to be considered a child of the decedent for purposes of intestate succession, "[t]he putative parent [must give] consent in a record to posthumous conception that would include the individual."[275] This requirement furthers only the state interest in effectuating the decedent's intent, and this interest is not served by excluding posthumously conceived children if it can otherwise be shown that the decedent intended to conceive after death. It is unlikely that a person who purposely stores his gametes would intend a child conceived of those gametes by his surviving spouse to not inherit.[276] Therefore, the requirement of "consent in a record" actually undermines one of the state interests.

Instead, there should be a presumption that when the decedent leaves his sperm specifically for the use of his surviving spouse, he intended to conceive a child after his death. The burden should be on the party seeking to preclude the child's inheritance to show the decedent did not intend to conceive after death; this can be shown either by direct

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[274] *See supra* note 154.
[275] *See id.* § (b)(3).
[276] *See supra* text accompanying note 263.

or circumstantial evidence.[277] Moreover, in order for the decedent to prevent inheritance by a posthumously conceived child, the decedent must opt out of this presumption by such means as a written document. Part of the contract of marriage is to allow one's spouse to raise that spouse's own children. Thus, a child created from both spouses, even after the death of one, should be presumed to legally be the child of both spouses, and should receive all legal rights attached to that presumption, including inheritance.

This presumption makes sense given that there are a number of state intestacy provisions that presume the decedent intended all children conceived of his marriage to inherit from him. For example, Maryland's Estates and Trusts Code includes provisions for omitted children and for allowances. The omitted child provision presumes that if a testator's will includes one or more of his children and a child was born to him after executing the will and omitted from the will, he intended to include that child, unless he explicitly stated otherwise.[278] Thus, this provision assumes the decedent wanted to support all of his children, even those born after the execution of his will, and requires that the decedent act affirmatively in order to avoid this presumption. In addition, in Maryland, a child of the decedent who is conceived before but born after the decedent's death is treated as if alive at the time of death.[279] Therefore, if a probate court may presume the decedent intended his child to inherit even though he never knew his child and may not even have known he was going to have a child, it is logical to include a child who is not just born, but also conceived, after his death.

Finally, the Maryland Estates and Trusts Code presumes that the decedent would have wanted to support his children financially after his death even though he may have not otherwise stated this. Section 3-201 of the Maryland Estates and Trusts Code gives an allowance of up to $2,500 to each child who is unmarried and under the age of eighteen for

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[277] Furthermore, like Professor Chester, I agree that *Woodward* went too far in requiring the decedent's consent to *support* the posthumously conceived child. First, a parent who intends to conceive a child is unlikely to neglect the child financially. See *supra* note 263 and accompanying text. Second, like Professor Chester stated, this requirement makes little sense in the context of intestacy statutes. *See* Chester, *supra* note 155, at 735. An intestacy statute serves as an expression of the state regarding how the decedent's assets should be distributed once the heirs have been established, and therefore, the statute is not dependent on the decedent's intent with respect to whom the decedent intends to support. *Id.*

[278] MD. CODE ANN., EST. & TRUSTS § 3-301 (2004).

[279] *Id.* at § 3-107.

that child's own personal use before the decedent's estate is distributed.[280] Thus, if state intestacy statutes generally presume the decedent intended to provide for the children of his marriage in most situations, even where the decedent does not explicitly state this intent, the model rule would allow a court to presume the decedent also intended a posthumously conceived child born to his surviving spouse to inherit from his estate.

This presumption, however, should be restricted to where the other biological parent is the surviving spouse of the decedent because that is the situation most analogous to the other intestacy provisions that presume the decedent intended to include his children in the distribution scheme, and thus where it is most logical to presume the decedent would have wanted his posthumously conceived child to be included. Hence, where a person other than the decedent's surviving spouse uses the decedent's sperm to conceive a child, the burden should be on the party supporting inheritance rights of the posthumously conceived child to show the decedent intended to conceive with a non-marital partner after his death.[281]

The issue of whether the decedent intended his gametes, or embryos created of his gametes, to be used only by his surviving spouse can be resolved by requiring a donor in all cases to fill out a form at the clinic. For example, when a man deposits his sperm, he should be required by the clinic to fill out a form asking him what should be done with his sperm in the event of his death, whether he wants it to be used to create a child after his death, and by whom he would like it to be used to create a child. If the intended beneficiary is someone other than his spouse, the form should also ask whether he wants any resulting children to inherit from his estate. This approach would make the decedent's intent clear, so the court would not need to categorically exclude any resulting posthumously conceived children from inheritance in order to meet the important state interests.

The time limitation imposed by the Chester proposal is substantially related to the important state interest of distribution of the estate in an orderly and efficient manner. The proposal requires that a

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[280] *Id.* § 3-201.

[281] Restricting the presumption in favor of inheritance rights of posthumously conceived children to the situation where the gametic material is left specifically for the surviving spouse's use will also serve the state interest in efficient estate administration by providing a natural statute of limitations. The child can only be conceived while the surviving spouse is capable of reproducing.

complaint for the determination that the child can inherit from the decedent must be filed within three years of the putative parent's death and before final distribution of the estate.[282] The rationale for the limitation of three years is to prevent an estate from being "left in limbo" for up to ten years, but to allow a sufficient amount of time for the surviving spouse to try to conceive.[283] Furthermore, the proposal allows the surviving spouse to assert an "ongoing attempt" to create a child from the decedent's gametic material within the three year limitation; a child need not actually be born.[284]

In addition, although the surviving spouse is given a three-year period in which to file a complaint, the whole estate should not be left open during this time. Rather, as Chester recommends, only a certain percentage of the share of the estate that the decedent's issue would be entitled to should be set aside for the posthumously conceived child.[285] This will allow the rest of the heirs to receive their appropriate shares of the property in a timely manner, yet still satisfy the inheritance rights of the child by reserving a certain percentage for that child. Chester's proposal also states that if there is no posthumously conceived child by the end of the three-year period, this set-aside amount will be distributed to "any appropriate non-posthumously conceived descendants at law of the decedent pursuant to the applicable intestacy statute."[286] However, this rule leaves out a plan for the event in which there are no other issue. In that case, the set-aside share should be distributed completely in accordance with the state's intestacy statute. Therefore, if the decedent had no children, the property would be distributed to the heir that is the next closest degree of relation to the decedent under the distribution scheme. This would most likely be the surviving spouse.

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[282] *See supra* note 154, § (b)(4).

[283] Chester, *supra* note 154, at 736; *see also supra* note 149 (explaining the reasoning behind the choice of three years).

[284] *See supra* note 154, § (c).

[285] *See* Chester, *supra* note 154, at 743. Subsection (c) provides that once the court has determined there is a posthumously conceived child or an ongoing attempt to create one, the court will issue an order directing the personal representative to set aside a certain percentage of the issues' shares of the estate for the posthumously conceived child for the balance of the three-year period. Professor Chester recommends fifty percent of the issues' shares be set aside for the posthumously conceived child alone. This figure may especially be appropriate if the surviving spouse has multiple posthumous children, as is likely with the use of ovary-stimulation drugs that are usually used in IVF.

[286] *See* Chester, *supra* note 154, at 744.

Moreover, the requirement that the complaint be filed before final distribution is substantially related to this important state interest of efficient estate administration. It would be inefficient and create difficulties for the estate and beneficiaries if all of the property were already distributed and had to be returned for redistribution years after final distribution of the estate. Three years gives the surviving spouse enough time to grieve for the decedent, decide to have a child, and successfully attempt conception. Even if the attempts are not successful, proof of ongoing attempts, such as a contract between the surviving spouse and fertility clinic, will suffice to set aside the possible resulting child's share of the property. This is a fair compromise in balancing the child's interests and state's interests, and is substantially related to the state's interest in efficient estate administration.

A third state interest that needs to be resolved is the interest against fraudulent paternity claims. Chester's proposal does not explicitly address this concern. However, this interest should not bar the child from inheriting because it is possible to prove paternity through DNA testing.[287] The decedent is likely to have left more than enough samples of gametic material besides that used to create his child. The DNA information in these additional samples can be tested against the child's DNA to conclusively show the child is the biological offspring of the decedent. Moreover, if a clinic utilizes a registry, that registry should contain basic information about the decedent, such as his identification and physical description, as well as a DNA databank.[288] These forms can be kept on file or in a registry so that a child born after the individual has passed away can prove he/she is the child of the decedent. If neither of these circumstances exists, however, there are still alternative methods of proving paternity. The putative father's body can be exhumed and DNA analyzed from tissue samples, or if the putative parent had children during his lifetime, the DNA of those children can be compared against the DNA of the posthumously conceived child to show the likelihood of a common parent.[289] Therefore, the interest against fraudulent paternity

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[287] *See* Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747, 787 (1994) (arguing that the possibility of DNA testing has "rendered obsolete" problems of proof of paternity in the context of non-marital children). Proving paternity of posthumously conceived children is also possible because one can determine paternity long after the putative parent's death through DNA testing. *Id*.

[288] Admittedly, there may be privacy concerns with the use of such registry. *See id*. at 792-94 (discussing privacy concerns regarding the use of DNA technology).

[289] *Id*. at 765-67.

claims should not necessarily preclude a posthumously conceived child from inheriting.

The rule proposed in this article seeks only to address the situation where the deceased parent dies intestate or leaves a class gift to his "children." In those situations, the question would be: may a biologically-related child conceived after the decedent's death and born to the decedent's spouse inherit from the decedent? The default rule should presume the decedent intended the child to inherit from him, and a child should be excluded only if there is explicit evidence showing otherwise. As long as there is a time limitation on when the complaint for determination of the child as a posthumously conceived child can be filed, the state's concern with inefficient estate administration and lack of finality will be resolved. Furthermore, the state's interest in preventing fraudulent paternity claims should no longer be a hurdle to inheritance in the twenty-first century because of the possibilities of DNA testing. Only in limited circumstances will a court need to exclude a posthumously conceived child from inheriting in order to meet the state's interests.

Although the four documented cases involving inheritance rights of posthumously conceived children specifically addressed only the issue of social security benefits, the resolution of that issue in many of the cases depended upon whether the child would have been able to inherit from the deceased parent under the applicable state's intestacy provisions. It is therefore possible to predict whether the children in these cases would have been able to inherit from their deceased parents under the rule proposed in this article. Judith Hart would have been able to inherit from her father under this rule if it could be shown either that the sperm left by her father was intended for her mother's use, or that her father intended to conceive a child posthumously, and as long as her mother filed a complaint on her behalf before final distribution of her father's estate. Furthermore, Judith was born within thirteen months of her father's death, satisfying the three-year limitation requirement. Amanda and Elyse Kolacy would have also been able to inherit from their father under New Jersey law because they were born within eighteen months of their father's death and conceived of his sperm, which was intended for their mother's use. Likewise, Lauren Woodward's daughters could have inherited from Warren's estate because the children were born within two years of his death and Warren's sperm was intended specifically for Lauren's use. Finally, under the proposed rule, the twins born to Rhonda Gillett would still be able to inherit from their father's estate because they were born within

eighteen months of his death, and his sperm was intended for Rhonda's use.[290]

VII. CONCLUSION

Most state intestacy laws do not explicitly address posthumously conceived children and therefore, courts in these states are forced to fall back on out-dated statutes and common law ideas. A few states have enacted legislation that expressly addresses the ability of posthumously conceived children to inherit from deceased parents. However, most of these statutes are not favorable to such children and likely violate the Equal Protection Clause.

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

The rule proposed in this article presumes that men who preserve sperm for their wives' use intend to conceive children after their death, and thus allows posthumously conceived children to inherit as long as the requisite time limitations are met. In order to meet the state interests of adherence to the decedent's intent, efficient estate administration, and prevention of fraudulent paternity claims, this rule imposes a three-year statute of limitations for filing a complaint on behalf of the child. Consent to be a parent of a posthumously conceived child should be required where the surviving spouse was not the specifically intended beneficiary. A categorical exclusion preventing such children from inheriting, regardless of the circumstances surrounding the child's

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[290] However, *Gillett-Netting* is slightly more complicated than the other three cases because the decedent also left three surviving children form a previous marriage. If the set aside amount proposed by Professor Chester were used in this case, each of the other three children would receive one-sixth of the total assets left for the decedent's issue, or one-twelfth of the whole estate, while each of the posthumously conceived twins would receive one-quarter of the total issues' share, or one-eighth of the whole estate. In this case, therefore, it would be better to implement a rule so that each child received an amount equal to each of the other children, or one-tenth of the estate each.

conception, is not substantially related to an important state interest, and thus violates the Equal Protection Clause.