

POSTMORTEM CONCEPTION AND A FATHER'S LAST WILL

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I. INTRODUCTION

In January 2003, as war with Iraq loomed and thousands of American troops received orders to deploy to the Middle East, some men took the time to visit a sperm bank.¹ Rather than acting as donors, they deposited sperm for their own use, in case exposure to chemical or biological weapons, or even vaccinations, caused fertility problems upon their return.² Similar stories were reported as soldiers deployed for the Gulf War in 1991,³ including a campaign to inform men in the military that sperm banks were an option for them.⁴ In addition to the soldiers that worried about chemical hazards, many men have banked their sperm because they are cancer patients whose treatments may render them sterile, athletes vulnerable to groin injuries, or for other reasons.⁵ Most of these men hope

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1. Ellen Gamberman, *For U.S. Troops, a Personal Mission*, BALT. SUN, Jan. 27, 2003, at 1A.

2. Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY, Jan. 27, 2003, at 1A.

3. Teresa Burney, *War Boosts Sperm Deposits*, ST. PETERSBURG TIMES, Feb. 19, 1991, at 1B; Kathleen Doheny, *War Prompts Planning for Future Families*, L.A. TIMES, Feb. 4, 1991, at E1; Elizabeth Kurylo, *Sperm Banks: Some GIs Hedging Future*, ATLANTA J. & CONST., Feb. 6, 1991, at A7.

4. Marilyn Dunlop, *Fearing Injury, Soldiers Bank Sperm*, TORONTO STAR, Feb. 13, 1991, at A14.

5. Ivor Davis, *Posterity Insurance: AIDS, Infertility and Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets*, CHI. TRIB., Apr. 26, 1988, at Tempo 1 (men banked their sperm for a variety of reasons, such as they traveled extensively and might not be at home during their wives' fertile period; they worked in the nuclear industry or might be exposed to hazardous materials; they were on military duty; or their sperm count was low); Suzy Hagstrom, *This Bank Freezes All of Its Assets*, ORLANDO SENTINEL, June 27, 1994, at Cent. Fla. Bus. 12.

to use the sperm themselves in the future.⁶ But what if the man dies, and his widow or girlfriend gives birth to a baby years later? What effect will this child have on the man's will?

This problem has been discussed in legal literature for over forty years, but we are still struggling with the solutions. In 1962, W. Barton Leach, Story Professor of Law at Harvard, predicted that the new phenomenon of sperm banks, created to protect the issue of astronauts from mutations caused by ionizing radiation in space, posed a threat to the common law Rule Against Perpetuities.⁷ Because the sperm could be preserved indefinitely, the astronaut's widow could have his children long after a life in being plus twenty-one years, thus invalidating bequests that once would have been routinely upheld. Fifteen years after Professor Leach's prediction, an Australian newspaper reported that a widow had given birth to a child using her deceased husband's cryopreserved sperm.⁸

The obstacles to a postmortem conception ("PMC") child inheriting are considerable. First, the widow or girlfriend must obtain the sperm after the man's death; then, she must become pregnant and give birth to a child; finally, the child must prove paternity and make a timely claim against the estate. But assuming that all these obstacles can be overcome, and in many cases they have, can the child inherit from the predeceased father? This Article will examine one common fact pattern, in which the father dies leaving a will and frozen sperm. When we construe the will, should we take into account the possibility that children might be born years after his death?

II. EXTENT OF THE PROBLEM

The best evidence we have that postmortem conception has occurred is the babies themselves. Newspapers have reported several instances of successful pregnancies using a deceased man's sperm.⁹ Four court cases have addressed the issue of whether children conceived after their fathers' deaths are entitled to inherit

6. Davis, *supra* note 5 (noting that of 2400 depositors at California Cryobank, 2000 banked sperm for their own possible future use).

7. W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 943 (1962).

8. Carolyn Sappideen, *Life After Death—Sperm Banks, Wills and Perpetuities*, 53 AUSTL. L.J. 311, 311 n.4 (1979) (citing a report in the SYDNEY MORNING HERALD, July 12, 1977).

9. Nancy Bartley, *Benefits in Limbo for In-Vitro Child of Deceased Dad*, SEATTLE TIMES, June 3, 2002, at B1 (man froze his sperm after diagnosis of brain cancer, then died in 1994; his fiancé used his frozen sperm and gave birth to his child in 1996); Amanda Ward, *LIFE AFTER DEATH: Like Diane Blood, These Women Had Their Children After Their Husbands Died*, DAILY MAIL (London), Apr. 2, 2002, at 46 (citing four women who became pregnant using their deceased husbands' frozen sperm); *World's First Children Born from Frozen Egg and Sperm*, CHI. SUN-TIMES, Dec. 30, 2000 at 14 (doctors announced the first successful birth of a human conceived from eggs and sperm that were both frozen). In 1999, the University of California at San Francisco reported the first baby born using sperm retrieved from her father after he had died. *Fertility Experts Face New Life-and-Death Ethical Issues*, UCSF DAYBREAK NEWS (Apr. 12, 1999), at http://www.ucsf.edu/daybreak/1999/04/12_vernoff.html.

in intestacy and thus eligible to receive Social Security benefits.¹⁰ But are these cases the only instances of postmortem conception, or might many more children be conceived long after their fathers' deaths? No statistics are available on how many women have conceived and given birth after their partner has died, or plan to do so in the future. But we can make an inference about its prevalence by examining advances in technology that enable postmortem conception and the number of requests for sperm after the man has died. First, the technology. The ability to freeze sperm and later thaw it while still retaining its fertility has been available since at least the 1940s.¹¹ Cryopreservation is now a common practice, with 99% of the clinics reporting to the Centers for Disease Control offering it in 1999,¹² compared with 74% in 1988.¹³ Once frozen, sperm may be viable almost indefinitely; scientists are unsure how long it will last, but are confident that sperm can be stored for at least ten years.¹⁴ Freezing one's sperm, however, does not necessarily mean that one wants children postmortem; cryopreservation is often utilized for other reasons.¹⁵ A second statistic is more probative on the issue of children conceived after the father's death: the number of requests to harvest sperm after a man has died.¹⁶ Such a request is generally made only when a postmortem child is desired.¹⁷ From 1980 to 1995, forty fertility clinics reported a total of eighty-two requests for postmortem retrieval of sperm, with more than half

10. See Ellen J. Garside, Comment, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 721 (1996) (discussing *Hart v. Shalala*, No. 94-3944 (E.D. La. 1994), also discussed *infra* at 104-17); see also *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002); *Woodward v. Comm. of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). As of May 2003, the Social Security Administration reported a total of eleven cases involving postmortem conception children seeking survivor benefits by establishing they are entitled to inherit under state law. Kathleen Pender, *Brave New World of Inheriting*, S.F. CHRON., May 11, 2003, at Bus. 11.

11. Sappideen, *supra* note 8, at 311.

12. Centers for Disease Control, *1999 National Report on Assisted Reproductive Technology Success Rates*, at 57, available at <http://www.cdc.gov/reproductivehealth/ART99/index99.htm> (last visited Jan. 25, 2004).

13. U.S. GEN. ACCT. OFFICE, REP. TO THE CHAIRMAN, SUBCOMM. ON REGULATION, BUS. OPPORTUNITIES & ENERGY, COMM. ON SMALL BUS., H.R. DOC. NO. 90-24, Dec. 1989, at 32.

14. Stacy Sutton, Note, *The Real Sexual Revolution: Posthumously Conceived Children*, 73 ST. JOHN'S L. REV. 857, 869 (1999); see also GR. BRIT. DEPT. HEALTH & SOC. SEC., REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY § 10.4, at 54 (1984) (stating there is "no upper limit to the length of time for which it is safe for frozen storage to continue before use"); Carole Agus, *Drop of Life: Docs Rush to Save Sperm of Man Killed in Cop Struggle*, NEWSDAY (New York), Jan. 19, 1995, at A3 (noting that frozen sperm is expected to last 20 years).

15. For example, some men deposit sperm as "insurance" in case of illness or accident. Winthrop Thies, *A Look to the Future: Property Rights and the Posthumously Conceived Child*, TRTS. & ESTS. 922, 922 (1971).

16. Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?* 3 DEPAUL J. HEALTH CARE L. 39, 45 (1999).

17. Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 243 (1999/2000).

the requests being made in the last year of the study.¹⁸ Newspapers recount stories of wives or girlfriends freezing the sperm of recently deceased men,¹⁹ and several law review articles have debated the legality and ethics of sperm harvesting.²⁰ The practice is common enough that the American Society for Reproductive Medicine has issued a policy on postmortem retrieval of gametes, stating that “[a] spouse’s request that sperm or ova be obtained terminally or soon after death without the prior consent or known wishes of the deceased spouse need not be honored.”²¹ In 1998, the New York Task Force on Life and the Law recommended legislation prohibiting the retrieval of gametes from deceased persons or living persons incapable of providing informed consent, unless the individual consented in writing to the retrieval under these circumstances, or the person seeking to retrieve the gametes established extraordinary circumstances in a judicial proceeding.²² An American Bar Association committee has circulated a discussion draft of a statute, the “Model Reproductive Technologies Act,” which would make it unlawful to collect gametes from a dead person without a written testamentary document authorizing the procedure.²³

In cases where the man has stored sperm at a sperm bank, the spouse or partner may seek to obtain the frozen sperm after the man’s death. Unlike the retrieval cases above, this sperm was deposited while the man was alive and with his consent. Several cases have been litigated in which the surviving partner has

18. Kerr, *supra* note 16, at 45.

19. *Id.* at 39–40. In one case, the request was not from a wife or girlfriend, but rather from the decedent’s mother. Nineteen-year-old Jeremy Ross died playing Russian Roulette; his mother had doctors keep Jeremy alive long enough to surgically remove his sperm so she might have grandchildren someday. Laura Dwyer, Note, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881, 881 (2000) (citing Scott Sonner, *Sperm Retrieval Raises Questions*, THE COLUMBIAN, Oct. 2, 1998, at A2); see also Jamie Talan, *Posthumous Paternity: Exploring the Ethics of Sperm Retrieval for Surviving Spouses*, NEWSDAY (New York), June 10, 2003, at A37 (the acting chairman of urology at New York Weill Cornell Center has received twenty-two requests in the past decade to collect sperm from a dead or dying man; the pace of requests has increased in recent years, with at least eight calls since 2001).

20. See Dwyer, *supra* note 19; see also Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U. L.J. 451 (2000); Strong, *supra* note 17.

21. Am. Soc’y for Reprod. Med., *Posthumous Reproduction* (Jan. 10, 1997), available at <http://www.asrm.org/Media/Ethics/posthum.html>.

22. NEW YORK STATE TASK FORCE ON LIFE & THE LAW, EXECUTIVE SUMMARY OF ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 10 (Apr. 1998), available at <http://www.health.state.ny.us/nysdoh/taskfcel/execsum.htm>. Similarly, the New Zealand National Ethics Committee on Assisted Human Reproduction (“NECAHR”) concluded that “collection of sperm from a comatose or recently deceased person without that person’s prior written consent is ethically unacceptable.” NECAHR, GUIDELINES FOR THE STORAGE, USE, AND DISPOSAL OF SPERM FROM A DECEASED MAN 6 (Feb. 2000), available at <http://www.newhealth.govt.nz/necahr/files/guidelinesforsperm.pdf>.

23. ABA Comm. on the Laws of Assisted Reprod. Tech. & Genetics, Model Assisted Reprod. Tech. Act R. 1.02(6) (Discussion Draft 1999), at <http://www.abanet.org/ftp/pub/family/modelassistedreptech.doc>.

demanded the frozen sperm. Litigation may be needed because a number of clinics will not routinely release the sperm. A 1998 survey of 324 assisted reproductive technology ("ART") clinics found that 45% of the responding clinics prohibited the use of frozen sperm by a widow or girlfriend after the man's death, while 35% of the clinics allowed such use.²⁴ In France, the Centers for the Study and Conservation of Sperm ("CECOS")²⁵ received fifteen requests for postmortem insemination with frozen sperm between 1976 and 1984.²⁶ The first widely reported case seeking frozen sperm after the man's death was brought in France in *Parpalaix v. CECOS* in 1984.²⁷ Alain Parpalaix had deposited sperm with a CECOS sperm bank two years before his death in 1983, but had left no explicit instructions regarding its disposition. Alain's widow asked that the sperm be turned over to her; CECOS refused her request. The French court decided that Alain's intent should control regarding who should receive the sperm,²⁸ and gave the sperm to his widow whom he married two days before his death.²⁹ The court left open questions of filiation and inheritance; a later report indicated that the widow's attempt to have a child with the frozen sperm failed.³⁰

The next case to receive a considerable amount of publicity involved the attempt of an eccentric businessman, William Kane,³¹ to leave his frozen sperm to his girlfriend, Deborah Hecht. In *Hecht v. Superior Court*, the California Court of Appeal held that Ms. Hecht's request to receive the sperm did not violate public policy,³² and ordered that Kane's frozen sperm be turned over to her.³³ As in *Parpalaix*, the court found that the decedent had decision-making authority as to the sperm, and so his intent as to the disposition of the sperm should control.³⁴

In a third case involving a postmortem request for frozen sperm, *Hall v. Fertility Institute of New Orleans*,³⁵ the decedent's mother and executor moved for a preliminary injunction to prevent the decedent's girlfriend from obtaining his frozen sperm. The court determined that decedent's Act of Donation, purporting to give the sperm to his girlfriend, did not violate public policy, and should be upheld

24. Judy Stern, et al., *Access to Services at Assisted Reproductive Technology Clinics: A Survey of Policies and Practices*, 184 AM. J. OF OBSTETRICS AND GYNECOLOGY 591, 595 (2001). The New York State Task Force found that some sperm banks will release stored semen to the decedent's widow even without the man's specific instructions. New York State Task Force, *supra* note 22, at 12.

25. Derek Jones, *Artificial Procreation, Societal Reconceptions: Legal Insight from France*, 36 AM. J. COMP. L. 525, 533 (1988).

26. *Id.* at 538.

27. *Id.* at 525.

28. *Id.* at 528; see also Shapiro & Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 232 (1986).

29. Jones, *supra* note 25, at 527-28.

30. *Id.* at 530.

31. Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57 (1995).

32. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 289 (Cal. Ct. App. 1993).

33. *Hecht v. Superior Court*, 59 Cal. Rptr. 2d 222, 227 (Cal. Ct. App. 1996) (ordered not published).

34. *Hecht*, 20 Cal. Rptr. 2d at 289 (citing *Davis v. Davis*, 842 S.W. 2d 588, 602 (Tenn. 1992)).

35. 647 So. 2d 1348 (La. Ct. App. 1994).

if decedent was competent and not under undue influence at the time the donation was executed.³⁶

As with postmortem retrieval of sperm, the American Society for Reproductive Medicine ("ASRM") has issued policy guidelines on when postmortem requests for frozen sperm should be granted. If the man has consented to the storage of his sperm, and has designated that it can be used for posthumous pregnancy, the ASRM concludes that "it would seem to be totally appropriate to honor this designation after [his] death in the absence of any adverse consequences to the living participants in the pregnancy or any expected children."³⁷ If the deceased denied permission to use his gametes for posthumous reproduction, ASRM concludes that a request by the surviving spouse to override that denial should not be honored.³⁸

The American Medical Association ("AMA") has also adopted guidelines on the use of sperm after the man's death. The AMA Council on Ethical and Judicial Affairs provides in its Code of Medical Ethics that the frozen semen should not be used for purposes other than those originally intended by the donor.³⁹ Where the male donor left no instructions, the AMA advises that "it is reasonable to allow the remaining partner to use the semen for artificial insemination," but encourages the doctor to advise the man of this policy so that he has an opportunity to override it if he objects.⁴⁰

Practically speaking, after the frozen sperm has been obtained, three obstacles to postmortem conception still remain: the lower fertility rates using frozen gametes, the high cost of assisted reproductive techniques, and the difficulty of proving paternity. First, using frozen sperm rather than fresh leads to a drop in the number of viable sperm.⁴¹ Artificial insemination⁴² using frozen sperm has a success rate of between 8% and 10%, while using fresh sperm yields a success rate of between 16% and 18%.⁴³ A second obstacle to postmortem

36. *Id.* at 1351.

37. Am. Soc'y for Reprod. Med., *supra* note 21.

38. *Id.*

39. AM. MED. ASS'N COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, CODE OF MEDICAL ETHICS: CURRENT OPINIONS § 2.04, 6 (2003).

40. *Id.*

41. M.C. Schiewe, et al., *Cryopreservation of Intact Testis Biopsies for ICSI*, 68 SUPP. FERTILITY & STERILITY 115 S (1997) (citing study showing that, when sperm were cryopreserved without preliminary processing, 30% survived freezing and thawing); *Women's Care: Cryopreservation (Freezing) of Sperm*, at <http://www.womens-care.net/cryopreservation.html> ("Freezing and thawing usually results in the loss of from 50% to 90% of the motile sperm in any sample.") (last visited Nov. 18, 2003).

42. Some type of assisted reproductive technique is necessary, since the frozen sperm must be thawed, rehydrated, and cleansed prior to insemination. Lisa M. Burkdall, Note, *A Dead Man's Tale: Regulating The Right To Bequeath Sperm in California*, 46 HASTINGS L.J. 875, 886 (1995) (citing Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP., PROB. & TR. J. 55, 63 (1994)).

43. Telephone Interview with Dr. J. Benjamin Younger, President, ASRM (Aug. 8, 2002); see also *Women's Care*, *supra* note 41 (stating that pregnancy rates are lower if frozen sperm rather than fresh sperm is used).

conception is the cost. Artificial insemination costs about \$300 to \$700 per cycle⁴⁴ with many women undergoing three to six cycles before becoming pregnant or trying another technique such as in vitro fertilization (“IVF”).⁴⁵ If IVF is necessary, however, then the price tag is substantially higher, with a cost of between \$8000 to \$15,000 per cycle.⁴⁶

A third obstacle to a PMC child inheriting is the difficulty of proving paternity. In many cases a PMC child will not benefit from a presumption of paternity, not having been born within either 280 or 300 days of the father’s death.⁴⁷ States such as Ohio require paternal acknowledgment or a court order during the father’s lifetime,⁴⁸ thus precluding a PMC child from inheriting. A few other states require the paternity action to be filed within a short time of the father’s death, thus effectively eliminating an action by a PMC child.⁴⁹ Many states, however, allow a child to prove paternity after the father’s death without strict limits on when the action must be filed.⁵⁰ A complete discussion of all the obstacles to proving paternity, and whether a state’s general paternity laws would be applied to a PMC child, is beyond the scope of this Article, but the reader should be aware of the problem.⁵¹

In addition to a state’s general paternity laws, a few states have enacted provisions specifically addressing PMC children. North Dakota provides that a person who dies before a conception using that person’s sperm is not a parent of any resulting child.⁵² At least six other states (Colorado, Delaware, Texas, Washington, Virginia, and Florida) provide that a PMC child generally does not inherit from the deceased parent unless a specific exception is met. In Colorado, Delaware, Texas and Washington, if a spouse dies before placement of eggs,

44. *Fertility Treatment: Your Options At a Glance* (Feb. 21, 2003), at <http://www.babycenter.com/refcap/preconception/fertilityproblems/1228997.html>.

45. *Id.*

46. *Id.*; see also Agus, *supra* note 14 (\$12,000 per IVF procedure); Amy Marcus, *Finding a Cheaper Way to Make a Baby*, WALL ST. J., Mar. 6, 2003, at D1 (citing costs as high as \$15,000 per IVF attempt, and noting that many insurance policies do not cover the procedure so patients must pay for it themselves).

47. Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091, 1153–54 (1997).

48. James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 785 (1998) (citing GA. CODE ANN. § 53-4-4 (1997); IOWA CODE § 633.222 (1996); and OHIO REV. CODE ANN. § 2105.15 (Anderson 1997); and explaining that a New York statute requiring adjudication during the father’s lifetime was upheld in *Lalli v. Lalli*, 439 U.S. 259, 275 (1978)).

49. See, e.g., *S.V. v. Estate of Bellamy*, 579 N.E.2d 144 (Ind. Ct. App. 1991) (holding that a child born eight months after his father’s death could not inherit from him, because the paternity action was not filed within five months of death).

50. Robert Silverman, Comment, *Inheritance Rights of Non-Marital Children Under Michigan’s 1993 Probate Code Changes*, 1995 DET. C.L. REV. 1123, 1132 n.65 (1995) (citing statutes in more than 30 states that allow proof of paternity after the father’s death).

51. See Sutton, *supra* note 14, at 892.

52. N.D. CENT. CODE § 14-18-04 (1997).

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.⁵³ Virginia does not recognize any person as the parent if the person dies before *in utero* implantation, whether or not the other gamete provider is the person's spouse.⁵⁴ Virginia, however, does recognize the decedent as the parent if the decedent consented to be a parent in writing before the implantation,⁵⁵ if the child is born within ten months of the parent's death.⁵⁶ Florida law also appears to preclude most claims: a child conceived from the egg or sperm of a person who died before the transfer of their eggs, sperm, or preembryos to a woman's body is not eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.⁵⁷ Louisiana and Massachusetts, by contrast, have evidenced a desire to allow postmortem children to inherit. Louisiana allows a PMC child to inherit in cases where the decedent specifically authorized his spouse to use his gametes, and where the child is born within three years of the decedent's death.⁵⁸ A Massachusetts statute providing that "posthumous children shall be considered as living at the death of their parent"⁵⁹ has been held to allow PMC children to inherit if the decedent consented to postmortem conception and to support the resulting child.⁶⁰ Thus at least nine states⁶¹ have dealt with the specific question of PMC children and inheritance, but they may still find some questions to litigate.⁶² That leaves a majority of states with no clear law on the subject.

53. COLO. REV. STAT. § 19-4-106(8) (2003); H.B. 139, § 8-707, 2003 Leg. (Del. 2003) (enacted); TEX. FAM. CODE ANN. § 160.707 (Vernon 2002); WASH. REV. CODE § 26.26.730 (2002).

54. VA. CODE ANN. § 20-158 (Michie 1995).

55. *Id.* § 20-158(B).

56. VA. CODE ANN. § 20-164 (Michie 1995); Burkdale, *supra* note 42, at 901.

57. FLA. STAT. ANN. § 742.17 (West 1997).

58. 2003 La. Sess. Law Serv. 495 (West). In California, a proposal to amend the Probate Code, A.B. 695, would allow a PMC child to inherit if the child is born within two years of the decedent's death, and other statutory requirements are satisfied. A.B. 695, 2003-04 Leg. (Cal. 2003).

59. MASS. GEN. LAWS, ch. 190, § 8 (1990).

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

61. A bill pending in California would add California Probate Code Sections 249.5 and 249.6 to allow a child conceived after the decedent's death to inherit providing certain conditions are met by clear and convincing evidence, and would prohibit any distribution of the decedent's property for two years after his death or six months subsequent to the birth of a child conceived after the decedent's death, whichever occurs first. A.B. 695.

62. For example, Florida creates an exception where the decedent provides for the child by will. But how specific must the provision be? Would a bequest "to my issue" suffice, or must there be shown an intent to include those conceived after the decedent's death? *See* FLA. STAT. ANN. § 742.17 (West 1997). Similarly, in Virginia, which requires the decedent to consent before implantation, how specific does the consent have to be? Does the decedent have to agree to provide for the child, as the Massachusetts court requires? *See* VA. CODE ANN. § 20-158(B) (Michie 1995).

The technology to produce PMC children currently exists. Thousands of men have frozen their sperm.⁶³ These frozen materials can survive for years after the deaths of the genetic parents and still be used successfully to produce children. Thus, it is theoretically possible to have many PMC children born each year. The many obstacles to bearing PMC children, such as the lower success rate with frozen gametes, the hurdles to obtaining the frozen material after one partner's death, the natural disinclination of many people to have children using the gametic material of someone already dead, and the high cost of proceeding in vitro, mean that we probably will not have many such children. We will, however, have some children conceived and born postmortem, and we need to address the problems associated with that phenomenon. The advent of new technology, such as artificial wombs,⁶⁴ frozen stem cells that can be used in the future to produce sperm or eggs,⁶⁵ and cloning,⁶⁶ may make it even easier for such children to be born.

While only a handful of American jurisdictions have enacted legislation on PMC children and inheritance, several multi-disciplinary task forces and committees have been formed in the United States and abroad to grapple with these issues and propose solutions. Three groups in the United States have recommended legislation be enacted that a child conceived after its parent's death should not inherit: the National Conference of Commissioners of Uniform State Laws (in 1988), the New York State Task Force on Life and the Law (in 1998), and the American Bar Association's Committee on the Laws of Assisted Reproductive Technologies and Genetics (in 1999). The National Conference approved the Uniform Status of Children of Assisted Conception Act ("USCACA"),⁶⁷ which provides in part that "an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."⁶⁸ This section was designed to "provide finality for determining parenthood of those whose genetic material is utilized in the procreation process after their death" and to "avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent."⁶⁹

Ten years after the USCACA was proposed, the New York State Task Force on Life and the Law issued its report on Assisted Reproductive

63. Davis, *supra* note 5.

64. Barry Brown, *Reconciling Property Law with Advances in Reproductive Science*, 6 STAN. L. & POL'Y REV. 73, 77; Robin McKie, *Men Redundant? Now We Don't Need Women Either: Scientists Have Developed an Artificial Womb that Allows Embryos to Grow Outside the Body*, THE OBSERVER, Feb. 10, 2002.

65. Amy L. Komoroski, Comment, *After Woodward v. Commissioner of Social Services: Where Do Posthumously Conceived Children Stand in the Line of Descent?* 11 B.U. PUB. INT. L.J. 297, 302 (2002).

66. See Nanette Elster, *Who Is the Parent in Cloning?* 27 HOFSTRA L. REV. 533 (1999) (giving a thorough discussion of the laws and policy discussions involved in cloning humans).

67. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. 161 (1998).

68. *Id.* § 4(b), at 166.

69. Garside, *supra* note 10, at 727.

Technologies. Task Force members included “leaders in the fields of law, medicine, nursing, philosophy, and bioethics, as well as patient advocates and representatives of diverse religious communities.”⁷⁰ The Task Force recommended that the New York legislature enact a statute to “provide that an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.”⁷¹

In December 1999, the American Bar Association’s Committee on the Laws of Assisted Reproductive Technologies and Genetics adopted a discussion draft of a “Model Assisted Reproductive Technologies Act.” The proposed act provides that, in the absence of a testamentary document, if an intended parent dies before the embryo is transferred to the woman, the resulting child has no rights against the estate of the intended parent, and is not an heir.⁷² The ABA discussion draft, however, may not cover our scenario since the definition of “intended parent” is stated as “an individual or couple, married or unmarried, who enter into a written or oral agreement with a donor, or gestational carrier under this Act providing that they intend to be legally bound as the parent of a child or children born through assisted conception.”⁷³

The *Restatement of the Law Third—Property: Wills & Other Donative Transfers* has also proposed solutions to these issues. Rather than banning inheritance by a PMC child, the Restatement Third would allow inheritance where the child is “born within a reasonable time after the decedent’s death in circumstances indicating that the decedent would have approved of the child’s right to inherit.”⁷⁴ A “clear case” of such approval would occur with “a child produced by artificial insemination of the decedent’s widow with his frozen sperm.”⁷⁵ Thus, the Restatement Third’s proposal, unlike those of the USCACA, the New York Task Force, and the ABA Committee, would appear to routinely allow inheritance by PMC children, as long as the decedent had frozen his sperm before his death.

Other countries have concluded that PMC children should not inherit from a deceased parent. In Great Britain, the Committee of Inquiry Into Human Fertilisation and Embryology (commonly called the Warnock Committee after its chair, Dame Mary Warnock) issued a comprehensive report in 1984 following a two-year inquiry. The committee, concerned about “profound psychological problems for the child and the mother,”⁷⁶ recommended that “the use by a widow

70. New York Task Force on Life and the Law, *Fact Sheet* (Jan. 13, 2003), available at <http://www.health.state.ny.us/nysdoh/taskfce/factsht.htm>.

71. New York Task Force on Life and the Law, *Executive Summary of Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy* (Jan. 13, 2003), available at <http://www.health.state.ny.us/nysdoh/taskfce/execsum.htm>.

72. MODEL ASSISTED REPRODUCTIVE TECHNOLOGIES ACT § 1.07 (1)(a) & (c) (Discussion Draft 1999).

73. *Id.* § 1.01 (13).

74. RESTATEMENT (THIRD) OF PROPERTY: WILLS & DONATIVE TRANSFERS § 2.5 cmt. 1 (1999).

75. *Id.*

76. GR. BRIT. DEPT. HEALTH & SOC. SEC., *supra* note 14, § 4.4, at 18.

of her dead husband's semen for AIH [artificial insemination by husband] should be actively discouraged.⁷⁷ In cases where the widow proceeded despite this caution, the committee recommended legislation to provide that any child born by AIH or IVF who was not *in utero* at the date of the death of its father should be disregarded for the purposes of succession to, and inheritance from, the latter.⁷⁸ Great Britain's Human Fertilisation and Embryology Act of 1990 accordingly provides that where the sperm of a man is used after his death, he is not to be treated as the father of the child.⁷⁹ French law goes further, banning the use of gametes (sperm, eggs, and embryos) for posthumous reproduction.⁸⁰ Three Australian states (Victoria, South Australia, and Western Australia) also ban the use of gametes from a person known to be dead.⁸¹ The other Australian states do not have legislation, and a court in Tasmania has held that a frozen embryo, if later born alive, could inherit from its deceased parents.⁸² In Canada, the Royal Commission on New Reproductive Technologies concluded that "embryos stored for a couple's own use should not be used to create a pregnancy after the death of either partner, regardless of the couple's stated intent."⁸³ The Commission expressed concern about issues of inheritance and the well-being of any resulting PMC children.⁸⁴ In addition, the Roman Catholic Church has recommended legislation banning postmortem conception.⁸⁵

While the uniform statutes and other countries' committees have generally recommended that sperm and eggs not be used after the donors' death, and have decided that, if such gametic material is used anyway, any resulting PMC child should not be allowed to inherit, a number of American legal commentators have come out the other way, urging that these children be allowed to inherit even if no specific provision is made for them in the testator's will. Several argue that a

77. *Id.* § 10.9, at 55.

78. *Id.* § 10.9, at 55 (concerning AIH) & § 10.15, at 57 (concerning IVF).

79. HUMAN FERTILISATION & EMBRYOLOGY ACT, 1990, § 28(6)(b) (Eng.) (discussed in *R. v. Human Fertilisation & Embryology Authority*, 3 W.L.R. 1176 (Q.B. 1996)). Legislation is pending, however, to change the law and allow the birth certificate to name the father. In *Brief: Britain: Widows Score Point in In Vitro Fatherhood Case*, L.A. TIMES, Mar. 1, 2003, at A4.

80. Bioethics Law of July 29, 1994, J.O., July 30, 1994, 11056-68 (discussed in Evelyn Shuster, *The Posthumous Gift of Life: The World According to Kane*, 15 J. CONTEMP. HEALTH L. & POL'Y 401, 421-22 (1999)).

81. Belinda Bennett, *Posthumous Reproduction and the Meanings of Autonomy*, 23 MELB. U. L. R. 286, 289-92 (1999).

82. *In re Estate of K* (1996) 131 F.L.R. 374, 381.

83. Shuster, *supra* note 80, at 421 (citing ROYAL COMM'N ON NEW REPROD. TECHS., PROCEED WITH CARE: FINAL REPORT (1993)).

84. *Id.*

85. Helen M. Alvare, *Catholic Teaching and the Law Concerning the New Reproductive Technologies*, 30 FORDHAM URB. L.J. 107, 122 (2002) (citing the Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day* (*Donum Vitae*) (1987)).

postmortem child should inherit as a pretermitted heir.⁸⁶ Professor Leach was the first to offer a “draft opinion” in which a court could hold that the child was the legitimate issue of the decedent (provided the widow had not remarried) and thus eligible to inherit from his deceased father. If an issue arose regarding the Rule Against Perpetuities, the court could construe the term “life in being” as encompassing the period of the deceased husband’s reproductive capacity, including any postmortem period during which his frozen sperm remained fertile.⁸⁷ Leach found no “visible inconvenience” in his proposal, because he hypothesized that the frozen sperm was not likely to last very long, probably equal to the normal life-span of most men.⁸⁸

In 1971, Winthrop Thies, in a widely cited article, followed Leach’s proposal by suggesting a statute, the Uniform Rights of the Posthumously Conceived Child Act.⁸⁹ Thies’ call for a Uniform Act allowing PMC children to inherit was prompted by the report of a successful pregnancy using frozen sperm earlier that same year.⁹⁰ Thies’ article was the first in a long series of calls for Uniform Acts, typically suggesting that PMC children be entitled to inherit. While some articles recommended that the postmortem use of both sperm and embryos⁹¹ or only embryos⁹² should be banned, most articles are to the contrary, and urge that the resulting children be allowed to inherit. A number of articles propose uniform or model statutes allowing inheritance,⁹³ some with limits on how long the estate will remain open while we wait for the posthumous conception to occur: 300 days

86. Shapo, *supra* note 47, at 1155; *see also* Cindy L. Steeb, Note, *A Child Conceived After His Father’s Death? Posthumous Reproduction and Inheritance Rights*, 48 CLEV. ST. L. REV. 137, 159 (2000).

87. Leach, *supra* note 7, at 944.

88. *Id.*

89. Thies, *supra* note 15, at 922.

90. Thies, *supra* note 15, at 922 n.1.

91. Alexander Capron, *Alternative Birth Technologies: Legal Challenges*, 20 U.C. DAVIS L. REV. 679, 694 (1987).

92. Kristin Antall, Note, *Who Is My Mother? Why States Should Ban Posthumous Reproduction by Women*, 9 HEALTH MATRIX 203, 234 (1999).

93. *See* Bailey, *supra* note 48, at 814 (urging reform of statutes governing intestacy and afterborn children); Sheri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 563–64 (1993) (proposing a model statute to allow PMC children to inherit consistent with the decedent’s intent); Robert Kerekes, *My Child . . . But Not My Heir: Technology, the Law and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213, 245–49 (1996) (proposing a new uniform act to deal with posthumous reproduction); Sappideen, *supra* note 8, at 319 (proposing a change in Australian law to allow PMC children to inherit by using the decedent’s wife as the “measuring life” for the Rule Against Perpetuities, and by suspending the class-closing rule); Monica Shah, Commentary, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 570 (1996) (proposing a change in intestacy laws to set aside a percentage of the estate for PMC children); Jennifer M. Stolier, Comment, *Disputing Frozen Embryos: Using International Perspectives to Formulate Uniform U.S. Policy*, 9 TUL. J. INT’L & COMP. L. 459, 461 (2001) (proposing the appointment of a commission modeled on the Warnock Committee in the United Kingdom to propose uniform laws).

to use assisted reproductive technology or ART,⁹⁴ a two-year window of opportunity,⁹⁵ 5 years,⁹⁶ or even 10 years.⁹⁷ Other solutions include a “procreative will”⁹⁸ that allows decedents to provide for PMC children. Most commentators seem to feel this unnecessary because a court is likely to enforce a will provision providing specifically for PMC children anyway. In addition, given the fact that few people execute *any* will,⁹⁹ it seems impractical to suggest yet another will. One article proposed written notice by the decedent of the intent to conceive posthumously,¹⁰⁰ while others would require that any man desiring postmortem conception accept the responsibility to support any resulting children.¹⁰¹ One author points out that this solution might treat a posthumous child differently and more favorably than the decedent’s other children; instead, she would favor legislation that the postmortem child inherit from the decedent but be treated the same as the decedent’s other children.¹⁰² One commentator, while hopeful, has turned out to be wrong: “The concern that posthumous reproduction complicates the administration of the decedent’s estate rests on an illusion” that these children can later inherit.¹⁰³

III. CASE LAW CONFUSION

By leaving the regulation of this area to the individual states rather than having a uniform national policy, states run the risk of considerable confusion in estate planning. Most jurisdictions have not dealt with the issue of postmortem conception and inheritance, at least in reported cases, but a few have in recent

94. Janet Berry, Essay, *Life After Death: Preservation of the Immortal Seed*, 72 TUL. L. REV. 231, 252 (1997).

95. See Burkall, *supra* note 42, at 905; Shapo, *supra* note 47, at 1217; and Steeb, *supra* note 86, at 161. Cf. Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 995 (1996) (proposing that a child born within two years and 300 days of the decedent’s death would inherit).

96. Kerekes, *supra* note 93, at 248.

97. Sutton, *supra* note 14, at 928.

98. Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefit for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 296–97 (1999).

99. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 71 (6th ed.) (2000) (stating that “[s]tudies indicate that the large majority of people die intestate, forsaking wills and legal advice”). A 2000 survey by the American Association of Retired Persons (“AARP”), *Where There Is a Will . . . Legal Documents Among the 50+ Population: Findings from an AARP Survey*, concluded that, while 60% of adults fifty and older reported having a will, the percentage having a will increases by age, with only 44% of those ages fifty to fifty-four having a will. The survey is available at <http://research.aarp.org/econ/will.html>.

100. Garside, *supra* note 10, at 731.

101. Chester, *supra* note 95, at 995; Shah, *supra* note 93, at 569–70.

102. Shapo, *supra* note 47, at 1217. Thus, the PMC child would share in whatever testamentary gift the other children received, or would take as an omitted child, or would take in intestacy.

103. Kermit Roosevelt III, *The Newest Property: Reproduction Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 137 (1998).

years. Four cases have addressed whether a PMC child is an “heir” under state law and thus entitled to Social Security benefits as a dependent of a deceased wage earner pursuant to 42 U.S.C. Section 402(d) of the Social Security Act.

In 1994, in *Hart v. Shalala*,¹⁰⁴ the federal district court for the Eastern District of Louisiana was asked to decide if Judith Hart, conceived three months after her father’s death using his frozen sperm, was entitled to inherit in intestacy under Louisiana law.¹⁰⁵ A previous administrative proceeding found that she was not an heir under Louisiana law, which required the heir to exist at the time of the decedent’s death.¹⁰⁶ The Social Security Administration settled the case and awarded survivorship benefits.¹⁰⁷ Two reported cases, *In Re Estate of Kolacy*¹⁰⁸ and *Woodward v. Commissioner of Social Security*,¹⁰⁹ concluded that the PMC children were entitled to inherit in intestacy under their states’ laws, and thus could be awarded survivorship benefits. In the New Jersey case, *Kolacy*, twins were born eighteen months after their father’s death, using sperm he had frozen after his diagnosis of leukemia. The court ruled that the twins were entitled to inherit in intestacy because of the state’s general intent to enable children to take property from their parents and the clear and convincing evidence that the decedent was the twins’ biological father.¹¹⁰ The court found that such children should routinely be found to inherit, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.¹¹¹

In *Woodward*, the Supreme Judicial Court of Massachusetts ruled in January 2002 that under Massachusetts law, a child resulting from posthumous reproduction can inherit as “issue” in intestacy if the surviving parent demonstrates a genetic relationship between the child and the decedent, and the decedent affirmatively consented to posthumous conception and to support any resulting child.¹¹² Massachusetts law states that posthumous children shall be considered as living at the death of their parent.¹¹³ In reaching the conclusion that PMC children should inherit in some circumstances, the court weighed three powerful state interests: the best interests of the children, the reproductive rights of the genetic parent, and the state’s interest in orderly administration of estates.¹¹⁴

104. *Hart v. Shalala*, No. 94-3944 (E.D.La. 1994); see Garside, *supra* note 10.

105. Chester, *supra* note 95, at 988. If Judith Hart was entitled to inherit in intestacy under Louisiana law, she would be eligible to receive Social Security benefits as a child of a deceased wage earner.

106. Due to the efforts of Judith’s mother, Nancy Hart, the law has since been changed to allow a PMC child to inherit. Tamar Lewin, *The Nation: Taking After Father: A Frozen Sperm Riddle*, N.Y. TIMES, Jan. 13, 2002, § 4, at 3.

107. *Benefits Awarded to In-Vitro Child*, NAT’L L.J., Mar. 25, 1996, at A8.

108. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

109. 760 N.E. 2d 257 (Mass. 2002).

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

111. *Id.*

112. *Woodward*, 760 N.E.2d at 259.

113. MASS. GEN. LAWS ch. 190, § 8 (1990).

114. *Woodward*, 760 N.E.2d at 259.

Most recently, in an Arizona case, the U.S. District Court was asked to decide if two children conceived by in vitro fertilization more than ten months after the decedent's death were entitled to inherit from his estate under Arizona state law, and thus eligible to receive child's survivor benefits under the Social Security Act.¹¹⁵ The court noted that Arizona's intestate succession statutes provide for an after-born heir, but require that the child must be in gestation at the time of decedent's death.¹¹⁶ Because the children were conceived long after the decedent's death, they were not entitled to inherit in intestacy and thus not eligible for Social Security benefits as his "survivors."¹¹⁷

While no reported cases have addressed the issue of whether a PMC child can inherit under the decedent's will, that scenario is the next logical step. What effect will a PMC child, or the possibility of a PMC child due to the existence of frozen sperm, have on the decedent's will?

IV. THREE FUNDAMENTAL WILLS DOCTRINES & THEIR EFFECTS ON INHERITANCE

Can the issue of inheritance under a will for a PMC child be resolved using conventional wills doctrines? One possibility is the requirement of survival in Wills law. Does "survival"—the requirement that those inheriting not predecease the testator—imply a requirement that one be living at the time of the testator's death?

A. Does "Survive" Mean "Alive"?

"The dead give to the living."¹¹⁸

The institution of inheritance, including the requirement that an heir¹¹⁹ must survive the decedent in order to inherit, is of ancient origin. Mesopotamia allowed a form of wills: a father could make a gift to his "favored son" in a sealed document that took effect at the father's death, under both the Code of Lipit-Ishtar (1934–1924 B.C.)¹²⁰ and the Laws of Hammurabi (1792–1750 B.C.).¹²¹ Mesopotamia also had the doctrines of lapse and anti-lapse: if son A predeceased his father leaving A's two sons B and C, then B and C would take their father's share of their grandfather's estate.¹²² The Greeks required survivorship in

115. Gillett-Netting v. Barnhart, 231 F.Supp. 2d 961, 970 (D. Ariz. 2002).

116. *Id.*

117. *Id.*

118. LUIGI MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY APPLIED TO LEGAL INSTITUTIONS § 514, at 771 (John Lisle trans., Augustus M. Kelley Publishers) (1968) (quoting an old German & French motto).

119. "Heirs" are those entitled by statute to receive a dead relative's property that is not disposed of by will. MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE 282 (West 1992). For convenience, however, this Article uses "heir" to mean all those inheriting property, including by will, rather than using the phrase "heirs and devisees."

120. RUSS VERSTEEG, LAW IN THE ANCIENT WORLD § 1.05, at 9 (2002).

121. *Id.* § 1.07, at 12.

122. *Id.* § 3.04, at 55–56.

intestacy, with grandsons representing their deceased fathers and taking per stirpes, not per capita.¹²³ Roman law recognized wills in The Twelve Tables¹²⁴ in 451–50 B.C.¹²⁵ When the heir designated in the will did not survive the testator, intestacy would result.¹²⁶

The requirement of survivorship is so basic and has enjoyed such a longstanding history that little has been written on why it was adopted. The reason could be elemental: if society is attempting to give away a dead person's property, why give it to another dead person? Requiring survivorship could also be pragmatic. Ancient Egypt, which allowed inheritance both by intestacy and by will, required the eldest son to make funeral arrangements for his parents; if the eldest son was unable or unwilling to do so, another child could take over the obligations, and in return receive the eldest son's greater portion of the estate.¹²⁷ In ancient Greece, the near relatives who inherited the estate also had certain duties, such as performing last rites for the deceased, following the deceased to the grave site, and, if the decedent had been murdered, seeking justice against the killer.¹²⁸ Under Roman law, an heir was traditionally liable for all the debts of the deceased even when the debts exceeded the assets of the estate.¹²⁹ Frequently a person named as heir refused the inheritance or died before the testator, and so it was common to name several "heirs (*substitui*) who would take the inheritance if those previously named refused to do so or had died."¹³⁰ In all of these ancient societies, only a person alive at the time the decedent died could carry out these responsibilities.

The notion that those inheriting had reciprocal obligations to the decedent is found in early English law as well. In his Commentaries on English Common Law, Blackstone emphasized that an heir be capable of performing duties and, therefore, it was important that those inheriting real property be alive.¹³¹ English common law had a number of mechanisms to ensure that those inheriting were alive at the time of distribution of the property, so that there would be no gaps in seisin for real property. One such mechanism was the rule of destructibility of contingent remainders. For example, suppose an estate were created "To Abelard for life, remainder to the eldest daughter of Buckingham in tail."¹³² If Abelard died

123. J. WALTER JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS* 192 (1956).

124. ALAN WATSON, *ROMAN LAW & COMPARATIVE LAW* 77 (1991).

125. *Id.* at xiii.

126. ALAN WATSON, *THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC* 176 (1971).

127. VERSTEEG, *supra* note 120, § 6.04, at 157.

128. JONES, *supra* note 123, at 194.

129. WATSON, *supra* note 124, at 79. Mesopotamia also provided that the heirs inherited the debts of the decedent. VERSTEEG, *supra* note 120, § 3.04, at 55.

130. WATSON, *supra* note 124, at 79.

131. WILLIAM BLACKSTONE, *BLACKSTONE'S COMMENTARIES ON THE LAW* 243–44 (Bernard C. Gavit ed., Wash. L. Book Co. 1941) (1802).

132. Estates could be created in tail male (for male descendants of the designated ancestor) or in tail female (for female descendants of the designated ancestor). In the case of a tail female, only a daughter, granddaughter or great granddaughter (and so on) could inherit; a son or grandson could not. Thus, if Buckingham's wife were pregnant at the time

before Buckingham's wife¹³³ had a daughter, the remainder would be void, even if Buckingham's wife, not pregnant at the time of Abelard's death, gave birth years later to a daughter.¹³⁴ If Buckingham's wife were pregnant at the time of Abelard's death, courts prevented the destruction of the contingent remainder if a daughter were born alive.¹³⁵ In this way, the common law ensured that someone would be alive and able to take the property on Abelard's death, or within nine months thereafter.

More recently, English and American commentators have abandoned the emphasis on the recipient's duties, and have instead focused on the decedent's personal autonomy and right to control both the decedent's property and the behavior of the decedent's family after death. John Locke saw inheritance as a form of control allowing decedents the power to bestow their estates on those who pleased them best.¹³⁶ Giving property to a child long dead would do nothing to change that child's behavior. Jeremy Bentham propounded more of a reliance theory of inheritance, especially for intestacy: he saw decedents as sharing their goods and property with those tied to them through kinship, marriage, or friendship.¹³⁷ Injustice would result if death took away the family's sole basis of support at the same time it took away their friend, spouse, or parent. Thus, in Bentham's view, intestacy was designed to give the family the share they were accustomed to receiving while the decedent was alive.¹³⁸ Only those surviving the decedent would need that support. Immanuel Kant defined inheritance as "a transfer of belongings and goods of someone who is dying to a survivor by the wills of both."¹³⁹ Kant asserted that it would be "absurd to think that someone who has died can still possess something after his death."¹⁴⁰ Because the heir must agree to accept the inheritance, the heir must be alive at the time of the testator's death.

From the requirement of survival we can infer a concomitant requirement that the heir must be alive at the time of the decedent's death. But there are long-standing exceptions to this rule. The ancient Romans recognized that a child might

of Abelard's death, only a daughter born alive from that pregnancy would prevent the destruction of the remainder. *Id.* at 277.

133. The term "wife" is used because only legitimate children could inherit in English common law. *Id.* at 368.

134. *Id.* at 320.

135. LEWIS SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 39 (West 2d ed. 1966). Simes calls this result "sheer judicial legislation," given that the unborn child could not possibly have seisin for the time before his or her birth. Despite criticism of the courts' attempts to limit the destructibility rule, the case of *Reeve v. Long*, 3 Lev. 408 (1694), became law, and the same rule was declared by statute for unborn persons in *inter vivos* family settlements. *Id.* at 39.

136. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 39 (C.B. Macpherson ed., 1980).

137. JEREMY BENTHAM, THE THEORY OF LEGISLATION 1081 (Richard Hildreth trans., 1975).

138. *Id.*

139. IMMANUEL KANT, METAPHYSICS OF MORALS 110 (Mary Gregor trans., 1991).

140. *Id.* at 111.

be born after his or her father's death,¹⁴¹ as did Blackstone in his Commentaries.¹⁴² This would necessitate a delay in distributing the estate, but only in cases where the widow was pregnant, and then for less than a year.¹⁴³ The common law recognized other situations where a child might be born years after the decedent's death in the case of a class gift, and thus developed the class-closing rules. These rules may hold the key to the solution for the postmortem conception child.

B. Class-Closing Rules and the PMC Child

At common law, a class could close in two ways: (1) upon the physiological or natural closing of the class, or (2) the artificial closing of the class due to the rule of convenience.¹⁴⁴ If a testator's will left his property to A's children, the class would close physiologically when A, the person who could produce the class members, died.¹⁴⁵ With the advent of assisted reproductive technology, it is now possible to have a child years after one's death, so that the natural closing of the class no longer coincides with the death of the named parent. One option, however, is to apply the first rule, and close the class of the testator's children on his death even in cases where he has left frozen sperm. This is certainly the simplest solution, but goes against some of the policies underlying the class-closing rules.

The class-closing rule commonly called the "rule of convenience" attempted to balance three conflicting concerns. First, the common law assumed that the testator, by using a class term rather than naming individual beneficiaries, intended to include all possible members of the class.¹⁴⁶ Second, the common law assumed that a testator would usually prefer that distribution be effected as soon as possible.¹⁴⁷ And the third assumption was that a testator would not want any part of the gift to lapse or fail in some other way such as by violating the Rule Against Perpetuities.¹⁴⁸ Thus, the rule of convenience provided a mechanism to distribute the devise to the class, even in instances where it was still theoretically possible for more members of the class to be born later.

141. WATSON, *supra* note 126, at 176 (noting that intestacy could result where the devisee named in the will did not survive the testator).

142. BLACKSTONE, *supra* note 131, at 352. This was fortunate for Blackstone, himself a posthumous child. *Id.* at 3.

143. *Id.* at 197-98. The heir presumptive could ask for an inspection of the widow to determine if she were pregnant. If the conclusion was that she was not pregnant, then the heir presumptive would take the inheritance, but could lose it on the birth of a child within forty weeks of the husband's death. *Id.*

144. CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 156 (3d ed. 2002).

145. *Id.*; WILLIAM M. MCGOVERN & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 397 (2d ed. 2001).

146. SIMES, *supra* note 135, at 208; *see also* Lux v. Lux, 288 A.2d 701 (R.I. 1972).

147. *See* SIMES, *supra* note 135, at 208; *see also* *In re Powell*, 1 Ch. 227, 230 (1897) (citing Vaughan Hawkins' treatise: "[T]he testator is considered to intend the objects of his bounty to be ascertained at as early a period as possible.").

148. SIMES, *supra* note 135, at 208.

The basic rule of convenience provides that the class will close whenever any member of the class is entitled to immediate possession and enjoyment of his or her share.¹⁴⁹ While this is a rule of construction and not a rule of law, and is not applied where the testator has evidenced contrary intent, the rule is "adhered to more closely than any other rule of construction."¹⁵⁰ Once the class is closed, no person can be added to the class. Thus, suppose that T's will makes a devise of \$10,000 to a class of persons, such as the children of B. If B has a child when the testator dies, the class closes and that child alone takes as devisee, even though B is alive and can have more children. However, if B has no children at the time of the testator's death, then the class does not close. "Since the testator must have known there were no class members alive at his death, it is assumed the testator intended all class members, whenever born, to share."¹⁵¹

The practical nature of the rule of convenience is apparent when comparing an immediate gift to a class (for example, \$10,000 to B's children) with a gift of a specific sum to each member of the class (for example, \$10,000 apiece to each child of C). If a gift of a "specific sum is given to each member of the class, the class closes at the death of the testator regardless of whether any members of the class are then alive."¹⁵² This allows the administrator of the estate to know how much to set aside for C's children.¹⁵³ If we allowed the estate to remain open until C's death, what amount should the administrator set aside? C might have one child, ten children, or no children. Consequently at common law the class immediately closed in the case of a gift of a specific sum, even though C might later have children.

The rule of convenience may provide the best non-legislative solution in cases where a man has died leaving a will and frozen sperm. The common law has recognized for centuries that leaving open an estate on the remote chance that a child *might* be born years or decades hence is not efficient or fair to existing

149. MCGOVERN & KURTZ, *supra* note 145, at 397; W. BARTON LEACH & JAMES K. LOGAN, *FUTURE INTEREST & ESTATE PLANNING* 364 (1961). For an early discussion of the rule of convenience, see *Thomas v. Thomas*, 51 S.W. 111 (Mo. 1899).

150. DUKEMINIER & JOHANSON, *supra* note 99, at 778.

151. *Id.* at 779.

152. *Id.* at 785.

Life looked rosy to *A* as he sat
 By the crepe-draped casket of *T*.
 Five hundred pounds to each child he begat
 Would soon make him wealthy mused he.
 So he married at once, and began procreating
 At five hundred per, he supposed;
 But you know and I know (what hardly needs stating)
 That the class had already closed.
 Mistakes of this sort are bound to arise
 When a client takes actions like these
 Without seeing his lawyer as soon as *T* dies,
 And paying the usual fees.

Id. at 786 (quoting Frank L. Dewey, reproduced in W. BARTON LEACH, *LANGDELL LYRICS OF 1938* (1938)).

153. SIMES, *supra* note 135, at 209.

beneficiaries. While the common law was willing to make an exception for nine months in the case of a widow known to be pregnant at the time of the decedent's death, in most other cases the common law insisted that the class be closed.

Applying the rule of convenience to the PMC child, we see that there are at least five possible scenarios: (1) the father's will expressly includes PMC children in its terms; (2) the will devises something to "my children" and there are children at the father's death; (3) the will devises something to "my children" but the decedent has no children at death; (4) the will is silent on children; and (5) the will devises a remainder (rather than an immediate gift) to the decedent's children. With the common law's three goals in mind, we can attempt to apply the class-closing rules to these five scenarios.

1. *The decedent's will expressly devises a gift to "my postmortem children."* Where the testator has expressly included PMC children in his will, the estate should stay open in case such children are born. The common law provided that the rule of convenience was a rule of construction, and, therefore, should not be applied where the testator has evidenced contrary intent. By expressly including "my PMC children," the testator has indicated that he does *not* want the class to close on his death. Several legal commentators have expressed the view that not only *should* these provisions be upheld but under current legal doctrine they most likely *would* be upheld.¹⁵⁴

2. *The will devises an immediate gift to "my children," and the testator (T) has children at death.* The common law would close the class, and not wait to see if children are born years later. Should we allow the rule of convenience to apply, even in a case where T has frozen sperm? Does the fact that T has frozen gametes evidence an intent to have children after death? Possibly, but in many cases, no such intent can be inferred. There are many reasons a person might decide to store genetic material that have nothing to do with postmortem reproduction. Many men use cryopreservation because of illness, or because they are getting older and fear a loss of potency, or already have fertility problems.¹⁵⁵ They may desire children, but do not necessarily want them postmortem. In some instances, the decedent has not frozen the gametes himself; rather, the sperm has been harvested after death, or when the man was in a persistent vegetative state.¹⁵⁶

154. Michelle Brenwald & Kay Redeker, *A Primer On Posthumous Conception and Related Issues of Assisted Reproduction*, 38 WASHBURN L.J. 599, 639 (1999); Shapo, *supra* note 47, at 1155; *see also* Banks, *supra* note 98, at 251; John Robertson, *Ethical and Legal Issues in Cryopreservation of Human Embryos*, 47 FERTILITY & STERILITY 371, 374-75 (1987) (advocating a policy that PMC children would inherit only when the testator specifically provided for them in his will). The Florida statute, discussed *supra* notes 57 and 62, allows the PMC child to make a claim only where the child has been provided for by the decedent's will. FLA. STAT. ANN. § 742.17 (West 1997).

155. *See* Davis, *supra* note 5; Hagstrom, *supra* note 5.

156. Kerr, *supra* note 16, at 45 (noting that forty fertility centers reported eighty-two requests for postmortem sperm retrieval); *see also* Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35, 52 (2000) (citing a Pennsylvania survey of postmortem sperm procurement); Dana A. Ohi et al., *Procreation After Death or Mental Incompetence: Medical Advance or Technology Gone Awry?* 66

Thus, if a court is construing a will that does not specifically provide for postmortem children where the decedent has frozen sperm but has not indicated that such material should be used after his death, the class should close and only the decedent's living children should inherit. In this scenario, the assumption that T intended to include all children whenever born is quite weak, and outweighed by the common law assumption that the property should be distributed as soon as possible.

3. *The will devises an immediate gift to "my children," and T has no children at death, but has cryopreserved his sperm.* In this instance, T's intent is more difficult to ascertain. As with the second scenario, the mere fact that T has frozen sperm does not necessarily mean a desire for postmortem reproduction. However, if that is not T's intent, then why the reference in T's will to his children? Perhaps the will language has been inserted in case T has children before his death. T may have been trying to have children but died before his partner became pregnant. Ordinarily, the rule of convenience would not apply here, at least where the testator has devised property to *another's* children. But what should we do where the testator has devised property to his own (currently non-existent) children? If we decide that these future children should inherit, is it fair to include these children but exclude those in scenario two? As a practical matter, courts will most likely routinely close the class and distribute the estate, unless the testator's widow or girlfriend asserts that she plans to have children using the decedent's frozen sperm.¹⁵⁷

4. *The will is silent on children.* Should a PMC child take as an omitted child? Typically, an omitted child statute provides that a child born or adopted after the execution of the testator's will is entitled to a share of the estate, absent evidence that the omission was intentional.¹⁵⁸ In many states, the intent to omit must appear in the will itself.¹⁵⁹ Many jurisdictions, however, provide that the omitted child does not take a share where the will devises all or substantially all of the estate to the parent of the omitted child.¹⁶⁰ Thus, if the decedent's will stated, "I expressly leave nothing to any child born from my frozen sperm," then that

FERTILITY & STERILITY 889 (1996) (including seven case studies of sperm retrieval requests in dead or incompetent men).

157. A proposed California statute would hold the estate open for two years if, within six months of the decedent's death, written notice is given that the decedent's genetic material was available for the purpose of posthumous conception. An amendment to CA Probate Code Section 249.7 provides that, if such notice is not given in a timely manner, the estate may be distributed, and any PMC child would be barred from making a claim. A.B. 695, 2003-04 Leg. (Cal. 2003). See discussion *supra* note 58.

158. See, e.g., CAL. PROB. CODE § 21620 (West 2003). Some states include all children whenever born, not just those born after the will. See, e.g., MASS. GEN. LAWS ch. 191, § 20 (1990); *In re Estate of Hilton*, 649 P.2d 488 (N.M. App. 1982). Some states also include the issue of a deceased child. See, e.g., MASS. GEN. LAWS ch. 191, § 20 (1990); OHIO REV. CODE ANN. § 2107.34 (West 2002); WIS. STAT. § 853.25 (2002); *In re Estate of Woodward*, 807 P.2d 262 (Okla. 1991).

159. MCGOVERN & KURTZ, *supra* note 145, at 130-34.

160. *Id.* at 132 (citing UNIF. PROB. CODE § 2-302(a)(1) and CAL. PROB. CODE § 21621(b)).

child would be excluded from a claim. Similarly, if the will left everything to the parent of the PMC child, again, that child would have no claim.

But what if the decedent's will gives all his property to his sister or to a charity or some other entity, and says nothing about children? Should we allow a PMC child to take as an omitted child? The rationale behind the omitted child statutes seems to be missing in the case of the PMC child. Omitted child statutes are generally based on the premise that failure to mention a child in the will was an oversight.¹⁶¹ If the child has not been conceived at the time of the decedent's death, is it fair to infer that the decedent "forgot" to update his will to include the child?¹⁶²

5. *The will devises a life estate to the decedent's spouse, and the remainder to the decedent's children.* At common law, the class would not close at the decedent's death, even if the decedent had children at the time, because no child was entitled to *immediate* distribution—the remainder could not be distributed to the children until the life estate was over. Thus, the class was allowed to increase until the time of distribution. Because "distribution of a class gift is postponed . . . there is commonly no inconvenience involved in permitting the class to increase until the time of distribution."¹⁶³ As long as the widow is alive, it does not hurt to "wait and see" if any more children are produced, and then divide up the remainder. In this sense, such a devise would be similar to a devise of a life estate to one's surviving spouse or children followed by a remainder to the decedent's grandchildren, where the class could easily increase or decrease as grandchildren are born or die. While the decedent's widow can upset the shares of existing children by producing more children, this is no different from many other class bequests.

By applying the rule of convenience, we have three scenarios in which the class might remain open to include PMC children: where the will expressly includes "my postmortem children"; where the will gives an immediate gift to "my children" but the testator has none; and where the will gives a life estate to someone (usually T's wife or girlfriend) with a remainder in T's children. There are, moreover, three scenarios where the class would close immediately on the testator's death and exclude any PMC children: where the will gives an immediate gift to "my children" and the testator already has children at his death; where the will gives a specific sum to each class member; or where the will expressly excludes all PMC children. One final scenario, where the will devises all T's

161. *Id.* at 130; Estate of Torregano, 352 P. 2d 505, 513 (Cal. 1960) (stating that "[s]ince its origin as a state, California has continuously protected both spouse and children (and to some extent, grandchildren) from unintentional omission from a share in testator's estate").

162. In addition to the "omitted child" statutes, some states also provide for a child omitted from the will because the decedent believed the child to be dead or was unaware of the child's birth. *See, e.g.*, CAL. PROB. CODE § 21622 (West 2003). Such a statute requires the petitioner to prove that, at the time of execution of the decedent's will or trust, the decedent failed to provide for a living child solely because of this erroneous belief, and thus would not apply to a PMC child. Estate of Della Sala, 86 Cal. Rptr. 2d 569 (1999).

163. SIMES, *supra* note 135, at 209.

property to others and is silent on children, depends on an individual state's "omitted child" law but arguably should not include the PMC child.

Would the results outlined above carry out the common law's three basic assumptions? The first assumption, that the testator wants to include all possible class members, can be accomplished by always leaving the class open, but the common law chose not to do that, usually because of the second assumption: that T would want distribution to take place as soon as possible. By closing the class in the scenario where T has children at death and has made an immediate gift to "my children," this second goal is accomplished. It is also accomplished in the case of a gift of a specific sum to each class member, in which the common law would close the class whether the testator had children or not.

That leaves us with the third common law assumption, that the gift not violate the dreaded Rule Against Perpetuities. The rule provides that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."¹⁶⁴ The rule applies to all class gifts, requiring the class to close and all conditions precedent to vest, or fail, within the period of the rule.¹⁶⁵

Under traditional common law analysis, leaving the class open to include postmortem children could be a problem. In the three scenarios in which our application of the rule would hold the class open for PMC children (express language in the will, an immediate gift "to my children" but T has no children, and the "life estate to spouse/ remainder to children" scenario), none would violate the common law rule *if* the mother of the PMC children is a life in being at T's death. We can then use T's widow or girlfriend as the measuring life; since all of T's children will be born within *her* lifetime, the rule would not be violated. But as any law student knows, the common law Rule Against Perpetuities was anything but logical and reality-based. With such rules as "the fertile octogenarian"¹⁶⁶ and "the unborn widow,"¹⁶⁷ the common law worried about any possibility, however remote, that the interests would not vest or fail within the perpetuities period. Using the common law assumptions, it is theoretically possible that a woman born after the testator's death could be the mother of his children, if she somehow got access to his frozen sperm and was able to prove paternity. Thus, in a strict common law jurisdiction, gifts to PMC children would always fail, since the class cannot be certain to close within a life in being plus twenty-one years. Even worse, under the "all or nothing" rule,¹⁶⁸ virtually *any* devise in a will to the testator's children would be void, even in cases where the testator had children alive at his death.¹⁶⁹ To avoid this drastic result, however, perhaps a traditional common law

164. JOHN CHIPMAN GRAY, *RULE AGAINST PERPETUITIES* § 201 (Roland Gray ed., 4th ed. 1942).

165. MOYNIHAN & KURTZ, *supra* note 144, at 244.

166. SIMES, *supra* note 135, at 286.

167. *Id.* at 285-86.

168. *Id.* at 289. At common law, if one class member's interest violated the Rule Against Perpetuities, the entire class gift was void, even as to class members who were in being at the time of the testator's death, and who had met all conditions precedent.

169. The common law made two exceptions to the "all or nothing" rule: first, where there was a devise of a stated amount to each member of the class, and second where

state would be willing to assume that the testator's widow or girlfriend is the only one able to have his children, and thus use her as a life in being. An unborn person attempting to have T's children using his frozen sperm would almost certainly be barred from making a claim on behalf of the unborn children by the Statute of Limitations in the jurisdiction, which typically requires claims to be made before a final order of distribution is granted.

Most American states today do not follow the common law Rule Against Perpetuities. Twenty-six states and the District of Columbia have adopted the Uniform Statutory Rule Against Perpetuities, finding an interest that violates the common law rule valid if it actually vests within ninety years of its creation.¹⁷⁰ Some states have adopted the "wait-and-see" rule, in which the interest is valid if it actually vests or fails to vest in a timely manner,¹⁷¹ while a few states have abolished the Rule Against Perpetuities entirely.¹⁷² Thus, in a majority of American jurisdictions, the Rule Against Perpetuities would not be a factor in determining at the outset whether any PMC children should inherit from the decedent.

With the Rule Against Perpetuities removed from the equation, we can still balance the common law's first two assumptions: that the testator intends to benefit all potential members of the class, and secondly that the distribution be made as soon as possible after the testator's death. In many cases, the evidence that the testator desires PMC children to inherit will be inconclusive: a reference to "children" in the testator's will, or frozen sperm with no directions on what to do with the sperm after the testator's death. The evidence of the testator's intent is so weak that it should not be sufficient to overcome the second assumption. Rather than hold the estate open for many years on the off-chance that another child will be born, the class should close and the estate be distributed.

C. *The Parol Evidence Rule and Wills*

A final Wills doctrine should also be considered here: the assumption that a will is the final expression of the testator's intent on how he wishes his estate to be distributed. Because "the best evidence of the testator's intent, the testator, is dead when the will is probated,"¹⁷³ courts have "traditionally been reluctant to allow extrinsic evidence in interpreting wills."¹⁷⁴ A request by the testator's widow or girlfriend that the estate be held open to include possible PMC children may well require the admission of considerable evidence to determine the testator's

there was a devise to a class which was valid under the Rule, but then followed by a gift over of the share of each member of the class to his children, issue, or the like. *Id.* We have already discussed the first exception, finding that the class would close immediately on the testator's death. The second exception is beyond the scope of this Article.

170. MOYNIHAN & KURTZ, *supra* note 144, at 248.

171. *Id.* at 247.

172. *Id.* at 248 (citing ALASKA STAT. § 34.27.075 (Michie 2000); IDAHO CODE § 55-1522 (Michie 1965); N.J. STAT. ANN. § 46:2F-9 (West 1999); S.D. CODIFIED LAWS § 43-5-8 (Michie 1983)).

173. MCGOVERN & KURTZ, *supra* note 145, at 241.

174. *Id.*

intent. Certain evidence would be difficult to fabricate and thus would likely be admitted: for example, whether the testator already had children when the will was executed, or whether the testator cryopreserved his sperm before his death. In Massachusetts, evidence that the decedent intended to support his PMC child is also required in order for the child to be determined his heir,¹⁷⁵ requiring still more parol evidence of the decedent's wishes and intentions. However, this type of evidence, regarding *why* the testator froze his sperm, or what he meant by the term "children" in his will, or whether he intended to support a PMC child, is precisely the kind of evidence courts are reluctant to consider.¹⁷⁶ In order to protect the right of the testator to leave his property as he wishes, such evidence, unless in the will itself, should be excluded.¹⁷⁷ Without this additional evidence, the mere fact that the testator froze his sperm does not convey much information as to his intent; in a vast number of cases, men freeze their sperm for their own use while they are alive, and we simply do not know their thinking about possible inheritance by a PMC child.¹⁷⁸ Thus, absent clear instructions in the will itself, such as a devise to "my PMC children," or similar evidence, the estate should not be held open indefinitely to include a potential child born years after the testator's death.

V. CONCLUSION

With thousands of men freezing their sperm for their own later use, the potential exists for a child to be born years after his father's death. Should these postmortem children inherit? In most American jurisdictions, neither courts nor legislatures have resolved this issue. Traditional common law rules support the conclusion that such children should not routinely inherit under their fathers' wills. The centuries-old doctrine that one must survive the decedent in order to inherit underscores our understanding that a testator typically provides for those he knows. As one court recently stated, the requirement that heirs must survive the decedent is "indicative that they must be in existence at the time of the decedent's death."¹⁷⁹ Even in cases where a testator has used a class term in order to include those born after his death, we should not rush to assume that the testator intends to include his postmortem children. In most cases, the common law assumptions that the class should close and that distribution be effected as soon as possible will trump the scant evidence that the testator might have wanted a PMC child to inherit. Finally, in order to protect the testator's right to devise his property by will, extrinsic evidence of his intentions and desires should be carefully examined. In most cases, courts should conclude that the remote possibility that a PMC child might be born should not be considered in distributing the decedent's estate.

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

176. *See MCGOVERN & KURTZ*, *supra* note 145, at 245-47.

177. *See Model Assisted Reprod. Tech. Act*, *supra* note 23, at R. 1.07 (providing that a PMC child does not inherit in the absence of a testamentary document such as a will or trust).

178. *See supra* notes 5 and 6 and accompanying text.

179. *Gillett-Netting v. Barnhart*, 231 F.Supp. 2d 961, 966 (D. Ariz. 2002).

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