2010

Family Law and Estate Law - Reproductive Technology - Use of Artificial Reproductive Technologies After the Death of a Parent

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I. INTRODUCTION

After eleven years of marriage and numerous unsuccessful attempts at becoming pregnant, Wade Jr. and Amy Finley participated in an In Vitro Fertilization and Embryo Transfer (IVF/ET) Program at the University of Arkansas for Medical Sciences (UAMS). In filling out consent forms outlining their participation in the IVF/ET Program, Wade Jr. "agreed to ‘recognize any children born after the IVF procedure as [his] legitimate offspring.” Both parents also acknowledged a clause stating:

Your embryos will remain frozen and in storage until you direct the IVF personnel otherwise. The legal status of frozen embryos is not known. Should you get a divorce or one or both of you die, the disposition of the frozen embryos might be determined in a court of law. You should consider this issue very carefully and obtain expert legal advice if necessary.

Physicians implanted two of the embryos in Amy, while they froze four other embryos for preservation. Amy miscarried both implanted embryos. One month after the embryo implantation, Wade Jr. unexpectedly died in a work-related accident; he died intestate. Approximately one year after Wade Jr.'s death, Amy had physicians thaw two of the frozen embryos and implant them in her uterus. Nine months later, she gave birth to their son, Wade III. A court subsequently denied Amy's claim for workers' compensation benefits for Wade III because it found that Wade III was not "dependant" upon his father. The Social Security Administration also denied insurance benefits for Amy and Wade III. The courts left Amy and her child without financial support from her late husband's employer or estate.

The Arkansas Supreme Court in Finley v. Astrue reached its decision regarding insurance benefits by narrowly interpreting Arkansas intestacy
These intestacy statutes require that a child who is to receive benefits from a deceased parent must have been conceived before the parent’s death. The court refused to broadly interpret the intestacy statutes, thereby excluding from coverage children like Wade III who have been posthumously conceived through IVF. At least eight states have more clearly defined the rights of children who are born from fertilized embryos that have been implanted after the death of a parent. Arkansas should follow suit and establish intestacy rights for children who came from fertilized embryos implanted after the death of a parent.

This note will first discuss in vitro fertilization and some of the reasons why couples take part in that process. It will then analyze legal problems that may arise for children born through postmortem embryo implantation. It will also look at judicial decisions to see how other states have treated inheritance issues for children conceived posthumously. The next section of this note will offer possible solutions for Arkansas courts and the state legislature to ensure that children conceived posthumously are protected and given inheritance rights from their deceased parent’s estate. Lastly, this note will conclude by asserting that children born from postmortem embryo implantation are entitled to benefits and rights from their deceased parent.

II. BACKGROUND

A. In Vitro Fertilization and Cryopreservation

As the procedures become more accessible, the use of artificial reproductive technologies is becoming more widespread. Two such procedures, in vitro fertilization and cryopreservation, when used in conjunction, can assist a couple in having a child together in the future, even after a partner has died.
In vitro fertilization (IVF) is the process by which an egg is fertilized outside the body in a controlled experimental environment before being “inserted into the womb for gestation.” Usually, before an egg is retrieved from the body, a woman takes a variety of hormones to encourage her ovaries to produce a large amount of eggs for retrieval in the IVF procedure to increase the odds of fertilization, and thus pregnancy. After the ovaries have been hyper-stimulated, eggs are retrieved from the woman’s body and then fertilized with sperm. After about forty hours of culturing, the embryos can be transferred to the uterine cavity or frozen in liquid nitrogen for transfer in a future natural cycle; this latter process is called cryopreservation. Between twenty and twenty-five percent of implanted embryos result in term pregnancies. Storing fertilized embryos for future use through cryopreservation is a significant step in IVF because not all of the embryos need to be immediately implanted upon fertilization. To increase the chances of becoming pregnant through IVF, and to decrease the likelihood of multiple births, the use of cryopreservation allows the embryo implantation process to take place over multiple natural cycles.

There are numerous reasons why a couple may choose to use these artificial reproductive technologies. A couple might utilize IVF because of infertility, because of male dysfunctions, because they are a same-sex couple who wish to have children together, or for a variety of other medical reasons. Women may elect to cryopreserve their eggs while they are at the peak of their fertility, while men may choose to cryopreserve their sperm for future use.
for later use if they are at risk for developing future fertility problems.33 Parents may cryopreserve embryos for future IVF treatments to check for possible disease, such as HIV, before implantation.34 This note will discuss another possible use of cryopreservation: to enable a wife to become pregnant by her husband after his death.

B. Inheritance Problems That May Arise When a Child Is Born Posthumously Through Assisted Reproductive Technology

In terms of inheritance, treatment of posthumously conceived children varies from state to state.35 While “children who are conceived during the lives of their parents, even if born after the death of a parent, are protected under the laws of inheritance and are considered lawful heirs,”36 posthumously conceived children must overcome several burdens to prove they are the lawful heirs of their deceased parent.37

Inheritance problems typically arise with posthumously conceived children when the deceased parent has not left a will or trust.38 A child conceived posthumously will likely be able to inherit as the decedent’s heir if the decedent expressed his or her intent to provide for future children and expressed how his or her property should be distributed.39 When a decedent’s express intent is shown through a document or an express agreement with an assisted reproduction clinic, it should be upheld.40

However, when the decedent dies intestate, the issue of inheritance rights is left to the state to determine. Arkansas will not allow a child to inherit from a deceased parent unless the child was conceived prior to the decedent’s death.41 Under current Arkansas law, children conceived posthumously are not given any rights to inherit from their deceased parent’s estate, regardless of that parent’s intent or consent.42

33. Kristine S. Knaplund, Postmortem Conception and a Father’s Last Will, 46 ARIZ. L. REV. 91, 91 (2004). Examples of such men include athletes prone to groin injuries, soldiers who risk exposure to something that may cause infertility, or cancer patients whose treatment may cause infertility.
34. KINDREGAN & MCBRIEN, supra note 27, at 85.
35. For an example, see 35 Wm. Mitchell L. Rev. 433.
36. KINDREGAN & MCBRIEN, supra note 27, at 221.
37. See infra Part II D 1.
39. Id.
40. Id. at 350–51.
42. See infra Part II C.
The receipt of Social Security benefits depends on the posthumously conceived child's inheritance status in the state in which the deceased parent was domiciled. Because state intestacy laws vary, a posthumously conceived child's entitlement to child survivor rights will depend on the state in which the child was born. When a child is denied inheritance rights through state law because he or she was not dependent on the parent at the time of the parent's death, or is otherwise deemed illegitimate, a court may automatically deny the child any sort of Social Security survivor benefits.

C. Arkansas Law on the Inheritance Rights of Posthumously Conceived Children

Because the technology is fairly new, courts have not had much opportunity to address or develop this area of law. This section reviews current Arkansas law addressing inheritance issues of posthumously conceived children, focusing primarily on the case law produced from Amy Finley's efforts to obtain inheritance and Social Security benefits for her son. This section also examines pertinent Arkansas statutory law that controls these inheritance issues.

Cryopreservation, combined with IVF, allowed Amy Finley to become pregnant nearly one year after her late husband's death. While married, Amy and Wade Jr. took part in IVF and embryo transfer fertility treatments at UAMS. Using Amy's eggs and Wade Jr.'s sperm, doctors created ten embryos for the couple. At that time, the Finleys allowed the doctors to implant two embryos into Amy, and they cryopreserved four embryos. Amy subsequently miscarried, and neither of the implanted embryos resulted in a term pregnancy. About a month and a half after the embryos were implanted, Wade Jr. unexpectedly died during the course of his work.

Nearly one year after Wade Jr.'s death, doctors thawed two of the cryopreserved embryos and implanted them in Amy's uterus; this procedure resulted in one pregnancy. Amy gave birth to their child on March 4,

44. See, e.g., Finley, 372 Ark. 103, 270 S.W.3d 849.
45. Id., at 106, 270 S.W.3d at 850–51.
46. Id. at 105, 270 S.W.3d at 850.
47. Id., 270 S.W.3d at 850.
48. Id. at 105–06, 270 S.W.3d at 850.
49. Id. at 106, 270 S.W.3d at 850.
51. Id., 288 S.W.3d at 687.
2003. After the birth of Wade III, Amy sought Wade III’s social security insurance benefits.

In reviewing this case, the Supreme Court of Arkansas had to interpret intestacy law and found that a child “created as an embryo through in vitro fertilization during his parents’ marriage, but implanted into his mother’s womb after the death of his father” is not entitled to inherit from his father under Arkansas intestacy law as a surviving child. Amy also sought to recover dependency benefits from her late husband’s employer for their child, but the Arkansas Court of Appeals held he was not entitled to them. Addressing Amy’s constitutional arguments, the United States District Court for the Eastern District of Arkansas held that Amy and her child were not deprived of equal protection by either Arkansas intestacy law, which denied her inheritance claims, or by the Social Security Act’s definition of “child,” which was based on Arkansas intestacy law.

In deciding that children born by means of artificial reproductive technology more than nine months after their father’s death are not entitled to inherit under Arkansas law, the courts relied on a narrow interpretation of Arkansas’s statutory intestacy laws. When a person dies intestate, any portion of the estate “not effectively disposed of by his or her will shall pass to his or her heirs . . .” The Arkansas Inheritance Code of 1969 declares that “[a]ny child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession.” Unless there is clear and convincing evidence showing otherwise, the husband’s consent to the artificial insemination is presumed. The Code further provides the applicable law of inheritance for posthumous descendants:

Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate . . . However, no right of inheritance shall accrue to any person other than a lineal descendant of the intestate, unless such a person has been born at the time of the intestate’s death.

52. Id., 288 S.W.3d at 687.
53. Finley, 372 Ark. at 104–05, 270 S.W.3d at 850.
54. Id. at 105, 270 S.W.3d at 850.
55. Farm Cat, Inc., 103 Ark. App. at 296, 288 S.W.3d at 689.
58. Finley, 601 F. Supp. 2d at 1106.
60. Id. § 28-9-209(c) (LEXIS Repl. 2004).
61. Id.
62. Id. § 28-9-210(a)–(b) (LEXIS Repl. 2004) (emphasis added).
As discussed above, the Arkansas Supreme Court denied Wade III any insurance benefits after narrowly interpreting the intestacy laws.

D. Other States' Laws on the Inheritance Rights of Posthumously Conceived Children

Only a handful of states have addressed whether a child conceived posthumously through artificial reproductive technology is entitled to inherit from his or her deceased parent's estate. There is a split of authority on the issue. Massachusetts, New Jersey, New York, and the Ninth Circuit Court of Appeals, applying Arizona state law, have all ruled that children conceived posthumously through the use of artificial reproductive technology may be entitled to some inheritance benefits. In addition to Arkansas, New Hampshire, Florida, and the Ninth Circuit Court of Appeals, applying California state law, have all decided that posthumously conceived children are not entitled to receive inheritance benefits from his or her deceased parent.

1. Posthumously Conceived Children Given Inheritance Rights

This section will look at decisions made by the Massachusetts Supreme Court, the Supreme Court of New Jersey, and the United States Court of Appeals for the Ninth Circuit, ruling on an appeal from the District of Arizona. All of these courts ruled that posthumously conceived children could be entitled to inheritance rights from their deceased parent.

a. Massachusetts

In 2002, the Supreme Court of Massachusetts ruled that "limited circumstances may exist . . . in which posthumously conceived children may enjoy the inheritance rights of 'issue' under [Massachusetts] intestacy law." Before a child conceived posthumously can enjoy his or her inheritance rights from the deceased parent, the surviving parent has the burden of proving the following: (1) a genetic relationship between the child and the deceased parent; (2) that the deceased parent "affirmatively consented to

63. See Infra Section II.D.1.
64. See Infra Section II.D.2.
65. See infra Section II.D.1.a.
66. See infra Section II.D.1.b.
67. See infra Section II.D.1.c.
posthumous conception”; and (3) that the deceased parent “affirmatively consented . . . to the support of any resulting child.”

In reaching this decision, the court weighed and analyzed three competing interests: “the best interests of children, the State’s interest in the orderly administration of estates, and the reproductive rights of the genetic parent.” With regard to the first interest, the court found that the legislature intended for posthumously conceived children to be given “‘the same rights and protections of the law’ as children conceived before death.” The State’s interest in an orderly administration of estates is furthered by two intestacy statute requirements: A claimant must prove a genetic relationship between the deceased parent and the posthumously conceived child and must also bring the paternity claims within one year against the intestate estate. The final interest, that of protecting the reproductive rights of the deceased parent, is furthered by requiring proof of a deceased parent’s affirmative consent to “posthumous reproduction and the support of any resulting child.” After balancing these competing state interests, the Massachusetts court held that posthumously conceived children are entitled to inherit as long as there is a genetic relationship between the decedent and the child, the decedent consented to posthumous conception, and the decedent consented to the support of any resulting child.

b. New Jersey

In 2000, the Supreme Court of New Jersey reviewed a case in which a mother, Mariantonia Kolacy, sought to have her twin daughters declared intestate heirs of their deceased father, William Kolacy. This was a case of first impression. Soon after William learned that he had leukemia, he and his wife, fearing that he may become infertile due to his cancer or its related treatments, decided to have his sperm harvested and placed in a sperm bank. William died from his leukemia about a year after being diagnosed. Nearly one year after his death, an IVF procedure was successfully completed, and the resulting embryos were placed in Ma-

69. Id. at 259.
70. Id. at 265.
71. Id. at 266; cf. MASS. GEN. LAWS ANN. ch. 209C, § 1 (West 2007) (“Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children.”).
73. Id. at 269.
74. Id. at 272.
76. Id. at 1260.
77. Id. at 1258.
78. Id.
Mariantonia's womb. Nineteen months later, Mariantonia gave birth to twin girls. Mariantonia sought to have her daughters declared heirs of William in New Jersey in order to recover Social Security benefits for them.

In its decision, the court interpreted the pertinent statutory language in accordance with the legislature's intent. At the time, the statute for posthumously born heirs read: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent." The court determined that the legislature had not foreseen the situation in which a biological, posthumously conceived child could be born after the death of his or her parent, but the legislature had a general "intent to enable children to take property from their parents and through their parents from parental relatives." The court determined that New Jersey should "grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates." Based on its statutory interpretation, the court recognized the twin daughters as the legal heirs of their father, William, under the New Jersey intestate laws.

c. Arizona

In 2004, the United States Court of Appeals for the Ninth Circuit reviewed an Arizona district court decision that held that two children conceived through IVF after their father's death were not entitled to child's insurance benefits under the Social Security Act (the "Act"). This was an issue of first impression for the circuit court. In this case, a couple had attempted to conceive a child, but the wife had fertility problems. In addition, due to cancer, the husband risked becoming sterile once he began

79. Id.
80. Id.
81. Estate of Kolacy, 753 A.2d at 1259.
82. Id. at 1261–62.
83. Id. at 1260. Similar wording is seen in Arkansas's posthumous heir statute, "Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate." Ark.Code Ann. § 28-9-210(a) (LEXIS Repl. 2004). The statute relied on in In re Estate of Kolacy was amended in 2005 to read: "An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." N.J. Stat. Ann. § 3B:5-8 (West Supp. 2010).
84. Estate of Kolacy, 753 A.2d at 1262.
85. Id.
86. Id. at 1264.
88. Id. at 596.
89. Id. at 594.
chemotherapy treatments. Consequently, before beginning these treatments, the husband deposited sperm to be cryopreserved for his wife’s future use. Before the couple was able to conceive naturally, the husband died from his cancer. About a year and a half after her husband’s death, the mother bore two children following a successful IVF procedure.

The court found that, based on the facts, it was clear that the two children were the biological children of the deceased husband. The court also pointed out that the Social Security Administration had defined the word “child” as “the natural, or biological child of the insured.” Therefore, the posthumously conceived children were to be considered children under the Act. However, in order to receive insurance benefits under the Act, the children also had to show dependency on the insured. Under Arizona law, “every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.” The Court deemed the children dependent upon their deceased father because “all legitimate children automatically are considered to have been dependent on the insured individual, absent narrow circumstances not present in this case.” Because the children in this case were legitimate, and as a result of their legitimacy under Arizona law dependent upon their deceased father who was insured under the Act, they were entitled to insurance benefits under the Act.

2. Posthumously Conceived Children Denied Inheritance Rights

This section will examine decisions made by the Supreme Court of New Hampshire, a Florida district court, and the United States Court of

90. Id. at 594.
91. Id.
92. Id.
93. Id. at 595.
95. Id. at 596.
96. Id. at 597.
97. Id. at 594 (citing ARIZ. REV. STAT. ANN. § 8-601(2007)); see 42 U.S.C. § 402(d)(1) (2006) (“Every child . . . of an individual entitled to old-age or disability insurance benefits, or of an individual who dies a fully or currently insured individual, if such child . . . (C) was dependent upon such individual . . . (ii) if such individual has died, at the time of such death . . . shall be entitled to a child’s insurance benefit . . . “). 98. See ARIZ. REV. STAT. ANN. § 8-601 (2007).
99. Gillett-Netting, 371 F.3d at 598. Narrow circumstances include instances when the parent “was not living with or contributing to the support of such child and . . . such child is neither the legitimate nor adopted child of such individual, or . . . such child had been adopted by some other individual.” 42 U.S.C. § 402(d)(3) (2006).
100. Gillett-Netting, 371 F.3d at 599.
101. See infra Section II.D.2.a.
102. See infra Section II.D.2.b.
Appeals for the Ninth Circuit, \(^\text{103}\) ruling on a case from California. Along with Arkansas, \(^\text{104}\) these courts have determined that children conceived posthumously through the use of artificial reproductive technologies are not entitled to inheritance rights from their deceased parent.

a. New Hampshire

In 2007, the Supreme Court of New Hampshire determined whether "a child conceived after her father’s death via artificial insemination [was] eligible to inherit from her father as his surviving issue under New Hampshire intestacy law."\(^\text{105}\) In 1997, after finding out he had a terminal illness, Rumzi Brian Khabbaz began banking his sperm with the hope "that his wife could conceive a child through artificial insemination."\(^\text{106}\) In addition to his desire to allow his wife access to his sperm, he "executed a consent form indicating that the sperm could be used by his wife ‘to achieve pregnancy’ and that it was his ‘desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law.’"\(^\text{107}\) After Mr. Khabbaz’s death, his wife used the banked sperm in an artificial insemination procedure to conceive a child.\(^\text{108}\) Following the birth of their child, the mother sought Social Security survivor’s benefits for her daughter.\(^\text{109}\) However, before the child could receive survivor’s benefits, she had to be eligible to inherit from her father under New Hampshire intestacy law.\(^\text{110}\)

To determine her eligibility, the court relied on the state statute that controls the estate distribution of a person who dies intestate.\(^\text{111}\) This statute states: "The part of the intestate estate not passing to the surviving spouse . . . passes as follows: (a) To the issue of the decedent equally if they are all of the same degree of kinship to the decedent . . . ."\(^\text{112}\) The court explained that, when interpreting this statute, it would apply “plain and ordinary meaning to the words used” and would “interpret legislative intent from the statute as written and [would] not consider what the legislature might have said or add language that the legislature did not see fit to include.”\(^\text{113}\) The court subsequently determined that the statute, when viewed in its entirety,

\(^{103}\) See infra Section II.D.2.c. 
\(^{104}\) See supra Part B. 
\(^{106}\) Id. 
\(^{107}\) Id. 
\(^{108}\) Id. 
\(^{109}\) Id. 
\(^{110}\) Id. 
\(^{111}\) Khabbaz, 930 A.2d at 1183. 
\(^{112}\) See N.H. REV. STAT. ANN. § 561:1 (II) (LexisNexis 2006); Khabbaz, 930 A.2d at 1183. 
\(^{113}\) Khabbaz, 930 A.2d at 1182–83.
expressed a legislative intent to allow only those persons who survive a decedent to be eligible to inherit from his or her estate.\textsuperscript{114} Thus, unless a person wishing to inherit as an heir is alive at the time of the decedent’s death, he or she will be unable to inherit.\textsuperscript{115} As a result, posthumously conceived children are not afforded inheritance rights in New Hampshire.

b. Florida

In 2005, a Florida district court addressed whether a posthumously conceived child was entitled to inherit under Florida intestacy law so that the child would be eligible to receive child’s survivor benefits under the Social Security Act.\textsuperscript{116} About a month after Michelle Stephen married her husband, Gar, he died of a heart attack.\textsuperscript{117} The day after his death, Michelle had sperm taken from Gar’s body and cryopreserved for future use.\textsuperscript{118} After many unsuccessful IVF efforts, Michelle finally became pregnant and had a son three years after her husband’s death.\textsuperscript{119} She subsequently filed for child’s survivor benefits in her son’s name.\textsuperscript{120}

In this case, Florida law controlled parentage and inheritance rights, the determination of which is essential to establish whether a child can receive Social Security survivor benefits from a deceased parent’s estate.\textsuperscript{121} Florida enacted a statute in 1993 that directs the inheritance rights of posthumously conceived children. Under Florida law, “a child conceived from the sperm of a person who died before the transfer of sperm 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.”\textsuperscript{122} Because the child in this case was not born until more than three years after his father’s death, and the father died without a will, the child was not eligible to claim against the decedent’s estate.\textsuperscript{123}

c. California

In 2009, five years after its ruling in Gillett-Netting v. Barnhart, the United States Court of Appeals for the Ninth Circuit decided a California case involving the same issue concerning the inheritance rights of a post-

\begin{footnotes}
\textsuperscript{114} Id. at 1184.
\textsuperscript{115} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 1264.
\textsuperscript{122} Stephen, 386 F. Supp. 2d at 1264 (citing Fla. STAT. ANN. § 742.17 (West 2010)).
\textsuperscript{123} Id. at 1265.
\end{footnotes}
humously conceived child. However, the governing state law in this case was quite different. After being married five years, the husband, Bruce Vernoff, died unexpectedly and the wife, Gabriela, asked a doctor to take semen from her late husband’s body. About three years following her husband’s death, the wife used her husband’s sperm in an IVF procedure, and she gave birth to their child, Brandalynn. The mother brought an action to receive child survivor benefits from the Social Security Administration for Brandalynn. In order to recover under the Social Security Act, Brandalynn had to establish that Bruce Vernoff was her parent under the relevant state family law provisions.

Under California law, a child can show dependency on a parent in the following three ways: (1) establish actual dependency at the time of the deceased’s death; (2) establish legitimacy and dependency, like in Gillett-Netting; or (3) establish a right to inherit under the California intestacy laws. In this case, the court could not declare Brandalynn dependent under any of these options.

The first option was not available because the child was not yet conceived at the time of the deceased’s death. The child also could not prove dependency under the second option because no California law supported the proposition that Bruce Vernoff was the “natural” parent of Brandalynn. Under California law, having a biological relationship with a child does not equate to being a natural father. One method of showing that a father is a natural parent in California is through the use of the statutory presumption. The presumption is that when a father and mother have been married, the father is the natural parent of any child born during the marriage or within 300 days after the marriage has ended or the decedent has died. However, because Brandalynn was born about three years after her biological father’s death, this presumption did not apply. The deceased father also could not be declared Brandalynn’s natural father under this

124. Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009); see Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).
125. Vernoff, 568 F.3d at 1105.
126. Id.
127. Id.
128. Id. at 1106.
129. Id. at 1106-07.
130. Id. at 1107.
131. Vernoff, 568 F.3d at 1109-10.
132. Id. at 1108.
133. Id. at 1109; see CAL. FAM. CODE § 7611(West Supp. 2010), invalidated by In re Jerry P., 95 Cal. App. 4th 793 (Cal. App. 2 Dist. 2002).
134. Vernoff, 568 F.3d at 1109.
second option because he did not consent to the removal or use of his sperm.  

Brandalynn also did not meet the requirements of the third option to establish dependency on the deceased-insured. This option is only satisfied if a child can show that he or she is entitled to inherit from the decedent through California intestacy laws in effect at the time of the decedent’s death. The court found that Brandalynn did not meet any of the requirements in the California Probate Code to be entitled to inherit from the Bruce Vernoff’s estate. Because Brandalynn could not prove dependency on her biological father, she was not entitled to inherit from his estate under California law.

III. ANALYSIS

Jurisdictions that deny inheritance rights to children who are conceived posthumously through the use of artificial reproductive technologies are potentially causing those children and their surviving parents several problems. However, because children conceived posthumously are no different than children conceived before the death of one of their parents, they should be treated equally in the eyes of the law. There are several ways these jurisdictions, including Arkansas, can resolve these inheritance and Social Security benefits problems in order to pave the way for posthumously conceived children to inherit from their deceased parent.

A. The State Legislature Should Address the Problem

In 1978, the first child conceived outside of a woman’s body was born. Five years after this first “test-tube baby,” the first child was born

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135. Id.
136. Id. at 1111-12.
137. Id. at 1111.
138. The court laid out the following three methods of establishing dependency under section 402(d)(3): (1) by “show[ing] actual dependency at the time of the insured’s death”; (2) by “establishing that the insured is [his or] her ‘parent’ under California law provisions and . . . therefore, deemed both legitimate and dependent”; or (3) by establishing legitimacy under section 416(h)(2) so that the child may inherit under the California intestacy laws from the insured. Vernoff, 568 F.3d at 1106-07.
139. Id. at 1110-11; see CAL. PROB. CODE §§ 6407 (West 2009) (section does not extend intestacy rights to posthumously conceived children), 6453 (West 2009) (section is inapplicable because it has not been established that the father was the “natural” father), and 249.5 (West Supp. 2010) (section is inapplicable because it was enacted after the father’s death, but it still would not give the child inheritance rights because the father did not consent to the artificial insemination procedure, nor was the conception timely).
140. Vernoff, 568 F.3d at 1111.
141. Janet L. Dolgin, Surrounding Embryos: Biology, Ideology, and Politics, 16 HEALTH
from a cryopreserved embryo. However, because Arkansas law concerning posthumously born children has not been amended since 1969, it does not include any provisions for children conceived posthumously through assisted reproductive technologies. As IVF and cryopreservation have become more commonplace, several state legislatures have begun addressing the inheritance status of children conceived posthumously. Several have modeled their intestacy laws concerning posthumously conceived children after the Uniform Parentage Act. This Act provides:

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

Other states have imposed additional requirements, beyond express consent. Some have established time restraints that dictate whether a child conceived posthumously may be able to inherit from a deceased parent’s estate. Florida requires that a posthumously conceived child be provided for in the decedent’s will in order to make a claim against the deceased parent’s estate. The Arkansas legislature should also establish time constraints for claims against a father’s estate in order to avoid additional intestate issues. Restricting claims against a father’s estate to two or three years after a father’s death would not be unduly burdensome on the surviving heirs of an estate or beneficiaries of a will.


145. See Cal. Prob. Code §§ 249.5–8 (West Supp. 2010) (child conceived and born after the death of the decedent shall be deemed to have been born in the lifetime of the decedent if the decedent expressed an intent in writing to have his or genetic material used posthumously and the child was in utero using the decedent’s genetic material within two years of decedent’s death); La. Rev. Stat. Ann. § 9:391.1 (2008) (parent must consent in writing and child must be born within three years of death of parent); Va. Code Ann. § 20-158 (2008) (deceased parent must consent in writing before embryo implantation or the embryo implantation must occur before the notice of death can reasonably be communicated to the doctor performing the implantation).

B. A Different Statutory Interpretation

When the legislature enacted the Arkansas Inheritance Code of 1969, it did not foresee the widespread use of assisted reproductive technology by couples wishing to have biological children together, let alone the possibility of posthumously conceived children. Because of this, courts should interpret the intestacy statute more broadly. Arkansas and New Jersey have nearly identical statutes, but when presented with similar cases, their courts have reached opposite results. The Arkansas Supreme Court should apply a broader interpretation of the statute, just as the New Jersey court did in In re Kolacy. In that case, the court found the general legislative intent was to grant all offspring of a decedent the legal status of an heir. That court preferred to use the general intent of the legislature because a “literal reading of statutes did not consciously purport to deal with the kind of problem before [it].”

The Finley court expressed concerns about interfering in an area where the legislature should control the issue. However, as the New Jersey court pointed out, “[s]imple justice requires [the court] to do the best [it] can with the statutory law which is presently available.” When people come into court with issues that are not currently addressed by the legislature, like inheritance rights of posthumously conceived children, “judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question.” A statutory interpretation that allows posthumously conceived children to inherit, within a reasonable amount of time and subject to the technologies of the day, results in a just outcome.

C. Judicial Decree

In the absence of written consent, when justice requires, a judge can find implied consent through the facts of a case. After being presented with all the evidence and hearing all the testimony from interested parties, a court may be able to determine “that the decedent wished to procreate after death, [so] the resulting child should be allowed to take under the decedent’s estate.”

147. See supra note 83 and accompanying text.
149. Id.
151. Id. at 1261–62.
152. Id. at 1261.
In the Finley case, such an assumption would have been reasonable. Based on all of the testimony, the court could have concluded that Wade Jr. wished to procreate, even after death. Unlike the California case, where the wife had sperm taken from her deceased husband’s body, Amy and Wade Jr. both actively participated in the creation of embryos that they planned to use in the future if their first IVF procedure did not result in a term pregnancy. Thus, even though Wade Jr.’s death was unexpected, he had still taken steps that allowed for the future use of his gametes. When the Finleys began artificial reproduction treatments and procedures at UAMS, they were doing it with the intent of producing a child. Wade Jr. even signed a consent form to recognize any children resulting from the procedure as his legitimate children. If they did not want to have any children in the future, they could have disposed of the other fertilized embryos, rather than having them cryopreserved for future use. A court could have found that Wade Jr. implicitly consented to fathering children after his death.

If intent to conceive a child can be gathered from the actions of the father before his death, courts should allow the posthumously conceived child to inherit and receive benefits from his father’s estate.

D. Define the Moment of Conception

The Finley court said it was not going to define the moment of conception in order to determine the rights of Wade III. However, a concise definition of the term “conceive” would resolve problems arising in future cases involving children born after a postmortem embryo implantation. A common definition of “conception” includes “the process of becoming pregnant involving fertilization or implantation or both.” Amy and Wade Jr. had Amy’s eggs fertilized with Wade Jr.’s sperm before Wade Jr.’s death. Applying the above definition, this moment, before Wade Jr.’s death, would qualify as the moment of conception. If Wade III was deemed to have been “conceived” before his father’s death, he would be entitled to inherit from his father’s estate in Arkansas.

IV. CONCLUSION

When a posthumously conceived child is denied inheritance rights, that child is treated differently and unfairly from a child conceived during the lives of both parents. When a couple chooses to use artificial reproductive
technologies to have a child, that child is no less of a child to the couple than one conceived naturally. It is fundamentally unfair to treat a posthumously conceived child differently by not allowing that child to enjoy inheritance rights from a deceased parent. When a posthumously conceived child is still the intended, biological child of a deceased parent, that child should receive the Social Security benefits a decedent has accrued as well as his or her respective inheritance from the decedent’s estate.

The Arkansas Legislature should clearly define the inheritance rights of posthumously conceived children. Arkansas should follow the lead of several other states and model its legislation after the Uniform Parentage Act. A signed acknowledgment, expressing the decedent’s desire that if assisted reproduction were to occur after his or her death, the decedent would be the parent of the resulting child would easily resolve this issue.

However, until the Arkansas Legislature clarifies the law on children born after the death of a parent through the means of assisted reproductive technology, courts should interpret the Arkansas Inheritance Code of 1969 more broadly, issue judicial decrees based on the intent of the decedent, or define the moment of conception to include the fertilization of a mother’s egg by the father’s sperm. These alternative solutions are all possible ways that children like Wade III could be protected under Arkansas intestacy laws and be eligible to inherit from a deceased parent’s estate. Eligibility to claim against a parent’s estate will also lead to the receipt of Social Security child’s survivor benefits.

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158. See supra note 138.

* J.D. expected May 2011, University of Arkansas at Little Rock; B.A. in Sociology, University of Arkansas, 2008. I would like to thank my Notes Editor Elizabeth Castleman for her encouragement and guidance throughout the note writing process. I would also like to thank the UALR Law Review for their dedication and diligence in reviewing my note for publication. Finally, I would like to thank my parents and all my family for their unconditional love and never-ending support.