

Note

Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities

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I. INTRODUCTION

A man is presumed to be the father of a child if he is married to the child's mother at the time of the child's birth or if the child is born within 300 days after the marriage is terminated by death.¹ The presumption of parenthood is an outgrowth of the common law rule that a child born to a widow within 280 days of her husband's death is the legal issue of the widow's husband.² This presumption is important because most people die intestate (without a will).³ While rules on intestate succession vary, the deceased's estate is typically divided among any surviving spouse and children. A death-imposed natural limit on a father's paternity characterized the outer limits of parentage possible until 1949, when a viable method for

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1. UNIF. PARENTAGE ACT § 204(a)(1)–(3) (2002), *available at* <http://www.law.upenn.edu/bll/ulc/upa/final2002.pdf>. The assumption also applies to dissolution of the marriage by annulment, declaration of invalidity, divorce, or court decree of separation. *Id.* The presumption of parenthood is rebuttable by adjudication. *Id.* § 204(b).

2. Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, the Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TR. J. 213, 214 (1996).

3. *Id.* at 225.

preserving sperm outside of the male body was discovered.⁴

This discovery made it technologically possible for a man to fertilize an ovum after his death, resulting in paternity of a child born more than 300 days after the father's death.⁵ The possibility of a child born long after a father's death, who is therefore potentially not recognized as the legal heir of the father, is significant because much of the legal interaction that is taken for granted between a child and his or her parent is based upon the law's presumption of legitimacy. Prominent among these interactions are the laws that determine how a child inherits from his or her parent, whether through testate or intestate succession.

Though the technology has existed for decades, and potential problems were recognized fairly early,⁶ issues surrounding the treatment of children of posthumous conception for inheritance purposes have become far more pressing in the past decade. Over the fifty-five year period between 1998 and 2052, Americans will engage in a wealth transfer of at least \$41 trillion through both testate and intestate succession.⁷ If the problems discussed in this article were involved in even 1/100 of 1% of this transfer, more than \$4 billion would be at issue.

This article will begin by giving a brief history of assisted reproduction technologies, allowing the reader to understand how we came to the present dilemma. It will then focus on two

4. Cindy L. Steeb, *A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes*, 48 CLEV. ST. L. REV. 137, 140 (2000).

5. See Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 91 (2004). This possibility became reality in 1977: "an Australian newspaper reported that a widow had given birth to a child using her deceased husband's cryopreserved sperm." *Id.* at 92 (citing Carolyn Sappideen, *Life After Death—Sperm Banks, Wills and Perpetuities*, 53 AUSTL. L.J. 311, 311 n.4 (1979)). While it is now possible for women to reproduce post-mortem through cyropreservation of eggs and embryos and the use of a surrogate, this technology will not be discussed in this article.

6. *Id.* at 92 (noting that in 1962, Harvard Professor W. Barton Leach predicted the challenges that births from cyropreservation of sperm would provide for the Rule against Perpetuities).

7. John J. Havens & Paul G. Schervish, *Why the \$41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Comments*, 7 J. GIFT PLAN. 11, 11 (2003). The \$41 trillion figure commonly reported in the media is the result of an assumed "real secular growth" rate of 2%. *Id.* A 3% growth rate would result in a wealth transfer of \$73 trillion and a 4% rate in a \$136 trillion transfer. *Id.* The value of household wealth had a growth rate of 3.34% (inflation adjusted) for the period of 1950-2001. *Id.* at 11-12.

areas where post-mortem conception has the potential to interact with current law:⁸ the inheritance rights of post-mortem-conception children⁹ and the potential effect of cryopreservation technology on the Rule against Perpetuities.¹⁰ Attempts have been made over the years to adapt the law to new reproductive technologies. None of them fully answered the questions posed, and all failed to keep up with changing technology.

This article will conclude that the only workable solution for dealing with post-mortem-conception children and their inheritance rights is to establish a hard cutoff for establishing paternity in those children who it can not be proven were in gestation at the time of the father's death. Any testate provisions that provide for after-born children must be "reworked" to match the testator's intent as best as possible, without violating the new rule. Any reworking must also take into account the Rule against Perpetuity's original purpose.

8. These issues are far from the only ones raised by post-mortem conception. Two of the most discussed topics not addressed in this article are the status of sperm and embryos as property and the ethical ramifications of allowing harvesting of sperm after brain death. For a discussion of the property status of sperm, see Andrea Corvalán, *Fatherhood After Death: A Legal and Ethical Analysis of Posthumous Reproduction*, 7 ALB. L.J. SCI. & TECH. 335, 338-51 (1997). Responses to the issue of harvesting sperm post-brain death have varied but there may be a growing mini-consensus that the procedure should be allowed when there is a showing of pre-mortem intent and approval by the decedent's spouse/partner. See NEW YORK HOSPITAL GUIDELINES FOR CONSIDERATION OF REQUEST FOR POST-MORTEM SPERM RETRIEVAL, <http://www.cornellurology.com/guidelines.shtml> (last visited Oct. 17, 2005) (maintaining that the wife, as next of kin, should be the only one empowered to make the decision on post-mortem sperm harvesting); see also Michele Chabin, *Israeli Parents Unable to Harvest Dead Son's Sperm, Court Decides*, J. THE JEWISH NEWS WKLY OF N. CAL., Dec. 5, 2003, available at <http://www.jewishsf.com/> (search "Israeli parents unable to harvest dead son's sperm"; then click on hyperlink to article). Britain has "actively discouraged" post-mortem harvesting since 1984. Knaplund, *supra* note 5, at 100-01. Post-mortem harvesting may be becoming more prevalent in the United States; in 1995 fertility clinics reported more than forty such requests, as many request as reported total in the fourteen previous years. *Id.* at 93-94.

9. Post-mortem-conception children refers to any situation where a child is conceived or an embryo implanted after one of the child's biological parents has died. Exceptions are anonymous donors or surrogacy arrangements in which the biological parent(s) were never intended to act as legal parent(s).

10. "[T]he rule against perpetuities is 'No 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.'" JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 302 (5th ed. 2002) (quoting JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942)).

II. BACKGROUND

A. THE TECHNOLOGY

Although it is not certain where the idea first arose that a child could be conceived other than through sexual intercourse, the recognition of such a possibility is at least 2000 years old.¹¹ The idea was first put into practice over 600 years ago as a way of gaining an edge in battle when Arab tribes tried to dilute the gene pool of enemy tribes' horses by artificially inseminating their mares with the sperm of inferior male horses.¹² While such practices may have seemed radical in the past, today it is possible, conventional, and almost commonplace to at least consider the possibility of attempting to have children without engaging in sexual intercourse.¹³

A woman was first artificially inseminated in a procedure performed by an English doctor, Dr. John Hunter, in 1770.¹⁴ The first known successful use of the procedure in the United States occurred in 1884.¹⁵ Scientists have known for some time that sperm could remain viable through cryopreservation,¹⁶ the act of storing a substance in a frozen state.¹⁷ Cryopreservation

11. Steeb, *supra* note 4, at 139. The oldest known writing that contemplates conception without intercourse is a 22 A.D. Talmudic document. *Id.* The document tells of a rabbi's discussion that a woman might become pregnant from being in bath water 'contaminated' with sperm. *Id.*

12. 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, 746 (1998); accord Steeb, *supra* note 4, at 140.

13. See Sharona Hoffman & Andrew P. Morriss, *Birth After Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 595 (2004) (stating that approximately 400,000 frozen embryos are stored in the United States). The number of frozen embryos does not include the number of gametes (eggs and sperm) that are cryogenically stored in the United States. *Id.* at 593-98.

14. Steeb, *supra* note 4, at 140. There is disagreement as to whether this procedure was actually successful. See Bailey, *supra* note 12, at 746 n.10 (acknowledging the attempt by Dr. Hunter and asserting that it was unsuccessful).

15. Bailey, *supra* note 12, at 746. The woman was a medical student, as was the sperm donor. Differing eyewitness accounts make this claim uncertain. *Id.* at 818 n.11.

16. See Steeb, *supra* note 4, at 140 ("[I]n 1866, an Italian scientist, Montegazza, discovered that sperm could survive being frozen.").

17. P.L. Matson et al., *Cryopreservation: Sperm and Embryos - Results in Question*, in ASSISTED REPRODUCTION 123 (R.W. Shaw ed., 1995).

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was unsuccessful until 1949, however, when scientists discovered that adding a small amount of glycerol before freezing greatly increased the viability rate of the sperm.¹⁸ Artificial insemination using cryopreserved sperm was first successfully achieved in Australia in 1977.¹⁹

Cryopreservation is currently the only technique by which semen may be stored for extended periods.²⁰ The freezing process destroys a number of sperm, but the survival rate is approximately 48% to 79%.²¹ The maximum length of time that sperm can remain viable is not currently known, but estimates range from twelve years²² to centuries.²³ Sperm frozen for twenty-one years has been successfully used in artificial insemination.²⁴

Cryopreservation of sperm has been used by (among others) astronauts,²⁵ soldiers,²⁶ and cancer patients receiving

Cryopreservation can be achieved through a process of freezing and vitrification (conversion of a liquid into a glass). *Id.*

18. *Id.* at 127.

19. See Knaplund, *supra* note 5, at 92 & n.8.

20. Matson et al., *supra* note 17, at 123.

21. K. Sueoka et al., *A New Strategy for the Treatment of Male Infertility Due to Severe Oligozoospermia and Azoospermia*, in *ADVANCES IN HUMAN REPRODUCTION* 366 (F.A. Moeloe, B. Affandi, & A.O. Trouson eds., 1993). The recovery rate of viable sperm from a frozen state ranges from 48% (plus or minus 6%) to 79% (plus or minus 8%), depending on the cryopreservation buffer used. *Id.* Merely adding glycerin to the solution resulted in the 48% recovery rate, while adding glycerin, egg yolk, and Pluronic F68 resulted in the 79% recovery rate. *Id.* A buffer of glycerin and egg yolk resulted in a 69% (plus or minus 11%) recovery rate. *Id.*

22. Sperm Bank Directory, Frequently Asked Questions, <http://www.spermbankdirectory.com/faq4.htm> (last visited Oct. 17, 2005).

23. Stanley W. Ashley, *Frozen Sperm May Last for Generations*, YOUR FAMILY DOCTOR, <http://www.online-ambulance.com/articles/doc/3/grp/Men/art/FrozenSperm.htm> (last visited Oct. 17, 2005); see also *Q & A: Frozen Sperm*, BBC NEWS, May 25, 2004, <http://newswww.bbc.net.uk/2/hi/health/3745775.stm> (last visited Oct. 17, 2005) (asserting that cryopreserved sperm “has no apparent sell-by date”).

24. *Baby Born from 21-Year-Old Sperm*, BBC NEWS, May 25, 2004, <http://newswww.bbc.net.uk/2/hi/health/3742319.stm> (last visited Oct. 17, 2005). The baby was born from sperm frozen by the father at age seventeen. *Id.* The father froze his sperm in anticipation of going sterile from treatment for testicular cancer. *Id.*

25. Bailey, *supra* note 12, at 746 (“Modern, widespread application of technological advances . . . probably began during the early days of the United States space program. In 1962, Mercury astronauts had their sperm frozen for future use in case exposure to cosmic radiation while in orbit rendered them sterile.”).

26. See Knaplund, *supra* note 5, at 91 n.8 (stating that soldiers deployed to the Persian Gulf frequently went to the sperm bank before leaving).

chemotherapy or radiation therapy.²⁷ Its use is rising, as the Second Gulf War has prompted a “record increase in visits by departing military men” to sperm banks.²⁸ The use of cryopreservation will most likely increase as the technology continues to lengthen the time sperm can be viably cryopreserved and tests continue to show the effectiveness of the procedure.²⁹

B. THE LAW

Prior to the Uniform Parentage Act, children born after the biological father’s death were considered to be valid issue of the father if they lived 120 hours after birth³⁰ and were born within 280 days of their father’s death.³¹ In 1973, the 280-day period was extended to 300 days in the Uniform Parentage Act,³² which also made the presumption of paternity rebuttable.³³ Following the promulgation of the Uniform Parentage Act, it became increasingly obvious that children were being born or would soon be born who would strain the limitations of the Uniform Parentage Act. In 1988, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Status of Children of Assisted Conception Act.³⁴ The purpose of the Act was to “effect the security and well being of those children born and living in our midst as a result of assisted

27. See *id.* (noting a fear among patients that the treatments will make them sterile).

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

29. In a recent study, frozen sperm was found to be as effective as fresh sperm for effective in vitro fertilization. Mayo Clinic, *Frozen, Fresh Sperm Both Effective for In Vitro Fertilization*, May 12, 2004, <http://www.mayoclinic.org/news2004-rst/2258.html>. Data from a ten-year period was collected, the data contained 1,580 cycles of fresh sperm attempts and 309 cycles using frozen sperm. *Id.* Cycles using fresh sperm produced a success rate of 51.6%, cycles using frozen sperm produced a success rate of 53.1%. *Id.*

30. UNIF. PROB. CODE § 2-108 (2006).

31. Kerekes, *supra* note 2, at 214 (stating that the 280 days is a common law court doctrine developed through the guidance of the Uniform Probate Code).

32. UNIF. PARENTAGE ACT § 4(a)(1) (1973) (amended 2002), *available at* <http://www.law.upenn.edu/bll/ulc/fnact99/1990s/upa7390.pdf>.

33. *Id.* § 4(b).

34. UNIF. STATUS OF CHILD. OF ASSISTED CONCEPTION ACT (1988).

conception.”³⁵ The Act provides that “[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.”³⁶ The justification for not considering a genetic post-mortem-conception parent a legal parent is to provide for “finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death.”³⁷

Though the desirability for finality in determining parenthood is a laudable goal, there are both moral and legal problems that arise from a firm cutoff period. Therefore, any scheme which involves such a firm cutoff period should be narrowly tailored to meet the societal goals of providing for efficient transfer of property from the deceased while minimizing any harm visited upon posthumously conceived children.

A child has the constitutional right to a determination of paternity.³⁸ This right has never been qualified to exist only for those children with living parents, nor should it. It would be illogical to consider a right belonging to Person A as dependent upon the status of Person B.

C. TESTATE AND INTESTATE SUCCESSION

It is generally agreed that provisions in a testator’s will that provide for post-mortem-conception children are valid,³⁹ subject to the Rule against Perpetuities. While this notion may be comforting, it is not as helpful as one might initially think in analyzing the inheritance rights of post-mortem-conception children. The majority of Americans die intestate.⁴⁰ Therefore,

35. *Id.* prefatory note. The act was meant to address the “status of children, their rights, security, and well being.” *Id.*

36. *Id.* § 4(b).

37. *Id.* § 4 cmt. (noting that section 4(b) was designed in response to controversy caused by the problem in Australia in the 1980s). This rule coincides with British law under the Human Fertilisation and Embryology Act of 1990. See Knaplund, *supra* note 5, at 101 (stating that the British law provides that where the sperm of a man is used after his death, the man is not to be treated as the father of a resulting child).

38. *State ex rel. Henderson v. Woods*, 865 P.2d 33, 37 (Wash. Ct. App. 1994) (citing *State v. Santos*, 702 P.2d 1179, 1181–82 (Wash. 1985)).

39. Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV 1091, 1155 (1997). The article suggests that the conveyance could be effected either through keeping open the estate, or setting up a statutory trust with the as yet unconceived child as beneficiary. *Id.*

40. Kerekes, *supra* note 2, at 225. (“[S]tudies indicate that the large

it is important to decide how to treat post-mortem-conception children whose parents died intestate.

An important case in the development of modern intestacy law is *Trimble v. Gordon*.⁴¹ In *Trimble*, a mother challenged the constitutionality of an Illinois statute that disallowed intestate succession of illegitimate children from their father.⁴² The Court held that the Illinois statute was in violation of the Fourteenth Amendment's Equal Protection Clause.⁴³ Based on *Trimble*, any distinction that is made based on the legitimacy of the child (or presumably a similar status) must be narrowly tailored.

Cases that have arisen in this area have primarily dealt with post-mortem-conception children seeking benefits from the state as survivors of their late biological father. The first case that arose was *Hart v. Chater*.⁴⁴ *Hart* arose after Nancy Hart successfully used her deceased husband's cryopreserved sperm to conceive a child.⁴⁵ Ms. Hart sought Social Security survivor's benefits for her daughter, Judith Christine Hart, as the daughter of her late husband.⁴⁶ When Ms. Hart was denied Social Security benefits for her daughter, she filed for a hearing with the Social Security Administration. Although Ms. Hart was unsuccessful the both at the trial and appellate level,⁴⁷ the Social Security Administration eventually reversed its position and decided to award survivor benefits to Judith Hart despite the previous judgments.⁴⁸

majority of people die intestate.") (quoting JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 67 (5th ed. 1995)).

41. *Trimble v. Gordon*, 430 U.S. 762 (1977).

42. *Id.* at 763.

43. *See id.* at 776.

44. (Soc. Sec. Admin. Hearing) (March 27, 1995) (Torres, A.L.J.), *cited in* Kerekes, *supra* note 2, at 232. The material on the *Hart* case is on file with Mr. Kerekes.

45. Kerekes, *supra* note 2, at 232. The sperm had been frozen in anticipation of chemotherapy for the treatment of cancer. The chemotherapy was ultimately unsuccessful, and Edward Hart died. *Id.*

46. *Id.* Nancy Hart also sought (and presumably received) survivor benefits for herself. *Id.*

47. *See id.* at 232-39. The Appeals Council found that Judith Hart could not inherit as a "child" under Louisiana state law, nor was she Edward Hart's "child" within the meaning of the Social Security Act. *Id.*

48. *Id.* at 239-40 (basing its reversal on the "significant policy issues" raised by Hart that were not contemplated when the Social Security Act originally was passed, and deciding that a resolution of those issues should involve the legislative and executive branches).

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The issue next made headlines in early 2002 with *Woodward v. Commissioner of Social Security*.⁴⁹ In *Woodward*, the court sought to answer the following question:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?⁵⁰

The court answered the above question in the affirmative but limited its application to certain circumstances.⁵¹ In order for a post-mortem-conception child to qualify as the legal child of the deceased, a two-part test must be met.⁵² First, the child must be shown to be the genetic child of the decedent.⁵³ Second, the survivor must then establish that the "decedent affirmatively consented to posthumous conception and to the support of any resulting child."⁵⁴

In reaching its decision, the Supreme Judicial Court of Massachusetts observed that the Massachusetts intestacy statute lacked an express requirement that children be alive or in existence at the time of their parents' death.⁵⁵ In the absence of an express legislative intent to require that posthumous children exist as of the date of the deceased parent's death, the court engaged in a balancing test.⁵⁶ The court weighed the "[l]egislature's overriding purpose to promote the welfare of all children,"⁵⁷ against the legislative goals of "requiring certainty of filiation between the decedent and his issue," and "establishing limitations periods for the commencement of claims against the intestate estate."⁵⁸

The Ninth Circuit Court of Appeals recently addressed the

49. 760 N.E.2d 257 (Mass. 2002).

50. 760 N.E.2d at 259. Although the question, as phrased by the court, applies only to married couples, it is doubtful any distinction between married and unmarried couples could be made. In *Trimble v. Gordon*, 430 U.S. 762 (1977), the Supreme Court held that removing children from their father's line of intestate succession based on their legitimacy status to be unconstitutional.

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

52. *See id.*

53. *Id.*

54. *Id.* (noting that even where both parts of the test are met, "time limitations may preclude commencing a claim for succession rights on behalf of a posthumously conceived child.").

55. *See id.* at 264.

56. *See id.* at 264-65.

57. *Id.* at 266.

58. *Id.*

effect of post-mortem conception on intestate succession in *Gillett-Netting v. Barnhart*.⁵⁹ Rhonda Gillett-Netting gave birth to twins from her husband's sperm on August 6, 1996, approximately eighteen months after he died.⁶⁰ Gillett-Netting sought to have her children declared as legally those of her deceased husband so that they could collect Social Security survivor's benefits. After being denied by the Social Security Administration and the trial court,⁶¹ Gillett-Netting received a favorable ruling from the appellate court.⁶²

The appellate court noted that the issue before it was a matter of first impression for any court at the federal appellate level but also mentioned the recent opinion in *Woodward*.⁶³ Although the reasoning of the appellate court was consistent with that of the *Woodward* court, the *Gillett-Netting* court added significant dicta in its opinion regarding post-mortem-conception children and intestate succession. The appellate court distinguished between legitimacy for the purposes of gaining survivors benefits and legitimacy for the purpose of inheriting under intestacy statutes.⁶⁴ If the appellate court had found the children legitimate for all purposes, they would have had a right to inherit intestate from their father despite their status as post-mortem-conception children.

In sum, *Trimble* established that allowing intestate succession based on the legitimacy status of a child is unconstitutional.⁶⁵ Soon after, *Heart* established the right of children to receive Social Security survivor benefits even if conceived after the death of a parent.⁶⁶ Though the outcome in *Heart* was the result of a Social Security Administration decision, *Woodward* made this decision the law, at least in

59. *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004).

60. *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002), *rev'd* 371 F.3d 593 (9th Cir. 2004). Mr. Netting had deposited his sperm to be frozen and stored for future use by his wife before he began treatment for cancer. 371 F.3d at 594.

61. *See* 231 F. Supp. 2d at 963-64.

62. *See Gillett-Netting*, 371 F.3d at 599.

63. *Id.* at 596 n.3.

64. *Id.* at 599 n.8 ("Because Juliet and Piers are Netting's legitimate children under Arizona state law, we need not consider whether they could be deemed dependent for another reason, such as their ability to inherit property from their deceased father under Arizona intestacy laws.").

65. *Trimble*, 430 U.S. 762.

66. *See Kerekes, supra* note 44.

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Massachusetts.⁶⁷ The position was further supported by the ninth circuit in *Gillett-Netting*.⁶⁸

D. THE EFFECT ON THE RULE AGAINST PERPETUITIES

The Rule against Perpetuities was created to prevent decedents from controlling assets from beyond the grave.⁶⁹ The rule states, “[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.”⁷⁰ Two of the most important facets of the rule are that it is a rule of logical proof⁷¹ and that an interest is not considered vested in a class as long as the class is subject to open.⁷² The rule is a rule of logical proof because it requires a possibility to be logically impossible before it will discount it (i.e., the fertile octogenarian⁷³). The second condition, the non-vesting of an interest in a class subject to open, means that as long as it is possible for a class to be added to, then an interest does not vest in that class. These two rules interact often; a testate gift to the class consisting of the children of X cannot vest until X dies.

As a rule of proof, the rule does not consider how unlikely or likely an event is to occur; so long as there exists any logical possibility, no matter how remote, of an occurrence, the rule takes it into account.⁷⁴ The most commonly given examples of scenarios that are logically possible, though extremely improbable, are the fertile octogenarian and the unborn widow.⁷⁵

67. *Woodward*, 760 N.E.2d 257 (Mass. 2002).

68. *Gillet-Netting*, 371 F.3d 593.

69. See Daphna Lewinsohn-Zamir, *The Objectivity Of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669, 1746 (2003); DUKEMINIER & KRIER, *supra* note 10, at 303.

70. DUKEMINIER & KRIER, *supra* note 10, at 302.

71. *Id.* at 303.

72. *Id.* at 311.

73. See RESTATEMENT (SECOND) OF PROP., *infra* note 75.

74. *Id.* at 303.

75. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.4 reporter’s note 7, 8 (1983). The fertile octogenarian scenario exists because the rule assumes that all people are capable of bearing children regardless of their age. *Id.* cmt. h, reporter’s note 7. Though this may have been absurd in the seventeenth century, when the rule originated, the same technology that makes post-mortem conception possible could make this scenario less absurd. A classic example of the fertile octogenarian problem played out in real life is *See v. Audley*, 1 Cox 324, 29 Eng. Rep. 1186 (Ch. 1787). The unborn widow scenario holds that the phrase “X’s widow” refers to whoever is married to X at the time of X’s death not who is married to X at the time, and that said person may as yet be unborn at the time of the reference.

Analyzing the inheritance rights of post-mortem-conception children is a problem because of the combination of the rule's two facets listed above (logical proof and open class). For centuries, a gift "to all my children" or "to the heirs of my body" was understood to capture a closed class. When a person died, the class of potential heirs would necessarily be fixed.⁷⁶ This is no longer the case today, as a third and possibly much more far reaching scenario must be considered, "the 100 year dead father."

Imagine Mr. Smith: Mr. Smith is divorced, has two children, and was recently diagnosed with cancer. Desiring to have more children in the future, Mr. Smith has his sperm cryopreserved before chemotherapy. The therapy is unsuccessful and Mr. Smith succumbs to the cancer. Mr. Smith had the foresight to draft a will, and in this will he leaves his estate to "all my children upon reaching the age of 18," with the exception of the cryogenically preserved sperm, which he leaves to his parents so that they might have more grandchildren through him. For the purposes of the Rule against Perpetuities, the validating life at this point would most likely be any of among Mr. Smith's children and his parents.⁷⁷

Five years later, as Mr. Smith's parents are on a drive with Mr. Smith's two children, they die in a car accident. Mr. Smith's parents have left everything to Mr. Smith's brother, their only remaining child. Included in "everything" is the still-unused cryopreserved sperm. Mr. Smith's brother, seeking to replace the family he lost, finds a surrogate mother to be impregnated by his brother's cryopreserved sperm. The impregnation succeeds, and a child is born. This child, biologically Mr. Smith's, will not reach the age of eighteen (the qualifying age in Mr. Smith's will) until twenty-three years after Mr. Smith's death, thus violating the Rule against Perpetuities. Due to this possibility, the entire gift to the class of his children is void, and none of Mr. Smith's children may inherit under his will.⁷⁸

76. Subject to the child in gestation exception discussed *supra* § I.

77. Generally, a validating life is any individual who can affect the vesting of the interest and whose life establishes that the interest will vest or fail within the Rule against Perpetuities period. See *DUKEMINIER & KRIER, supra* note 10, at 303-04. Either of Mr. Smith's parents, being in control of his cryopreserved sperm, would thus qualify as validating lives so long as the child's interest vested within twenty-one years of each parent's lifetime.

78. Though in this scenario it likely would not matter, as a voiding of the clause would resign his property to intestate succession, and his children would

This scenario, while improbable, highlights the potential problems caused by the interaction of the Rule against Perpetuities and advances in assisted reproductive technology. The scenario is also now technologically possible and certainly not the most far-fetched logically possible scenario that can be conjured.

Perhaps even more alarming is the possibility that a person may have had sperm cryogenically preserved and not have informed anyone of this fact before dying. This scenario is very difficult to disprove with certainty and creates the possibility of post-mortem conception in almost every death.⁷⁹ As a society, we want to avoid being in a position where we must invalidate every bequest “to my children” made since 1949.⁸⁰ An alternative rule must be developed.

III. ANALYSIS

A. HOW TO HANDLE INTESTATE SUCCESSION

The two questions presented by the intersection of succession and advances in reproductive technology can be broken down into those concerning testate succession and those concerning intestate succession. Of the two, testate succession and the effect of the Rule against Perpetuities presents the more intellectually interesting question. However, the more pressing question and the one that has given rise to actual controversies is how to handle the intestate succession status of posthumously conceived children. As previously noted, several courts have dealt with these questions; the consensus shows a strong favoring of the child’s right to inherit intestate.

most likely inherit that way.

79. Even if one could prove that a dead man’s sperm was not secretly cryopreserved during his life, we are not that far away from medical technology being able to clone the sperm cells of a dead man. Scientists have already discovered methods for freezing spermatological stem cells, raising the possibility that cells can be frozen, thawed, cloned and refrozen. *See* Bailey, *supra* note 12, at 745 (“[S]cientists at the University of Pennsylvania and the University of Texas Southwestern Medical Center recently discovered a method for freezing spermatological stem cells, thereby raising the possibility of thawing, duplicating and implanting sperm cells for a century or more.”). With these technological advances come even more radical possibilities for post-mortem parentage.

80. A possibility which Bailey suggests is the state of the law. *See id.* at 790-91 (arguing that the possibility of post-mortem-conception children voids any bequest “to my children,” as well as a bequest “to the children of my good friend Frank Jones,” in any state with the classic Rule against Perpetuities).

Statutory attempts to solve problems associated with assisted reproductive technology and succession law generally conflict with court decisions. While case-law has extended the time period when a child can inherit intestate (and be eligible for Social Security survivors benefits) after his or her father dies,⁸¹ the Uniform Parentage Act⁸² provides only a 300 day period.⁸³ Similarly, the Uniform Status of Children of Assisted Conception Act does not consider a posthumously born child the legal offspring of the deceased parent.⁸⁴

In *State ex rel. Henderson v. Woods*,⁸⁵ the court used definitive language in establishing the constitutional right to a legal determination of parentage.⁸⁶ While such a right has yet to be invoked in any case involving a posthumously conceived child,⁸⁷ there is little reason to believe that courts would limit this right to children whose parents are alive at their conception or birth. Similarly, while no court has held that treating pretermitted children⁸⁸ and posthumously conceived children differently for the purposes of determining intestate succession violates the equal protection clause,⁸⁹ such a conclusion might flow from the reasoning set forth in *Trimble*.⁹⁰

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

82. See UNIF. PARENTAGE ACT § 4(a) (2002).

83. An important change that must be made to any statute/court opinion or statutory scheme dealing with this issue is that the time period should be changed from one concerning the date of birth, to one concerning the date of conception. In *Gillett-Netting v. Barnhart*, the plaintiff gave birth to her deceased husband's child ten and one-half months after his death. 371 F. 2d 593 (9th Cir. 2004). Assuming thirty days per month, the birth occurred 315 days after the husband's death, missing the assumed validity period of the Uniform Parentage Act by only fifteen days; had the baby been born two weeks early, there may have been no controversy. Creating a situation where there is incentive to try and induce early delivery serves the best interests of no one.

84. See UNIF. STATUS OF CHILD. OF ASSISTED CONCEPTION ACT § 4(b) (1988).

85. 865 P.2d 33 (Wash. Ct. App. 1994).

86. "The child has a constitutionally protected interest in an accurate determination of paternity." *Id.* at 37.

87. Kerekes, *supra* note 2, at 226.

88. Pretermitted children are those alive at the time of a parent's death.

89. Kerekes, *supra* note 2, at 226.

90. *Trimble v. Gordon*, 430 U.S. 762 (1977). In *Trimble*, the Court concluded that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as an unjust - way of deterring the parent." 430 U.S. at 769-70.

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It does not make sense to argue that illegitimate children have a right to inherit under intestate succession⁹¹ but that posthumously conceived children do not. While it is possible, and perhaps even likely, that the father of an illegitimate child never intended to have that child, there is little reason for a man to have stored sperm (thereby giving rise to the possibility of posthumous conception) unless he intended it to be used to conceive his biological heir.

Two different issues are involved in these situations, and I suggest a two-pronged analysis. Of the three major cases that have dealt with succession rights of posthumously conceived children,⁹² all have dealt with rights to receive Social Security survivor's benefits. None of the three cases discussed whether a child conceived by post-mortem conception can inherit from a father intestate.

Where Social Security benefits are concerned, any child born to the man's wife or partner should qualify for survivors benefits. This reasoning follows from the ruling in *Gillett-Netting*,⁹³ merely extending the time beyond the eighteen-month period that was at issue in that case. Unlike intestate inheritance from the estate of the deceased, survivor's benefits come from the government; hence, there is no adversarial interest on behalf of others who are in line to inherit from the estate.

Where problems arise concerning intestate succession of an estate,⁹⁴ leaving the estate open for the remainder of the life of the decedent's spouse or partner is inefficient. This could force others who have the possibility of inheriting through intestate succession to wait for a prolonged period. A time period should be defined under which the spouse or partner can bear the child of the decedent and have it be considered as the decedent's heir for intestate succession. Rather than attempting to define a time period, I will focus on setting out guidelines for how such a period should be selected.

A reasonable period for mourning should be allowed and

91. *See id.* at 770-71.

92. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002), *Hart v. Charter* (Soc. Sec. Admin. Hearing) (March 27, 1995) (Torres, A.L.J.), and *Gillett-Netting v. Barnhart*, 371 F. 3d 593 (9th Cir. 2004). *See supra* § II.B.

93. *Hart* was settled out of court during the appeals process. *See Girl to Get Benefits in Death of Father Before Conception*, N.Y. TIMES, March 12, 1996, at A13.

94. Such a problem would arise in the case of an unmarried couple in a state where in the absence of surviving issue, the intestate estate goes to the parents or siblings of the decedent.

should be determined by an appropriate body which would include both legal and mental health experts. There would then be a reasonable period for the spouse or partner to attempt to become pregnant using the decedent's cryopreserved sperm. This period would take into account current success rates and provide for multiple attempts if necessary.⁹⁵ By utilizing such a method of determining rights of intestate succession, a valid attempt is made to allow the spouse or partner to fulfill the wishes of the decedent to have a child (though he may not have contemplated that it would be posthumous), while acknowledging the interests of other parties in a speedy and absolute settling of the estate.

B. CHANGE THE RULE AGAINST PERPETUITIES?

The problems associated with the Rule against Perpetuities only present themselves in the case of testate succession because there is no creation of an interest without a will. In analyzing the treatment of posthumously conceived children, the following normative judgments are made:

It is necessary that all posthumously conceived children born to the decedent's spouse or partner be treated the same unless the decedent specifically provided for differentiation.

It is necessary that all posthumously conceived children contemplated by the decedent be treated the same, unless the decedent explicitly provided for differentiation.

It is preferable, but not necessary, that posthumously conceived children be treated the same as children alive/conceived at the time of the father's death.⁹⁶

These judgments help to ensure that children are not placed into different, disadvantageous legal situations due to factors beyond their control. To do otherwise would jeopardize a posthumously conceived child's "constitutionally protected interest in an accurate determination of paternity."⁹⁷

95. The time period presumably would vary as technology progresses and in vitro attempts attain a higher success rate.

96. The first and second judgments ensure that a scheme will not be subject to scrutiny under the Equal Protection Clause for granting children substantially different legal rights based solely on birth order. While it would be preferable from a normative point of view to treat posthumously-conceived children and pretermission children the same, no court has held this necessary as a matter of law.

97. Kerekes, *supra* note 2, at 226 (citing *State ex rel. Henderson v. Woods*,

Many suggestions have been made regarding the proper way to modify or eliminate the Rule against Perpetuities, either entirely or insofar as it affects the post-mortem conception issue. Some of the more provocative suggestions are discussed below. When viewed in light of the above mentioned criteria, all of these plans are unsatisfactory because they either treat posthumously conceived children differently for purposes of testate succession or treat posthumously conceived children contemplated by the decedent differently, or they make a distinction between posthumously conceived children and pretermitted children when there is no offsetting gain in ease of applicability. Those proposals which attempt to minimize or eliminate instances where they break from the above criteria do so by enacting a scheme which violates the constitutional boundaries established in previous court rulings.⁹⁸

i. Changes Already in Place

Some commentators have suggested that the problem of post-mortem children and the Rule against Perpetuities can be solved through modifications of the rule.⁹⁹ In fact, many states have already adopted modifications of the Rule against Perpetuities.¹⁰⁰ The three main variations being implemented are the *cy pres* doctrine and two versions of the wait-and-see rule: the common law period and the ninety-year period.¹⁰¹

865 P.2d 33, 37 (Wash. Ct. App. 1994)).

98. The two most important court rulings that the suggested plans risk violating are *Henderson*, 865 P.2d 33 (1994) and *Trimble v. Gordon*, 430 U.S. 726 (1997). The *Henderson* court found a constitutionally protected right to a determination of parenthood. 865 P.2d at 37. In *Trimble*, the Court found unequal treatment of children based on legitimacy in determination of intestate succession rights to be a violation of the Equal Protection Clause. 430 U.S. at 762. The important characteristic of these decisions is that they were both based on constitutional rights, so a scenario presented which violates either of these holdings could not be gotten around with mere legislative action.

99. See, e.g., Steeb, *supra* note 4, at 160 (discussing the Uniform Probate Code's determination concerning after born children, as well as the perspectives of the *cy pres* doctrine and the wait-and-see doctrine).

100. See DUKEMINIER & KRIER, *supra* note 10, at 327-28 (noting that six states have adopted a "wait-and-see for the Common Law Perpetuities Period" approach, and that twenty-six states have at some point adopted the Uniform Statutory Rule against Perpetuities).

101. The ninety-year wait-and-see rule was adopted under the Uniform Statutory Rule Against Perpetuities (USRAP) in 1974. See UNIF. PROB. CODE § 2-901(a)(1) (2006) (canonizing the ninety-year wait-and-see rule). USRAP also superseded the wait-and-see common law rule during the same year. See *id.* § 2-906. Under USRAP, a bequest is deemed valid if it complies with either variant of the wait-and-see rule. DUKEMINIER & KRIER, *supra* note 10, at 326.

However, none of the modifications, in and of themselves, will save a testamentary disposition “to all my children” from the voiding clause of the Rule against Perpetuities.

The wait-and-see approach was first advocated by Harvard Law School Professor W. Barton Leach.¹⁰² Under a wait-and-see approach, an interest is not voided at the time of creation merely because it might violate the Rule against Perpetuities. Instead, an appropriate time period is allowed to see if an actual violation occurs.¹⁰³ An appropriate time period can be whatever is decided upon by the legislature, but the two most common approaches are the common law period, and the ninety-year period included in the Uniform Statutory Rule against Perpetuities.¹⁰⁴

The *cy pres* doctrine “reforms a document to make the bequests conform to the Rule against Perpetuities if the testator’s intent can be protected.”¹⁰⁵ Such a method would be ineffective in constructing an adequate situation where post-mortem-conception children are concerned because of the myriad of logical possibilities that can occur. New assisted reproductive technologies greatly increase the complexity of the *cy pres* analysis for a court because they give rise to a much broader range of scenarios that will violate the Rule against Perpetuities.¹⁰⁶

Neither the common law wait-and-see approach, nor the ninety-year wait-and-see approach will be sufficient to fix the problem. The common law wait-and-see approach fails, for example, in a case where a child was born twenty-one years after the death of his father.¹⁰⁷

102. See DUKEMINIER & KRIER, *supra* note 10, at 326-27.

103. *Id.* at 327.

104. The wait-and-see common law rule only invalidates a bequest when the interest neither vests nor fails within a life in being plus twenty-one years. As such, this approach considers actual events, and not logically possible events, when applying the Rule against Perpetuities. See *id.* at 327. The ninety-year wait-and-see rule simply requires that an interest vest within ninety years of the testator’s death, thus eliminating the need for validating lives and minimizing the impact of improbable but possible deaths. See *id.* at 327-28.

105. Steeb, *supra* note 4, at 160.

106. See Hoffman & Morriss, *supra* note 13, at 611-12. By increasing the constraints on what a court can do, the courts will become more limited in their ability to satisfy the donor’s intent while making sure that the modification does not violate the Rule against Perpetuities.

107. See *Baby Born from 21-Year-Old Sperm*, *supra* note 24.

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While a real-world situation that would violate the ninety-year wait-and-see rule is undoubtedly rare, it is logically and technologically possible.¹⁰⁸ A ninety-year wait-and-see rule presents a problem by putting the burden on those waiting to inherit to disprove a possibility of post-mortem conception during those ninety years. It would be almost impossible to prove the non-existence of cryopreserved sperm, leading to situations where every gift “to my children” is in limbo for ninety years following a man’s death.

ii. The “Rule of Convenience”

The “rule of convenience”, created by Professor Barton Leach¹⁰⁹ and outlined by Professor Kristine Knaplund closes a class as soon as the interest vests in at least one member of the class.¹¹⁰ The rule of convenience is supposed to balance three conflicting concerns of the common law Rule against Perpetuities: the presumption that the testator intended to include all members of a class, the presumption that a testator would prefer speedy dissolution of his or her estate, and the presumption that a testator would want his or her gift to survive the Rule against Perpetuities.¹¹¹ Knaplund outlines five scenarios where the rule of convenience would come into play.

Two of Knaplund’s scenarios are particularly troubling, both in light of morality and the current state of the law.¹¹² The first troubling scenario involves situations where “the will devises something ‘to my children’ and there are children at the father’s death.”¹¹³ Under the “rule of convenience,” the class of children who would inherit is then closed at the father’s death. While this allows a definitive answer regarding who has a right to inherit, it cuts off all after-born heirs. Some may argue that this is an unacceptable solution because it cuts off all after-born heirs when there is no evidence of the decedent’s intent to do so. There is also an argument to be made that because the father’s will included a class rather than naming specific individuals, he

108. See Ashley, *supra* note 23.

109. See Hoffman & Morriss, *supra* note 13, at 614.

110. See Knaplund, *supra* note 5, at 108.

111. *Id.*

112. The other three scenarios include: the father’s will expressly includes post-mortem children in its terms, the will is silent on children, and the will devises a remainder to the decedent’s children. *Id.* at 110. These scenarios would necessitate the change envisioned by the rule of convenience, but would not lead to objectionable situations involving posthumously conceived children.

113. *Id.*

intended to include all members of the class and not just the individual members of the class of which he knew.¹¹⁴ Furthermore, such a distinction between heirs based on time of birth could give rise to constitutional equal protection claims from the posthumously conceived child.¹¹⁵ A court is thus forced to differentiate between illegitimate children alive at the time of the father's death and posthumously conceived children. Despite these weaknesses, this solution is acceptable and necessary.

The second troubling scenario, outlined by Knaplund, is one in which the father dies, leaves a bequest "to all my children," has no children at the time of his death, but his cryopreserved sperm is later used to conceive a child.¹¹⁶ In this case, the rule of convenience would close the class of the father's children at the birth of the first posthumously conceived child. This child would then inherit the entire bequeathment, and any other posthumously conceived children would not be members of the class, thus inheriting nothing. Even though the court would likely draw a distinction between living and after-born children so as to allow this scenario, it is doubtful that it would find a distinction based solely on birth order constitutional. The rule of convenience therefore, in at least one scenario, gives rise to unsatisfactory results and must be rejected as a satisfactory answer to the problem in and of itself.

iii. Repealing the Rule Against Perpetuities

Some have argued for the complete repeal of the Rule against Perpetuities.¹¹⁷ The justification for repealing the rule is that the purpose for which it was originally invented is no longer a concern of modern society:

[L]ogic could lead one to argue that a social policy device first sculpted to prevent the aggregation of assets in the hands of several hundred noble families at a time when London, the largest city in the common law world, had less than 10,000 inhabitants, has outlived its

114. See *id.* at 108.

115. See *Trimble v. Gordon*, 430 U.S. 762 (1977) (holding that differentiating the status of children for inheritance purposes based on legitimacy was unconstitutional).

116. See Knaplund, *supra* note 5, at 109.

117. See, e.g., Keith L. Butler, *Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L. REV. 1237 (2000); G. Graham Waite, *Let's Abolish the Rule Against Perpetuities*, 21 REAL EST. L.J. 93 (1992); Joel C. Dobris, *The Death of the Rule Against Perpetuities, or The RAP Has No Friends--An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000).

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justification. While certain ownership patterns were politically and economically undesirable for a feudal sovereign, these patterns do not present a clear danger in our modern society.¹¹⁸

While repealing the rule would end the problem, a host of new problems would emerge.¹¹⁹ Professors Levin and Mulroney suggest that the rule could be replaced by a carefully constructed estate tax,¹²⁰ but it is unclear how this would provide guidance in determining the status of posthumously conceived children under a “to all my children” bequest. If we are going to set an arbitrary deadline for the child to be born following the father’s death, it is unclear why we could not do this by merely extending the Rule against Perpetuities vesting period by this same amount of time.¹²¹

iv. Case-by-Case Exclusion

Another suggestion is to exclude posthumously conceived children on a case-by-case basis. “If an interest would be invalid under the common law Rule [against Perpetuities] by including after-born persons within a class, after-borns shall be excluded from the class to the extent necessary to avoid a violation under the common law Rule.”¹²² This rule is problematic, however, because it would exclude all posthumously conceived children whose inheritance would violate the Rule against Perpetuities, even those specifically provided for (either individually or as a class) in the decedent’s will.¹²³

118. Hoffman & Morriss, *supra* note 13, at 618 (quoting Leonard Levin & Michael Mulroney, *The Rule against Perpetuities and Generation-Skipping Tax: Do We Need Both?*, 35 VILL. L. Rev. 333, 356 (1990)).

119. In addition to the problems which the rule was originally intended to solve, problems added by the possibility of posthumously conceived children would be how to craft a plan that would allow living children to take from the estate while acknowledging the possibility of future born heirs, and their right to inherit.

120. Hoffman & Morriss, *supra* note 13, at 619. The estate tax would be crafted in such a way as to make long-term control of assets “prohibitively expensive.” Hoffman & Morriss acknowledge that this is a very unlikely scenario, as the government is currently considering whether to phase out the estate tax permanently. *Id.*

121. It is important to note that setting an arbitrary deadline may give rise to the constitutional issue discussed *supra* § II – B.

122. Hoffman & Morriss, *supra* note 13, at 620 (quoting Ira Mark Bloom, *Perpetuities Refinement: There Is an Alternative*, 62 WASH. L. Rev. 23, 70 (1987)).

123. *See id.* at 621.

v. Hoffman/Morriss Proposal

Hoffman and Morriss propose including a provision in any will that does not mention posthumously conceived children, providing that “nothing in this will shall be construed to provide an inheritance for any posthumously born individuals.”¹²⁴

This adaptation of the Hoffman/Morriss proposal is problematic both because of the logistical problems with implementing it and its application to real world scenarios.¹²⁵ What if the decedent provided for all his posthumously born children, without regard to the identity of the mother? The Hoffman/Morriss proposal does not provide a way for this bequest to survive a Rule against Perpetuities problem, even though the rule would presumably honor the explicit request of the decedent. Morriss and Hoffman claim that the perpetuities problems can be solved by “saving” clauses, instructing courts to construe testate documents in ways that would not violate the Rule against Perpetuities.¹²⁶ However such a claim is short-sighted. Saving clauses will be ineffective in dealing with the possibility of posthumously conceived children born centuries after the death of the father. Morriss and Hoffman have not modified the rule’s logical possibility provisions, and no saving clause is good in perpetuity.¹²⁷

vi. Redefine a Life in Being

It has been suggested that a “life in being” for purposes of validating an interest should be redefined to include the entire time period of a male’s reproductive capacity.¹²⁸ Other possible redefinitions of a life in being are to extend the decedent’s life in being for a set time, the lifetime of the woman to whom the cryopreserved sperm was left, or the time period in which the woman to whom the cryopreserved sperm was left remains

124. *Id.* at 624. The presumption would be rebuttable. *Id.*

125. For instance, what standard of proof would be needed to rebut the presumption? Also, the decedent’s spouse/partner, the person who is most likely to know the intentions of the decedent, is not a disinterested party.

126. *Id.* at 627 (explaining that “savings’ clauses . . . instruct courts to fix problems that may arise”).

127. See DUKEMINIER & KRIER, *supra* note 10, at 312. A savings clause is used in conjunction with a trust. The savings clause is designed to “terminate the trust . . . at the expiration of specified measuring lives plus 21 years, if the trust has not previously terminated.” *Id.*

128. See Kerekes, *supra* note 2, at 242.

unmarried.¹²⁹

Redefining a life in being to include a man's reproductive capabilities may have been a viable option a decade ago, but with the recent advances in reproductive technology and the possibility raised by scientists that sperm can be cryogenically preserved for centuries,¹³⁰ this is no longer a viable option. Defining a life in being as the time period of a male's reproductive capability has the effect of bestowing immortality, and a bequest has the possibility of surviving a challenge to the Rule against Perpetuities in perpetuity.

Redefining the term life in being to include a set amount of time after the death of the father is undesirable for two reasons. First, it violates the criteria set out in the beginning of this section that all posthumously conceived children be afforded equal treatment. Second, it could place whomever the cryopreserved sperm was bequeathed to in a position where that person must make a choice between using it to conceive a child before he or she is physically or emotionally ready, and alternatively waiting and sacrificing some of the posthumous child's legal rights.

Measuring the life based on the status of the woman to whom the cryopreserved sperm has been left has some validity. However, such a modification assumes that only a bequest to the female partner of the decedent would be made or allowed. In doing so, it fails to provide for the Mr. Smith hypothetical, *supra*, where the sperm is left to a party for its eventual use by a third party who is not the decedent's wife or partner.

vii. Proposed Solution

The proposed solution involves excluding, as a bright-line rule, posthumously conceived children from a bequest "to all my children." This scenario does away with any arbitrary time periods under which a child can be conceived and considered as included in the class of the decedent's children.

There is one scenario that still gives rise to a problem, the answer to which is not clear under the above-mentioned proposal. Imagine that a husband and wife are attempting to conceive a child by artificial insemination. On his way to work, the husband is involved in a fatal accident. Unaware of this, his

129. *See id.* at 242-43. If the woman to whom the cryopreserved sperm was left remarries, she would need to file a sworn statement of intent not to use the sperm. *Id.* at 43.

130. *See Q & A: Frozen Sperm, supra* note 23.

wife proceeds to her appointment that afternoon and undergoes successful insemination. The child would, strictly speaking, be posthumously conceived. The first reaction to this problem might be to create a one-day grace period, but certainly there are situations where two or three days might pass. What about the soldier's wife whose husband is captured and she undergoes this procedure during the weeks or months when his status is unknown? It would be better to add a reasonable knowledge requirement instead of having a grace period in these situations. The spouse or partner undergoing artificial insemination must know, or should reasonably know, of the demise of her spouse or partner. While there will still be questions as to when it would be reasonable to presume knowledge, these are now questions of fact, and as such can more easily be dealt with on a case-by-case basis.

For circumstances where there is a provision in the will for posthumous children, different analyses must be used depending on the nature of the bequest. Two types of posthumous bequests are possible: those that pick out a limited class of posthumously conceived children and those made to a general class, "to my posthumously conceived children."

For those bequests that pick out a limited class of posthumously conceived children, the bequest would be allowed to stand. For instance, if a man were to leave half of his estate to "his first posthumously conceived child," half of his estate could be held in trust for said child. Even if such a child were never to be conceived, the bequest would still be valid, and the inheritance would just be held in a perpetual trust.¹³¹ Though this would treat two posthumously born children different based solely on their birth order, the decedent's will expresses an explicit wish to do so. Just as it is legally permissible to leave one's entire estate to one's firstborn child and nothing to all other children,¹³² it would be legally permissible to provide only for the first posthumously conceived child. A similar analysis is

131. If some upper end to the viability of cryogenically preserved sperm is later found, the trust would expire at the end of this viability period.

132. In the case where pretermitted children are omitted from a will, section 2-302 of the Uniform Probate Code provides a share of the estate to the omitted child unless "it appears that the omission was intentional." Steeb, *supra* note 4, at 158 (quoting UNIF. PROB. CODE § 2-302(b)(1)). In the circumstances where the first posthumously conceived child is identified as such, it is fair to surmise that this clause intentionally excluded all after-born posthumous children.

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applicable if a clause in the will were to divide a portion of the decedent's estate among "the first x posthumous children born," or "any posthumous children born within time period y ." Though these later scenarios present potential perpetuities problems, the rule can be adjusted using a combination of provisions from the modified rules already in place, while still falling within the three provisions outlined in the beginning of this section.

Any bequest "to all of my posthumously conceived children" would be invalidated. The decedent's estate would be divided as if the provision did not exist.¹³³ This solution is no worse than the treatment of other created interests which violate the Rule against Perpetuities. The benefit from this proposal is that it provides to those who are alive and are supposed to inherit a portion of the decedent's finality in their possession of the estate. It should also be noted that post-mortem-conception children who have a bequeathment to them invalidated under this rule will still be eligible for Social Security survivors benefits so long as they meet the criteria set out in § III(A)(i) *supra*.

IV. CONCLUSION

Technology has advanced at rates far outpacing other facets of our intellectual lives; this is perhaps truer than in the field of biology than anywhere else. Despite the recognition over four decades ago of the problems that would be posed by advances in reproductive technology, the legislative and executive branches of our government have not seen fit to come up with a satisfactory solution. The courts have thus been left in a position where they must interpret laws that were written without contemplation of today's technology and decide how to apply them to situations never envisioned by the drafters. More troubling for the legal community is that court decisions can quickly be made obsolete by even further advances in technology. A comprehensive scheme must be adapted to deal with the advances in reproductive technology which takes account of past court rulings and common law principles, yet remains flexible enough to deal with situations that were not contemplated by the drafters of these rulings/principles.

Many options have been put forth for how to deal with the problems posed by advancing technology. Some of the earlier

133. This is the same treatment given to normal testamentary interests that violate the Rule against Perpetuities. See *DUKEMINIER & KRIER, supra* note 10, ch. 4(E)(4).

proposed solutions fail because they did not realize the eventual possibilities that would develop, nor the widespread implementation and success of the technology. Others are unsatisfactory because they do not realize that we are not starting on a clean slate, but must make any new scheme fit the basic principles of past rulings/principles.

When it comes to testate succession, it seems best to enact clear bright-line rules that are independent of current technological practices and that rely on best matching the decedent's intent with the original purpose of the Rule against Perpetuities. By disallowing the inclusion of posthumously conceived children from inclusion in an "all my children" clause, we ensure that estates will not be indefinitely held in trust, thereby decreasing their social utility. The same socially negative effect would be possible if testate clauses picking out all posthumously conceived children were allowed. By still allowing for testators to single out particular posthumously conceived children or determinable groups of posthumously conceived children, people are given the chance to ensure that their estate is distributed in the manner they most prefer.

By setting a firm cutoff for children to inherit under intestate succession, bereaved parties are given the opportunity to fulfill the wishes of deceased loved ones, even if those wishes were not explicitly stated in a will. The harshness of this cutoff is blunted by allowing posthumously conceived children to be eligible for Social Security survivor's benefits.

The proposal set forth in this article also takes into account current technology and possible advances in future technology, thus preventing situations encountered in the past when proposed solutions were shortsighted in scope.

Finally, this proposal falls within the framework laid out by the courts for intestate succession while maximizing the rights of the posthumously conceived child, without unduly burdening others in line for intestate succession. Similarly, the proposed methods for fixing problems relating to the Rule against Perpetuities provides for equal protection of equally situated posthumously conceived children, while trying to maximize respect for the decedent's wishes without undoing the purpose for which the rule was first enacted.