



# The Issue with Issue: Rights of Posthumously Conceived Children

New reproductive technologies beget estate planning issues in areas such as Social Security benefit eligibility and inheritance rights.

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**W**ith sophisticated storage techniques for genetic material and advances in medical technology, a child can be conceived after the death of one or both of the child's genetic parents. The traditional context for the use of stored genetic material after death has generally involved sperm stored before the death of a cancer patient, who preserved it fearing infertility or death. As science continues to advance, however, the impetus for storing genetic material has expanded from those who are ill or in the military to those who have extra genetic material left after infertility treatments and those just

wishing to postpone childbirth until later in life.

As state legislatures struggle to keep pace with an area in which technology has fast outpaced the law, practitioners are confronted the question: How should posthumously conceived children (PCC) be treated for inheritance, intestacy, and other purposes?

Intestacy statutes drafted long before the new technologies could even have been contemplated are often unclear in this context. At its heart, the fundamental issue involves striking a balance between recognizing the interests of the children born of these new technologies and

the interests of existing beneficiaries in certainty and finality.

## Social Security benefits: a circuit split resolved

The reported U.S. cases dealing with the rights of after-born children generally have involved their entitlement to Social Security benefits. Until the Supreme Court determination in *Astrue v. Capato*,<sup>1</sup> there was a split among the circuit courts.<sup>2</sup> The split involved the interpretation and reconciliation of two statutory provisions regarding children's Social Security survivor benefits.

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Pursuant to Social Security Act (the Act) 42 U.S.C. section 416(e)(1), “Child” means the child or legally adopted child of an [insured] individual.” However, section 416(h)(2)(A) of the Act provides that “[i]n determining whether an applicant is the child of [an] insured individual...the

**Given the variance in state laws and the fact that this area is in flux due to rapidly advancing technologies, establishing the donor’s intent is critical.**

Commissioner of Social Security shall apply [the intestacy law of the insured individual’s domiciliary state].” Because a PCC generally easily satisfies the section 416(e)(1) definition, the circuit split involved the question of whether a PCC needs to satisfy section 416(e)(1) alone or whether the PCC must also satisfy the section 416(h)(2)(A) definition, which turns on state intestacy law.

In *Gillett-Netting v. Barnhardt*, the Ninth Circuit determined it was sufficient that a PCC qualified for benefits under section 416(e)(1).<sup>3</sup> The court held that, where parentage is not disputed, a biological child of a deceased wage earner is a natural child under subsection (e)(1) who qualifies for survivor benefits without the additional need to satisfy the terms of section 416(h)(2)(A). Following the *Gillett-Netting* case, the Social Security Administration (SSA) issued an acquiescence ruling only

for states within the Ninth Circuit.<sup>4</sup> The ruling memorialized its interpretation that the provisions of section 416(h) provide the analytical framework for determining whether a child is the insured’s child under section 416(e).<sup>5</sup>

When *Capato v. Commissioner* was decided at the circuit court level,<sup>6</sup> the Third Circuit agreed with the reasoning in the *Gillett-Netting* case that the common meaning of the word “child” in section 416(e) undeniably encompasses undisputed biological offspring, and that satisfying section 416(h) in addition to section 416(e) was not necessary. It declined to give deference to the SSA’s interpretation as contrary to Congress’s unambiguously expressed intent. Courts in the Fourth and Eighth Circuits followed the SSA interpretation and determined that a PCC was required to satisfy section 416(h)(2)(A), making qualification for benefits dependent on the intestacy law of the state in which the wage earner was domiciled.<sup>7</sup>

In *Astrue v. Capato*, the Supreme Court held that the SSA’s interpretation of determining benefit eligibility by reference to state intestacy laws, even if not the only reasonable interpretation, was a permissible one (indeed persuasive) and entitled to deference.<sup>8</sup> According

to the court, because a child who may take from a father’s estate is more likely to be dependent during the parent’s life and at his death,<sup>9</sup> reliance on state intestacy law to determine who is a “child” serves the Act’s driving objective, which is to “provide...dependent members of [a wage earner’s] family with protection against the hardship occasioned by [the] loss of [the insured’s] earnings.”<sup>10</sup> Employing eligibility to inherit under state intestacy law was, held the court, a workable substitute for burdensome case-by-case determinations as to whether a child was in fact dependent on her father’s earnings. Additionally, the court pointed out that elsewhere in the Act, other terms were defined by reference to state law.

### Estate planning contexts

While the string of cases leading up to the Supreme Court determination all involved PCC’s entitlement to Social Security benefits, the issues involved in the estate planning arena are arguably more complex. A new beneficiary in the estate planning context can profoundly affect a dispositive plan. Adding an additional recipient for Social Security benefits may not affect other recipients at all. If PCC are accord-

<sup>1</sup> *Astrue v. Capato*, 132 S. Ct. 2021 (2012).

<sup>2</sup> *Gillett-Netting v. Barnhardt*, 371 F.3d 593 (CA-9, 2004); *Beeler v. Astrue*, 651 F.3d 954 (CA-8, 2011); *Schafer v. Astrue*, 641 F.3d 49 (CA-4, 2011); *Capato*, 631 F.3d 626 (CA-3, 2011).

<sup>3</sup> Note 2 *supra*.

<sup>4</sup> SSAR 05-1(9), 70 Fed. Reg. 55656 (9/22/2005).

<sup>5</sup> 42 U.S.C. section 416(h) contains other ways an applicant can qualify as a child, including if the insured acknowledged parentage in writing, had been decreed a parent by a court, or had been ordered to pay child support; or there is satisfactory evidence that the deceased insured is the biological parent and the insured was, at the time of his death, living with the applicant or contributing to his support. None of these additional criteria apply to PCC.

<sup>6</sup> *Capato*, 631 F.3d 626 (CA-3, 2011).

<sup>7</sup> *Beeler v. Astrue*, 651 F.3d 954 (CA-8, 2011); *Schafer v. Astrue*, 641 F.3d 49 (CA-4, 2011).

<sup>8</sup> The SSA regulations provide that the agency

will apply the version of the domiciliary state’s laws in effect at the time it makes its final determination, unless doing so would render the applicant ineligible for benefits, in which case it will apply any version of that state’s law in effect from the first month for which the applicant could be entitled to benefits, whichever is most beneficial to the applicant. See 20 C.F.R. section 404.355(b)(4) and *Bosco v. Astrue*, 2013 WL 3358016 (DC N.Y., 2013).

<sup>9</sup> Citing *Mathews v. Lucas*, 427 U.S. 495 (1976).

<sup>10</sup> Citing *Califano v. Jobst*, 434 U.S. 47 (1977).

<sup>11</sup> PCC eligible to inherit under state intestacy statute: *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div., 2000) (New Jersey); *Woodward*, 760 N.E.2d 257 (Mass., 2002) (Massachusetts, under certain circumstances). PCC not eligible to inherit under state intestacy statute: *Stephen*, 386 F. Supp. 2d 1257 (DC Fla., 2005) (Florida); *Khabbaz*, 930 A.2d 1180 (N.H., 2007) (New Hampshire); *Finley v. Astrue*, 270 S.W.3d 849 (Ark., 2008) (Arkansas); *Vernoff v. Astrue*, 568 F.3d 1102 (CA-9, 2009) (Cal-

ed inheritance rights, estates would have to remain open during whatever is the permissible period for posthumous conception. A claim for Social Security benefits could potentially be made many years after the deceased wage earner's death, without the complication of delaying distributions to other beneficiaries during the waiting period. The issue of how to treat a PCC for purposes of inheritance from *relatives* of the deceased genetic parent does not arise in the Social Security context. Social Security entitlement is also limited to certain family members.

Even in the Social Security context, although the Supreme Court resolved the circuit split, it can be very difficult to determine whether a child is entitled to inherit from a deceased parent under state intestacy law. Many state legislatures have not addressed the inheritance rights of PCC. State intestacy statutes drafted long before posthumous conception was even contemplated are by definition ambiguous because they were not designed to accommodate the situations with which they are now confronted. Indeed, some courts found PCC entitled to inherit under the state intestacy laws at issue, while others have reached the opposite conclusion.<sup>11</sup>

ifornia has a PCC statute, but PCC did not satisfy PCC statute because decedent did not consent to posthumous reproduction and PCC not born within statutory timeframe. PCC was also not eligible to inherit under California intestacy laws); *Mattison*, 825 N.W.2d 566 (Mich., 2012) (Michigan); *Amen v. Astrue*, 822 N.W.2d 419 (Neb., 2012), dismissed by 2013 WL 274923 (Neb., 2013) (Nebraska); *Bosco v. Astrue*, 2013 WL 3358016 (DC N.Y., 2013) (New York); *Capato*, 532 Fed. Appx. 251 (CA-3, 2013) (Florida, remanded determination after United States Supreme Court ruling).

<sup>12</sup> *Finley v. Astrue*, 270 S.W.3d 849 (Ark., 2008).

<sup>13</sup> *Bosco v. Astrue*, 2013 WL 3358016 (DC N.Y., 2013).

<sup>14</sup> *Seaman v. Colvin*, 145 F. Supp. 3d 421 (E.D. Pa. 2015).

<sup>15</sup> *Bosco v. Astrue*, 2013 WL 3358016 (DC N.Y., 2013).

<sup>16</sup> 20 Pa.C.S. section 2104(4).

<sup>17</sup> O.R.S. Chapter 112.077(1).

### Further nuances – when is conception?

The law has traditionally accorded children conceived before but born after the death of their fathers the same rights as children born during their fathers' lifetimes. Many of the cases in the Social Security context involve children born via artificial insemination after the death of the father, with sperm stored before death. In that context, PCC are clearly conceived after the father's death. In some cases, however, there have been situations in which embryos have been fertilized and frozen *during* the father's lifetime, and implanted after death. The question in those circumstances is whether conception occurred when the embryos were fertilized, so the children are entitled to inherit as children who were conceived before but born after the death of their fathers.

That argument was rejected in cases interpreting the intestacy laws in Arkansas,<sup>12</sup> New York,<sup>13</sup> and Pennsylvania.<sup>14</sup> The Arkansas Supreme Court declined to define the term "conceived," which would involve making a determination that would implicate public policy concerns, "including, but certainly not limited to, the finality of estates." In holding that the role of the court is not to create the law but to interpret the law and give effect to the legislature's intent, the court held that the legislature did not intend for the statute to permit a child, created through in vitro fertilization and implanted after the father's death, to inherit in intestate succession. Not only did the statute fail to specifically address that scenario, it was enacted in 1969, well before that technology was developed.

Similarly, the United States District Court for the Southern District of New York noted that New York courts have almost uniformly invoked the principle that a child "en ventre sa mere,"

– i.e. in the mother's belly – at the time of the decedent's passing and subsequently born alive, is able to inherit from the decedent through intestacy. According to the district court:

...the traditional "en ventre sa mere" test...draws a rational distinction between cases where the unborn child's arc toward birth has been fully set in motion biologically and requires no further affirmative volitional acts on the part of either parent from cases where additional volitional steps must be taken for a child to be born...the concept is broad enough to encompass new reproductive procedures...while simultaneously upholding the traditional policy objective of achieving certainty and finality in the distribution of intestate property.<sup>15</sup>

The United States District Court for the Eastern District of Pennsylvania affirmed the positions taken in Arkansas and New York in ruling against plaintiffs seeking to establish that posthumous children were afterborn heirs of the respective decedents. In order to inherit via intestate succession, Pennsylvania's intestacy statute is clear that a person must have been "begotten" before the decedent's death, but the statute fails to define the term "begotten."<sup>16</sup> The court found that there was no need for it to define "begotten," since the statute in question was enacted before development of current technology. Accordingly, it could definitively be said that General Assembly did not intend to permit a child born following a frozen embryo transfer several years after the father's death to inherit under intestate succession.

Interestingly, legislation enacted in Oregon regarding posthumously conceived children specifically provides that an embryo that exists outside a person's body is not considered to be conceived until the embryo is implanted into a person's body.<sup>17</sup>

## Scant case law on inheritance rights

As courts have struggled to interpret intestacy statutes drafted well before the new technologies could even have been contemplated, a New York Surrogate faced a similar issue in interpreting the provisions of a trust document drafted well before the grantor could have formed an intent regarding treatment of PCC. *In re Martin B*<sup>18</sup> is apparently the only case thus far decided in the U.S. directly concerning the inheritance rights of PCC.

In *In re Martin B*, two PCC were born to the wife of a decedent who had stored his sperm before cancer treatment, which was unsuccessful. The father of the decedent had created trusts for the benefit of classes that included the decedent's "issue" and "descendants." The question for determination was whether the decedent's PCC qualified as members of the classes. The court held that the controlling factor was the grantor's intent as gleaned from a reading of the trust agreements. Ironically, when the trusts were created in 1969, the grantor could not have contemplated that his issue could include PCC. Nevertheless, despite absence of specific intent, the court found that the grantor's dispositive scheme was to benefit his sons and their families equally. The court referred to Restatement (Third) of Property section 14.8<sup>19</sup> that a child of assisted reproduction should be treated for class-gift purposes as a child of the person who consented to be a parent, but was prevented from doing so by death, and determined that a "sympathetic reading" of the instruments warranted the conclusion that the grantor intended all members of his bloodline to receive their share.

According to the court, "Simply put, where a governing instrument is silent, children born of this new

biotechnology with the consent of their parent are entitled to the same rights for all purposes as those of a natural child." The proceeding was, however, an uncontested application by trustees seeking the court's advice and the surviving spouse had agreed to destroy all remaining stored sperm, thereby closing the class of children. Accordingly, the holding of the case is probably limited to its specific facts, and the court in fact called for comprehensive legislation to resolve the issues raised by advances in biotechnology.

## State legislatures respond

Because state intestacy statutes were not designed to deal with the new technologies, many state legislatures have responded with legislation that specifically defines under the circumstances under which PCC will be accorded inheritance and other rights. To date, 27 states have enacted statutes dealing with those conceived posthumously<sup>20</sup> and three states have introduced legislation in 2021.<sup>21</sup>

Of the 27 states with legislation, twelve have enacted a version of the 2002 Uniform Parentage Act (UPA) with respect to PCC.<sup>22</sup> Eight states<sup>23</sup> adopted the UPA language, which provides:

If an individual who consented in a record to be a parent by assisted

reproduction dies before placement of eggs, sperm or embryos, the deceased individual is not a parent of a resulting child, unless the deceased individual consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.<sup>24</sup>

In an apparent attempt to limit the benefits of the statute to surviving spouses, the other four states that have statutes based on the 2002 UPA<sup>25</sup> refer to a "spouse," instead of an "individual":

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

The 2002 UPA did not include a time limit within which a child was required to be conceived or born after death.<sup>26</sup> The ULC released an updated UPA in 2017 that adds a time frame and the ability to prove intent to reproduce posthumously as an alternative to specific written consent.<sup>27</sup> Under the 2017 UPA, a deceased individual will be considered a parent of a PCC if that individual gave written consent to assisted reproduction by a woman who agreed to give birth if (1) either (A) the individual gave written consent to posthumous reproduction, or (B) the individual's intent to be

<sup>18</sup> *In re Martin B*, 841 N.Y.S.2d 207 (Sur. Ct., 2007).

<sup>19</sup> Section 14.8 has been subsequently updated.

<sup>20</sup> Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Minnesota, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. It is extremely unlikely that North Carolina's statute applies to PCC, although it can literally be read to do so. See *infra*.

<sup>21</sup> CT. H.B. 6321 (2021), MA. S.B. 1133 (2021) and P.A. H.B. 115 (2021).

<sup>22</sup> Oklahoma has adopted the UPA, but without Article 7, the article that addresses a child of assisted reproduction.

<sup>23</sup> Delaware, Maine, New Mexico, North Dakota, Rhode Island, Vermont, Washington, and Wyoming.

<sup>24</sup> Uniform Parentage Act (2000) section 707

(amended 2002).

<sup>25</sup> Alabama, Colorado, Texas, and Utah.

<sup>26</sup> Uniform Parentage Act (2002), ULC, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=ee7ce93f-78bf-da90-292c-39680396eb82&forceDialog=0> (December, 2002).

<sup>27</sup> Uniform Parentage Act (2017), ULC, <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=1a489a1f-ec9a-ee72-7dbc-10f6d43943b5&forceDialog=0> (July 19, 2017).

<sup>28</sup> Uniform Parentage Act (2017) section 708.

<sup>29</sup> Uniform Parentage Act (2017) section 706.

<sup>30</sup> For example, in New York, the genetic child must be in utero with 24 months or born within 33 months of the genetic parent's death. N.Y. EPTL section 4-1.3. In California, the child

a parent by posthumous reproduction is established by clear and convincing evidence *and* (2) either (A) the embryo is in utero within 36 months or (B) the child is born within 45 months of that individual's death.<sup>28</sup> The 2017 UPA also addresses what happens if the marriage of a woman who gives birth to a child conceived by assisted reproduction is terminated through divorce or dissolution, subject to legal separation, declared invalid, or annulled before the transfer of gametes or embryos to the woman. A former spouse of that woman is not a parent of the child unless that former spouse consented in a record to be a parent if assisted reproduction were to occur after divorce, dissolution, annulment, declaration of invalidity, or legal separation, and the former spouse did not withdraw consent.<sup>29</sup>

Some state statutes have always imposed time limits within which a child must be conceived or born. Those time limits typically require birth within one to four years after death.<sup>30</sup> The Uniform Probate Code (UPC), as adopted in Colorado and North Dakota, treats a child as in gestation at an individual's death if the child is in utero within 36 months or born within 45 months of death.<sup>31</sup> As noted in the UPC comments,<sup>32</sup> a time frame after death is designed to allow a

spouse or partner to grieve, decide whether to proceed with assisted reproduction, and provide a reasonable allowance for unsuccessful attempts to achieve pregnancy. It is part of the overall attempt to strike a balance between the interests of PCC and the interests of current beneficiaries in finality.<sup>33</sup>

### State-by-state determinations

Below is a description of how each state with enacted or pending legislation has dealt with the issue of posthumously conceived children (these statutes are summarized in Exhibit 1):

**Alabama.**<sup>34</sup> Alabama enacted a version of the 2002 UPA which requires a spouse's written consent that, if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child. As well as the UPA consent requirement, there is an additional requirement that the record be signed by the consenting spouse and maintained by the licensed assisting physician.

**Arkansas.**<sup>35</sup> Arkansas amended its PCC statute as of April 26, 2021. The current statute recognizes a deceased individual as a parent of a PCC provided there is (1)(a) written consent to posthumous reproduction or (b) clear and convincing evidence of intent to parent a child by posthumous reproduction *and* (2) the child is in utero within 24 months after the death of the decedent. Upon divorce, the decedent's consent to posthumous conception with his or her spouse is automatically revoked.

**California.**<sup>36</sup> California's statute provides that a child conceived and born after the death of a decedent shall be deemed to have been born during the decedent's lifetime, and after the execution of the decedent's testamentary instruments, if all of the following conditions are satisfied:

must be in utero within two years of death. Cal. Prob. Code section 249.5-6.

<sup>31</sup> Uniform Probate Code (2019) section 2-104(b).

<sup>32</sup> Comment to Uniform Probate Code (2019) section 2-120(k).

<sup>33</sup> Comment j to section 15.1 of Restatement (Third) of Property: Wills and Other Donative Transfers, provides that a child produced posthumously by assisted reproduction is treated as in being at the decedent's death, if the child was born within a reasonable time after death. The UPC timeframe of a child in utero within 36 months or born within 45 months is referred to as appropriate for a court to adopt as reasonable.

<sup>34</sup> Ala. Code section 26-17-707.

<sup>35</sup> Ark. Code section 28-9-221, amended by AR H.B. 1829 (2021).

<sup>36</sup> Cal. Prob. Code sections 249.5 and 249.6.



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**EXHIBIT 1**

## Comparative Chart of Posthumously Conceived Children Statutes

State	Effective Date	Statute	Version of Uniform Parentage Act	Written Consent to Posthumous Reproduction Required	Time Period Within Which Child is Required to be Conceived/Born
Alabama	January 1, 2009	Ala. Code §26-17-707	Yes	Yes	Silent
Arkansas	April 26, 2021	A.C.A. §28-9-221	No	Yes	In utero within 24 months.
California	January 1, 2005, Amended January 1, 2006	Cal. Prob. Code §§249.5 – 249.7	No	Yes	In utero within two years of death.
Colorado	July 1, 2003, Amended July 1, 2010	Colo. Rev. Stat. §§19-4-106(8), 15-11-120(11)	Yes	Yes	In utero within 36 months or born within 45 months of death.
Connecticut	October 1, 2013, Amended May 26, 2021	Conn. Gen. Stat. §§45a-785 – 45a-788	No	Yes	In utero within one year of death.
Delaware	January 1, 2004	Del. Code Ann. Tit. 13, §8-707	Yes	Yes	Silent
Florida	June 30, 1993	Fla. Stat. §742.17	No	N/A	N/A
Illinois	January 1, 2018	755 ILCS 5/2-3	No	Yes	Born within 36 months of death.
Iowa	July 1, 2011	Iowa Code §§633.220A, 633.267(2), 633A.3106	No	Not necessarily	Born within two years of death.
Louisiana	August 15, 2001, Amended August 15, 2003	La. Rev. Stat. Ann. §9:391.1	No	Yes	Born within three years of death.
Maine	January 1, 2016	19-A M.R.S.A. §1927	Yes	Yes	Silent
Maryland	June 1, 2013	Md. Estates and Trusts Code Ann. §1-205(a)(2)	No	Yes	Born within two years of death.
Minnesota	August 1, 2010	Minn. Stat. §524.2-120	N/A	N/A	N/A
New Hampshire	July 21, 2014	N.H. Rev. Stat. §168-B:2(IV)	No	Yes	Silent
New Mexico	January 1, 2010	N.M. Stat. Ann. §40-11A-707	Yes	Yes	Silent
New York	November 21, 2014	N.Y. EPTL §4-1.3	No	Yes	In utero within 24 months or born within 33 months of death.
North Carolina	June 12, 2013	N.C. Gen. Stat. §29-19(b)(3)	No	No	Silent
North Dakota	August 1, 2005, Amended August 1, 2009	N.D. Cent. Code §§14-20-65, 30.1-04-19(11)	Yes	Yes	In utero within 36 months or born within 45 months of death.
Ohio	March 14, 2017	Ohio Rev. Code Ann. §§2105.14, 2107.34	N/A	N/A	Born within three hundred days of death.
Oregon	January 1, 2016	O.R.S. Chapter 112.077	No	Yes	In utero within 2 years of death.
Rhode Island	January 1, 2021	R.I. Gen. Laws Ann. §15-8.1-707	Yes	Yes	In utero within 36 months or born within 45 months of death
Texas	June 14, 2001	Tex. Fam. Code Ann. §160.707	Yes	Yes	Silent
Utah	May 2, 2005	Utah Code Ann. §78B-15-707	Yes	Yes	Silent
Vermont	July 1, 2018	Verm. Stat. Ann. Tit. 15C, §707	Yes	Yes	In utero within 36 months or born within 45 months of death
Virginia	July 1, 1994, Amended July 1, 2019	Va. Code Ann. §§20-158(B), 20-164	No	Not necessarily	Born within ten months of death.
Washington	July 22, 2011, Amended January 1, 2019	Wash. Rev. Code Ann. §26.26A.635	Yes	Yes	In utero within 36 months or born within 45 months of death
Wyoming	July 1, 2003	Wyo. Stat. Ann. §14-2-907	Yes	Yes	Silent

Filing or Notice Requirement	Protections for Fiduciaries and Other Beneficiaries	Additional Notes
		Determination of parental status limited to deceased "spouse."
Notice must be given to personal representative within six months of death.	Following receipt of notice, the fiduciary shall retain any remaining assets of the decedent's estate to which a posthumous child of the decedent may have a valid claim until three years after the death of the decedent.	Determination of parental status limited to deceased "spouse."
Notice must be given to personal representative within four months of death.	Following receipt of notice, may not make distributions before two years of death. No fiduciary liability before notice/actual knowledge. Beneficiaries personally liable to PCC with superior rights for distributions previously made up to value of distribution. Three year statute of limitations for claims, cannot be tolled for any reason. If timely notice not given, can make distributions as if PCC predeceased and wrongful distribution claim is barred.	Person must be designated by decedent to control use of genetic material.
		Determination of parental status limited to deceased "spouse."
Notice must be given to personal representative within 30 days of the later of death or appointment of first fiduciary.	No fiduciary liability before notice/actual knowledge. Beneficiaries ratably liable to PCC up to value of previous distributions only if fiduciary has insufficient assets.	Decedent must have specifically authorized surviving spouse to control genetic materials in a written document also signed by spouse.
		PCC not entitled to inherit unless expressly provided for in decedent's will.
Notice must be given to administrator within 6 months of death.	Does not impose fiduciary duty on administrator to provide notice of decedent's death.	Included in notice requirement is an assertion that the person intends to raise PCC as his/her own.
	Actions challenging rights of PCC must be brought within one year of PCC's birth.	Decedent must have authorized surviving spouse to initiate posthumous reproduction or must have specifically bequeathed genetic material in valid will.
	Actions to disavow paternity must be brought within one year of PCC's birth.	Decedent must have authorized surviving spouse to use his gametes and child must be born to surviving spouse.
Decedent's written consents to use genetic material for posthumous conception and to be parent of PCC must be filed within six months of death, PCC's birth record must be filed within two years and 60 days of death.	Absent filing of written consents and PCC's birth records (1) person holding property can make distributions without liability if PCC unknown to that person and (2) transferee also not liable if PCC unknown to transferee.	Applies only to children of individuals dying on or after October 1, 2012.
		Denies PCC inheritance rights; child must be in gestation prior to death.
Within seven months of death must (1) give notice to personal representative that genetic material available and (2) record written instrument authorizing designated person to make decisions regarding genetic material in Surrogate's Court.	If notice provided, personal representative need not pay any dispositions before birth of genetic child. If disposition is directed beforehand, bond can be required.	Applies to instruments created by genetic parent regardless of date. For instruments where genetic parent not creator, law applies to wills of individuals dying on or after September 1, 2014 and trusts executed on or after September 1, 2014.
Notice of claim must be given to personal representative within six months of publication of notice to creditors.		DNA testing to establish paternity, but extremely unlikely statute applies to PCC.
		Allows PCC inheritance rights in intestacy as long as born within three hundred days after death and living one hundred twenty hours after birth.
Notice must be given to personal representative written four months of the date of appointment.		
		Determination of parental status limited to deceased "spouse."
		Determination of parental status limited to deceased "spouse."
		Allows PCC to inherit if decedent consented in writing or if implantation occur as before notice of death can reasonably be communicated to physician performing procedure.

1. The decedent, in a signed and dated writing, specifies that the genetic material shall be used for posthumous conception and designates a person to control the use of the genetic material.
2. The designated person gives written notice to the personal representative within four months of death that the decedent's genetic material is available for posthumous reproduction.
3. The child is in utero within two years of death.

The California statute also includes provisions regarding the effect of the receipt of notice, including:

- No distributions can be made before two years of death, except under certain circumstances, including if the distribution will not be affected by the PCC or the designated person sends written notice that he does not intend to use the genetic material.
- There is no liability for distributions made before the receipt of notice or the acquiring of actual knowledge of the existence of genetic material for posthumous reproduction.
- Beneficiaries to whom distributions are made are personally liable to a PCC who has superior rights, the liability being limited to the fair market value of the property distributed.
- Actions to impose liability are subject to a three-year statute of limitations, which cannot be tolled for any reason.

Further protections are provided if timely notice is not provided, as follows:<sup>37</sup>

- Distributions can be made as if the PCC predeceased the decedent without heirs.
- Wrongful distribution claims against the person making the

distribution or the recipient are barred.

Colorado.<sup>38</sup> Colorado enacted a version of the 2002 UPA provision which requires a spouse's written consent that, if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child. In addition to the consent requirement, the child must be:

1. In utero within 36 months of death; or
2. Born within 45 months of death.

Connecticut.<sup>39</sup> Until January 1, 2022, Connecticut's statute provides that a child conceived and born after the death of a decedent is deemed to have been born during the decedent's lifetime, and after the execution of the decedent's testamentary instruments, if the following conditions are satisfied:

1. The decedent, in a writing signed and dated by both the decedent and the decedent's spouse, specifies that genetic material may be used for posthumous conception and specifically designates the spouse to control the use of the genetic material after death; and
2. The child is in utero within one year of death.

On May 26, 2021, this state enacted a version of the 2017 UPA titled the Connecticut Parentage Act,<sup>40</sup> effective January 1, 2022, which updates the current statute by removing the restriction to designate the decedent's spouse to control the genetic material, allowing the decedent to designate any individual. As of January 1, 2022, if a person who intends to be a parent of a child conceived by assisted reproduction dies before the transfer of the gamete or embryo, the deceased person is a parent only if the embryo is in utero within one year of death and there is a written

document that satisfies the following conditions:

1. Specifically states that the person's gametes may be used for posthumous conception;
2. Specifically provides the person who agreed to give birth with the authority to exercise custody, control, and use of the gametes should the person die; and
3. Is signed and dated by the person and the person agreed to give birth.

The Act also follows the 2017 UPA in addressing what happens when a couple's marriage is terminated (the birth parent's former spouse is not a parent to a child born from assisted reproduction unless the former spouse consented in a record to parent if assisted reproduction occurred after a dissolution of marriage, annulment, or legal separation).

The spouse must also give a copy of the decedent's signed writing to the estate fiduciary within the later of 30 days of death or the appointment of a fiduciary, but the failure to do so will not impair the rights of the PCC.

The Connecticut statute also includes provisions regarding the liability of the fiduciary and other beneficiaries, including:

- There is no liability for distributions made before the fiduciary (1) receives a copy of the decedent's signed writing, (2) acquires actual knowledge of the existence of genetic material for posthumous reproduction or (3) receives

<sup>37</sup> Cal. Prob. Code section 249.7.

<sup>38</sup> Colo. Rev. Stat. section 19-4-106(8); Colo. Rev. Stat. section 15-11-120.

<sup>39</sup> Conn. Gen. Stat. sections 45a-785 through 788.

<sup>40</sup> CT. H.B. 6321 (2021).

<sup>41</sup> Del. Code Ann. Tit. 13, section 8-707.

<sup>42</sup> Fla. Stat. section 742.17.

<sup>43</sup> 755 ILCS 5/2-3.

notice from a PCC's representative within 150 days of the first fiduciary's appointment that a child has or may be posthumously conceived.

- Beneficiaries to whom distributions have been made are ratably liable to a PCC who is entitled to property only if the fiduciary has insufficient assets to satisfy that obligation and, the liability is limited to the fair market value of the property distributed.

Delaware.<sup>41</sup> Delaware enacted the 2002 UPA provision which requires an individual's written consent that, if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Florida.<sup>42</sup> Florida's statute specifically provides that a child conceived from the eggs or sperm of a person who dies before the transfer of the eggs, sperm, or preembryo to a woman's body shall not be eligible for a claim against the decedent's estate, unless the child has been provided for by the decedent's will.

Illinois.<sup>43</sup> This state's law, effective January 1, 2018, provides that a posthumous child can inherit in intestacy if that child was not in utero at the decedent's death, as long as

all of the following conditions are met:

1. The child is born of the decedent's gametes.
2. The child is born within 36 months of the decedent's death.
3. The decedent had provided written consent to be a parent of any child born of such gametes posthumously.
4. The administrator of the estate receives notice within 6 months of the decedent's death from the person to whom such consent applies that: 1) decedent's gametes exist; 2) the person has the intent to use the gametes so that a child could be born within 36 months of the decedent's death; and 3) the person has the intent to raise any child as his or her own.

There is no duty upon the administrator of the estate to provide notice of death to any person, and the law applies regardless of when any person actually receives notice.

For the purpose of determining the property rights of any person under an instrument, the law provides that posthumous children in utero at the time of decedent's death

are entitled to inherit, unless a contrary intent is evident. However, in order for those not in utero at death to inherit under an instrument, one of the following conditions must be met:

1. the intent to include the child is demonstrated by clear and convincing evidence, or
2. the fiduciary or other property holder treated the child as the decedent's child for purposes of a division or property distribution made before January 1, 2018 based on a good faith interpretation of Illinois law regarding the right of the child to take property under the instrument.

The use in the instrument of terms such as "child," "children," "grandchild," "grandchildren," "descendants," and "issue," whether or not modified by phrases such as "biological," "genetic," "born to," or "of the body" will not alone constitute clear and convincing evidence of an intent to include posthumous children not in utero at the decedent's death. An intent to exclude posthumous children not in utero at the decedent's death is presumed with respect to any instrument that does not address specifically how



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and when the class of posthumous children are to be determined, whose posthumous children are to be included and when a posthumous child has to be born to be considered a beneficiary.

Iowa.<sup>44</sup> Under Iowa's statute, a child conceived and born after death or born as a result of the implantation of an embryo after death will be considered a child of the decedent if all of the following conditions are met:

1. A genetic parent-child relationship is established.
2. The decedent, in a signed writing, authorized the surviving spouse (which for testate decedents can include a common law spouse) to use the genetic material to initiate the posthumous procedure that resulted in the child's birth.
3. The child is born within two years of death.

Children of testate decedents and heirs of intestate decedents have one year from the birth of the child to bring an action to challenge the child's right to a share of the estate.

The personal representative's final report must contain a statement as to whether the decedent left genetic material, and if so, that sufficient estate assets have been reserved for potential distribution to PCC and that final distributions will not be made until two years after death.<sup>45</sup>

Louisiana.<sup>46</sup> Under Louisiana's statute, a child conceived after death will be considered a child of the decedent if the following conditions are met:

1. The decedent specifically authorized in writing his surviving spouse to use his gametes.
2. The child was born to the surviving spouse within three years of death.

Heirs or legatees have one year from the birth of the child to bring an action to disavow paternity.

Maine.<sup>47</sup> Maine's statute, effective July 1, 2016, enacted the 2002 UPA provision which requires an individual's written consent that, if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

**Many states have no laws regarding the inheritance rights of PCC. Even if a state that does have a relevant statute, the statute may not reflect the client's wishes.**

Massachusetts.<sup>48</sup> This state does not currently have PCC legislation. In February 2021, a bill was introduced to enact the Massachusetts Parentage Act. The Act has the same time-frame requirements as the 2017 UPA but changes the evidentiary standard required to prove intent to posthumous reproduction from clear and convincing evidence to a preponderance of the evidence. The proposed Massachusetts Parentage Act also follows the 2017 UPA in addressing what happens when a couple's marriage is terminated (the birth parent's former spouse is not a parent to a child born from assisted reproduction unless the former spouse consented in a record to parent if assisted reproduction occurred after a divorce or annulment).

Maryland.<sup>49</sup> Under Maryland's statute, the definition of "child" for the purposes of estates and trusts includes a child conceived with the

genetic material of a person after that person's death, if the following conditions are satisfied:

1. The decedent consented in writing to the use of the genetic material for posthumous conception.
2. The decedent consented in writing to be the parent of a child posthumously conceived using that genetic material.
3. The child is born within two years of death.
4. With respect to any trust, the decedent was the creator of the trust and the trust became irrevocable on or after October 1, 2012.

Both the written consents referred to must be filed with the register of wills within six months of death. For an individual dying between October 1, 2012 and May 30, 2013, the consents must be filed by December 1, 2013. A copy of the PCC's birth certificate must be filed with the register of wills within two years and 60 days of death. The law applies only to children of individuals who die on or after October 1, 2012.

Minnesota.<sup>50</sup> Minnesota's statute specifically provides that a parent-child relationship does not exist between a child of assisted reproduction and another person unless the child of assisted reproduction is in gestation prior to the death of that person.

<sup>44</sup> Iowa Code sections 633.220A, 633.267 and 633A.3106.

<sup>45</sup> Iowa Code section 633.477.

<sup>46</sup> La. Rev. Stat. Ann. section 9:391.1.

<sup>47</sup> 19-A M.R.S.A. section 1927.

<sup>48</sup> MA. S.B. 1133 (2021).

<sup>49</sup> Md. Estates and Trusts Code Ann. section 1-205(a)(2).

<sup>50</sup> Minn. Stat. Ann. section 524.2-120.

<sup>51</sup> N.H. Rev. Stat. section 168-B:2(IV).

<sup>52</sup> N.M. Stat. Ann. section 40-11A-707.

<sup>53</sup> N.Y. EPTL section 4-1.3.

<sup>54</sup> N.Y. Fam. Ct. Act section 581-102.

<sup>55</sup> N.Y. EPTL section 11-1.5.

<sup>56</sup> NV A.B. 229 (2021).

<sup>57</sup> N.C. Gen. Stat. section 29-19(b)(3).

New Hampshire.<sup>51</sup> New Hampshire's statute requires an individual's written consent that, if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

New Mexico.<sup>52</sup> New Mexico enacted the 2002 UPA provision which requires an individual's written consent that, if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

New York.<sup>53</sup> New York's legislation was enacted in 2014 and is found in its Estates Powers and Trust Law (EPTL). The statute previously used the terms "genetic parent" (a man or woman who provided sperm or ova used to conceive a child born after death) and "genetic child" (a child born using the sperm or ova from a genetic parent). New York enacted the Child-Parent Security Act (CPSA), effective February 15, 2021, which modernizes the definition of parent by updating existing law in tying parent to intent, particularly before conception, and setting out rules for determining parentage in the third-party reproduction context.<sup>54</sup> To conform the EPTL with the CPSA, the terms "genetic child" and "genetic parent" are replaced to read "child" and "intended parent," effective February 15, 2021, with no reference to genetic material. "Child" is simply defined as a child conceived through assisted reproduction and "intended parent" has the same meaning as the CPSA, which is an individual who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction or a surrogacy agreement. Indeed, as the revised EPTL is drafted, it seems possible for a decedent to have a posthumously conceived child recognized for purposes of inheritance and intestacy, even if there is no genetic connection between the decedent and the child. Only if the decedent's genetic material is involved must the decedent authorize a person to make decisions about the use of

the genetic material after the decedent's death.

A child born after the death of an intended parent will be considered a child of that parent if the following requirements are satisfied:

1. In a written instrument signed not more than seven years before death, the intended parent must have (a) expressly consented to the use of the genetic material for posthumous reproduction and (b) authorized a person to make decisions about the use of the genetic material after the intended person's death.
2. The person authorized in the writing must give notice of the existence of the stored genetic material to the personal representative of the intended parent's estate within seven months of the issuance of letters.
3. The authorized person must record the writing in the Surrogate's Court within seven months of the intended parent's death.
4. The genetic child must be in utero within 24 months or born within 33 months of the intended parent's death.

If these four requirements are met, the child will be considered a distributee of the intended parent and a child of the genetic parent for purposes of gifts to children, issue, descendants, and similar classes in instruments of the genetic parent or of others. With regard to dispositive instruments in which the genetic parent was not the creator, this provision is applicable only to wills of those dying on or after September 1, 2014 and to lifetime trusts executed on or after that date. For instruments created by the genetic parent, the law will apply regardless of date.

The statute includes a model form of the written instrument.

Authority under the written instrument is revoked in the event of divorce. If notice of the availability of the decedent's genetic material has been given as provided, the personal representative may delay paying dispositions until the birth of a genetic child entitled to inherit. If a disposition is directed to be paid in advance of the birth, the personal representative may require a bond.<sup>55</sup>

Nevada.<sup>56</sup> This state currently does not have PCC legislation. In March 2021, Nevada introduced legislation that mirrors the 2017 UPA regarding an individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death, including the UPA's time frames. The legislation also addresses what happens when an intended parent under a gestational agreement dies before the transfer of a gamete or embryo. If an intended parent dies before the transfer, that person is not a parent of a child unless:

1. The gestational agreement provides otherwise; and
2. The transfer of a gamete or embryo occurs not later than 36 months after the death of the intended parent or birth of the child occurs not later than 45 months after the death of the intended parent.

North Carolina.<sup>57</sup> North Carolina enacted legislation that modernizes the way children born out of wedlock are referred to by removing previous references to "illegitimate" and to "bastardy." While apparently not intended to encompass PCC, the statute literally allows a child born out of wedlock to inherit in intestacy from a father who died prior to (or within one year after) the child's birth if paternity can be established by DNA testing (and notice is given to the personal representative within six months of publication of notice to creditors). There is no comparable DNA testing provision with respect to mothers, and it seems extremely unlikely

that the legislature intended to allow for PCC of genetic fathers (with no time constraints regarding how long after death the PCC must be born or other requirements) but not genetic mothers.

**North Dakota.**<sup>58</sup> North Dakota enacted the 2002 UPA provision which requires an individual's written consent that, if assisted reproduction were to occur after death, the deceased individual would be a parent of the child. In addition to the consent requirement, the child must be conceived or born within either of the following time frames:

1. In utero within 36 months of death or
2. Born within 45 months of death.

**Ohio.**<sup>59</sup> As of April 6, 2017, this state's statute provides that "[n]o descendant of an intestate shall inherit ... unless born within three hundred days after the death of the intestate and living for at least one hundred twenty hours after birth." Where the decedent dies testate,<sup>60</sup> a decedent's will must specifically provide for any person born more than three hundred days after the decedent's death. That posthumously conceived child can inherit only if born within one year and three hundred days from the decedent's date of death.

**Oregon.**<sup>61</sup> Oregon's statute, effective January 1, 2016, specifically requires that a decedent's will or trust provide for posthumously conceived children. Additionally, the following requirements must be met:

1. The decedent, in a signed writing, must have specified that the genetic material may be used for posthumous conception.
2. The person designated by the decedent to control the use of the genetic material must give written notice to the personal representative within 4 months of the date of appointment.

3. The child must be in utero within two years of death.

**Pennsylvania.**<sup>62</sup> This state currently does not have PCC legislation. In January 2021, Pennsylvania introduced legislation that mirrors the 2017 UPA regarding an individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death, including the UPA's time frames. The proposed legislation also follows the 2017 UPA in addressing what happens when a couple's marriage is terminated (the birth parent's former spouse is not a parent to a child born from assisted reproduction unless the former spouse consented in a record to parent if assisted reproduction occurred after a divorce, dissolution or annulment).

**Rhode Island.**<sup>63</sup> Rhode Island enacted the 2017 UPA, effective January 1, 2021. The legislation mirrors the 2017 UPA time frame parameters and its provisions regarding an individual's intent to be a parent posthumously, but changes the evidentiary standard from clear and convincing evidence to a preponderance of the evidence. Rhode Island's PCC statute also follows the 2017 UPA in addressing what happens when a couple's marriage is dissolved by final decree of divorce (the birth mother's former spouse is not a parent to a child born from assisted reproduction unless the former spouse consented in a record

to parent if assisted reproduction occurred after a divorce).<sup>64</sup>

**Texas.**<sup>65</sup> Texas enacted a version of the 2002 UPA which requires a spouse's written consent that, if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

**Utah.**<sup>66</sup> Utah enacted a version of the 2002 UPA which requires a spouse's written consent that, if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child. A signed semen storage agreement that included a provision to donate preserved sperm to the donor's wife in the event of his death was held insufficient to constitute the requisite consent. The agreement defined the risks and obligations between the donor and the storage facility and did not constitute consent in a record to be the parent of a child *conceived* by artificial means after the donor's death.<sup>67</sup>

**Vermont.**<sup>68</sup> Vermont adopted the 2017 UPA but changed the evidentiary standard to prove intent to reproduce posthumously from clear and convincing evidence to a preponderance of the evidence.

**Virginia.**<sup>69</sup> Virginia's statute provides that any person who dies before in utero implantation of an embryo resulting from the union of the spouse's sperm or gestational mother's ovum with another gamete, whether or not the other ga-

<sup>58</sup> N.D. Cent. Code sections 14-20-65 and 30.1-04-19(11).

<sup>59</sup> Ohio Rev. Code Ann. sections 2105.14 and 2107.34.

<sup>60</sup> Ohio Rev. Code Ann. section 2107.34

<sup>61</sup> O.R.S. section 112.077.

<sup>62</sup> P.A. H.B. 115 (2021).

<sup>63</sup> R.I. Gen. Laws Ann. section 15-8.1-707.

<sup>64</sup> R.I. Gen. Laws Ann. section 15-8.1-706.

<sup>65</sup> Tex. Fam. Code Ann. section 160.707.

<sup>66</sup> Utah Code Ann. section 78B-15-707.

<sup>67</sup> *Burns v. Astrue*, 289 P.3d 551 (Utah, 2012).

<sup>68</sup> Vt. Stat. Ann. Tit. 15C, section 707.

<sup>69</sup> Va. Code Ann. section 20-158(B).

<sup>70</sup> Va. Code Ann. section 20-164.

<sup>71</sup> Wash. Rev. Code Ann. section 26.26A.635.

<sup>72</sup> Wyo. Stat. Ann. section 14-2-907.

<sup>73</sup> In New York, for example, the term "after-born

child" is defined in the pretermitted statute as a child born during the testator's lifetime or in gestation at the time of the testator's death and born thereafter. NY EPTL section 5-3.2(b).

<sup>74</sup> Conn. Gen. Stat. section 45a-257b. Iowa's statutory amendments regarding the rights of PCC in the context of testate succession also seem to function as a pretermitted statute. See Iowa Code section 633.267, section 633A.3106.

<sup>75</sup> *Hecht v. Superior Court*, 16 Cal. App. 4th 836 (Ct. App., 1993).

<sup>76</sup> *Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992).

<sup>77</sup> *Roblin v. The Public Trustee for the Australian Capital Territory & Anor*, [2015] ACTSC 100, 24 April 2015.

<sup>78</sup> N.Y. EPTL section 4-1.3(i).

<sup>79</sup> Iowa Code section 633.267.

<sup>80</sup> La. R. S. sections 9:124 through 9:133.

<sup>81</sup> Fla. Stat. section 742.17.

mete is that of the person's spouse, is not the parent of any resulting child unless either of the following occurred:

1. Implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure.
2. The person consents to be a parent in a writing executed before the implantation.

However, that statutory section must be read with another section of the statute,<sup>70</sup> which provides that a child born more than ten months after the death of a parent shall not be recognized as the parent's child.

Washington.<sup>71</sup> As of January 1, 2019, Washington adopted the 2017 UPA, including its timeframes and evidentiary standards.

Wyoming.<sup>72</sup> Wyoming enacted the 2002 UPA provision which requires an individual's written consent that, if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

### Other possible statutory relief

If a testator fails to provide for children who were born after the execution of testamentary documents, pretermitted state statutes make provision for them. The statutes presume that, absent an indication to the contrary, the testator would have wanted to benefit those children.

PCC are by definition born after a decedent executed his or her will. It might therefore be possible for a PCC to make a claim through a pretermitted statute, if the PCC satisfied any applicable state definition of "child born after" a will's execution<sup>73</sup> and any applicable timeframe for filing a claim. However, since the pretermitted child statutes were presumably not drafted with PCC in mind, it is unclear whether a court would read those statutes

to encompass PCC and, even if they did, whether they would require additional evidence of the decedent's intent specifically to provide for PCC. State statutes might also explicitly provide for pretermitted PCC, as Connecticut<sup>74</sup> has done.

### Planning considerations in light of rapidly advancing technology

Given the continued popularity and advancement of assisted reproductive technologies, this topic will likely continue to receive attention. In the meantime, best practices for practitioners might encompass the following considerations:

**Document intent.** Clients with stored genetic material should properly document their intent regarding use of that material posthumously (or in the event of divorce). Because the characterization of genetic material as "property" with the ability to bequeath it will likely vary depending on state law and may not be clear. Documenting intent regarding posthumous use of genetic material can be key. It will be prudent to memorialize intent as comprehensively as possible, including in the agreement with the fertility clinic, in estate planning documents, and in other memoranda.

The following are examples of the range of ways in which states treat this issue:

- In California, the court in *Hecht v. Superior Court*<sup>75</sup> determined that the decedent had an interest, in the nature of ownership, to the extent he had decision-making authority over his stored sperm. That interest was sufficient to constitute "property," and the court concluded that the sperm was part of the decedent's estate, which the executor had a duty to preserve. The

*Hecht* court relied on a case decided in the divorce context - *Davis v. Davis*.<sup>76</sup> The *Davis* court concluded that frozen embryos are special property, occupying an interim category that entitles them to special respect because of the potential for human life. In a case decided in Australia,<sup>77</sup> the judge referred to the *Hecht* case and determined that semen stored by a decedent was property, the ownership of which was vested in the deceased while he was alive and, upon his death, in his personal representatives.

- The law in New York<sup>78</sup> provides that the posthumous use of genetic material is subject exclusively to the provisions of that law and any contract with the storage facility, and may not be the subject of a disposition in an instrument created by the donor or any other person.
- In Iowa,<sup>79</sup> as an alternative to a signed writing authorizing the surviving spouse to use a decedent's genetic material for posthumous reproduction, the statute provides that the testator can, by specific reference to the genetic material, bequeath the genetic material to the other parent in a valid will.
- In Louisiana, an "in vitro fertilized human ovum" is a biological human being that is not the property of the physician, the facility, or the donors.<sup>80</sup>
- Florida requires a written agreement between the donors of genetic material and the treating physician that provides for the disposition in the event of divorce or death, and provides default rules in the absence of an agreement.<sup>81</sup>

Given the variance in state laws and the fact that this area is in flux due to rapidly advancing technologies, establishing the donor's intent is critical. In *Estate of Kievernagel*,<sup>82</sup> the court used the intent of the donor to determine the disposition of his stored sperm after his death, finding that the donor intended that his frozen sperm be discarded. Note also that various state statutes have specific requirements (including written consent to posthumous conception, the designation of a person to control the disposition of the genetic material after death, etc.) that must be satisfied in order to fall within their purview.

**Include dispositive provisions.** Consider drafting specific provisions to address how a client wants to treat PCC. Many states have no laws regarding the inheritance rights of PCC. Even if a state that does have a relevant statute, the statute may not reflect the client's wishes. Some clients may wish to exclude PCC; others may want to include them within certain parameters.

A standard definitional provision, which can be adapted for individual preferences if necessary, may be worth considering. It might include:

- Requirements such as specific consent to posthumous reproduction.
- A time frame within which birth must occur.
- Rules regarding whether a PCC must be born to a surviving spouse or life partner.

- A requirement of proof of maternity or paternity.

Because the need for finality in estate administration is not present in the trust context, more liberal timeframes might be appropriate in the trust context. As noted in *In Re Martin B.*, the concerns related

**Even if a current client is not involved with assisted reproduction or is past child-bearing age, the client's descendants may use those technologies and it will be important to define the class of potential future beneficiaries.**

to winding up an estate differ from those related to identifying whether a class disposition to a grantor's issue includes children conceived after the grantor's death but before the disposition becomes effective.

**Remember broader implications.** Remember that provisions governing PCC can be applicable both to the testator/grantor *and* to his or her descendants. Even if a current client is not involved with assisted reproduction or is past child-bearing age, the client's descendants may use those technologies and it will be important to define the class of potential future beneficiaries for the *In Re Martin B.* type of scenario. Partic-

ularly in the context of dynasty trusts, set up to last for successive generations that extend into the future when unimagined technologies may be available, these matters take on increased importance.

**Choose authorized representative.** Although a surviving spouse or partner might be the obvious choice, what if there is no such person or that person dies? The role is potentially steeped with liability: for example, consider a potential suit from a genetic child who was unable to inherit because the representative failed to satisfy the statutory notice requirements.

**Choose jurisdiction.** Consider including provisions for moving a trust to another jurisdiction to take advantage of favorable laws, which may, as in many other contexts, provide flexibility.

**Include perpetuities savings clause.** Include a perpetuities savings clause to avoid inadvertently violating the rule against perpetuities.

**Consider more broadly ownership and possession of stored genetic material.** Apart from the inheritance context, questions arise regarding how to deal with stored genetic material. Even if the window of inheritance has passed, questions about what to do with stored genetic material remain. The heart of the issue revolves around the question as to whether the genetic material is person, property, or some form of hybrid. Practitioners might consider whether ownership and possession of genetic material should be dealt with in wills, trusts, or other dispositive instruments, as well as marital agreements. ■

<sup>82</sup> *Estate of Kievernagel*, 166 Cal. App. 4th 1024 (Ct. App., 2008).