Critiquing the 2008 Model Act: Redefining "Consent" and Implications of Intent-Based Parenthood for Posthumous Reproduction

Amy Lai
Critiquing the 2008 Model Act: Redefining “Consent” and Implications of Intent-Based Parenthood for Posthumous Conception

**INTRODUCTION: WINTHROP THIES’ PROPHECY**

In matters as vital as these, crying out for the certainty of result that the law should attempt to bring to human affairs, plainly should not we rather turn to the relative certainty inherent in well drawn statutes? And better that the statutes be thought over, studied and enacted now – before these problems arise – than afterwards.1

In his 1971 article, Winthrop D. Thies considered the report of a successful pregnancy using frozen sperm earlier that same year and foresaw a future when husbands would deposit their sperm as “insurance” against illness or accident, which their wives or widows, as the case might be, would later use to give birth to healthy children through artificial insemination.2 Thies suggested enacting a “Uniform Rights of the Posthumously Conceived Child Act,” which should cover, among others, the legal rights of the child conceived pursuant to an authorization in the testator-donor’s will, the rights of such a child when the will is silent or absent, and the possible “cut-off” point on how late after the father’s death the “child” could be born and still claim the protection of the Act.3 Thies asserted that only such an enactment would avoid expensive and preventable litigation, as well as its accompanying uncertainty, anguish, and sense of social injustice.4

Thies’ prophecy has come true. Over the past three decades, cryopreservation of sperm has been increasingly used by astronauts, soldiers and cancer patients receiving

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2 See id.
3 Id.
4 Id. at 960.
chemotherapy or radiation therapy. The Second Gulf War prompted a record increase in visits by departing military men to sperm banks.\(^5\) This trend will likely grow. Technology is not presently available to extract a woman’s genetic material after her death, and egg cryopreservation is still a delicate, rarely performed procedure.\(^6\) In contrast, technology has continued to lengthen the time sperm can be viably cryopreserved and to increase the effectiveness of artificially inseminating women with cryopreserved sperms.\(^7\)

As courts began to determine, in ad hoc fashion, the inheritance rights of posthumously conceived children, legal reform groups had proposed various uniform laws over the years to provide the bases for statutes covering these rights, including the Uniform Probate Code (UPC), the Uniform Parentage Act (UPA), and the Restatement (Third) of Property: Wills and Other Donative Transfers. This paper focuses upon and addresses the insufficiency and implications of the Model Act, most recently proposed by the American Bar Association (ABA) in February, 2008, which governs assisted reproductive technology.

\section*{I. An Immodest Proposal}

The Model Act purports to serve as a “flexible framework of legal rights, obligations, and protections to the stakeholders in assisted reproductive technology as well as promoting the interest of society generally.”\(^8\) It also attempts to “effectively fill” the legal “void” created by a lack of governing state law in most states and an abundance of conflicting

\(^5\) E.g., Joshua Greenfield, \textit{Dad Was Born a Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, With a Focus on the Rule Against Perpetuities}, 8 \textit{MINN. J.L. SCI. \\& TECH.} 277, 281-82 (2007).


\(^7\) E.g., Greenfield, \textit{supra} note 5, at 282.

\(^8\) CHARLES P. KINDREGAN, JR. \\& MAUREEN MCBRIEN, \textit{ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE: SUPPLEMENT} 9 (A.B.A. 2009).
judicial opinions by many courts. Nevertheless, the Model Act’s apparently accommodating nature, as indicated in ABA’s use of the word “flexible,” is in stark contrast to its unnecessarily rigid statutory language and stringent standard governing posthumous reproduction. Moreover, despite the Model Act’s purported void-filling purpose, its promulgation of intent-based parenthood also carries profound implications for Congress and state legislatures.

Pursuant to the Model Act, gametes or embryos shall not be collected from deceased or incompetent individuals or from cryopreserved tissues unless “consent in record” was executed prior to death or incompetency by the individual or the individual’s authorized fiduciary. An exception is permitted in the event of an emergency where the required consent is alleged but unavailable and where, in the opinion of the treating physician, loss of viability would occur as a result of delay. Nevertheless, in such instances, transfer of gametes or embryos shall be prohibited unless approved by a court, because “absence of consent in record shall constitute a presumption of non-consent.” Any individual or entity not acting in accordance with these provisions may be subject to civil liability and/or criminal sanction. ABA’s introduction to the Model Act further clarifies that “consent in record” means “written consent.”

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9 Id. at 33.
10 See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 205(1), (4) (2008).
11 See id. § 205(1); KINDREGAN, JR. & McBRIEN, supra note 8, at 33.
12 MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(13) defines a “Gamete” as “a cell containing a haploid complement of DNA that has the potential to form an embryo when combined with another gamete. Sperm and eggs are gametes. A gamete may consist of nuclear DNA from one human being combined with the cytoplasm, including cytoplasmic DNA, of another human being.”
13 Id. § 205(1).
14 Id. § 205(2).
15 Id. § 205(3).
16 Id. § 205(4).
17 See KINDREGAN, JR. & McBRIEN, supra note 8, at 14.
A. Unreasonably Stringent One-Size-Fits-All Consent Standard

The Model Act sets an unreasonably stringent standard of consent for the use of decedent’s sperm for posthumous reproduction, which applies equally to cases where gametes are harvested from the dead person and where they are retrieved from deposited cryopreserved tissues. The UPC, the UPA and the Restatement (Third) do not touch on posthumous reproductive autonomy and the legality of retrieving gametes from cryopreserved tissues or deceased individuals. Neither the UPC nor the Restatement (Third) even mentions “consent.” The UPA addresses “consent” only in relation to the legality of the parent-child relationship, stating that parenthood would be established if the decedent had “consented in a record” that if assisted reproduction were to occur after death, he would be a parent of the child.

Not only do the UPA, the UPC, and the Restatement (Third) all fail to address posthumous reproductive autonomy, but there is also a lack of case law that mandates written consent from deceased individuals for the use of gametes for posthumous conception. After the widely publicized case of Diane Blood, the English Court clarified that it is illegal to remove, store or use a person’s gametes without that person’s written consent. Nevertheless, in another much cited case, Parpalaix v. C.E.C.O.S., the French Court did not require written consent. While neither of these decisions is binding upon them, American courts may chose to rely on them for guidance in the light of the paucity of American court

18 See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 205(1)-(4).
19 See UNIF. PROBATE CODE § 2-108 (amended 2006); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 (amended 2009).
20 See UNIF. PARENTAGE ACT § 707 (amended 2002).
opinions on posthumous reproductive autonomy. Indeed, the few decisions that have been handed down by American court do not adopt the Model Act’s stringent standard. In *Hecht v. Superior Court*, the case of first impression in the United States, the California Court of Appeal did not treat written consent as a dispositive factor in allowing plaintiff to use her deceased boyfriend’s sperm. Furthermore, the California Court of Appeal recently interpreted the *Hecht* opinion to mean that a preponderance of evidence that the decedent had “actual intention” to use his sperm for posthumous reproduction, or that his intent was “ascertainable,” would suffice.

**B. Intent-Based Parenthood and the Egregious Consent/Inheritance Gap**

The Model Act’s emphasis on decedent’s consent also implicates intent-based parenthood and, thus, carries far-reaching implications. As a proposal governing assisted reproductive technology, the Model Act does not cover the rights of posthumously conceived children to social security survivor benefits or to inheritance. Nevertheless, it is nonsensical and unjust to presume that the decedent who consents to posthumous reproduction would or should be able to refuse to support his children and to impose such obligations upon the government.

The gap between consent and inheritance is not merely arbitrary, since it has led to egregious results. Under the Social Security Act (SSA), children must establish dependency upon a decedent at the decedent’s death to qualify for survivor benefits. The circumstances

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25 *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 205.
26 *See* id.
in which posthumous children are conceived and born thus disqualify them from the “dependency” requirement. Alternatively, children must establish their status as heirs of the decedent under state intestacy laws to claim survivor benefits.\textsuperscript{28} However, only a minority of states have enacted statutes specifically addressing the legal status of children conceived posthumously. California provides extensive protection to these children, requiring parent to provide by “clear and convincing evidence” that the decedent specified in writing that “his or her genetic material shall be used for posthumous conception of a child.”\textsuperscript{29} The person designated to be in control of the biological material must notify the executor of the decedent’s estate within four months, and the child must be in utero within two years of the decedent’s death.\textsuperscript{30} Florida sets a higher standard by refusing to recognize parentage unless the decedent expressly provided for the occurrence in the form of a will.\textsuperscript{31} In contrast, intestacy laws in New Jersey and Arizona, for instance, provide only for after-born heirs conceived before decedent’s death, but not posthumously conceived children.\textsuperscript{32} In the majority of states, such as Massachusetts,\textsuperscript{33} which have not enacted legislation specifically addressing the status of children conceived posthumously, their rights to both survivor benefits and inheritance thus become highly uncertain.\textsuperscript{34}

In cases where posthumously conceived children were recognized as legal heirs of their deceased parents, the decisions were typically based on judicial discretion. In the case

\textsuperscript{28} \textit{Id.} § 416(h)(2)(A).
\textsuperscript{29} \textit{CAL. PROB. CODE} § 249.5 (West 2009).
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{FLA. STAT. ANN.} § 742.17(4) (West 2009).
\textsuperscript{32} \textit{ARIZ. REV. STAT. ANN.} § 14-2104(A) (2009); \textit{N.J. STAT. ANN.} § 3B:5-8 (2009).
of *In re Estate of William J. Kolacy*, for example, the court granted the children legal status as their father’s children and heirs by recognizing the general legislative intent behind the New Jersey intestacy statute that children should be amply provided for in the event of their parent’s death.\(^{35}\) In *Woodward v. Commissioner of Social Security*, the Massachusetts Supreme Judicial Court reasoned that, because the state’s intestacy statutes had no express requirement that posthumous children be in gestation at the time of the decedent’s death,\(^{36}\) the state needed to balance and harmonize three powerful interests: “The best interests of children …, the orderly administration of estates, and the reproductive rights of the genetic parent.”\(^{37}\) Accordingly, a posthumously conceived child must prove a genetic relationship with the decedent and demonstrate that the decedent “affirmatively consented” to posthumous conception, and “to the support of any resulting child.”\(^{38}\) In *Gillett-Netting v. Barnhart*, the Ninth Circuit granted social security benefits to the posthumously conceived children, who were legitimate and presumably dependent upon the decedent, without even reaching the merits of the intestacy issue in Arizona.\(^{39}\) In contrast, in *Stephen v. Commissioner of Social Security*, the United States District Court in Florida adhered to a restrictive reading of the SSA and state intestacy law. Hence, it held that the posthumously conceived child neither dependent on the decedent at the time of death, nor provided for in the decedent’s will and was, therefore, not a child for the purposes of the SSA, was not entitled to survivor benefits.\(^{40}\)

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\(^{37}\) *Id.* at 264-65.

\(^{38}\) *Id.* at 270.

\(^{39}\) *Gillett-Netting v. Barnhart*, 371 F.3d 593, 598-99 (9th Cir. 2004).

The rest of this paper aims to accomplish two things. First, it argues that written consent is necessary for harvesting gametes from a dead body and that a lesser standard of consent should be adopted for using gametes that decedents had deposited and cryopreserved before they died. Second, it argues that the Model Act’s implication of intent-based parenthood affirms the necessity for Congress to clarify the SSA’s “dependency” provisions and for states to revise their intestacy statutes so as to protect the rights of posthumously conceived children. Gloria J. Banks’ constructive and prospective support tests, when improved, will be highly useful for determining whether to grant these children the rights to social security benefits and inheritance. An improved version of her support tests will not only address problems that arise when a decedent does not leave a will, but will also resolve potential ambiguities commonly found in a will or a written statement. Consequently, the best interests of posthumously conceived children will be served.

II. TIPPING THE SCALE OF CONSENT

Judge Cardozo in 1914 found the right of every competent person to consent to, or withhold consent for, medical treatment. Consent is necessary in the case of posthumous reproduction, although it involves the use of the gametes of the deceased. Using dead people’s gametes without their prior authorization violates their common law right to bodily integrity, as well as their right to privacy emanating from the express individual freedoms

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41 Banks is a professor at the Widener University School of Law and writes in the areas of property, wills and trusts, and bioethics and the law.
43 *See, e.g.*, In re Storar, 420 N.E. 2d 64, 71 (N.Y. 1981); *see also* Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C.L. Rev. 901, 948 (1997).
enumerated in the Constitution.\footnote{44} Since gametes are a unique type of property with life-creating potential and nonreplicable characteristics, hence having an intrinsic and vital connection to the personhood of the individual from whom they originate, such rights do not terminate with the individual’s death.\footnote{45}

To date, commentators have proposed either a uniformly high consent standard that requires a written authorization,\footnote{46} or a uniformly low standard that requires clear, specific evidence in written or oral form.\footnote{47} Neither standard addresses the circumstances in which the gametes are to be retrieved.\footnote{48} This section of the paper attempts to reconfigure consent as a scale upon which various factors must be weighed to determine the standard of consent. A stricter standard of consent should be adopted when gametes are to be harvested from a dead body. However, where the decedent already had the gametes cryopreserved before death, several factors compel the scale of consent to tip in favor of a lesser standard.

\textbf{A. Harvesting Gametes from the Dead: Written Consent}

The Model Act’s stringent standard of consent is not unjustified. First, obtaining sperm or eggs from a dead person is a highly invasive process, and for some people such process conducted without prior consent is tantamount to a sexual assault.\footnote{49} While gametes have often been compared to organs, procreation is significant to an individual’s personhood

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\textit{DEECH \& SMAJDOR, supra} note 21, at 107-08.
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that organ donation is not, and implications of posthumous procreation are far more serious for the deceased’s family than is organ donation, which creates a potential conflict of interests between the living and the deceased.\textsuperscript{50} The family’s decision-making role in posthumous reproduction should be considered, yet the interests of the individual, who while alive may not have wished to become a parent, should be prioritized.\textsuperscript{51} Moreover, certain acts committed after a person’s death can harm the individual’s interests, despite the fact that the person no longer exists and is unaware of the occurrence, one example being defamation of a dead person which affects adversely how the individual is remembered.\textsuperscript{52} Given that a promise made while alive imposes upon the promisor a duty that does not suddenly become null and void after the death of the promisee, using gametes without proof of consent may cause postmortem harm to the decedent.\textsuperscript{53}

One must therefore agree with the Model Act that written authorization is a necessary prerequisite to harvesting gametes from a dead person. Although in the absence of documented evidence, the living spouse or significant other would normally be the most qualified person to testify as to the decedent’s desire, such testimony would often be accompanied by the surviving spouse’s overwhelming desire to procreate, which might impair his or her ability to give an accurate and unbiased account of the decedent’s interest and/or intention.\textsuperscript{54} Only written consent can eliminate the risks of invading the decedent’s bodily integrity and acting against his or her wishes.\textsuperscript{55}

\textsuperscript{50} See Schiff, \textit{supra} note 43, at 933.
\textsuperscript{51} See \textit{id.} at 933-34. Here, this paper does not completely agree with Schiff’s argument that because of the potential conflict of interests, the family must have a lesser decision-making role in posthumous reproduction than in organ donation.
\textsuperscript{52} \textit{Id.} at 939.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{E.g.,} DEECH \& SMAIDOR, \textit{supra} note 21, at 13-14.
\textsuperscript{55} See Schiff, \textit{supra} note 43, at 948.
B. Retrieving Cryopreserved Gametes: Clear, Convincing Evidence

A lesser consent standard should nonetheless be adopted in cases where the deceased had his or her gametes cryopreserved. The mere act of depositing the gametes is no indication that the deceased wanted postmortem children, because it could be, and has often been motivated by other reasons, including a desire to use them at some future point in anticipation of an event that the person knows or fears will have an adverse effect upon his or her procreative potential. Nevertheless, at least three reasons compel the consent scale to tip in favor of a lesser standard of consent for retrieving cryopreserved gametes. Thus, clear and convincing evidence, such as a serious, specific oral statement indicating the decedent’s desire to procreate posthumously, should suffice.

First, requiring written consent may be unrealistic. The argument that a will could be unduly burdensome for many individuals, especially those whose socio-economic position makes legal consultation less viable, lacks merit. People who can afford to have their gametes cryopreserved can probably afford a will because preparing a will is less expensive, and can be done online without an attorney nowadays. Nonetheless, demanding a will, or even a written statement, could be excessive because couples might not have known ahead of time that the decedent was terminally ill, and certainly can have no ability to foresee a fatal accident that would give rise to the need for posthumous reproduction. In addition, prior written consent might not convey the decedent’s last wish. On the other hand, the lack of written consent by no means preclude the possibility of a strong desire expressed in confidence, such as to a doctor, illuminating the decedent’s intent that his or her spouse or significant other use his or her gametes after death. Hence, consent that protects the

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56 E.g., id. at 905.
57 See id. at 953.
58 See Horner, supra note 34, at 176.
decedent’s interests or intentions needs not be written; it only needs to be demonstrated by clear and convincing evidence.\textsuperscript{59}

Second, where gametes have been cryopreserved, withdrawing the gametes from the cryo-bank arguably does not invade the decedent’s right to bodily integrity as much as harvesting them from the dead body.\textsuperscript{60} In most cases, this question has little practical significance, because it is usual practice for the fertility clinic storing the cryopreserved gametes to require that depositors specify at the outset their wishes regarding the disposition of their gametes in case of death.\textsuperscript{61} However, where gametes are stored without such directions, the fact that their retrieval is a far less invasive process is certainly an important factor to be considered.

Third, the desire of the surviving spouse or significant other, while not sufficient to trump the dead man’s intention, is another significant factor. Because procreation is significant to an individual’s personhood, the argument that the autonomy interests of the dead spouse have less value than the analogous interests of the surviving spouse and other family members is clearly erroneous.\textsuperscript{62} Nevertheless, the right to engage in posthumous reproduction depends upon a judgment of the importance of the posthumous reproductive experience.\textsuperscript{63} Although the deceased can forestall any controversy by clearly expressing his or her intentions, where the deceased’s desire is ambiguous, a commitment to his or her

\textsuperscript{59} See id.
\textsuperscript{60} See Schiff, supra note 43, at 948.
\textsuperscript{61} Id.
\textsuperscript{62} See Cate, supra note 42, at 1070-72; see also John A. Robertson, Posthumous Reproduction, 69 IND. L.J. 1027, 1064 (1994).
\textsuperscript{63} See Cate, supra note 42, at 1069; see also Robertson, supra note 62.
reproductive autonomy alone does not provide an adequate, sensible answer to whether his or her gametes should be used for reproduction.64

These three factors altogether tip the consent scale in favor of a lesser standard that requires clear, convincing evidence in either oral or written form, but not the higher standard that mandates written consent under the Model Act or proposed by some commentators. In some cases, cultural norms about decision-making processes might have a place on the consent scale.65 The Western orientation toward self-determination and autonomy would need to be tempered by an informed, sensitive view of specific cultural contexts, where significant decisions about lineage rest with the wider family and decision-making processes are more collectively oriented.66 Thus far, there are no reported cases on posthumous reproductive autonomy in collectivist cultural, ethnic, and social groups, but one would imagine that peculiar cultural factors would compel the scale to tip in favor of an even lesser standard of consent.67

III. BRIDGING CONSENT AND INHERITANCE

The Model Act, which emphasizes consent as a prerequisite in posthumous reproduction, not merely promulgates intent-based parenthood, but also affirms the need to bridge the gap between consent and inheritance. Because the traditional marriage vows are

64 See, e.g., Robertson, supra note 62.
66 Id. The New Zealand authors use a hypothetical example of “Michael Hekke,” the only male heir of his collectivist society, which generates the need for a lesser standard of consent on posthumous reproduction. Indeed, various ethics and advisory committees on assisted reproductive technology in New Zealand have suggested that proper account must be taken of the ethical perspectives of Māori and other cultural, ethnic and social groups on matters related to assisted reproductive technology. Eric Blyth & Ruth Landau, THIRD PARTY ASSISTED CONCEPTION ACROSS CULTURES: SOCIAL, LEGAL AND ETHICAL PERSPECTIVES 157 (Jessica Kingsley Publishers 2004).
67 See Jones & Gillett, supra note 65.
intended to endure “until death do us part,” the death of a spouse terminates the marital relationship and, therefore, posthumously conceived children are born outside of their parents’ marriage covenant and viewed as “illegitimate.”  

Over the past decades, the Supreme Court has increasingly minimized the common law’s discriminatory treatment of non-marital children and accorded them greater constitutional protections than before.  

Under equal protection analysis, non-marital children are similarly situated as marital children, both being the genetic offspring of their parents and differing only in the circumstances of their births.  

So long as consent from decedent was obtained, a posthumously conceived child belongs to a family in which both parents intended to conceive him or her in the only way they could in their individual circumstances. If denying a non-marital child survivor benefits and rights of inheritance violates the Fourteenth Amendment’s Equal Protection Clause, then doing the same to posthumously conceived children, whom their parents intended to bring to this world, cannot be unconstitutional.  

Nevertheless, the inadequacy of the SSA’s survivor provisions, as well as the lack of state and federal legislation specifically addressing the status of posthumously conceived children, not only deprive these children of their constitutional protection, but also defeat the legislative purposes behind these statutes. Congress enacted the SSA’s survivor provisions to provide support for orphaned children who, because of the death of their wage-earning parents, would otherwise suffer severe financial misfortune.  

Similarly, state intestacy statutes intend to “approximate a decedent’s wishes” when that person did not express those

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68 Scharman, supra note 34, at 1038-39.  
69 Id. at 1044.  
71 See, e.g., id.  
wishes in life. Social Security provisions that do not consider posthumously conceived children “dependent” upon their dead parents and make them ineligible for survivor benefits no doubt frustrate Congressional intent. Likewise, statutes that refuse to respect the parents’ likely desire to support posthumously conceived children are inconsistent with the longstanding purpose of intestate succession.

Thus, to bridge consent and inheritance, the SSA’s dependency provisions and state intestacy laws must be revised so as to recognize expressly the legal status of these children. Granting financial support under both federal and state laws serves not only the best interests of these children, but also the best interests of society, because the possibility of their becoming public dependents and burdening society will actually be diminished.

A. Gloria Banks’ Constructive/Prospective Support Tests

Law Professor Gloria Banks espouses using intent-based parenthood to determine social security benefits. She contends that the SSA’s dependency requirement could be satisfied by a decedent’s formally written document in the form of a “procreation will,” acknowledging his or her intent to support potential posthumously born or conceived children. Banks’ real insights lie in her proposed constructive and prospective support tests which serve to determine dependency in the absence of such a “procreation will.”

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73 E.g., Scharman, supra note 34, at 1025.
74 See e.g., Banks, supra note 72.
75 See, e.g., Scharman, supra note 34, at 1025.
76 E.g., Star, supra note 47, at 625.
77 Banks, supra note 72, at 349.
78 See id. at 370.
developed these two interrelated tests from the SSA’s commensurate support test to reflect the biophysical impediments inherent in posthumous conception.\(^79\)

Banks’ constructive support test is reasonably developed from the SSA’s commensurate support test, which holds that if the father contributes to the support of the mother of an unborn child, he contributes also to the support of the child.\(^80\) Thus, under her constructive support test, the posthumously conceived child would have to show that decedent supported the living parent in a preexisting, substantial relationship before he died.\(^81\) Because it is impractical to require actual support of an unconceived child who could not have material needs during the preconception stage, the decedent’s procreative support of his spouse would be construed as constructive support of the unconceived child.\(^82\) Banks gives probative weight to evidence showing that the decedent regularly contributed toward his spouse’s living expenses in preparation for the coming pregnancy, including his maintenance of shelter and food for the purpose of preparing her for childbearing and rearing.\(^83\) Conceding that it could be difficult to ascertain the decedent’s true intent in providing for the intended parent, Banks also proposes a prospective support test that requires evidence of the decedent’s more affirmative action to care for the future child.\(^84\)

Under Banks’ prospective support test, the posthumously conceived child would have to show that the decedent acknowledged a clear intent and made a firm commitment to provide future support to his or her potential child.\(^85\) Banks gives weight to the decedent’s payment for the future, long term storage of his gametes and for the assisted reproductive

\(^{79}\) See id.
\(^{81}\) Banks, supra note 72, at 371.
\(^{82}\) Id.
\(^{83}\) Id. at 371-72.
\(^{84}\) See id. at 372.
\(^{85}\) Id. at 373.
procedures to be performed on the intended parent. Other evidence of probative value would be his prearranged preparations for the requisite prenatal and medical care of the intended parent, as well as prearranged payment of the future child’s medical and health insurance and educational costs. In addition, there should be evidence of the deceased’s express intent to support his future child in formal documents, such as beneficiary designations in life insurance policies, as well as written or oral statements made to reliable sources, including health care providers, close associates or family members.

**B. Improving Banks’ Support Tests**

Banks’ tests need to be revised because she proposes an inflexible two-year statute of limitations on the application for survivor benefits that is based upon an unsound rationale. Reasoning that the absence of a time frame would stretch the constructive and prospective dependency standards to tenuous abstractions, she suggests limiting the time period within which potential applicants must be conceived, born and be qualified to apply for such benefits under either of the two support tests. Accordingly, she suggests a two-year statute of limitations accruing from the decedent’s date of death, which meets the constitutional parameters applied to statutes of limitations related to providing a non-marital child’s paternity and legal rights.

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86 *Id.* at 374.
87 *Id.*
88 *Id.* at 374-75. Banks does not suggest the standard of proof that should be adopted to establish such written and oral statements. Nevertheless, she cites to *Hecht v. Superior Court*, 16 Cal. App. 4th 836 (App. Ct. 1993), where decedent wrote a letter to his unconceived children, acknowledging his intent to parent them and his regrets for not surviving to do so. Banks asserts that a “formalized public acknowledgment” would provide the “greatest reliable source of evidence” in establishing postmortem procreative intent. *Id.* at 375.
89 *Id.* at 377.
90 *Id.* at 377-78.
While Banks reasonably suggests a time period for applying for survivor benefits under the SSA, her proposed statute of limitations is unduly limited. On the one hand, because both of her support tests presume the decedent’s intent to beget a child in the near, foreseeable future, the lack of a time limitation would defeat the very foundation of the tests.\(^91\) On the other hand, imposing a narrow and inflexible time period would likely place an undue burden upon the surviving spouse, by forcing her to choose between conception before she is physically or emotionally ready and waiting, thereby sacrificing the posthumously conceived child’s legal rights. Moreover, assisted reproduction has a far lower success rate than normal reproduction. As a result, while pregnancy could happen quickly, it might take several years.\(^92\)

Instead of a statute of limitations, Congress should set a more reasonable time period within which the surviving spouse should conceive the child. The two-year period seems unreasonable in view of current law. The latest version of the UPC provides that “an individual is a parent of a child of assisted reproductive technology who is conceived after the individual’s death and the child is treated as in gestation … if the child is in utero not later than 36 months after the individual’s death or born not later than 45 months after his death.”\(^93\) While the UPA avoids stating a time limit, the Restatement (Third) uses a “reasonable time period.”\(^94\) Hence, the UPC’s three-year period allows more time for

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91 See id. at 371-75, 377-78.
94 See Unif. Parentage Act § 707; Restatement (Third) of Prop.: Wills & Donative Transfers § 2.5.
mourning as well as attempts to become pregnant using the decedent’s cryopreserved gametes.\textsuperscript{95}

Regardless of the exact time period chosen by the legislature, children conceived after this period should not become ineligible, as long as there is clear and convincing evidence of previously unsuccessful attempts at artificial insemination with decedent’s gametes. The low success rate of artificial insemination warrants a more lenient standard than that imposed by a fixed time limit.\textsuperscript{96} At the same time, Banks’ support tests presume a desire to procreate in the near future, hence the necessity for the surviving spouse to show that he or she attempted, but failed, to fulfill their desire.\textsuperscript{97}

\textbf{C. Applying an Improved Version of Banks’ Support Tests to State Intestacy Laws}

Banks merely advocates a redefinition of “dependency” under the SSA and does not say anything about state intestacy laws. The notion of intent-based parenthood that informed her support tests as well as the 2008 Model Act nevertheless affirms the urgent need for state legislatures to redraft their intestacy laws in light of the current laws that mostly disadvantage posthumously conceived children.

There are at least three reasons why states should be encouraged to use an improved version of Banks’ support tests to revise their intestacy statutes. States no doubt have an important interest in the orderly administration of estates, which is why the Supreme Court has affirmed that this area of law is particularly within their competence.\textsuperscript{98} Nevertheless, the support tests would serve the general purpose of intestacy statutes by approximating a

\textsuperscript{95} See UNIF. PROB. CODE § 2-108.
\textsuperscript{96} See Karlin, supra note 92.
\textsuperscript{97} See Banks, supra note 72, at 371-75, 377-78.
\textsuperscript{98} Scharman, supra note 34, at 1022.
decedent’s wishes when he or she did not express those wishes. Second, setting a period within which these children need to be conceived to inherit from their estate would prevent the states from violating the Equal Protection Clause, while balancing the rights of the deceased parent and the child with those of other heirs and the public. Third, the support tests’ reasonable time limit would solve the potential problem arising out of an indefinite period during which the surviving spouse could make use of the cryopreserved gametes to claim inheritances. Advances in reproductive technology allowed gametes to be cryopreserved for many years, and scientists even raised the possibility that sperm can be cryogenitically preserved for centuries. With the reasonable time limit of the support tests, the difficulty in defining “life in being” for purposes of validating an interest will be solved.

D. Supporting One Posthumously Conceived Child or More?

The improved version of Banks’ support tests would help to resolve a difficult issue created by posthumously conceived children in estate settlement, which concerns the number of such children to be supported. The reasonable period in which cryopreserved gametes can be used to conceive children not only helps to define “life in being,” but also puts a limit on the number of children that would be provided for.

In the absence of a will or any expressly written statement by the decedent, the question of how many children should be supported is readily addressed by the support tests. Because the tests presume procreation in the foreseeable future, it would be reasonable to

99 See id. at 1025.
100 See, e.g., Scharman, supra note 34, at 1038-39, 1044.
101 See, e.g., Greenfield, supra note 5, at 298-99.
102 Id.
provide support only to the first child or, in cases of twins and triplets, children of the first conception. 103 Assuming that the surviving parent, for whatever reason, manages to satisfy the requisite consent standard for a second conception, this “first-conception rule” should hold. To provide for the child or children of later conception(s) would defeat the presumption of the support tests and stretch them beyond their foreseeable limit. 104

The support tests also address difficult issues that arise when a decedent leaves a will that does not expressly provide for posthumously conceived children. With no express provision, evidence that the decedent showed constructive/prospective support would nonetheless favor granting rights to the child or children of the first conception. 105 Besides, the entitlement of posthumously conceived children to inheritance through a will that does not expressly provide for them is buttressed by the existence of pretermission statutes in many states, which are designed to protect a child who has been left out of a parent’s will, as long the omission is proven to be inadvertent rather than intentional. 106 The same logic should apply to ambiguous situations where the will devises something to “my children,” and there are already children at the decedent’s death; or the will devises something to “my children” but the decedent has no children at death; or the will is silent on children altogether. 107 Although commentators have suggested closing the class of heirs and not allowing the posthumously conceived children the right to inherit in these situations, a

103 See Banks, supra note 72, at 371-75, 377-78.
104 See id.
105 See id.
106 Star, supra note 47, at 617.
107 See Kristine S. Knaplund, Posthumous Conception and a Father’s Last Will, 46 ARIZ. L. REV. 91, 110-12 (2004); Banks, supra note 72, at 371-75, 377-78.
showing of the decedent’s constructive/prospective support would favor granting such rights to the child or children of the first conception.\textsuperscript{108}

When a decedent leaves a will that provides for posthumously conceived children, problems might still arise concerning how many of these children should be provided for. Generally, courts do not interfere with a testator’s intent and enforce testamentary dispositions unless they are contrary to law or public policy.\textsuperscript{109} Thus, if a posthumously conceived child is named as a beneficiary in its deceased parent’s will, that child should be permitted to inherit pursuant to the will.\textsuperscript{110}

Two types of posthumous bequests could nonetheless be found in such a will. The first type explicitly picks out a limited class of posthumously conceived children which, as all commentators seem to have agreed, should be allowed to stand regardless of the number of children so as to respect the decedent’s intent.\textsuperscript{111} The second type of bequest grants a testamentary interest to “all of my posthumously conceived children.” Some suggest that this should be invalidated due to the indefinite number of posthumous children that could be conceived, so that the estate would be divided among those who are alive at the testator’s death.\textsuperscript{112} Others suggest that the estate should stay open because the common law provided that the rule of convenience, which serves to close the class of heirs, was merely a rule of construction and therefore should not be applied where the testator has evidenced contrary

\textsuperscript{108} See Knaplund, supra note 107; Banks, supra note 72, at 371-75, 377-78.
\textsuperscript{109} Star, supra note 47, at 617.
\textsuperscript{110} Id.
\textsuperscript{111} See, e.g., Greenfield, supra note 5, at 300. Greenfield, for instance, suggests that if a man decides to leave half of his estate to his first posthumously conceived child, half of his estate could be held in trust for his said child. Even if such a child was never to be conceived, the bequest would still be valid and the inheritance would just be held in a perpetual trust. Id.
\textsuperscript{112} E.g., id. at 301.
intent. Banks’ support tests manage to reconcile these two opposite positions. Again, a showing of constructive/prospective support for the future child warrant granting rights to the child conceived after the decedent’s death. Moreover, absent a showing of constructive/prospective support for more than one posthumous conception, the bequest “to all of my posthumously conceived children” should be interpreted as providing only for the posthumous child or children of the first conception.

**CONCLUSION: BACK TO THE FUTURE**

*Why are things so heavy in the future? Is there a problem with the earth’s gravitational pull?*116

While legislation has rarely kept up with technology, legislators must not turn their back to the future. Instead, inspired by Winthrop Thies’ 1971 prophecy that has come true over the past decades, they must make use of available facts to envision possible future scenarios. In doing so, they will find a future that looks so familiar that it makes them feel like they are going back to it. The 2008 Model Act is an inadequate proposal that has not considered all the available facts and court opinions, and one that has created far-reaching legal implications. Therefore, the Model Act, as well as state and federal legislation, must be revised and, in Thies’ words, “thought over” again, aided by constant envisioning of the future.

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113 E.g., Knaplund, *supra* note 107, at 110.
114 See Banks, *supra* note 72, at 371-75, 377-78.
115 See id.
116 BACK TO THE FUTURE (Universal Pictures 1985). This is a dialogue by Dr. Emmett Brown, one of its main characters.
Nevertheless, as in all other family law issues, one must not look for a magical test on posthumous reproduction. As this paper has sought to show, the variety of circumstances necessitates a humanization of the law, as well as the actual process of deciding whether the decedent consented to posthumous reproduction and to supporting posthumously conceived children and how many such children should be granted support.\textsuperscript{117} Posthumous procreation must rest on the consent of the decedent; nevertheless, decisions on the rights to survivor benefits and inheritance must be made in connection with the best interests of the children who are yet to be conceived.\textsuperscript{118}


\textsuperscript{118} See id. at 136.
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