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Kristine Knaplund

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The New Uniform Probate Code’s Surprising Gender Inequities

By Kristine S. Knaplund

I. Introduction

Two married heterosexual couples are in a car crash. The husband of couple # 1 dies instantly, as does the wife of couple # 2. At the hospital, at their spouses’ requests, doctors are able to retrieve Husband # 1’s (H1) sperm and Wife # 2’s (W2) ova for cryopreservation.¹ Two years later, Wife #1 (W1) uses her dead husband’s frozen sperm to become pregnant; Husband # 2 (H2) uses his dead wife’s frozen ova and arranges with a surrogate to have a baby. Will the predeceased spouses be presumed to be parents of the resulting children, conceived and born years after their deaths?

Until recently, few states had a clear answer to this question. The 2008 version of the Uniform Probate Code (UPC) attempts to resolve a broad range of issues that arise with assisted reproduction, including the issue of postmortem conception. UPC Sections 2-120 and 2-121 apply to our hypothetical: 2-120 covers assisted reproduction where no gestational surrogate is involved (as is the case for couple #1); 2-121 applies where there is a gestational surrogate (as with couple #2). Who would be the parents using the new UPC? As long as couple #1 was

married at the time of the car crash with no divorce proceedings pending, UPC 2-120 would presume that H1 was the father of the child, even though his sperm was retrieved after his death.\textsuperscript{2} In fact, UPC 2-120 would presume that H1 is the child’s father even if his sperm was not used at all, and W1 used a third party’s donated sperm to become pregnant.\textsuperscript{3} Couple #2, on the other hand, would not benefit from any presumption that W2 was the child’s mother. UPC 2-121 raises the presumption of parentage for W2 only if she deposited her ova before she died.\textsuperscript{4} Thus, for W2 to be named as the parent of the child, we would need either her written consent, or clear and convincing evidence that she wanted to have children conceived and born after her death.\textsuperscript{5}

Legislation once covered very little of assisted reproduction, leaving the questions of parentage uncertain. The new Uniform Probate Code attempts to fill virtually all of the gaps, but does so in a way that produces unexpected results for women. Can these differences in treatment of men and women be justified?

This Article will examine the 2008 provisions of the Uniform Probate Code regarding assisted reproduction, and in particular the proposed standards for determining parentage when a child is conceived after one of the intended parents has died. Part II will briefly discuss the history of legislation covering assisted reproduction, from the first statutes that dealt with married couples using donated sperm, to the more comprehensive laws today. Part III reviews

\begin{itemize}
    \item \textsuperscript{2} Unif. Probate Code § 2-120(h)(2) (2008).
    \item \textsuperscript{3} § 2-120(h)(2). Under § 2-120, a presumption of consent is raised if “the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceedings were then pending...” § 2-120(h)(2).
    \item \textsuperscript{4} Unif. Probate Code § 2-121(f)(1) (2008) (raising a presumption of parentage if “the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child.”).
    \item \textsuperscript{5} Unif. Probate Code § 2-121(e) (2008).
\end{itemize}
existing law and cases on parentage and inheritance for postmortem conception children. Part IV applies the new UPC provisions to different scenarios in which a man or woman has died before conception, or a surrogacy agreement, has occurred. Part IV concludes the Article with recommendations for changes to the UPC.

II. A Brief Legislative History of Statutes Regulating Parentage in Assisted Reproduction

“Assisted reproduction,” in which a woman becomes pregnant through means other than sexual intercourse, first occurred with the use of artificial insemination, transferring sperm to a woman’s uterus or cervix via a syringe. An account of insemination of a woman with donor sperm was first published in 1884, but the technique was probably utilized long before, having been developed in animal husbandry. The technology to freeze sperm while still retaining its fertility, called cryopreservation, has been available since at least the 1940s. The legal world began to take notice of the practice of artificial insemination with the publication of W. Barton Leach’s article in 1962 predicting that the recent establishment of sperm banks, originally created to store the sperm of astronauts, could pose problems for the application of the common law Rule Against Perpetuities. In the absence of legislation, courts struggled with issues such as

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9 W. Barton Leach, Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent, 48 A.B.A.J. 942, 943 (1962). The Rule Against Perpetuities requires that an interest “vest, if at all, Gender and the NewUPC.docx
whether a wife committed adultery when donor sperm was used to conceive a child,\textsuperscript{10} and whether a husband who had consented to the procedure was obligated to support the resulting child.\textsuperscript{11}

In 1973 the National Conference of Commissioners on Uniform State Laws drafted the original Uniform Parentage Act, which attempted to resolve some of these questions. The Act was concerned primarily with children born out of wedlock,\textsuperscript{12} and thus Section 5, on artificial insemination, focused on declaring the child the legitimate offspring of a husband who had consented to his wife’s insemination with donor sperm.\textsuperscript{13} The 1973 Act provided:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The physician shall certify their signatures and the date of the insemination, and file the husband’s consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician’s failure to do so does not

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\textsuperscript{13} \textit{Id.} at 8.
affect the father and child relationship. All papers pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.

The Comment to Section 5 acknowledged that “This Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was thought useful, however, to single out and cover in this Act at least one fact situation that occurs frequently.”

The Act urged other groups to consider legislation covering broader issues raised by artificial insemination (AI). A host of questions remained after the original UPA was proposed, such as: What if the woman who receives the donated sperm is unmarried? What if no doctor is involved in the process? What if the semen “donor” and the woman had an agreement that he

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14 Id. at 8-9.
15 Id. 9.
18 See, e.g., In the Matter of the Adoption of Michael, 166 Misc. 2d 973, 974-5 (1996) (New York statute on married women held to cover unmarried women as well; therefore, parties were not required to identify sperm donor before adoption of child).
19 See, e.g., Jhordan C. v. Mary K. And Victoria T., 179 Cal. App. 3d 386, 393 (1986) (noting that the California legislature “has embraced the apparently conscious decision by the drafters of the UPA to limit application of the donor nonpaternity provision to instances in which the semen is provided to a licensed physician.... Accordingly, [the California statute] by its terms does not apply to the present case” in which sperm was provided directly to the woman). Accord, Turchyn v. Cornelius, 1999 Ohio App. LEXIS 4129 (1999).
would be involved in the child’s life? The original UPA did not cover these possibilities, and litigation predictably followed.

With the birth of the first “test tube baby” in 1978, another perplexing question arose: did these statutes on artificial insemination also apply to more sophisticated techniques such as in vitro fertilization? Artificial insemination (AI) is not complicated and can easily be accomplished without a doctor. However, AI only addresses a limited range of infertility problems. For more complicated infertility issues, especially those where the woman is having difficulty conceiving, reproductive science has developed alternatives such as in vitro fertilization (IVF), in which both the egg and the sperm are combined outside the woman’s body to create a embryo which is implanted in the woman’s uterus. Unlike AI, IVF is possible only

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22 As the California Court of Appeal stated in Jhordan C. V. Mary K., “It is true that nothing inherent in artificial insemination requires the involvement of a physician. Artificial insemination is, as demonstrated here, a simple procedure easily performed by a woman in her own home.” Jhordan C., 179 Cal. App. 3d at 393-94. The donor ejaculates into a cup; his sperm is then inserted into the woman’s uterus or cervix with a syringe or turkey baster. At-Home Insemination Instructions, Fertility Plus, available at http://www.fertilityplus.org/faq/homeinsem.html.

23 AID (Artificial insemination by donor) is often used where the woman’s male partner is sterile or has a low sperm count, or the woman has no male partner, as in Jhordan C.

with extensive medical involvement. Still, IV and IVF share some commonalities: both procedures address infertility, and both can include sperm donated by a third party. Thus the issue has arisen: If a woman creates a child using IVF, does a state’s AI statute apply? Two courts so far have confronted this problem, and both have decided that the artificial insemination statute does not resolve the parentage issue when the woman uses IVF to become pregnant.  

And what of egg donors? The 1973 UPA spoke specifically of donated sperm, not eggs or embryos but today thousands of children are conceived with eggs or embryos donated by third parties. The Centers for Disease Control publishes an annual Assisted Reproductive Technology Report, which collects data on fertility treatments in which both eggs and sperm are handled. The 2006 National Summary reported that 93% of the 426 clinics offered services involving donor eggs, and 65% of the clinics offered services involving donor embryos. The CDC also reported that 16,976 cycles, or 12% of all assisted reproductive cycles in 2006,

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25 In the Matter of Parentage of J.M.K. and D.R.K, 155 Wash. 2d 374, 392 (2005) (“...the process of artificial insemination is completely different from the process of in vitro fertilization” so Washington AI statute did not apply to children conceived through IVF; statute has since been amended); Finley v. Astrue, 372 Ark. 103, 111 (2008) (artificial insemination and IVF are “two completely different procedures” and thus AI statute does not apply to children conceived through IVF using deceased husband’s frozen sperm).

26 Section 5 of the 1973 UPA referred to “sperm donated by a man.” A woman produces eggs through ovulation. Once the egg is successfully joined with sperm, it can develop into an embryo. See 2006 ART Success Rates, supra note 24, Appendix B, Glossary, at p. 525.

27 See 2006 ART Success Rates, supra note 24. The report thus excludes artificial insemination, in which only sperm is handled.

28 Id. at 89.
involved donor eggs or embryos.  Do statutes regulating sperm donors cover egg and embryo donors?

To keep up with advances in reproductive technology, both the UPA and the UPC realized that statutes must include five key points to be complete. First, the statute should cover the donation of all reproductive material: sperm, eggs, and embryos. Second is the issue of the donee: Because many of the woman using reproductive technology are unmarried, the statute should address the status of the donor to both single and married women. As a New York court noted in applying its AI statute on married women to unmarried women:

[w]here a man donates his sperm to a medical facility to be used for the purpose of artificial insemination, and all parties agree from the outset that they are forever to remain anonymous from each other, there is no reason why the forfeiture of the man’s parental rights without further notice should depend upon ‘the luck of the draw’ because his sperm was utilized to impregnate a married woman instead of one who was not.

29 Id. at 56. The report explains, “Because ART consists of several steps over an interval of approximately two weeks, an ART procedure is more appropriately considered a cycle of treatment rather than a procedure at a single point in time. The start of an ART cycle is considered to be when a woman begins taking drugs to stimulate egg production or starts ovarian monitoring with the intent of having embryos transferred.” Id. at 4, “What is an ART cycle?” Of the 16,976 cycles begun in 2006, 15,505 resulted in an embryo actually being transferred to a woman’s uterus. Id. at 11.

30 See, e.g., Dantzig v. Biron, 2008 Ohio App. LEXIS 180 (2008) (parentage action was dismissed for failure to include a necessary party, the unnamed egg donor).

31 In the Matter of the Adoption of Michael, 166 Misc. 2d 973, 974 (1996).
Third, given the widespread use of assisted reproductive techniques in addition to artificial insemination, the statute should include all such procedures. Fourth, the statute needs to address issues of maternity and not simply paternity. Finally, with thousands of couples freezing their reproductive material, and the ability to retrieve eggs or sperm even after a person has died, the statute needs to address issues of parentage when a child is conceived long after a parent’s death.

The UPA updated its language to address these five critical points but, not surprisingly, many states have not adopted the new provisions. Some states still have the original 1973 UPA language, which only covers a donor who gives sperm to a licensed physician for use by a married woman.32 Now that 90% of ART clinics offer their services to single women,33 some states have adopted AI statutes to include all women regardless of marital status.34 Two states have amended their AI statutes to include other reproductive techniques such as in vitro fertilization.35 Others have added egg donors to their sperm donor statutes, or enacted new statutes specifically for egg donors.36


33 See 2006 ART Success Rates, supra note 24, at 89.


Some states have adopted the 2002 UPA and now have statutes that cover donations of sperm, eggs or embryos to any donee (married or unmarried) using any form of reproductive technology. Colorado, for example, provides: “A donor is not a parent of a child conceived by means of assisted reproduction.” Donor” is defined as “an individual who produces egg or sperm for assisted reproduction, whether or not for consideration. ‘Donor’ does not include a husband who provides sperm, or a wife who provides eggs, to be used by assisted reproduction by the wife.” “Assisted reproduction” includes artificial insemination (now typically called intrauterine insemination), in vitro fertilization, and intracytoplasmic sperm injection.

Newly revised Uniform Probate Code sections 2-120 and 2-121 incorporate many of the parentage assumptions of the UPA so that we not only know who the parents are (and are not), but also can establish inheritance rights. As with the UPA, the UPC provides that a “third party donor” of sperm or eggs is not a parent of the child. In cases of assisted reproduction not

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Intracytoplasmic sperm injection, developed in the 1990s, involves inserting a single sperm into an egg and then implanting the resulting embryo. Sonia Bychkov Green, Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law, 24 Wis. J.L. GENDER & SOC’Y 25, 31 (Spring 2009).

40 Unif. Prob. Code § 2-120(b) (2008). “Third party donor” is defined in the statute as “an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:
involving a gestational carrier, the woman who gives birth is the mother,\textsuperscript{41} and her spouse, or
another individual who consented to the procedure, is the other parent.\textsuperscript{42} If the child is born to a
gestational carrier, then UPC 2-121 applies, and generally the woman who gives birth is not the
mother.\textsuperscript{43} For 2-121, a parent-child relationship exists with the “intended parents,” which the
code defines as “an individual who entered into a gestational agreement providing that the
individual will be the parent of a child born to a gestational carrier by means of assisted
reproduction.”\textsuperscript{44}

The new UPC sections also address the issue of postmortem conception (PMC), adding
presumptions of parentage for children conceived after the death of one or both of the intended

\begin{itemize}
  \item[(A)] a husband who provides sperm, or a wife who provides eggs, that are used for assisted
  reproduction by the wife;
  \item[(B)] The birth mother of a child of assisted reproduction; or
  \item[(C)] An individual who is determined under subsection (e) or (f) to have a parent-child
  relationship with a child of assisted reproduction.
\end{itemize}


\textsuperscript{41} § 2-120(c).

\textsuperscript{42} § 2-120(d) if the husband’s sperm was used; otherwise, (f).

\textsuperscript{43}Unif. Prob. Code § 2-121(c) (2008). The statute provides that the gestational carrier is the
mother only by court order, or in cases where the gestational carrier is the child’s genetic mother
and no other potential parent exists. After cases such as \textit{In the Matter of Baby M}, 537 A.2d
1227, 1253 (N.J. 1988) in which the gestational carrier, who was also the genetic mother, was
declared to be the mother of the resulting child, the common practice today is to ensure that the
gestational carrier has no genetic connection to the child. See Charles P. Kindregan, Jr.,
\textit{Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology},
17 AM. U.J. GENDER SOC. POL’Y & L. 601, 607 (2009); Jane E. Brody, \textit{Much Has Changed in
Surrogate Pregnanies}, N.Y. TIMES, July 21, 2009, at Section D7, \textit{available at}
surrogate pregnancies today, the surrogate has no genetic link to the baby.”).

\textsuperscript{44}Unif. Prob. Code § 2-121(a)(4).
parents. While a few states have statutes addressing the parentage of PMC children, most do not, and so widespread adoption of the new UPC provisions could clarify this issue.

III. Current Law on PMC Children

The Uniform Parentage Act acted much more quickly than the UPC to enact provisions regarding children conceived long after a parent had died. Five states have adopted the 2000 version of the Uniform Parentage Act Section 707, which provides:

If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.\(^{45}\)

Delaware, North Dakota and Wyoming have adopted a more recent version of UPA Section 707, which applies to any individual who consents in writing to post mortem conception, rather than to a “spouse.”\(^{46}\) California and Louisiana require written consent and also impose a timetable within which the sperm or eggs must be used to conceive a child.\(^{47}\) Florida accepts only one form of written consent: a will. Its statute provides that a child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or embryo to a

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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.\textsuperscript{48}

New York law precludes a PMC child from inheriting as a pretermitted child, but is otherwise silent on the status of a child conceived after a person’s death.\textsuperscript{49} A Virginia law clarifying the status of “children of assisted conception” states that any child born more than ten months after the death of a parent is not recognized as the child of that parent and thus cannot inherit in intestacy or by will.\textsuperscript{50}

In states with no law specifically addressing post mortem conception, courts have struggled to apply existing statutes to this unique fact pattern. Courts in three states (New Jersey, Massachusetts and Arizona) have held that state law allows a decedent to be named the parent of a PMC child if certain conditions are met;\textsuperscript{51} courts in two other states with no statutes, New Hampshire and Arkansas, have held that the PMC child could not inherit from the decedent.\textsuperscript{52}

\textsuperscript{48} Fla. Stat. § 742.17(4) (2010). Absent that provision in a will, two cases have held that a PMC child is ineligible to inherit in intestacy under Florida law and thus not entitled to Social Security benefits as the decedent’s child. Stephen v. Comm’r of Soc. §, 386 F.Supp. 2d 1257, 1265 (M.D. Fla. 2005); Capato v. Astrue, 2010 U.S. Dist. LEXIS 27350, *14 (2010).

\textsuperscript{49} N.Y. Est. Powers & Trusts Law § 5-3.2(b) (2010). The Committee that recommended the amendment noted that a person who wanted a PMC child to inherit “could readily create a trust for such a child under his or last will.” Surrogate’s Court Advisory Committee, Report to the Chief Admin. Judge of the State of New York 13 (2006). The official comment to the Alabama statute (which requires a spouse’s consent in a signed record) similarly states: “Of course, an individual who wants to explicitly provide for such [PMC] children in his or her will may do so.” Code of Ala. § 26-17-707 cmt. (2010).


\textsuperscript{51} In re Estate of Kolacy, 753 A.2d 1257 (N.J.Super. Ct. Ch. Div. 2000); Woodward v. Comm’r of Soc. Sec., 760 N.E.2d 257 (Mass. 2002); Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2002). For a discussion of the facts and holdings in these cases, see Kristine S. Knaplund, Gender and the NewUPC.docx
UPC 2-120 requires evidence that the decedent consented to assisted reproduction with intent to be treated as a parent of the child.\textsuperscript{53} Unlike the UPA, however, the UPC allows consent to be proven in a variety of ways.\textsuperscript{54} Consent under the UPC can be demonstrated by a signed record\textsuperscript{55} or by other clear and convincing evidence.\textsuperscript{56} Evidence of such consent is presumed if the birth mother is a surviving spouse and at her deceased spouse’s death no divorce proceedings were pending.\textsuperscript{57} Similar consent provisions are found in UPC 2-121,\textsuperscript{58} when the child is born to a gestational carrier, but the evidence needed to raise the presumption of consent is quite

\textit{Maternity and Inheritance for the Biotech Child}, 43 ABA REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 393, 403-406 (Fall 2008).

\textsuperscript{52} Eng v. Comm’r of Soc. Sec., 930 A.2d 1180 (N.H. 2007); Finley v. Astrue, 372 Ark. 103 (2008). For a discussion of the facts and holdings in these cases, see Kristine S. Knaplund, \textit{Maternity and Inheritance for the Biotech Child}, 43 ABA REAL PROPERTY, TRUST AND ESTATE LAW JOURNAL 393, 406-407 (Fall 2008). A court in California has also held that a PMC child was not the child of the decedent and could not inherit in intestacy under state law, in Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009). California has since enacted a statute requiring written consent from the decedent and time limits on when the PMC child can be born. Cal. Prob. Code Section 249.5(a) (2010).

\textsuperscript{53} Unif. Prob. Code § 2-120(f).

\textsuperscript{54} UPA Section 707 states that the decedent is not a parent unless he or she consented in a record. Accord, Proposed Model Act Governing Assisted Reproduction, ABA Section of Family Law § 702 (2006).


\textsuperscript{56} § 2-120(f)(2)(C).

\textsuperscript{57} § 2-120(h)(2).

\textsuperscript{58} UPC 2-121(e) requires “(1) a record, signed by the individual that, considering all the facts and circumstances, evidences the individual’s intent; or (2) other facts and circumstances establishing the individual’s intent by clear and convincing evidence.” § 2-121(e).
different. While §2-120 simply requires that the decedent have been married, §2-121 requires much more: First, the individual must deposit eggs or sperm before death at a time when decedent and his/her spouse were married with no divorce proceedings pending, and second, the individual’s spouse must function as a parent of the child within two years of the child’s birth.\textsuperscript{59}

For both UPC 2-120 and 2-121, there are time limits to allow the decedent’s estate to close. In order for the decedent to be considered the child’s parent, the postmortem conception child must be either \textit{in utero} within 36 months of the individual’s death, or born not later than 45 after the individual’s death.\textsuperscript{60}

\textbf{IV. Four Couples and Their Postmortem Conception Children}

By examining UPC 2-120 and 2-121, we discover key differences in how the two apply to men and women. UPC 2-120 does not require that the decedent’s sperm or eggs be used in order for the decedent to be named as a parent, while UPC 2-121 does so require. UPC 2-120 raises a presumption of consent even if a spouse’s gametic material is retrieved after the decedent’s death; UPC 2-121 does not. How do these differences play out for various couples who might want to get the benefit of parentage of a postmortem conception child?

\textsuperscript{59} § 2-121(f).

\textsuperscript{60} §§ 2-120(k), 2-121(h). The official comment explains why two time limits are included: “If the assisted reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases.” Official comments at pp. 81, 86.
First, we can imagine four scenarios where a surviving partner wants the decedent to be named the other parent of their PMC child, in cases where the decedent is a genetic parent of the child. Let’s assume that the PMC child is in utero within 36 months of the partner’s death, or born within 45 months of the partner’s death.

A. Scenario One: Surviving Partner is Birth Mother and Decedent is Male and Genetic Father

The easiest case, and the one that has occurred in most of the reported cases involving PMC children, is this: The surviving partner is the birth mother of the PMC child; the decedent is male and the genetic father of the child. To determine if the decedent will be named the father of the child, we would first look for a signed record to evidence that he consented to assisted reproduction by the birth mother with the intent to be treated as the other parent of the child. Such intent could be reflected in a consent form that the UPC encourages all genetic repositories to make available, adapted from Cal. Health & Safety Code Section 1644.7 and 1644.8. If we

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1 The California statute provides: “Any entity that receives genetic material of a human being that may be used for conception shall provide to the person depositing their or her genetic material a form for use by the depositor that, if signed by the depositor, would satisfy the conditions set forth in Section 249.5 of the Probate Code, regarding the decedent’s intent for the use of that material. The use of the form is not mandatory, and the form is not the exclusive means of expressing a depositor’s intent. The form shall include advisements in substantially the following form: ‘The use of this form for designating whether a child conceived after your death will be your heir is not mandatory. However, if you wish to allow a child conceived after your death to be considered as your heir (or beneficiary of other benefits such as life insurance or
find such written consent, then the decedent is the father, but what if we don’t? Next, we would
ask if the decedent and the birth mother were married at the time of decedent’s death, with no
divorce proceedings pending. If so, then his consent is presumed; clear and convincing
evidence to the contrary is needed to rebut the presumption. This consent could be presumed
merely by the fact of the marriage, even in a case where the decedent’s sperm was retrieved after
his death. Postmortem sperm retrieval was first reported in 1980, and the ethical implications
have been debated ever since, but it is feasible and it is occurring.

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64 Cappy M. Rothman, A Method for Obtaining Viable Sperm in the Postmortem State, 34
Fertility & Sterility 512 (1980).
65 See, e.g., Carson Strong, Consent to Sperm Retrieval and Insemination After Death or
Persistent Vegetative State, 14 J.L. & HEALTH 243 (2000); Kathryn D. Katz, Parenthood From
the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying, 2006 U.
CHI. LEGAL F. 289 (2006); Barron H. Lerner, In A Wife’s Request At Her Husband’s Deathbed,
66 Requests for postmortem sperm retrieval are frequent enough for hospitals to have generated
written policies on the practice. See, e.g., New York Hospital Guidelines for Consideration of
Administrative Policy & Procedure Manual, Sperm Retrieval from Dead or Comatose Patients
Suppose the decedent was not married at the time of his death, and we have no written record of his consent. A third avenue is still available to name him the parent of the child: The surviving partner can provide clear and convincing evidence that he intended to be treated as a parent of a posthumously conceived child. The Massachusetts Supreme Court in *Woodward* imposed a similar evidentiary requirement before the decedent could be declared the father, but how that would be established is not at all clear.

**B. Scenario Two: Both Partners are Female: One Birth Mother, and One Genetic Mother**

In our second scenario, both partners are female. The surviving partner is the birth mother; the decedent is the genetic mother. Note that this is not a surrogacy arrangement, since the surviving partner intends to be a parent of the resulting child, and so once again UPC 2-120 applies. We need a third person for this scenario, a sperm donor, but assuming he is a true “donor” and has no intent to be a parent, he would not be the father of the child. The birth mother would have a parent-child relationship; the issue is whether the decedent can be named as the other parent of the child. As with our first scenario, we would first look for a signed record that the decedent consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child. Absent such a writing, we would ask if the two women

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68 § 2-120(b).

69 § 2-120(c).

70 § 2-121(f)(1).
were married in a state that allows women to marry or recognizes such marriages;\footnote{Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia issue marriage licenses to same sex couples; Rhode Island, New York and Maryland recognize same sex marriages from other states. California briefly issued marriage licenses to same sex couples after the decision in In Re Marriage Cases, 43 Cal. 4th 757, 183 P.3d 384 (2008) on May 15, 2008 until Proposition 8 was enacted on November 4, 2008. National Conference of State Legislatures, Same Sex Marriage, Civil Unions and Domestic Partnerships, April 2010, available at http://www.ncsl.org/default.aspx?tabid=16430. The federal Defense of Marriage Act enacted in 1996 bars federal recognition of same sex marriage and allows, but does not require, states to bar same sex marriages and refuse to recognize same sex marriages performed in other states.} if so, we can raise the presumption of consent as long as no divorce proceedings were pending when the decedent died.\footnote{Unif. Prob. Code § 2-120(h)(2).} If there is no signed record and the decedent was not married, then, again, we can still try to prove by clear and convincing evidence that the decedent intended to be treated as a parent of a posthumously conceived child. In this way, scenario #2 tracks precisely scenario #1, with one added difficulty: We need to be in a state that will allow two women to be named as the child’s parents.\footnote{See, e.g., K.M. v. E.G., 37 Cal. 4th 130, 143 (2005) (“a child can have two mothers.”); In the Matter of the Parentage of L.B., 122 P. 3d (2005); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 441 (2006).}

C. Scenario Three: Heterosexual Couple Where The Woman Dies First

Things get more complicated in scenario #3, involving a heterosexual couple where the woman dies first. Let’s assume that the surviving partner is male and the genetic father; the decedent is female and the genetic mother of the PMC child. As in scenario #2, a third person must be involved, but this time that third person is a gestational carrier, and thus UPC 2-121

\footnote{See, e.g., K.M. v. E.G., 37 Cal. 4th 130, 143 (2005) (“a child can have two mothers.”); In the Matter of the Parentage of L.B., 122 P. 3d (2005); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 441 (2006).}
applies. Science is working on an exterior womb, but hasn’t come up with one yet, and so a surrogate is necessary. After the woman’s death, her surviving partner finds a willing surrogate and enters into an agreement that she will carry the child but not be the parent. Our first issue is whether the birth mother (the gestational carrier) will be named the mother of the child, rather than the decedent (the genetic mother). UPC 2-121(c) declares no parent-child relationship for the gestational carrier unless a court so orders, or the gestational carrier is the genetic mother and no other parent is available. Would a court order that the gestational carrier is the mother?

Statutes that conclusively presume that the woman who gives birth is the mother have been declared unconstitutional in several states. An Arizona statute provided that the surrogate was the legal mother of the child, and, if she were married, her husband was presumed to be the child’s legal father. The presumption of paternity, but not the presumption of maternity, was rebuttable. Applying a strict scrutiny analysis, the court found that Arizona had failed to provide a compelling interest to justify treating the biological mother and father differently, and thus declared the statute unconstitutional on equal protection grounds. Utah had a similar statute, providing that “the surrogate mother is the mother of the child for all legal purposes, and

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74 Gretchen Reynolds, Artificial Wombs: Will We Grow Babies Outside Their Mothers’ Bodies? Aug. 1, 2005, available at http://www.popsci.com/scitech/article/2005-08/artificial-wombs (A human womb may be available in “10 years, maybe, or a little more...It could take as much as 50 years, but I’m very hopeful that this is possible.”).


77 Id.

her husband, if she is married, is the father of the child for all legal purposes.” The United States District Court found that the Due Process clause requires the State to give the biological parents a “fundamentally fair hearing” before depriving them of parenthood of “their own children.” Application of the statute could also violate the Fourteenth Amendment’s guarantee of equal protection because the genetic father could be listed on the birth certificate, but not the genetic mother. A Maryland court has held that equal protection requires that the gestational surrogate be given the opportunity to remove her name as “mother” on the birth certificate, just as a presumed “father” with no genetic tie to the child can do. Thus, a state statute that declares the gestational carrier to be the mother may not be upheld.

Assuming that a court agrees that the gestational carrier is not the mother, can the decedent, the genetic mother of the child, be named as the mother instead? As with our first two scenarios, we would look first to a signed record evidencing her intent. If we lack the signed writing, we could next try to raise the presumption of consent if the decedent and her surviving partner were married, but note the further hurdles we must clear to get this presumption. Unlike 2-120, where we merely need to prove that the decedent was married at the time of death and no divorce proceedings were pending, we need much more under 2-121 for the presumption. We first must show that the decedent, before her death deposited the eggs used to conceive the child


81 Id. at 1294.

82 In re Roberto d.B., 923 A.2d 115 (2007).

83 Unif. Prob. Code § 2-121(e).
(no postmortem retrieval available here); second, when she deposited the eggs, she was married and no divorce proceedings were pending, and third, her surviving spouse functioned as a parent of the child not later than two years after the child’s birth. 84 Otherwise, we must provide clear and convincing evidence of her intent to be a parent of a child conceived and born after her death. 85

D. Fourth Scenario: Two Male Partners

Our fourth scenario involves two male partners: a surviving partner who wishes to use his deceased partner’s sperm with the intent that the decedent be named a parent of the PMC child. Two more people would typically be required: an egg donor (who generally would not be a parent, as above for the sperm donor) and a gestational carrier (also not a parent, as above). In this scenario, it would be especially important for the gestational carrier to be a genetic stranger; otherwise, a court might find the carrier to be the mother because she is the child’s genetic mother. 86 For the decedent (the genetic father) to be declared a parent, we would again check for a writing, see if he and his surviving partner were married in a jurisdiction that recognizes same sex marriage, or find clear and convincing evidence of his intent. As with scenario #2, we would also need to ascertain that the jurisdiction allows two men to be named parents.

Another unique aspect arises for scenario # 4: This is the first time a person who is neither the birth mother nor a genetic parent is seeking to be named a parent. Would the surviving partner be a parent? Under UPC 2-121, he would: he is “an individual who entered

84 § 2-121(f).
86 Unif. Prob. Code § 2-121(c)(2). The statute further requires that “a parent-child relationship does not exist with an individual other than the gestational carrier under this section.”
into a gestational agreement providing that the individual will be a parent of a child born to the
gestational carrier,"87 and thus an “intended parent,” as long as he functioned as a parent within
two years of the child’s birth.88 So even though the surviving partner is not genetically related to
the child, he could still be named a parent as well as his deceased partner.

E. Extending and Complicating the Four Scenarios

In each of the four scenarios so far, the decedent’s sperm or eggs were used and thus the
decedent had a genetic tie to the child. Can the decedent be named the parent of a PMC child in
the absence of such a tie? Here is another key difference between 2-120 and 2-121: while 2-121
(gestational carrier) finds a parent-child relationship “with an individual whose sperm or eggs
were used after the individual’s death,”89 no such language exists in 2-120. Thus, as long as no
gestational carrier is used, a decedent with no genetic tie to the child could be named the parent
of the child.90

Scenario #1 involved a male/female couple where the man died first. Let’s assume the
man has no available sperm – he is infertile, or he dies in such a manner that his sperm cannot be
retrieved after his death. We need a third party here – a sperm donor – but as long as he is a true
donor, he will not be a parent. If the decedent and the birth mother were married at the time of

87 § 2-121(a)(4).
88 § 2-121(d)(1).
89 § 2-121(e).
90 Several courts have held that a partner in a same sex relationship can be named a parent of a
child, even though the partner has no biological or genetic tie. See, e.g., In the Matter of
Parentage of L.B., 122 P. 3d 161 (Wash. 2005); Elisa B. V. Superior Court, 37 Cal. 4th 108
(2005); Miller-Jenkins v. Miller-Jenkins, 912 A.2d 915 (Vt. 2006).
his death with no divorce proceedings pending, the UPC will presume that he consented to be the intended parent of her child, even though a third party’s sperm was used. A person can rebut the presumption by clear and convincing evidence to the contrary, but would simply the absence of evidence that he wanted a PMC child be enough? Probably not. If the decedent does not satisfy the marriage requirement, then we need either a written record of his consent, or clear and convincing evidence that he consented.

In Scenario #2 (female/female couple) the decedent might be named the mother if she and the birth mother were married, or she satisfies the consent requirement. Note however, that her surviving partner must be the birth mother; with a gestational carrier, UPC 2-121 requires that the decedent’s eggs be used. Unlike UPC 2-120, UPC 2-121 allows a non-genetic intended parent in only two circumstances, neither of which would apply to our decedent: the intended parent functioned as a parent no later than two years after the child’s birth, or the intended parent died while the gestational carrier was pregnant.

In both Scenario # 3 (male/female couple where the woman dies first) and Scenario # 4 (male/male couple), a gestational carrier must be used, and thus only a decedent with a genetic tie to the child can be named a parent.

Another curious difference in language between UPC 2-120 and 2-121 occurs with the presumption of consent if the decedent dies married. Not only must the decedent’s sperm or eggs be used to create the child, under UPC 2-121 the material must have been deposited while

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92 § 2-121(d)(1).
93 § 2-121(d)(2).
the decedent was alive. It is possible to retrieve sperm after a man’s death, and there are a number of published articles discussing the ethics and efficacy of the procedure. As long as no gestational carrier is used, UPC 2-120 raises a presumption of consent for the decedent to be the parent of the PMC child even if his sperm was retrieved after his death. If a gestational carrier is in the picture, then the presumption of consent arises only if he deposited the sperm before his death or incapacity.\footnote{Lisa V. Brock and Anna C. Mastroianni, \textit{Sperm and Egg Retrieval for Posthumous Reproduction}, 268 (Phillip E. Patton & David E. Battaglia eds., (2005)).} What about post mortem retrieval of ova? As with sperm, it is possible to retrieve ova after a woman has died, but there are no reported cases of the procedure thus far.\footnote{§ 2-121(f)(1).} Suppose the retrieval occurs after the woman dies. Will the decedent be named the mother of the resulting child? If she was married, and her surviving partner is the birth mother, then the presumption of consent in UPC 2-120 will apply, and she will be the mother. But if a gestational surrogate is used, no presumption of consent will arise under UPC 2-121.

\section*{V. Should States Adopt UPC 2-120 and 2-121?}

Certain aspects of the 2008 UPC are a clear improvement on existing law and should be adopted easily. Updating existing statutes to cover donations other than sperm – ova and embryos – will make the law consistent with existing practices, as will changing the language from “artificial insemination” to include the entire range of assisted reproduction, such as in vitro fertilization. Deleting references to “married couples” to clarify parentage issues when the recipient of donated material is unmarried will likewise clarify existing law and practice.
That leaves the issues of gestational surrogacy and postmortem conception, which are both more controversial and the subject of fewer existing statutes. Several states do not recognize surrogacy contracts and thus would most likely refuse to enact UPC 2-121, which allows gestational surrogacy and declares that, in most cases, the surrogate is not the mother of the resulting child. What will be the result in a state that enacts UPC 2-120, but not UPC 2-121? By omitting 2-121, of course, the issues of parentage when surrogacy is used will still be an open question, but other, more gendered outcomes will ensue as well. Enacting only 2-120 means that a dead man will be declared the parent of a PMC child in several of our scenarios, but a dead woman almost never will be, because UPC 2-120 will rarely apply where the woman dies first. As we saw in our four scenarios, the only time UPC 2-120 will allow a dead woman to be declared the mother of a PMC child is in the case where her female surviving partner used the dead woman’s ova to conceive the child. Even then, the dead woman can be declared the mother only if the state allows two women (the genetic mother and the birth mother) to be named on the birth certificate.

The provisions in both UPC 2-120 and 2-121 on postmortem conception will change existing law in several ways. In those states with current statutes based on the UPA, a decedent can be named the parent of a PMC child only with his or her written consent. The new UPC provisions allow consent to postmortem conception to be proven either by consent in a record or by clear and convincing evidence, and include broad presumptions of consent for those who were married at the time of death (for men) and had cryopreserved their ova (for women). These presumptions of consent, especially for married men, go too far. As the Massachusetts Supreme

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Court observed in *Woodward*, “a decedent’s silence, or his equivocal indications of a desire to parent posthumously, ‘ought not to be construed as consent.’” The court thus refused to allow “the mere genetic tie of the decedent to any posthumously conceived child, or the decedent’s mere election to preserve gametes, [to be] sufficient to bind his intestate estate for the benefit of any posthumously conceived child.” The UPC goes much further: it raises the presumption of consent even in the absence of a genetic tie or the preservation of gametes.

Another objection to both UPC 2-120 and 2-121 on the issue of postmortem conception regards the closing of the decedent’s estate. Both UPC statutes have time limits on when the PMC child must be conceived or born, but those limits are quite generous: the child must be in utero not later than 36 months after the individual’s death or born not later than 45 months after the individual’s death. Does that mean the executor or personal administrator must keep the estate open for that period of time, waiting to see if a PMC child is born? The issue is especially complicated when the decedent is male, because there is no requirement that his sperm be used to create the new child.

To solve these problems, legislatures should modify the UPC provisions in several ways. First, a notice provision that a surviving partner intends to create a PMC child would help with this last issue, and allow the administrator to close most estates. California, for example, requires the decedent to consent to postmortem use of his or her gametes in a signed record.

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4 Id. at 553.
97 Unif. Prob. Code §§ 2-120(k)(1); 2-121(h)(1).
98 §§ 2-120(k)(2); 2-121(h)(2).
which designates the person who may use the gametes. That designated person must give notice to the administrator of the decedent’s estate within four months of the issuance of a death certificate that he or she intends to use the material to create a PMC child. If the notice is given, then the estate must remain open for the allotted time (although California, unlike the UPC, requires the PMC child to be in utero within 2 years, a shorter time than the UPC). Where no such notice is given within four months, as will likely be the result in the vast majority of cases, the administrator can proceed without worrying about the effect of a PMC child.

Second, the UPC should be amended to resolve presumptions of parentage of a PMC child. Why does the new code presume that a deceased husband would want to be the father of a child created years after his death with another man’s sperm? And why does the UPC assume that a woman would not want a PMC child under equivalent circumstances? The requirements for the presumption of consent should be the same in the two statutes for PMC children, rather than placing onerous and almost insurmountable evidentiary requirements to declare a deceased wife the mother, but easily accomplished requirements to declare a deceased husband the father.

With these changes, the new UPC will cover a much broader range of issues for PMC children than current law. As the sections now stand, they pose a delicious irony: they allow a woman, especially a married woman, to alter the property distribution of a man’s estate by having a PMC child (even a child without his genetic material), but accord very few men the same power. After centuries of laws giving men complete power over their wives’ property,

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100 § 249.5(b).

101 § 249.5(c).
perhaps the new UPC is attempting to tip the balance the other way, and give women more power in some situations. In legal and equitable terms, however, it is probably best to minimize these gendered outcomes. Provisions that automatically presume consent to postmortem conception parentage solely by the fact that one was married at the time of death go too far, and thus should be amended in the ways suggested by this Article.