INHERITANCE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN IN TEXAS: THE NEW RULES AND WHAT THEY MEAN

Comment

by Kate Hancock

I. INTRODUCTION

A posthumous child is a child conceived before, but born after, the death of a parent.[1] Until recently, due to the obvious mechanics of reproduction, this meant that the child's father died before the child's birth.[2] At common law, and throughout the history of our nation, the legislature based policy decisions regarding these children on this notion.[3] This concept meant that a posthumous child was considered the biological and legitimate child of the father.[4]

But advancements in reproductive science in recent years, particularly cryopreservation—the freezing genetic material via glycerol—have revolutionized traditional notions of reproduction and family development by allowing people to preserve cells to create a life at a future date.[5] This method of creating a family—through frozen genetic materials—is becoming increasingly popular, attracting people employed in dangerous professions, cancer patients or otherwise sickly people, and even middle-aged women who fear they will become infertile before they are ready to start a family.[6] But the benefit these medical reproductive advancements provide does not come without a cost.[7] The ability to preserve an embryo for later use has many legal implications (which are beyond the scope of this comment) for the estate planning community: questions regarding whether the embryo is a life or property, proper disposal, and the rights of a nontraditionally conceived child to things such as social security.[8] This comment will discuss a different legal issue, one that many courts and legislatures have neglected

1. *See infra* Section III.A.
2. *See infra* Sections II.A–C, III.A.
3. *See infra* Sections II.A–C.
4. *See* Brianne M. Star, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613, 613 (2004).
5. *See infra* Section IV.A.
6. *See* David Shayne, *Benefits Due a Child Conceived After a Parent's Death Are Uncertain*, HOLLAND & KNIGHT (Nov. 19, 2015), http://www.hklaw.com/PrivateWealthBlog/Benefits-Due-a-Child-Conceived-After-a-Parents-Death-Are-Uncertain-11-19-2015/ [perma.cc/D3DY-DNGS].
7. *See* Thomas D. Arado, *Frozen Embryos and Divorce: Technological Marvel Meets the Human Condition*, 21 N. ILL. U. L. REV. 241, 252–56 (2001); *see* Lloyd T. Kelso, *In Vitro Fertilization and the Legal Status of Stored Embryos*, 1 N.C. FAM. L. PRAC. § 9:4, at 5–6 (2015).
8. *See* Arado, *supra* note 7; *see* Kelso, *supra* note 7.

to, or are just beginning to, address: what are the rights of posthumously conceived children in regards to heirship?[9]

The state of Texas tried to answer this question during the 84th legislature by amending one section and adding another to the Estates Code.[10] The first section establishes the inheritance rights of posthumous children when the gift is an immediate gift flowing through intestate succession, and the second applies to inheritance rights in the class-gift context.[11]

This comment will serve as an analysis and critique of the new Texas legislation.[12] First, Part II will provide a brief historical background regarding the inheritance rights of posthumous children to set the context for discussion.[13] This section will include a history of assisted reproduction technologies to show how scientific advancements are necessarily giving rise to a need for legislators to reevaluate the stance taken on the rights of posthumous children, as well as a general overview of the various interests at stake when an individual decides to engage in posthumous reproduction.[14]

Next, Part VI of this comment will look at Estates Code § 201.056 and analyze the Texas legislature's codification of the inheritance rights of posthumously conceived children.[15] This Part will include an overview of the other legislative approaches taken throughout the United States.[16] After that, Part VII will discuss Estates Code § 255.401, the section dealing with class-gift inheritance.[17] This discussion will examine the ramifications of the imprecise wording and construction used in the drafting of the statute.[18] This lack of clarity results in unintended consequences, which the drafters need to remedy.[19]

Finally, this comment will conclude by critiquing the amendments that are currently proposed to deal with the ambiguity that the language of Estates Code § 255.401 creates.[20] Recommendations and suggestions for attorneys, will drafters, and individuals will follow this critique to help ensure that loved ones are provided for in a way consistent with the testator's intent while they await legislative action.[21]

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9. *See infra* Parts V–VII.
10. *See* TEX. EST. CODE ANN. §§ 201.056, 255.401 (West 2015); *see infra* Sections IV.A, VI.
11. *See* EST. §§ 201.056, 255.401.
12. *See infra* Parts IV–VIII.
13. *See infra* Part II.
14. *See infra* Part III.
15. *See infra* Part IV.
16. *See infra* Sections V.A–B.
17. *See infra* Part VII.
18. *See infra* Part VII.
19. *See infra* Part VII.
20. *See infra* Part VII.
21. *See infra* Part VIII.

II. POSTHUMOUS HEIRS: A HISTORY OF THEIR RIGHTS

History has treated posthumous children—ones in gestation but born after the death of the father—differently based on important policy concerns of the time.[22] The following sections will address the rights that common law extended to these children in the United States and in Texas.[23]

A. Treatment at Common Law

Common law presumed a posthumous child to be the legitimate child of a married couple.[24] Courts consistently held that the law was to treat a child already conceived, but not yet born, as born at the time of specific events.[25] This presumption considered the child as the biological and legitimate child of the father.[26] The presumption also afforded the child, once born, the same rights and advantages the child would have received had his birth preceded his father's death.[27]

For the purposes of this comment, the right to inherit was the most important right extended to posthumous children.[28] The right to inherit entitled posthumous children to take by descent, but not if they were related to the deceased in another way (such as a sibling, niece or nephew, or other relation).[29] One rationale for allowing such a rule was the preference of keeping a family's fortune within the bloodline.[30]

B. Treatment in the United States

In the United States, the traditionally followed rule allows a child conceived and born after a decedent's death to qualify as an eligible heir to the deceased parent's estate.[31] However, a child conceived before or at the time of the decedent's death was considered "a child in existence for all

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22. *See infra* Sections II.A–C.

23. *See infra* Part II.A–C.

24. ALEXANDER W. RENTON & MAXWELL A. ROBERTSON, ENCYCLOPEDIA OF THE LAWS OF ENGLAND 335 (Street & Maxwell, Limited 1906). Another commonly used term to refer to a child still in the womb is "*en ventre sa mere*" which literally translates to "in his mother's womb." *Id.*

25. *Id.* at 337–38 (including for purposes of interpreting a will, in dealing with the phrase "life in being" for purposes of the rule against perpetuities, for class determinations with language "children living at such and such time", and in three specific cases where courts interpreted "born" to also include children in gestation at the time of the event).

26. *See* Star, *supra* note 4, at 613.

27. *See* RENTON & ROBERTSON, *supra* note 24.

28. *See id*.

29. *See* 2 F.W. MAITLAND & FREDERICK POLLOCK, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I (Cambridge, Cambridge Univ. Press 1898, 2d ed. 1996).

30. *Id.*

31. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 2.5 cmt. l (AM. LAW INST. 1999).

beneficial purposes."[32] So long as the child was afterward born, the fact that the child was not unborn at decedent's death did not render that child incapable of taking as a devisee or legatee.[33] So, in most instances, a posthumous child conceived before decedent's death would take as an heir in the same manner as any other similarly situated children.[34] This inheritance occurred unless, of course, the parent's will contained language indicating that the child would not benefit, then the class would not include the *en ventre sa mere* child.[35] In that situation, the testator's intention would trump the otherwise general rule that an after-born child could take.[36]

Historically, laws of intestacy followed this same presumption.[37] A child who was in gestation at the time of the estate owner's death was entitled to inherit through intestate succession because the law considers a child in being at gestation, and heirship was determined at the time of decedent's death.[38] Under this same traditional rule, a child conceived and born after the decedent's death was not entitled to inherit through intestate succession.[39] Commentators note that advancements in assisted reproductive technologies require reexamination of this law, as it is possible that a decedent's intention may have in fact been to include this posthumously conceived child in the estate.[40]

Many experts' consensus is that most statutory codifications allow for such a reexamination, as much of the statutory language only states that children in gestation are treated as then-living, rather than declaring that those not in gestation are precluded from this category.[41] Indeed, states have begun to address the issue of posthumously conceived children and are reaching sometimes-differing results on what the law should be.[42]

C. Treatment in Texas (Prior to September 1, 2015)

Prior to the statutory change that took place on September 1, 2015, the Texas statute extending inheritance rights read: "No right of inheritance shall

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32. 4 JEFFREY A. SCHOENBLUM, PAGE ON THE LAW WILLS § 34.15 (2003).

33. 79 AM. JUR. 2d *Wills* § 145 (2013) [hereinafter *Wills*].

34. SCHOENBLUM, *supra* note 32.

35. *Id.*

36. *See* id; *see* 79 AM. JUR. 2d *Wills* § 145 (2013).

37. *See* RESTATEMENT (THIRD) OF PROP.: 1 WILLS AND DONATIVE TRANSFERS § 2.1 (AM. LAW INST. 2003).

38. *Id.*

39. *Id.*

40. *See* RESTATEMENT (THIRD) OF PROP.:1 WILLS AND DONATIVE TRANSFERS § 2.1 (AM. LAW INST. 2003).

41. *Id.* at § 2.5 cmt. k. The Restatement takes the position that a child posthumously produced from the decedent's genetic material must be born within a reasonable time after the decedent's death and that the surrounding circumstances must indicate that the decedent did or would have approved of the child's right to inherit. *See id.*

42. *See infra* Part V.

accrue to any persons other than to children or lineal descendants of the intestate unless they are in being and capable in law to take as heirs at the time of the death of intestate."[43] This statute did not require children of the deceased to be in gestation at the time of death, however that requirement did exist as to other "heirs," (e.g., siblings or nieces).[44]

This Texas statute, modeled after a 1785 Virginia statute, implies a departure away from the common law requirement that *any* child conceived prior to death was considered "in being" for the purposes of inheritance.[45] It is worth noting that the statutory language does not distinguish between those children conceived pre-death of decedent and those conceived post-death.[46] However, at the time the statute was drafted and enacted, posthumous conception was not possible.[47] So, while it may seem to a present-day reader that the intent was to allow posthumously conceived children to inherit the same as those conceived before their parent's death, the reality is that drafters did not even contemplate this possibility.[48]

III. THE CHANGING LANDSCAPE: WHAT IS POSTHUMOUS REPRODUCTION AND WHY WOULD YOU DO IT?

There is a widely held perception that, in many ways and for many reasons, the law should not treat a child differently just because the child's parent passed before the time of birth.[49] However, advances in medicine have complicated this perception.[50]

The modern reproductive technologies discussed in the following section are changing the way we must think about the inheritance rights of posthumously conceived children.[51] One of these modern reproductive technologies is freezing genetic material.[52] For varying reasons, individuals are choosing to freeze their genetic materials for use at a later date, sometimes after they have passed.[53] Because of this, long gone are the days when a class

43. TEX. PROB. CODE ANN. § 41(a) (West 2014).

44. *Id.*

45. 9 GERRY W. BEYER, TEXAS LAW OF WILLS, TEXAS PRACTICE SERIES § 7.16 (3d ed. 2002) [hereinafter BEYER, TEXAS PRACTICE SERIES].

46. *See id*.

47. *See id*.

48. *See supra* Section II.A–C.

49. *See supra* Section II.A–C.

50. *See* Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347, 349 (Winter 2011).

51. *See* Paul Sullivan, *Fertility Treatments Produce Heirs Their Parents Never Knew*, CNBC LAW & REGULATIONS (Aug. 30, 2013), http://www.cnbc.com/id/101000188 [perma.cc/EH3N-EU62].

52. *See infra* Section III.B.

53. *See infra* Section III.B.

of heirs closed at the time of the mother's death or 9 months after the father's.[54]

A. What Is Posthumous Reproduction?

Posthumous reproduction is the act of creating a child after one or more of the child's biological parents have died.[55] The use of cryogenically preserved semen to perform various methods of the assisted reproductive technologies (ART) that couples struggling with infertility more commonly use effects the posthumous reproduction process.[56] The resulting posthumously conceived child is more commonly referred to as a "PC child."[57]

The first of these methods is Intrauterine Insemination (IUI), which involves the placement of a man's sperm into a woman's uterus using a long, narrow tube or a syringe.[58] This is one of the most commonly used forms of ART and is also one of the cheapest.[59]

In Vitro Fertilization (IVF) is a newer and commonly used method of ART.[60] IVF is a method that involves assisting in the union between eggs and sperm.[61] This method takes a couple's genetic materials and incubates the materials in a dish to produce a fertilized egg (embryo); the egg may later be placed into the woman's uterus.[62] Alternatively, individuals can freeze the embryos through cryopreservation and use them at a later date.[63]

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54. *See* Lane Thomasson, *Burns v. Astrue: "Born in Peculiar Circumstances," Posthumously Conceived Children and the Adequacy of State Intestacy Laws*, 91:3 DENVER L.R. 715, 718 (2014).

55. Carpenter, s*upra* note 50, at 349.

56. *Id.*; *Assisted Reproductive Technology: A Guide for Patients*, AM. SOC'Y FOR REPROD. MED., 1, 24 (Revised 2015), https://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/ART.pdf [perma.cc/V7QG-BF5J] [hereinafter *Guide*]. Cryopreservation means "freezing at a very low temperature, such as in liquid nitrogen (-196°C) to keep embryos, eggs, or sperm viable." *Id.*; Thomasson, *supra* note 54, at 718. Scientists first discovered that sperm could be frozen cryogenically in 1949. *Id.*; UNIF. PROB. CODE 2-115 (2009). The UPC defines assisted reproduction as any method of causing pregnancy other than sexual intercourse. *Guide*, *supra* note 56; Thomasson, *supra* note 54, at 718.

57. Shayne, *supra* note 6. PC child is short for "posthumously conceived child." *Id.*; Thomasson, *supra* note 54, at 718.

58. Eunice Kennedy Shriver, *Assisted Reproductive Technology* (ART), NAT'L INST. OF CHILD HEALTH & HUMAN DEV., https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/art.aspx [perma.cc/96HG-4UQ7]; Thomasson, *supra* note 54, at 717.

59. *See* Thomasson, *supra* note 54, at 717. This form of ART is more commonly known as Artificial Insemination. *Id.*

60. *See Guide*, *supra* note 56, at 4.

61. *Id.*

62. Shriver, *supra* note 58; *Guide*, *supra* note 56, at 14. IVF can also be done with the use of donor sperm, eggs, or embryos. *Id.* Embryos frozen through this process can be preserved for lengthy periods of time, with successful births occurring after a freezing period of almost 20 years. *See id.*

63. *Guide*, *supra* note 56, at 4, 12.

Another method of ART is surrogacy or inseminating a third-party woman with sperm from the male partner of a couple.[64] The resulting child is biologically related to the surrogate and to the male, but the child is not biologically related to the legal mother.[65] Instead of using a surrogate, another option is to hire a gestational carrier to implant with an embryo that is not biologically related to her.[66] This alternative is an option for a woman who produces healthy eggs but is unable to carry a pregnancy to term.[67] This option results in a child who is related to both of the married parents.[68]

Together, these and other methods of ART, are creating exciting opportunities for those starting a family.[69] At the same time, this opportunity has drastically complicated the traditional view determining heirs.[70]

B. Why Would One Choose Posthumous Reproduction?

Consider this example: after being diagnosed with cancer, and worried that chemotherapy treatments will cause infertility, a man decides to freeze his sperm so that he and his wife can have a child of their own after his recovery.[71] Unfortunately, he doesn't recover: If his wife decides to use his frozen sperm to conceive a child a year or two later, should that child be an heir to the father's estate?[72] Also consider: women in their 20's and 30's who want to focus on their careers are saving their eggs.[73] The woman's eggs could also produce a child after her death.[74] If so, should that child be an heir to the mother's estate?[75]

These are just a few scenarios in which someone might decide to posthumously conceive a child.[76] But, whatever the reason, it is important to recognize that the interests of multiple individuals are always at stake when posthumous conception is undertaken.[77] The following section discusses some of those interests.[78]

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64. Shriver, *supra* note 58. This can be done following cryopreservation of the genetic material. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *See* Thomasson, *supra* note 54, at 717.
70. *See id.*
71. *See* Sullivan, *supra* note 51.
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *See infra* Part IV.
78. *See infra* Part IV.

IV. THE COMPETING INTERESTS INVOLVED

Some commentators refer to posthumous reproduction as a perfect storm of competing interests: "There's the surviving partner who wants to reproduce, the interests of the deceased while they were alive or as they memorialized them, the pre-existing kids who don't want their interest diluted and finally the kids who are brought into the picture but who may be financially most at risk."[79] How should this area of the law work to ensure that children who are genetically linked to the deceased are treated fairly?[80] And how should the law balance these interests against the interests of other people whose lives are affected by the posthumously conceived child's legal rights?[81] The following sections discuss some of the relevant parties and their competing interests.[82]

A. The Deceased Parent

A parent, including a deceased parent, should have the right to reproductive freedom.[83] Reproductive freedom involves the right to choose; in some instances, this might mean freedom in the choice to conceive, but in others, it can mean the freedom to choose not to.[84] If, for example, a father preserves genetic material during his lifetime but does not contemplate possibility of the material creating an offspring after his death, and his surviving wife does so, has this infringed upon his reproductive freedom?[85] The answer seems to be yes—when procreative decisions are made without his consent posthumous harm can result, either by the creation of or failure to create a biological child against his wishes.[86]

Expanding on this right is the more involved interest in choosing whether or not to start a family.[87] Think back to the discussion on methods of artificial reproduction; it is true that individuals conceive without necessarily choosing to start a family of their own—for example, a woman intending to serve as a gestational carrier for another,—but, for the majority of individuals, conception is just one step in the process of starting a family.[88]

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79. Sullivan, *supra* note 51.

80. *See id*.

81. *See* Hilary Young, *Presuming Consent to Posthumous Reproduction*, 68 J. OF L. & HEALTH 68, 73–83 (2014).

82. *See infra* Sections IV.A–D.

83. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that the right to have a child is fundamental); Morgan Kirkland Wood, *It Takes a Village: Considering the Other Interests at Stake when Extending Inheritance Rights to Posthumously Conceived Children*, 44 GA. L. REV. 873, 902–04 (Spring 2010).

84. *See* Wood, *supra* note 83.

85. *See id*.

86. *See* Star, *supra* note 4, at 625.

87. *See* Young, *supra* note 81, at 73–77.

88. *See id*.

For many individuals, a child is a legacy, and continuing their legacy is important enough that they would prefer to have a child that they never know, than have their family tree reach an end.[89]

The decedent—and the decedent's descendants—additionally has a property interest to weigh.[90] If a child who is biologically related to the decedent is born after the decedent's death, that child might be entitled to a share of the decedent's estate.[91] Most people would like to know that after they pass, the distribution of their estate would take care of their loved ones.[92] Should the future child, who the decedent does not know or know about, be entitled to a share of the estate?[93]

B. The Surviving Parent

A PC child's surviving parent refers to the living person who desires to procreate with the deceased parent.[94] Like the deceased parent, a surviving parent has reproductive interests worth protecting, including the freedom to decide whether or not to conceive a child after a loved one's death.[95]

Although it is true that one person cannot force another to procreate, there are several instances where the surviving parent's decision to create a PC child should perhaps be honored.[96] This includes situations in which the couple has already preserved genetic materials they intended to use at a later date, where an embryo has already been created, when a person is unable to reproduce with anyone else, and when the two parents once relied on—and intended for—the relationship to result in a biological child.[97]

If an approach is taken that values these interests of the surviving parent, it is important that the individual is able to decide whether to engage in posthumous reproduction without added outside pressures.[98] Statutes like those in effect in Iowa and California allow for this these statutes provide a window of time, up to two years, to weigh the pros and cons of doing so.[99] Under these statutes, if the surviving spouse decides to posthumously

89. *See id.*
90. *See infra* Section IV.D.
91. *See infra* Section IV.D.
92. *See infra* Section IV.D.
93. *See infra* Part V.
94. Young, *supra* note 81, at 78. The overwhelming majority of instances where a living person wants to procreate with a deceased person involve situations where one person in a couple dies, and the living person still wishes to use pre-embryos or gametes create children who are biologically related to their deceased lover. *Id.*
95. *See id.*
96. *See id.*
97. *See id.*
98. *See* Wood, *supra* note 83.
99. *See id.*

conceive a child using the deceased's genetic material during that window, that child is entitled to inheritance rights.[100]

C. The Posthumous Child

The posthumous child, or would-be class member, is also someone who obviously has a stake in the way the birth state permits posthumous children to take through intestacy or class gift inheritance rights.[101] These laws, depending on the drafting language, may preclude or include a child as an heir to an estate, based on the testator's will, and despite the testator's wishes.[102] How intestacy and estate laws will treat PC children is important because in many states, receiving a share of the parent's estate is the only hope that the child has at obtaining financial security whenever the biological parent has died.[103]

D. The Other Family Members and Interested Parties

The decision to posthumously reproduce does not only effect the descendant and surviving spouse but also other family members.[104]

Other family members, such as the PC child's grandparents, have an interest in whether posthumous reproduction occurs.[105] These include legal concerns, like how to account or provide for this child in an estate plan, or whether these children are heirs through intestacy laws.[106] Non-legal concerns also exist, including the experience of grandparenthood, a wish for a link to their deceased child, or even wanting to prevent the living parent from procreating with their child, the deceased parent.[107]

Additionally, the posthumous conception and subsequent birth of a child who is entitled to inherit from the decedent could also adversely affect other family members, including other heirs and class members.[108] This is so

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100. *See id.*

101. *See* Young, *supra* note 81, at 83.

102. *See* Wood, *supra* note 83, at 902–04.

103. *See* Astrue v. Capato, 566 U.S. 541 (2012) (ruling that a child's eligibility for social security survivorship benefits are tied to the child's intestacy rights under applicable state law); Alycia Kennedy, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 B.C. L. REV. 821 (2013); *Inheritance Rights of Posthumously Conceived Children*, ETTINGER LAW FIRM (Dec., 5, 2015), https://www.newyorkestateplanninglawyer blog.com/2015/12/inheritance-rights-of-posthumously-conceived-children.html [https://perma.cc/3T5N-W4G8] (arguing that veteran's benefits should extend to children conceived through artificial insemination).

104. *See* Young, *supra* note 81, at 81.

105. *See id.*

106. *See* Carpenter, s*upra* note 50, at 349.

107. *See* Young, *supra* note 81, at 81.

108. *See* Wood, *supra* note 83, at 902–04.

because the child's birth may cause delays in distributing the estate or may reduce the portion of the estate other family members are entitled to.[109]

Situations in which the posthumous child is entitled to take are not the only situations that can breed hostility amongst these same family members.[110] For example, situations in which siblings or otherwise related people grow up closely, the posthumous child who is left out of a group of heirs might grow to resent the more fortunate relatives.[111]

V. AN ALTERNATIVE APPROACH: HOW OTHER STATES ARE ADDRESSING THE ISSUE

The inheritance rights of posthumously conceived children is an area of law that legislatures have failed to address.[112] The following section analyzes the approaches that various states around the country have taken, most of which are based on model acts.[113] As of the date of this writing, a large portion of the states with statutes concerning posthumous children adopted the statutes prior to the time when posthumous conception and birth via ART were possible.[114] This results in legislation that seems to address the rights of this child but in reality never contemplated their existence.[115] In contrast, several states have indeed reformed their statutes to address the rights of these children, but the adopted statutory language or case law does not always produce the same result.[116]

A. Legislative Approaches

The following section outlines the Legislature's attempts to limit or extend inheritance rights to posthumously conceived children.[117]

1. The Model Probate Code

The American Bar Association Probate Law Division promulgated its first model act, the Model Probate Code (MPC), in 1946.[118] Section 25 contained an "after-born heirs" provision that codified the traditional rule that all heirs must be living or in gestation at the moment of the decedent's

109. *See id*.
110. TEX. EST. CODE ANN. § 201.056 (West 2015); *see* Young, *supra* note 81, at 73–83.
111. *See* EST. § 201.056.
112. *See* Carpenter, s*upra* note 50.
113. *See* IOWA CODE ANN. § 633-267 (West 2011); *see* Carpenter, s*upra* note 50, at 363.
114. *See* IOWA § 633-267;*see* Carpenter, s*upra* note 50, at 363.
115. IOWA § 633-267; Carpenter, s*upra* note 50, at 349.
116. *See* Shayne, *supra* note 6.
117. *See infra* Section V.A.1–5.
118. MODEL PROB. CODE (1946).

death.[119] The exact language of the provision read: "Descendants. . .of the intestate, begotten before his death but born thereafter, shall inherit as if they had been born in the lifetime of intestate and had survived him. . . . [Otherwise]. . .distribution of intestate's estate shall be determined by the relationships existing at the time of the death. . . ."[120]

A few states, including Indiana, Iowa, and Ohio still have statutes containing the MPC language.[121] Because the MPC language predates cryopreservation and the possibility of posthumous conception, it can often lead to problems in dealing with probate and class gift issues involving afterborn children.[122] For this same reason, it would seem illogical for courts to read this language strictly or to avoid making appropriate exceptions for posthumously conceived children.[123]

2. The Uniform Probate Code (1969 & 1990)

The Uniform Probate Code (UPC), adopted in 1969 and drafted by the National Conference of Commissioners of Uniform State Laws (NCCUSL), replaced the MPC.[124] When first introduced, it included a provision similar to the MPC's afterborn-heirs provision, with a few stylistic changes; "conceived" was used rather than "begotten," and the second sentence was omitted.[125] The section read: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."[126]

The UPC underwent its first revision in 1990.[127] As part of the revising, § 2-108 was modified to read: "An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."[128]

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119. Carpenter, s*upra* note 50, at 363.

120. MODEL PROB. CODE § 25 (1946).

121. IND. CODE ANN. § 29-1-2-6 (West 2015); IOWA CODE ANN. § 633.220 (West 1965); OHIO REV. CODE ANN. § 2105.14 (West 2012).

122. *See* IOWA § 633-267. However, the Iowa Probate Code does have a separate section of the Probate Code which allows posthumous children conceived as a result of assisted reproduction to take as heirs if they meet certain requirements. *see id.*; *see* Carpenter, s*upra* note 50, at 363.

123. *See* Carpenter, s*upra* note 50, at 363.

124. *See* UNIF. PROB. CODE (1969); *see* Carpenter, s*upra* note 50, at 364.

125. UNIF. PROB. CODE 2-108; MODEL PROB. CODE § 25 (1946). *See* Carpenter, s*upra* note 50, at 364.

126. UNIF. PROB. CODE § 2-108.

127. *See* UNIF. PROB. CODE (1990).

128. *Id.* § 2-108 .

3. Uniform Status of Children of Assisted Conception Act

The Uniform Status of Children of Assisted Conception Act (USCACA) was drafted in 1988 and approved in 1989.[129] The purpose was to create an Act that was child-oriented and benefits the security and well being of children born of assisted conception to address the "precise issue of the status of children, their rights, security, and well being."[130]

This Act was the first instance when the Commissioners specifically addressed posthumously conceived children.[131] Surprisingly, § 4(b) of the Act stated: "An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[132] This essentially resulted in an explicit denial of intestate inheritance rights for posthumously conceived children.[133] Considering the overall purpose of the Act, it seems odd that they chose not to extend posthumously conceived children these rights, but nonetheless that is what they decided.[134]

Despite the attempt to address an area of law that desperately needed addressing, the USCACA was mostly a failure.[135] Only two states, North Dakota and Virginia, ever adopted it, but their statutes no longer contain the same language.[136]

4. The Uniform Parentage Act

The NCCUSL drafted the Uniform Parentage Act (UPA) in 1973 as an attempt to provide a uniform legal framework for determining paternity questions, particularly in the case of non-marital children.[137] The UPA underwent a major revision in 2000 which incorporated parts of the USCACA into it.[138] This version, along with amendments made in 2002, are the NCCUSL's current, official recommendation on the subject of parentage.[139]

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129. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1973) [hereinafter USCACA].

130. UNIF. PARENTAGE ACT (1973).

131. *Compare* UNIF. PROB. CODE, *with* USCACA (1973) (the UPC did not address PC's whereas the USCACA does).

132. USCACA § 4(b).

133. *See id.* § 10(c)(1973) (clarifying that for matters of intestate succession, other matters concerning the child's interest in the parent's estate, class-gift membership, and donative transfers, this section controls.); Carpenter, s*upra* note 50, at 367.

134. *See* UNIF. PROB. CODE 2-108 (1969); MODEL PROB. CODE § 25 (1946); *see* Carpenter, s*upra* note 50, at 367 (noting the puzzling decision to favor expediency over the interest of the child).

135. *See* Carpenter, s*upra* note 50, at 368.

136. *See id.*; *see infra* Section V.B.5–6.

137. UNIF. PARENTAGE ACT (1973).

138. UNIF. PARENTAGE ACT (2000).

139. UNIF. PARENTAGE ACT (2002) prefatory note.

The UPA made a critical change in adopting the language of USCACA § 4(b) and added the words "unless the deceased spouse consented in a record that if assisted reproduction were to occur after death."[140] This change in wording allows departure from the default rule that posthumous children have two biological parents but only one legal parent upon consent.[141] The committee notes to these sections explain that the purpose of requiring consent is to make "intention, rather than biology, is the controlling factor" and to "encourage careful drafting of assisted reproduction agreements."[142]

Finally, the NCCUSL recognized that posthumously conceived children could have a parent-child relationship with their deceased parent.[143] However, this statute is still limited in at least three ways: (1) the UPA is a parentage, rather than a probate, act; (2) there is no language indicating whether or not the statute applies to probate matters; and (3) if it does apply, the statute is overly broad in a manner that would make application difficult.[144]

Some jurisdictions may avoid one of these potential problems—the second—as the statute provides that the Act applies in all circumstances "except as otherwise specifically provided by other law of [the applicable] State."[145] But still these problems, together or alone, mean that it is sometimes unclear what rights posthumous children have in states that still have UPA statutory language.[146]

5. Uniform Probate Code (2008)

The UPC underwent its final revision in 2008.[147] This revision, deleted § 2-108 and moved the language to § 2-104(a)(2).[148] The words "at a particular time" were substituted with "at the decedent's death" and a sentence was added requiring proof, by clear and convincing evidence, that the individual survived for at least 120 hours.[149]

Particularly important in the 2008 version of the UPC is the addition of § 2-120, titled "Child Conceived by Assisted Reproduction Other Than

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140. *Compare* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(b) (1973), *with* UNIF. PARENTAGE ACT §§ 706–07 (2002). Other changes include substituting "spouse" with "individual." *Id.*; *supra* Section III.A. Note that §§ 160.706–.707 of the Texas Family Code are based on this UPA language, but with a heightened requirement that a licensed physician keep the consent. *See supra* section III.A.

141. *See* UNIF. PARENTAGE ACT §§ 706–07 (2002).

142. *Id. See* drafter's comment.

143. Carpenter, s*upra* note 50, at 369.

144. *Id.*

145. UNIF. PARENTAGE ACT § 203 (2002).

146. Carpenter, s*upra* note 50, at 372. For a still-current example of a state statue containing the UPA language, *see* ALA. CODE 26-17-7070 (West 2009).

147. UNIF. PROB. CODE (2008).

148. *Compare* UNIF. PROB. CODE § 2-108 (1990) *and* UNIF. PROB. CODE § 2-104(a)(2) (2008).

149. *Compare* UNIF. PROB. CODE § 2-108 (1990) *and* UNIF. PROB. CODE § 2-104(a)(2) (2008).

Children Born to a Gestational Carrier."[150] For establishing a parent-child relationship under this section, there is a requirement that the decedent intended to be treated as a parent.[151] Additionally, this section provides that if the child is conceived within thirty-six months and born within forty-five months of the intestate's death, then the individual is the parent of a child born from assisted reproduction and that child is considered in gestation at that individual's death.[152] The committee's comment explains two purposes for this section: (1) to allow a surviving spouse who has preserved genetic material for assisted reproduction with a grieving period in which to decide whether or not to proceed with assisted reproduction; and (2) to allow a reasonable period of time for multiple tries in the case of unsuccessful pregnancy attempts.[153] Other commentators suggest that the time frame was intended to mirror the time available to recover assets that were improperly distributed according to § 3-1006.[154]

Additionally, § 2-705 provides that the same thirty-six to forty-five month window shall apply in the class-gift context.[155] The section reads: "If a child of assisted reproduction . . . is conceived posthumously and the distribution date is the deceased parent's death, the child is treated as living at the distribution date" and shall take if the child is conceived and born in that window and lives for at least 120 hours after.[156] The comments to this section justify the statutory rule in the same manner that is used to justify § 2-120(k); that a surviving spouse or grieving partner should be allotted adequate time to make a decision regarding posthumous conception before closing the class in which the resulting child would be a member.[157]

In summary, these legislative documents have attempted to address the changing realities and complexities of family life as they have evolved.[158] The following subsection looks at some unique approaches state legislatures have taken to address the inheritance rights of posthumously conceived children.[159]

B. Other Statutory Approaches

The following section discusses legislation that other states have enacted to address intestate succession for posthumous children.[160] The list

150. UNIF. PROB. CODE § 2-120 (2008).
151. *Id.* § 2-120(k).
152. *Id.*
153. *Id.*
154. *See* Carpenter, s*upra* note 50, at 374.
155. UNIF. PROB. CODE § 2-705(g)(2) (2008).
156. *Id.*
157. *Id.*
158. *See* Carpenter, *supra* note 50.
159. *See infra* SectionV.B.1–6.
160. *See infra* Section V.B.1–6.

is not comprehensive, but it is merely meant to serve as an overview of approaches.[161]

1. California

In California, in order for a posthumously conceived child to take under intestate laws, the parents of that child must meet a list of requirements.[162] First, the decedent must execute a signed and written consent, authorizing a designated person permission to use the genetic material for posthumous conception.[163] Within four months of issuance of the decedent's death certificate, the designated person must give written notice to someone with power to control the decedent's property to inform them of the genetic material available for posthumous conception.[164] Finally, the deceased's genetic materials must be used to initiate a pregnancy within two years of the parent's death.[165] If these conditions are met, the child is deemed born within the parent's life and is entitled to a share of the estate.[166]

2. Colorado

In Colorado, a child in gestation at the time of the father's death is treated as born within the father's life and entitled to take through intestate succession.[167] Interestingly, a posthumously conceived child is treated as if the child were in gestation at the time of the father's death, and thus, the child is entitled to take as an heir through intestate succession.[168] Essentially, under these laws, the biological child of an estate owner is always permitted to take as an heir.[169] This seems to reflect the common law belief that it is more favorable for the decedent's estate to pass through descent than to go to a half-blood or non-blood relative.[170]

3. Iowa

The intestacy laws regarding posthumous children in Iowa are similar to the law in California in that they require the deceased whose paternity is

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161. *See infra* SectionV.B.1–6.
162. *See* CAL. PROB. CODE § 249.5 (West 2006).
163. *Id.*
164. *Id.*
165. *Id.*
166. CAL. PROB. CODE § 249.5; ARK. CODE ANN. § 28-9-221 (West 2015). Arkansas has a very similar statute, but instead imposes a twelve-month time limit, rather than two years, and they are not required to give the notice within four months. *Id.*
167. *See* COLO. REV. STAT. § 15-11-104 (West 2010).
168. *Id.* at § 15-11-120.
169. *Id.*
170. *See supra* Section II.B.

contested to fulfill the same written consent requirement.[171] However, Iowa has in place two additional requirements: (1) a genetic relationship between parent and child must be established; and (2) the child must be born within two years of the parent's death, as opposed to conceived within two years.[172]

4. Louisiana

Louisiana is another state that conditions intestacy rights on birth within a certain time period after the decedent has passed.[173] Under the statute, a child must be born within three years of the estate owner's death to qualify as an heir to that estate.[174] Interestingly, the statute also contains a provision allowing individuals with a diluted interest, because of the posthumous children, an avenue to challenge that child's paternity for up to a year after the child's birth.[175]

5. North Dakota

Like California, Louisiana, and Iowa, the intestacy laws in North Dakota allow a child conceived posthumously the right to inherit if that child is conceived or born within a certain time period.[176] To take in this state, a child must be conceived within three years, or born within forty-five months, of the parent's death.[177]

6. Virginia

Similarly, the state of Virginia will extend intestacy inheritance rights to posthumous children in two different instances.[178] First, the child has intestacy rights if the embryo is implanted in utero before notice of death can reasonably be communicated to the physician performing the procedure.[179] Second, the child has intestacy rights if the parent consents to the procedure and subsequent birth in writing.[180]

VI. THE TEXAS APPROACH: INTESTACY RIGHTS OF POSTHUMOUS

171. *See* IOWA CODE § 633.220A (2011).
172. *Id.*
173. LA. REV. STAT. ANN. § 391.1.
174. *Id.*
175. *Id.*
176. N.D. CENT. CODE § 30.1-04-04 (West 2009).
177. *Id.* at § 30.1-04-19(11).
178. VA. CODE ANN. § 20-158(B) (West 2000).
179. *Id.*
180. *Id.*

CHILDREN

The way that states provide, or do not provide, inheritance rights through intestacy laws exist on a spectrum.[181] On one end of this spectrum, a state may have the default rule, which states that no right accrues to any person not conceived, or even just born, before the estate owner's death.[182] On the other hand, a state could theoretically extend full rights to a child, regardless of when the child is born in relation to the parents' lives.[183] Then, states like California and Iowa take middle of the road approaches.[184] The following section discusses the new Texas legislative approach adopted September 1, 2015.[185]

A. Estates Code § 201.056

The new Texas statute controlling the inheritance rights of posthumous children in situations of intestate succession reads:

> No right of inheritance accrues to any person unless the person is born before, or is in gestation at, the time of the intestate's death and survives for at least 120 hours. A person is:
> (1) considered to be in gestation at the time of the intestate's death if insemination or implantation occurs at or before the time of the intestate's death; and
> (2) presumed to be in gestation at the time of the intestate's death if the person is born before the 301st day after the date of the intestate's death.[186]

As previously noted, the Texas law prior to this amendment was actually more favorable to posthumous children who were descendants of the deceased, as it allowed for them to take as heirs.[187] This new statute places the children of the decedent on the same foot as any other posthumous heir in that it forbids any of them to take unless they were conceived before the testator's death.[188]

In instances where a person does not consent to use of their genetic material to posthumously conceive a child, this statute does not seem

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181. *See supra* Part IV.
182. *See supra* Part IV.
183. *See supra* Part IV; COLO. REV. STAT. § 15-11-104 (West 2010).
184. *See* CAL. PROB. CODE § 249.5 (West 2010); VA. CODE ANN. § 20-158(B)(West 2000).
185. *See supra* Section VI.A.
186. TEX. EST. CODE ANN. § 201.056 *(replacing* TEX. PROB. CODE ANN. § 41(a) (West 2014)).
187. *See* BEYER, TEXAS PRACTICE SERIES, *supra* note 45, at § 7.16; EST. § 201.056 (amending TEX. EST. CODE ANN. § 201.056 (2014)). The previous statute read: "No right of inheritance accrues to any person other than to a child or lineal descendant of an intestate, unless the person is in being and capable in law to take as an heir at the time of the intestate's death." *Id.*
188. BEYER, TEXAS PRACTICE SERIES, *supra* note 45, at § 7.16.

inconsistent with statutes found in other sections of the Texas Code.[189] For example, a section of the Texas Family Code states that following a divorce, if a child is born through assisted reproduction, the former spouse is not considered that child's parent unless the ex-spouse consented, and the consent of the parent-child relationship is revocable at any point prior to the procedure.[190]

Another section uses the same language to extend the consent requirement but applies in the case of a deceased spouse.[191] If one spouse passes away before conception through assisted reproduction occurs, then the deceased is not the parent of the resulting child unless the deceased gave recorded consent kept by a licensed physician; in such circumstances the deceased would be the parent.[192] Both of these sections require consent before the government will recognize a legal parent-child relationship.[193] It would seem to logically follow that if an individual does not give consent to use the person's genetic material to create a child, and thus creating no parent-child relationship, then necessarily the child would be precluded from taking as an heir through intestate succession.[194] However, if a person does give consent to use the genetic material to create a child with whom the person shares a legal relationship, it seems odd to deprive that same child of inheritance rights.[195] Regardless, one would think that if a person is thorough enough to consider what will happen to genetic material in the event of either death or suicide, that same person is equally as likely to work diligently to create an estate plan that adequately provides for the resulting posthumous child, and this section of the Estates Code would no longer apply.[196]

The approach the legislature chose seems to favor finality and is consistent with other areas of Texas law.[197] It is important to note that posthumously conceived children are not totally cut off from the estate, just from intestacy.[198] Therefore, for an individual contemplating freezing genetic materials for ART purposes, it is also imperative to consider what

189. TEX. FAM. CODE ANN. §§ 160.706-07 (West 2007); UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4 (1988). The Uniform Status of Children of Assisted Conception is the source of this statutory language. *Id.*

190. FAM. § 160.706.

191. *Id.* § 160.707.

192. *Id.*

193. *Id.* at §§ 160.706–.707.

194. *See id.*; *see supra* Part V. The inverse "consent" argument could be made here. *See supra* Part V. If consent is required before a legal parent-child relationship will be recognized, it does not follow to allow a child to take through intestate succession in situations where no such consent was given. See *supra* Part V.

195. *See* FAM. §§ 160.706–707; *see* TEX. EST. CODE ANN. § 201.056 (2014).

196. *See* Mary Kate Zago, *Second Class Children: The Intestate Inheritance Rights Denied to Posthumously Conceived Children and How Legislative Reform and Planning Techniques Can Create Equality*, SETON HALL U. 1, 6 (2014), http://scholarship.shu.edu/student_scholarship/609, [perma.cc/e342-52ct].

197. *See* EST. § 201.056.

198. *See id.*

happens to that material after death.[199] If the individual wishes for the remains to be used to create a posthumous child, it would be prudent to write a will to account for the future financial interests of that child.[200]

Overall, the new § 201.056 of the Texas Estates Code is relatively straightforward.[201] The following section takes a look at another statute, enacted and made effective on the same day as § 201.056, which is not nearly as cut-and-dry.[202]

VII. THE TEXAS APPROACH: POSTHUMOUS CHILDREN AND CLASS GIFTS

Section 255.401 of the Texas Estates Code also took effect on September 1, 2015.[203] The statute reads as follows:

> (a) The right to take as a member of a class does not accrue to any person unless the person is born before, or in gestation at, the time of the testator's death and survives for at least 120 hours. A person is:
> (1) considered to be in gestation at the time of the testator's death if insemination or implantation occurs at or before the time of the testator's death; and
> (2) presumed to be in gestation at the time of the intestate's death if the person is born before the 301st day after the testator's death.
> (b) A provision in the testator's will that is contrary to this section prevails over this section.[204]

This section's intent seems clear enough on its face—to preclude the use of a decedent's sperm, eggs, or embryos to produce class heirs, and non-class heirs, years or even decades subsequent to the testator's death that the testator does not clearly indicate is an intended beneficiary.[205] But two problems with the word choice used in the statute likely preclude many intended beneficiaries from taking as members of a class.[206]

First, the language in the section fails to distinguish between immediate gifts and postponed gifts because it uses "the time of the testator's death" to mark the cut off period for which a child can be born to be included in a class, instead of at the time the class actually vests.[207] Second, this failure to distinguish between "insemination or implantation" has the same effect, by suggesting, or at least leaving open the question as to whether, someone who

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199. *Id.* § 255.401(b).
200. *See id.*
201. *See id.*
202. *See infra* Part VII.
203. EST. § 255.401.
204. *Id.*
205. *See id.*
206. *See id.*
207. GERRY W. BEYER, TEXAS LAWS OF WILLS § 30.3–.4 (3d ed.) (2015).

is born through a natural birth, but after testator's death, would be excluded from the class.[208]

These two sets of words indicate that the statute is likely to apply the same way regardless if the gift is given "to my grandchildren" or "to my only child for life, then my grandchildren."[209] Usually, for immediate gifts, the people included as recipients are determined at the time of the testator's death.[210] Postponed gifts, on the other hand, are usually contingent on some event happening before the gift takes effect—like the death of someone who has an immediate interest in something.[211] In many circumstances, one would think that a testator does not expect for the class of "my grandchildren" to close at the time of death, but the statutory language makes it unclear if that would nonetheless be the result.[212]

On a side note, this section seems consistent with statutes discussed in Part VI.A and with the UPA, for basically the same reasons as discussed above.[213] As previously mentioned, §§ 160.706 and 160.707 of the Family Code and the UPA prevent the establishment of a legal parent-child relationship when a child is conceived and born of assisted reproduction following the dissolution of a marriage, unless the former spouse consents to being the parent.[214] It states that a spouse who dies before assisted reproduction takes place is not the parent of child unless the decedent gave consent. [215] In both instances, a licensed physician must keep record of the consent.[216] It does not seem a far leap to suggest that the final clause of the statute was the Texas legislature's attempt to articulate a connection between the legal parent-child relationships created in the Texas Family Code and UPA to probate or class-gift issues.[217]

But still, the statute runs the risk of cutting out whole classes of descendants, born of a natural and normal birth, from inheriting.[218] To address this problem the Texas Estate's Code Committee has drafted, and is in the process of proposing, amendments to the statute.[219] The proposal, with changed words in italics, reads:

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208. EST. § 255.401.

209. BEYER, *supra* note 208, at § 30.4.

210. *See id.*

211. *See id.*

212. EST. § 255.401.

213. TEX. FAM. CODE ANN. §§ 160.706–.707; UNIF. PARENTAGE ACT §§ 706–707 (2002).

214. FAM. §§ 160.706–.707.

215. *Id.*

216. *Id.* §§ 160.706(b), 160.707. That is, in Texas, which has a heightened consent requirement than the UPA. *Id.*

217. *See id.* §§ 160.706(b), 160.707; Carpenter, s*upra* note 50, at 369 (explaining that including this language in a state's parentage statutes, but not the probate statutes, makes it unclear if any probate rights are being extended to the child.).

218. *See* BEYER, *supra* note 208, at § 30.3.

219. *See* TEX. EST. CODE ANN. § 255.401 (Est. Code Comm. Proposal as of Jan. 29, 2015).

> (a) A right to take as a member under a class gift does not accrue to any person unless the person is born before, or is in gestation at, the time of the death *of the person for whom the class is being measured* and survives for at least 120 hours. A person is:
> (1) considered to be in gestation at the time of a *person's* death if insemination of implantation occurs at or before the time of the *person's* death; and
> (2) presumed to be in gestation at the time of a *person's* death if the person was born before the 301st day after the date of the *person's* death.
> (b) A provision in the testator's will that is contrary to this section prevails.[220]

This proposal is still in its earliest stages, but it seems to be a step toward adding clarity to the statute's meaning, as well as to carrying out the drafters' intent.[221] Changing the language "at the time of the testator's death" to "the death of the person for whom the class is being measured," allows the classes for immediate gifts and for class-gifts to close at different times.[222] While an immediate gift will always vest at the time of the testator's death, this is not necessarily so for other gifts.[223] If a gift is "to my children for life, then to my grandchildren" the original version of the statute meant that the class of "my grandchildren" to would close at the time the testator's death.[224] Under the revised version, the class of "my grandchildren" would not vest or close until the testator's final child died.[225]

This second result is much more favorable because as previously mentioned, an estate owner with several children probably does not expect for all of the children's' families to be completed at the time of the decedent's death.[226] And even if the estate owner does, it is unlikely that the owner would want to treat an unexpected child who comes later differently.[227] Under the revised proposal, it is no longer necessary for the two classes to close simultaneously.[228] This revision preserves the intent of the drafters to preclude children born via frozen eggs, sperm, or embryos years or decades after the closing of the class, from nonetheless being included in that class, while at the same time avoiding the inadvertent result of prematurely cutting out intended beneficiaries.[229]

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220. *Id.*
221. *See id.*
222. BEYER, *supra* note 208, at § 30.3.
223. *See id.*
224. *Id.*
225. *Id.*
226. *See id.*
227. *See id.*
228. *See* TEX. EST. CODE ANN. § 255.401 (Est. Code Comm. Proposal as of Jan. 29, 2015).
229. *See id.*

The only foreseeable potential problem with the proposed statutory language is the use of "a person's" to replace "the testator's."[230] This language is somewhat confusing.[231] Perhaps a better solution would be to again change the language, replacing it either with "the close of the class" or "the vesting date of the class he is to be included in."[232] These phrases are not as ambiguous and carry out the same intent as "a person's" in a clearer fashion.[233]

As mentioned, this redraft of the statute is still in its earliest stages.[234] While it is the opinion of the author that the revised version provides clarity to the purpose of the statute, as well as increases the chances that practitioners will apply it as intended, there is no way to be certain it will ever make it to the Estates Code.[235] Indeed, even if the proposal is accepted, it could be a long time until it becomes law.[236] In the meantime, the following section proposes ways for practitioners to ensure their clients distribute their estates in the manner they desire under the two new Estates Code sections.[237]

VIII. PRACTICAL ADVICE FOR PRACTITIONERS

A. Early Considerations

With the developments in assisted procreation, individuals should consider the possibility of posthumous conception or the existence of frozen embryos at death during the drafting stage.[238] If a client has stored, or plans to store, genetic material for conception at a later date, that client should address the postmortem intentions for that genetic material in the client's will.[239]

B. Modify Documents

Section 255.401 of the Estates Code explicitly states that it is a default rule that only applies in instances where no other provision in the will expresses a contrary intent.[240] Thus, one of the most obvious pieces of advice for attorneys to ensure that a client provides for the intended beneficiaries is

230. *See id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *See infra* Part VIII.
238. *See* Susan N. Gary, *Posthumously Conceived Heirs*, GP SOLO MAGAZINE (Sept. 2005), http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/posthumousheirs.html [perma.cc/N2P9-QT26].
239. *Id.*
240. *See* TEX. EST. CODE ANN. § 255.401(b).

to edit existing documents.[241] Discovering the estate owner's intent and documenting it accomplishes this assurance; wills and other materials should adequately define descendants by, on their face, including or excluding children conceived postmortem.[242] Modifying existing documents is an important move because, as the legislature makes clear, the section applies to the estates of decedents who die after the effective date, rather than merely applying to any will created after the effective date.[243]

C. Create a Trust

Another option for helping a client who is inclined to allow for a posthumous child is to create a trust because doing so "will allow the estate to close more quickly than it might otherwise."[244] Practitioners should urge clients opting to go this route to designate a time period in which eligible posthumous children must be born to qualify and also name alternative beneficiaries in the event no posthumous child is conceived or born.[245] Creating a trust allows for bypassing of the statutory inheritance rules and is more likely to result in the following of the testator's wishes.[246]

Additionally, requiring or requesting that your client obtains a letter from the physician overseeing the assisted insemination or implantation confirming that the child was born within 301 days of the decedent's death is advisable.[247] Doing so will move along the process of administering your client's estate after the client passes.[248]

In some instances, a client may have already created a trust that is no longer capable of modification.[249] In such a situation, one of the only viable options for extending rights to the PC child is to procure a certified statement of intent from your client explaining to whom the assets go to and how the client wants them distributed.[250]

D. Texas Estates Code § 255.451

One potential avenue for providing for beneficiaries that § 255.401 of the Estates Code precludes can be found in § 255.451 of the same code.[251]

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241. *Id.*
242. *See* Shayne, *supra* note 6.
243. *See* 2015 TX H.B. 2418 (NS) (Mar. 5, 2015).
244. Gary, *supra* note 239.
245. *See id.*
246. *See id.*
247. *See* Heidi E. Junge, *Legislative Update 2015: Estates Code and Related Matters*, STEWART LEGAL SERVS., www.stewart.com/content/dam/stewart/Microsites/texas/pdfs/082515.pdf [perma.cc/LQK6-5RNP].
248. *Id.*
249. *See* Shayne, *supra* note 6.
250. *Id.*; *see infra* Section VIII.D.
251. *See* TEX. EST. CODE ANN. § 255.451 (West 2015).

This section, which also became effective September 1, 2015, has a provision that allows courts to reform or modify an unambiguous will if the representative of the estate shows through extrinsic evidence that the terms of the will are not consistent with the testator's intent and the inconsistency is due to a scrivener's error.[252] This statute replaces the old rule, which prohibited the use of extrinsic evidence to read ambiguity into an otherwise unambiguous will.[253]

Because this statute is so new, practitioners have not litigated it in Texas courts.[254] It is, therefore, unclear how practitioners will interpret and apply the statute.[255] To an extent, this could work to the benefit of someone bringing a claim contesting a will as a scrivener's error.[256] One possible cause of, and argument for, a scrivener's error is that many attorneys simply are not knowledgeable on posthumous conception issues, resulting in an inability to draft a document that preserves the client's intent.[257] If extrinsic evidence, such as the record kept with the physician consenting to have a parent-child relationship with a posthumously conceived child, is allowed, the evidence might permit class membership to an otherwise excluded individual.[258]

IX. CONCLUSION

Posthumous heirs have always occurred whenever a child's father dies before birth or in situations where a legally dead woman gives birth to a child.[259] Each jurisdiction has historically afforded these posthumous children with a level of rights that the state's lawmakers and public policy deemed appropriate.[260] But advances in medicine and ART now allow for many modern wonders in the form of diverse family structures that, until recently, were completely inconceivable.[261] The ability to create an heir through cryopreservation has changed the question from how to treat posthumous heirs to one of how to treat posthumously conceived heirs, and the issue is hotter than ever.[262]

Just last year, Texas answered this question and established its default rule as one that does not extend inheritance rights to posthumously conceived

252. *See id.* § 255.451(a)(3). The representative is required to making this showing by clear and convincing evidence. *Id.* at (b).
253. *See* San Antonio Area Found. v. Lang, 35 S.W.3d 636, 637 (Tex. 2000).
254. TEX. EST. CODE ANN. § 255.451. Effective date is Sept. 1, 2015. *Id.*
255. *Id.*
256. *Id.*
257. *See* Zago, *supra* note 197.
258. *See* EST. § 255.401(b).
259. *See supra* Parts I–II.
260. *See supra* Part II.
261. *See supra* Part III.
262. *See supra* Parts III, V.

children, unless an estate owner specifically provides for that child in a will.[263] The legislation accomplished this through changes to the Estates Code—amending one section and adding another completely new section—with hopes of striking the right balance between all of the interested parties involved.[264] The legislation designed these sections to prevent the decedent's sperm, eggs, or embryos from producing heirs born years or decades after the decedent's death.[265] The first of these sections, § 201.056, clearly accomplishes this goal on its face because it prevents children conceived after the death of their deceased parent from taking part of the estate through intestacy.[266] The second, § 255.401, is not as clear.[267] The language of the statute is not clear and seems to indicate that it will inadvertently cut out whole classes of people who the legislature did not intend to cut out.[268] Luckily, Estates Code Committee of Texas has a proposal in the works that is aimed correcting the ambiguity in the statute.[269] With a little tweaking, the statute should be able to finally fully carry out the legislature's intent.[270] In the meantime, this comment should serve as an aid for attorneys, estate planners, and owners to deal with the unclear language of the statute.[271]

263. *See supra* Parts III, V.
264. *See supra* Parts VI–VII.
265. *See supra* Parts VI–VII.
266. *See supra* Part VI.
267. *See supra* Part VII.
268. *See supra* Part VII.
269. *See supra* Part VII.
270. *See supra* Part VII.
271. *See supra* Part VIII.