POSTMORTEM SPERM RETRIEVAL AND THE SOCIAL SECURITY ADMINISTRATION: HOW MODERN REPRODUCTIVE TECHNOLOGY MAKES STRANGE BEDFELLOWS

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I. INTRODUCTION

On July 3, 1995, Bruce Vernoff, age thirty-five, died unexpectedly as the result of an adverse allergic reaction to a prescription medication.[1] Gabriela

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1. Brief for the Appellee at 8, Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009) (No. 08-55049) [hereinafter Brief for the Appellee]; Claire Bowles, *You Don't Need to Make Sperm or Even Be Alive to Be a Father*, BIO-MEDICINE, Mar. 24, 1999, at 1, http://news.bio-medicine.org/medicine-news-2/You-Dont-Need-To-Make-Sperm-Or-Even-Be-Alive-To-Be-A-Father-11111-1/; Charles Arthur, *Woman Is Pregnant by Sperm of Dead Man*, THE INDEPENDENT (London, England), July 16, 1998, at 1.

"Gaby" Vernoff, his wife of five years, survived him.[2] The couple had no children at the time of Bruce's death.[3] Gaby asked Dr. Cappy Rothman to extract sperm from Bruce's body, and the procedure was successfully performed thirty hours after Bruce's death.[4] The sperm were cryopreserved.[5] In 1998, Gaby Vernoff was successfully impregnated with her deceased husband's sperm.[6] She gave birth to a baby girl, Brandalynn Vernoff, on

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2. Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009); Brief for the Appellee, *supra* note 1, at 8.

3. *Vernoff*, 568 F.3d at 1105; Brief for the Appellee, *supra* note 1, at 8. Mr. Bruce Vernoff did not have a will. *Id*.

4. Bowles, *supra* note 1, at 1. Dr. Rothman extracted five vials of semen from Bruce Vernoff's body. *Vernoff*, 568 F.3d at 1105; Brief for the Appellee, *supra* note 1, at 8. In 1978, Dr. Cappy Miles Rothman was the first man to perform a postmortem sperm extraction. Cappy Miles Rothman, *Live Sperm, Dead Bodies*, 20 J. ANDROL.456, 456 (1999). Unlike the Vernoff extraction, Dr. Rothman did not perform his first extractions at the request of the decedent's spouse. *Id*. Dr. Rothman described his first cases as follows:

> . . . I harvested sperm from a young man who had sustained fatal head injuries . . . . Although the deceased was unmarried and without a fiancée, this man's father was greatly consoled by knowing that viable sperm were restored. When I recovered sperm from another young man who had died of a gunshot wound, his parents were obviously comforted when they saw motile sperm from their son. Preserving part of the deceased let them identify with their lost son and allowed the theoretical possibility of continuation of the patrilineal heritage.

Id. (footnote omitted). The sperm from Dr. Rothman's earlier extractions were not used for fertilization because, among other reasons, "[t]he sperm were of poor quality, and after freezing and thawing, it would have been unreasonable to anticipate progeny." *Id*. Upon Bruce Vernoff's death, Dr. Rothman had "already carried out the extraction for the families of about a dozen dead men. In these cases, the families simply wanted to keep the sperm as a memento, rather than to use it." Arthur, *supra* note 1, at 1. Dr. Rothman described his motivation for granting Ms. Vernoff's request as follows: "'I just did it because the family was in so much stress and so much grief.'" BBC NEWS, *Baby from Dead Husband's Sperm*, Mar. 27, 1999, http://news.bbc.co.uk/2/hi/science/nature/305302.stm. "Dr. Rothman is the founder of the Center for Male Reproductive Medicine and is the co-director and co-founder of the IVF Center at Century City Hospital" in Los Angeles. Center for Male Reproductive Medicine website, Cappy Rothman, MD Facs, http://www.malereproduction.com/bio_rothman.html (last visited Sept. 11, 2009). He is also "the medical director of the California Cryobank, the world's largest sperm bank." *Id*.

At the time of Bruce Vernoff's extraction, his body had been refrigerated for thirty hours, which Dr. Rothman reported as the longest time lapse that had occurred prior to a sperm retrieval. BBC NEWS, *supra*; s*ee also* Steve Planchon, Comment, *The Application of the Dead Man's Statutes in Family Law*, 16 J. AM. ACAD. MATRIM. LAW. 561, 561 (2000); Bowles, *supra* note 1, at 1; Arthur, *supra* note 1, at 1.

5. *See generally* E.E. Gottenger & H.M. Nagler, *The Quagmire of Postmortem Sperm Acquisition*, 20 J. ANDROL. 458 (1999) (addressing issues pertaining to postmortem sperm retrieval including cryopreservation). Sperm cryopreservation involves cooling extracted sperm in liquid nitrogen to sub-zero temperatures for a specified period of time. John Hopkins Medicine Fertility Center, *Embryo and Sperm Cryopreservation*, http://www.hopkinsmedicine.org/fertility/services/cryopreservation.html (last visited Sept. 11, 2009). Sperm cryopreservation is often utilized by men who are about to undergo cancer treatment. Gottenger & Nagler, *supra*, at 458. Also, military personnel may choose to bank sperm prior to deployment, in the event they do not return. Maria Doucettperry, *To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military*, ARMY LAW., May 2008, at 1, 1-2. *See generally*, Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 ARIZ. L. REV. 91, 93 (suggesting that sperm cryopreservation and postmortem conception are likely to grow in popularity due to technological advancements and increased availability). In 2004, the longest reported period of successful sperm cryopreservation followed by a live human birth was 21 years. New Scientist, *Baby born from sperm frozen for 21 years*, May 25, 2004, http://www.newscientist.com/article/dn5031-baby-born-from-sperm-frozen-for-21-years.html (referencing G. Horne et al., *Live Birth with Sperm Cryopreserved for 21 Years Prior to Cancer Treatment: Case Report*, 19 HUMAN REPROD. 1448, 1448-49 (2004), *available at* http://humrep.oxfordjournals.org/cgi/content/full/19/6/1448).

6. *Vernoff*, 568 F.3d at 1105. She was impregnated using *in vitro* fertilization (IVF). *Id*.

March 17, 1999.[7] Brandalynn was reputed to be the first baby born using sperm extracted from her father's body after his death.[8] At age ten, Brandalynn was the focus of the first Circuit Court of Appeals case to decide whether a child conceived in these circumstances is eligible to receive social security benefits as a survivor of her father.[9] On June 17, 2009, the Court of Appeals for the Ninth Circuit, in *Vernoff v. Astrue*, decided that Brandalynn was not entitled to social security benefits.[10]

Postmortem sperm retrieval (PMSR) is the process of removing sperm from the cadaver of a recently deceased male.[11] Utilizing one of a number of techniques, doctors are able to extract sperm from the decedent's body no later

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> IVF is a method of assisted reproduction in which a man's sperm and a woman's eggs are combined outside of the body in a laboratory dish. One or more fertilized eggs (*embryos*) may be transferred to the woman's uterus, where they may implant in the uterine lining and develop. Excess embryos may be *cryopreserved* (frozen) for future use.

American Society for Reproductive Medicine, *Assisted Reproductive Technologies: A Guide for Patients*, at 4 (2008), *available at* http://www.asrm.org/Patients/patientbooklets/ART.pdf. Insemination by IVF formerly involved putting eggs and numerous sperm together into a laboratory petri dish or incubator. *See, e.g.*, Cyrene Grothaus-Day, *From Pipette to Cradle, From Immortality to Extinction*, 7 RUTGERS J. OF L. & RELIG. 2, 6 (2005); Machelle M. Siebel, *Understanding the Medical Procedures and Terminology Surrounding Reproductive Technology*, ADOPTION AND REPRODUCTIVE LAW IN MASSACHUSETTS (2000), *available at* http://faculty.law.miami.edu/mcoombs/documents/Siebel.ARTTechnologies.pdf. A newer form of IVF is "intracytoplasmic sperm injection" (ICSI). ICSI is "the direct microinjection of a single sperm into a single egg in order to achieve fertilization." UCSF Center for Reproductive Health, *Intracytoplasmic Sperm Injection (ICSI)*, http://www.ucsfivf.org/ucsf-icsi.htm (last visited Sept. 11, 2009).

Apparently, after one unsuccessful attempt to become pregnant, fifteen months after Bruce Vernoff's death in 1995, Gaby Vernoff gave birth to Brandalynn in 1999. *See* Planchon, *supra* note 4, at 561; Bowles, *supra* note 1, at 1; Arthur, *supra* note 1, at 1.

7. *Vernoff*, 568 F.3d at 1105; Bowles, *supra* note 1, at 1; Arthur, *supra* note 1, at 1; BBC NEWS, *supra* note 4.

8. *See supra* notes 1, 4. However, one report indicates that there was a child born in France from posthumously-extracted sperm two years prior to Brandalynn's birth. BBC NEWS, *supra* note 4.

9. *Vernoff*, 568 F.3d at 1104-08. The opinion of the district court, rendered on November 13, 2007, was sealed by the court; therefore, references to the district court's decision have been extracted from the parties' briefs and the published opinion of the Court of Appeals for the Ninth Circuit.

10. *Id.* at 1104.

11. *See* Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?*, 3 DEPAUL J. HEALTH CARE L. 39 (1999); Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS U. L.J. 451 (2000). Sperm retrieval is sometimes referred to as "sperm procurement" or "sperm extraction" or "sperm harvesting." *See* Kerr, *supra*; Chester, *supra*.

The postmortem retrieval of human eggs from deceased women has not yet been perfected. However, most of the reasoning that is explored in this article would be applicable regardless of whether the decedent was male or female. *See, e.g.*, LISA V. BROCK & ANNA C. MASTROIANNI, SPERM AND EGG RETRIEVAL FOR POSTHUMOUS REPRODUCTION: PRACTICAL, ETHICAL, AND LEGAL CONSIDERATIONS (David E. Battaglia & Philip E. Patton eds., Humana Press 2005); Katheryn D. Katz, *Parenthood from the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289, 296-97 (2004).

Similar issues arise with gametic material retrieved from an individual who is in a permanent state of unconsciousness. *See, e.g.*, Bryce Weber, Ron Kodama, & Keith Jarvi, *Postmortem Sperm Retrieval: The Canadian Perspective*, 30 J. ANDROL. 407 (2009); Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347 (1999). The discussions in this article will be limited to the retrieval of sperm from men who have already been pronounced dead.

than thirty-six hours after death.[12] Typically, the sperm are cryopreserved (frozen) for future use.[13]

The use of PMSR raises a host of legal, ethical, moral, and medical questions.[14] These questions encompass a wide range of issues.[15] Is it ethical to extract gametic material from a human without his or her consent?[16] Is this extraction a prohibited mutilation of a cadaver?[17] Who has the authority, if

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12. *See, e.g.*, Weber et al. *supra* note 11, at 407. Weber and his colleagues enumerate the following techniques for retrieving sperm from human bodies: "surgical excision of the epididymis; aspiration and irrigation of the vas deferens; electroejaculation; and orchidectomy." *Id*. (citations omitted); s*ee also* Kerr, *supra* note 11, at 41-42 n.15-17; *Study Results from Chaim Sheba Medical Center, Department of Urology Provide New Insights into Life Sciences*, HOSP. L. WKLY., Dec. 14, 2006, at 414 (describing seventeen cases of PMSR performed within 7 1/2 - 36 hours of death).

13. Gottenger & Nagler, *supra* note 5, at 458 (describing the cryopreservation of sperm).

14. While there are no current statistics on the number of requests for PMSR, these requests are reported to be "occurring with increasing frequency." *Ethics of Post-Mortem Sperm Retrieval Discussed by New York-Presbyterian Urologists*, Apr. 26, 2003, http://nyp.org/news/hospital/81.html. A 1997 survey reported that eighty-two requests were received in forty U.S. hospitals between 1980 and 1995, with about one half of these requests occurring in 1995. *See* Kerr, *supra* note 11, at 45 (reporting that these numbers were "believed to be conservative estimates"). Sperm retrieval has been requested by wives, fiancées, girlfriends, parents, family friends, intensive care workers, and social workers. *See* Katz, *supra* note 11, at 295-96. Kerr describes one situation in which the widow originally requested the sperm removal, but when she decided not to use her deceased husband's sperm to conceive, his mother then requested the sperm with the intent of herself (presumably using a donor egg) bearing her own grandchild. Kerr, *supra* note 11, at 42. *See generally* Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967 (1996); Chester, *Double Trouble*, *supra* note 6; Doucettperry, *supra* note 5; Laura A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881 (2000); Susan N. Gary, *We Are Family: The Definition of Parent and Child for Succession Purposes*, 34 ACTEC 171 (2008); Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393 (2008); Knaplund, *A Father's Last Will*, *supra* note 5; Kathryn Venturatos Lorio, *Conceiving the Inconceivable: Legal Recognition of the Posthumously Conceived Child*, 34 ACTEC 154 (2008); Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procr*eation, 75 N.C. L. REV. 901 (1997); Strong, *Ethical and Legal Aspects*, *supra* note 11; Carson Strong, *Consent to Sperm Retrieval and Insemination after Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243 (2000).

Some medical institutions have established guidelines for responding to requests for PMSR. *See, e.g.*, Jennifer A. Tash et al., *Postmortem Sperm Retrieval: The Effect of Instituting Guidelines*, 170 J. UROL. 1922, 1922-25 (2003) (describing the guidelines instituted at the Weill Medical College of Cornell University). "The guidelines included [four] general considerations: 1) issues of consent, 2) medical contraindications, 3) resource availability and 4) a 1-year waiting period for bereavement and assessment of recipient." *Id*. at 1923 (citations omitted). *See also* The Ethics Committee for the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 FERTILITY & STERILITY SUPP. 1 (2004); Katz, *supra* note 11, at 289.

15. *See infra* notes 16-31 and accompanying text.

16. *See generally* M.J. Parker, *'Til Death Us Do Part: The Ethics of Postmortem Gamete Donation*, 30 J. MED. ETHICS 387-88 (2004). At least one medical ethicist has likened this process to "raping someone when he is dead." *See* Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. MED. ETHICS 35, 55 (2000) (quoting bioethicist Arthur Caplan). *See also* Barron H. Lerner, *In a Wife's Request at Her Husband's Deathbed, Ethics Are an Issue*, N.Y. TIMES, Sept. 7, 2004, at F1, *available at* http://www.nytimes.com/2004/09/07/health/07essa.html.

17. On the treatment of dead bodies, *see* Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45 (2005); Frances Foster, *Individualized Justice in Disputes Over Dead Bodies*, 61 VAND. L. REV. 1351 (2008); Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971 (1999).

anyone, to consent to PMSR?[18] Who has the authority to receive sperm extracted through PMSR, and to what uses may the sperm be put?[19] Should PMSR be treated as an anatomical gift?[20] Should the rules for extracting sperm from deceased minors differ from those for extracting sperm from deceased adults?[21] Is a man's sperm "property" that can be given away or devised?[22] Does sperm have an economic value and, if so, what are the tax ramifications?[23] Can sperm be sold after the father's death?[24] May a child who is born using posthumously extracted sperm inherit from the father?[25] Is such a child included in a class gift, either under the father's will or the will or trust of another?[26] Will that child be treated as a child of the father for purposes of eligibility to bring a wrongful death lawsuit?[27] Do these children have constitutional equal protection rights?[28] If children conceived using PMSR are allowed to take property from the father or others, or are entitled to government death benefits, does this offer a financial incentive for women to retrieve a man's sperm after he dies and become impregnated with it?[29] If state laws relating to PMSR differ, will this encourage "reproductive tourism" by people who are seeking more advantageous treatment for their children?[30] What are the social and psychological ramifications to a child who is born under these

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18. *See* Katz, *supra* note 11, at 305-11.

19. *Id.*

20. *See* Kerr, *supra* note 11, at 61-70; Bethany Spielman, *Post Mortem Gamete Retrieval After Christy*, ABA Health eSource, Vol 5, No. 2 (2008), http://www.abanet.org/health/esource/Volume5/02/spielman.html (last visited Sept. 11, 2009).

21. *See, e.g.*, Assisted Human Reprod. Act: Prohibited Activities, S.C. 2004, c.2, s. 9 (Canadian statute prohibiting any person from obtaining or using sperm or ovum from a minor except for the purpose of preserving the gametic material "for the purpose of creating a human being that the person reasonably believes will be raised by the donor").

22. This question was raised in *Hecht v. Superior Court of Los Angeles County*, in which a man, who had banked sperm prior to committing suicide, devised the sperm to his female companion for her use, should she desire to become pregnant after his death. Hecht v. Superior Court of Los Angeles County, 20 Cal. Rptr. 2d 275, 276-77 (Cal. Ct. App. 1993). *See generally* William Boulier, *Sperm, Spleen, and Other Valuables: The Need to Recognize Property Rights in Certain Body Parts*, 23 HOFSTRA L. REV. 693, 696-704 (1995) (discussing how the *Hecht* decision began the process of recognizing the body as property).

23. *See* Jay Soled, *The Sale of Donors' Eggs: A Case Study of Why Congress Must Modify the Capital Asset Definition*, 32 U.C. DAVIS L. REV. 919 (1999).

24. *See* http://www.spermbank.com/newdonors/index.cfm?ID=4 (stating that, during life, males are offered money for the service of donating their sperm to sperm banks).

25. *See* James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743 (1998).

26. *See* Knaplund, *A Father's Last Will*, *supra* note 5; *infra* note 71 and accompanying text.

27. *See generally* Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933 (1996) (analyzing the wrongful death statutes and the states continued confusion of legitimacy classifications).

28. *See, e.g.*, Kristi S. Knaplund, *Equal Protection, Postmortem Conception, and Intestacy*, 53 U. KAN. L. REV. 627, 643 (2005).

29. *Id.* at 632-33.

30. *See generally* Rothman, *supra* note 4, at 456 ("limiting the procedure of postmortem sperm retrieval will lead to the development of reproductive tourism because of regional (state- or country-imposed) restrictions").

circumstances?[31] The list of questions is virtually endless. This article focuses on one small aspect of this multi-faceted technological development: The entitlement of a child, conceived using posthumously retrieved sperm, to social security benefits as a survivor of his or her father. Brandalynn Vernoff's case provides an answer to that question, at least as it applies in cases that arise in the State of California and the federal courts of the Ninth Circuit.[32]

II. RELEVANT LEGISLATION

Although PMSR has been the subject of legislation in other countries, to date, the United States federal government has not enacted any statute that pertains specifically to posthumous conception or PMSR.[33] However, some state and uniform laws that deal more generally with the posthumous birth and posthumous conception of children will have a direct impact on whether children born of posthumously retrieved sperm will be able to inherit from their biological fathers or be eligible for social security benefits as survivors of their fathers.[34]

"Posthumous birth" will be used throughout this article to refer to the birth of a child or other heir after the death of the parent or relative. "Posthumous conception" will generally be used to refer to the impregnation of a woman by sperm that the father banked during his life in anticipation of a possible premature death. While children conceived and born from sperm retrieved through PMSR are obviously the products of posthumous conception, the term posthumous conception has more often referred to children conceived after a parent's death through the use of sperm purposely banked by the father prior to death, rather than from sperm extracted from the father's body after death.[35]

State and uniform laws that deal with posthumous birth and posthumous conception fall into two categories. The first group of statutes, which includes the Uniform Parentage Act (UPA), deals generally with the parentage of children.[36] These statutes cover a number of issues that are not relevant to

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31. *See, e.g.*, Gottenger & Nagler, *supra* note 5; Katz, *supra* note 11, at 313-15.

32. Vernoff v. Astrue, 568 F.3d 1102, 1111-12 (9th Cir. 2009).

33. *See, e.g.*, Assisted Human Reproduction Act: Prohibited Activities, S.C. 2004, c. 2, s. 8 (Consolidated Stats. of Canada); Human Fertilization & Embryology Act 2008, Ch. 22, s.39 (England). *See generally* G. Bahadur, *Death and Conception*, Human Reprod. 117:10, 2769, 2771 (2002) (describing legislation in European countries); Catherine Best, *Vic. Parliament Upholds Use of Sperm from Dead to Conceive*, AAP Newsfeed, Australian Associated Press Pty., Ltd., Oct. 9, 2008 (describing proposed legislation in Victoria, Australia); J. Dostal et al., *Postmortem Sperm Retrieval in New European Union Countries: Case Report*, Human Reprod. 20:8 2359, 2360 (describing legal status of PMSR in Hungary and the Czech Republic); Judy Siegel-Itzkovitch, *Israel Allows Removal of Sperm from Dead Men at Wives' Request*, BMJ Vol. 327 at 1187 (11/22/03) (describing Israel Attorney General's Guidelines on PMSR).

34. *See* Lorio, *supra* note 14, at 159-60; Gary, *We Are Family*, *supra* note 14, at 180-86; Knaplund, *A Father's Last Will*, *supra* note 5, at 93.

35. Knaplund, *A Father's Last Will*, *supra* note 5, at 93-94.

36. *See* Knaplund, *Biotech Child*, *supra* note 14, at 401 (listing those statutes dealing specifically with the parentage of posthumous children).

inheritance rights, such as child custody and support responsibilities.[37] The second group of statutes, which includes the Uniform Probate Code (UPC), deal specifically with the rights of children to share in their parents' estates or otherwise be entitled to distributions due to their parents' deaths.[38] As shown in the later discussion of *Vernoff v. Astrue*, both types of statutes are relevant to whether a child who is conceived and born using PMSR is eligible to receive social security benefits.[39]

A. Parentage Statutes

The UPA addresses a number of issues revolving around the parent-child relationship, with a particular focus on the status of children who are born out of wedlock.[40] While the scope of the UPA is far broader than the distribution of a parent's property at death, if a parent-child relationship is established under the UPA, that relationship "applies for all purposes, except as otherwise specifically provided" by another law of the state.[41] The UPA addresses the paternity of both posthumously born children and posthumously conceived children. A posthumously born child is presumed to be the child of a man if the parents were married and the child is born within 300 days of the termination of the marriage by the father's death.[42] Under Section 201 of the UPA, a father-child relationship is established if the man "consented to assisted reproduction by a woman under [Article] 7 which resulted in the birth of the child."[43] Article 7 of the UPA is devoted to children who are conceived other than "by means of sexual intercourse . . . ."[44] Section 703 states that "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as

37. *See, e.g.*, CAL. FAM. CODE §§ 7613-7614 (West 2008) (addressing parentage of children resulting from artificial insemination and child support issues).

38. *See* Lorio, *supra* note 14, at 160 (describing statutes specifically addressing posthumous children's inheritance rights).

39. *See* discussion *infra* Part III.D.

40. The UPA is the "official recommendation of the [Uniform Law Commission] on parentage." UNIF. PARENTAGE ACT Prefatory Note (2000) (amended 2002). The Commission (formally known as the National Conference of Commissioners on Uniform State Laws or NCCUSL) has been addressing the issue of parentage, particularly as it relates to children who are born out of wedlock, for almost 100 years. *See id.* The first UPA was promulgated in 1973. *See* Unif. L. Comm'rs, Summary, UNIF. PARENTAGE ACT, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upa.asp (last visited Sept. 11, 2009).

The basic premise of the UPA is equal treatment of children regardless of the marital status of the parents. *See* UNIF. PARENTAGE ACT § 202. The same approach was adopted for purposes of intestate succession in the UPC. *See* UNIF. PROBATE CODE § 2-114 (2006). S*ee also* Gary, *We Are Family*, *supra* note 14, at 174 (describing the UPA).

41. UNIF. PARENTAGE ACT § 203. *See* Gary, *We Are Family*, *supra* note 14, at 177. Professor Gary explores the different treatment of children of assisted reproduction by the UPA and the UPC explaining that "the UPC rules apply to the distribution of property after death, while the UPA rules may create ongoing support obligations." *Id.*

42. UNIF. PARENTAGE ACT § 204(a)(2)-(3). Under UPA Section 204(a)(3), this presumption prevails if the couple thought they were married but the marriage turns out to be invalid or void. *Id.* § 204(a)(3).

43. *Id.* § 201(b)(5).

44. *Id.* § 701.

provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."[45] Section 704 requires the consent to be in "a record signed by the woman and the man."[46] Under Section 707, even if a man or a woman consented to be a parent, that individual is not considered to be the child's parent if the individual died "before placement of eggs, sperm, or embryos."[47] The only circumstance under which that individual will be considered the child's parent is if "the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child."[48] Thus, under the UPA, it appears that a child who is born from sperm retrieved from the child's father after the father's death is not considered to be the child of that father unless the father had actually anticipated the sperm retrieval and left a written "record" in which he consented to the use of his sperm for assisted reproduction.[49] A similar set of provisions appears in the ABA Proposed Model Code Governing Assisted Reproduction.[50]

Alabama, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming adopted the UPA as amended in 2002.[51] Oklahoma, however, did not adopt the provisions of Article 7 that relate to children of assisted reproduction.[52]

Promulgated in 1988, the Uniform Status of Children of Assisted Conception Act (USCACA) specifically addressed parentage issues for children conceived through assisted reproduction techniques.[53] Section 4 prohibited such children from being treated as the children of the deceased parent if the parent died "before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm."[54] The Comment explains the section as follows:

> [The section] is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation

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45. *Id.* § 703.

46. *Id.* § 704(a).

47. *Id.* § 707.

48. *Id.*

49. *See id*.

50. ABA Fam. L. Sec. Comm. on Assisted Reprod. Tech. and Genetics, Proposed Model Code Governing Assisted Reproduction, § 602 (2007), http://www.abanet.org/family/committees/artmodelcode_feb 2007.pdf (last visited Sept. 11, 2009). *See generally* Charles P. Kindregan, Jr., & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 FAM. L.Q. 203, 218-19 (2008) (stating that "[i]t is not the intent of the Model Act to conflict with or to supersede the provisions of either the Uniform Parentage Act (UPA) or the Uniform Probate Code (UPC)").

51. *See* ALA. CODE § 26-17-101 to -905 (1975) (effective Jan. 1, 2009); DEL. CODE ANN. Tit. 13, § 8 (2003); N.D. CENT. CODE § 14-20-01 to -66 (2005); OKLA. STAT. ANN. Tit. 10, § 7700 (West 2006); TEX. FAM. CODE §§ 160.001-.763 (Vernon 2001); UTAH CODE ANN. §§ 78B-15-101 to -902 (2005); WASH. REV. CODE §§ 26.26.0011-.913 (2002); WYO. STAT. ANN. § 14-2-401 to -907 (2003).

52. *See* OKLA. STAT. ANN. tit. 10, § 7700 (West 2009) (lacking subsection applying to parentage of children conceived through assisted reproduction).

53. *See* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988).

54. *Id.* § 4.

> process after their death. The death of the person whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo into a womb would end the potential parenthood of the deceased.[55]

North Dakota, the only state to adopt this provision, repealed it in 2005.[56] The NCCUSL withdrew the USCACA in 2000 when promulgating the newest version of the UPA.[57]

B. Inheritance Statutes

State inheritance laws have long recognized that a biological father may die while the woman who is carrying his child is pregnant.[58] Inheritance statutes generally allow posthumous children to inherit from the parent or other relatives.[59] Posthumous conception is a more recent development that has only been addressed in the inheritance laws of a few states.[60]

As a general rule, only someone who is surviving at the death of a decedent is eligible to take from that decedent's estate.[61] However, most states have statutes that describe circumstances under which someone who is born after the decedent's death may still share in the decedent's estate.[62] Some of the statutes that allow children born after the parent dies to inherit from that parent state only that posthumous children are deemed to be living at the time of the death of the parent.[63] The statutes do not define the term posthumous children.[64] Arguably, because these statutes are silent on whether a

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55. *Id.* § 4 cmt.

56. N.D. CENT. CODE § 14-18-04 (1989), *repealed by* 2005 N.D. Laws 135.

57. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988), 9C U.L.A. 363 (2001), Refs. & Annots. Despite the non-acceptance among the states and the NCCUSL's eventual withdrawal of the Act, the Court of Appeals for the Ninth Circuit referred to USCACA briefly in its opinion. *See* Vernoff v. Astrue, 568 F.3d 1102, 1111 (9th Cir. 2009).

58. *See, e.g.*, Groce v. Rittenberry, 14 Ga. 232, 237 (1853) (discussing the development of the English rule that a child who is "en ventre sa mere"—literally meaning "in the mother's stomach"—is living at the time of the parent's death).

59. *See* Lorio, *supra* note 14, at 159-61.

60. *See, e.g.*, LA. REV. STAT. ANN. § 9:391.1 (2008); *see also* CAL. PROB. CODE § 249.5 (West 2009).

61. *See, e.g.*, GA. CODE ANN. § 53-2-1(c)(1) (2008).

> Upon the death of an individual who is *survived* by a spouse but not by any child or other descendant, the spouse is the sole heir. If the decedent is also *survived* by any child or other descendant, the spouse shall share equally with the children, with the descendants of any deceased child taking that child's share, per stirpes; provided, however, that the spouse's portion shall not be less than a one-third share . . . .

Id. (emphasis added). *See also* Khabbaz v. Comm'r of Soc. Sec., 930 A.2d 1180, 1183-84 (N.H. 2007) (deciding that a child conceived after the father's death using stored sperm did not survive the father and thus would not qualify as his intestate heir under the state statute referring to the "surviving issue").

62. *See, e.g.*, TEX. FAM. CODE ANN. § 160.707 (Vernon 2009); *see also* WASH. REV. CODE § 26.26.730 (2005) (allowing child of assisted reproduction to inherit only if deceased recorded consent).

63. *See, e.g.*, CAL. PROB. CODE § 249.5 (West 2009).

64. *See, e.g.*, MO. ANN. STAT. § 474.050 (West 2009); NEV. REV. STAT. § 132.290 (2009); OKLA. STAT. ANN. tit. 84, § 228 (West 2009). In Delaware and West Virginia, a posthumous child is described simply as a child "in the mother's womb." *See* DEL. CODE ANN. title 12, § 310 (2009); W. VA. CODE

posthumously born child must be conceived prior to the parent's death, statutes of this type would not preclude a child who was both conceived and born after the parent's death from inheriting from the parent.[65]

Other state statutes use terminology that seems to expressly require that a child who is born after a parent's death be conceived prior to the death of the parent in order to be able to share in that parent's estate.[66] The pre-2008 version of the UPC, in Section 2-108, provides that a child "in gestation" at the time of a parent's death is considered alive at the time of the parent's death, if the child lives at least 120 hours after birth.[67] The requirement in these statutes and the UPC that a child be conceived or in gestation prior to the father's death seem to preclude from inheritance a child whose father's sperm were not extracted until after the father's death.[68] However, in at least one case, a state

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§ 42-1-8 (2009). The Kentucky statute speaks of a "child born of a widow." KY. REV. STAT. ANN. § 391.070 (West 2009). The North Carolina statute speaks of "lineal descendants . . . born within 10 lunar months" of the decedent's death. N.C. GEN. STAT. § 29-9 (2009).

65. *See* MASS. GEN. LAWS ANN. ch. 190, § 8 (West 2009). Prior to 2008, this law provided simply that "[p]osthumous children shall be considered as living at the death of their parent." *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 264 (Mass. 2002). In *Woodward v. Commissioner of Social Security*, the Supreme Judicial Court of Massachusetts determined that, because this undefined term contained no requirement that a child "be in existence" at the decedent's death, children who were conceived after a father's death from sperm that he had banked prior to undergoing chemotherapy would enjoy the same succession rights as children conceived before their father's death. *Id*.

66. *See, e.g.*, COLO. REV. STAT. ANN. § 15-11-108 (2009) ("Relatives of the decedent *conceived before the decedent's death* but born thereafter inherit as if they had been born in the lifetime of the decedent if the relative lives one hundred twenty hours or more after birth.") (emphasis added); GA. CODE ANN. § 53-2-1(b) (2009) ("[C]hildren of the decedent who are born after the decedent's death are considered children in being at the decedent's death, provided they were *conceived prior to the decedent's death*, were born within ten months of the decedent's death, and survived 120 hours or more after birth . . . .") (emphasis added). *See also* ALA. CODE § 43-8-47 (2009); ARK. CODE ANN. § 28-9-210 (2009); CAL. PROB. CODE § 6407 (West 2009); FLA. STAT. ANN. § 732.106 (West 2009); IDAHO CODE ANN. § 15-2-108 (2009); MD. CODE ANN., EST. & TRUSTS § 3-107 (West 2009); MINN. STAT. ANN. 524.2-108 (West 2009); NEB. REV. STAT. § 30-2308 (2009); N.Y. EST. POWERS & TRUST LAW § 4-1.1 (McKinney 2009); OR. REV. STAT. § 112.075 (2009); S.C. CODE ANN. § 62-2-108 (2009); S.D. CODIFIED LAWS § 26-1-2 (2009); TENN. CODE ANN. § 31-2-108 (2009); WIS. STAT. ANN. § 854.21 (West 2009); WYO. STAT. ANN. § 2-4-103 (2009). The Indiana and Ohio statutes speak of a child "begotten" before the decedent's death. IND. CODE § 29-1-2-6 (2009); OHIO REV. CODE ANN. § 2105.14 (West 2009).

67. UNIF. PROBATE CODE § 2-108 (2008). *See also* ALASKA STAT. 13.12.108 (2009); ARIZ. REV. STAT. ANN. § 14-2108 (2009); HAW. REV. STAT. § 560:2-108 (2009); MICH. COMP. LAWS ANN. § 700.2108 (2009); MONT. CODE ANN. § 72-2-118 (2009); N.J. STAT. ANN. § 3B:5-8 (West 2009); N.M. STAT. ANN. § 45-2-108 (West 2009); UTAH CODE ANN. § 75-2-108 (2009). The 2008 amendments to the UPC have moved this provision to UPC Section 2-104(a)(2) and added the requirement that it must be proved by clear and convincing evidence that the child lived 120 hours after the child's birth. UNIF. PROBATE CODE § 2-108.

68. For example, in *Stephen v. Commissioner of Social Security*, the district court pointed out that a child whose mother had retrieved sperm from the father after the father's death and used that sperm to become pregnant was not conceived prior to the father's death and thus was not an "afterborn heir" under Florida Statute Section 732.106. Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1264 (M.D. Fla. 2005); *see infra* text accompanying notes 103-06. *See also* Finley v. Astrue, 270 S.W.3d 849 (2008) (interpreting state intestacy statute that required a child to be conceived prior to the father's death to preclude from inheritance a child born of an embryo that had been created during the parents' life but not implanted into the mother until after the father's death). This question had been certified to the Arkansas Supreme Court after the child appealed the Social Security Administration's denial of benefits to her. *Id*. at 852. In *In re Martin B.*, the judge of the Surrogate's Court of New York pointed out that a 2006 amendment to a New York

statute that contained the term *conceived* was construed broadly so as to include children born of sperm banked by the father while he was still alive, but not used by the mother for conception until several months after his death.[69] Additionally, the drafters of the Restatement (Third) of Property: Wills and Other Donative Transfers take the position that UPC Section 2-108, with its reference to a child who is in gestation, does not preclude a child conceived after the decedent's death from inheriting from the decedent's estate.[70]

In addition to the states that have adopted the UPA, four states—Virginia, Florida, California, and Louisiana—have enacted statutes that explicitly address posthumous conception.[71] As with the UPA, these statutes may expand and clarify the inheritance rights of many posthumously conceived children, but would most likely preclude any rights in children conceived using PMSR.[72]

The Virginia statute, which was enacted in 1991, is modeled in part after USCACA, but the Virginia statute does not contain the USCACA blanket

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statute to define an "after-born" as a child in gestation at the parent's death has been "specifically intended to make it clear that a post-conceived child is excluded from sharing in the parent's estate . . . ." *In re* Martin B., 841 N.Y.S.2d 207, 209 (N.Y. Sur. Ct. 2007). Despite this observation, the court did allow posthumously conceived twins to share in a trust as the issue of their grandfather. *Id*. at 212. The court looked not to the statute, as that dealt only with wills, but rather to the intent of the parents of the children. *Id*. at 211-12. The court concluded that "if an individual considers a child to be his or her own, society through its laws should do so as well." *Id*. at 211. The court noted that the tentative draft of the restatement dealing with wills and other donative transfers favored the inclusion of posthumously conceived children as members of the class of children or issue of parents who had consented to function as parents but had been kept from doing so by premature death. *Id*.; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 14.8 (Tentative Draft No. 4, at 207, 2007).

69. *See In re* Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

70. *See* RESTATEMENT (THIRD) PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.1 cmt. (d) (1999); UNIF. PROBATE CODE § 2-108.

71. *See, e.g.*, CAL. PROB. CODE § 249.5; FLA. STAT. ANN. § 742.17; LA. REV. STAT. ANN. § 9:391.1 (West 2008); VA. CODE ANN. § 20-158 (West 2009). *See supra* text accompanying notes 40-49; http://www.law.cornell.edu/uniform/vol9.html (states adopting the UPA include Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Rhode Island, Texas, Washington, and Wyoming); *see also* B. 3571, 2009 -2010 Assem., Reg. Sess. (N.Y. 2009) (not passed), *available at* http://assembly.state.ny.us/leg/?bn=A03571&sh=t. The bill would have amended N.Y. Estate Powers & Trust Law by adding new section 4-1.3:

> (A) For the purposes of this Article: (1) a child conceived posthumously within two years of the date of death of his or her maternal progenitor shall be considered a non-marital child and the legitimate child of such maternal progenitor, who shall be his or her mother for the purposes of intestate succession; and such child may inherit from his or her mother and from his or her maternal kindred, provided the provisions of paragraph (B) of this section are established. (2) A child conceived posthumously within two years of the date of death of his or her paternal progenitor shall be considered a non-marital child and the legitimate child of such paternal progenitor, who shall be his or her father for the purposes of intestate succession; and such child may inherit from his or her father and from his or her paternal kindred, provided the provisions of paragraph (B) of this section are established.

B. 3571, 2009-2010 Assem., Reg. Sess. (N.Y. 2009). This proposed legislation, as introduced in 2007 as Bill 5181, is discussed in Robert Matthew Harper, *Dead Hand Problem: Why New York's Estates, Powers, and Trusts Law Should Be Amended to Treat Posthumously Conceived Children As Decedents' Issue and Descendants*, 21 QUINNIPIAC PROB. L.J. 267, 285-87 (2008).

72. CAL. PROB. CODE § 249.5; FLA. STAT. ANN. § 742.17; LA. REV. STAT. ANN. § 91:391.1 (creating a writing requirement or extenuating circumstances to create inheritance rights); VA. CODE ANN. § 20-158.

prohibition against treating a posthumously conceived child as a child of the deceased parent.[73] The Virginia statute deals only with embryos, and thus, may not apply in the case of PMSR.[74] The statute provides that a court should not consider an individual who dies before the implantation of "an embryo resulting from the union of his sperm or her ovum with another gamete" as the parent of the resulting child unless that individual consented "to be a parent in writing executed before the implantation."[75]

The Florida statute deals more broadly with eggs, sperm, and pre-embryos but substantially restricts the circumstances under which a child posthumously conceived from these gametes may take a portion of the parent's estate.[76] This 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 preembryos to a woman's body" may only take from the decedent's estate if the decedent provided for that child in the decedent's will.[77] It is unlikely that a man who has not banked sperm prior to his death would write a will in which he contemplated the birth of posthumously conceived children.[78] Thus, the Florida statute would prohibit the child from taking in almost every, if not every, case involving PMSR.[79]

Under the California statute, adopted in 2006 (long after Brandalynn's birth in 1999 in California), a child who is conceived after the parent's death is deemed to be born during the decedent's life (and after the execution of all of the decedent's testamentary instruments) if clear and convincing evidence shows the following: (1) the parent specified in writing that his or her genetic material could be used for the posthumous conception of a child; (2) the person whom the parent had designated to control the genetic material gave written notice that the parent's genetic material was available for posthumous conception; and (3) the child was in utero, using the parent's genetic material, within two years of the parent's death.[80] The California statute does not use

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73. VA. CODE ANN. § 20-158 (West 2009) (first enacted in 1991 by Va. Acts 1991, ch. 600); s*ee supra* text accompanying notes 53-57 (discussing USCACA).

74. § 20-158(B).

75. *Id.* The individual also would be treated as a parent if "implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure." *Id.*

76. FLA. STAT. ANN. § 742.17(4).

77. *Id.* In *Stephen v. Commissioner of Social Security*, the court used this statute to deny a child social security benefits. Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257 (M.D. Fla. 2005); *see also infra* text accompanying notes 103-06.

78. *See generally Stephen*, 386 F. Supp. 2d at 1257 (discussing the limited occurrence of the decedent providing for a posthumously conceived child in a will).

79. *See* FLA. STAT. ANN. § 742.17(4) (requiring strict guidelines for a child conceived through PMSR to be treated as an heir).

80. CAL. PROB. CODE § 249.5 (West 2009); *see infra* Part III.D. (discussing the California statute). The writing had to be dated and signed by the parent, could be amended or revoked by the parent, and must have designated a person who would control the genetic material. § 249.5(a). The notice had to be given by certified mail within four months of the decedent's death to the "person who has the power to control the distribution of either the decedent's property or death benefits payable by reason of the decedent's death." *Id.*

gender specific pronouns nor does it refer to the decedent's spouse.[81] On the other hand, the Louisiana statute refers to a decedent who has left specific written authorization for "his surviving spouse to use his gametes."[82] If a child is born under these circumstances within three years of the father's death, the child will have all rights, "including the capacity to inherit from the decedent," that the child would have had if the child had been living at the decedent's death.[83] Again, as it is unlikely that a man who has not banked sperm during his life will have left a written consent for use of his sperm after his death, the California and Louisiana statutes would most likely preclude inheritance by a child whose father's sperm were retrieved by PMSR.[84]

In 2008, the UPC was amended to include expanded provisions that address the parent-child relationship.[85] New UPC Section 2-120 deals with the inheritance rights of children conceived by assisted reproduction.[86] As with the UPA and the other state statutes described above, new Section 2-120(f) treats a child born through assisted reproduction as the child of the individual whose gametes were used if that individual consented in a signed writing to be treated as the parent of the child.[87] However, that is not the sole method that an individual may use to establish the parent-child relationship.[88] The new Code section contemplates that such a signed record may not exist, but that the decedent's "actions [may] speak as loud as words."[89] The decedent's consent to be treated as a parent may be shown if the decedent "functioned as a parent of the child no later than two years after the child's birth" or intended to do so,

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§ 249.5(b). The California statute expressly does not apply to a child produced by human cloning. *Id*. § 249.5(c).

81. *See* § 249.5.

82. LA. REV. STAT. ANN. § 9:391.1 (2008).

83. *Id.* § 9:391.1(a). The statute allows others whose share in the decedent's estate may be reduced by the birth of the posthumously conceived child one year in which to contest the child's paternity. *Id.* § 9:391.1(b).

84. *See* discussion *supra* Part II.B.

85. *See* UNIF. PROBATE CODE art. II, Pt. 1, general cmt. (2008) (explaining that the amendment was partially in response to issues raised by assisted reproduction); UNIF. PROBATE CODE § 2-115(2) (defining assisted reproduction as "a method causing pregnancy other than sexual intercourse," which mirrors UPA Section 102). *See also* Gary, *We Are Family*, *supra* note 14, at 177-82 (discussing a wide-range of issues surrounding the parent-child relationship covered by the 2008 amendment to the UPC).

Professors Ronald Chester and Susan Gary offered proposals that led up to the enactment of these new UPC provisions. *See* Ronald Chester, *Posthumously-Conceived Heirs Under a Revised Uniform Probate Code*, 38 REAL PROP. PROB. & TR. J. 727 (2004); Susan N. Gary, *Posthumously-Conceived Heirs: Where the Law Stands and What to Do About It Now*, 19 PROB. & PROP. 32, 32, Mar.-Apr. 2005.

86. *See* UNIF. PROBATE CODE § 2-120 (2008).

87. *See* § 2-120(f) (stating that the signed document need not specifically say that the parent agrees to be treated as the parent as long as "all facts and circumstances" evidence this consent). The comment to § 2-120(f) cites *In re* Martin B. as an example of a record that would evidence intent the form signed by the father. *In re* Martin B., 841 N.Y.S.2d 207 (N.Y. Sur. Ct. 2007). The form in this case did not speak of the father's intent to be treated as a parent but rather that he gave his wife all rights to the cryopreserved sperm. *Id.* at 211-12. *See also* Gary, *supra* note 14, at 184.

88. *See, e.g.*, § 2-120(f).

89. *Id.* § 2-120 cmt. f.

but was prevented from doing so by death or incapacity.[90] Finally, in the case of a posthumously conceived child, if the decedent's intent to be treated as a parent is shown by clear and convincing evidence, the parent-child relationship can be established.[91] Additionally, under new UPC Section 2-120(k), a posthumously conceived child must either 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."[92]

The Restatement (Third) of Property: Wills and Other Donative Transfers goes further than the UPC or any of the current state statutes in protecting the rights of a posthumously conceived child.[93] The drafters state that the "Restatement takes the position that, to inherit from the decedent, a child produced from genetic material of the decedent by assisted reproductive technology must be born within a reasonable time after the decedent's death in circumstances indicating that the decedent would have approved of the child's right to inherit."[94] Thus, the drafters' position indicates that the decedent need not have left a writing that allowed his sperm to be used for posthumous reproduction, but rather, only that the circumstances indicate his approval or consent to the birth of a child who could inherit from him.[95] Furthermore, the lack of a specified time period for conception or birth would allow the court to look at each case of posthumous conception on a case-by-case basis to determine whether the birth of the child took place within a "reasonable time after the decedent's death."[96] The Restatement approach could allow a child conceived through sperm retrieved by PMSR to inherit from the father.[97] "Circumstances indicating that the decedent would have approved of the child's right to inherit" might include a case in which the stated plans of a newly married couple to have children are shattered by the sudden death of the

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90. *Id.* § 2-120(f)(2)(A)-(B).

91. *Id.* § 2-120(f)(2)(C).

92. *Id.* § 2-120 cmt. k (explaining that the 36-month period is designed to allow time for grieving, for reaching a determination as to whether to have a child, and for making several attempts at doing so and the 45-month alternative is offered because assisted reproduction techniques are sometimes not performed at a clinic that would keep accurate records of the date of conception). *See* Gary, *We Are Family*, *supra* note 14, at 184 (addressing whether the time limits may cause cases of induced labor).

93. *See supra* text accompanying note 70.

94. RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5, cmt. l (2000) (explaining that a "clear case" would be one in which the decedent's widow uses his frozen sperm to become pregnant after his death). The Restatement endorses the UPA concept that a child be considered the child of his or her "genetic parents, whether or not they are married to each other." *Id.* § 2.5(1). Additionally, the Restatement addresses class gifts and provides that, unless there is evidence of a different intent on the part of the parent, a child who is born by means of assisted reproduction is included in the class of the parent's children if the parent consented to function as the child parent. *Id.* § 14.8 (Tentative Draft No. 4, 2001). *See also supra* text accompanying note 67. *See generally* Melissa B. Vegter, *The "ART" of Inheritance: A Proposal for Legislation Requiring Proof of Parental Intent Before Posthumously Conceived Children Can Inherit from a Deceased Parent's Estate*, 38 VAL. U. L. REV. 267, 305-09 (2003) (discussing artificial reproductive technologies and recommending an amendment to the UPC).

95. RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (2000).

96. *Id.* § 2.5 cmt. 1.

97. *See id.*

father.[98] Another situation may include a couple trying to conceive a child, either through natural or assisted reproductive techniques, at the time of the father's death.[99]

III. PMSR AND SOCIAL SECURITY: THE CASE OF *VERNOFF V. ASTRUE*

The application of the statutes described above to PMSR has played out not in the context of inheritance cases, but rather in cases in which the mothers of posthumously conceived children have sought social security survivors' benefits for the children conceived and born after their fathers' deaths.[100] Despite some willingness in the past on the part of the Social Security Administration (SSA) and the courts to allow social security benefits for children born from sperm their fathers banked prior to death, both the SSA and the Ninth Circuit Court of Appeals have drawn the line at the receipt for benefits by children whose fathers' sperm were harvested after death by PMSR.[101]

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98. *See* Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005). In the *Stephen* case, the husband died of a heart attack only a month after the couple was married. *Id*.; *see infra* text accompanying note 113. One news report, relating to Brandalynn Vernoff's birth, indicated that Gaby Vernoff had a video of her husband talking about his desire to have children. Charlotte Maden, *U.S. Soldier's Widow Takes Sperm After His Death*, Progress Educational Trust, Apr. 14, 2008, http://www.ivf.net/iv/f/us_soldier_s_widow_takes_sperm_after_his_death-o3340.html. However, the briefs that were filed in the Court of Appeals for the Ninth Circuit contain no mention of this evidence. *See, e.g.*, Brief for the Appellee, *supra* note 1. The Court of Appeals for the Ninth Circuit also stated that there was "no agreement, or even evidence of [Bruce Vernoff's] consent or intent." Vernoff v. Astrue, 568 F.3d 1102, 1109 (9th Cir. 2009).

99. *See, e.g.*, Mike McKnight, Benefits Denied to Girl Conceived After Father's Death, WOWT.com Omaha, Oct. 24, 2008, http://www.wowt.com/news/headlines/33256169.html (last visited Sept. 11, 2009). This circumstance is illustrated by the story of a Nebraska mother currently fighting the Social Security Administration's denial of benefits to her child, who was conceived just seven days after the father died. *Id*. The couple engaged in the process of assisted reproduction. *Id*. According to the widow, her husband told her to "keep up with the fertility treatments so we could have a child of our own, even if he couldn't be here." *Id*.

100. *See, e.g.*, *id*.

101. In the first social security case that involved a child conceived posthumously from sperm banked by her father, *Hart v. Shalala*, the Social Security Administration initially denied benefits to the child, but, prior to the district court handing down an opinion to the contrary, acquiesced in the award of benefits. Hart v. Shalala, No. 94-3944 (E.D. La. 1994). *See also* Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 255-56 (1999); Doroghazi, John, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L. Q. 1597, 1603 (2005).

For excellent discussions of the cases relating to social security benefits and children conceived after the father's death from sperm banked by the father during his life, see Donald E. Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229 (1985); Ronald Volkmer, *Posthumously Conceived Children Eligible for Social Security*, 31 EST. PLAN 564 (2004); Banks, *supra*; Doroghazi, *supra*; Gary, *We Are Family*, *supra* note 14; Knaplund, *Equal Protection*, *supra* note 28; Knaplund, *A Father's Last Will*, *supra* note 5; Knaplund, *Biotech Child*, *supra* note 14; Lorio, *supra* note 34.

A. Determining Eligibility for Social Security Benefits: The Basic Test

The SSA has been called upon twice to address the status of a child conceived from sperm extracted from the child's father after the father's death.[102] In both cases, the SSA refused the child's request for benefits.[103] Both cases were appealed to the federal courts.[104] The first decision, *Stephen v. Commissioner of Social Security*, arose out of a case in Florida, and was dealt with easily by the court because Florida had a statute that was directly on point.[105] The second case was *Vernoff v. Astrue*.[106]

In determining the right of a child to receive social security benefits, the Social Security Act indicates that both state and federal rules may govern eligibility.[107] Section 402(d)(1) of the statute allows social security benefits to be awarded to a child of a wage earner if the child is an unmarried minor and is dependent upon the wage earner at the time of the wage earner's death.[108] Under Section 416(e), a child includes "the child or legally adopted child of an individual."[109] Section 416(h)(2) of the statute goes on to provide that, in determining whether a child is the child of the wage earner, the Commissioner "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State" in which the wage earner was domiciled when he died.[110] This reference to state law caused the first federal courts that examined the eligibility of posthumously conceived children to receive social security benefits to certify to the state courts of the father's domicile whether the posthumously conceived child could inherit under the laws of that state.[111] The federal court used this approach in the *Stephen* case,

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102. *See Stephen*, 386 F. Supp. 2d at 1260; *Vernoff*, 568 F.3d at 1105.

103. *See Stephen*, 386 F. Supp. 2d at 1260; *Vernoff*, 568 F.3d at 1105.

104. *See Stephen*, 386 F. Supp. 2d at 1260; *Vernoff*, 568 F.3d at 1105.

105. FLA. STAT. ANN. § 732.106 (West 2009); *Stephen*, 386 F. Supp. 2d at 1260.

106. *Vernoff*, 568 F.3d at 1102.

107. 42 U.S.C. § 402(d)(1) (2006).

108. *Id.* Under 42 U.S.C. Section 402(d)(3), a child is deemed dependent on each of the child's parents unless the parent is not living with the child at the time of the parent's death and the child was neither the legitimate nor adopted child of the parent. *Id.* § 402(d)(3).

109. *Id.* § 416(e). The term also includes a stepchild who was the individual's stepchild at least nine months prior to the individual's death and certain grandchildren or step-grandchildren of the individual. *Id.*

110. *Id.* § 416(h)(2).

111. *See, e.g.*, Woodward v. Comm'r Soc. Sec., 760 N.E.2d 257 (Mass. 2002). In *Woodward*, the Supreme Judicial Court of Massachusetts construed the state's intestacy statute to allow children born from sperm that their father left in a sperm bank to inherit under the state laws of intestacy if their mother could prove their genetic relationship with the father and that the father consented to the posthumous reproduction. *Id.* at 272. The decision was a response to the certification to the court by the United States District Court for the District of Massachusetts of whether these children would enjoy the same inheritance rights under Massachusetts law as natural children of a decedent. *See Woodward*, 760 N.E.2d at 259. A similar case was addressed by the Superior Court of New Jersey, Chancery Division in 2000. *See In re* Kolacy, 753 A.2d 1257, 1258-59 (N.J. Super. Ch. 2000). The twins whose social security benefits were at issue were born posthumously after their mother was impregnated with sperm that her husband had deposited in a sperm bank before undergoing chemotherapy. *Id.* While pursuing her claim through the SSA, the mother also brought a claim in the state court to determine whether the twins were the heirs of their father. *Id.* The Superior Court

which was the first social security case to examine the rights of a child conceived with sperm retrieved from the father after the father died.[112]

The *Stephen* case involved a man who died of a heart attack in 1997, roughly a month after he and his wife married.[113] Mr. Stephen's wife arranged to have sperm extracted from his body the day after he died.[114] After several attempts, Mrs. Stephens gave birth to a son in 2001.[115] She applied for social security benefits on behalf of her son.[116] As noted above, the Social Security Act directs the Commissioner to determine whether a child is the child of a decedent by looking to the state law that governs the "devolution of intestate personal property."[117] The district court looked to the Florida law prohibiting a posthumously conceived child not provided for in a decedent's will from making any claim against the decedent's estate, and the court determined that the child in the *Stephen* case was ineligible for social security benefits.[118] The court pointed out that the child's status was not governed by the Florida law allowing a posthumously born child to inherit, because that law deals specifically with a child who was conceived prior to the decedent's death.[119]

B. Determining Eligibility for Social Security Benefits: The Gillett-Netting *Test*

The Court of Appeals for the Ninth Circuit in *Vernoff*, without limiting itself to the clearly defined method of determination used in the *Stephen* case, used two tests to determine possible eligibility for social security benefits.[120] The first test was the basic test described above, which looks to state intestacy law, and the second test was the *Gillett-Netting* test, which applies to cases in the Ninth Circuit.[121] The *Gillett-Netting* test was available in deciding the *Vernoff* case because the Court of Appeals for the Ninth Circuit was the only federal circuit court that addressed the issue of posthumously conceived

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looked to the legislative intent of New Jersey's intestacy statute and determined that the twins were indeed encompassed by the statute as heirs of their father. *Id.* at 1262-63.

112. *See* Stephen v. Comm'r of Soc. Sec., 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005). The child whose rights were at issue in the *Stephen* case was born in 2001, two years after Brandalynn Vernoff's birth. *Stephen*, 386 F. Supp. 2d at 1259; *see also* Vernoff v. Astrue, 568 F.3d 1102, 1105 (9th Cir. 2009). However, while Gaby Vernoff was seeking judicial review of the SSA's denial of benefits for Brandalynn, the Ninth Circuit decided *Gillett-Netting v. Barnhart*. *Vernoff*, 568 F.3d at 1105; *see also* Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004). Consequently, the district court remanded the *Vernoff* case back to the SSA for reconsideration in light of the Ninth Circuit's opinion. *Vernoff*, 568 F.3d at 1105.

113. *Stephen*, 386 F. Supp. 2d at 1259.

114. *Id.*

115. *Id.*

116. *Id.*

117. 42 U.S.C. § 416(h)(2)(A) (1999).

118. *Stephen*, 386 F. Supp. 2d at 1264-65.

119. *Id.* at 1264, n.8 (citing FLA. STAT. ANN. § 732.106 (West 2009)).

120. Vernoff v. Astrue, 568 F.3d 1102, 1105-12 (9th Cir. 2009).

121. *Id.* at 1105-09.

children's rights to social security benefits.[122] *Gillett-Netting* involved twins posthumously conceived by sperm deposited by their father in a sperm bank after he learned that he must undergo chemotherapy for cancer.[123] The Court of Appeals for the Ninth Circuit did not use state intestacy law in this case to determine whether the twins were the children of their father.[124] Instead, the court of appeals determined that the direction in Social Security Act Section 416(h) to look to state law for a definition of child came into play only if the parentage of the child was disputed.[125] As there was no question whether the *Gillett-Netting* twins were the biological children of their father, their parentage was not in dispute.[126] Thus, there was no need to resort to Section 416(h) and its discretion to look to state intestacy law to determine whether the twins were in fact the children of their father.[127]

After concluding that the twins were the children of their father, the court looked to Section 402(d)(1) of the Social Security Act to determine whether the twins were dependent on their father and thus satisfied the second prong of eligibility.[128] The court of appeals stated that the twins could not demonstrate actual dependency because the children were not yet born at the time their father died.[129] However, the court went on to state that the children could be "statutorily deemed dependent on [the father] without proving actual dependency."[130] Section 402(d)(3)(A) of the Social Security Act provides that a child is "deemed dependent upon his father" unless "such child is neither the legitimate nor adopted child of such individual."[131] Section 402(d)(3) ends with a sentence that provides that a child "deemed to be a child of a fully or currently insured individual pursuant to Section 416(h)(2)(B) . . . shall be deemed to be the legitimate child of such individual."[132] Citing Section 402(d)(3), the court again bifurcated the inquiry: A child is either legitimate under the relevant state parentage law or, if not, the child could still be *deemed* legitimate under Section 416(h)(2) of the Social Security Act if the child was "entitled under the intestacy laws of the insured parent's domicile to inherit personal property from the parent."[133] The court turned first to the relevant state parentage law (the law of Arizona, which was the father's domicile at

122. Gillett-Netting v. Barnhart, 371 F.3d 593, 596 n.3 (9th Cir. 2004).

123. *Id.* Following the *Gillett-Netting* decision, SSA reconsidered and confirmed its original order that Brandalynn Vernoff was not eligible for social security benefits. *Vernoff*, 568 F.3d at 1106.

124. *Gillett-Netting*, 371 F.3d at 596.

125. *Id.* at 597.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 597-98.

131. 42 U.S.C. § 402(d)(3)(A) (2009).

132. *Id.* § 402(d)(3).

133. *Gillett-Netting*, 371 F.3d at 598 (quoting *Norton v. Mathews*, 427 U.S. 524, 527, n.1 (1976)). The bifurcation between state parentage statutes and state intestacy statutes is the same bifurcation as that set forth previously in Part I of this article. *See supra* Part I.

death) to determine whether the *Gillett-Netting* twins were the father's legitimate children.[134] Noting that Arizona parentage law no longer makes a distinction between legitimate and illegitimate children, the court said that every child in Arizona is "the legitimate child of its natural parents."[135] The court also pointed out that if the father was alive, then he would bear the obligation to support the children.[136] Having determined that the twins were the legitimate children of the father under Arizona parentage law, the court of appeals concluded that Section 402(d)(3) of the Social Security Act conclusively deemed the children dependent on the father and entitled to benefits.[137] Because the *Gillett-Netting* twins were their father's legitimate children under Arizona parentage law, the court of appeals determined that it did not have to examine whether the children were entitled to take his personal property under the state's intestacy laws.[138] Phrased differently, because the children were deemed dependent under Section 402(d)(3), the children did not have to prove that they were deemed dependent under Section 416(h).[139]

C. The Social Security Administration's Response to Gillett-Netting

Following the *Gillett-Netting* decision, the SSA issued a Social Security Acquiescence Ruling (SSAR).[140] In this ruling, the SSA stated that, solely in cases that arose in states or territories that are in the Ninth Circuit, the SSA will determine that "a biological child of an insured individual who was conceived by artificial means after the insured's death is the insured's 'child' for purposes of the Act."[141] Furthermore, in these states, the SSA will not apply Section 416(h) of the Social Security Act (with its reference to state intestacy laws) to determine the status of the child.[142] "In addition, if the child is considered legitimate under State law," the SSA will consider the child legitimate for

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134. *Gillett-Netting*, 371 F.3d at 598.

135. *Id.* at 599 (quoting AZ. REV. STAT. § 8-601 (LexisNexis 1975)). Under the Arizona statute, "every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock." § 8-601.

136. *Gillett-Netting*, 371 F.2d at 599. The Court pointed out in a footnote that had the children been conceived from the sperm of a donor who was not married to the mother, Arizona law would likely not require the donor to support the children and the Social Security Act likely would not have deemed the children dependent. *Id*. at 599, n.7.

137. *Id.* at 599.

138. *See supra* text accompanying note 117.

139. *Gillette-Netting*, 371 F.3d at 599. 42 U.S.C. Section 402(d)(3), according to the court, provides that legitimacy is a matter of state law, even though 42 U.S.C. Section 416(h) offers alternative ways to deem a child legitimate even if the state law does not recognize the child as such. *Id*. (construing 42 U.S.C. § 402(d)(3) (2009)). Consequently, there was no need to resort to the other methods of proving legitimacy set out in the Social Security Act. *Id*.

140. S.S.R. (70 Fed. Reg. 55656-01 2005).

141. *Id.* The states and territories within the Ninth Circuit include Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. *Id*.

142. *Id.*

purposes of the Act and thus deemed dependent upon the father.[143] The SSA noted that all of the states in the Ninth Circuit, except Guam, had eliminated any distinction between children who are legitimate as opposed to illegitimate, and replaced this distinction with a system of parent-child rights that exist regardless of whether the parents are married when the child is born.[144] Thus, these children need only establish that "an individual is his parent under state family law provisions."[145] After the SSAR, two legal mechanisms for determining whether a posthumously conceived child is eligible to receive social security benefits existed.[146] If the child's father was domiciled in the Ninth Circuit, the *Gillett-Netting* approach is applied.[147] On the other hand, if the child's father was domiciled in any other state, the state intestacy law approach of Section 416(h)(2)(A) is applied.[148] Under this bifurcated regime the court decided the *Vernoff* case.[149]

D. Vernoff v. Astrue

As previously noted, Brandalynn Vernoff, the child whose benefits were at issue in the *Vernoff* case, was born four years after her father's death from sperm extracted from the father's body after he died.[150] In the year the child was born, Gaby Vernoff applied for social security benefits on behalf of the child, claiming the child was a survivor of Bruce Vernoff.[151] SSA denied the claim, after which Gaby Vernoff sought relief in the district court.[152] While the *Vernoff* case was pending in the District Court for the Central District of California, the Court of Appeals for the Ninth Circuit handed down the *Gillett-Netting* decision, and the SSA issued its SSAR.[153] At that point, the district court remanded the *Vernoff* case back to the SSA for reconsideration in light of these developments.[154] In December 2006, the SSA affirmed its earlier decision to deny benefits to Brandalynn.[155] In an unpublished opinion, the district court issued a judgment in favor of the SSA.[156] Apparently applying the approach taken by the court of appeals in *Gillett-Netting*, the district court

143. *Id.*
144. *Id.*
145. *Id.* This phrase from the SSAR was quoted with added italic emphasis by the United States Court of Appeals for the Ninth Circuit in *Vernoff v. Astrue*. Vernoff v. Astrue, 568 F.3d 1102, 1106 (9th Cir. 2009).
146. *See* Brief of the Appellee, *supra* note 1, at 4.
147. *Id.*
148. In its brief in the *Vernoff* case, the SSA stated that it continues to apply state intestacy law, as directed by Section 416(h)(2)(A) of the Social Security Act, when deciding cases that arise outside of the Ninth Circuit. *Id.* at 4 n.1.
149. *See Vernoff*, 568 F.3d at 1105-11.
150. *See supra* text accompanying notes 1-10.
151. *Vernoff*, 568 F.3d at 1105.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. Brief for the Appellee, *supra* note 1, at 1. This opinion was delivered on November 13, 2007. *Id.*

determined that Brandalynn could not prove that she was a dependent of her father.[157] The district court also looked to California law, both as it existed prior to 2006 and as amended in 2006, and decided that Brandalynn was not Bruce Vernoff's natural child and, thus, could not prove dependency as required by the Social Security Act.[158]

In the *Vernoff* case, the Court of Appeals for the Ninth Circuit faced the challenge of construing not only the federal law but also California law in determining Brandalynn's entitlement to benefits.[159] As in *Gillett-Netting*, the threshold question was whether Brandalynn was a child of her father for purposes of Section 402(d)(1) of the Social Security Act.[160] The court noted at the outset that Brandalynn would be considered her father's child as a consequence of the reasoning set forth in the *Gillett-Netting* decision and the SSAR because there was no dispute that Brandalynn was her father's biological child.[161] However, as the court pointed out, "that determination does not end our inquiry."[162] The determinative question was whether Brandalynn was dependent upon her father when he died.[163] The court observed that there were three methods by which Brandalynn could prove the required dependency: (a) show actual dependency (which, of course, was not possible as Brandalynn's father had died long before she was born); (b) establish that Bruce Vernoff was her parent under California law, which would satisfy the requirements of the SSAR and *Gillett-Netting*; or (c) show that she could inherit under the California laws of intestacy, which would satisfy the requirements of Section 416(h)(2)(A) of the Social Security Act.[164] In discussing the third method, the court of appeals signaled that the method described in the SSAR and *Gillett-Netting* was not the exclusive means for establishing eligibility in states that are in the Ninth Circuit, but rather an additional means that could be used if the preferred method of the SSA (that is, showing intestacy rights, as required by Section 416(h)(2) of the Social Security Act, which has been referred to earlier in this article as the basic test) could not be satisfied.[165]

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157. *Id.* at 2.

158. *Id.* at 12.

159. *Vernoff*, 568 F.3d at 1105-12.

160. *Id.* at 1105.

161. *Id.* Both parties agreed that Brandalynn was the father's biological child. *See* Brief for the Appellee, *supra* note 1, at 27; Brief for the Appellant at 16, Vernoff v. Astrue, 568 F.3d 1102 (9th Cir. 2009) (No. 08-55049) [hereinafter Brief for the Appellant].

162. *Vernoff*, 568 F.3d at 1106.

163. *Id.* As described above, Section 402(d)(1) of the Social Security Act requires the applicant both to be the child of the wage earner and to have been dependent upon the wage earner when he died. 42 U.S.C. § 402(d)(1) (2009) *construed by Vernoff*, 568 F.3d at 1106-07.

164. *Vernoff*, 568 F.3d at 1110.

165. *Id.*; *see also supra* Part III.A.

1. Application of the Gillett-Netting *Test: California Parentage Law*

The court of appeals began its analysis by applying the SSAR and *Gillett-Netting* test of determining whether Bruce Vernoff was Brandalynn's parent under California parentage law.[166] California, like Arizona, enacted a statute that defines parentage without reference to the marital status of the parents.[167] The statute provides that a parent-child relationship exists between a child and the child's "natural or adoptive parents."[168] However, unlike Arizona, California has other statutes that further define the concept of parentage, particularly as it relates to a child's natural father.[169] Prior to 2006, the California Family Code listed five conditions under which a man is presumed the natural father of a child.[170] Brandalynn's situation did not meet any of these conditions.[171] The court of appeals agreed with Brandalynn's contention that these five conditions were not the exclusive conditions for determining whether Bruce Vernoff could be Brandalynn's natural parent.[172] The court went on to state that Brandalynn had failed to establish in any other manner that Bruce Vernoff was Brandalynn's natural father.[173] The court of appeals also pointed out that California law did not equate biological parenthood with natural parent status.[174] In fact, according to a California case cited by the court of appeals, "[a] biological father can be a presumed father, but is not necessarily one; and a

166. *Vernoff*, 568 F.3d at 1106.

167. CAL. FAM. CODE § 7601 (West 2009) (replicating Section 1 of the UPA prior to the 2002 amendments); *cf.* ARIZ. REV. STAT. § 8-601 (LexisNexis 1975). *See also* CAL. PROB. CODE § 6450 (West 2009) (granting intestacy rights to a child, regardless of the marital status of the child's natural parents).

168. § 7601.

169. *See, e.g.*, CAL. FAM. CODE § 7601 (West 2009) (defining natural children and addressing posthumously conceived children). The irony is that Brandalynn would probably be considered her father's legitimate child under Arizona's bare-bones statute while the detail in California's statute may well preclude her from receiving social security benefits.

170. *See* CAL. FAM. CODE § 7611 (West 2004). In 2007, the court held that application of this statute resulted in an unconstitutional violation of equal protection. *In re* Mary G., 59 Cal. Rptr. 3d 703 (Cal. Ct. App. 2007). The court's finding is not relevant to posthumously conceived children.

171. *Vernoff*, 568 F.3d at 1107-08. The conditions are as follows: (1) the parents were married and the child was born within 300 days of the termination of the marriage by death or disability; (2) the parents attempted a valid marriage in apparent compliance with the law; (3) the parents married or attempted to marry after the child was born and the father consented to be listed on the child's birth certificate or otherwise support the child; (4) the father received the child into his home and openly held the child out as his child; or (5) the child resided in a nation that engaged in an Orderly Departure Program and the father had declared under penalty of perjury that he was the child's father. § 7611. The court of appeals described these conditions and noted particularly that the closest one to Brandalynn's situation was the first condition, except that Brandalynn had not been born within the required 300 days. *Vernoff*, 568 F.3d at 1107-08.

172. *Vernoff*, 568 F.3d at 1109. In the Appellant's Brief, Brandalynn's lawyers pointed first to California Family Code Section 7610, which states that a parental relationship "may" be established "under this part." Brief for the Appellant, *supra* note 163, at 22; *see also* § 7610. The appellant also pointed out other sections of the California Family and Probate Codes indicating that the statutes are meant to be construed broadly when determining natural parent status. Brief for the Appellant, *supra* note 161, at 26; *see, e.g.*, § 7630(c) (allowing an action to determine a parent-child relationship for a child with no presumed father under Section 7611).

173. *Vernoff*, 568 F.3d at 1109.

174. *Id.* at 1108.

presumed father can be a biological father, but is not necessarily one."[175] California law instead looks to the presumptions laid out in its Code and is guided by the best interests of the child.[176] Again quoting a California case, the court of appeals noted that California took the approach that "every child knows—the parent-child relationship is not spun from DNA."[177]

The court of appeals also examined the California statutes relating to artificial insemination to determine whether Brandalynn's parentage could be established under one of these statutes.[178] California Family Code Section 7630(c) allows an action to establish a father-child relationship if none of the presumptions under Section 7611 are met.[179] However, the provisions of California law which the court would consider to establish the paternity of a child conceived through artificial insemination all revolve around the basic presumption that the father consented to the insemination.[180] Because this essential ingredient was missing, the court concluded that the statutes dictated against a finding that Bruce Vernoff was Brandalynn's natural father under California law.[181] For example, California Family Code Section 7613 presumes a husband to be the father of a child who is conceived through artificial insemination even if the sperm is not the sperm of the husband, provided the husband consented to the insemination.[182] The court of appeals said that "[c]onsent is lacking here."[183] An expression of intent on the part of the biological father is also a necessary element in California Family Code Section 7630(f), which allows a "party to an assisted reproduction agreement" to bring an action "to establish a parent and child relationship consistent with the intent expressed in that assisted reproduction agreement."[184] Once again, the court of appeals noted that in Brandalynn's case there was "no agreement, or even evidence of [Bruce Vernoff's] consent or intent."[185] The court pointed out that consent was so central to establishing a parent-child relationship because "consent . . . demonstrates a willingness to support the child and an intent to create the child."[186] The court noted that, in *Gillett-Netting*, the mother was able to show that the decedent had not only consented to her having his child, but was also able to show the decedent's willingness to support the child.[187] As neither of these could be shown by Gaby Vernoff, the court concluded that

175. *Id.* (quoting *In re* T.R., 34 Cal. Rptr. 3d 215 (2005)).
176. *Id.*
177. *Id.* (quoting *In re* Jerry P., 116 Cal. Rptr. 2d 123 (Cal. Ct. App. 2002)).
178. *Id.*
179. CAL. FAM. CODE § 7630(c) (West 2009).
180. *Vernoff*, 568 F.3d at 1109.
181. *Id.* at 1109-10.
182. § 7413(a).
183. *Vernoff*, 568 F.3d 1109.
184. § 7630(f).
185. *Vernoff*, 568 F.3d at 1109.
186. *Id.*
187. *Id.* at 1109-10 (discussing Gillett-Netting v. Barnhart, 371 F.3d 593, 599 (9th Cir. 2004)).

"Brandalynn does not fall under the Ninth Circuit's ruling in G*illett-Netting* and the subsequent SSAR."[188]

2. Application of the Basic Test: California Intestacy Law

Having determined that Brandalynn was not entitled to social security benefits under the test set forth in *Gillett-Netting* and the SSAR, the court of appeals reverted to the use of the test for determining eligibility that universally applied prior to the holding in G*illett-Netting*.[189] As noted above, grounded in Section 416(h)(2) of the Social Security Act, this test applies "such law as would be applied in determining the devolution of intestate personal property by the courts of the State" in which the wage earner was domiciled when he died.[190] Thus, the court of appeals examined California intestacy law to determine whether Brandalynn would be eligible to share in Bruce Vernoff's estate.[191] At the time Brandalynn filed her claim, the California Probate Code defined *child* as any individual entitled to take from a parent by intestate succession under the Code and *parent* as any individual entitled to take by intestate succession from a child.[192] The Code provided that any share in an intestate decedent's estate that did not pass to the surviving spouse or domestic partner would pass to the decedent's issue.[193] The Code also contained three provisions relevant to posthumously-born children: Sections 6407, 6450 and 6453.[194] To make matters more complicated, in 2006, California's Family and Probate Codes were amended to provide explicit circumstances under which posthumously conceived children could inherit from their biological fathers.[195] The court of appeals looked at all of these statutes and pointed out that the burden was on Brandalynn to prove that at least one of these provisions specifically included her as an intestate heir.[196]

As the court of appeals noted, California law contains a provision that allows a child born after the decedent's death to inherit but only if the child was

188. *Id.* at 1110.
189. *Id.*
190. 42 U.S.C. § 416(h)(2) (2004); *see supra* Part III.A.
191. *Vernoff*, 568 F.3d at 1110.
192. CAL. PROB. CODE §§ 26, 54 (1990).
193. § 6402.
194. §§ 6407, 6450, 6453; *see also Vernoff*, 568 F.3d at 1110.
195. *Vernoff*, 568 F.3d at 1110.
196. *Id.* Brandalynn's lawyers had asserted that the burden was on the SSA to prove Brandalynn's exclusion from inheriting under the state's intestacy laws. *Id.* The court of appeals pointed out that they had "misplace[d] the burden, which is on Brandalynn to establish her eligibility." *Id.* The court went on to say that their argument also "misconstrue[d] the nature of intestacy law, which excludes from inheritance any person not specifically included." *Id.*

"conceived before the decedent's death."[197] The court rejected Brandalynn's attempt to expand this law to allow all posthumously born children to inherit.[198]

The California Probate Code contains statutes relating to the parent-child relationship that mirror those of the California Family Code.[199] California Probate Code Section 6450 recognizes a parent-child relationship for intestacy purposes between the child and the child's natural parents regardless of whether the parents were married when the child was born.[200] California Probate Code Section 6453 defines the term *natural parent* for intestacy purposes.[201] This statute recognizes the presumptions of parentage that are set forth in California Family Code Section 7611.[202] As noted above, the court of appeals already determined that Brandalynn's situation did not meet any of these presumptions.[203] The California Probate Code also provides that a parent-child relationship may be established by an action brought under California Family Code Section 7630, but only if certain conditions are met.[204] Brandalynn could not possibly meet the first two of these conditions because the conditions involve actions that took place during the father's life—either an order entered during the father's lifetime or the father openly holding the child out as his own.[205] The third condition under which an action to establish paternity could be brought is if "[i]t was impossible for the father to hold the child out as his own and paternity is established by clear and convincing evidence."[206] The court of appeals looked to California cases that had applied this "impossibility" condition and found it was limited to situations in which either (1) the father died after the child was conceived but before the child was born; or (2) the child's mother or a third party physically prevented the father

197. § 6407.

198. *Vernoff*, 568 F.3d at 1110. State courts that have examined similar statutes have construed them in different ways. *See, e.g., In re* Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). This argument was successful in this New Jersey case construing a similarly-worded statue to apply to a child born using sperm that the father banked prior to his death and the mother used for insemination after the father's death. *Id.* at 1263-64. On the other hand, in *Finley v. Astrue*, the court held that the state intestacy statute, which required that a child be conceived prior to the father's death, precluded from inheritance a child born using an embryo created during the parents' life but not implanted into the mother until after the father's death. Finley v. Astrue, 270 S.W.3d 849, 853 (2008). The court of appeals made a passing reference to the *Finley* case and no reference to the *Kolacy* case. *Vernoff*, 568 F.3d at 1110.

199. *Compare* CAL. PROB. CODE §§ 6450-6450 (West 2009) *with* CAL. FAM. CODE §§ 7600-7614 (West 2009).

200. CAL. PROB. CODE § 6450.

201. *Id.* § 6453.

202. *Id.*; *see also supra* note 173.

203. *Vernoff*, 568 F.3d at 1107-08.

204. § 6453(b). *See also* CAL. FAM. CODE 7630(c) (allowing for an action to determine the existence of a father-child relationship to be brought if none of the presumptions of California Family Code Section 7611 are met).

205. CAL. PROB. CODE § 6453(b)(1)-(2).

206. *Id.* § 6453(b)(3).

from holding the child out as his own.[207] The court decided that it need not determine whether to expand the impossibility provision to include a posthumously conceived child because such an expansion would only result in allowing Brandalynn to bring an action under California Family Code Section 7630, and the court already concluded that she would not prevail in such an action.[208]

California Probate Code Section 6453(c) also allows a natural parent and child relationship to be established through the application of California Probate Code Section 249.5.[209] As noted above, the amendments to California's Family and Probate Codes, which relate to posthumously conceived children (including new California Probate Code Section 249.5) were not enacted until after Brandalynn's birth.[210] Section 7611 of the California Family Code was expanded in 2006 to provide that a man is presumed to be the natural father of a child if "[t]he child is in utero after the death of the decedent and the conditions set forth in Section 249.5 of the Probate Code are satisfied."[211] New Section 249.5 of the California Probate Code deems a posthumously conceived child to have been born within the decedent's lifetime if the decedent had specified in writing that his or her genetic material could be used for the posthumous conception of the child, certain notice requirements are met, and the child "was in utero using the decedent's genetic material and was in utero within two years of the date of issuance of a certificate of the decedent's death."[212] The lack of any written consent by her father and the timing of Brandalynn's conception and birth preclude her from inheriting from the decedent under California Probate Code Section 249.5 even if it had been enacted prior to her birth.[213]

After examining the amended California Family and Probate Codes, the court of appeals proclaimed that "we do not generally decipher previous legislative intent based upon subsequent legislation . . . ."[214] However, it noted that the California courts decided a case prior to these amendments that gave this court "insight as to how California courts interpreted the intestacy

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207. *Vernoff*, 568 F.3d at 1110 (citing Cheyanna M. v. A.C. Nielsen Co., 78 Cal. Rptr. 2d 335, 347 (Cal. Ct. App. 1998) (father died after conception but before birth) and *In re* Jerry P., 116 Cal. Rptr. 2d 123, 137 (Cal. Ct. App. 2002) (father physically prevented from holding the child out as his own)).

208. *Id.* at 1102; *see supra* text accompanying notes 149-52.

209. § 6453(c).

210. *Compare* § 249.5 (effective Jan. 1, 2005) *with Vernoff*, 568 F.3d at 1105 (Brandalynn was born Mar. 17, 1999).

211. CAL. FAM. CODE § 7611 (West 2009), *invalidated by In re* Mary G. 59 Cal. Rptr. 3d 703 (Cal. Ct. App. 2007) *and In re* Jerry P., 116 Cal. Rptr. 2d 123 (Cal. Ct. App. 2002).

212. CAL. PROBATE CODE § 249.5 (West 2009). It would seem that this law would either supplement or supersede California Probate Code Section 6407, which provides that "[r]elatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent." *Id*. § 6407.

213. *See id.* § 249.5.

214. *Vernoff*, 568 F.3d at 1111.

provisions prior to the passage of § 249.5."[215] In *Hecht v. Superior Court*, the court awarded a man's frozen sperm to his girlfriend, yet predicted that a child resulting from impregnation would unlikely be able to inherit from him.[216] The *Hecht* court cited the USCACA provision that provides that a posthumous child born through artificial reproductive techniques is not the child of the individual who provided the sperm, egg, or embryo.[217] The court concluded from *Hecht* that California would take a very narrow view when determining the inheritance rights of posthumously conceived children.[218]

E. Equal Protection Argument

Even after the court of appeals decided Brandalynn was ineligible to receive social security benefits under the applicable federal and state laws, it still needed to address whether the refusal to grant benefits was a denial of the equal protection that is guaranteed Brandalynn under the Fifth and Fourteenth Amendments to the United States Constitution.[219] The court's initial inquiry dealt with what level of scrutiny to apply to the government's actions in this case.[220] Equal protection claims are typically subject to one of three levels of scrutiny: (1) strict scrutiny, which is reserved for cases involving race and national origin discrimination and thus would not be appropriate in this case; (2) intermediate scrutiny, which is applied to discriminatory classifications based on gender or legitimacy; or (3) rational basis scrutiny, which is the lowest level of scrutiny and applies in all other cases.[221] In determining whether to apply intermediate scrutiny or rational basis scrutiny, the framing of the classification used by the government is important.[222] Here, the court had to decide if the classification, and resulting denial of benefits to Brandalynn, was

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215. *Id.*

216. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 290 (Cal. Ct. App. 1993); *see also supra* note 22.

217. *See supra* text accompanying notes 53-57. The USCACA was not enacted by the State of California. *See Vernoff*, 568 F.3d at 1111.

218. *Hecht*, 20 Cal. Rptr. 2d at 290.

219. S*ee* Julie E. Goodwin, *Not All Children Are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 234 (2005) (providing an extensive discussion of the equal protection rights of posthumously conceived children); Knaplund, *Equal Protection*, *supra* note 28.

220. *See Vernoff*, 568 F.3d at 1112.

221. *See* Mathews v. Lucas, 427 U.S. 495, 504-06 (1976) (refusing to apply strict scrutiny to a case involving the denial of social security benefits to non-marital children); Brief for the Appellant, *supra* note 161, at Part V. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1976); Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944). The Supreme Court of the United States has also applied an "insurmountable barrier test" to classifications based on legitimacy, striking down state laws that make the marital status of the child's parents an insurmountable barrier to the child's vindication of rights or receipt of benefits. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Gomez v. Perez, 409 U.S. 535 (1973).

222. *See* Goodwin, *supra* note 219, at 243-45.

one based on legitimacy or lack thereof, or simply one based on distinctions among various subclasses of posthumously conceived children.[223]

Brandalynn argued that the denial of benefits was based on legitimacy and that the court of appeals should apply intermediate scrutiny.[224] This classification requires that the disallowance of benefits be substantially related to an important government objective.[225] The court of appeals, however, agreed with the SSA that the appropriate level of scrutiny in Brandalynn's case was rational basis scrutiny.[226] Under rational basis scrutiny, the government needed only to prove that its classification reasonably related to a legitimate government purpose.[227] The SSA explained that its refusal to grant benefits in this case was not grounded in a classification based on legitimacy.[228] Rather, the distinction was among various subclasses of posthumously conceived children.[229] Those born within a certain period of time after the father's death or with the father's written consent that the sperm can be put to such a use are entitled to social security benefits.[230] Those posthumously conceived children whose fathers did not consent or who were not born within the statutory time period will not receive benefits.[231] The SSA posited that this distinction is reasonably related to the government's legitimate interest in using reasonable presumptions to limit social security benefits to those children who have lost a parent's support.[232] Agreeing, the court of appeals cited *Mathews v. Lucas*, in which the Supreme Court of the United States determined that the Social Security Act provision that did not provide nonmarital children with the same presumption of dependency provided to legitimate children did not violate the Fifth Amendment Equal Protection clause.[233] The distinction was justified because the Social Security Act is designed to provide support to children who are dependent upon the parent at the parent's death, and the presumption that a legitimate child was dependent upon the parent reasonably promotes administrative convenience.[234]

An underlying theme of the *Vernoff* case was whether the Social Security Act would be construed broadly enough to encompass most, if not all,

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223. *Id.*

224. *See, e.g.*, *Trimble*, 430 U.S. at 774 (holding that a state statute that allowed legitimate children to inherit from both parents, but allowed nonmarital children to inherit only from their mothers, violated the Fourteenth Amendment's equal protection mandate). *See also supra* note 141. Commentator Julie Goodwin argues that intermediate scrutiny should be applied to any state law that deals with the inheritance rights of posthumously conceived children. *See* Goodwin, *supra* note 219, at 271-80.

225. *Clark*, 486 U.S. at 461.

226. *Vernoff*, 568 F.3d at 1112; s*ee* Brief for the Appellee, *supra* note 1, at 33-39.

227. *See* Mathews v. Lucas, 427 U.S. 495, 509 (1976).

228. *Vernoff*, 568 F.3d at 1112.

229. *Id.*

230. *Id.* at 1107-08.

231. *Id.*

232. *See* Brief for the Appellee, *supra* note 1, at 33-39.

233. *Vernoff*, 568 F.3d at 1112 (citing Mathews v. Lucas, 427 U.S. 495, 509 (1976)); s*ee also supra* text accompanying notes 112-13.

234. *Mathews*, 427 U.S. at 509.

biological children of a decedent, or construed somewhat more narrowly to exclude some children because of the timing of their births or the circumstances of their conceptions.[235] Obviously, the drafters of the Social Security Act, which was enacted in 1935 and expanded in 1939 to include benefits for dependent children, did not contemplate a world in which children would be born years after their parents' deaths, let alone from sperm that were harvested after the father had died.[236]

IV. CONCLUSION

Prior to the *Vernoff* case, at least half of the social security cases that involved posthumously conceived children granted benefits to those children.[237] In *Gillett-Netting*, the Court of Appeals for the Ninth Circuit stated that "the Act is construed liberally to ensure that children are provided for financially after the death of a parent."[238] However, the *Vernoff* case is the one at which the judicial system has drawn the line. This line was previously drawn by the legislatures of those few states that adopted statutes dealing with posthumously conceived children.[239] Realistically, in none of those states would a child conceived following PMSR inherit from the father because all of those states require some type of written consent, approval, or acknowledgement by the father that his genetic material may be used after his death to produce children.[240] Thus, the *Vernoff* decision is not a surprising one, although it is one that will continue to have ramifications in those states that have not yet dealt legislatively with the concept that children can be conceived and born after the death of a parent—even without any prior knowledge by the parent that such a child would be conceived. The decision balances the need to protect children who are, or would have been, dependent upon their parents for support with the necessity of limiting government support to a reasonably foreseeable and manageable class of children.

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235. *See generally Vernoff*, 568 F.3d at 1111 (noting that the timing of the birth and lack of consent to use sperm could change the child's ability to receive social security benefits).

236. Social Security Amendments Act of 1939, ch. 666, 53 Stat. 1360 (1939).

237. For cases decided in favor of the child's receipt of benefits see *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004); Woodward v. Commissioner of Social Security, 760 N.E.2d 257 (2002); *In re* Estate of Kolacy, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000). For cases not allowing benefits see Finley v. Astrue, 279 S.W.3d 849 (2008); Khabbaz v. Commissioner of Social Security, 930 A.2d 1180 (2007); Stephen v. Commissioner of Social Security, 386 F. Supp. 1257 (M.D. Fla. 2005).

238. *Gillett-Netting*, 371 F.3d at 598 (citing Smith v. Heckler, 820 F.2d 1093, 1095 (9th Cir. 1987) and Doran v. Schweiker, 681 F.2d 605, 607 (9th Cir. 1982)).

239. *See* discussion *supra* Part II.A.

240. *See* discussion *supra* Part II.A.