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# The Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children

## I. INTRODUCTION

When Sergeant Dayne Darren Dhanooolal of Columbus, Georgia, died on March 31, 2008, while serving in Iraq, Kynesha Dhanooolal, his widow, hoped to be able to fulfill his expressed wish of having children.<sup>1</sup> She obtained a temporary restraining order in federal court to prevent the military from embalming Sergeant Dhanooolal until someone extracted and froze samples of his sperm.<sup>2</sup> Mrs. Dhanooolal planned to be artificially inseminated with the sperm as early as that summer.<sup>3</sup>

While this may sound like the stuff of science fiction, science and technology no longer limit human reproduction to the act of sexual intercourse. Couples today have options such as surrogacy, artificial insemination, and in vitro fertilization – techniques collectively referred to as assisted reproductive technology. In fact, it is now even possible for a couple to conceive a child with both parents' genetic material, even if one parent dies before actual conception.<sup>4</sup> Known as posthumous conception, this form of conception is occurring in increasing numbers.<sup>5</sup> Some spouses resort to posthumous concep-

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1. Harry R. Weber, *Ga. Soldier's Widow Wants His Sperm*, ASSOCIATED PRESS, Apr. 7, 2008, available at [http://www.usatoday.com/news/nation/2008-04-07-2254969189\\_x.htm](http://www.usatoday.com/news/nation/2008-04-07-2254969189_x.htm).

2. *Id.*

3. *Id.*

4. This usually occurs by harvesting and cryopreserving a parent's gametes during her life or post-mortem and using the gametes through artificial insemination or in vitro fertilization to impregnate a woman when that parent is diseased. Ruth Zafran, *Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception*, 8 HOUS. J. HEALTH L. & POL'Y 47, 50 (2007).

5. In 2003, it was estimated that hundreds of thousands of cryopreserved embryos existed in the United States. Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 580 n.1 (2005) (citing D. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, 79 FERTILITY & STERILITY 1063-69 (2003)). As more American soldiers store their sperm and surviving spouses harvest sperm from newly deceased spouses, these numbers are rising. *Id.* (citing THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 17 (2004), available at [http://www.bioethics.gov/reports/reproductionandresponsibility/\\_pcbe\\_final\\_reproduction\\_and\\_responsibility.pdf](http://www.bioethics.gov/reports/reproductionandresponsibility/_pcbe_final_reproduction_and_responsibility.pdf)).

tion upon the death of a spouse from a terminal illness.<sup>6</sup> The ongoing military engagements in Iraq and Afghanistan and continued U.S. troop casualties have only increased the number of soldiers' widows who use in vitro fertilization and other methods to conceive children from the extracted gametes of their spouses.<sup>7</sup>

Recently, courts have started to address the inheritance rights of posthumously conceived children. The current statutory and common-law framework in Missouri, as in many other states, "revolves around the idea that parent-child relationships are created by a man and a woman having sexual intercourse and a child being born as a result."<sup>8</sup> With the rapid advances in reproductive technology, however, this concept of parentage is clearly outdated and in need of improvement. Missouri law does not adequately address the issues of intestate succession and inheritance for children born through posthumous conception. To resolve this gap in state law, the Missouri legislature should adopt the 2008 amendments to the Uniform Probate Code (UPC). This note examines the provisions of the 2008 amendments, legislation and case law in other states, and the possible ways a Missouri court could decide a case based on its current statutory framework. In the end, adopting these provisions in Missouri would do much to clarify the rights of inheritance for the posthumously conceived.

## II. UNIFORM PROBATE CODE AMENDMENTS

Currently, seventeen states have enacted the UPC, including Minnesota, North Dakota, South Dakota, and Nebraska.<sup>9</sup> Prior to the 2008 amendment to the UPC, Section 2-114(a) stated that "for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status."<sup>10</sup> Additionally, Section 2-114(c)

6. See, e.g., *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004); *Khabbaz v. Comm'r, Social Sec. Admin.*, 930 A.2d 1180 (N.H. 2007); *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

7. See, e.g., Gregg Zoroya, *Science Makes Fallen Soldier a Father*, USA TODAY, Feb. 12, 2007, at 1; Tony Allen-Mills, *War Widows Give Birth with Stored Sperm*, THE SUNDAY TIMES, Oct. 28, 2007, available at [http://www.timesonline.co.uk/tol/news/world/us\\_and\\_americas/article2753585.ece](http://www.timesonline.co.uk/tol/news/world/us_and_americas/article2753585.ece). See also Maria Doucetperry, *To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military*, ARMY LAW., May 2008, at 1.

8. Tim R. Schlesinger, *Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support*, 61 J. MO. B. 22, 22 (2005).

9. The other states that have enacted the UPC are Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Montana, New Jersey, New Mexico, Pennsylvania, South Carolina, and Utah. National Conference of Commissioners on Uniform State Laws, *A Few Facts About the . . . Uniform Probate Code*, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-upc.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upc.asp).

10. UNIF. PROBATE CODE § 2-114(a) (1990), available at <http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm>.

prevented a child from inheriting from her natural parent “unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child.”<sup>11</sup>

In the summer of 2008, the National Conference of Commissioners on Uniform State Laws (NCCUSL) created a new subpart to the Uniform Probate Code on parent-child relationships to address more specifically how to treat children created through assisted reproductive technology.<sup>12</sup> In addition to new statutory language, the 2008 amendment included a detailed commentary explaining the need for the amendments.<sup>13</sup> According to one researcher, “10 to 15 percent of all adults experience some form of infertility.”<sup>14</sup> Data from the Center for Disease Control of the U.S. Department of Health and Human Services shows that, excluding artificial insemination, the number of children born from assisted reproductive technology more than doubled from 1996 to 2004.<sup>15</sup> Increased use of reproductive technology, along with growing numbers of unmarried individuals who want children, have raised legal questions concerning children born through assisted reproduction.<sup>16</sup> With its promulgation of the 2008 amendment, NCCUSL now advocates that children “are entitled to the respect the law gives to family choice,” regardless of whether parents have a child through sexual intercourse or assisted reproductive technology.<sup>17</sup> Section 2-120 of the 2008 UPC amendments addresses the inheritance rights of children born through these new technologies.<sup>18</sup>

UPC Section 2-120 has three pertinent provisions regarding posthumous conception. Section 2-120(f) states that a parent-child relationship exists between a “child of assisted reproduction”<sup>19</sup> and an individual who consented to assisted reproduction by the birth mother and intended to be the child’s other parent.<sup>20</sup> The simplest way to establish an individual’s consent is to

11. UNIF. PROBATE CODE § 2-114(c) (1990).

12. UNIF. PROBATE CODE title page & pt. I cmt. (amended 2008), *available at* <http://www.law.upenn.edu/bll/archives/ulc/upc/2008amends.pdf>.

13. *Id.* at pt. I cmt.

14. *Id.* (citing DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 31 (2006)).

15. *Id.* at § 2-120 cmt. (quoting CENTERS FOR DISEASE CONTROL AND PREVENTION, *2004 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES* (2006), *available at* <http://www.cdc.gov/ART/ART2004>). The UPC commentary notes that accuracy of this data is problematic because artificial insemination is one of the most common forms of assisted reproduction. *Id.*

16. *Id.* at pt. I cmt.

17. *Id.* (quoting CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, *ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO EMERGING LAW AND SCIENCE* 6-7 (2006)).

18. *Id.* at § 2-120.

19. A “child of assisted reproduction” refers to “a child conceived by means of assisted reproduction by a woman other than a gestational carrier under Section 2-121.” *Id.* at § 2-120(a)(2).

20. *Id.* at § 2-120(f).

prove, in light of all facts and circumstances, that he or she signed a record demonstrating consent before or after the child's birth.<sup>21</sup> If no signed record exists, it must be shown that the person intended to "function as a parent of the child . . . but was prevented from carrying out that intent by death, incapacity, or other circumstances," or established, by clear and convincing evidence, that the individual "intended to be treated as a parent of a posthumously conceived child."<sup>22</sup>

The second provision, Section 2-120(h), presumes parentage for an individual consenting to assisted reproduction under subsection (f) if the birth mother is a surviving spouse of the individual, no divorce proceedings are pending at the time, and clear and convincing evidence does not indicate the contrary.<sup>23</sup>

Section 2-120(k) is the third pertinent provision, which places a time limit on when a posthumously conceived child can inherit under intestate succession law. Typically, once a parent-child relationship is found to exist, a child must survive the deceased parent for 120 hours to inherit from him or her.<sup>24</sup> Since a posthumously conceived child obviously cannot meet that requirement, Section 2-120(k) gets around this by stating that such a child will be treated as if she were in gestation at the time of the parent's death, as long as the child was actually "in utero not later than 36 months after the individual's death [or] born not later than 45 months after the individual's death."<sup>25</sup> NCCUSL used a three-year period, plus an additional nine months, in order to give a surviving spouse or partner sufficient time to grieve, decide whether or not to use assisted reproduction, and have a child despite unsuccessful attempts.<sup>26</sup> If a parent-child relationship is established under Section 2-120, "the parent is a parent of the child and the child is a child of the parent for purposes of intestate succession."<sup>27</sup> With UPC Section 2-120, it is clear that, for purposes of intestate succession, NCCUSL seeks to treat posthumously conceived children no differently from those born during the decedent's lifetime, as long as the decedent evinced some kind of consent.

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21. *Id.* at § 2-120(f)(1).

22. *Id.*

23. *Id.* at § 2-120(h).

24. The requirement of survival by 120 hours is under UPC Section 2-104(a)(2).  
*Id.* at § 2-120(k).

25. *Id.*

26. *Id.* at § 2-120(k) cmt.

27. *Id.* at § 2-116.

### III. LEGAL BACKGROUND

#### A. *Similar Legislation in Other States*

Within the past decade, various states have passed legislation to address the problems of inheritance for children conceived with a person's genetic material after that person's death. These statutes specify whether such a child can inherit from her deceased parent and under what circumstances. The following states explicitly recognize inheritance, or impliedly do so by affirming the existence of parentage:

**Connecticut:** In Connecticut, a child born through artificial insemination is deemed the "naturally conceived legitimate child of the husband and wife" if they consented to artificial insemination with donor sperm.<sup>28</sup> Such a child can inherit the estate of her consenting parents or their relatives, but not from her genetic father.<sup>29</sup> Likewise, the parents of the child can inherit from their child if the child dies intestate.<sup>30</sup> The Connecticut Supreme Court has only addressed these statutes in one case<sup>31</sup> and has not yet determined whether they would apply to posthumously conceived children.

**Louisiana:** Louisiana's statute treats a child conceived after the decedent's death as a child of the decedent if he "specifically authorized in writing his surviving spouse to use his gametes."<sup>32</sup> The child has the right to inherit if she is born to the surviving spouse within three years of the decedent's death and has the gametes of the decedent.<sup>33</sup> The law was enacted in 2001 and amended in 2003 to clarify that a child could inherit from the same decedent as if the child was "in existence" at the time of the decedent's death.<sup>34</sup>

**California:** Under the California Probate Code, a posthumously conceived child of the decedent is deemed to have been born during the decedent's lifetime if it is proven, by clear and convincing evidence, that the decedent specified in writing that the decedent's genetic material could be used for posthumous conception.<sup>35</sup> Additionally, the declarant must sign and date the writing, as well as designate someone to control the use of her genetic material.<sup>36</sup> This writing, however, can be revoked or amended if the decedent

28. CONN. GEN. STAT. § 45a-774.

29. *Id.* at § 45a-777(a).

30. *Id.* at § 45a-777(b).

31. *Doe v. Doe*, 710 A.2d 1297 (Conn. 1998).

32. LA. REV. STAT. ANN. § 9:391.1.A (Supp. 2008).

33. *Id.*

34. S.B. 494, 2001 Reg. Sess. (La. 2001); S.B. 473, 2003 Reg. Sess. (La. 2003). This is due to the requirement under Louisiana Civil Code Article 939 that "a successor must exist at the time of the death of the decedent in order to inherit." *See also* LA. REV. STAT. ANN. § 9:391.1 cmt. (Supp. 2008).

35. CAL. PROB. CODE § 249.5(a) (West Supp. 2009).

36. *Id.*

signs and dates a later document evidencing her intent to do so.<sup>37</sup> Upon the decedent's death, the person designated to control the decedent's genetic material must give notice to the distributor of the decedent's estate.<sup>38</sup> This notice must be given within four months after a decedent's death certificate issues, or after a court determines the fact of a decedent's death, whichever occurs first.<sup>39</sup> Finally, the child must have the decedent's genes and be in utero within two years of issuance of the decedent's death certificate or a judgment on the fact of her death, whichever comes first.<sup>40</sup>

**Virginia:** Virginia allows for a child born through artificial insemination to be a child of a decedent if born within ten months of the decedent's death.<sup>41</sup> Yet if the decedent "die[d] before in utero implantation of an embryo" with a decedent's genes, the decedent is not the parent of the child unless "(i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation."<sup>42</sup>

Other states have adopted the position of the 2002 revision to the Uniform Parentage Act (UPA).<sup>43</sup> Section 707 of the UPA states that, unless the deceased individual consented in a record to be the parent even if assisted reproduction occurred after his death, the posthumously conceived child is not his child.<sup>44</sup> A 2005 assisted reproduction statute in Colorado essentially tracks the language of the UPA.<sup>45</sup> Similarly, in Texas, a deceased spouse is not the parent unless a licensed physician kept records of the decedent's consent to be the parent of a posthumously conceived child.<sup>46</sup>

A few states, however, have chosen not to recognize the intestate succession inheritance rights of children born through posthumous conception or, at least, have severely curtailed their ability to inherit. Florida's statute is the most specific, in that a child who is conceived with a decedent's genetic material after the decedent's death "shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's

37. *Id.*

38. CAL. PROB. CODE § 249.5(b) (West Supp. 2009).

39. *Id.*

40. *Id.* at § 249.5(c).

41. VA. CODE ANN. § 20-158.B.

42. *Id.*

43. It is currently in effect in Alabama, Texas, Delaware, North Dakota, Oklahoma, Utah, Washington, and Wyoming. National Conference of Commissioners on Uniform State Laws, *A Few Facts About The . . . Uniform Parentage Act*, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-upa.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp).

44. UNIF. PARENTAGE ACT § 707 (2002).

45. COLO. REV. STAT. § 19-4-106(8) provides that "[i]f a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child."

46. TEX. FAM. CODE ANN. § 160.707 (Vernon 2008).

will.”<sup>47</sup> In Idaho, the statute which addresses afterborn children and intestate succession states that children conceived before a decedent’s death, whether by natural or artificial means, can inherit if born within ten months after that decedent’s date of death.<sup>48</sup>

*B. Cases Addressing the Rights of Posthumously Conceived Children to Inherit: The Social Security Context*

Currently, very few cases have addressed solely the issue of posthumously conceived children inheriting through intestate succession. Most of the cases dealing with a posthumously conceived child’s right to inherit arise when a surviving spouse tries to obtain Social Security survivor’s benefits for that child. Because the test under Social Security is based on whether a child would be an intestate heir under state law,<sup>49</sup> it is useful to examine how these cases have been decided.

Social Security child insurance benefits are established under 42 U.S.C. § 402(d). Congress defines the word “child” broadly as “the child or legally adopted child of an individual.”<sup>50</sup> Federal regulations similarly state that a child is entitled to benefits from an insured person if she is the insured’s natural child, stepchild, adopted child, grandchild, or stepgrandchild.<sup>51</sup> Notably, the Social Security Administration will follow the law of intestate succession in the state where the child resides.<sup>52</sup> Thus, despite the fact that an underlying action may be for Social Security benefits, the legal analysis for deeming a child eligible for survivor’s benefits under state law is the same as determining if a posthumously conceived child can inherit under intestacy law.

One of the earliest cases dealing with the issue is the New Jersey decision of *In re Estate of Kolacy*, in which a mother, in order to facilitate her pending claims for benefits through Social Security, tried to get a state court ruling on her children’s ability to inherit from their father.<sup>53</sup> In *Kolacy*, the decedent had been diagnosed with leukemia, and he and his wife deposited his sperm at a sperm bank.<sup>54</sup> About a year after the decedent died, his widow underwent in vitro fertilization using the decedent’s sperm and gave birth to twins in November 1996.<sup>55</sup> The court first looked to the state’s Parentage

47. FLA. STAT. ANN. § 742.17 (West 2009).

48. ID. STAT. ANN. § 15-2-108.

49. See Karen Minor, Note, *Posthumously Conceived Children and Social Security Survivor’s Benefits: Implications of the Ninth Circuit’s Novel Approach For Determining Eligibility in Gillett-Netting v. Barnhart*, 35 GOLDEN GATE U. L. REV. 85, 89 (2005) (citing 42 U.S.C. § 416(h)(2)(A), (B) (2004)).

50. 42 U.S.C. § 416(e)(1) (2006).

51. 20 C.F.R. § 404.354 (2008).

52. *Id.* at § 404.355(b)(1).

53. 753 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 2000).

54. *Id.* at 1258.

55. *Id.*



Act, which established a presumption of parentage if the man “and the child’s biological mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce.”<sup>56</sup> It noted that this presumption could be rebutted by clear and convincing evidence and found that such evidence existed in this case to establish that the twins were the children of the decedent, because his “intentional conduct created the possibility” of posthumously conceived children.<sup>57</sup> To get to that conclusion, however, the court decided to “accept as true” that the decedent “unequivocally expressed his desire” that his wife use his sperm if he were to die.<sup>58</sup> The court also appealed to public policy by stating that a child, no matter how born, “is a full-fledged human being . . . entitled to all of the love, respect, dignity and legal protection which that status requires” and, as such, the law should “enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons.”<sup>59</sup>

A case that places more emphasis on the need for evidence of the decedent’s consent than *Kolacy* is *Woodward v. Commissioner*.<sup>60</sup> Mrs. Woodward, who was denied child’s benefits by the Social Security Administration, appealed to the U.S. District Court in Massachusetts.<sup>61</sup> The district court, in turn, certified the following question to the Massachusetts Supreme Judicial Court:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts’ law of intestate succession?<sup>62</sup>

Similar to the facts in *Kolacy*, Mrs. Woodward’s husband had deposited sperm in a sperm bank, and, after his death, Mrs. Woodward underwent artificial insemination using his sperm and gave birth to twins.<sup>63</sup>

The Massachusetts Supreme Judicial Court held that a posthumously conceived child could inherit under state intestacy law if the decedent was the genetic parent of the child and the surviving parent or the child’s legal representative established that the decedent “affirmatively consented” to posthumously

56. *Id.* at 1262 (quoting N.J. STAT. ANN. § 9:17-43.a(1)).

57. *Id.* at 1263-64.

58. *Id.* at 1263.

59. *Id.*

60. 760 N.E.2d 257 (Mass. 2002).

61. *Id.* at 261.

62. *Id.* at 259.

63. *Id.* at 260.

ous conception and posthumous financial support of the child.<sup>64</sup> Although state intestacy statutes did not explicitly limit eligible posthumous children to those in utero at the decedent's death,<sup>65</sup> the court concluded that it needed to strike a balance among three state interests: the interests of the Woodward children, orderly administration of estates, and the decedent's reproductive rights.<sup>66</sup> Noting that frozen semen could remain viable for up to ten years and that a person who donates genetic material may not desire posthumously conceived children, the court stated that its holding requiring evidence of the decedent's consent supported the legislature's intent to prevent fraud.<sup>67</sup> The Massachusetts Supreme Judicial Court noted that Mrs. Woodward's children could inherit if conceived from the decedent's genes and if she could prove her husband had affirmatively consented to both posthumous conception and supporting any resulting child.<sup>68</sup>

Since intestate succession is primarily a state issue, only one federal appellate circuit, the Court of Appeals for the Ninth Circuit, has addressed posthumous conception in the context of intestate succession and Social Security benefits. In *Gillett-Netting v. Barnhart*, after being diagnosed with cancer, Mr. Netting had his sperm frozen for his wife's later use.<sup>69</sup> He indicated during his life that he wanted his wife to have a child with his sperm after his death.<sup>70</sup> About ten months after Mr. Netting's death, Mrs. Gillett-Netting underwent in vitro fertilization and gave birth to twins. She then applied for Social Security child survivor's benefits.<sup>71</sup> The Ninth Circuit decided not to look to state intestacy law.<sup>72</sup> Instead, it determined that courts need only apply state intestacy law when the child's parents are unmarried or the child's parentage is disputed.<sup>73</sup> Based on the Ninth Circuit's interpretation of the Social Security Act, any legitimate child could be found dependent on a parent and thus eligible for survivor's benefits without looking to intestacy law.<sup>74</sup> The court then looked to laws regarding legitimacy in Arizona, where Mr. Netting's children resided.<sup>75</sup> "In Arizona, '[e]very child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.'"<sup>76</sup> Since the children were undisputedly legitimate, the

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64. *Id.* at 259.

65. *Id.* at 262.

66. *Id.* at 264-65.

67. *Id.* at 269-70.

68. *Id.* at 272.

69. 371 F.3d 593, 594 (9th Cir. 2004).

70. *Id.* at 595.

71. *Id.*

72. Minor, *supra* note 49, at 101.

73. *Gillett-Netting*, 371 F.3d at 598 (explaining that, because 42 U.S.C. § 414(h) lets an illegitimate child establish eligibility, these methods do not apply to a legitimate child).

74. *Id.*

75. *Id.*

76. *Id.* (quoting ARIZ. REV. STAT. § 8-601).

court reasoned that, were Mr. Netting alive, he would have been obligated to support his children, despite the fact they were conceived through in vitro fertilization.<sup>77</sup> Thus, the Ninth Circuit concluded that they were entitled to benefits under the Social Security Act.<sup>78</sup>

A case similar to *Gillett-Netting*, in which a federal court looked to applicable state law to determine Social Security benefits yet reached the opposite result, is *Stephen v. Commissioner of Social Security*.<sup>79</sup> After the decedent died suddenly, his widow extracted and cryopreserved his semen.<sup>80</sup> She began in vitro fertilization treatments in July 1998 and gave birth to a son in June 2001.<sup>81</sup> The U.S. District Court for the Middle District of Florida looked to state statutes to determine the son's inheritance rights and noted that Florida prohibited any kind of inheritance for a child conceived posthumously, unless the decedent provided for the child in his will.<sup>82</sup> The court found that, since the decedent did not leave a will, under Florida law, his son could not bring a claim against his estate.<sup>83</sup> Under the Social Security Act, his son was not eligible for survivor benefits.<sup>84</sup>

Like *Woodward, Khabbaz v. Commissioner* is another case in which a state supreme court – in this instance, the New Hampshire Supreme Court – addressed a certified question from the U.S. District Court in New Hampshire on the rights of posthumously conceived children to inherit under state intestacy law.<sup>85</sup> Mr. Khabbaz, who was diagnosed with a terminal illness, deposited his sperm and signed a consent form stating he had the “desire and intent to be legally recognized as the father of the child to the fullest extent allowable by law.”<sup>86</sup> After he died in 1998, his wife underwent artificial insemination and gave birth to a daughter in 2000.<sup>87</sup> His wife then sought Social Security survivor's benefits for her daughter.<sup>88</sup> Under New Hampshire intestacy statutes, if the decedent has no surviving spouse, then the decedent's estate goes “[t]o the issue of decedent equally [but] if there are no surviving issue, to the decedent's parent or parents equally.”<sup>89</sup> The court looked to the plain meaning of the word “surviving,” which was “remaining alive or in

77. *Id.* at 599 (citing ARIZ. REV. STAT. § 25-501 (providing that the genetic father of a child born through artificial insemination is considered the natural parent if the father is married to the mother)).

78. *Id.* at 596.

79. 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

80. *Id.* at 1259.

81. *Id.*

82. *Id.* at 1264 (citing FLA. STAT. § 742.17).

83. *Id.* at 1265.

84. *Id.*

85. 930 A.2d 1180, 1182 (N.H. 2007).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1183 (quoting N.H. REV. STAT. § 561:1).

existence,”<sup>90</sup> and held that no “posthumously conceived child is a ‘surviving issue’ within the plain meaning of the statute.”<sup>91</sup> The court noted that the statute’s repeated references to the phrase “surviving issue” demonstrated a “clear legislative intent” to allow those living at the time of the decedent’s death to inherit and to establish a “timely and orderly . . . distribution process.”<sup>92</sup> Thus, the court found that the posthumously conceived daughter of Mr. Khabbaz could not inherit under New Hampshire intestacy law.<sup>93</sup>

The most recent case on this issue is *Finley v. Astrue*, in which the U.S. District Court for the Eastern District of Arkansas certified the question of intestate succession for posthumous children to the Arkansas Supreme Court.<sup>94</sup> The Finleys used fertility treatments to freeze four embryos from their eggs and sperm.<sup>95</sup> After Mr. Finley died intestate, Mrs. Finley had two embryos implanted in her uterus.<sup>96</sup> She then filed for Social Security child’s survivor benefits after her child’s birth.<sup>97</sup>

The Arkansas Supreme Court noted that state intestacy law required a posthumous child to be born after, but conceived before, the decedent’s death to be able to inherit: “Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.”<sup>98</sup> Yet could an embryo created with the decedent’s genetic material before his death be deemed “conceived before his . . . death?” The court found that the legislature would not have intended such a result, since the statute did not refer to fertility treatments and was enacted before the technology for in vitro fertilization had developed.<sup>99</sup> Thus, under Arkansas intestacy law, when an embryo is created through in vitro fertilization during the parents’ lifetime, but only implanted in a womb after a parent’s death, the resulting child cannot inherit as a surviving child. The court deemed it appropriate to leave questions of public policy to the legislature and urged them to revisit the intestate succession statutes.<sup>100</sup>

90. *Id.* at 1183-84 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2303 (unabridged ed. 2002)).

91. *Id.* at 1184.

92. *Id.*

93. *Id.* at 1185.

94. 270 S.W.3d 849, 850 (Ark. 2008).

95. *Id.*

96. *Id.* at 850-51.

97. *Id.* at 851.

98. *Id.* at 853 (citing ARK. CODE ANN. § 28-9-210(a) (2004)).

99. *Id.* (citing Janet L. Dolgin, *Surrounding Embryos: Biology, Ideology, & Politics*, 16 HEALTH MATRIX 27 (2006) & Dena S. Davis, *The Puzzle of IVF*, 6 HOUS. J. HEALTH L. & POL’Y 275 (2006)).

100. *Id.* at 855.

### C. Missouri's Current Statutory Scheme

Missouri courts have yet to address the question of whether a posthumously conceived child could inherit from a deceased, genetic parent under state intestacy law. Two statutes with potential relevance address the establishment of a parent-child relationship. One state statute directly deals with assisted reproduction: Missouri Revised Statute Section 210.824 says that if a woman undergoes artificial insemination with sperm from a man who is not her husband, but her husband consents in writing to the sperm's use, the husband will be "treated in law as if he were the natural father of a child thereby conceived."<sup>101</sup> This statute, however, does not deal with situations where the spouse conceives using the husband's sperm, nor does it consider any other types of reproductive technology, such as in vitro fertilization. As such, it is a statute limited in scope and application.

The second parentage statute is Missouri Revised Statute Section 474.060, under which "a person born out of wedlock is a child of the mother" as well as "a child of the father" if "paternity is established by an adjudication before the death of the father, or is established thereafter by clear and convincing proof."<sup>102</sup> Although this statute does not directly address intestate succession, a court could possibly construe this statute to allow a posthumously conceived child to inherit if the surviving parent establishes paternity by clear and convincing evidence.

Missouri's general scheme for intestate succession can be found in Missouri Revised Statute Section 474.010. The first part of the statute dictates what a surviving spouse receives, with differing rules based on whether the decedent has "surviving issue" and who are the parents of the said issue.<sup>103</sup> The second part describes distribution of the "part not distributable to the surviving spouse, or the entire intestate property, if there is no surviving spouse" and states that the property goes "to the decedent's children, or their descendants, in equal parts; . . . if there are no children, or their descendants, then to the decedent's" parents or siblings.<sup>104</sup> Notably, the second part of Section 474.010, under which children of posthumous conception fall, only says "children" and not "surviving issue."

Missouri Revised Statute Section 474.050 is the only law that specifically addresses posthumous heirs and estates:

All posthumous children, or descendants, of the intestate shall inherit in like manner, as if born in the lifetime of the intestate; but no right of inheritance accrues to any person other than the child-

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101. MO. REV. STAT. § 210.824 (2000); see Tim R. Schlesinger, *Assisted Human Reproduction: Unsolved Issues in Parentage, Child Custody and Support*, 61 J. MO. B. 22 (2005).

102. MO. REV. STAT. § 474.060.

103. *Id.* at § 474.010(1).

104. *Id.* at § 474.010(2).

ren or descendants of the intestate, unless they are born and capable in law to take as heirs at the time of the intestate's death.<sup>105</sup>

The most recent case to interpret this statute is *Vogel v. Mercantile Trust Company National Association*.<sup>106</sup> In *Vogel*, the plaintiffs brought an omitted heir claim against their grandmother's will, which established a trust for her son but directed for its termination and distribution of its funds to the son's then-only daughter upon the son's death.<sup>107</sup> The plaintiffs, who sought part of the trust funds, were children from the son's second marriage, born nearly thirty years after their grandmother's death.<sup>108</sup> In examining Missouri Revised Statute Section 474.050, the Supreme Court of Missouri construed the phrase "posthumous children, or descendants, of the intestate" to mean only "those conceived during the lifetime of the testator, but born thereafter" could inherit from their parents.<sup>109</sup> Thus, because Missouri limits children who can inherit from a decedent to those conceived during that decedent's life, it seems to bar children of the decedent born through posthumous conception from inheriting.

#### IV. COMMENT

In her article, *To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military*, Major Maria Doucettperry presents the following hypothetical: First Lieutenant James Perry and his wife decide to deposit his sperm in a sperm bank before he is deployed to Afghanistan.<sup>110</sup> Lieutenant Perry explicitly tells his wife to use his sperm to fulfill his dream of having three children if he does not return.<sup>111</sup> This hypothetical, with the additional presumptions that Lieutenant Perry dies while serving in Afghanistan and that Mrs. Perry subsequently uses his sperm to have a daughter, will be used to show how Missouri courts would potentially interpret a posthumously conceived child's rights to inherit under state intestacy law.

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105. *Id.* at § 474.050.

106. 511 S.W.2d 784 (Mo. 1974).

107. *Id.* at 786.

108. *Id.*

109. *Id.* at 789 (interpreting MO. REV. STAT. § 304 (1919), which used the same statutory language).

110. Doucettperry, *supra* note 7, at 1.

111. *Id.*

*A. How a Case in Missouri May Be Decided*

If Missouri were to use the approach of the New Jersey court in *In re Estate of Kolacy*,<sup>112</sup> Mrs. Perry's daughter would likely be able to inherit her father's estate. In *Kolacy*, the court found that, under the New Jersey Parentage Act, which established paternity if the biological parents were married and the child was born within 300 days after a spouse's death, a surviving spouse could rebut a "reverse presumption" of non-parentage for a child born 300 days after a spouse's death by clear and convincing evidence.<sup>113</sup> Missouri Revised Statute Section 210.822 similarly follows the New Jersey Parentage Act<sup>114</sup> and also allows for rebuttal of the presumption with clear and convincing evidence.<sup>115</sup> In Mrs. Perry's case, if the Missouri court assumed as true that Lieutenant Perry wanted her to use the sperm specifically for posthumous conception, the court would likely find his statement sufficient to establish his intent and rebut a "reverse presumption" of no paternity under Section 210.822. A Missouri court could also broadly construe intestacy laws under a public policy seeking to "enhance and enlarge the rights of each human being to the maximum extent possible," as the *Kolacy* court did.<sup>116</sup>

For courts that want some evidence of intent, the surviving spouse's word alone will probably be deemed insufficient, as indicated in *Woodward v. Commissioner*.<sup>117</sup> If, for instance, Lieutenant Perry's statement of his intent for Mrs. Perry to use his sperm for posthumous conception was not in writing or not stated to anyone but Mrs. Perry, a Missouri court may look more favorably towards *Woodward*, which required the surviving spouse to establish that the decedent "affirmatively consented" to posthumous conception and to supporting the child financially.<sup>118</sup> As the Massachusetts Supreme Judicial Court noted in *Woodward*, since the state's intestacy statutes did not explicitly limit eligible "posthumous children to those in utero at the decedent's death,"<sup>119</sup> a consent requirement would serve the public policy of "orderly administration of estates" by preventing fraudulent inheritance claims while still recognizing the rights of posthumously conceived children to inherit.<sup>120</sup> Unfortunately, the *Woodward* court did not expressly address what evidence would be sufficient to establish affirmative consent. Depending on

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112. 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

113. *Id.* at 1262-63 (interpreting N.J. STAT. ANN. § 9:17-43.a(1)).

114. Both Acts state that paternity is established when the child is born within 300 days after the marriage ends by death of one of the parents. MO. REV. STAT. § 210.822 (2000); N.J. STAT. ANN. § 9:17-43.a(1).

115. MO. REV. STAT. § 210.822 (2000).

116. 753 A.2d at 1263.

117. 760 N.E.2d 257 (Mass. 2002).

118. *Id.* at 259.

119. *Id.* at 262.

120. *Id.* at 264-65.

the facts of the case – if the consent was in a signed and dated writing, in the decedent’s medical records, verbally given to the spouse, etc. – a child may not be able to meet that evidentiary bar.

While the evidentiary requirements in *Woodward* would prove challenging, following the approach of *Gillett-Netting v. Barnhart*<sup>121</sup> also presents potential limitations in its application to a Missouri case. Most notably, it is a case in which the Ninth Circuit chose not to use state intestacy law to determine eligibility for Social Security survivor’s benefits.<sup>122</sup> The court found that, since “nothing in the statute suggests that a child must prove parentage . . . if it is not disputed,” the Social Security provision, which requires looking to state intestacy law, only applies when parentage is disputed.<sup>123</sup> In this case, the children’s parentage was not at issue, so, under Arizona laws concerning legitimacy and parentage, the children were legitimate and eligible for benefits.<sup>124</sup> The Ninth Circuit found the state’s intestacy law irrelevant to establishing whether a posthumously conceived child could get Social Security benefits, as long as the child’s parentage was not disputed.<sup>125</sup>

In Mrs. Perry’s case, if she were just applying for Social Security benefits, she could similarly argue that the court need only look to Missouri law regarding parentage, since a parent-child relationship with her husband could easily be established. Yet appealing to Missouri parentage laws probably would not work as it did in *Gillett-Netting*, because Missouri Revised Statute Section 210.822, as part of its Parentage Act, establishes a presumption of parentage when the child is born during the marriage or within 300 days after the marriage ends by death.<sup>126</sup> Since a posthumously conceived child can potentially be born after the 300-day period,<sup>127</sup> a court may find it harder to construe the Missouri statute in Mrs. Perry’s favor, unless that court follows *Kolacy* and allows a child to rebut a “reverse presumption” of non-paternity with clear and convincing evidence of parentage. On the other hand, if Mrs. Perry were only trying to get her daughter a portion of her husband’s estate and not Social Security benefits, Missouri courts would not be able to follow *Gillett-Netting* since they would need to interpret state intestacy law, not parentage law.

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121. 371 F.3d 593 (9th Cir. 2004).

122. *Id.* at 595-96.

123. *Id.* at 597.

124. *Id.*

125. *Id.*

126. *Contra* ARIZ. REV. STAT. § 8-601 (“Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock.”).

127. *See* Allen-Mills, *supra* note 7 (One widow gave birth to a son two years after her husband’s death; another widow followed her fertility clinic’s advice to wait a year after her husband died to ensure she still wanted to go through with in vitro fertilization.).



Other courts have found that state intestacy law still applies in the Social Security context, even when parentage could easily be established. In *Khabbaz v. Commissioner*, the New Hampshire Supreme Court addressed a certified question from a federal district court, because whether a child could get Social Security benefits “depend[ed] upon whether she c[ould] inherit from her father under state intestacy law.”<sup>128</sup> Under the approach of *Khabbaz*, a Missouri court would look to the general statute governing distribution and descent – Missouri Revised Statute Section 474.010. Just as the court in *Khabbaz* emphasized the statute’s use of the phrase “surviving issue,” a court would probably take note that Missouri dictates what a surviving spouse receives based on whether the decedent has “surviving issue.”<sup>129</sup> A Missouri court may similarly find that, for Mrs. Perry and her daughter, the statute’s language evinces an intent to consider only descendants living at the time of Lieutenant Perry’s death.

Mrs. Perry could then try to argue that the second part of Section 474.010 supports a claim for intestate succession to posthumously conceived children, because it gives intestate property to the “decedent’s children,” with no specification that those children be “surviving.”<sup>130</sup> Whether a Missouri court would accept such a claim would probably depend on whether the court focused on the legislature’s intent, the public policy of efficient distribution, or the rights of posthumously conceived children. If the court wished to emphasize human rights, it could find for Mrs. Perry based on grounds similar to those in *In re Estate of Kolacy*, in which the court noted that a child, regardless of when she is born, is “a full-fledged human being . . . entitled to all of the . . . legal protection which that status requires.”<sup>131</sup> If the court decided to follow *Khabbaz*, with its emphasis on the intent of the legislature and policy of efficient distribution, it would likely hold that Mrs. Perry’s daughter had no claim on a part of her father’s estate.

Of all the posthumous conception cases, the case that Missouri courts would probably find most useful in Mrs. Perry’s situation is *Finley v. Astrue*,<sup>132</sup> because of similarities in Missouri’s and Arkansas’s intestate succession schemes. Missouri Revised Statute Section 474.050 lets posthumous children of a decedent inherit “as if born in the lifetime of the intestate; but no right of inheritance accrues to any person other than the children or descendants of the intestate, unless they are born and capable in law to take as heirs at the time of the intestate’s death.”<sup>133</sup> In *Vogel v. Mercantile Trust Company National Association*, the phrase “posthumous children, or descendants, of the intestate” in the Missouri statute was construed to mean only “those con-

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128. 930 A.2d 1180, 1182 (N.H. 2007).

129. MO. REV. STAT. § 474.010(1) (2000).

130. *Id.* at § 474.010(2).

131. 753 A.2d 1257, 1263 (N.J. Super. Ct. Ch. Div. 2000).

132. 270 S.W.3d 849 (Ark. 2008).

133. MO. REV. STAT. § 474.050.

ceived during the lifetime of the testator, but born thereafter,” could inherit from their parents.<sup>134</sup>

Arkansas law also requires a posthumous child’s conception before the decedent’s death,<sup>135</sup> so the statutory analysis in *Finley* would likely be very helpful for a Missouri court dealing with a situation like Mrs. Perry’s. If the court were to follow *Finley*, it would emphasize legislative intent based on the statute’s language and the legislature’s intent at the time of enactment. Like the *Finley* court, a Missouri court may find it significant that Missouri Revised Statute Section 474.050 was enacted long before the advent of assisted reproductive technology and thus naturally failed to address children born through such methods.<sup>136</sup> The court might also note that, despite ample opportunities to update the law, the legislature has not. In Mrs. Perry’s case, the moment of conception would not be an issue before the court because she and Lieutenant Perry had frozen and stored sperm, not embryos. A Missouri court would probably find that, since Mrs. Perry’s daughter was conceived and born after Lieutenant Perry’s death, she would be unable to inherit.

Of course, it is possible that a Missouri judge would refuse to read intestacy statutes as strictly as the Arkansas Supreme Court in *Finley*, reject the Supreme Court of Missouri’s limiting interpretation under *Vogel*,<sup>137</sup> and instead follow *Woodward v. Commissioner*<sup>138</sup> to hold that the Missouri Revised Statutes, in not explicitly prohibiting posthumously conceived children, allow for inheritance. In a sense, the result under *Woodward* seems like the better result than outright rejection of inheritance for any child born after the death of her parent. Not only does a counter result punish the child, but it also fails to consider the wishes of any parent in regards to his or her plans for future children.

Yet such a result, based in large part on public policy and perhaps a sense of fairness, does not seem likely. Missouri courts frequently cite the need to follow a statute’s “plain and ordinary meaning.”<sup>139</sup> The state law, whether Missouri Revised Statute Section 474.010 or Section 474.050, simply does not address the situation of posthumous conception. Unless the courts decide to allow for proof of affirmative consent, as in *Woodward v. Commissioner*, or appeal to larger issues of public policy, such as treating children

134. 511 S.W.2d 784, 789 (Mo. 1974) (interpreting MO. REV. STAT. § 304 (1919), which used the same statutory language).

135. ARK. CODE ANN. § 28-9-210(a) (“Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.”).

136. Act July 4, 1807, 1 Terr. L. 131, § 13.

137. 511 S.W.2d 789.

138. 760 N.E.2d 257, 259 (Mass. 2002).

139. See, e.g., *Union Elec. Co. v. Metro. St. Louis Sewer Dist.*, 258 S.W.3d 48, 54 (Mo. 2008) (en banc); *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251 (Mo. 2003) (en banc), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003) (en banc).

equally regardless of status or efficient administration of estates, they may find it best to follow *Finley* and leave questions of public policy to the legislature.<sup>140</sup> Nonetheless, what is clear from analyzing the different approaches from various courts is that the current statutory scheme for intestate succession in Missouri is woefully inadequate to deal with the problems facing children posthumously conceived through assisted reproductive technology.

### B. Missouri Adoption of the 2008 UPC Amendments

Before a Missouri court is forced to grapple with intestate succession for a posthumously conceived child under current intestacy laws, the Missouri legislature should consider adopting the 2008 amendments to the Uniform Probate Code. These amendments go a long way towards filling in the various gaps in state intestacy law and establishing a more uniform approach that balances a state's varying interests in timely and orderly distribution, prevention of fraudulent claims, and the rights of posthumous children. For one, to address the types of concerns raised in *In re Estate of Kolacy*, UPC Section 2-120 enhances the rights of posthumous children. At the same time, the UPC acknowledges the concerns in *Woodward v. Commissioner* of fraudulent claims and a decedent's right to control the disposition of his own genetic material even after death by requiring evidence of the decedent's consent or intent.<sup>141</sup> The UPC would also prevent the harsh result of *Stephen v. Commissioner of Social Security*, which required a decedent to provide for a posthumously conceived child in his will, creating an absolute bar to any child whose parent died intestate.<sup>142</sup> The fact that Florida law has such strict requirements<sup>143</sup> indicates the state's desire to prove consent and intent; UPC Section 2-120, in requiring a decedent's consent to assisted reproduction in writing or intent to treat a posthumously conceived child as his own, addresses this problem.<sup>144</sup> Additionally, the UPC takes into consideration timely distribution of a decedent's estate, as emphasized in *Khabbaz v. Commissioner*, by requiring that a child be in utero within thirty-six months or born within forty-five months after a decedent's death in order to be deemed living at the decedent's death.<sup>145</sup>

At first glance, UPC Section 2-120 may seem strict in requiring consent in writing or clear and convincing evidence of intent,<sup>146</sup> particularly if a dece-

140. See *Finley v. Astrue*, 270 S.W.3d 849, 855 (Ark. 2008).

141. UNIF. PROBATE CODE § 2-120(f) (2008) (stating that a parent-child relationship exists between a child of assisted reproduction and someone other than the birth mother if the parent consented to assisted reproduction with intent to be treated as the other parent of the child).

142. 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005).

143. See FLA. STAT. § 742.17.

144. See *supra* text accompanying notes 17-19; UNIF. PROBATE CODE § 2-120(f).

145. UNIF. PROBATE CODE § 2-120(k).

146. *Id.* at § 2-120(f).

dent finds it sufficient to tell only his spouse his wishes regarding his genetic material or signs medical consent forms which fail to address his desired disposition of his genes upon his death. In Missouri, the clear and convincing evidence standard is quite high, requiring evidence that “instantly tilts the scale in the affirmative when weighed against the evidence in opposition, and [leaves] the fact finder’s mind . . . with an abiding conviction that the evidence is true.”<sup>147</sup> While this may prove difficult for an unmarried couple, at least for married couples, the UPC provides an even simpler path: As long as the birth mother is a surviving spouse (with no pending divorce at the decedent’s death) and no clear and convincing evidence establishes the contrary, a presumption exists that the decedent intended to be the parent of a posthumously conceived child.<sup>148</sup> For people such as the hypothetical Mrs. Perry or even Kynesha Dhanoolal, the Iraq war widow who removed her husband’s sperm post-mortem to have his children,<sup>149</sup> a surviving spouse would then have a much easier time proving the existence of a parent-child relationship for purposes of intestate succession.

## V. CONCLUSION

Considering the lack of statutory and case law addressing the situation of children born through posthumous conception, Missouri should consider adopting these new UPC provisions. Under the 2008 amendments to the UPC, surviving spouses and their children would receive a more streamlined result in Missouri, and certainly across state lines, while Missouri courts could still advance the interests of timely estate distribution and interpretation of statutory law according to the legislature’s intent. Treating posthumously conceived children no differently than their naturally conceived counterparts not only seems proper in light of ever-increasing scientific advances in the field of assisted reproductive technology, but it also certainly seems like the right thing to do. In no way should a child be punished under probate law just because of her parent’s untimely death or her parent’s lack of foresight in making clear his or her wishes regarding future children.

KIMBERLY E. NAGUIT

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147. *In re Wyman*, 220 S.W.3d 471, 474 (Mo. App. W.D. 2007) (quoting *McCoy v. McCoy*, 159 S.W.3d 473, 475 (Mo. App. W.D. 2005)) (internal quotation marks and citation omitted).

148. UNIF. PROBATE CODE § 2-120(h)(2).

149. Weber, *supra* note 1.

