

The New Uniform Probate Code's Surprising Gender Inequities

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I. INTRODUCTION

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

Until recently, few states had a clear answer to this question. The 2008 version of the Uniform Probate Code (UPC) attempts to resolve a broad range of issues arising from assisted reproduction,³ including issues surrounding postmortem conception.⁴ Two sections of the Uniform Probate Code apply to our hypothetical: § 2-120 covers assisted reproduction that does not involve a gestational carrier (as with couple #1), and § 2-121 applies where there is a gestational carrier (as with couple #2). Both of these sections aim to determine the legal parentage of a child conceived using assisted reproduction.⁵

* Professor Law, Pepperdine University School of Law. The Author wishes to thank research librarian Jennifer Allison, her research assistants Anson Cain and Jennifer Serrine, participants in the Duke Journal of Gender Law and Policy Symposium, and participants in the Pepperdine Law School Faculty Colloquium including Professors Christine Chambers Goodman, Mark Scarberry and Maureen Weston, for their helpful comments and support on this article.

1. Cryopreservation is a storage mechanism through which a substance is frozen. See Joshua Greenfield, Note, *Dad Was Born A Thousand Years Ago? An Examination of Post-Mortem Conception and Inheritance, with a Focus on the Rule Against Perpetuities*, 8 MINN. J. L. SCI. & TECH. 277, 280 (2007). The technology to freeze sperm has existed since the 1940s. Carolyn Sappideen, *Life After Death – Sperm Banks, Wills and Perpetuities*, 53 AUSTL. L.J. 311, 311 (1979). The ability to freeze unfertilized eggs is a more recent development; the first report of a baby conceived and born from embryo that originated as a thawed-out egg was in 1986. Angela Townsend, *As The Technology of Freezing Eggs Improves, More Options Open Up For Women*, CLEVELAND PLAIN DEALER, Feb. 19, 2009, http://blog.cleveland.com/medical/2009/02/as_the_technology_of_freezing.html.

2. "Gestational carrier" is the preferred term now, rather than "surrogate" or "surrogate mother." See UNIF. PARENTAGE ACT Article 8 (2002), available at http://www.law.upenn.edu/bll/archives/ulc/upa/final2002.htm#TOC1_15.

3. See UNIF. PROBATE CODE § 2-115(2) (defining "assisted reproduction" as "a method of causing pregnancy other than sexual intercourse.")

4. See generally UNIF. PROBATE CODE §§ 2-120, 2-121 (amended 2008), 8 U.L.A.58-65.

5. See generally Sheldon F. Kurtz and Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 AM. C. TR. & EST. COUNS. L. J. 30 (2009).

For couple #1, as long as they were married with no divorce proceedings pending at the time of the car crash, UPC § 2-120 presumes that H1 is the father of the child even though his sperm was retrieved after his death.⁶ In fact, UPC § 2-120 presumes that H1 is the child's father even if W1 used a third party's sperm donated to a licensed physician, not her deceased husband's sperm, to become pregnant.⁷ Couple #2, on the other hand, does not benefit from any presumption that W2 was the child's mother.⁸ UPC § 2-121 raises the presumption of parentage for W2 only if she deposited her ova before she died.⁹ Thus, for W2 to be named as the parent of the child, we need either her written consent or clear and convincing evidence that she wanted to have children conceived and born after her death.¹⁰

Establishing rules for determining parentage is left to the states, yet with little legislation addressing assisted reproduction technologies, children born out of these new arrangements often face uncertainties regarding who are their legal parents. The new UPC sections on assisted reproduction attempt to answer these questions but do so in a way that produces unexpected results for children conceived and implanted after a person dies. Are these unexpected results, and the UPC's different treatment of married men and women, justified?

This Article will examine the 2008 provisions of the Uniform Probate Code regarding assisted reproduction and the proposed standards for determining parentage when a child is conceived after one of the intended parents has died. Part II will briefly discuss the history of legislation covering assisted reproduction, from the first statutes that dealt with married couples using donated sperm, to the more comprehensive laws today. Part III reviews existing law and cases of parentage and inheritance for PMC children. Part IV applies the new UPC provisions to different scenarios in which a man or woman has died before the implantation of a child, or the execution of a surrogacy agreement, has occurred. Part V concludes the Article with recommendations for changes to the UPC.

II. A BRIEF LEGISLATIVE HISTORY OF STATUTES REGULATING PARENTAGE IN ASSISTED REPRODUCTION

"Assisted reproduction," in which a woman becomes pregnant through means other than sexual intercourse, first occurred with the use of artificial insemination (AI), which is the transferring of sperm to a woman's uterus or cervix using a syringe.¹² The first published account of insemination of a

6. UNIF. PROBATE CODE § 2-120(h)(2).

7. *Id.* A presumption of consent is raised if "the birth mother is a surviving spouse and at her deceased spouse's death no divorce proceedings were then pending." *Id.*

8. *Id.*

9. *Id.* § 2-121(f)(1) (raising a presumption of parentage if "the individual, before death or incapacity, deposited the sperm or eggs that were used to conceive the child").

10. *Id.* § 2-121(e).

11. *Id.*

12. See Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 956 (2009).

woman with donor sperm appeared in 1884.¹³ The technology to freeze human sperm while still retaining its fertility, called cryopreservation, has existed since at least the 1940s.¹⁴ The legal world began to take notice of the practice of artificial insemination with the publication of W. Barton Leach's 1962 article predicting that the recent establishment of sperm banks, originally created to store the sperm of astronauts, could pose problems for the application of the common law Rule Against Perpetuities.¹⁵ In the absence of legislation, courts struggled with issues such as whether a wife committed adultery when using donor sperm to conceive a child¹⁶ and whether a husband who consented to artificial insemination was obligated to support the resulting child.¹⁷

In 1973 the National Conference of Commissioners on Uniform State Laws drafted the original Uniform Parentage Act ("1973 Act") in order to resolve some of these questions. The 1973 Act focused primarily on children born out of wedlock.¹⁸ Thus Section 5, addressing artificial insemination, declared the child the legitimate offspring of a husband who had consented to his wife's insemination with donor sperm.¹⁹ The 1973 Act provided:

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.²⁰

13. Phillip E Patton, *Optimizing Success in a Donor Insemination Program*, in CONTEMPORARY ENDOCRINOLOGY: OFFICE ANDROLOGY 91-92 (Phillip E. Patton & David E. Battaglia eds., 2005).

14. Sappideen, *supra* note 1, at 311.

15. W. Barton Leach, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, 48 A.B.A. J. 942, 943 (1962). The Rule Against Perpetuities requires that an interest "vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942). The Rule thus granted the head of the family "control only as long as the life of anyone possibly known to him plus the next generation's minority." JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 889 (8th ed. 2009). With the advent of frozen sperm and the "fertile decedent," it is now possible for children to be born decades after a parent's death, and thus well beyond the lifetimes of those known to him. *Id.* at 894.

16. See, e.g., *Gursky v. Gursky*, 242 N.Y.S. 2d 406, 411 (Sup. Ct. 1963).

17. See, e.g., *People v. Sorensen*, 437 P.2d 495, 497-98 (Cal. 1968).

18. UNIF. PARENTAGE ACT prefatory note (1973), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.pdf>.

19. *Id.* § 5.

20. *Id.* § 5.

The Comment to Section 5 acknowledged that "[t]his Act does not deal with many complex and serious legal problems raised by the practice of artificial insemination. It was thought useful, however, to single out and cover in this Act at least one fact situation that occurs frequently."²¹ The 1973 Act urged other groups to consider legislation covering the broader issues raised by AI.²² A host of questions remained after proposal of the original Parentage Act. What if the woman who receives the donated sperm is unmarried?²³ What if no doctor is involved in the process?²⁴ What if the semen "donor" and the woman had an agreement that he would be involved in the child's life?²⁵ The 1973 Act did not address these possibilities, and litigation predictably followed.

The advent of *in vitro* fertilization (IVF) in 1978²⁶ created other perplexing questions. IVF involves extracting both the egg and the sperm, combining them in the laboratory, allowing the resulting pre-embryo to begin dividing, and then implanting it in the woman's uterus. A key question was whether statutes establishing legal parentage in cases of AI also applied to IVF. AI is not complicated and can easily be accomplished without a doctor;²⁷ however, it is only able to address a limited range of infertility problems.²⁸ For more complicated infertility issues, especially those where the woman is having difficulty conceiving, reproductive science has developed alternatives such as

21. *Id.* § 5 cmt.

22. *Id.*

23. *See, e.g., In re Adoption of Michael*, 636 N.Y.S. 2d 608, 608 (Sur. Ct. 1996) (holding that the New York statute covered unmarried women as well as married women and that parties were not required to identify the unknown sperm donor before adoption of the child by the biological mother's husband).

24. *See, e.g., Jhordan C. v. Mary K*, 224 Cal. Rptr. 530, 535 (Cal. Dist. Ct. App. 1986) (noting that the California legislature "has embraced the apparently conscious decision by the drafters of the UPA to limit application of the donor nonpaternity provision to instances in which semen is provided to a licensed physician Accordingly, [the California statute], by its terms does not apply to the present case," in which sperm were provided directly to the woman); *Turchyn v. Cornelius*, Case No. 98 CA 86, 1999 Ohio App. LEXIS 4129 (Aug. 26, 1999).

25. *See, e.g., Browne v. D'Alleva*, FA064004782S, 2007 Conn. Super. LEXIS 3250 (Dec. 7, 2007); *Tripp v. Hinckley*, 736 N.Y.S. 2d 506 (App. Div. 2002); *In re H.C.S.*, 219 S.W. 3d 33 (Tex. App. 2006); *Ex rel. R.C.*, 775 P. 2d 27 (Colo. 1989); *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989), *cert. denied*, 495 U.S. 905 (1990); *C.O. v. W.S.*, 639 N.E.2d 523 (Ohio C.P. 1994).

26. Randi Hutter Epstein, *Pioneer Reflects on Future of Reproductive Medicine*, N.Y. TIMES, Mar. 22, 2010, <http://www.nytimes.com/2010/03/23/health/23prof.html>. The first test tube baby, Louise Brown, was conceived using *in vitro* fertilization. Mary Duenwald, *After 25 Years, New Ideas in the Prenatal Test Tube*, N.Y. TIMES, July 15, 2003, <http://www.nytimes.com/2003/07/15/health/after-25-years-new-ideas-in-the-prenatal-test-tube.html>.

27. As the California Court of Appeal stated in *Jhordan C. v. Mary K.*, "It is true that nothing inherent in artificial insemination requires the involvement of a physician. Artificial insemination is, as demonstrated here, a simple procedure easily performed by a woman in her own home." *Jhordan C.*, 224 Cal. Rptr. at 535. The donor ejaculates into a cup; his semen is then inserted into the woman's uterus or cervix with a syringe or turkey baster. *At-Home Insemination Instructions*, FERTILITY PLUS, <http://www.fertilityplus.org/faq/homeinsem.html> (last visited Mar. 17, 2011).

28. AID (artificial insemination by donor) is often used where the woman's male partner is sterile or has a low sperm count or where the woman has no male partner, as in *Jhordan C.* *See Jhordan C.*, 224 Cal. Rptr. at 530.

IVF.²⁹ Unlike AI, IVF is only possible with extensive medical involvement. Still, AI and IVF share some commonalities: both procedures address infertility, and both can include sperm donated by a third party. Issues have arisen regarding the applicability of a state's AI statute when a woman becomes pregnant using IVF. Two courts have confronted this problem, and both have decided that their state's AI statute does not resolve the parentage issue when other methods of assisted reproduction are used.³⁰

And what of egg donors? The 1973 Parentage Act spoke specifically of donated sperm,³¹ but today thousands of children are conceived with eggs or embryos donated by third parties.³² The Centers for Disease Control publishes an annual Assisted Reproductive Technology Report of data on fertility treatments in which both eggs and sperm are handled.³³ The 2008 National Summary reported that 92% of the 436 clinics offered services involving donor eggs, and 67% of the clinics offered services involving donor embryos.³⁴ It also reported that 18,121 cycles, or 12% of all assisted reproductive cycles, involved donor eggs or embryos.³⁵ As a result, courts must consider whether statutes regulating sperm donors cover egg and embryo donors.³⁶

To keep up with advances in reproductive technology, both the Parentage Act and the UPC must include five key points to be complete. First, the statute should cover the donation of all reproductive material: sperm, eggs, and embryos. Second, because many of the woman using reproductive technologies are single, the statute should address the status of the donor regardless of the recipient's marital status. As a New York court noted in applying its AI statute covering married women to unmarried women:

29. CTRS. FOR DISEASE CONTROL & PREV., 2008 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 1 (2010), available at http://www.cdc.gov/art/ART2008/PDF/ART_2008_Full.pdf [hereinafter 2008 ART SUCCESS RATES].

30. *In re* Parentage of J.M.K. and D.R.K., 119 P.3d 840, 849 (Wash. 2005) (holding that Washington's then-existing AI statute did not apply to children conceived through IVF because "the process of artificial insemination is completely different from the process [sic] in vitro fertilization"); *Finley v. Astrue*, 270 S.W.3d 849, 854 (Ark. 2008) (holding that Arkansas' AI statute does not apply to children conceived through IVF using a deceased husband's frozen sperm because AI and IVF are "two completely different procedures").

31. Section 5 of the 1973 UPA referred to "semen donated by a man." UNIF. PARENTAGE ACT § 5 (1973), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/upa7390.pdf>. A woman produces eggs through ovulation. Once the egg is successfully joined with sperm, it can develop into an embryo. See 2008 ART SUCCESS RATES, *supra* note 29, at 537.

32. See 2008 ART SUCCESS RATES, *supra* note 29, at 60.

33. See *id.* at 3. The report thus excludes artificial insemination, in which only sperm is handled.

34. *Id.* at 91.

35. *Id.* at 60. The report explains:

Because ART consists of several steps over an interval of approximately 2 weeks, an ART procedure is more appropriately considered a *cycle* of treatment rather than a procedure at a single point in time. The start of an ART cycle is considered to be when a woman begins taking drugs to stimulate egg production or starts ovarian monitoring with the intent of having embryos transferred.

Id. at 4. Of the 18,121 cycles begun in 2008 that used only donor eggs or embryos, 16,579 resulted in an embryo actually being transferred to a woman's uterus. *Id.* at 13.

36. See, e.g., *Dantzig v. Biron*, 2008 Ohio 209, P1 (2008) (upholding dismissal of parentage action for failure to include a "necessary party," the unnamed egg donor).

[w]here a man donates his sperm to a medical facility to be used for the purpose of artificial insemination, and all parties agree from the outset that they are forever to remain anonymous from each other, there is no reason why the forfeiture of the man's parental rights without further notice should depend upon 'the luck of the draw' because his sperm was utilized to impregnate a married woman instead of one who was not.³⁷

Third, given the widespread use of assisted reproductive technologies in addition to AI, the statute should apply to all such procedures. Fourth, the statute should address issues of maternity and not simply paternity. Finally, with thousands of couples freezing their reproductive material and technology providing the ability to retrieve eggs or sperm even after a person has died, the statute should address issues of parentage when a child is conceived long after a parent's death.

The Uniform Parentage Act updated its language in 2000 and 2002 to address these five critical points but many states have not adopted the new provisions. Some states still have the original 1973 Parentage Act language, which only covers a donor who gives sperm to a licensed physician for use by a married woman.³⁸ Now that 93% of Assisted Reproductive Technology (ART) clinics offer their services to single women,³⁹ some states have adopted AI statutes to include all women regardless of marital status.⁴⁰ Two states have amended their AI statutes to include other reproductive techniques such as in vitro fertilization.⁴¹ Others have added egg donors to their sperm donor statutes, or enacted new statutes specifically for egg donors.⁴²

Some states have adopted the updated version of the Parentage Act, enacting statutes that cover donations of sperm, eggs or embryos to any donee (married or unmarried) using any form of reproductive technology. The Colorado statute, for example, provides: "A donor is not a parent of a child conceived by means of assisted reproduction."⁴³ "Donor" is defined as "an individual who produces eggs or sperm for assisted reproduction, whether or not for consideration. 'Donor' does not include a husband who provides sperm,

37. *In re Adoption of Michael*, 636 N.Y.S. 2d 608, 609 (Sur. Ct. 1996).

38. *See, e.g.*, MINN. STAT. ANN. § 257.56(2) (West 2010); MO. ANN. STAT. § 210.824 (West 2010); MONT. CODE ANN. § 40-6-106 (2010); NEV. REV. STAT. ANN. § 126.061 (LexisNexis 2010); WISC. STAT. ANN. § 891.40 (West 2010).

39. *See* 2008 ART SUCCESS RATES, *supra* note 29, at 91.

40. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 40/3(b) (West 2010) ("The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife shall be treated in law as if he were not the natural father of a child thereby conceived."); CAL. FAM. CODE § 7613(b) (West 2010); KAN. STAT. ANN. § 38-1114(f) (2008); OHIO REV. CODE ANN. § 3111.95(B) (West 2000); OR. REV. STAT. ANN. § 109.239 (2009).

41. MICH. COMP. LAWS ANN. § 333.2824(6) (West 2010) (covering "utilization of assisted reproductive technology"); CAL. FAM. CODE § 7613(b) (West 2011) (covering AI and IVF).

42. *See, e.g.*, FLA. STAT. ANN. § 742.14 (West 2011); CONN. GEN. STAT. ANN. § 45a-775 (West 2010); OHIO REV. CODE ANN. § 3111.97(D) (West 2009); OKLA. STAT. tit. 10, § 555 (West 2009).

43. COLO. REV. STAT. ANN. § 19-4-106(2) (2010); *see also* DEL. CODE ANN. tit. 13, § 8-702 (2004); TEX. FAM. CODE ANN. § 160.702 (WestWest 2010); UTAH CODE ANN. § 78B-15-702 (2010); VA. CODE ANN. § 20-158(A)(3) (2010); WASH. REV. CODE ANN. § 26.26.705 (West 2011); WYO. STAT. ANN. 14-2-802 (2010).

or a wife who provides eggs, to be used for assisted reproduction by the wife."⁴⁴ "Assisted reproduction" includes artificial insemination (now typically called intrauterine insemination), in vitro fertilization, and intracytoplasmic sperm injection.⁴⁵

Newly revised Uniform Probate Code sections 2-120 and 2-121 incorporate many of the parentage assumptions of the 2000 and 2002 Parentage Act so we can identify who are, and who are not, the parents, and can also establish inheritance rights. As with the updated Parentage Act, the UPC provides that a "third party donor" of sperm or eggs is not a parent of the child.⁴⁶ In cases of assisted reproduction not involving a gestational carrier, the woman who gives birth is the mother⁴⁷ and her spouse, or another individual who consented to the procedure, is the other parent.⁴⁸ UPC § 2-121 applies if the child is born to a gestational carrier: generally, the woman who gives birth is *not* the mother.⁴⁹ Under § 2-121, a parent-child relationship exists with the "intended parents," with an "intended parent" defined as "an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction."⁵⁰

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

44. COLO. REV. STAT. ANN. § 19-1-103(44.5) (2010). *Accord* N.M. STAT. ANN. § 40-11A-102 (I) (2010); TEX. FAM. CODE ANN. § 160.102(6) (West 2010); WYO. STAT. ANN. 14-2-402(a)(viii) (2010).

45. *See, e.g.*, DEL. CODE ANN. tit. 13 § 8-102(4) (2004); N.D. CENT. CODE § 14-20-02(102)(4) (2009); TEX. FAM. CODE ANN. § 160.102(2) (West 2010); UTAH CODE ANN. § 78B-15-102(3) (2010); WASH. REV. CODE ANN. § 26.26.011(4) (West 2011); WYO. STAT. ANN. 14-2-402(a)(iv) (2010). Intracytoplasmic sperm injection, developed in the 1990s, involves inserting a single sperm into an egg and then implanting the resulting embryo. Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge the Traditional Realm of Conflicts of Law*, 24 WIS. J.L. GENDER & SOC'Y 25, 31 (2009).

46. UNIF. PROBATE CODE § 2-120(b) (amended 2008), 8 U.L.A. 58 (Supp. 2010). "Third party donor" is defined in the statute as:

an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

- (A) a husband who provides sperm, or a wife who provides eggs, that are used for assisted reproduction by the wife;
- (B) the birth mother of a child of assisted reproduction; or
- (C) an individual who is determined under subsection (e) or (f) to have a parent-child relationship with a child of assisted reproduction.

Id. § 2-120(a)(3).

47. *Id.* § 2-120(c).

48. *Id.* § 2-120(d) if the husband's sperm were used; otherwise, § 2-120(f).

49. *Id.* § 2-121(c). The statute provides that the gestational carrier is the mother only by court order, or in cases where the gestational carrier is the child's genetic mother and no other potential parent exists. *Id.* After cases such as *In re Baby M*, 537 A.2d 1227 (N.J. 1988), in which the gestational carrier, who was also the genetic mother, was declared to be the legal mother of the resulting child, the common practice today is to ensure that the gestational carrier has no genetic connection to the child. *See* Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL'Y & L. 601, 607 (2009); Jane E. Brody, *Much Has Changed in Surrogate Pregnancies*, N.Y. TIMES, July 20, 2009, <http://www.nytimes.com/2009/07/21/health/21brod.html> (noting that "in a vast majority of surrogate pregnancies today, the surrogate has no genetic link to the baby").

50. UNIF. PROBATE CODE § 2-121(a)(4).

of the intended parents. Only a few states have statutes addressing the parentage of PMC children, and widespread adoption of the new UPC provisions would clarify this issue.

III. CURRENT LAW ON POSTMORTEM CONCEPTION CHILDREN

The Parentage Act addressed postmortem conception more promptly than did the UPC. Six states have adopted the 2000 version of the Parentage Act Section 707, which provides:

If a spouse dies before placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.⁵¹

Delaware, North Dakota and Wyoming have adopted the 2002 version of Parentage Act § 707 that applies to any individual, rather than just a "spouse," who consents in writing to post mortem conception.⁵² California and Louisiana require written consent and also impose a timetable within which the sperm or eggs must be used to conceive a child.⁵³ Florida accepts only one form of written consent: a will. Its statute provides that a child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or embryo to a woman's body shall not be eligible for a claim against the decedent's estate unless the decedent's will provided for the child.⁵⁴ Two states have statutes aimed at eliminating claims of parentage or inheritance by a PMC child. New York law allows a child born after the execution of a testator's last will to claim a share if the child has been omitted from that will, but precludes a PMC child from making such a claim by requiring that the child be "born during the testator's lifetime or in gestation at the time of the testator's death and born thereafter." It is otherwise silent on the status of a child conceived after a person's death.⁵⁵ A Virginia law clarifying the status of "children of assisted

51. UNIF. PARENTAGE ACT § 707 (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/upa/upasty1020.pdf>; see ALA. CODE § 26-17-707 (2010) (requiring that spouse sign the record and that the record be maintained by a licensed assisting physician); COLO. REV. STAT. ANN. § 19-4-106(8) (2010); N.M. STAT. ANN. § 40-11A-707 (2010); TEX. FAM. CODE ANN. § 160.707 (West 2010) (requiring that the record be kept by a licensed physician); UTAH CODE ANN. § 78b-15-707 (2010); WASH. REV. CODE ANN. § 26.26.730 (West 2011).

52. DEL. CODE ANN. tit. 13, § 8-707 (2010); N.D. CENT. CODE § 14-20-65 (2010); WYO. STAT. ANN. § 14-2-907 (2010).

53. CAL. PROB. CODE § 249.5(a) (West 2011); LA. REV. STAT. ANN. § 9:391.1(A) (2010).

54. FLA. STAT. ANN. § 742.17(4) (West 2011). Absent that provision in a will, a PMC child is ineligible to inherit via intestacy under Florida law and thus might not be entitled to Social Security benefits as the decedent's child. *Stephen v. Comm'r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1265 (M.D. Fla. 2005). *Contra Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626 (3d Cir. 2011).

55. N.Y. EST. POWERS & TRUSTS LAW § 5-3.2(b) (McKinney 2011). The Committee that recommended the amendment noted that a person who wanted a PMC child to inherit "could readily create a trust for such a child under his or her last will." SURROGATE'S COURT ADVISORY COMM., REPORT OF THE SURROGATE COURT'S ADVISORY COMMITTEE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE STATE OF NEW YORK 13 (2006). The official comment to the Alabama statute (which requires a spouse's consent in a signed record) similarly states: "Of course, an individual who wants to explicitly provide for such [PMC] children in his or her will may do so." ALA. CODE § 26-17-707 cmt. (2010).

conception" states that any child born more than ten months after the death of a parent is not recognized as the child of that parent and thus cannot inherit in intestacy or by will.⁵⁶

Courts have struggled to apply existing statutes to the post mortem conception fact pattern in states with no law specifically addressing this unique issue. Courts in three states (New Jersey, Massachusetts, and Arizona) have held that state law allows a decedent to be named the parent of a PMC child if certain conditions are met.⁵⁷ Courts in two states (New Hampshire and Arkansas) with no statutes addressing PMC have held that a PMC child may not inherit from a decedent.⁵⁸

UPC § 2-120 requires evidence that the decedent consented to assisted reproduction with intent to be treated as a parent of the child.⁵⁹ Unlike the Parentage Act, which states that a decedent is not a parent unless s/he or consented in a record,⁶⁰ the UPC allows consent to be proven by a signed record⁶¹ or other clear and convincing evidence.⁶² Evidence of such consent is presumed if the birth mother is a surviving spouse and no divorce proceedings are pending at the time of her deceased spouse's death.⁶³ Although similar consent provisions are found in UPC § 2-121,⁶⁴ which is triggered when the child is born to a gestational carrier, the evidence needed to raise the presumption of consent is quite different. While § 2-120 requires that the decedent have been married, § 2-121 requires more: the decedent must have deposited eggs or sperm before death, at a time when the decedent and his/her spouse were married with no divorce proceedings pending, and the decedent's spouse must function as a parent of the child within two years of the child's birth.⁶⁵

56. VA. CODE ANN. § 20-164 (2010). In *Schafer v. Astrue*, the Fourth Circuit applied the Virginia statute to hold that a child born seven years after the decedent's death was not eligible to inherit as his "child" and thus ineligible for Social Security survivor benefits. *Schafer v. Astrue*, No. 10-1500, 2011 U.S. Dist. LEXIS 7456, at *38-39 (4th Cir. Apr. 12, 2011).

57. See *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004). For a discussion of these cases, see 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, 403-406 (2008).

58. *Eng Khabbaz v. Comm'r of Soc. Sec.*, 930 A.2d 1180 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008). For a discussion of these cases, see Knaplund, *supra* note 57, at 406-07. A court in California also held that a PMC child was not the child of the decedent and could not inherit via intestacy under state law. *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009). California has since enacted a statute requiring written consent from the decedent and imposing time limits on when the PMC child can be born in order for the child to inherit. CAL. PROB. CODE § 249.5(a) (West 2011).

59. UNIF. PROBATE CODE § 2-120(f) (amended 2008), 8 U.L.A. 58 (Supp. 2010).

60. UPA § 707 states that the decedent is not a parent unless he or she consented in a record. UNIF. PARENTAGE ACT, § 707 (2000); *accord* MODEL ACT GOVERNING ASSISTED REPRODUCTION § 702 (Proposed Draft 2006).

61. UNIF. PROBATE CODE § 2-120(f)(1).

62. *Id.* § 2-120(f)(2)(C).

63. *Id.* § 2-120(h)(2).

64. See *id.* § 2-121(e) (amended 2008) (stating that intent can be shown with "(1) a record signed by the individual which considering all the facts and circumstances evidences the individual's intent; or (2) other facts and circumstances establishing the individual's intent by clear and convincing evidence").

65. *Id.* § 2-121(f).

For both UPC § 2-120 and § 2-121, there are time limits on when a decedent may be deemed the parent of a PMC child so as to allow the decedent's estate to close. In order for the decedent to be considered the child's parent, the PMC child must be either *in utero* within 36 months of the individual's death or born no later than 45 months after the individual's death.⁶⁶

IV. FOUR COUPLES AND THEIR POSTMORTEM CONCEPTION CHILDREN

By examining UPC § 2-120 and § 2-121, we discover key differences in how the two sections are applied. UPC § 2-120 does not require that the decedent's sperm or eggs be used in order for the decedent to be named as a parent; UPC § 2-121 does. UPC § 2-120 raises a presumption of consent even if a spouse's gametic material is retrieved after his/her death; UPC § 2-121 does not. How do these differences play out for various couples who desire the benefit of parentage of a PMC child?

First, we can imagine four scenarios where a surviving partner wants the decedent – a genetic parent of the child – to be named the other parent of their PMC child. For these scenarios assume that the PMC child is *in utero* within 36 months of the decedent's death, or born within 45 months of the decedent's death.

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

The easiest case, and the one that has occurred in most of the reported cases involving PMC children, is where the surviving partner is the birth mother of the PMC child and the decedent is the genetic father of the child.⁶⁷ To determine if the decedent will be named the legal father of the child, we would first look for a signed record to evince his consent to assisted reproduction with the birth mother, and his intent to be considered the other parent of the child.⁶⁸ Such intent could be reflected in a consent form that the UPC encourages all genetic repositories to make available;⁶⁹ furthermore, the UPC indicates that repositories may look to California's Health and Safety Code Sections 1644.7 and 1644.8 for guidance in creating consent forms.⁷⁰ If we find such written consent, then the

66. *Id.* § 2-120 cmt. (h), (k). The official comment explains why two time limits are included:

If the assisted-reproduction procedure is performed in a medical facility, the date when the child is in utero will ordinarily be evidenced by medical records. In some cases, however, the procedure is not performed in a medical facility, and so such evidence may be lacking. Providing an alternative of birth within 45 months is designed to provide certainty in such cases.

Id. § 2-120(k) cmt.

67. See e.g., *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004); *Eng Khabbaz v. Comm'r, Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007); *Finley v. Astrue*, 270 S.W.3d 849 (Ark. 2008); *Vernoff v. Astrue*, 568 F.3d 1102 (9th Cir. 2009); *Capato v. Astrue*, No. 08-5405, 2010 U.S. Dist. LEXIS 27350 (D.N.J. Mar. 23, 2010).

68. UNIF. PROBATE CODE § 2-120(f)(1) (amended 2008), 8 U.L.A. 59 (Supp. 2010).

69. *Id.* § 2-120 legislative n.

70. CAL. HEALTH & SAFETY CODE § 1644.7 (2010). The California statute provides:

decedent is the father. If there is no written consent, then we would ask if the decedent and the birth mother were married at the time of decedent's death, with no divorce proceedings pending.⁷¹ If so, then his consent is presumed; however, clear and convincing evidence to the contrary can be used to rebut the presumption. Thus, even in a case where the decedent's sperm was retrieved after death, his consent to a PMC child would be presumed merely by the existence of the marriage. While the ethics of postmortem sperm retrieval have been debated⁷² ever since Rothman first reported his method in 1980,⁷³ the procedure is feasible and practiced.⁷⁴ Suppose the decedent was not married at the time of his death, and we have no written record of his consent. A third avenue is still available to name him the parent of the child: the surviving partner can provide clear and convincing evidence that the decedent intended to be treated as a parent of a PMC child.⁷⁵ In the absence of an applicable statute, the Massachusetts Supreme Court in *Woodward* imposed a similar evidentiary requirement before the decedent could be declared the father,⁷⁶ but how such intent would be proven is not at all clear.⁷⁷

Any entity that receives genetic material of a human being that may be used for conception shall provide to the person depositing his or her genetic material a form for use by the depositor that, if signed by the depositor, would satisfy the conditions set forth in Section 249.5 of the Probate Code, regarding the decedent's intent for the use of that material. The use of the form is not mandatory, and the form is not the exclusive means of expressing a depositor's intent. The form shall include advisements in substantially the following form: 'The use of this form for designating whether a child conceived after your death will be your heir is not mandatory. However, if you wish to allow a child conceived after your death to be considered as your heir (or beneficiary of other benefits such as life insurance or retirement) you must specify that in writing and you must sign that written expression of intent. This specification can be revoked or amended only in writing signed by you (and not by spoken words). You should consider how having a child conceived after your death affects your estate planning (including your will, trust, and other beneficiary designations for retirement benefits, life insurance, financial accounts, etc.) These issues can be complex, and you should discuss them with your attorney.'

Id.

71. UNIF. PROBATE CODE § 2-120(h)(2).

72. See, e.g., Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243 (2000); Katheryn D. Katz, *Parenthood From the Grave: Protocols for Retrieving and Utilizing Gametes from the Dead or Dying*, 2006 U. CHI. LEGAL F. 289 (2006); Barron H. Lerner, *In a Wife's Request at Her Husband's Deathbed, Ethics Are an Issue*, N.Y. TIMES, Sept. 7, 2004, <http://www.nytimes.com/2004/09/07/health/07essa.html>.

73. Cappy M. Rothman, *A Method for Obtaining Viable Sperm in the Postmortem State*, 34 FERTILITY & STERILITY 512 (1980).

74. Requests for postmortem sperm retrieval are frequent enough for hospitals to have generated written policies on the practice. See e.g., *New York Hospital Guidelines for Consideration of Requests for Post-mortem Sperm Retrieval*, CORNELL UROLOGY (2010), <http://www.cornellurology.com/guidelines.shtml>; *Sperm Retrieval from Dead or Comatose Patients*, LAHEY CLINIC (Sept. 27, 2010), <http://www.lahey.org/WorkArea/linkit.aspx?LinkIdentifier=ID&ItemID=5187>.

75. UNIF. PROBATE CODE § 2-120(f)(2)(C).

76. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 269 (Mass. 2002).

77. For example, suppose a couple were on their way to a sperm bank to collect the man's sperm before he began chemotherapy. The man is killed in a car crash en route. While this evidence may establish that the man intended to reproduce, is it clear and convincing evidence that he consented to be a parent of a PMC child, or only of a child conceived and implanted in his lifetime?

B. Scenario Two: Partners are Both Female – Surviving Partner is the Birth Mother and Decedent is the Genetic Mother

In our second scenario, both partners are female. The surviving partner is the birth mother; the decedent is the genetic mother. Note that this is not a surrogacy arrangement since the surviving partner intends to be a parent of the resulting child. Thus, UPC § 2-120 applies. We need a third person for this scenario, a sperm donor, but assuming he is a true "donor" and has no intent to be a parent, he would not be the father of the child.⁷⁸ The birth mother would have a parent-child relationship;⁷⁹ the issue is whether the decedent can be named as the other parent of the child. As with our first scenario, we would first look for a signed record that the decedent consented to assisted reproduction with the birth mother, and intended to be treated as the other parent of the child.⁸⁰ Absent such a writing, we would ask if the two women were married in a state that allows same-sex marriage or recognizes such marriages performed in another state.⁸¹ If so, we can raise the presumption of consent as long as no divorce proceedings were pending when the decedent died.⁸² If there is no signed record and the decedent was not married, then we can still try to prove parental status by clear and convincing evidence that the decedent intended to be treated as a parent of a PMC child. In this way, scenario #2 precisely tracks scenario #1, albeit with one added difficulty: we need to be in a state that allows two women to be named as the child's parents.⁸³

C. Scenario Three: Surviving Partner is the Father and Decedent is the Genetic Mother

Things get more complicated in our third scenario, involving a heterosexual couple where the woman is the decedent. Let us assume that the surviving partner is the genetic father and the decedent is the genetic mother of the PMC child. As in scenario #2, a third person must be involved, but this time

78. UNIF. PROBATE CODE § 2-120(b).

79. *Id.* § 2-120(c).

80. *See id.* § 2-121(e)(1).

81. Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and the District of Columbia issue marriage licenses to same-sex couples; Rhode Island, New York and Maryland recognize same-sex marriages from other states. *Same Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=16430> (last updated Feb. 2011). California briefly issued marriage licenses to same-sex couples after the decision in *In re Marriage Cases*, 183 P.3d 384 (2008) on May 15, 2008 until Proposition 8 was enacted on November 4, 2008. *Id.* The federal Defense of Marriage Act bars federal recognition of same-sex marriage and allows, but does not require, states to bar same-sex marriages and refuse to recognize same-sex marriages performed in other states. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C). The status of DOMA is in flux as this article goes to press; President Obama has instructed the Justice Department to stop defending the law, although the law itself still stands. Tara Siegel Bernard, *Gay Couples and the Law*, N.Y. TIMES, Feb. 26, 2011, at B5.

82. UNIF. PROBATE CODE § 2-121(f)(2).

83. *See, e.g.*, *K.M. v. E.G.*, 117 P.3d 673, 681 (Cal. 2005) (stating "a child can have two mothers"); *In re Parentage of L.B.*, 122 P.3d 161, 163 (Wash. 2005) (holding that a woman had standing to sue the biological mother of a child for coparentage); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006) (holding that both female parties were the legal parents of a child).

that third person is a gestational carrier, and thus UPC § 2-121 applies. Scientists are working on an exterior womb but have yet to devise a viable one;⁸⁴ therefore, a gestational carrier is necessary. After the woman's death, the surviving partner finds a willing gestational carrier and enters into an agreement that the gestational carrier will give birth to the child but not be the legal parent. The first issue is whether the birth mother (the gestational carrier) will be named the mother of the child, rather than the decedent (the genetic mother). UPC § 2-121(c) declares no parent-child relationship exists for the gestational carrier unless a court so orders, or the gestational carrier is the genetic mother and no other parent is available. Would a court order that the gestational carrier is the mother? Statutes that conclusively presume that the woman who gives birth to a child is the mother have been declared unconstitutional in several states. For example, an Arizona statute provided that the gestational carrier was the legal mother of the child,⁸⁵ and, if she were married, her husband was presumed to be the child's legal father.⁸⁶ The presumption of paternity, but not the presumption of maternity, was rebuttable.⁸⁷ Applying a strict scrutiny analysis, the court found that Arizona had failed to provide a compelling interest to justify treating the biological mother and father differently, and thus declared the statute unconstitutional on equal protection grounds.⁸⁸ Utah had a similar statute, providing that "the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes."⁸⁹ A United States District Court found that the Due Process clause requires the State to give the biological parents a "fundamentally fair hearing" before depriving them of parenthood of "their own children."⁹⁰ In addition, application of the statute could violate the Fourteenth Amendment's guarantee of equal protection if the genetic father could be listed on the birth certificate, but the genetic mother could not.⁹¹ A Maryland court held that equal protection requires that the gestational carrier be given the opportunity to remove her name as "mother" on the birth certificate, just as a presumed "father" with no genetic tie to the child can.⁹² Thus, a state statute that declares the gestational carrier to be the mother may not be upheld.

84. See Gretchen Reynolds, *Artificial Wombs: Will We Grow Babies Outside Their Mothers' Bodies?*, POPULAR SCL, Aug. 1, 2005, available at <http://www.popscl.com/scitech/article/2005-08/artificial-wombs> (quoting Hung-Ching Liu, Director of the Reproductive Endocrine Laboratory at Cornell University's Center for Reproductive Medicine and Infertility, stating that an artificial human womb may be available in "10 years, maybe, or a little more...It could take as much as 50 years, but I'm very hopeful that this is possible.").

85. ARIZ. REV. STAT. ANN. § 25-218(B) (2007 & Supp. 2010), *invalidated by* Soos v. Superior Court, 897 P.2d 1356 (Ariz. Ct. App. 1994).

86. *Id.* § 25-218(C).

87. *Id.*

88. *Soos*, 897 P.2d at 1361.

89. UTAH CODE ANN. § 76-7-204(3)(a) (repealed 2005).

90. *J.R. v. Utah*, 261 F.Supp. 2d 1268, 1289 (D. Utah 2003).

91. *Id.* at 1294.

92. *In re Roberto d.B.*, 923 A.2d 115, 119-25 (Md. 2007).

Assuming that a court agrees that the gestational carrier is not the mother, can the decedent, the genetic mother of the child, be named as the mother instead? As with our first two scenarios, we would look first to a signed record evidencing the decedent's intent.⁹³ If we lack a signed record, we could try to raise the presumption of consent based on the marriage of the decedent and her surviving partner, but there are further hurdles we must clear to get this presumption. Unlike § 2-120, where we need to prove that the decedent was married at the time of death and no divorce proceedings were pending, more is needed under § 2-121 for the presumption to apply. We first must show that the decedent, before her death, deposited the eggs used to conceive the child (no postmortem retrieval is available here). Second, we must show that when she deposited the eggs, the decedent was married and no divorce proceedings were pending. Finally, we must show that the decedent's surviving spouse functioned as a parent of the child no later than two years after the child's birth.⁹⁴ Absent these conditions, clear and convincing evidence of the decedent's intent to be a parent of a child conceived and born after her death is required.⁹⁵

D. Scenario Four: Partners are Both Male – Surviving Partner is the Parent and Decedent is the Genetic Father

The fourth scenario involves two male partners: a surviving partner who wishes to use his deceased partner's sperm with the intent that the decedent be named a parent of the PMC child. Two more people would typically be required: an egg donor (who generally would not be a parent, similar to the sperm donor in scenario #3) and a gestational carrier (also not a parent, as in scenario #3). In this situation, it is especially important for the gestational carrier to be a genetic stranger; otherwise, a court might find the carrier to be the legal mother because she is the child's genetic mother.⁹⁶ For the decedent (the genetic father) to be declared a parent, we would again look for a signed record that the decedent consented to assisted reproduction and intended to be a parent to the resulting child, see if he and his surviving partner were married in a jurisdiction that recognizes same-sex marriage, or find clear and convincing evidence of his intent. As with scenario #2, we would also need to ascertain that the jurisdiction allows two men to be named parents.

Another unique issue arises in scenario #4: this is the first time a person who is neither the birth mother nor a genetic parent is seeking to be named a parent. Would a court find the surviving partner is a legal parent? Under UPC § 2-121, it would: the surviving partner is "an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier,"⁹⁷ and thus an "intended parent" as long as he functioned as a parent within two years of the child's birth.⁹⁸ So even though

93. UNIF. PROBATE CODE § 2-121(f) (amended 2008), 8 U.L.A. 64 (Supp. 2010).

94. *Id.*

95. *Id.* § 2-121(e)(2).

96. *Id.* § 2-121(c)(2). The statute further requires that "a parent-child relationship does not exist under this section with an individual other than the gestational carrier."

97. *Id.* § 2-121(a)(4).

98. *Id.* § 2-121(d)(1).

the surviving partner is not genetically related to the child, he could still be named a parent along with his deceased partner.

E. Extending and Complicating the Four Scenarios

In each of the four scenarios so far, the decedent's sperm or eggs were used and thus the decedent had a genetic tie to the child. Can the decedent be named the parent of a PMC child in the absence of such a tie? This question reveals another key difference between § 2-120 and § 2-121: while § 2-121 finds a parent-child relationship with "an individual whose sperm or eggs were used after the individual's death,"⁹⁹ no such language exists in § 2-120. Thus, as long as no gestational carrier is used, a decedent with no genetic tie to the child could be named the parent of the child.¹⁰⁰

Scenario #1 involved a male/female couple where the man died first. Let us assume the man has no available sperm – he is either infertile or he dies in such a manner that his sperm cannot be retrieved after his death. Here, a sperm donor is required, and as long as he is a true donor, he will not be a parent of the resulting child. If the decedent and the birth mother were married at the time of the decedent's death and no divorce proceedings were pending, the UPC will presume that the decedent consented to be the intended parent of the child, even though a third party's sperm was used.¹⁰¹ A person can rebut the presumption by clear and convincing evidence to the contrary, but would the absence of evidence that the decedent wanted a PMC child be enough? Probably not. If the marriage requirement is not met, then we need either a written record of the decedent's consent, or clear and convincing evidence that he consented.

In scenario #2 (female/female couple) the decedent might be named the mother *if* she and the birth mother were married, or she satisfies the consent requirement. Note however, that her surviving partner must be the birth mother; UPC § 2-121 requires that the decedent's eggs be used with a gestational carrier. Unlike UPC § 2-120, UPC § 2-121 allows a non-genetic intended parent in only two circumstances, neither of which would apply to our decedent: the intended parent functioned as a parent no later than two years after the child's birth,¹⁰² or the intended parent died while the gestational carrier was pregnant.¹⁰³

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

Another curious difference in language between UPC § 2-120 and § 2-121 occurs with the presumption of consent if the decedent dies married. Under UPC § 2-121, not only must the decedent's sperm or eggs be used to create the

99. *Id.* § 2-121(e).

100. *See, e.g., In re Parentage of L.B.*, 122 P.3d 161 (Wash. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 971 (Vt. 2006) (holding that a partner in a same-sex relationship can be named a parent of a child, even though the partner has no biological or genetic tie).

101. *See* UNIF. PROBATE CODE § 2-120(h)(2) (amended 2008), 8 U.L.A. 59 (Supp. 2010).

102. *Id.* § 2-121(d)(1).

103. *Id.* § 2-121(d)(2).

child, the material must have been deposited while the decedent was alive. It is possible to retrieve sperm after a man's death, and there are a number of published articles discussing the ethics and efficacy of the procedure. As long as no gestational carrier is used, UPC § 2-120 raises a presumption of consent for the decedent to be the parent of the PMC child even if his sperm was retrieved after his death. If a gestational carrier is in the picture, then the presumption of consent arises only if he deposited the sperm before his death or incapacity.¹⁰⁴ What about post mortem retrieval of ova? As with sperm, it is possible to retrieve ova after a woman has died, but there are no reported cases of the procedure thus far.¹⁰⁵ If the retrieval occurs after the woman dies, will the decedent be named the mother of the resulting child? If she was married, and her surviving partner is the birth mother, then the presumption of consent in UPC § 2-120 will apply, and she will be the mother. However, if a gestational carrier is used, no presumption of consent will arise under UPC § 2-121.

V. SHOULD STATES ADOPT UPC § 2-120 AND § 2-121?

Certain aspects of the 2008 UPC are a clear improvement on existing law and should be adopted. Updating existing statutes to cover donations other than sperm – namely ova and embryos – will make the law consistent with existing practices, as will changing the language from "artificial insemination" to include the entire range of ARTs, such as IVF. Deleting references to "married couples" will likewise clarify existing law and practice.

The issues of gestational surrogacy and postmortem conception are both more controversial and the subject of fewer existing statutes than the issues of including all genetic material and all ARTs. Several states do not recognize surrogacy contracts¹⁰⁶ and thus would most likely refuse to enact UPC § 2-121, which allows gestational surrogacy and declares that, in most cases, the gestational carrier is *not* the mother of the resulting child. What will be the result in a state that enacts UPC § 2-120, but not UPC § 2-121? By omitting § 2-121, the issues of parentage when surrogacy is used will still be an open question, but other, more gendered outcomes will ensue as well. Enacting only § 2-120 means that a deceased *man* can be declared the parent of a PMC child in several scenarios, but a deceased *woman* can almost never be, because UPC § 2-120 will rarely apply when the deceased party is female. As we saw in our four scenarios, the only time UPC § 2-120 will allow a deceased woman to be declared the mother of a PMC child is in the case where her female surviving partner gives birth to the child within the statutory time frame. Even then, the deceased woman can be declared the mother only if the state allows two women (the genetic mother and the birth mother) to be named on the birth certificate.

The provisions in both UPC § 2-120 and § 2-121 on postmortem conception will change existing law in several ways. In those states with current statutes

104. *Id.* § 2-121(f)(1).

105. See generally Lisa V. Brock and Anna C. Mastroianni, *Sperm and Egg Retrieval for Posthumous Reproduction: Practical, Ethical, and Legal Considerations*, in OFFICE ANDROLOGY, *supra* note 13, at 267, 268.

106. See, e.g., IND. CODE ANN. § 31-20-1-1 (LexisNexis 2007); MICH. COMP. LAWS ANN. § 722.855 (2005 & Supp. 2010); N.Y. DOM. REL. LAW § 123 (McKinney 2010).

based on the Parentage Act, a decedent can be named the parent of a PMC child only with his or her written consent. The new UPC provisions allow consent to PMC to be proven *either* by consent in a record *or* by clear and convincing evidence, and include broad presumptions of consent for heterosexuals who were married at the time of death (for men) or had cryopreserved their ova (for women). These presumptions of consent, especially for married men, go too far. As the Massachusetts Supreme Court observed in *Woodward*, "a decedent's silence, or his equivocal indications of a desire to parent posthumously, 'ought not to be construed as consent.'"¹⁰⁷ The court thus refused to allow "the mere genetic tie of the decedent to any posthumously conceived child, or the decedent's mere election to preserve gametes, [to be] sufficient to bind his intestate estate for the benefit of any posthumously conceived child."¹⁰⁸ The UPC goes much further: it raises the presumption of consent even in the *absence* of a genetic tie or the preservation of gametes.¹⁰⁹

Another objection to both UPC § 2-120 and § 2-121 on the issue of postmortem conception regards the closing of the decedent's estate. Both UPC statutes have time limits on when the PMC child must be conceived or born, but those limits are generous: the child must be *in utero* not later than 36 months after the individual's death¹¹⁰ or born not later than 45 months after the individual's death.¹¹¹ Does that mean the executor or personal administrator must keep the estate open for the requisite period of time, waiting to see if a PMC child is born? The issue is especially complicated when the decedent is male, because there is no requirement that his sperm be used as a precursor to naming him the father of the child.

To solve these problems, legislatures should modify the UPC provisions in several ways. First, a notice provision that a surviving partner intends to create a PMC child would help with the time issue and would allow the administrator to close most estates faster. California, for example, requires the decedent to consent to postmortem use of his or her gametes in a signed record which designates the person who may use the gametes.¹¹² That designated person must give notice to the administrator of the decedent's estate within four months of the issuance of a death certificate that he or she intends to use the material to create a PMC child.¹¹³ If notice is given, then the estate must remain open for the allotted time (although California, unlike the UPC, requires the PMC child to be *in utero* within two years, a shorter time than that mandated by the UPC).¹¹⁴ Where no such notice is given within four months, as will likely be the result in the vast majority of cases, the administrator can proceed without worrying about the effect of a PMC child.

107. See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E. 2d 257, 269 (Mass. 2002) (quoting Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 951 (1997)).

108. *Id.* at 553.

109. UNIF. PROBATE CODE § 2-120(h) (amended 2008), 8 U.L.A. 59 (Supp. 2010).

110. *Id.* § 2-120(k)(1); *Id.* 2-121(h)(1).

111. *Id.* § 2-120(k)(2); *Id.* § 2-121(h)(2).

112. CAL. PROB. CODE § 249.5(a) (West 2011).

113. *Id.* § 249.5(b).

114. *Id.* § 249.5(c).

Second, the UPC should be amended to resolve presumptions of parentage of a PMC child. Why does the new code presume that a deceased husband would want to be the father of a child created years after his death with another man's sperm?¹¹⁵ And why does the UPC assume that a woman would *not* want a PMC child under equivalent circumstances?¹¹⁶ The requirements for the presumption of consent should be the same in the two UPC sections regarding PMC children, rather than placing onerous and almost insurmountable evidentiary requirements to declare a deceased woman the mother, but easily accomplished requirements to declare a deceased man the father.

With these changes, the new UPC will cover a much broader range of issues for PMC children than addressed by the current law. As the sections now stand, they pose a delicious irony: they allow a woman, particularly a married woman, to alter the property distribution of a man's estate by having a PMC child (even a child without his genetic material), but accord very few men the same power. After centuries of laws giving men complete power over their wives' property, perhaps the new UPC is attempting to tip the balance the other way, and give women more power in limited situations. In legal and equitable terms however, it is probably best to minimize these gendered outcomes. Provisions that automatically presume consent to PMC parentage solely by the fact that one was married at the time of death go too far, and thus should be amended in the ways suggested by this Article.

115. See UNIF. PROBATE CODE § 2-120(h).

116. See *id.* § 2-121.