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## FROM *EN VENTRE SA MERE* TO THAWING AN HEIR: POSTHUMOUSLY CONCEIVED CHILDREN AND THE IMPLICATIONS FOR SUCCESSION LAW IN CANADA

Christine E. Doucet\*

*[R]eproductive technologies will grow and advance, and as they do, the number of children they will produce will continue to multiply. So, too, will the complex moral, legal, social, and ethical questions that surround their birth.<sup>1</sup>*

*Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless.<sup>2</sup>*

### I. Introduction

The rapid and continued advancements in assisted reproductive technology now make it possible for children to be both conceived and born after the death of a genetic parent. The use of assisted reproduction is increasing across Canada<sup>3</sup>; in 2009, there were 16,315 *in vitro* procedures performed in Canada, resulting in 5,710 live births.<sup>4</sup> This figure represents only one form of assisted reproductive technology, and does not include the numerous children born as a result of artificial insemination.<sup>5</sup> The increase in use of procedures such as *in vitro* fertilization may be a result of numerous factors, including families choosing to have children

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<sup>1</sup> *Eng Khabbaz v Commissioner, Soc Sec Administration*, 155 NH 798; 930 A 2d 1180 at 1186 (Supreme Court of New Hampshire, 2007).

<sup>2</sup> *Woodward v Comm'r of Soc Sec*, 760 NE 2d 257 at 266 (Mass Sup Jud Ct 2002) [*Woodward*].

<sup>3</sup> Alberta Law Reform Institute, *Succession and Posthumously Conceived Children: Report for Discussion* (Edmonton: Alberta Law Reform Institute, 2012) at 4.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* As the Report indicates: “[W]ith respect to artificial insemination, it is difficult to estimate how often the procedure is performed due to the lack of reporting requirements.”

later in life, a decrease in the number of children available for adoption, and the decreasing cost of treatments and procedures.<sup>6</sup>

Succession legislation across the country recognizes there may be situations in which a child is conceived before, but born after, the death of one parent. Children who are *en ventre sa mere* at the time of their parent's death are granted succession rights, including the right to inherit on intestacy.<sup>7</sup> Most legislation, however, is silent when it comes to posthumously conceived children. Many of the legislative schemes governing intestate succession were enacted before the development of assisted reproductive technology, and the legislatures perhaps did not contemplate these developments and the implications these advancements can have on succession law. As technology continues to advance, these implications, including the rights of posthumously conceived children to inherit on intestacy, warrant consideration. The purpose of this paper is to examine the implications of posthumous conception on estate litigation and succession law in Canada, as well as identify and explore possible ways of addressing this emerging issue. Any consideration, however, requires a balanced approach. By examining the ways in which other jurisdictions have addressed this issue, this paper will outline possibilities and considerations for reform.

While there are many implications arising from the use of assisted reproductive technology on estate litigation, the scope of this paper is limited to an examination of the succession rights of posthumously conceived children to inherit on intestacy. Part II of this paper will outline the competing interests and policy considerations that need to be balanced in situations involving posthumously conceived children. Part III will provide an overview of the current law and legislative context in Canada. It will examine the federal *Assisted Human Reproduction Act*, provincial legislation, and reform efforts from jurisdictions across the country. Part IV will offer international perspectives by examining case law, legislation, and law reform efforts from the United States, the United Kingdom, and Australia. Part V will look at possible legislative reforms to protect posthumously conceived children and their right to inherit on intestacy. Alternatively, the courts may establish rights for posthumously conceived children. Part VI will examine the use of the *parens patriae* jurisdiction and how this inherent jurisdiction of the superior courts can be used to address the issues. Finally, Part VII will offer conclusions and recommendations to protect posthumously conceived children and their rights to inherit on intestacy.

## II. Competing Interests and Policy Considerations

There are many circumstances in which individuals may want to procreate after the death of a spouse or partner. As Kindregan notes, gametes may be cryo-preserved specifically for use by the surviving spouse or intimate partner of the deceased person.<sup>8</sup> For example, an individual might receive a diagnosis that may be

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<sup>6</sup> *Ibid.*

<sup>7</sup> See e.g. *Succession Law Reform Act*, RSO 1990, c S26, ss 1(1), 47(9); *Wills and Succession Act*, SA 2010, c W 12.2, s 58(2); *Intestate Succession Act*, CCSM c I85, s 1(3).

<sup>8</sup> Charles P Kindregan, Jr, "Dead Dads: Thawing an Heir From the Freezer" (2009) 35 *Wm Mitchell L Rev* 433 at 436.

terminal, and may choose to cryopreserve his or her gametes for future use by a surviving spouse or partner.<sup>9</sup> In other circumstances, a person involved in high-risk behaviour, such as a member of the armed forces, might choose to cryopreserve his or her gametes.<sup>10</sup> Situations may also arise where a person dies unexpectedly, and his or her gametes become available even though there was no specific consent from the deceased person. As Kindregan suggests, these are complex cases, which pose “legally troublesome” questions.<sup>11</sup>

Complex questions, such as those that arise within the context of posthumously conceived children, involve many different competing interests. The Supreme Judicial Court of Massachusetts outlined three important interests that stand to be affected when determining whether or not posthumously conceived children can inherit under an intestacy.<sup>12</sup> In *Woodward v Commissioner of Social Security*, the court suggested that this determination should “balance and harmonize” the best interests of the child, the orderly administration of estates, and the reproductive rights of the genetic parents.<sup>13</sup>

### III. The Current Law and Context in Canada

Although there has been debate on the issue of posthumously conceived children and the possibility of expanding succession rights to such children, there has been much less in the way of legislative action in Canada. In 1985, the Ontario Law Reform Commission issued a report that highlighted the need for legislation regarding the rights of posthumously conceived children. Despite this report and others calling for legislative action, assisted reproductive technology was not federally regulated in Canada until the enactment of the *Assisted Human Reproduction Act* in 2004.<sup>14</sup> This federal statute, however, is silent with respect to the rights of posthumously conceived children, as succession law falls within provincial jurisdiction.

One provincial legislature has taken steps to establish rights for posthumously conceived children through legislative reform. In 2011, British Columbia became the first province to enact legislation that grants posthumously conceived children the right to inherit on intestacy.<sup>15</sup> Although not yet in force, amendments to the *Wills, Estates and Succession Act* demonstrate a thoughtful balancing of the competing interests that are at stake and provides an example for other provinces and territories to follow. This paper will now examine the current domestic law and context in order to highlight the desirability of reform to keep pace with technological advancements that have impacted, and will continue to impact, the laws of succession across the country.

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* See also Krisine S Knaplund, “Postmortem Conception and a Father’s Last Will” (2004) 46 *Ariz L Rev* 91.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Woodward*, *supra* note 2 at 546.

<sup>13</sup> *Ibid.*

<sup>14</sup> Howard S Black & Jodey Therriault, “Future Estate Planning Considerations: Cryo-Preservation, Cryonics and Cord Blood” (2001) 30 *ETPJ* 151 at 151.

<sup>15</sup> *Family Law Act*, SBC 2011, c 25.

(i) *Federal Legislation – The Assisted Human Reproduction Act*

In 2004, the federal government enacted the *Assisted Human Reproduction Act (AHRA)*<sup>16</sup> which regulates assisted human reproduction, with the primary goals of protecting and promoting the health and safety of Canadians who use, or are born through the use of, assisted reproduction. With respect to posthumous conception, the consent requirements under the *AHRA* are of importance. Section 8 of the *AHRA* provides that written consent must be given for the use of human reproductive material:

8. (1) No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose.

(2) No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose.

(3) No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose.<sup>17</sup>

The federal regulations require that the written consent be given prior to the use of the human reproductive material.<sup>18</sup> In a recent decision, the constitutionality of the *AHRA* came under fire. In *Reference re Assisted Human Reproduction Act*, the Supreme Court of Canada struck down a number of the provisions of the *AHRA*.<sup>19</sup> The majority of the Court, however, held that the consent requirements were constitutional, as it fell within the scope of the federal criminal law power.<sup>20</sup> As will be discussed below, any legislative reform should conform to the consent requirements under the *AHRA*.

(ii) *Provincial Legislation*

In 2010, the British Columbia government issued a White Paper that dealt with proposed amendments to the province's family law legislation, which includes changes to succession legislation.<sup>21</sup> A year later, the provincial government enacted amendments to the *Wills, Estates and Succession Act (WESA)*<sup>22</sup> that will provide

<sup>16</sup> SC 2004, c 2.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, s 3.

<sup>19</sup> *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

<sup>20</sup> *Ibid* at para 90.

<sup>21</sup> Ministry of the Attorney General – British Columbia, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (Victoria, BC: British Columbia Ministry of Attorney General, 2010) [White Paper].

<sup>22</sup> Bill 4, *Wills, Estates and Succession Act*, 4<sup>th</sup> Sess, 39<sup>th</sup> Parl, 2009 (assented to 29 October 2009), SBC 2009, c 13 (not yet in force).

succession rights for posthumously conceived children, with certain conditions.<sup>23</sup> The majority of Bill 16 – Family Law Act<sup>24</sup> came into force in March 2013 and amended the WESA to include the following provisions:

8.1 (1) A descendant of a deceased person, conceived and born after the person's death, inherits as if the descendant had been born in the lifetime of the deceased person and had survived the deceased person if all of the following conditions apply:

(a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;

(b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;

(c) the deceased person is the descendant's parent under Part 3 of the *Family Law Act*.

(2) The right of a descendant described in subsection (1) to inherit from the relatives of a deceased person begins on the date the descendant is born.

(3) Despite subsection (1) (b), a court may extend the time set out in that subsection if the court is satisfied that the order would be appropriate on consideration of all relevant circumstances.

Section 8.1(2) limits a posthumously conceived child's right to inherit from other relatives who may die intestate to the date when the posthumously conceived child is born. While a posthumously conceived child can inherit from their parent after their death, the same child does not have a claim against a relative who died intestate before their birth.

With the exception of British Columbia, succession legislation across Canada does not currently provide legal rights for posthumously conceived children to inherit on intestacy.<sup>25</sup> Legislative provisions establish succession rights for children who are conceived before, but born after, the death of a parent. For example, in Alberta, the *Wills and Succession Act* provides that any reference to "a 'child', to a 'descendant' or to 'kindred' includes any child who is in the womb at the time of the deceased's death and is later born alive."<sup>26</sup> Similarly, in Nova Scotia, the *Intestate Succession Act* does not define a child; however, the legislation provides that a child who is *en ventre sa mere* at the time of a parent's death is entitled to inherit on

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<sup>23</sup> White Paper, *supra* note 21 at 33.

<sup>24</sup> Bill 16, *Family Law Act*, 4<sup>th</sup> Sess, 39<sup>th</sup> Parl, BC, 2011 (assented to 24 November 2011), SBC 2011, c 25.

<sup>25</sup> See e.g. *Wills and Succession Act*, SA 2010, c W-12.2; *Intestate Succession Act*, CCSM c 185; *Succession Law Reform Act*, RSO 1990, c S26; *Intestate Succession Act*, RSNS 1989, c 236.

<sup>26</sup> *Wills and Succession Act*, SA 2010, c W-12.2, s 58(2).

intestacy. Section 12 of Nova Scotia's legislation states the following: "Descendants and relatives of the intestate, begotten before the intestate's death but born thereafter, shall inherit as if they had been born in the lifetime of the intestate and had survived the intestate."<sup>27</sup> In Ontario, the *Succession Law Reform Act (SLRA)*<sup>28</sup> defines "child" as including "a child conceived before and born alive after the parent's death."<sup>29</sup> The *SLRA* further defines "issue" as including "a descendant conceived before and born alive after the person's death."<sup>30</sup> Pursuant to the legislation, when a person dies intestate, it is the decedent's spouse, children and issue who are eligible to inherit.<sup>31</sup>

As Burns suggests, there are two elements to the definition of child and issue in the *SLRA*, both of which need explanation in the context of assisted reproduction.<sup>32</sup> First, there is a linear genetic connection; and second, there is the element of conception.<sup>33</sup> It is the second element, conception, which is of particular importance for posthumously conceived children. As mentioned above, if a child is conceived while a parent is alive and is *en ventre sa mere* at the time of the parent's death, the legislation provides that a child in such circumstances is considered a child for the purposes of legislation, and is eligible to inherit from their parent's estate on intestacy. The *SLRA*, however, is silent as to whether posthumously conceived children are considered children and therefore also eligible to inherit on intestacy. While the courts in Canada have yet to interpret the legislation in this context, provincial legislatures may consider providing protections for such children, so long as certain prescribed conditions are met, as will be discussed below. Such reforms will serve to protect the rights of posthumously conceived children and, at the same time, balance other competing interests.

### (iii) Provincial Law Reform Commissions

Almost three decades ago, the Ontario Law Reform Commission (OLRC) issued a report that highlighted the need for legislative action to address the issues concerning posthumously conceived children and succession.<sup>34</sup> In its report, the Commission recommended that a posthumously conceived child with the "sperm of the mother's husband or partner... should be entitled to inheritance rights in respect of any undistributed estate once the child is born or is *en ventre sa mere*, as if the child were conceived while the husband or partner was alive..."<sup>35</sup>

Although the Commission was in favour of granting inheritance rights to posthumously conceived children on intestacy, the Commission was also aware of the

<sup>27</sup> *Intestate Succession Act*, RSNS 1989, c 236, s 12.

<sup>28</sup> RSO 1990, c S26.

<sup>29</sup> *Ibid*, s 1.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid*, s 47.

<sup>32</sup> Clare Burns, "Mission Impossible: Estate Planning and Assisted Human Reproduction" (Paper delivered at the 2010 Canadian Bar Association National Conference, 16 August 2010) [unpublished] at 9.

<sup>33</sup> *Ibid*.

<sup>34</sup> Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, vol 2 (Toronto, Ontario Law Reform Commission, 1985).

<sup>35</sup> *Ibid* at 278. It appears through its recommendations that the Commission did not consider the possibility that posthumously conceived children could be conceived using the frozen gametes from a deceased woman through surrogacy.

competing interests and considerations that must be balanced. The Report suggested that in certain situations, the application of this principle would be “impracticable, or unacceptably disruptive where the estate has already been distributed according to ... the laws of intestate succession ... Distributions made should not be disturbed ... distribution should not be postponed simply because [gametic material] is held in cryopreservation.”<sup>36</sup> Although the OLRC Report was not adopted by the legislature, academic commentators and other law reform commissions across the country have considered many of the recommendations in the Report.<sup>37</sup>

In 2008, the Manitoba Law Reform Commission released a report on posthumously conceived children and intestate succession.<sup>38</sup> Among other things, the Report recommended that Manitoba’s provincial legislation governing succession law be amended to provide certain rights to posthumously conceived children. Manitoba’s *Intestate Succession Act (ISA)* defines “issue” as “all lineal descendants of a person through all generations.”<sup>39</sup> A posthumously conceived child, being biologically related to the person, may appear to qualify as a “lineal descendant,” however, the Act further qualifies this by stating that “kindred of the intestate conceived before and born alive after the death of the intestate inherit as if they had been born in the lifetime of the intestate.”<sup>40</sup> The *ISA* is silent as to whether children conceived and born after the death of a parent are considered to be issue within the meaning of the legislation.<sup>41</sup>

The Report recommended that the *ISA* be amended to include succession rights for posthumously conceived children to inherit on intestacy, subject to four conditions.<sup>42</sup> First, any posthumously conceived children must be conceived within two years of the grant of administration of the estate.<sup>43</sup> Second, the potential user of the genetic material must provide notice in writing within six months of the grant of administration of the estate to the administrator of the estate and to any person whose interest in the estate may be affected.<sup>44</sup> Third, there must be proof of a biological link between the posthumously conceived child and the deceased parent.<sup>45</sup> Finally, there must be consent in writing signed by the deceased person to the use of the gametic material for the purpose of posthumous conception and to the future inheritance rights of any resulting children.<sup>46</sup> Despite the Law Reform Commission’s Report urging legislative action to address this issue, Manitoba’s government has yet to incorporate the Report’s recommendations into legislation.

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<sup>36</sup> *Ibid* at 182.

<sup>37</sup> Black and Therriault, *supra* note 14 at 157.

<sup>38</sup> Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependents Relief: The Intestate Succession Act: sections 1(3), 6(1), 4(5), 4(6) and 5*, (Winnipeg: Manitoba Law Reform Commission, 2008).

<sup>39</sup> *Intestate Succession Act*, CCSM c I85 at 1(1).

<sup>40</sup> *Ibid*, s 1(3).

<sup>41</sup> Manitoba Law Reform Commission, *supra* note 38 at 4.

<sup>42</sup> *Ibid* at 24.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid*.



A preliminary discussion of expanding rights for posthumously conceived children has now begun in Alberta. In January 2012, the Alberta Law Reform Institute released a Report for Discussion, entitled “Succession and Posthumously Conceived Children.”<sup>47</sup> While the Report does not propose specific recommendations, it raises some of the issues that concern posthumously conceived children, including whether these children should be eligible to inherit from their deceased parent on intestacy. Further, the Report presents some of the possible considerations for reform, including amendments to the current legislation in Alberta.

#### **IV. Succession Rights of Posthumously Conceived Children – International Perspectives**

While British Columbia has enacted provincial legislation that addresses the succession rights of posthumously conceived children on intestacy, many provinces and territories across the country have yet to consider possible reforms. It is useful, in this regard, to examine international examples of legislative efforts and jurisprudence, which can provide additional guidance for provincial legislatures and courts in considering the succession rights of posthumously conceived children to inherit on intestacy. The United States has begun to address these issues, through both jurisprudence and state legislation. Moreover, Australia and the United Kingdom have also examined the rights of posthumously conceived children to varying degrees. This paper will now turn to an examination of jurisprudence from the United States on the issue of the succession rights of posthumously conceived children.

##### *(i) Jurisprudence*<sup>48</sup>

Courts in Canada have not yet had the opportunity to address whether posthumously conceived children have the right to inherit under intestacy. Many of the cases arising in the United States provide a thoughtful analysis of the competing interests that must be balanced in cases involving the rights of posthumously conceived children. At the same time, these cases also acknowledge the underlying public policy issues that are at stake and many courts have urged state legislatures to take on the complex task of balancing these concerns through the enactment of legislation.

While the majority of cases that have been decided in the United States have focused on the rights of posthumously conceived children to access benefits, such as social security survivor benefits, the following cases hinged on whether or not a posthumously conceived child can inherit on intestacy pursuant to state intestacy law. Under the federal *Social Security Act (SSA)*, a child is entitled to receive benefits provided that the parent was fully insured, the child is under the age of 18 and

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<sup>47</sup> Alberta Law Reform Institute, *supra* note 3.

<sup>48</sup> For a more comprehensive examination of American jurisprudence on the issue of posthumously conceived children, see Jamie Rowsell, “Stayin’ Alive: Postmortem Reproduction and Inheritance Rights” (2003) 41:3 Fam Ct Rev 400. See also Michael K. Elliott, “Tales of Parenthood from the Crypt: The Predicament of the Posthumously Conceived Child” (2004) 39 Real Prop Prob & Tr J 47.

unmarried, and the child was dependent on the individual at the time of death.<sup>49</sup> The SSA defines a child as “the child or legally adopted child of an individual.”<sup>50</sup> The legislation provides for the determination that a child may be deemed a child under the SSA if, among other things, that child would be eligible to inherit on intestacy pursuant to state legislation.<sup>51</sup> If the status of a potential child is in dispute, as may well be the case with a posthumously conceived child, the Social Security Administration as well as the courts, look to state intestacy legislation to determine whether a posthumously conceived child can be considered a “child” pursuant to the SSA.

In one of the first cases to consider the legal status and rights of posthumously conceived children, the New Jersey Superior Court examined whether 18-month old twins, who were posthumously conceived, were eligible to receive social security benefits.<sup>52</sup> In *Estate of William Kolacy*, the husband was diagnosed with cancer. Prior to undergoing chemotherapy, the husband deposited sperm into a sperm bank, in the event that such treatment rendered him sterile. Almost a year after his death, his widow underwent in-vitro fertilization and conceived twin girls who were born eighteen months after his death. In this case, the court examined New Jersey’s intestacy legislation and held that, given the general legislative intent of the statute to give preference to children, the children should be deemed the legal heirs of Mr. Kolacy.<sup>53</sup> As Lewis suggests, the court in this case concluded that the statute must be interpreted broadly, so as to give a posthumously conceived child the chance to inherit from a decedent’s estate.<sup>54</sup>

The court emphasized the fact that the state legislation failed to address the issues raised in this case. The court urged the legislature to take action.<sup>55</sup> Given the unpredictable nature of the legislative process, however, the court was not willing to take a wait-and-see approach:

The State has urged that courts should not entertain actions such as the present one, but should wait until the Legislature has dealt with the kinds of issues presented by this case. As indicated above, I think it would be helpful for the Legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into the courts seeking redress for present problems. We judges cannot simply put those problems on hold in the hope that some day (which may never come) the Legislature will deal with the problem in question. Simple justice re-

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<sup>49</sup> *Social Security Act*, 42 USC § 402(d)(1); See also Charles P Kindregan, Jr & Maureen McBrien, *Assisted Reproductive Technology: A Lawyer’s Guide to Emerging Law and Science*, 2d ed (Chicago, American Bar Association, 2011) at 267.

<sup>50</sup> *Social Security Act*, *ibid* at § 416(e)(1).

<sup>51</sup> *Ibid* at § 416(h)(2). In cases of a deceased individual, the state from which the legislation is to be considered is “the State in which he was domiciled at the time of his death.”

<sup>52</sup> *In re Estate of Kolacy*, 753 A 2d 1257 (NJ Super Ct 2000) [*Kolacy*].

<sup>53</sup> *Ibid* at 1262.

<sup>54</sup> Browne C Lewis, “Dead Men Reproducing: Responding to the Existence of Afterdeath Children” (2008-2009) 16 *Geo Mason L Rev* 403 at 414.

<sup>55</sup> *Ibid*.

quires us to do the best we can with the statutory law which is presently available.<sup>56</sup>

While the result in this case was a declaration that the children were the legal heirs of Mr. Kolacy, the court noted that this would not always be an appropriate remedy. The court emphasized the competing interests that arise in cases of posthumously conceived children and noted that granting the legal status of heir may not always be appropriate, particularly when doing so would “unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates.”<sup>57</sup> The court opined, however, that this issue could be addressed through the imposition of time limits through enacting legislation, noting that “it would undoubtedly be both fair and constitutional for a Legislature to impose time limits and other situationally described limits on the ability of after born children to take from or through a parent.”<sup>58</sup>

In *Woodward v Commissioner of Social Security Administration*,<sup>59</sup> the appellant, Lauren Woodward, conceived twins through artificial insemination after the death of her husband, using his frozen sperm. The mother sought to access Social Security survivor benefits on behalf of herself and her two daughters. After the mother’s application was denied, she appealed in the United States District Court for the District of Massachusetts. The federal court then certified the issue to the Supreme Judicial Court of Massachusetts, who was tasked with determining whether or not posthumously conceived children could inherit under Massachusetts’ intestacy legislation.

The court held that in “certain limited circumstances,” a posthumously conceived child “may enjoy the inheritance rights of ‘issue’” under Massachusetts’ intestacy legislation.<sup>60</sup> As noted above, the court in this case held that determining whether posthumously conceived children can inherit on intestacy implicates three important state interests: the best interests of the child, the orderly administration of estates, and the reproductive rights of the genetic parent.<sup>61</sup> In its discussion of the best interests of the child, the court held that “the protection of minor children...has been a hallmark of legislative action and jurisprudence of [the] court.”<sup>62</sup>

The court also noted that assisted reproductive technologies that make posthumous conception possible have been in existence for several years. The court went further and stated that despite the existence of these technologies, the legislature “has not acted to narrow the broad statutory class of posthumous children to restrict posthumously conceived children from taking in intestacy.”<sup>63</sup> Furthermore, the court argued, the legislature “has in great measure affirmatively supported the assistive reproductive technologies that are the only means by which these children can come into being.”<sup>64</sup> As a result of the legislature’s failure to act on this issue, the

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<sup>56</sup> *Ibid* at 1261-1262.

<sup>57</sup> *Ibid* at 1262.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Woodward*, *supra* note 2.

<sup>60</sup> *Ibid* at 259.

<sup>61</sup> *Ibid* at 265.

<sup>62</sup> *Ibid*.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid*.

court assumed that the legislature “intended that such children be ‘entitled,’ in so far as possible, ‘to the same rights and protections of the law’ as children conceived before death.”<sup>65</sup>

While the decision in *Woodward* favoured the rights of the posthumously conceived children, the court acknowledged the limitations of the court process and, similar to the court in *Kolacy*, stressed the need for legislative action. As the court noted,

[t]he questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.<sup>66</sup>

Although some courts have recognized the rights of posthumously conceived children to inherit on intestacy, this recognition has not been universal across the United States.<sup>67</sup> In *Finley v Astrue*,<sup>68</sup> the Arkansas Supreme Court also considered the rights of posthumously conceived children to inherit on intestacy. The facts of the case were as follows<sup>69</sup>: Amy and Wade Finley were married in 1990. During the course of their marriage, the Finleys participated in an in vitro fertilization and embryo transfer program. In 2001, Mr. Finley died intestate. Less than one year later, Ms. Finley conceived a child using the previously frozen embryos. Ms. Finley applied for Social Security benefits on behalf of the child, however her application was denied. She appealed the decision to the United States District Court, who once again certified the question of state law as to whether a posthumously conceived child was eligible to inherit under Arkansas intestacy law.<sup>70</sup>

The Supreme Court of Arkansas examined the state intestacy legislation and determined that the statute precludes posthumously conceived children from inheriting on intestacy.<sup>71</sup> The statute stipulates that posthumous descendants must be conceived before the decedent’s death.<sup>72</sup> As the statute does not provide a definition of conceived, Ms. Finley argued that conception occurred when the embryo was created, which took place while Mr. Finley was alive.<sup>73</sup> The court, however, rejected this argument.

While some courts have taken the approach of bridging a legislative gap, the court in *Finley* took the opposite approach and looked solely to the legislative intent:

We can definitively say that the General Assembly... did not intend for the statute to permit a child, created through in vitro fertilization and

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<sup>65</sup> *Ibid* at 266.

<sup>66</sup> *Ibid* at 272.

<sup>67</sup> See *Eng Khabbaz v Commissioner, Social Security Administration*, 930 A 2d 1180 (NH Sup Ct 2007); *Finley v Astrue, Commissioner, Social Security Administration*, 270 SW 3d 849 (Ark Sup Ct 2008).

<sup>68</sup> *Ibid*, *Finley v Astrue*.

<sup>69</sup> *Ibid* at 850-851.

<sup>70</sup> *Ibid* at 850.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Ibid* at 853. See Ark Code Ann §28-9-210(a) (2004).

<sup>73</sup> *Ibid* at 851.

implanted after the father's death, to inherit under intestate succession. Not only does the instant statute fail to specifically address such a scenario, but it was enacted in 1969, which was well before the technology of in vitro fertilization was developed.<sup>74</sup>

The court refused to define conception, stating that the role of the court “is not to create the law, but to interpret the law and to give effect to the legislature’s intent.”<sup>75</sup> Further, the court noted that defining conception would lead the court into the role of policy-maker:

Were we to define the term “conceive,” we would be making a determination that would implicate many public policy concerns, including, but certainly not limited to, the finality of estates. That is not our role. The determination of public policy lies almost exclusively with the legislature, and we will not interfere with that determination in the absence of palpable errors.<sup>76</sup>

While the court in this case refused to recognize the rights of posthumously conceived children to inherit on intestacy, the court concluded by urging the state legislature to address “the issues involved in the instant case and those that have not but will likely evolve.”<sup>77</sup>

The issues arising from the foregoing cases went before the United States Supreme Court in 2012. In *Astrue v Capato*,<sup>78</sup> the mother sought Social Security survivor benefits on behalf of her posthumously conceived children. The lower court decision outlines the facts of the case.<sup>79</sup> Shortly after they were married, Mr. Capato was diagnosed with cancer. Before commencing chemotherapy treatments, Mr. Capato had his sperm frozen. Although the Capatos conceived naturally during the course of his treatment, the couple wanted another child. Mr. Capato died in 2002 in Florida. Three months before he died, Mr. Capato executed a will that named his living son and two children from a previous marriage as beneficiaries. Although Mrs. Capato claims that she and her husband spoke to the lawyer about including “unborn children” in his will, there was no such provision. Six months after Mr. Capato’s death, Mrs. Capato conceived through in vitro fertilization and eighteen months after his death, she gave birth to twins.

Mrs. Capato applied for social security benefits on behalf of her twins, however her application was denied. The Social Security Administration’s decision was upheld by the District Court, and Mrs. Capato appealed to the United States Court of Appeals for the Third Circuit. In reversing the lower court’s decision, the Court of Appeals held that the children came within the definition of children under the *Social Security Act*.<sup>80</sup>

<sup>74</sup> *Ibid* at 854.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* at 855.

<sup>77</sup> *Ibid*.

<sup>78</sup> *Astrue, Commissioner of Social Security v Capato*, 132 S Ct 2021, 182 L Ed 2d 887 (2012) [*Capato*].

<sup>79</sup> *Capato v Commissioner of Social Security*, 631 F 3d 626 at 627-628 (Cir 2011).

<sup>80</sup> *Ibid* at 632.

In a unanimous decision, the United States Supreme Court reversed the Court of Appeals' decision and held that a posthumously conceived child cannot rely solely on a genetic connection between the child and the deceased person.<sup>81</sup> The Court held that the posthumously conceived child must demonstrate that he or she would have been eligible to inherit under the state's succession legislation. In reaching its decision, the Court looked at the intent of the social security legislation:

The paths to receipt of benefits under the Act and regulations, we must not forget, proceed from Congress' perception of the core purpose of the legislation. The aim was not to create a program "generally benefiting needy persons"; it was, more particularly, to "provide...dependent members of [a wage earners] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings."<sup>82</sup>

The Court held that the determination of whether a child is entitled to social security benefits must be made by determining whether he or she would be entitled to inherit under state intestacy legislation. In this case, Florida's law prohibits posthumously conceived children from inheriting, unless specifically provided for in the deceased's will. Ultimately, the Court held that the Social Security Administration's interpretation of the law was reasonable, and therefore its decision was entitled to deference.<sup>83</sup>

(ii) *Legislation*

**United States**

While the majority of states do not deal specifically with posthumously conceived children, twelve states currently have enacted some form of legislation that, to some degree, defines the rights of posthumously conceived children to inherit on intestacy.<sup>84</sup> California's legislation is the most comprehensive scheme dealing with the implications of posthumous conception and the rights of resulting children.<sup>85</sup> The provisions contemplate and address many of the policy concerns that arise in situations involving posthumous conception. Further, the legislation provides a balanced approach to harmonizing these concerns, including the best interests of the child, the orderly administration of estates, and the reproductive rights of the genetic parent. Under California law, a posthumously conceived child is considered to have been born during the lifetime of the decedent if certain conditions are met.<sup>86</sup> First, the statute requires that the decedent consent to the use of his or her gametic material for posthumous reproduction, and must designate a person to be in control of said material.<sup>87</sup> Second, the person designated by the decedent to

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<sup>81</sup> *Capato*, *supra* note 78.

<sup>82</sup> *Ibid* at 2032.

<sup>83</sup> *Ibid* at 2033.

<sup>84</sup> Kindregan & McBrien, *supra* note 49 at 266. These states include: California, Louisiana, Florida, Virginia, Colorado, Delaware, New Mexico, North Dakota, Texas, Utah, Washington, and Wyoming.

<sup>85</sup> Kindregan, *supra* note 8 at 443.

<sup>86</sup> Cal Prob Code § 249.5 (2010).

<sup>87</sup> *Ibid* at § 249.5(a).

control the gametic material must notify the estate within four months of the decedent's death that said material is available for use.<sup>88</sup> Finally, the child must be conceived within two years of the decedent's death.<sup>89</sup> As Kindregan suggests, the California statute can serve as an appropriate model and approach for other states to follow.<sup>90</sup>

Not all states that have enacted legislation permit posthumously conceived children to inherit on intestacy.<sup>91</sup> Florida's statute, for example, requires that a written agreement be executed between the couple intending to posthumously conceive and their physician, which outlines what is to happen to the gametes and/or embryos upon the death of a spouse.<sup>92</sup> Further, the statute provides that even if the couple consents to posthumous reproduction, a resulting child "shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will."<sup>93</sup> Therefore, a posthumously conceived child would be prohibited from inheriting on intestacy.

### United Kingdom

In 1984, the Department of Health and Social Security commissioned a report on the question of whether succession rights should be expanded to protect posthumously conceived children.<sup>94</sup> The Report recommended that posthumous conception should be "actively discouraged."<sup>95</sup> The Report acknowledged the underlying policy concern of finality and orderly administration of an estate, and suggested that posthumously conceived children could "cause real problems of inheritance and succession."<sup>96</sup> Finally, the Report recommended that the government introduce legislation to discourage posthumous conception that would exclude posthumously conceived children from any succession rights. The Report recommended that this legislation should provide "that any child born by [artificial insemination by husband] who was not *in utero* at the date of the death of its father shall be disregarded for the purposes of succession to and inheritance from the latter."<sup>97</sup>

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<sup>88</sup> *Ibid* at § 249.5(b).

<sup>89</sup> *Ibid* at § 249.5(c).

<sup>90</sup> Kindregan & McBrien, *supra* note 49 at 467.

<sup>91</sup> See Va Code Ann § 20.158(b) and Ohio Rev Code Ann § 2105.14 (2008). Virginia law permits the recognition of a posthumously conceived child as the child of a decedent, so long as the decedent consented in writing. This recognition, however, does not go so far as to grant inheritance rights to posthumously conceived children on intestacy. § 20.164(i) states clearly that "a child born more than ten months after the death of a parent shall not be recognized as such parent's child for the purposes of... (i) intestate succession..." Ohio law does not specifically address posthumously conceived children; however, the wording of the legislation appears to exclude these children from inheriting on intestacy. While the law provides for children who are *en ventre sa mere* at the time of the decedent's death, the provision appears to close the door on claims from posthumously conceived children to inherit on intestacy.

<sup>92</sup> Fla Stat § 742.17 (2010).

<sup>93</sup> *Ibid* at § 742.17(4) (2010).

<sup>94</sup> Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* by Chairman Mary Warnock (London: Her Majesty's Stationery Office, 1984).

<sup>95</sup> *Ibid* at 55.

<sup>96</sup> *Ibid*.

<sup>97</sup> *Ibid*.

Until recently, the legislation prohibited any recognition of a posthumously conceived child as a child of his or her father. The *Human Fertilisation and Embryology Act 1990 (HFEA)* stated that “where...the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child.”<sup>98</sup>

The *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* amended the *HFEA* to permit the declaration of such a man as the father of the child for the purposes of birth registration only.<sup>99</sup> Thus, posthumously conceived children are still prohibited from inheriting from their father’s intestacy.<sup>100</sup> As the statute is focused specifically on the use of a man’s sperm, it is unclear if the drafters of the legislation contemplated the use of a deceased woman’s frozen gametes in posthumous conception.

### Australia

In 2007, the New South Wales Law Reform Commission considered whether posthumously conceived children should be granted succession rights.<sup>101</sup> The Commission was tasked with examining the current law and drafting a model law on succession.<sup>102</sup> The Commission concluded there were three options for dealing with “the problem of children born more than 10 months after the death of the intestate.”<sup>103</sup> First, there could be no express recognition of posthumously conceived children, which would leave judges to deal with the issue on an *ad hoc* basis.<sup>104</sup> Second, there would be no provision other than to provide for an “ultimate limit of a fixed period after the death of the intestate, for example, one or two years.”<sup>105</sup> The final option considered by the Commission would be to disregard posthumously conceived children from inheriting on intestacy.<sup>106</sup>

While the Commission acknowledged the deficiencies in the current legislative scheme, given the advancements in assisted reproductive technologies, the Commission ultimately recommended the final option and suggested that “the simplest answer is to exclude [posthumously conceived children], by requiring them to be in the uterus at the intestate’s death.”<sup>107</sup> The Commission reasoned that granting inheritance rights to posthumously conceived children would lead to “delays and complexity in the administration of a deceased estate, especially when a number of people in a generation have to be determined for the purposes of *per stirpes* distribution.”<sup>108</sup> The Commission’s draft legislation would prohibit posthumously conceived children from inheriting on intestacy:

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<sup>98</sup> *Human Fertilisation and Embryology Act 1990* (UK), c 37, s 28(6).

<sup>99</sup> *Ibid*, s 28(5)(I).

<sup>100</sup> *Ibid*, s 28(6).

<sup>101</sup> Austl, Commonwealth, New South Wales Law Reform Commission, *Report 116: Uniform Succession Laws: Intestacy* (Sydney: New South Wales Law Reform Commission, 2007).

<sup>102</sup> *Ibid* at xi.

<sup>103</sup> *Ibid* at 129.

<sup>104</sup> *Ibid*.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid* at 128.



### 9 – General limitation of non-spousal entitlements

- (1) A person is not entitled to participate in the distribution of an intestate estate unless
  - (a) born before the intestate's death; or
  - (b) born after a period of gestation in the uterus that commenced before the intestate's death.<sup>109</sup>

As noted from the above discussion, many jurisdictions have taken on the task of addressing the issue of whether posthumously conceived children can inherit on intestacy. The results have varied from granting succession rights to posthumously conceived children, to an outright exclusion of these children from the distribution of a deceased person's estate on intestacy.

## V. Considerations for Reform

Drawing from examples from other jurisdictions, this paper will now turn to possible considerations for reform. In order to bring succession legislation in line with advancements in reproductive technologies, consideration may be given to recognizing posthumously conceived children and granting succession rights to such children to inherit on intestacy. Any amendments, however, should be subject to certain conditions. The best interests of posthumously conceived children, the orderly administration of estates, the interests of other beneficiaries, and the reproductive rights of the genetic parent need to be effectively balanced. In doing so, many of the public policy concerns that arise in situations involving posthumous conception can be addressed.

As reproductive technology continues to develop, other jurisdictions have begun to address the rights of posthumously conceived children. By drawing from some of these examples, such as the model set out in California's statute, British Columbia's recent amendments to the *Family Law Act*, and the recommendations in the Manitoba Law Reform Commission Report, it is possible for provinces across Canada to consider clarifying the rights of posthumously conceived children and establish certain requirements in order for them to be recognized as children and granted succession rights on intestacy. First, the deceased person must consent, in writing, to the posthumous use of his or her genetic material. This would protect the reproductive rights of the deceased person, and would ensure there was consent to the posthumous conception and to support any resulting child. Second, notice should be given to the administrator of the estate, which would permit freezing the administration of an intestacy on behalf of the posthumously conceived child. Third, a limitation period would establish a timeframe within which a child must be conceived. This time limit would need to take into account the interests of other potential beneficiaries under the intestacy, while at the same time it would need to acknowledge the grief a surviving spouse or partner might experience and

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<sup>109</sup> *Ibid* at 262.

the complexities and potential hurdles involved in undergoing assisted reproductive procedures.<sup>110</sup> Finally, a genetic link would be required in order for the child to be granted inheritance rights.

## VI. The *Parens Patriae* Jurisdiction

While there has been a growing discussion across the country with respect to posthumously conceived children, current legislation does not address the issues. If the issue of whether a posthumously conceived child can inherit on intestacy should come before the courts, the use of the courts' *parens patriae* jurisdiction to fill this legislative gap may be appropriate. As Wilson notes, the *parens patriae* jurisdiction is "[s]aid to be the sovereign power which has been vested in the provincial superior courts throughout Canada, its *raison d'être* was and remains the necessity within the law for a remedial failsafe for those who are unable to care for themselves."<sup>111</sup>

There is arguably a legislative gap in succession legislation across the country that does not currently provide legal rights and protections to posthumously conceived children. An examination of the application of the *parens patriae* jurisdiction in other contexts provides some support for the extension of this jurisdiction to establish rights for posthumously conceived children to inherit on intestacy.

In *E (Mrs) v Eve*, the Supreme Court of Canada commented on the nature and scope of the inherent *parens patriae* jurisdiction of provincial superior courts:

From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v Duke of Beaufort*...is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.<sup>112</sup>

The Court held that the *parens patriae* jurisdiction is founded on the principle of protecting those who cannot care for themselves; it is to be exercised for the benefit of that person, not for the benefit of others.<sup>113</sup>

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<sup>110</sup> Manitoba Law Reform Commission, *supra* note 38 at 18. As the Report notes, the success rate for artificial insemination is only approximately 40%. The success rate for in vitro fertilization varies, from 16% to almost 38%, depending on the age of the woman.

<sup>111</sup> Jeffrey Wilson, *Wilson on Children and the Law*, vol 2 (Toronto: Butterworths, 1994) at § 1.19.

<sup>112</sup> [1986] SCJ No 60 at para 72, [1986] 2 SCR 388 [*Eve*].

<sup>113</sup> *Ibid* at para 77.

The jurisprudence indicates that the *parens patriae* jurisdiction can be used to rescue a child in danger, or fill a legislative gap.<sup>114</sup> Courts have held, however, that this jurisdiction must be exercised with caution and restraint. As Justice LaForest held in *Eve, supra*, while the scope of the *parens patriae* jurisdiction may be unlimited, it does not follow that the discretion to exercise such jurisdiction is also without limits.<sup>115</sup> The jurisdiction must be exercised in accordance with the underlying principle:

Simply put, the discretion is to do what is necessary for the protection of the person for whose benefit it is exercised...The discretion is to be exercised for the benefit of that person, not for that of others. It is a discretion, too, that must at all times be exercised with great caution, a caution that must be redoubled as the seriousness of the matter increases. This is particularly so in cases where a court might be tempted to act because failure to do so would risk imposing an obviously heavy burden on some other individual.<sup>116</sup>

In *Lennox and Addington Family and Children's Services v TS*<sup>117</sup> the Ontario Superior Court of Justice was tasked with determining whether the child protection matter could be transferred to the jurisdiction of Iceland's child protection agency. In determining that the court was unable to invoke its *parens patriae* jurisdiction in such a case, Justice Robertson made the following comments with respect to filling a legislative gap: "the court is unable to repair any legislative shortcoming through *parens patriae*. As a court of superior jurisdiction, *parens patriae* authorizes the court through its inherent jurisdiction to intervene and rescue a child in danger. It can sometimes be used to bridge a legislative gap. It does not confer supplemental jurisdiction so as to rewrite legislation and procedure."<sup>118</sup>

While courts have held that the *parens patriae* jurisdiction can be used to fill a legislative gap, it must be used with restraint and courts must not "over-reach" in determining whether or not such a gap exists.<sup>119</sup> Courts must examine the legislative intent in order to determine whether the gap was intentional or part of a larger legislative scheme.<sup>120</sup> In *MDR v Ontario (Deputy Registrar General)*, an application was brought by two lesbian parents who sought to include the particulars of both parents on each child's Statement of Live Birth. The applicants' children were conceived using assisted reproductive technology with sperm from an anonymous donor. The applicants argued that they were entitled to registration of both parents' particulars under the *Vital Statistics Act* and a declaration of parentage pursuant to the *Children's Law Reform Act*. In the alternative, the applicants argued that the court ought to use its *parens patriae* jurisdiction to fill the legislative gap to

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<sup>114</sup> See *AA v BB*, 2007 ONCA 2, [2007] OJ No 2. See also *Beson v Newfoundland (Director of Child Welfare)*, [1982] SCJ No 95, 142 DLR (3d) 20.

<sup>115</sup> *Eve, supra* note 112 at para 77.

<sup>116</sup> *Ibid.*

<sup>117</sup> [2000] OJ No 1420 (Sup Ct).

<sup>118</sup> *Ibid* at para 20.

<sup>119</sup> *MDR v Ontario (Deputy Registrar General)*, [2006] OJ No 2268 at para 89, 270 DLR (4th) 90 (Sup Ct).

<sup>120</sup> *Ibid* at para 89.

protect the best interests of the children in this case. In determining that there were alternative mechanisms available, the court looked at the legislature's intent and the larger, comprehensive scheme for registration and recognition of parentage. The court held that no gap existed and therefore did not exercise its *parens patriae* jurisdiction. In reaching this decision, Justice Rivard made the following comments:

In light of this purpose, it is my view that the fact that lesbian co-mothers are not able to register under the VSA does not appear to be a mere gap, but part of a comprehensive scheme for birth registration and recognition of parentage. It was the legislature's intent that their primary source of recognition would be through a CLRA declaration or adoption. Like in C.G., the legislature has set out alternate routes through which an individual can be found to be a parent. While the alternative option is not as favourable to the Applicants, again like in C.G., this does not mean that the legislature has not turned its mind to the issue. It has determined that it is in the best interests of children to have more difficult issues of non-biological parentage considered by the courts.<sup>121</sup>

The court held that this case was distinguishable from cases in which a legislative gap had been found to exist where no alternative recourse was available.<sup>122</sup> The court emphasized the fact that the legislature had turned its mind to the best interests of the child in developing the legislative scheme by providing an alternative mechanism for determining and recognizing parentage.<sup>123</sup>

More recently, in *AA v BB*, the Ontario Court of Appeal applied the *parens patriae* jurisdiction to fill a legislative gap to permit the declaration of three parents under the *Children's Law Reform Act (CLRA)*. The Court of Appeal commented on the change in societal norms since the enactment of the legislation:

Present social conditions and attitudes have changed. Advances in our appreciation of the value of other types of relationships and in the science of reproductive technology have created gaps in the *CLRA*'s legislative scheme. Because of these changes the parents of a child can be two women or two men. They are as much the child's parents as adopting parents or "natural" parents. The *CLRA*, however, does not recognize these forms of parenting and thus the children of these relationships are deprived of the equality of status that declarations of parentage provide.<sup>124</sup>

The Court found it contrary to the child's best interests to be deprived of the legal recognition of the parentage of one of his mothers.

The Court in *AA v BB* emphasized the fact that the legislature could not have contemplated such a change in social conditions at the time when the *CLRA* was enacted. As Rosenberg J.A. held:

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<sup>121</sup> *Ibid* at para 97.

<sup>122</sup> *Ibid*.

<sup>123</sup> *Ibid*.

<sup>124</sup> *AA v BB*, *supra* note 114 at para 35.

There is no doubt that the legislature did not foresee for the possibility of declarations of parentage for two women, but that is a product of the social conditions and medical knowledge at the time. The legislature did not turn its mind to that possibility, so that over 30 years later the gap in the legislation has been revealed.<sup>125</sup>

Under the same line of reasoning, it can be argued that provincial legislatures could not have contemplated or foreseen such advancements in technology that now make it possible to conceive a child after the death of a genetic parent. Furthermore, the courts have held that a legislative gap will not exist for the purpose of invoking the *parens patriae* jurisdiction in circumstances in which there is an alternative mechanism or remedy to obtain the relief sought. In the case of posthumously conceived children, however, there is no such alternate form of recourse. By using this two-pronged approach, it is arguable that establishing succession rights for posthumously conceived children to inherit on intestacy would be an appropriate exercise of the *parens patriae* jurisdiction.

## VII. Conclusions and Recommendations

As Berry suggests, “[a]s quickly as courts deal with one issue of new reproductive technology, a new technology is developed that creates even more complicated issues.”<sup>126</sup> Assisted reproductive technology continues to develop and advance; however, the law has remained static. Recent developments, both in Canada and the United States, highlight the need for consideration of these complex issues. As discussed above, it is important to protect the rights of posthumously conceived children, while at the same time, balance competing interests, including the state, and other beneficiaries under the decedent’s estate. Other jurisdictions, both domestic and international, provide examples that harmonize and balance competing interests and policy considerations, while at the same time provide succession rights to posthumously conceived children to inherit on intestacy.

As the courts in *Kolacy* and *Woodward* urged, it should be the responsibility of legislatures, and not the courts, to address the complex policy issues that arise in situations involving posthumously conceived children. Courts, however, should not take a “wait-and-see” approach. Many provincial legislatures have, so far, not had the opportunity to address these issues, and it may be up to the courts to use the *parens patriae* jurisdiction to fill this legislative gap in order to protect posthumously conceived children and their right to inherit on intestacy. Many complex issues arise within the context of succession and posthumously conceived children, and these are issues that warrant consideration.

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<sup>125</sup> *Ibid* at para 38.

<sup>126</sup> Janet L Berry, “Life After Death: Preservation of the Immortal Seed” (1997) 72 Tul L R 231 at 256.