A PIECE OF YOU AND I: POSTHUMOUS CONCEPTION AND ITS IMPLICATIONS ON TEXAS ESTATES LAW

by Alexis C. Mejia[*]

Abstract

The Texas Estates Code Section 201.056 only recognizes as heirs, for intestate purposes, children in gestation at the time of the parent's death—children born before the 301st day after the deceased parent's death. This Comment recommends that the Estates Code be amended to extend the time frame in which a child can be conceived to 36 months. This would alleviate the restriction the state has placed on the child born posthumously. This amendment would allow the child conceived posthumously to recover survivor and insurance benefits if their parent has died intestate.

---

* J.D. Candidate, Texas Tech University School of Law, 2022; B.A., The University of Texas at El Paso, 2017. I would like to thank Gabrielle Griffith and the rest of the Estate Planning & Community Property Law Journal staff for their teachings, feedback, and editorial contributions. I would also like to thank Jorge Ortiz for his love, support, and patience through this process. Lastly, a special thanks to Professor Vaughn James for his invaluable guidance and assistance in writing this Comment.

I. INTRODUCTION

Now more than ever, individuals in the United States are waiting longer to start their families.[1] One of the reasons people are waiting to have families is because they do not consider it to be financially feasible to raise children.[2] According to a 2015 study conducted by the United States Department of Agriculture, it costs the average American about $13,000 a year to raise a child.[3] Other factors also contribute to the current delay in childbirth, such as someone choosing to pursue higher education or a career wherein they will earn a higher salary before they start a family.[4] These delays lead experts to anticipate issues related to risks of infertility once these individuals decide to have children.[5] Fortunately for these individuals, reproductive technology is available to assist them in eliminating such issues and enabling them to fulfill their dreams of bearing children.[6]

---

1. Ashely Stahl, *New Study: Millennial Women Are Delaying Having Children Due to Their Careers*, FORBES (May 1, 2020, 10:40 AM), https://www.forbes.com/sites/ashleystahl/2020/05/01/new-study-millennial-women-are-delaying-having-children-due-to-their-careers/#3f5625f9276a [https://perma.cc/DTH6-TJZC].

2. *Id.*

3. Mark Lino, *The Cost of Raising a Child*, U.S. DEP'T. AGRIC. (Feb. 20, 2020), https://www.usda.gov/media/blog/2017/01/13/cost-raising-child [https://perma.cc/T7UZ-SKTE].

4. *See* Stahl, *supra* note 1.

5. *See What's Up with Rising Infertility Rates?* PREMIER HEALTH (Feb. 26, 2016), https://www.premierhealth.com/your-health/articles/women-wisdom-wellness-/what-s-up-with-rising-infertility-rates-#:~:text=Infertility%20is%20more%20common%20than,unable%20to%20conceive%20a%20child [https://perma.cc/6Z4L-7HQT].

6. *Id.*

Picture a couple in Texas who married in their late 20s and decided to wait to have a child until their late 30s after they had purchased a home and both were established in their professions. When they were in their early 30s they decided to cryopreserve genetic material—a storage process of genetic material at a low temperature either by rapid cooling or by simultaneous cooling and dehydration—in the event they experienced fertility issues later in life.[7] They went through this process and took these measures because both had the intention of eventually having children, but due to an illness one suddenly passes away.

Because of this, the decedent dies intestate—without a will.[8] The surviving spouse then decides to still have a child with the decedent's genetic material that was previously preserved. With the assistance of reproductive technology, the spouse can successfully conceive using the preserved genetic material.[9] After the birth of the child, the surviving spouse then decides to file for Social Security benefits on behalf of the child. The Social Security Act requires that the intestacy laws of the state where the decedent resided be applied to determine if the child has a right to survivor's benefits.[10]

Texas Estates Code Section 201.056, for intestate purposes, considers beneficiaries to be children who were in gestation at the time of death of the deceased or who were born before the 301st day after the death of the deceased.[11] It is unclear how Texas courts would rule if presented with a legal issue regarding whether a child conceived posthumously is the heir of the decedent who died intestate.[12] But, it can be concluded that the court would follow the Texas Estates Code Section 201.056 and hold that children who are conceived posthumously are not considered the beneficiaries of the decedent.[13] Because of this, the Texas Legislature should enact an amendment to the Texas Parentage Act to allow the deceased parent's intention to be considered and not require that a consent form be specifically kept with a physician.[14]

Second, Estates Code Section 201.056 should be amended to allow children that are conceived posthumously to be considered beneficiaries of the decedent regardless of being born past 301 days of the decedent's death.[15] An amendment to Estates Code Section 201.056 should be made for the

---

7. *See* Philippa Roxby, *What Does Cryopreservation Do to Human Bodies?*, BBC NEWS (Nov. 18, 2016), https://www.bbc.com/news/health-38019392 [https://perma.cc/8VDY-H8RU].

8. *Id.*; *Intestacy*, CORNELL LAW, https://www.law.cornell.edu/wex/Intestacy [https://perma.cc/3PT4-DZK5].

9. *See infra* Section II.A.

10. *See infra* Section II.C.1

11. TEX. EST. CODE ANN. § 201.056.

12. *See infra* Section III.C.1.

13. *See infra* Section III.D.2.

14. *See infra* Section III.D.1.

15. *See infra* Section III.D.2.

following reasons: if the decedent had genetic material preserved, had the intention of conceiving a child through reproductive technology, and gave permission for this to still happen after their death, then the decedent's wishes should be recognized for intestate purposes.[16]

This Comment will discuss whether children conceived posthumously are considered beneficiaries of a deceased parent's estate under the current Texas Estates Code.[17] Part II provides a background of assisted reproductive technology, cryopreservation, and posthumous conception.[18] Additionally, several cases are analyzed, including the Supreme Court case, *Astrue v. Capato*, regarding posthumously conceived children and if they are considered beneficiaries under the Social Security Act.[19] Furthermore, this Comment examines the rules Texas follows today and identify sources that Texas can look to for guidance regarding posthumous conception.[20] Lastly, Part III proposes an amendment to Texas Estates Code Section 201.056 addressing why such change is imperative and why the amendment must be adopted.[21]

II. OVERVIEW ON ASSISTED REPRODUCTIVE TECHNOLOGY AND POSTHUMOUS CONCEPTION

A. Assisted Reproductive Technology

Assisted reproductive technology has been utilized in the United States since the 1980s.[22] In 1975, only 5% of women ages thirty years or older had first time births.[23] In 2010, that percentage rose to 26%.[24] A 2006–2010 study conducted by the Centers for Disease Control and Prevention (CDC) regarding family growth concluded that this percentage increases with age and that 20% of women ages thirty-five to forty-four were more likely to turn to assisted reproductive technology.[25] According to the CDC, currently about 1.9% of all infants born in the U.S. are conceived through some form of

16. *See infra* Section III.D.2.
17. *See infra* Part III.
18. *See infra* Part II.
19. *See infra* Section II.C.1.
20. *See infra* Part II.
21. *See infra* Part III.
22. Whitny Braun, *The History of Assisted Reproductive Technology in Under 1000 Words…*, HUFFINGTON POST [https://perma.cc/84WH-276S] (last updated Mar. 14, 2017).
23. *National Public Health Action Plan for the Detection, Prevention, and Management of Infertility*, CDC (June 2014), https://www.cdc.gov/reproductivehealth/infertility/pdf/drh_nap_final_508.pdf [https://perma.cc/ZL8X-MGP6] [hereinafter *National Public Health Action Plan*].
24. *Id.*
25. *Id.*

reproductive alternative.[26] The most used fertility treatment in the U.S. is in-vitro fertilization.[27] This is a costly process that consists of the retrieval of eggs from mature ovaries that are then fertilized by sperm in a laboratory.[28] Once fertilized, the eggs are then implanted in the uterus.[29] Other methods to make conception possible using artificial reproductive technology include: intrauterine insemination, intrafallopian transfer, and intracytoplasmic sperm injection.[30] There are also other third party assisted reproductive technology options available, including: surrogates, gestational carriers, as well as sperm, embryo, and egg donations.[31]

B. Posthumous Conception and Cryopreservation Explained

The occurrence of posthumous births is not a novel or recent phenomenon.[32] To clarify, historically, mothers have given birth after the biological father's death.[33] According to the American Society for Reproductive Medicine, "posthumous births have been recognized since antiquity when a husband or male partner died from illness, from accident, or in war after conception and pregnancy had been achieved, but before the resulting birth has occurred."[34] Posthumous "conception" became possible when genetic material, specifically semen, was able to be cryopreserved.[35] The cryopreserved genetic material was then used for reproductive purposes.[36]

Cryopreservation is the process used to preserve genetic material.[37] Genetic material can include: embryos, sperm, oocytes, DNA, and blood.[38] This process consists of laboratory freezing, conserving, and thawing of the

---

26. *ART Success Rates*, CTR. FOR DISEASE CONTROL PREVENTION, https://www.cdc.gov/art/artdata/index.html [https://perma.cc/99LA-WBRH] (last visited Apr. 4, 2021).

27. *National Public Health Action Plan*, *supra* note 23.

28. *In Vitro Fertilization (IVF)*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/QW56-2PK3] (last visited Sept. 12, 2020).

29. *Id.*

30. *Embryo Cryopreservation*, IRMS REPRODUCTIVE MEDICINE, https://www.sbivf.com/embryo-cryopreservation/ [perma.cc/2M4N-FMHY] (last visited Sept. 12, 2020).

31. *Id.*

32. *Posthumous Reproduction*, AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, https://www.asrm.org/topics/topics-index/posthumous-reproduction/ (last visited Sept. 12, 2020).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. Dr. William C. Shiel, *Medical Definition of Cryopreservation*, MEDICINENET, https://www.medicinenet.com/script/main/art.asp?articlekey=7252 [perma.cc/YM7L-QRHN] (last visited Apr. 4, 2021).

37. *Id.*

38. *Embryo Cryopreservation*, *supra* note 30.

genetic material.[39] The genetic material is stored long term in liquid nitrogen at a temperature around -320 degrees Fahrenheit (-196 degrees Celsius).[40] Through this process, genetic material can be preserved for many years.[41] For example, embryos can potentially be preserved for up to twenty-two years.[42] Due to this limitation, posthumous conception is only possible through cryopreservation, when the genetic material can be stored and used for the conception of a child long after one of the parents has died.[43]

Because embryos can potentially be stored for many years, individuals—specifically women—are utilizing cryopreservation to store unfertilized eggs.[44] Cryopreservation is often utilized by women to preserve their fertility and viable eggs to fertilize the eggs once they decide to have a child.[45] Egg freezing through cryopreservation is available to women of all ages but the success of the egg freezing for later use is often successful in women under the age of thirty-five.[46]

1. Legal Issues Arising from Posthumous Conception

Because posthumous conception is a rather recent artificial reproductive phenomenon, there are various rising legal issues regarding the children conceived from this novel method.[47] Some of these issues include whether the genetic material should be considered property, whether the genetic material must be destroyed or divided between parties in a divorce proceeding, and whether the use after the decedent's death for the conception of a child is permitted.[48]

This Comment will address whether children conceived posthumously with the decedent's genetic material are entitled to the decedent's estate.[49]

---

39. *Id.*

40. *Id.*

41. *Id.*

42. Dr. Janelle Dorsett, *How Long Do Frozen Embryos Last?*, THE CENTRE FOR REPRODUCTIVE MEDICINE (Apr. 1, 2019), https://www.lubbockinfertility.com/blog/2019/04/01/how-long-do-frozen-embryos-197441 [https://perma.cc/6YQB-M9JR].

43. *Frozen in Time: Planning for the Posthumously Conceived Child*, NAT'L L. REV. (July 22, 2019), https://www.natlawreview.com/article/frozen-time-planning-posthumously-conceived-child [perma.cc/5L5A-Z65Z].

44. *Id.*

45. *See Fertility Preservation*, FERTILITY INST., https://www.fertility-docs.com/ programs-and-services/egg-freezing/egg-embryo-oocyte-freezing-and-preservation-options.php [perma.cc/KB55-5W5S] (last visited Sept. 12, 2020).

46. *See id*.

47. *See* Kim Kamin, *Estate Planning for the Modern 21st Century Family (Part 1)*, GRESHAM PARTNERS, https://www.greshampartners.com/wp-content/uploads/Estate-Planning-for-the-Modern-21st-Century-Family-Part-1.pdf [perma.cc/LWK4-X6QJ] (last visited Sept. 20, 2020).

48. *See* Hecht v. Superior Ct., 16 Cal. App. 4th 836, 840 (1993); *In re* Est. of Kievernagel, 166 Cal. App. 4th 1024, 1025 (App. 3rd Dist. 2008).

49. *See* discussion *infra* Section III.

Some states do not recognize any child conceived long after the decedent's death as heirs.[50] Because states often follow their own laws in deciding the rights children conceived posthumously have to a deceased parent's estate, they often have different requirements that must be established for their courts to recognize these children as heirs.[51]

Aside from determining the rights of a child and whether they are entitled to the decedent's estate, legal issues exist regarding the beneficiary rights that a posthumously conceived child is entitled to.[52] Some examples of these rights include the beneficiary rights under the Social Security Act and survivor veteran benefits.[53]

C. Laws Concerning Posthumous Conception

The laws concerning posthumous conception at the federal and state levels are split.[54] Because of this, there is not a uniform set of laws for states to follow, further, federal law allows states to decide the beneficiary rights of a posthumously conceived child.[55]

States are the primary actors in deciding what rights children posthumously conceived have under their laws.[56] This section will explain the relevant federal law which primarily focuses on the Supreme Court decision in *Astrue v. Capato* and relevant Social Security Act provisions.[57] Next, this section discusses laws that states are encouraged to adopt, such as the Uniform Parentage Act and the Uniform Probate Code.[58]

1. Federal Law

Even though federal law does not address the legal implications of posthumous reproduction regarding inheritance or beneficiary rights, in 2012 the Supreme Court decided *Astrue v. Capato*, which sheds some light on these issue.[59] *Astrue* discussed posthumous conception and decided whether a child conceived posthumously can claim survivor insurance benefits under the Social Security Act.[60] This was the first time the Supreme Court decided

50. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
51. *See* Cassandra M. Ramey, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 NEV. L.J. 773, 775 (2017).
52. *Id.*
53. Astrue v. Capato, 132 S. Ct. 2021, 2023 (2012).
54. *See* Kamin, *supra* note 47.
55. *See* discussion *infra* Section II.C.2–3.
56. *See* discussion *infra* Section II.C.2–3.
57. *See* discussion *infra* Section II.C.
58. *See* discussion *infra* Section II.C.
59. Astrue v. Capato, 132 S. Ct. 2021, 2023 (2012).
60. *Id.*

a case that addressed posthumous conception through assisted reproductive technology.[61]

In *Astrue*, prior to his chemotherapy treatments, Mr. Capato decided to preserve his sperm in the event that the chemotherapy treatments rendered him sterile.[62] Mr. Capato suffered from esophageal cancer, and in 2001, he died in Florida where he and his wife resided.[63] After Mr. Capato's death, Ms. Capato went through in vitro fertilization using her husband's previously preserved sperm and gave birth to twins eighteen months later.[64] Mr. Capato left a will which listed as beneficiaries Ms. Capato, the son he had with Ms. Capato prior to his death, and his children from a previous marriage.[65]

In his will, Mr. Capato did not acknowledge any children conceived or born after his death as beneficiaries.[66] Ms. Capato later claimed the twins as survivors for insurance benefits, but the Social Security Administration denied her application.[67] The Social Security Administration claimed that under Florida's intestacy laws the twins could not claim survivor insurance benefits because Mr. Capato died before the twins were conceived.[68]

The U.S. District Court for the District of New Jersey affirmed the agency's decision and held that the intestacy laws of the domiciled state of Mr. Capato should be followed.[69] The U.S. Court of Appeals for the Third Circuit reversed the previous decision because it concluded that the children were "undisputed biological children of a deceased wage earner and his widow", and therefore qualified as beneficiaries for survivor benefits.[70]

The Social Security Administration appealed, and the Supreme Court ultimately determined that the twins would still not be able to inherit from the Social Security Administration as Congress intended "children" to refer only to those of married parents.[71] The Capato twins were not entitled to survivor benefits because the administration referred to state law for issues regarding family status and Florida laws explain that marriage ends at death.[72] Because Mr. Capato had died, he was not considered the husband of Ms. Capato and the twins were not considered children of married parents.[73] Further, the twins would not be able to claim survivor benefits under the

61. *Id.*
62. *Id.* at 2026.
63. *Id.*
64. *Id.*
65. *Id.* at 2023.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 2027.
71. *Id.*
72. *Id.*
73. *Id.*

Social Security Administration because Florida's intestacy laws explain that children born posthumously have to be conceived before the parent's death.[74]

Section 216 of the Social Security Act states that to determine whether an applicant is entitled to survivor benefits and to be considered the child of the insured individual,

> the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death.[75]

This is the specific section that the Supreme Court references in *Astrue*.[76] The Supreme Court held that Congress enacted this section to provide a resolution in intestacy cases, specifically in the application for child insurance benefits.[77]

2. State Guidance: Uniform Parentage Act

Although federal law is limited by the holding in *Astrue v. Capato*, states can refer to the Uniform Probate Code (UPC) or the Uniform Parentage Act (UPA) for guidance regarding the provisions each state can adopt.[78] States have adopted some version of the UPA, but because it is only recommended to enact it, states can decide what to include in their own laws.[79] Only Rhode Island, California, Vermont, and Washington have enacted the most recent revisions of the code.[80]

Section 708 of the current Uniform Parentage Act focuses on the intent of the individual for the assisted reproductive procedure and whether the deceased parent consented to the use of genetic material in written form.[81] According to the Act, this is sufficient to show the intent of the individual in being considered the parent of the child.[82] Thus, the Act further explains that

74. *Id.* at 2024–25.
75. 42 U.S.C. § 416(h)(2)(A) (2004).
76. *Astrue*, 132 S. Ct. at 2034.
77. *Id.*
78. UNIF. PARENTAGE ACT § 708; UNIF. PROB. CODE § 2-120.
79. *See* Kamin, *supra* note 47.
80. *Parentage Act*, UNIFORM LAW COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f (last visited Apr. 4, 2021) (the chart labeled "Legislation" on the right side of the website displays the status of jurisdictions which have either enacted or introduced the Act).
81. UNIF. PARENTAGE ACT § 708.
82. *Id.*

"the individual's death does not preclude the establishment of the individual's parentage of the child."[83]

Additionally, the Act explains that if an individual who consented in a record form to assisted reproduction dies before the transfer of gametes or embryos, the deceased individual is the parent of the child only if: (1) either, the individual consented in record that if they were to die, the individual would be considered the parent of the child; or the individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear-and-convincing evidence; and (2) the embryo is in utero not later than [36] months after the individual's death; or the child is born not later than [45] months after the individual's death.[84] The Uniform Parentage Act only provides the states with a recommended legal framework for establishing a parent-child relationship.[85]

3. State Guidance: Uniform Probate Code

The Uniform Probate Code is also recommended for states to enact their own laws for issues of intestacy.[86] The entire 2010 Code has been adopted by nineteen states and the remaining states have adopted some variation of it or have used it as guidance in the language for their own probate laws.[87]

The Uniform Parentage Act specifically states that "an individual is in gestation at the time of a decedent's death is deemed to be living if the individual lives 120 hours after birth."[88] Additionally, Section 2-120(k) recognizes children conceived posthumously by assisted reproduction and explains that an individual is the parent of the child conceived after the individual's death, if the child is: (1) "in utero not later than 36 months after the individual's death; or (2) born not later than 45 months after the individual's death."[89]

Further, the legislative note of this section explains that "states are encouraged to enact a provision" in which genetic depositories are required to provide a consent form.[90] According to the note, this would satisfy subsection (f)(1).[91] Section 2-120(f)(1) explains that a signed record would

---

83. *Id.*
84. *Id.*
85. *See* UNIFORM LAW COMMISSION, *supra* note 80 (description box located below the Enactment Map).
86. UNIF. PROB. CODE § 2-120.
87. *See* UNIFORM LAW COMMISSION, *supra* note 80.
88. UNIF. PROB. CODE § 2-104(a)(2).
89. *Id*. § 2-120(k).
90. *Id*. § 2-120.
91. *Id*. § 2-120(f)(1).

establish a parent-child relationship with another if the individual indicated, before or after the child's birth, their consent to a parent-child relationship.[92]

The comments explain why the Code adopted a 36-month period in which the child must be in utero in order for there to be a child-parent relationship.[93] The Code clarifies that a 36-month period was "designated to allow the surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy."[94] Moreover, the Code also explains why a 45-month period was incorporated and that its incorporation was based on the 36-month reasoning but it added an additional nine months which would allow for a typical pregnancy period.[95]

D. Relevant Case Law

Although this Comment will focus solely on Texas and the implications current Texas law has on the intestacy rights of the children conceived posthumously, it is important to turn to case law of other jurisdictions that address this issue in their courts.[96] Although many states are having to decide such questions in their courts, Texas has yet to decide on such legal issues.[97] Because of this, it is useful to evaluate cases of other jurisdictions and consider their decisions on whether children conceived posthumously are entitled to survivor benefits.[98]

The Supreme Judicial Court of Massachusetts held that genetic material, consent, and time limits must be considered if posthumously conceived children are to inherit when one of their parents has died intestate.[99] Similar to *Astrue v. Capato,* the surviving spouse in *Woodward* achieved conception by artificial insemination by using the preserved semen her husband left prior to his death.[100] About two years after her husband's death, she was able to successfully conceive and give birth to twin girls.[101]

---

92. *Id*. § 2-120(f)(1).
93. *Id*. § 2-120 (referring to the Editor's Notes).
94. *Id*. § 2-120 (referring to the Editor's Notes).
95. *Id.* § 2-120 (referring to the Editor's Notes).
96. *See* discussion *infra* Part II.D.
97. *See* Allison Stewart Ellis, *Inheritance Rights of Posthumously Conceived Children in Texas*, 43 ST. MARY'S L.J. 413, 418 (2012).
98. *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 261 (Mass. 2002); MacNeil v. Berryhill, 869 F.3d 109, 111 (2d Cir. 2017); Vernoff v. Astrue, 568 F.3d 1102, 1104 (9th Cir. 2009).
99. *Woodward*, 760 N.E.2d at 261.
100. *Id.*
101. *Id.*

After the twins' birth, she attempted to apply for survivor children benefits through the Social Security Administration.[102] However, the administration denied the application, claiming that the wife had not successfully established that the twins were the children of the husband under the Act's meaning of "children."[103] The wife appealed the decision to the United States District Court for the District of Massachusetts.[104] The District Court then deferred the question to the Supreme Judicial Court of Massachusetts to determine if the twins were entitled to inheritance rights of natural children under Massachusetts law of intestate succession.[105]

The Supreme Court of Massachusetts held that there are circumstances in which a child may inherit under Massachusetts' intestacy laws, but there is a threshold standard that determines inheritance.[106] The court held that the legal representative or parent of the child must: (1) establish a genetic relationship between the deceased and the child; and (2) show that the decedent consented to the posthumous conception and that they would support any children born after their death.[107] However, there are some limitations even if the parent meets the evidentiary standard.[108] The court recognized that there may be time limits that would preclude children from claiming succession rights.[109]

There are cases with facts similar to *Woodward* but with different outcomes.[110] In a New York case, *MacNeil v. Berryhill*, Ms. MacNeil filed an application for child survivor benefits, based upon the wage earnings of their deceased father, for her twin children conceived through assisted reproduction eleven years after her husband's death.[111] Subsequently, the applications for survivor benefits Ms. MacNeil had filed for her children were denied and Ms. MacNeil requested a hearing before an Administrative Law Judge (ALJ).[112] In this hearing the ALJ determined that although the twins were biologically the children of Ms. MacNeil's husband, under New York intestacy law, they were not entitled to the benefits because they were conceived after his death.[113] Soon after, Ms. MacNeil filed suit in the United States District Court for the Northern District of New York for a review of

102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 259.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 272.
110. MacNeil v. Berryhill, 869 F.3d 109, 111 (2d Cir. 2017).
111. *Id.*
112. *Id.*
113. *Id.*

the agency's determination, to which the court affirmed the agency's findings.[114]

Ms. MacNeil appealed the decision and the United States Court of Appeals for the Second Circuit ultimately determined that under New York's intestacy law, the children who were conceived posthumously were not permitted to inherit if the decedent died intestate.[115] In his concurring opinion, Judge Lynch explained that when Congress adopted the Social Security Act, it had no intentions of providing benefits to children conceived posthumously because at the time that was not possible.[116] Judge Lynch further described Ms. MacNeil's story as a modern scientific accomplishment, but unimaginable by the drafters of the Social Security Act.[117] Due to this unique problem, Judge Lunch explains that Congress may wish to "devote some thought to the issue."[118]

In *MacNeil*, the court took an originalist approach to the interpretation of the statute.[119] Judge Lynch explains that it is a mistake to infer that Congress' intention was anything different from what was stated in the statute.[120] He further explains that he finds it to be sound that states are applying strict rules in issues of intestacy.[121] A similar view and statutory interpretation can be seen in the following case, *Vernoff v. Astrue*.[122]

In the California case *Vernoff v. Astrue*, the Ninth Circuit determined that the father of a child posthumously conceived was not considered the "natural father" of the child under California law, and therefore, the child was not entitled to receive Social Security child survivor benefits.[123] Further, the court determined that in California, the child was not eligible to inherit from the deceased father and not entitled to Social Security child survivor benefits.[124] Moreover, the court determined that although the Social Security Administration excluded posthumously conceived children, it did not violate the Equal Protection Clause.[125]

In *Vernoff*, Ms. Vernoff's husband died of an accident in July 1995, and soon after, she requested that five vials of semen be extracted from her husband.[126] The extraction process was successful and in June 1998, Ms.

---

114. *Id.* at 118.
115. *Id.* at 111.
116. *Id.* at 109.
117. *Id.*
118. *Id*. at 120.
119. *Id.*
120. *Id.*
121. *Id.*
122. Vernoff v. Astrue, 568 F.3d 1102, 1104 (9th Cir. 2009).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1105.

Vernoff underwent in vitro fertilization.[127] Ms. Vernoff, through in vitro fertilization, was able to conceive a child, and in March 1999, she gave birth to a daughter.[128] The court reasoned that because the petitioner's marriage with the deceased was terminated by death, and the child was not born 300 days after the insured's death, under California law, the deceased could not be considered the natural father of the child posthumously conceived.[129]

E. Other Jurisdictional Approaches

To show the diversity between states' laws regarding posthumous conception, it is important to analyze what laws other states currently follow.[130] Currently, states have different requirements that must be satisfied before a state can determine whether a posthumously conceived child is the heir of a deceased parent under their estates' laws.[131]

Under New York Estates law, posthumously conceived children can inherit if four requirements are satisfied.[132] First, the statute requires that the child be conceived with the genetic material of the deceased parent.[133] Second, the deceased parent must execute a consent form, seven years before their death, which authorizes the use of their genetic material to be used for the conception of a child.[134] It should also be stated that their consent will extend to after their death.[135] Additionally, they must designate power to an authorized person to determine the use of their previously preserved genetic material.[136] Third, after the deceased parent's death and within seven months, the authorized person must notify and alert either the administrator or distributor of the estate that genetic material is reserved and that there is a fully executed consent form.[137] Fourth, the statute states that the child must be in gestation no later than twenty-four months or born within thirty-three months after the parent's death.[138]

New York's estates law clearly states what the deceased parent must have done prior to their death and what the authorized person must do after the deceased parent's death in order for children posthumously conceived to

127. *Id.*
128. *Id.* at 1105.
129. *Id.* at 1108.
130. *See infra* text accompanying notes 132–61.
131. *See infra* text accompanying notes 132–61.
132. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3 (McKinney 2021).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

be considered heirs.[139] The editor to the Estates Code explains that these requirements create transparency and extends rights to posthumous heirs and their families.[140]

California's Probate Code is similar to New York's Estates, Powers and Trusts Law statutes regarding posthumous conception.[141] Section 249.5 of California's Code provides that a decedent must specify prior to their death that their genetic material must be used for the purpose of conceiving a child posthumously.[142] It further specifies what the decedent must have included in writing: the decedent's signature and date of the execution of the document, any amendments and revocations signed and dated by the decedent, and the person the decedent had designated to have control of the genetic material after their death.[143] Additionally, the person assigned to designate the use of the genetic material must notify the distributor of the estate in writing that genetic material exists and explain that they are the designated person to make use of it.[144] This must all be done within four months of the issuance of the death certificate or judgment concluding as fact the decedent's death.[145] Lastly, the child must be in utero within two years of the decedent's death or within two years of the judgment declaring the decedent's death.[146]

The Editor's Notes of the annotated version of the Code explains that the statute specifies that the decedent must have left in written form, prior to their death, a consent form and a designation of an individual who would administer their estate after their death, because the intent of the decedent is of the upmost importance.[147] The statute presumes that if the decedent did not leave their written consent, then the genetic material cannot be used for the conception of a child.[148] Specifically, prior to the decedent's death they had to be specific as to how they wanted their genetic material to be used after their death.[149]

Some states require the decedent's consent be explicit in their will, one of these states is Florida.[150] Under Florida's laws, specifically regarding the inheritance rights of the disposition of eggs, sperm, or embryos, the statute explains that the child posthumously conceived has no rights to the

139. *Id.*
140. *Id.*
141. CAL. PROB. CODE § 249.5 (West 2021).
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* (referring to the Editor's notes regarding intent).
148. *Id.*
149. *Id.*
150. *Id.*

decedent's estate.[151] Posthumously conceived children are considered heirs only if their deceased parent in their will, explained that any children conceived after their death are their rightful heirs.[152]

Unlike Florida, Louisiana follows civil law to determine the designation of successors to an estate.[153] Louisiana's statute explains that a child is an heir of the decedent if the surviving parent was authorized by the decedent in writing to use the genetic material and that material was used for the conception of the child.[154] Additionally, it is required that the child be born within three years of the decedent's death.[155] The statute further mentions that if the inheritance rights of an heir are minimized by the birth of a posthumously conceived child, they must bring forth an action within one year of the birth of the child to question the paternity of the child.[156] The editor to the Estates Code explains that Louisiana allows children conceived posthumously to still recover although their parent died intestate, allowing for the children to be considered beneficiaries for Social Security survivor benefits.[157]

As previously explained, there are states that have different requirements when allowing children who were conceived posthumously to be considered the children or heir of the deceased parent.[158] Each state discussed is diverse; some require a strict compliance standard of the statute, while some others are more relaxed and only require a consent form, designation of authoritative figure to make use of the genetic material (it is usually a spouse or partner) and a specific time frame.[159] Unlike any of the laws of the four different states previously discussed, Texas has adopted the Uniform Parentage Act and an extra requirement.[160] This requirement includes a consent form kept by the decedent's physician.[161]

F. Current Law in Texas

Adopted in 2007, Texas' version of the Uniform Parentage Act takes a narrower view of requirements to be considered a child of a deceased parent

---

151. *Id.*

152. *Id.*

153. LA. STAT. ANN. § 9:391.1 (2021); *see also* GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES: EXAMPLES & EXPLANATIONS (7th ed. 2019).

154. LA. STAT. ANN. § 9:391.1.

155. *Id.*

156. *Id.*

157. *Id.* (referring to the Editor's Notes).

158. *See* discussion *supra* Section II.E.

159. *Id*.

160. TEX. FAM. CODE ANN. § 160.707.

161. Alea Roberts, *Where's My Share?: Inheritance Rights of Posthumous Children*, ABA (June 13, 2019), https://www.americanbar.org/groups/litigation/committees/jiop/ articles/2019/inheritance-rights-posthumous-children/ [https://perma.cc/726A-N4HH].

than the UPA version.[162] The latest version of the Texas Family Code Section 160.707 only recognizes a parent-child relationship of a posthumously conceived child and a deceased parent if at the time of the death of the parent, they were married to the surviving parent.[163] The Texas Family Code also explains that if a spouse dies before the child is conceived, the deceased is not considered a parent unless prior to their death they left a consent form on record with a licensed physician.[164] If a deceased individual's genetic material is used for assisted reproduction, that individual must have executed a consent form approving a parent-child relationship for the posthumously child to be considered their heir.[165] Although the UPA was amended in 2017, Texas did not amend this provision in its latest legislative session in 2019.[166]

For intestate purposes, Texas Estates Code section 201.056 *Persons Not in Being*, requires that "no right of inheritance accrues to any person unless the person is born before, or is in gestation at, the time of the intestate's death and survives for at least 120 hours."[167] The code further explains that a person is considered in gestation at the time of the intestate's death if the insemination or implication occurred at or before the death of the intestate and the person is born before the 301st day after the death of the intestate.[168] Section 201.056 of the Texas Estates Code clarifies makes it clear that if a parent dies intestate, a child conceived posthumously is not entitled to inheritance due to not being in gestation at the time of the parent's death regardless if they were conceived with the genetic material of the deceased parent.[169]

Further, for testate purposes, Texas currently considers what the decedent expressed in their will for the division of the estate.[170] If the testator recognized in their will any child conceived after the testator's death as their child and entitled the child to their estate, then the estate must be divided as the testator designated in their will.[171] Additionally, the consent of the decedent is considered and evaluated for the use of any genetic material that was cryopreserved before their death and for the conception of a child after the decedent's death.[172]

---

162. TEX. FAM. CODE ANN. § 160.707.
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id*. § 201.056.
168. *Id.* § 160.707.
169. *See id.*
170. *Id.*
171. *Id.*
172. *Id.*

III. DISCUSSION REGARDING POSTHUMOUS CONCEPTION IN TEXAS AND PROPOSED AMENDMENTS TO TEXAS ESTATES LAWS

Most cases address the Social Security Act (SSA) and the benefits made available to children born after one of their parent's death.[173] Additionally, many have written on how restrictive the SSA currently is to children conceived posthumously.[174] They have even suggested that there should be a mandatory reform and implementation across all states of parentage laws.[175] Because the SSA allows the states to decide if posthumously conceived children are to inherit, it is important to analyze states individually to assess how they each determine the allocation of benefits to children conceived after the decedent's death.[176]

This Comment focuses solely on Texas and includes a proposal of the expansion of its estates code for intestacy purposes.[177] It must be expanded because it does not consider the deceased parent's intention to have a child conceived after their death.[178] Additionally, the Estates Code, for intestate purposes of posthumously conceived children, should also be amended to 36 months after the intestate's death.[179]

A. Continued Assisted Reproductive Option: Posthumous Conception

People are now having children later in life when they are more established and feel they can provide for a child.[180] Fertility issues are to be expected due to this waiting. Because of this, new parents are now turning more to reproductive technology options more than ever before.[181] Due to advancements in reproductive technology, posthumous conception is now an option.[182]

The ability to have a child posthumously is currently utilized nationwide, but the issue lies in whether states will allow these children beneficiary rights in intestacy cases.[183] This can be an issue for a spouse who intended to have a child with their spouse's preserved genetic material after

---

173. Astrue v. Capato, 132 S. Ct. 2021, 2023 (2012); Woodward v. Comm'n of Soc. Sec., 760 N.E 257, 261 (Mass. 2002).

174. *See* Julie E. Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB. INT. L.J. 208, 229 (2005).

175. *Id.*

176. *Astrue*, 132 S. Ct. at 2024.

177. TEX. FAM. CODE ANN. § 160.707.

178. *Id.*

179. *See* TEX. EST. CODE ANN. § 201.056.

180. *National Public Health Action Plan*, *supra* note 23.

181. *Id.*

182. *Posthumous Reproduction*, *supra* note 32.

183. *See* Astrue v. Capato, 132 S. Ct. 2021 (2012).

their spouse's death.[184] A clear example of this can be seen in *Capato v. Astrue*, when the Supreme Court decided that the Social Security Act must turn to the state of domicile of the deceased parent to determine if the children were entitled to rights under their state's intestacy laws.[185]

If Texas was the domiciled state of the Capato's, it can be assumed that the Supreme Court would have ruled the same as they did in referring to the domiciled state law of the deceased to decide on the issue.[186] This assumption is based on the current Texas intestacy law in which it does recognize any children conceived after the parent's death as heirs.[187] Additionally, this implies that the Court would strictly impose this law without considering any outside factors such as consent and the deceased's choice to preserve their genetic material before their death.[188]

B. Discussion of Posthumous Conception in Texas

The modification created and implemented by Texas to its Parentage Act has the potential of creating several issues for estate purposes.[189] Although these issues have yet to be addressed in Texas courts, this narrow adoption of the UPA statutes leaves unanswered questions that can potentially create issues for the surviving partner or living parent of the child conceived and born after the decedent's death.[190]

For example, it is a potential burden on the surviving parent to require them to produce or submit a consent form to be kept by a physician.[191] As established by Texas Family Code Section 160.707, prior to their death, the decedent must have left a consent form declaring their intention to be deemed the parent of the child conceived through reproductive technology.[192] Specifically, the decedent needed to declare that they wanted to be considered the parent of the child if the child is conceived after the decedent's death.[193]

This requirement makes it difficult for the decedent to ensure the documents are properly executed and recorded before their death.[194] This requirement fails to consider that death is unexpected; often, individuals die without designating what will happen to their possessions and assets.[195]

184. *Id.*
185. *Id.*; TEX. EST. CODE ANN. § 201.056.
186. *See* TEX. EST. CODE ANN. § 201.056.
187. *Id.*
188. *Astrue*, 132 S. Ct. at 2023; TEX. EST. CODE ANN. § 201.056.
189. *See* TEX. FAM. CODE ANN. § 160.707.
190. Ellis, *supra* note 97.
191. *See* TEX. FAM. CODE ANN. § 160.707.
192. *Id*.
193. *See id.*
194. *See id.*
195. *See id.*

Because of this, some individuals may be unable to fulfill this requirement before their death.[196] Second, these requirements are burdensome on the surviving parent to be able to acquire and produce to a court.[197]

Aside from the consent form being burdensome on the surviving parent, it would potentially create a burden on the physician by requiring their office to maintain such records.[198] Some of these issues can include the risk of the consent form not being properly executed at the time the genetic material was extracted.[199] Moreover, physicians may not keep proper record of such forms, the form could be lost, the physician may forget to provide such forms to its patients or the physician may even die and such forms could be misplaced or unintentionally discarded.[200] It is likely that the lack of consent and the inability to produce the required consent form, could preclude a posthumously conceived child from being considered the child of the decedent.[201] Because of this, it is clear that there are issues that can arise out of Texas' modification of the UPA.[202]

C. Potential Effects Texas Estates Law Have on Posthumous Conception

Thus, for estate purposes, there should be a modification of the Texas Parentage Act that still considers the intention of the decedent prior to their death but eliminates the physician held consent form requirement.[203] Having a physician and their office to maintain a consent form in their records can be problematic due to (1) Texas not allowing posthumously children conceived to be considered beneficiaries and (2) Texas' narrow adoption of the UPA and how the Texas Estates Code does not recognize posthumous conceived children as heirs or beneficiaries.[204]

Further, for intestate purposes, the Texas legislature should amend Section 201.056 of the Texas Estates Code.[205] Specifically, what needs to be amended from Section 201.056 is the time for which a child can be entitled to the intestate's property; it should be modified to 36 months after the intestate's death.[206] This modification would allow posthumously conceived children to be considered beneficiaries of the decedent.

---

196. *See id.*
197. *See id.*
198. *See id.*
199. *See supra* Section II.F.
200. *See supra* Section II.F.
201. *See* TEX. FAM. CODE ANN. § 160.707.
202. *See id.*
203. *Id.*
204. *See* TEX. EST. CODE ANN. §§ 255.051, 201.056.
205. *See id.* § 201.056.
206. *See id.*

1. Testate Purposes

Under Texas Estates Code Section 255.051, a "pretermitted child" is considered the testator's child if they were born or adopted during the lifetime of the testator or after the testator's death.[207] It is important to note that, according to Section 255.052 of the Texas Estates Code, a pretermitted child is one that is not mentioned or provided for in the testator's will.[208] Although Section 255.051 acknowledges children born after the testator's death and classifies them as pretermitted children, it does not provide guidance on how long after the testator's death they are considered children of the testator.[209]

In fact, the Code does not explicitly state how long after the testator's death the pretermitted child is considered an heir, whether a few years after the death of the testator or even a decade after their death.[210] It is unclear if a child would be considered a pretermitted child if they were born 10 or 20 years after the testator's death and long after the testator's estate had been divided between its beneficiaries.[211] Because Section 255.051 does not clarify or provide a specific time frame on how long after a child can be born after the decedent's death an issue can arise of a pretermitted child born many years after the testator's death.[212] This can be an issue if a testator's surviving spouse would want to have a child posthumously using the preserved genetic material of the testator and long after the testator's death.[213]

Due to the lack of specificity in the Code in regard to the time frame, the testator could refer to family law for guidance on how to answer this question.[214] The Texas Parentage Act explains what is required to be considered the parent of a child posthumously conceived.[215] As stated in the Texas Parentage Act, the testator prior to their death will need to disclose on a consent form, kept by their physician, their explicit consent of the use of their genetic material for the purpose of being used for the conception of a child after their death.[216]

Additionally, the parent of the child posthumously conceived after their death must make their intention explicit in their will to be considered the parent..[217] An issue can arise when a testator recognizes children posthumously conceived in their will but fails to leave a consent form with

207. *Id.* § 255.051.
208. *Id.* § 255.052.
209. *Id.* § 255.051.
210. *Id.*
211. *Id.*
212. *Id.*
213. *See supra* Part I.
214. *See supra* Part I.
215. *See supra* Part I.
216. *See supra* Part I.
217. TEX. FAM. CODE ANN. § 160.707.

their physician.[218] Although the testator's will includes a provision providing for after-born children, the lack of a signed consent form could render that provision invalid.[219] Although in their will their intention would be clear and explicit, the requirement of having an executed consent form recorded and kept with physician would not be met. It is unclear if this would be sufficient to show before a court their consent in allowing their genetic material to be used for the purpose of conceiving a child after their death.[220]

2. Intestate Purposes

For intestate purposes, Texas Estates Code Section 201.056 explains that a child is entitled to an inheritance if they were in gestation at the time of death the intestate or if they were born 301 days after the date of the intestate's death.[221] This statute does not consider children who were conceived posthumously as beneficiaries of an intestate.[222] This statute does not address whether a child who is born more than 301 days after the death of the intestate would be considered a beneficiary if the individual left a consent form to be kept with their physician.[223] It is unclear if such issue has been presented or even considered by a Texas court.[224]

As previously explained, Texas has yet to decide on a case regarding posthumous conception and the inheritance rights a child is entitled to whether their parent dies testate or intestate.[225] Because of this, it is uncertain how courts would apply this statute.[226] This can be assumed based on what the statute currently states and because of how restrictive the statute was written.[227] The statute currently does not allow posthumously conceived children rights to an inheritance or estate in the event of intestacy.[228] Because of this, it can be assumed that Texas courts would apply a strict interpretation of this statute and not allow beneficiary rights to a child posthumously conceived.[229] Although it is unclear how a Texas court would decide on this issue, the statute purposely excludes posthumously conceived children and only allows those that are in gestation at the time of death of the intestate to

218. *See id.*
219. *See id.*
220. *See id.*
221. TEX. EST. CODE ANN. § 201.056.
222. *See id*.
223. *See id*.
224. *See supra* Section II.D.
225. Ellis, *supra* note 97.
226. *See* TEX. EST. CODE ANN. § 201.056.
227. *See id*.
228. *See id*.
229. *Id.*

be considered beneficiaries, because of this a court could apply a strict interpretation of the statute.[230]

Furthermore, this inference can be made because of how other states have applied their statutes and the restrictive requirements they have imposed in order for a posthumously conceived child to be considered a beneficiary of the parent who died intestate.[231] Some of these states include the state of New York and California.[232]

For example, New York's Estates Code addresses the inheritance allocated to non-marital children, specifically those that are conceived after one of their parent's death.[233] New York's Estates Code Section 4-1.3 for purposes of intestacy explains that a "genetic child" is one that was conceived with the genetic material produced by the decedent.[234]

Additionally, the statute explains that property is allocated to the genetic child if not more than seven years before the decedent's death they consented in writing for the use of their genetic material for the assisted reproduction of a child.[235] Further, that the decedent prior to their death needed to designate and authorize a specific person to delegate what would happen to their genetic material after their death.[236] The statute goes into detail what the designated person must do after the decedent's death and most importantly it explains the time frame in which a child posthumously conceived must be born in order to be considered a beneficiary.[237]

According to the statute, the genetic child born after the decedent's death must be in utero no later than 24 months after the death of the parent or be born no later than 33 months after the parent's death in order to be included in the disposition of the decedent's property.[238]

Similar to New York, California also has specific requirements in its probate code for the child conceived posthumously to be included in the distribution of the decedent's property.[239] Specifically, the statute explains that the decedent needed to include in writing that their preserved genetic material could be used for the conception of a child after their death. Additionally, the decedent needed to sign and date the document expressing their intentions for the genetic material.[240] The specification of intention

230. *See id.*
231. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
232. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *See id.*
239. *Id.*; CAL. PROB. CODE § 249.5.
240. CAL. PROB. CODE § 249.5.

regarding their genetic material can only be revoked if done in writing, signed, and dated by the decedent.[241]

Prior to his death, the decedent must also designate a person to delegate the use of the preserved genetic material left by the decedent.[242] Much like New York, California's probate code explains that the child must either be in utero within two years of the decedent's death, or there is a judgment from a court determining the decedent's death in order for the child to be entitled to the property left by the decedent.[243] Interestingly, California's probate code explains that this does not apply to children who share all of their nuclear genes with the person donating the implanted nucleus such as what is known to be, human cloning.[244]

Both New York and California allow posthumously conceived children to be considered the genetic child of the decedent who died intestate if certain requisites are met, and the decedent prior to their death met a few requirements.[245] As previously identified, some of these requirements include a written document specifying the designation of their genetic material and also the designation of a specific person who after their death would delegate what would happen to their preserved genetic material.[246] Lastly, both states specify an acceptable time frame that the child may be conceived using the decedent's preserved genetic material and also be considered a beneficiary.[247]

New York and California are a few of the states who recognize posthumously conceived children as beneficiaries of the decedent but have also implemented requirements from the decedent and the executor, person designated to delegate their estate.[248] Although some states allow these children to be considered beneficiaries, they are still imposing requisites and restrictions as to the time frame when the child can be conceived after the decedent's death.[249]

This bolsters the argument that Texas would apply a strict interpretation of its statute.[250] It is probable that a trial court would not exercise its discretion in allowing a child conceived posthumously to be considered the beneficiary of the decedent who died intestate.[251] However, it is unlikely that a trial court would exercise its discretion because the court would need to ignore the current Texas statute that does not extend to those children conceived after

241. *Id.*
242. *Id.*
243. N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
244. CAL. PROB. CODE § 249.5.
245. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
246. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
247. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
248. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
249. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
250. *See* TEX. EST. CODE ANN. § 201.056.
251. *See supra* Section III.C.

the decedent's death.[252] Some states allow posthumously conceived children to be considered the beneficiaries of the decedent; however, these states impose strict requirements that must be satisfied by parents and provide strict time frames of when the children had to be conceived.[253] Because of this, it is uncertain if a Texas court would exercise its discretion in allowing them to be considered beneficiaries of a parent who died intestate without imposing the time frame restrictions and requirements other states are known to have required of the decedent prior to their death.

D. Proposed Amendments to Texas Estates Law

There is great uncertainty regarding how Texas' courts will rule if faced with determining if a child posthumously conceived is the heir of the decedent and because of this, many issues can be avoided by expanding the Texas Parentage Act for purposes of testate and the Estates Code for intestate purposes.[254] This section will explain how amending the Texas Parentage Act in allowing a variety of different forms of consent to be considered to establish the consent requirement of the Act would be helpful in eradicating the current Act's potential issues.[255] Additionally, this section will explain how Texas Estates Code Section 201.056 should be expanded to 36 months to allow posthumously conceived children to be considered as beneficiaries under the Code.[256]

1. Texas Parentage Act

Although the Uniform Parentage Act was enacted and recommended to be adopted by all states, Texas modified it and implemented its own version of it.[257] As previously mentioned, in issues of testate, the Texas Parentage Act assists in determining if a child conceived after the death of a decedent is considered a pretermitted child or is considered the child of the decedent.[258] Because the Texas Estates Code is silent on children conceived posthumously, and the Parentage Act assists when a question arises regarding these children, amending the code would still assist for testate purposes.[259]

Specifically for this proposed amendment, this would be applied for the biological children of the decedent, those that are conceived with the

252. *See* TEX. EST. CODE ANN. § 201.056.
253. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.3; CAL. PROB. CODE § 249.5.
254. *See* TEX. EST. CODE ANN. § 201.056; TEX. FAM. CODE ANN. § 160.707.
255. *See* TEX. FAM. CODE ANN. § 160.707; *see also infra* Section III.D.1.
256. *See* TEX. EST. CODE ANN. § 201.056; *see also infra* Section III.D.1.
257. TEX. FAM. CODE ANN. § 160.707; UNIF. PARENTAGE ACT § 708.
258. TEX. FAM. CODE ANN. § 160.707.
259. *See id.*; *see also* TEX. EST. CODE ANN. § 201.056.

preserved genetic material of the decedent prior to the decedent's death. An amendment to the Texas Parentage Act should still encompass the consent requirement it currently demands, but it should specifically eliminate the requirement of having a consent form filed and kept by a physician.[260] Eliminating this requirement would eradicate many potential issues, such as the inability to locate the consent form kept by the physician or even the task of having to locate the physician.[261] Additionally, it would alleviate the burden placed on the surviving parent of the child in having to produce this specific form of consent.[262] The amendment to the Code would eliminate the requirement of having the consent form kept by a physician but it would only require that there be some form of consent signed by the decedent and left for these purposes.[263]

This specific modification to the Act would require a form that would show the decedent's consent, allowing for various forms of consent to be submitted as evidence of consent and designation of the preserved genetic material.[264] There are other ways in which a testator can show their consent, including a clause in their will acknowledging their intention of being considered the parent of the child posthumously conceived or highlighted in the required forms they signed when they went through a genetic material extraction procedure.[265] Because of this, judicial review of this issue in Texas would need to be determined on an individualized basis.[266] Texas judges would need to evaluate each form of consent left by the decedent and determine if it is sufficient to meet the consent requirement specified by the Act. The seriousness of each matter concerning posthumous conception in probate proceedings requires that each method of consent be evaluated closely and carefully. The outcome of such cases have serious implications on the lives of the parents and the children involved and therefore, an evaluation of the documents submitted is required.

a. Types of Required Consent Forms

If the Act is amended to allow consideration of parental consent, then it would not only benefit the surviving parent if there is an issue in determining if their deceased spouse is the parent, but also the posthumously conceived child.[267] It would be in the best interest of the child for Texas to allow various

260. *See* TEX. FAM. CODE ANN. § 160.707.
261. *See id.*
262. *See id.*
263. *See id.*
264. *See id.*
265. *See supra* Section II.B.1.
266. *See supra* Section III.B.
267. *See* TEX. FAM. CODE ANN. § 160.707.

forms of consent so that in the event the surviving parent could not provide to the court a form kept by a physician, the surviving parent could show the decedent's consent in some other method, whether through the decedent's actions prior to their death or in the forms they signed during the genetic material extraction procedure.[268]

Additionally, if the surviving parent is not able to properly provide for the child, then, under Texas law, the acknowledgment of various forms of consent would allow the posthumously conceived child to be entitled to survivor benefits under the Social Security Act and other children survivor like benefits that could supplement the costs associated with the upbringing of a child.[269] In modifying this requirement, the intention of the decedent would be considered and although this could be analyzed on a case by case basis, it would not be straying away from the UPA's recommended provision.[270] The UPA recommends for states to adopt a clear and convincing standard of evidence in determining if consent was given by the decedent was for posthumous reproduction.[271] Much like the couple in the *Capato* case, if a couple decides to preserve the genetic material of the spouse that is ill and there is some form of written consent, then that should be enough to determine the intention of the decedent.[272]

Comparably, Texas courts are allowing for consideration of agreements, such as an informed consent form for cryopreservation of embryos, when determining the consent of the individuals regarding the discardment of embryos in the event of divorce.[273] These forms are evaluated by different courts when evaluating the specific intentions of the spouses at the time of the egg or semen retrieval.[274] Although this has been evaluated by the courts in divorce proceedings when one party is petitioning for the discardment of the frozen embryos and the other party is requesting that they be transferred to them, the Texas Court of Appeals has explained that embryo agreements signed must be upheld.[275] In *Roman v. Roman*, the court explained that since the Informed Consent for Cryopreservation form was signed by both parties, and both agreed that in the event of a marriage separation they would want the embryos to be discarded, then the court should follow the terms of the agreement.[276]

Considering that Texas Courts review these forms when determining the consent of the individuals, these types of forms could be evaluated for

268. *See id.*
269. *See id.*
270. *See* UNIF. PARENTAGE ACT (2017).
271. *See id.*
272. Astrue v. Capato, 132 S. Ct. 2021, 2023 (2012).
273. *Frozen in Time: Planning for the Posthumously Conceived Child*, *supra* note 43.
274. *Id.*
275. Roman v. Roman, 193 S.W.3d 40, 54 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).
276. *Id.*

children conceived and born after the decedent's death without having to be kept by a physician.[277] Although the Texas Parentage Act requires that these types of forms be kept by a physician, if this requirement is eliminated and only requires that the surviving parent of the posthumously conceived child produce a document that proves the consent of the decedent, then this would alleviate the burden currently placed on the surviving parent by the current Texas statute.[278] There are various documents that could be evaluated to satisfy this requirement, some of these documents can be consent forms signed with a physician at the extraction of the genetic material, provisions contained in their will, and any other document that the decedent signed giving their consent for the reproduction of a child.[279]

Lastly, it should be noted that if the decedent, prior to their death, retracted their consent or changed their mind and did not want their genetic material to be used for the purpose of posthumous reproduction after their death, then that should also be considered by the court if it is in writing and signed and dated by the decedent. As previously explained, California's Probate Code—regarding the distribution awarded to a posthumously conceived child—explains that the specification of the decedent's intention, if revoked or amended, must be in writing and signed by the decedent.[280] Texas could implement a similar provision in which it explains that the revocation of consent had to be signed and dated by the decedent prior to the decedent's death.[281]

b. Expected Opposition to the Proposed Amendment to the Texas Parentage Act

It can be argued that Texas has not expanded its Parentage Act because it wants to have documented consent of the deceased parent kept by a physician.[282] Additionally, it could be inferred that the statute is purposefully restrictive so there is not a presumption of the intention of the decedent.[283] This can be a possible explanation as to why Texas states clearly in its Uniform Act that the consent form must be kept by a physician.[284] Although there could be legislative intent for it to remain as it is, this current statute has the potential of leaving the surviving spouse and posthumously conceived child at a disadvantage and without the possibility of receiving property

277. *See* TEX. FAM. CODE ANN. § 160.707.
278. *See id.*
279. *See id.*
280. *See* CAL. PROB. CODE § 249.5.
281. See *supra* Section II.F.
282. TEX. FAM. CODE ANN. § 160.707.
283. *Id.*
284. *Id.*

belonging to the decedent.[285] As previously mentioned, the physician must be relied on and be given a level of complete trust that the consent forms will be executed and safely kept if needed in the future.[286] Entrusting a physician and their office with such a task, could leave the surviving parent at a disadvantage if the records are not kept properly, misplaced, or if the physician cannot be found to testify regarding the intention of the deceased spouse.[287]

Moreover, it can be argued that it can be dangerous to allow various forms of consent to be submitted in order to show the consent of the decedent.[288] This view concludes that this will allow anything to be submitted from the surviving partner in order for the child to be considered the child of the decedent. Additionally, explaining that because many documents could be admitted to satisfy this requirement, documents could be falsified or altered to the consent requirement. Although this proposed amendment requires there to be various forms of consent to be considered without a specific required form, two possible reasons exists as to why this would be beneficial.[289] First, these various forms of consent would be evaluated closely by a court.[290] Secondly, it would still require the proof that prior to the decedent's death they intended to be considered a parent or had explicitly consented to be considered the parent of the posthumously conceived child.[291] Although such concerns are valid, it is important to note that other states have implemented similar requirements, and in their statutes, they have been able to avoid such potential issues.[292]

2. Texas Estates Code 201.056

For intestate purposes, Texas Estates Code Section 201.056 should also be amended.[293] The Code should be amended to 36 months to replace the current requirement that specifies that the child must be in gestation at the intestate's time of death.[294] Although it would be a significant amendment to the current statute, this would nevertheless be a desirable option.[295] The UPC recommends that states consider the decedent a parent of a child born after their death if the embryo is in utero within 36 months of the death of the

285. *See id.*
286. *Id.*
287. *See id.*
288. *See id.*
289. *See supra* Section III.D.1.
290. *See supra* Section III.D.1.
291. *See supra* Section III.D.1.
292. CAL. PROB. CODE § 249.5.
293. *See* TEX. EST. CODE ANN. § 201.056.
294. *See id.*
295. *See id.*

parent or if they were born 45 months after the parent's death.[296] This shows that the UPC recommends this option as a possible alternative and even expands it to 9 more months when it suggests a 45 month timeframe.[297] As previously stated, some states have fully implemented the UPC in their own laws, one of these states is Louisiana.[298] Louisiana has adopted a 36 month timeframe in its estates law since 2003.[299] This shows that states have already implemented such recommendation and it has been successful for these states.[300]

Amending the Code to 36 months and eliminating the requirement of the child being in utero at the time of death of the decedent in order to be considered a beneficiary would allow the surviving parent to be able to use the genetic material cryopreserved for the conception of a child.[301] This timeframe would allow the surviving spouse to use the genetic material left by their spouse or significant other, fulfill their intention of having a child, and for that child to be considered a beneficiary.[302] Although in Texas the surviving spouse would be able to conceive with the cryopreserved genetic material, in order for these children to be considered beneficiaries of the decedent the Code must be expanded.[303] The current Texas statute does not allow for this; however, an amendment to the Code and extending the time frame to 36 months would.[304] Amending the Code to 36 months would allow the surviving spouse some time to grieve their significant other and allow them the chance to decide if they want to have children with the genetic material previously cryopreserved by their spouse or significant other.[305] Additionally, this time frame would allow the surviving spouse to find the means to go through the costly process of assisted reproduction using previously preserved genetic material.[306] Lastly and most importantly, this would also allow for several attempts of the chosen assisted reproductive method the surviving chooses to achieve conception.[307]

---

296. UNIF. PROB. CODE § 2-120.
297. *See id*.
298. LA. STAT. ANN. § 9:391.1.
299. *Id*.
300. *See id*.
301. *See* TEX. EST. CODE ANN. § 201.056.
302. *See infra* Section III.D.2.b.
303. *See infra* Section III.D.2.b.
304. *See infra* Section III.D.2.b.
305. *See infra* Section III.D.2.b.
306. *See* Rachel Gurevich, RN, *How Much Does IVF Really Cost?*, VERYWELLFAMILY (Mar. 5, 2020), https://www.verywellfamily.com/how-much-does-ivf-cost-1960212 [https://perma.cc/W448-4X6C].
307. *See supra* Section II.A.

a. Reasoning for the Proposed Extended Timeframe

There are other benefits to extending the time of when a child can be born after the decedent's death, such as extending to the surviving parent the ability to conceive with the cryopreserved genetic material even if their spouse or partner died intestate.[308] This would allow the child to still be recognized as the decedent's beneficiary.[309] This extended period would allow the surviving spouse to grieve the loss of their loved one. Each individual has a different grieving period and process. It is uncertain if this is enough time for some individuals, but this time frame would allow the surviving spouse or partner to grieve as needed without making an immediate determination of the genetic material as soon as the passing of their loved one.[310] Additionally, this time frame would still allow them to be able to utilize the cryopreserved material for the conception of a child and still be able to claim the child for survivor benefits or for the child to be distributed a portion of the decedent's property.[311]

Furthermore, this would also allow and provide a chance for the surviving spouse to come up with the funds, if not feasible at the time, to be able to go through the costly processes available in the various assisted reproductive methods.[312] There are a variety of assisted reproductive methods that have different price ranges, but most are considered to be costly methods.[313] For example, an in vitro fertilization cycle can range from $10,000 to $15,000 depending on if the individual has health insurance and their health insurance covers fertility treatments.[314] The price is much higher for individuals without health insurance that covers fertility treatments.[315] For each additional cycle an individual can pay up to $7,000.[316] The required medication for this process is another cost that must be considered.[317] The medication needed can range from $1,500 to $3,000 depending on the treatment.[318] Additionally, regarding surrogacy, the surviving partner may choose to go through an assisted reproductive alternative of using a surrogate: this method is known to be a costly process.[319] Although states' statutes vary

308. *See supra* Section II.A.
309. *See supra* Section III.A.
310. *See* MacNeil, *supra* note 110.
311. *See id.*
312. *See supra* Section II.A.
313. Gurevich, *supra* note 306.
314. *Id.*
315. *Id*.
316. *Id.*
317. *Id.*
318. *Id.*
319. *See How Much do Surrogate Mothers Make?*, AM. SURROGACY, https://www.americansurrogacy.com/surrogate/how-much-do-surrogate-mothers-make (last visited Nov. 10, 2020) [https://perma.cc/DY4J-PKD9].

on what they permit regarding surrogacy, specifically if the surrogate could be compensated or even allowed to carry another person's child, if an individual decides to go through this process and it is allowed in their state, the individual must pay for the surrogate's medical expenses.[320] The individual may even need to pay for the surrogate's pre-natal care and lost wages due to the pregnancy.[321] Because of this, the surviving spouse or parent may need additional time to be able to acquire the funds given the high expense of these procedures.[322]

Moreover, while reproductive technology is vastly advanced and is widely utilized when individuals are faced with fertility issues, it is not always successful.[323] The surviving spouse may also need additional time and several attempts or cycles of such procedures to accomplish this.[324] In vitro fertilization is an example of one of these procedures.[325] In vitro fertilization is a stringent process that requires the woman's body to be in a certain condition, to prepare a woman's body for the retrieval of the eggs and the implanting of the fertilized embryos.[326] In regards to assisted reproduction, each case is different if the chosen assisted reproductive method requires the use of preserved genetic material.[327] There are cases in which the first attempt is successful in accomplishing the conception of a child, in others this is unlikely and several attempts must be made before this outcome proves to be successful.[328] A clear example of this is the in vitro fertilization process in which it is recommended to go through several cycles of the treatment in order to see successful results.[329] The more in vitro fertilization cycles a women goes through the higher the chance is of her being able to conceive.[330]

If the surviving spouse is trying to conceive utilizing the help of a surrogate, the spouse may need additional time to arrange the process.[331] There must be a "matching process," often through an agency, that individuals must go through before choosing the proper person who will be

320. *Id.*

321. *Id.*

322. *See id*.

323. *See* Mohammad Reza Sadeghi, *Low Success Rate of ART, an Illusion, a Reality or Simply a Too High Expectation*, U.S. NAT'L LIBR. OF MED., July–Sept. 2012 Issue, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3719356/ [https://perma.cc/P9D7-2SSW].

324. *See* Gurevich, *supra* note 306.

325. *Id.*

326. *In Vitro Fertilization (IVF)*, *supra* note 28.

327. *See* Rachel Gurevich, *The Chances for IVF Pregnancy Success*, VERYWELLFAMILY (Apr. 5, 2020), https://www.verywellfamily.com/what-are-the-chances-for-ivf-success-1960213 [https://perma.cc/NBP6-B36Z].

328. *See id*.

329. *See id*.

330. *See id*.

331. *How Long Does the Surrogacy Process Take?*, SURROGATE PARENTING (Sept. 29, 2015), https://www.surrogateparenting.com/how-long-does-the-surrogacy-process-take/ [https://perma.cc/JK5D-Y9Z8].

the surrogate that will carry their child.[332] This process can take up to four months to arrange, and additional time may be needed for the parties to decide on the agreement of compensation, pre-natal care, and pre-birth arrangements.[333] Surrogacy is a serious process that requires that the parties involved understand what they are agreeing to.[334] Often times, lawyers and other professionals are involved in these discussions regarding surrogacy.[335] Because of the stringent process of conceiving with the help of a surrogate, the current statute puts the surviving parent at a disadvantage when it does not allow for children who were posthumously conceived to be considered the child of the decedent in issues of intestate.[336] If the surviving parent's intention is to be able to conceive and for Texas to recognize their children as the child of the intestate, they are unable to because current Texas statute does not allow for this.[337]

These explanations for extending the current Texas timeframe after the decedent's death for the conception of a child are parallel to the UPC's reasoning in recommending states in adopting a 35-month or 45-month timeframe.[338] Both the proposed amendment and the UPC recognize that individual's may want to posthumously conceive children after the death of their significant other using their genetic material.[339] Additionally, they both recognize that these children should be entitled to beneficiary rights.[340] As previously discussed, the UPC explains that these timeframes "allow the surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy."[341] Because of these reasons, amending the Texas code to 36 months would be following what the UPC currently recommends.[342] This type of timeframe is not only encouraged by the UPC but has been adopted by other states.[343]

332. *Id.*
333. *Id.*
334. *See id.*
335. *Id.*
336. *See* TEX. EST. CODE ANN. § 201.056.
337. *See id.*
338. UNIF. PROB. CODE § 2-120 (referring to the Editor's Notes).
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*
343. *Id.*

b. Potential Elimination of Forum Shopping

Forum shopping could be avoided by extending the time of when a child can be considered a beneficiary in Texas.[344] Specifically, the couple can move to a state that recognizes as beneficiaries children who were conceived after the decedent's death.[345] Additionally, amending the code to 36 months and recognizing posthumously conceived children as beneficiaries would also prevent forum shopping.[346] If the intention of a couple is to have the option to posthumously conceive and for the law to consider those children as the decedent's children who are entitled to their estate then they can move to a state that would recognize this.[347] If one of them becomes terminally ill then the couple can move to a state that allows posthumously conceived children beneficiary rights before the death of spouse who is ill.[348] Amending the timeframe to 36 months in Texas would be similar to the statutes of other states that would allow this, this would not be a potential issue Texas would need to address.[349]

c. Expected Opposition to the Proposed Amendment to Extend to Posthumously Conceived Children

While the proposed amendment will likely address and solve many issues, it is important to discuss the expected opposed views of this proposed amendment to Texas Estates Code Section 201.056.[350] These opposed views fail because they do not take into consideration the intention of the decedent or their wishes for the use of their preserved genetic material.[351] First, the opposition may argue that the statute was written to only recognize children that were in gestation or in utero at the time of death of the decedent or that were made known to the decedent prior to their death.[352] Moreover, making it clear that the statute was written that way to purposely exclude any child born posthumously as the decedent's heir.[353] Additionally, this view can claim that the legislature does not want courts or the partner of the decedent to presume the intention of the decedent regarding the distribution and division of their estate.[354] Although this is an issue that must be avoided, this

344. *See infra* Section III.D.2.b.
345. *See infra* Section III.D.2.b.
346. *See* TEX. EST. CODE ANN. § 201.056.
347. *See supra* Section III.B.
348. *See supra* Section III.B.
349. *See* TEX. EST. CODE ANN. § 201.056.
350. *See id.*
351. *See supra* Section III.B.
352. TEX. EST. CODE ANN. § 201.056.
353. *See id.*
354. TEX. EST. CODE ANN. § 201.056.

too places a surviving spouse at a disadvantage because there are many reasons as to why someone could die without writing a will.[355] Some of these reasons include someone not thinking they need a will, an individual not getting around to executing a will, not finding it urgent enough to have one drafted, or dying before having a chance to writing a will.[356]

The statute does not address if the child conceived posthumously would be considered an heir if the intestate consented to their preserved genetic material to be used for assisted reproductive purposes after their death and as a result the child was conceived. [357] Amending the statute to 36 months would allow the surviving spouse or partner to be able to conceive through reproductive technology using the cryopreserved genetic material of the deceased.[358] Although it is uncertain what the reasoning of the legislature was when the statute was drafted and later enacted, Texas statutes are inconsistent in regards to children born after the decedent's death.[359] Texas statutes are inconsistent when Estates Code Section 255.051 allows a child to be considered a child born after a testator's death a pretermitted child but not under Texas Estates Code Section 201.056 where children conceived and born posthumously are not considered beneficiaries for intestate purposes.[360] Amending the code would assist in creating a consensus among the statutes.[361] For issues of intestate and testate, among Texas statutes, children who are conceived and are born after the decedent's death would be viewed consistently among the Texas Estates Code.[362]

Another criticism of such changes is that this would leave the estate open for quite some time and that it has the potential of delaying the distribution of rights to any existing heirs thus also incurring administrative expenses.[363] Additionally, this has the potential of having a negative impact on the property because the property could devalue or have a loss in assets.[364] Although a 36-month time frame would allow a surviving spouse or partner the ability to posthumously conceive a child while still allowing the children to be considered heirs, it places a cutoff time in which the surviving spouse can achieve this.[365] By creating a specific time frame of how long after a surviving spouse could achieve conception, the parties involved would be

355. *See* David Edwards, *3 Reasons the Majority of People Don't Have a Will*, EDWARDS GRP. LLC (Jan. 27, 2015), https://edwardsgroupllc.com/wills-and-trusts/3-reasons-the-majority-of-people-dont-have-a-will/ [https://perma.cc/4N3L-4C3M].

356. *See id.*

357. *See* TEX. EST. CODE ANN. § 201.056.

358. *See id.*

359. *See id.* §§ 201.056, 255.051.

360. *Id.* §§ 201.056, 255.051.

361. *Id.* §§ 201.056, 255.051.

362. *Id.* §§ 201.056, 255.051.

363. *See id.* § 201.056.

364. *Id.*

365. *See infra* Section III.D.2.b.

made aware of how long exactly after the decedent's death the distribution of rights and property would be made.[366]

Lastly, although this time frame may leave the estate opened for 36 months after the decedent's death, it is not indefinite; therefore, it would be only until the child is conceived and born within the 36-month period.[367] After this, the estate can be divided and transferred accordingly. Although there is a possibility that more than one child can be conceived utilizing any of the available reproductive methods, the estate can still be divided among them.[368] This certainly will need to be considered by the parties involved because of the high probability of there being more than one child conceived with the genetic material left by the decedent.[369] Although this may be viewed as a positive outcome for many, still others may view this as a risk.[370] This is something that should be left for the decedent and their spouse's to have discussed and decided upon prior to the decedent's death.[371] Regardless of the number of children posthumously conceived, the property could be made available and divided among the rightful beneficiaries.[372]

d. Probable Changes to Texas Estates Code 201.056

The proposed amendment to the Texas Estates Code Section 201.056 would assist in issues of intestacy.[373] An amendment to the code would help intestacy issues in which it would allow for the surviving parent to use the preserved genetic material of the decedent and for the child to still be considered the heir of the decedent although they were conceived and born after the death of the decedent.[374] This would create more certainty for the surviving spouse that the child would be considered an heir under Texas Estates Code and it would further allow the surviving parent to be able to carry out the wishes of the decedent.[375] First, it would provide the surviving spouse a chance to be able to grieve and still be able to go through the process of conceiving through assisted reproductive technology using the genetic material left by their spouse or partner prior to their death.[376] Second, it would

366. *See infra* Section III.D.2.b.
367. *See supra* Section II.B.
368. *See supra* Section II.B.
369. *Key Findings: Fertility Treatments and Multiple Births*, CDC, https://www.cdc.gov/art/key-findings/multiple-births.html (last visited Nov. 20, 2020) [https://perma.cc/9USU-BJRG].
370. *See id.*
371. *See supra* Part I.
372. *See supra* Section II.B.
373. *See* TEX. EST. CODE ANN. § 201.056.
374. *See id.*
375. *See id.*
376. *See supra* Section II.B.

not leave in question many issues that the current statutes do.[377] Some of these issues include whether a child conceived posthumously can be considered a beneficiary of the decedent who died intestate but left a consent form allowing their genetic material to be used for the conception of a child and additionally giving consent to be the genetic parent of the child that was conceived posthumously.[378] Third, it would prevent forum shopping.[379] Finally, it would allow the surviving spouse to be able to prove that the children posthumously conceived are the children of the deceased spouse because the decedent's genetic material was used for the conception of the child and because of the proposed amendment to the Texas Estates Code.[380]

IV. CONCLUSION

Posthumous conception and the beneficiary rights afforded to these children is a novel but ongoing issue that has little guidance in Texas due to the lack of case law and limited statutory laws that address it.[381] The proposal set forth in this comment would provide Texas with guidance in addressing issues raised by posthumously conceived children.[382] This would be accomplished by extending the Texas Estates Code Section 201.056 to 36 months as opposed to 301 days after the decedent's death or for the child to be in gestation at the time of the decedent's death.[383] This would provide that under Texas intestacy laws, posthumously conceived children are recognized as heirs.[384] This is a change that must be made because technological advancements in assisted reproduction practically ensure that this will continue to be an issue in the foreseeable future and beyond.[385]

377. *See supra* Section II.B.1.
378. *See supra* Section II.B.1.
379. *See supra* Section III.D.2.b.
380. *See supra* Section III.D.
381. *See supra* Part I.
382. *See supra* Part III.
383. *See supra* Section III.D.2.
384. *See supra* Section III.D.
385. *See supra* Part II.