COMMENT

AFTER *WOODWARD V. COMMISSIONER OF SOCIAL SERVICES*: WHERE DO POSTHUMOUSLY CONCEIVED CHILDREN STAND IN THE LINE OF DESCENT?

Posthumous conception? Postmortem creation? We live in a world in which we can separate reproduction from sex. We have sperm and eggs and embryos stored away in the freezers of myriad reproductive clinics. And now we are learning that we can separate reproduction from death.[1]

I. INTRODUCTION

In January of 1993, Lauren and Warren Woodward, married for more than three years, learned that Warren had leukemia.[2] The Woodwards, then childless, learned that Warren's proposed treatment plan could leave him unable to father children. The couple arranged for some of Warren's semen to be preserved at a sperm bank, so that the couple could later conceive children.[3] After Warren underwent an unsuccessful bone marrow transplant, he passed away in October 1993. Lauren was appointed to be administratrix of his estate.[4] Lauren Woodward, after much contemplation, became pregnant through artificial insemination with her deceased husband's sperm, and gave birth to twin girls in October 1995.[5]

Lauren Woodward applied for Social Security survivor benefits for the twins

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[1] Ellen Goodman, *We Need to Tame Our Reproductive Wild West*, THE BOSTON GLOBE, January 10, 2002 at A11.

[2] *See* Woodward v. Commissioner of Social Services, 760 N.E.2d 257 (2002).

[3] *See id.* at 538.

[4] *See id.*

[5] *See id.*

and herself in January 1996, and her claims were denied.[6] The Social Security Administration contended that she had not established that Michayla and Mackenzie, the twins, were Warren's "ch ildren" within the meaning of the Social Security Act.[7] Following the denial of her claims, Ms. Woodward filed a "co mplaint for correction of birth record" against the clerk of Beverly, Massachusetts in the Probate and Family Court requesting the addition of Warren Woodward as the girls' father on their birth certificates.[8] The Probate and Family Court judge entered a paternity judgment, and ordered that the birth certificates be amended to include Warren Woodward as the father.[9] In making this judgment of paternity, the judge accepted Lauren Woodward's voluntary acknowledgment of parentage on behalf of Warren, as wife and administratrix of his estate, and made no further findings of fact.[10]

The Social Security Administration was not persuaded by the Probate Court's judgment of paternity and the twins' amended birth certificates.[11] The administrative law judge reviewed the case *de novo*, and once again rejected her claims on the grounds that, *inter alia*, the twins were not entitled to inherit from Warren Woodward pursuant to Massachusetts paternity and intestacy laws.[12] The Social Security Administration's appeals council affirmed the judgment, thereby entitling Lauren Woodward to judicial review of these claims.[13]

Lauren Woodward sought judicial review of her claims in the United States District Court for the District of Massachusetts. Since " the parties agree that a determination of these children's rights under the law of Massachusetts is dispositive of the case and . . . no directly applicable Massachusetts precedent

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[6] *See id.* Warren Woodward was fully insured pursuant to the U.S. Social Security Act at the time of his death. *See id.* at 538 n.3. Section 42 U.S.C. 402(d)(1) (1994 & Supp. V 1999) affords "child " benefits for dependent children of parents who are fully insured under the Act at the time of their death. Further, § 42 U.S.C. 402(g)(1) (1994 & Supp. V 1999) affords "mother" benefits to a widow of a deceased husband who died while fully insured pursuant to the Act, so long as, among other things, she has custody of a child or children that are entitled to "chil d" benefits.

[7] *See Woodward*, 760 N.E.2d at 539. "Child " is defined by the Social Security Act (SSA) as the "child or legally adopted child of an individual." § 42 U.S.C. 416(e). The only way for Lauren Woodward and her daughters to be eligible for survivors' benefits under the SSA, is if Massachusetts intestate succession laws treat the children as her husband' s natural children for disposition of his property. *See* § 42 U.S.C. 402(d)(3) and § 416(h)(2)(A); 20 C.F.R. § 404.355(a)(1); 20 C.F.R. § 404.361(a).

[8] *See Woodward*, 760 N.E.2d at 260.

[9] *See id.* at 260.

[10] *See id.* at 261.

[11] *See id.*

[12] *See id.*

[13] *See Woodward*, 760 N.E.2d at 261. Generally, exhaustion of administrative remedies is required before a party may seek judicial review of a challenge to agency action. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938).

exists,"[14] Chief Justice Marshall of the District Court certified the following question to the Supreme Judicial Court of Massachusetts:

> If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will the children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law o f intestate succession?[15]

Not surprisingly, as discussed below, the Supreme Judicial Court's decision was considerably narrower than the extreme, and wide-reaching position of either party. Lauren Woodward advocated that "b y virtue of their genetic connection with the decedent, posthumously conceived children must always be permitted to enjoy the inheritance rights of the deceased parent's children under [the] law of intestate succession."[16] Certainly, the implications of such a broad position would, at the very least, cause panic to sperm donors everywhere. Likewise, the government's position that "b ecause posthumously conceived children are not 'in being' as of the date of the parent's death, they are always barred from enjoying such inheritance rights,"[17] would only serve to disadvantage children, who obviously had no control over the circumstances of their conception.

This comment addresses the problems faced by children conceived after the death of a parent by means of assisted reproductive technology in light of *Woodward v. Commissioner of Social Services*. First, in Part II, this comment outlines the traditional legal view of children born after the death of a parent, in the context of conventional conception. Part III surveys the most common reproductive technologies employed that can be used to achieve posthumous conception. Part IV of this comment addresses the delicate legal nature of sperm, ova and other reproductive materials, and the ability of a decedent to dispose of, or direct the use of, such materials at death. Part V discusses the uncertain state of the law regarding the rights of posthumously conceived children in the United States. Part VI discusses the *Woodward* opinion and the legal implications of the court's decision. Part VII speculates as to the outcome of the *Woodward* case in the District Court, and the future of technologically-conceived children pursuant to the laws of intestacy. It further concludes that the *Woodward* decision is sufficiently narrowly tailored so as to protect adequately the posthumously born children of reproductive technology while discouraging socially irresponsible behavior by grieving spouses. Finally, Part VIII suggests that the rights of posthumously conceived children would be better addressed at the legislative, rather than judicial level.

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[14] *See Woodward*, 760 N.E.2d at 261 (internal quotations omitted).

[15] *See id.* at 259.

[16] *See id.* at 262.

[17] *See id.*

II. TRADITIONAL STATUS OF POSTHUMOUSLY BORN CHILDREN

The problem of posthumously born children is not a new problem. At common law, if a man's wid ow claimed to be pregnant at the time of his death, the person who would be the heir of the deceased but for the widow's pregnancy could challenge the unborn child's paternity.[18] Courts developed a common law presumption that "th e normal period of gestation was 280 days and that a child born within 280 days of the death of the mother's husband was deemed to be the legitimate offspring of the decedent," and thereby entitled to inherit from or through the decedent.[19] The Uniform Parentage Act extended this presumption to three-hundred days.[20]

This presumption continued, as evidenced by the 1990 Uniform Probate Code, which provides that "[a] n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth."[21] Thus, the law deems a child conceived before, but born after a decedent's death to have been born before the father's death for purposes of intestate succession.[22] This presumption sufficiently safeguarded posthumously born children's rights until the mid-twentieth century when advances in reproductive technology began progressing at a speed that transcended both legislative and judicial remedies.[23] Due to technology for preserving sperm and other reproductive materials that allows for the feasible conception of genetic progeny following a genetic parent's death, a person's g enetic heirs may no longer be counted at the time of his or her death.[24] "[R]ecen t revolutionary advances made in human reproductive technology [have widened the] gap between the possibilities for creating human life and the legislative and judicial treatment of the rights of children."[25] As stated by one commentator:

> In its early years, assisted reproduction seemed a benign intervention of science, helping families bear children who could not do so naturally. Viewed in this way, the new technologies were technologies of hope, helping cement family structure. As with all things produced by science, invention proved its own engine, forever pushing the frontiers of the possible. For the most part, lawyers, politicians, and the rest of us just sat back and watched in awe.[26]

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[18] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES 456 n.19.

[19] Robert J. Kerekes, *My Child . . . But Not My Heir: Technology, The Law, and Post-Mortem Conception*, 31 REAL PROP. PROB. & TRUST J. 213, 214 (1996).

[20] *See* Uniform Parentage Act § 2, 9B U.L.A. 296 (1973).

[21] *See* Uniform Probate Code § 2-108 (1990).

[22] *See* Kerekes, *supra* note 19, at 214.

[23] *Id.* at 214-15.

[24] James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 745 (1998).

[25] Kerekes, *supra* note 19, at 215.

[26] Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception,*

Are we living in a brave new world?[27] Recently, "scientists at the University of Texas Southwestern Medical Center and the University of Pennsylvania ascertained a procedure for preserving spermatological stem cells for more than a century, thereby allowing for the possibility of posthumous conception more than one hundred years after the death of the genetic parent. Existing reproductive technology, however, has surpassed the capability to preserve viable sperm and ova: "today the fertilized egg, a zygote, can be frozen, stored, thawed, and brought to term years, perhaps decades, after both biological parents have died."[28] Further, "a single zygote can be divided numerous times, creating a theoretically unlimited number of identical offspring."[29] Even a cursory exploration of common reproductive technologies that may be used to achieve posthumous conception reveals the disparity between scientific possibilities and judicial and legislative consideration.

III. AVAILABLE REPRODUCTIVE TECHNOLOGIES

The development and use of reproductive technologies has long been the subject of religious, cultural, and ethical debate.[30] Recently, the use of such technologies has become so widespread as to implicate innumerable legal debates regarding parentage[31] and posthumous conception.[32] As recent events and

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Parental Responsibility, and Inheritance, 33 HOUS. L. REV. 967, 971 (1996); *see also* Lori B. Andrews & Nanette Elster, *Regulating Reproductive Technologies*, 21 J. LEGAL MED. 35 (2000) (asserting that "society lacks adequate structural mechanisms to assess the legal, cultural, religious, and ethical dimensions of what this progress [in reproductive technology] may mean to individuals, the family, and society.").

[27] *See* ALDOUS HUXLEY, BRAVE NEW WORLD (Bantam Books, 1958). The title of this book was inspired by William Shakespeare, The Tempest, act. 5, sc. 1 ("O brave new world, That has such people in it."). *See* Kerekes, *supra* note 19, at 215 and n.7.

[28] *Id.*

[29] *Id.* Perhaps more concerning is the very real possibility of human cloning. Andrews & Elster, *supra* note 26, at 60-65 ("Cloning raises even more dramatic questions about the limits of reproductive liberty."). The British government has given UK scientists "the final go-ahead to conduct limited human cloning." Cloning: *UK gives go-ahead for human cloning*, NEW SCIENTIST, (visited March 14, 2002) <http://www.newscientist.com/hottopics/clonong/cloning.jsp?id=ns99991975>. As well, Chinese scientists have recently created dozens of cloned human embryos. *See* Cloning: *Dozens of human embryos cloned in China*, NEW SCIENTIST, (visited March 14, 2002) <http://www.newscientist.com/hottopics/clonong/cloning.jsp?id=ns99992012>.

[30] *See* Andrews & Elster, *supra* note 26, at 35-44; *see also* Note, *In Vitro Fertilization: Insurance and Consumer Protection*, 109 HARV. L. REV. 2092 (1996).

[31] *See* Johnson v. Calvert, 851 P.2d 776 (Ca. 1993) (regarding competing parental rights of gamete provider and gestational carrier in surrogate arrangement); Jhordan C. v. Mary K., 179 Cal. App. 3d 386 (1986) (regarding paternity rights of donor who provided semen to lesbian couple).

[32] *See* Gloria G. Banks, *Traditional Concepts and Nontraditional Conceptions: Social*

technology evince, the possibility of posthumous conception has moved from the realm of science fiction to social reality, as women (and conceivably, men) are now able to "start families" after the death of a spouse. Though there are many other methods of assisted conception that could result in posthumous conception, only the two most common will be discussed as relevant to this inquiry.[33]

Artificial insemination is only one of the methods available, though likely the most well known and widely used method of assisted reproduction.[34] The relatively simple technique involves the assisted injection of a sample of medically treated sperm from a male into a female's reproductive tract to cause pregnancy.[35] There are two types of artificial insemination, each with differing legal implications. Homologous insemination involves the use of a husband or partner's sperm, and heterologous insemination involves the use of sperm donated by an anonymous donor.[36] Here, we are dealing with homologous insemination.

Depending upon the treatment of the sperm-containing material, the amount of

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Security Survivors Benefits for Posthumously Conceived Children, 32 Loy. L.A.L. REV. 251, 273-85 (1999); Susan M. Kerr et al., *Postmortem Sperm Procurement*, 167 J. UROLOGY 2154 (1997); Anne Reichman Schiff, *Arising From the Dead: Challenges of Posthumous Procreation*, 75 N.C.L. REV. 901 (1997); Monica Shah, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547 (1996); Ellen J. Garside, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713 (1996).

[33] Other methods of assisted reproduction that could result in a posthumous conception include gamete intrafallopian transfer, where the ova are removed from the female's fallopian tube, and reinserted in the fallopian tube along with donor sperm, resulting in any fetus produced traveling to the uterus. *See* Kerekes, *supra* note 19, at 216-17 (citing Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TRUST J. 55, 63-64 (1994)). As well, zygote intrafallopian transfer is a two-step procedure by which ova fertilized in a laboratory are implanted into the fallopian tube, and allowed to travel to the uterus. *See id.*; *see also* Banks, *supra* note 32, at 267-73. A "zygote" is the "cell formed by the union of two gametes, esp[ecially] a fertilized ovum before cleavage." AMERICAN HERITAGE COLLEGE DICTIONARY 1571 (3d ed. 1997)

[34] *See* Kerekes, *supra* note 19, at 215.

[35] This technique is generally used when fertilization by traditional means cannot be achieved. *See* Anna Peris, PharmD., *Therapies: Artificial Insemination*, (visited March 9, 2002) <http://www.fertilitext.org/p2_doctor/ai.html>; *see also* Alan S. Penzias MD, *Current Reproductive Endocrinology, Infertility: Contemporary Office-Based Evaluation and Treatment*, OBSTETRICS AND GYNECOLOGY CLINICS, Vol. 27, no. 3 (Sept. 2000). There are several types of artificial insemination, involving the location within the female reproductive tract where sperm is deposited. "T he types of [artificial insemination] are intracervical (in the cervical canal), intrauterine (in the uterine cavity), intrafollicular (in the ovarian follicle) or intratubal (in the fallopian tubes)." Peris, *supra*.

[36] See Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 214 (2001).

time such sperm remain viable will vary.[37] Reproductive material with a long period of viability could result in conception many years after the death of the donor.

In vitro fertilization is another reproductive technology that could enable a decedent to become a "father" long after his death. This technique involves the removal of eggs from the woman's ovaries by a relatively minor surgical procedure, after she has taken medications to induce ovulation.[38] The ova are then placed in a petri dish with the male's sperm and incubated to promote fertilization.[39] The embryos are then permitted to develop for a few days before being placed in a woman's uterus or frozen for future use.[40] It is possible that more than 20,000 viable, cryogenically preserved pre-embryos are currently being stored in the United States.[41]

In vitro fertilization affords for the possibility of a birth after the death of the father as well as the mother, due to the possibility of a surrogate carrier for gestation.[42] This possibility, however, is contingent on the availability of such pre-embryos to the surviving spouse, after the death of the other.

IV. THE LEGAL NATURE OF REPRODUCTIVE MATERIALS

For posthumous reproduction to become a reality depends largely on the ability of a decedent to direct the disposition of his or her reproductive material at death, or the otherwise legal availability of reproductive materials to the decedent's spouse or partner. Sperm, the "male gamete or reproductive cell,"[43] lacks a legal denotation as property or otherwise for purposes of succession.[44] "Determining the legal definition of sperm has ramifications that continue to confound learned jurists. Technological advances have created medical possibilities that existing case and statutory law have failed to anticipate."[45] What type of control should the person from whom the reproductive material originated retain over its disposition after his or her death? Are reproductive materials such as sperm, ova, zygotes, and embryos "property" for purposes of inheritance?

The first case to address the issue of a woman's right to use the sperm of a decedent was the French case of *Paraplaix v. Centre d'Etude et de Conservation de Sperme*.[46] In this case, Alain Paraplaix made one sperm deposit after learning

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[37] *See* Penzias, *supra* note 35.

[38] *See id.*

[39] *See id.*

[40] *See id.*; *see* Kerekes, *supra* note 19, at 216.

[41] *See* Davis v. Davis, 842 S.W.2d 588, 593 (Tenn. 1992) (citations omitted).

[42] *See* Kerekes, *supra* note 19, at 216.

[43] AMERICAN HERITAGE COLLEGE DICTIONARY 1309 (Houghton Mifflin Co., 3d ed.)

[44] *See* Kerekes, *supra* note 19, at 218.

[45] *Id.* at 218.

[46] *See* Donald E. Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem* Insemination, 1 J.L. & HEALTH 229-33 (1985).

that he suffered from testicular cancer, but gave no instructions as to his intended use of the sperm.[47] As a matter of course, the sperm bank denied his wife's request for the sperm after her husband's death.[48] The wife and the decedent's parents sued the sperm bank for release of the sperm.[49] The French court found it "imp ossible to characterize human sperm as movable, inheritable property within the contemplation of the French legislative scheme."[50] The court determined sperm to be " 'th e seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive,' " the fate of which "mu st be decided by the person from whom it is drawn."[51] The court found the sole issue was the intent of the donor, and found the testimony of the wife and parents to be determinative of Alain Paraplaix's unequivocal intent to have his wife become "th e mother of a common child."[52] Therefore, the Tribunaux de Grande Instance ordered the government-run sperm bank to turn over decedent's previously preserved sperm to the doctor of the surviving wife.[53] However, she failed to conceive, "d ue to the small quantity and poor quality of the sperm."[54]

The landmark case in the United States addressing the legal categorization of sperm is *Hecht v. Superior Court*.[55] In this case, a California court determined that decedent was entitled to bequeath his cryogenically preserved sperm to his girlfriend, Hecht, for her use, if she wished to become impregnated by it.[56] The court noted that "[s]p erm which is stored by its provider with the intent that it be used for artificial insemination is thus unlike other human tissue because it is 'g ametic material,' that can be used for reproduction."[57] Nonetheless, the court concluded, "at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction. Such interest[, the court concluded,] is sufficient to constitute 'p roperty'" with in the meaning of the California Probate Code.[58]

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[47] *See id.* at 229-30.

[48] *See id.* at 230.

[49] *See id.*

[50] *Id.* at 232.

[51] Shapiro & Sonnenblick, *supra* note 46, at 232.

[52] *Id.*

[53] *See id.* at 233.

[54] *Id.*

[55] 16 Cal. App.4th 836 (1993).

[56] *Id.* at 861.

[57] *Id.* at 850.

[58] *Id.* One commentator asserts a constitutional right to devise sperm or pass it at death. *See* Chester, *supra* note 26, at 979-82. Chester points to Holdel v. Irving, 481 U.S. 704 (1987), where the Supreme Court held it to be an unconstitutional taking to wholly prohibit the descent or devise of a specific class of property. *See Holdel*, 481 U.S. at 717-18. This commentator reasons that "[b]eca use the largest jurisdiction in the United States[, California,] has determined that sperm is at least a form of property for purposes of transfer at death, it is probable that even if a legislature blocked the descent of sperm, it would have to allow a sperm's devise." Chester, *supra* note 26, at 980 (internal citations

Hecht indicates that if a sperm donor has a right to dispose of his preserved sperm during his life, and if the required intent is shown, to dispose of it at death. As well, although the question of the devisability of more complex reproductive materials, such as frozen pre-embryos, has not been addressed by probate courts, the legal "p roperty" status of pre-embryos has been the subject of many disputes in divorce cases.[59] However, none of these cases resolve the legal status of children conceived as a result of such a disposition.

V. THE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN

All of the cases in which a parent seeks to have a posthumously conceived child deemed the legal heir of a decedent father have been raised in the context of the child's elig ibility for Social Security benefits. Under the Social Security Act, a child is eligible for Social Security benefits if, *inter alia*, he or she would be treated as an insured person's natural child for the purposes of estate administration under the state law of intestate succession where the decedent was domiciled at the time of his death.[60] Not surprisingly, each case involves children conceived through different methods of assisted reproductive technology.

The question of the rights of posthumously conceived children was first raised in *Hart v. Shalala*.[61] In this case, Nancy Hart gave birth to a baby girl, Judith Hart, on June 4, 1991, approximately thirteen months after the death of Nancy's husband.[62] Judith was conceived three months after her father's death, by means of gamete intrafallopian transfer.[63]

Almost one year after Judith's birth, Nancy applied to the Social Security Administration for survivor' s benefits for her daughter; her claim was denied on several grounds.[64] First, Louisiana law limited "h eirs" to persons who were alive at the time of decedent's death, or born within three hundred days thereafter.[65] Obviously, Judith could not qualify, as she was born beyond this period. Second, Judith was deemed to be an illegitimate child, because the death of one spouse legally ends a marriage, and she was not born within statutory

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omitted). Otherwise, he asserts, "it would have engaged in an unconstitutional taking of a class of property in violation of the Fifth and Fourteenth Amendments to the Constitution." *Id.* (internal citations omitted).

[59] *See, e.g.*, J.B. v. M.B., 783 A.2d 707 (N.J. 2001); Kass v. Kass, 235 A.D.2d 150 (Supr. Ct. N.Y. 2000); Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

[60] *See* 42 U.S.C. §§ 402(d)(3) and 416(h)(2)(A); 20 C.F.R. § 404.355(a)(1); 20 C.F.R. § 404.361(a).

[61] No. 94-3944 (E.D. La. Dec. 12, 1994) (unpublished opinion); *see also* Banks, *supra* note 32, at 251-56; Kerekes, *supra* note 19, at 232-40; John L. Gordon, *Successive Rights of Posthumously Conceived Children*, 18 J. JUV. L. 84, 94-96 (1997); Chester, *supra* note 26, at 988-92.

[62] *See* Banks, *supra* note 32, at 251.

[63] *See id.*

[64] *See id.* at 251-52.

[65] *See id.* at 252 (citing LA. CIV. CODE ANN. arts. 934, 953, 954, 957 (West 1997)).

period thereafter.[66] As such, she was required to prove her paternity within one year after her father's death.[67] "She was unable to meet this requirement because she was only ten days old at the time the statute of limitations expired in her case, no birth certificate was available, and Mrs. Hart was unable to file a petition while recovering from childbirth."[68] Finally, Judith's father was unable to acknowledge her as his biological daughter before he died, because "she was in a frozen embryonic state when he died."[69] Nancy challenged this denial of benefits.

Although both Judith and Nancy were granted survivors' benefits by a hearing officer at the administrative level based on Judith's genetic tie to her father and evidence presented as to the father's contemplation of posthumous paternity, the Social Security Administration's Appeals Council overturned this decision.[70] Surprisingly, in 1996, while the case was in the United States District Court for the Eastern District of Louisiana:

> Social Security Commissioner Shirley S. Carter announced that survivor's benefits would be paid to Judith Hart upon return of the case from the court to the Social Security Administration. The Commissioner stated that the review and resolution of significant public policy issues raised by Hart, in light of "[r]ecent advances in modern medical practice, particularly in the field of reproductive medicine, . . . should involve the executive and legislative branches, rather than the courts.[71]

A New Jersey Superior Court decided the question of the legal status of children posthumously conceived through in vitro fertilization in *In the Matter of Kolacy*,[72] but did not resolve the application of Social Security Act provisions. In February 1994, William and Mariantonia Kolacy, a married couple, learned that William had leukemia.[73] Fearing that treatment would cause sterility, the couple arranged for William's sperm to be preserved at a sperm bank.[74] Unfortunately, William's leukemia led to his death. Almost a year later, the widow underwent an in vitro fertilization procedure that resulted in the birth of twin girls, slightly more than eighteen months after William had died.[75] The court accepted as true the widow's testimony that William Kolacy "unequivocally expressed his desire

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[66] *See id.*

[67] *See* Banks, *supra* note 32, at 252 (citing LA. CIV. CODE ANN. art. 209 (West 1997)).

[68] *See id.* (citations omitted).

[69] *Id.* at 253.

[70] *See id.* at 254.

[71] *Id.* at 255-56 (citing News Release from Shirley S. Carter, Commissioner of Social Security at 1 (Mar. 11, 1996)).

[72] 753 A.2d 1257 (Super. Ct. N.J. 2000).

[73] *Id.* at 1258.

[74] *Id.*

[75] *Id.*

that she use the stored sperm after his death to bear his children."[76]

Looking to general legislative intent of New Jersey probate law, the court articulated that, as a matter of course, posthumously conceived children should be granted the legal status of heirs of the decedent, unless doing so would impede the rights of other people or unduly burden the orderly administration of estates. [77] The court noted that there was no problem of estate administration in the instant case, or with the competing interests of other persons alive at the death of the twins' father, but opined that such situations might be accommodated should they pose an obstacle.[78] The court, concerned with the rights of such children, expressed that: "[O]nce a child has come into existence, she is a full-fledged human being and is entitled to all of the love, respect, dignity and legal protection which that status [as heir] requires." The court asserted "th at a fundamental policy of the law should be to enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons."[79]

The *Hart* and *Kolacy* cases are illustrative of the common plight of posthumously conceived children, and evince judicial and administrative empathy for these children's well being. Fortunately, in the *Woodward* case, the federal court deferred to the Massachusetts Supreme Judicial Court's resolution of the issue.

VI. *WOODWARD V. COMMISSIONER OF SOCIAL SERVICES*

Noting no American court of last resort had considered the question of posthumously conceived genetic children's inheritance rights,[80] the Supreme Judicial Court of Massachusetts answered the certified question as follows:

> In certain, limited circumstances, a child resulting from posthumous reproduction may enjoy the inheritance rights of "issu e" under the Massachusetts intestacy statute. These limited circumstances exist where, as a threshold matter, the surviving parent or the child's other legal representative demonstrates a genetic relationship between the child and the decedent. The survivor or representative must then establish both that the decedent affirmatively consented to posthumous conception and to the support of any resulting child.[81]

The court pointed out that no provision of the Massachusetts intestacy statute,

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[76] *Id.* at 1263.
[77] *Kolacy*, 753 A.2d at 1262.
[78] *See id.* at 1262.
[79] *Id.* at 1263.
[80] *See id.* at 261.
[81] *See id.* at 259.

most notably, the "posthumous children" provision,[82] limited "the class of posthumous children to those in utero at the time of the decedent's death."[83] However, the court expressed concern over the fact that "the act of procreation [is] now separated from coitus," so that some circumstances of posthumous reproduction "may conflict with the purposes of the intestacy law and implicate other firmly established State and individual interests."[84]

The court began its analysis with section 1 of the Massachusetts intestacy statute, which provides that "issue" of a decedent is entitled to inherit a fixed portion of the decedent's estate subject to the rights of the surviving spouse and certain other debts and expenses.[85] The statute does not define the term "issue,"[86] though the term is generally understood to mean "all lineal (genetic) descendants, and now includes both marital and nonmarital descendants."[87]

Since the language of the statute itself did not provide any definitive guidance, the court considered "whether and to what extent [posthumously conceived] children may take as intestate heirs of the deceased genetic parent *consistent with the purposes of the intestacy statute*."[88] The court addressed three strong state interests that it found implicated by this question: (1) the promotion of a child's best interests; (2) the state's interest in orderly administration of decedents' estates; and (3) the genetic parent's reproductive rights. Each of these interests will be discussed in turn.

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[82] *See* MASS. GEN. LAWS ch. 190, § 8 (1936).

[83] *Woodward*, 435 N.E.2d at 262, 264. At common law, generally, intestate heirs are determined at the date of death. *See* National Shawmut Bank v. Joy, 53 N.E.2d 113 (1944); Gorey v. Guarente, 22 N.E.2d 99 (1939). The applicable exception to that common law rule is that children born within a reasonable gestation period after the death of a parent may inherit as children of the deceased. *See* Bowen v. Hoxie, 137 Mass. 527, 528-29 (1884). The court stressed that the statute itself was dispositive of a posthumous child's rights, and superseded any Massachusetts common law on the subject. *See Woodward*, 760 N.E.2d at 262-63 (citing Cassidy v. Truscott, 192 N.E. 164 (1934)). Other states have adopted provisions to address this exact problem. A North Dakota law declares that "[a] person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception." N.D. CENT. CODE ANN. 14-18-04 (2001). However, even a statute such as this leaves open the question of parentage in cases of in vitro fertilization, if "conception" occurs before the parent's death.

[84] *See id.* at 262.

[85] *See* MASS. GEN. LAWS ch. 190, § 1.

[86] *See Woodward*, 760 N.E.2d at 263.

[87] *See id.* (citing S.M. DUNPHY, PROBATE LAW AND PRACTICE § 8.5, at 123 (2d ed. 1997 & Supp. 2001) and cases cited therein). Nonmarital children, archaically referred to as "illegitimate" children, those born to parents who are not married to each other, were historically granted less protection than marital children under intestacy statutes. *See id.* at 263 n.12.

[88] *Woodward*, 760 N.E.2d at 264 (emphasis added).

A. The Best Interests of the Child

The court asserted that the promotion of the "b est interests" of children is of paramount concern to the Massachusetts legislature.[89] "Rep eatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be 'entitled to the same rights and protections of the law' regardless of the accidents of their birth."[90] The court found the legislature's failure to restrict the intestacy rights of posthumously conceived children to be a significant factor in its decision, because reproductive technologies have been broadly known and practiced for decades.[91] In fact, "th e Legislature has in great measure affirmatively supported the assisted reproductive technologies that are the only means by which these children can come into being."[92] The court refused to ascribe to the Legislature "the in herently irrational conclusion" that children born as a result of reproductive technologies should be afforded less protection under the law than other children.[93] The court assumed a legislative intent to afford equal entitlement for inheritance purposes to posthumously conceived children and those conceived before a parent's death, wherever possible.[94] For, although "[p]osthumously conceived children may not come into the world the way the majority of children do[,] they are children nonetheless."[95]

B. Orderly Administration of Estates

However, according to the court, the best interests of the posthumously conceived child, while of significant import, are not dispositive.[96] The court determined that affording a right of inheritance to all posthumously conceived children "in an era in which serial marriages, serial families, and blended families are not uncommon" could potentially "p it child against child and family against family."[97] Further, it would interfere with the orderly administration of estates, by imposing uncertainty on heirs and creditors of a given decedent's

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[89] *See id.* at 265. *See also* L.W.K. v. E.R.C., 735 N.E.2d 359 (Mass. 2000) ("The protection of minor children, most especially those who may be stigmatized by their 'illegitimate' status . . . has been the hallmark of legislative action and jurisprudence of this court.").

[90] *Woodward*, 760 N.E.2d at 265 (citing MASS. GEN.LAWS ch. 209C, § 1).

[91] *See id.* "[T]he Legislature has not acted to narrow the broad statutory class of posthumous children. . . ." *Id.*

[92] *Id.* (citing MASS. GEN. LAWS ch. 46, § 4b (artificial insemination of married woman); MASS. GEN. LAWS ch. 175, § 47H; MASS. GEN. LAWS ch. 176A. § 8K; MASS. GEN. LAWS ch. 176G, § 4 (insurance coverage for infertility treatments)).

[93] *See Woodward*, 760 N.E.2d at 265.

[94] *See id.* at 266.

[95] *Id.*

[96] *Id.*

[97] *Id.*

estate.[98] The court determined that the intestacy statute furthers the legislature's goals in two ways: (1) by requiring proof of the lineal relation between a decedent and his heirs and (2) by establishing a statute of limitations for claims against the estate.[99]

Pursuant to the Massachusetts intestacy statute, "absent the father's acknowledgment of paternity, or marriage to the mother, a nonmarital child must obtain a judicial determination of paternity as a prerequisite to succeeding to a portion of the decedent's estate."[100] The issue of "nonmarital" descendants becomes relevant in this case, because the death of one spouse to a marriage legally terminates the marriage.[101] Thereby, any child conceived, or presumably born, posthumously will always be a nonmarital child.[102] Due to the inherent circumstances of a posthumously conceived child's position, an acknowledgment of parentage cannot be accomplished before the death of the parent, so such a child must procure a judgment of paternity.[103] The court dismissed the problem of posthumous paternity disputes, articulating that "sophisticated modern testing techniques now make the determination of genetic paternity accurate and reliable."[104] Although proof of filiation satisfies the first prong of the court's test, it must still be shown that the decedent intended to parent posthumously.

C. Reproductive Rights of the Decedent Parent

The court did not address Lauren Woodward's claim that *her* reproductive rights would be infringed by denial of inheritance rights to her children, asserting that "[n]othing in the record even remotely suggests that she was prevented by the State from choosing to conceive children using her deceased husband's semen."[105] However, the reproductive rights of the deceased parent, certainly more complicated, were discussed at length.[106]

In fashioning the consent requirement, the court relied on *A.Z. v. B.Z.*,[107] for

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[98] *See Woodward*, 760 N.E.2d at 266 (citing S.M. DUNLPHY, PROBATE AND PRACTICE § 8.1, at 115 (2d ed. 1997)).

[99] *See id.*

[100] *Id.*

[101] *See id.* at 266 (citing Callow v. Thomas, 78 N.E.2d 637 (1948); Rawson v. Rawson, 31 N.E. 653 (1892)).

[102] *See id.* at 267.

[103] *See Woodward*, 760 N.E.2d at 267.

[104] *Id.* (citing Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747 (1994)).

[105] *See id.* at 268.

[106] *See id.* at 269-70.

[107] 725 N.E.2d 1051 (2000). This case involved a contractual dispute between a divorced couple as to the wife's use of frozen preembryos, which were created with the wife's egg and the husband's sperm during their marriage. The court held that "forced procreation is not an area amenable to judicial enforcement." *Woodward*, 760 N.E.2d at

the proposition that "in dividuals have a protected right to control the use of their gametes."[108] Accordingly, the court determined that "a decedent's silence, or his equivocal indications of a desire to parent posthumously, ought not to be construed as consent. The prospective donor parent must clearly and unequivocally consent, not only to posthumous reproduction but also to the support of any resulting child."[109] The court placed the burden of proving the unequivocal, affirmative consent of the decedent to posthumous conception and support of the child on the surviving parent.[110]

This two-fold consent requirement is necessary to ensure that intestacy law's goal of preventing fraudulent claims will be satisfied.[111] As the court explained:

> A man, for example, may preserve his semen for myriad reasons, including, among others: to reproduce after recovery from medical treatment, to reproduce after an event that leaves him sterile, or to reproduce when his spouse has a genetic disorder or otherwise cannot have or safely bear children. That a man has medically preserved his gametes for use by his spouse thus may indicate only that he wished to reproduce after some contingency while he was alive, and not that he consented to the different circumstance of creating a child after his death.[112]

The court noted that the uncertainty in ascertaining a donor's intent is exacerbated by the fact that "med ically preserved semen can remain viable for up to ten years after it was first extracted, long after the original decision to preserve the semen has passed and when such changed circumstances as divorce, remarriage, and a second family may have intervened."[113] The court's test is remarkably sensitive to the interests of the parties involved, and is sufficiently tailored to preserve the interests of intended posthumously conceived children, while proscribing "forced" parentage.

VII. LIKELY OUTCOME OF THE *WOODWARD* CASE: THE FUTURE OF TECHNOLOGICALLY-CONCEIVED CHILDREN

Will Lauren Woodward be able to prove that: (1) Michayla and Mackenzie are the genetic children of Warren Woodward; (2) Warren consented to father children posthumously; and (3) he affirmatively agreed to support them? The

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269 (internal quotations omitted).

[108] *Woodward*, 760 N.E.2d at 269. The court uses the word "game te" to mean "'a ny germ cell, whether ovum or spermatozoon.' " *Id.* at 261 n.7 (quoting STEDMAN'S MEDICAL DICTIONARY 710 (26th ed. 1995)).

[109] *Id.* at 269 (internal citations and quotation marks omitted).

[110] *See id.*

[111] *See id.* at 270.

[112] *Woodward*, 760 N.E.2d at 270.

[113] *Id.*

court did not specify "what proof would be sufficient to establish a successful claim under [Massachusetts] intestacy law on behalf of a posthumously conceived child."[114]

Proving the genetic link between a decedent parent and a posthumously conceived child is not likely to be a difficult hurdle for a surviving parent to clear. As the court articulated, "sophisticated modern testing techniques now make the determination of genetic paternity accurate and reliable."[115] Regardless, it was undisputed in this case, that Warren Woodward is the genetic father of Michayla and Mackenzie.[116]

More problematic for Ms. Woodward will be proving that Warren affirmatively consented to the creation and support of the twins. "Perhaps because the law was unsettled at the time, the wife's counsel took the position that the paternity judgment and the birth certificates were sufficient, and that no further evidence was required."[117] However, it is clear that these items, alone, are not sufficient in this case. The *Woodward* court criticized the Probate Court for entering the judgment of paternity, and rejected that judgment's sufficiency as proof of legal parentage.[118] The court asserted that the Probate judge should not have considered the voluntary acknowledgment of parentage executed by Ms. Woodward on behalf of herself, as mother, and her deceased husband, as administratrix of Warren's estate, "much less grounded his paternity judgment on them."[119] Further, while acknowledging that "a birth certificate is prima facie evidence of the facts recorded therein," the court contended that "genetic and legal parentage are not always coterminous."[120] The court indicated that proof of Warren's consent was scant on the existing factual record,[121] but provided that Ms. Woodward "may come forward with other evidence as to her husband's consent to posthumously conceive children" in the district court.[122] The question remains: what evidence will be sufficient to prove consent?

It is likely that a provision in the decedent's will, or other writing, could suffice to prove affirmative consent to posthumous conception. Although not addressing the same issue, in the *Hecht* case, for example, the decedent indicated in his will his consent to posthumously conceive.[123] In a portion entitled "Statement of Wishes," the decedent articulated:

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[114] *Id.*

[115] *Id.* (citing Note, *supra* note 105, at 747).

[116] *See id.* at 271.

[117] *Id.*

[118] *Woodward*, 760 N.E.2d at 271-72.

[119] *Id.* at 272. The court maintained that "[n]either the statutory powers granted to administrators, not the Massachusetts intestacy and paternity laws permit such procedures to establish paternity." *Id.* (internal citations omitted).

[120] *Id.* at 271.

[121] *See id.* at 271 n.24.

[122] *Woodward*, 760 N.E.2d at 271.

[123] *Hecht*, 16 Cal. App.4th at 840.

> It being my intention that samples of my sperm will be stored at a sperm bank for the use of Deborah Ellen Hecht, should she so desire, it is my wish that, should [Hecht] become impregnated with my sperm, before or after my death, she disregard the wishes expressed in Paragraph 3 above [pertaining to disposition of decedent's "d iplomas and framed mementoes,"] to the extent that she wishes to preserve any or all of my mementoes and diplomas and the like for our future child or children.[124]

Further, the decedent wrote a bizarre signed letter, stating:

> I address this to my children, because, although I have only two, Everett and Katy, it may be that Deborah will decide—as I hope she will—to have a child by me after my death. I'v e been assiduously generating frozen sperm samples for that eventuality. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born.[125]

Although written declarations of this type may be sufficient evidence, under the *Woodward* decision, to prove consent to posthumous paternity, it is not clear whether they would be sufficient to indicate consent to support any resulting children. Would the fact that the decedent in *Hecht* left the vast majority of his estate to the woman he hoped would conceive his child, and provided for sentimental gifts to his prospective posthumous children[126] be sufficient evidence of intent to support? The *Woodward* decision is sufficiently narrowly tailored so as to protect adequately the rights of intended posthumous children of a decedent while discouraging socially irresponsible behavior by grieving spouses. However, as a matter of great social and political concern, the rights of posthumously conceived children would be better addressed at the legislative, rather than judicial level.

VIII. A POSSIBLE LEGISLATIVE REMEDY?

The Massachusetts legislature should address the rights of posthumously conceived children. The *Woodward* Court, itself suggested that the legislature, rather than the judiciary should resolve the rights of children conceived with the aid of reproductive technologies.[127] As it articulated:

> As these [reproductive] technologies advance, the number of children they produce will continue to multiply. So, too, will the complex moral, legal,

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[124] *Id.* (brackets in original).
[125] *Id.* at 841.
[126] *See id.* at 840-41.
[127] *See Woodward*, 760 N.E.2d at 272.

> social, and ethical questions that surround their birth. The questions present in this case cry out for lengthy, careful examination outside the adversary process, which can only address the specific circumstances of each controversy that presents itself. They demand a comprehensive response reflecting the considered will of the people.[128]

One commentator points to the Uniform Status of Children of Assisted Conception Act (USCACA), as the "most relevant legislative initiative thus far determining the relational status of posthumously conceived children. . . ."[129] Section 4(b) of USCACA provides that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[130] The purpose of this section was to:

> [P]rovide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. [This section is meant to] deal with procreation by those who are married to each other. It is designed to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so.[131]

The USCACA has no legal effect unless a state elects to adopt its provisions. The legislatures of only several states, however, have enacted similar legislation.[132]

For example, Florida law provides that a "child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child had been provided for by the decedent's will."[133] Similarly, Texas law provides that "[i]f a spouse dies before the placement of eggs, sperm, or embryos, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death the deceased spouse would be a parent of the child."[134] North Dakota law, on the other hand, cuts off all inheritance rights

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[128] *Id.*

[129] Banks, *supra* note 32, at 290-91.

[130] Uniform Status of Children of Assisted Conception Act § 4(b), 9B U.L.A. 186, 189-90 (Supp. 1996).

[131] *Id.* at 190.

[132] *See* N.D. CENT. CODE § 14-18-04 (2001); FLA. STAT. ANN. § 742.17 (2001); TEX. FAM. CODE § 160.707 (2002); VA. CODE ANN. §§ 20-158 (2001).

[133] FLA. STAT. ANN. § 742.17.

[134] TEX. FAM. CODE § 160.707.

for posthumously conceived children.[135] It provides that "[a] person who dies before a conception using that person's sperm or egg is not a parent of any resulting child born of the conception."[136] Virginia law is a bit more comprehensive, and addresses the parentage of children posthumously conceived through the use of both artificial insemination and in vitro fertilization.[137]

All of these laws evince an increasing legislative inclination to promote individuals' reproductive liberties, limited by the intent of the deceased parent, in determining the legal status and/or rights of children resulting from assisted reproductive technology.[138] Although the available reproductive technologies may soon surpass the situations provided for by these statutes, legislative enactment reflects the will of the people, and may be amended as the state's citizens see fit. Judicial decisions address only the rights and interests of the parties to the instant case, while a legislature is able to weigh many more social, political and legal concerns. A comprehensive legislative scheme would provide certainty and predictability for families contemplating posthumous conception.

IX. CONCLUSION

Current laws addressing posthumously *born* children are inadequate for dealing with the problems faced by posthumously *conceived* children. In order for a child to qualify as an heir under the three-hundred day common law presumption, a grieving widow would have to become impregnated by her deceased husband's sperm within the month following his death. The medical advances that prolong the viability of reproductive materials and the ability of a decedent to dispose of such reproductive materials at his or her death enable surviving spouses or partners to posthumously conceive for many years following such disposition. Artificial insemination and in vitro fertilization, among others, have made the creation of posthumously conceived children a widespread social reality that should be dealt with at the legislative level.

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[135] N.D. CENT. CODE § 14-18-04 ; TEX. FAM. CODE § 160.707.

[136] N.D. CENT. CODE § 14-18-04 (2001).

[137] VA. CODE ANN. §§ 20-158. The law provides:

> B. Death of a Spouse. —Any child resulting from the insemination of a wife's ovum using her husband's sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.
>
> However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person's spouse, is not the parent of any resulting child, unless (i) implantation occurs before notice of death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation.

Id. See also Chester, *supra* note 26, at 1007-08

[138] *See* Banks, *supra* note 32, at 292.

Posthumously conceived children face a long battle under the current ad hoc intestate succession law. The carefully tailored *Woodward* opinion resolves some difficult, though not uncommon issues, in an era where advances in reproductive technologies far outpace judicial and legislative consideration of their implications. The significant weight that the Supreme Judicial Court places on the best interests of the posthumously conceived child evinces the court's recognition that these children have no control over the circumstances of their conception, and therefore, should not be disadvantaged by the perhaps, socially irresponsible choices of their parents.

Further, the court's recognition of the decedent parent's reproductive choices, and the reasonable, two-fold consent requirement evince reluctance to bind a decedent's estate through "forced" reproduction. Although Lauren Woodward may not be able to furnish the requisite proof of her husband's consent to father posthumously and support any resulting offspring, the court's opinion furnishes future posthumous parents with reasonably clear guidelines to provide for their children's well being and support.

However, because advances in modern reproductive technology have created myriad possibilities for posthumous conception and surely other problems yet to arise, the legislature needs to address the prospective issues that may emanate from this new technology. Legislation in several states specifically addressing the issue of posthumously conceived children provides certainty and predictability for persons planning to have children posthumously. The Massachusetts legislature should follow their lead, and enact a comprehensive scheme that clearly delineates the rights and responsibilities of all parties involved, reflecting the considered will of the people.

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