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INTRODUCING THE NEXT CLASS OF BASTARD: AN ASSESSMENT OF THE DEFINITIONAL IMPLICATIONS OF THE SUCCESSION LAW REFORM ACT FOR AFTER-BORN CHILDREN

Courtney Retter

Abstract: *After-born children are anachronistic aberrations. Defying any commonsense notion of procreation, an after-born child is conceived after the death of its parent. While a remarkable feat for reproductive medical science, posthumously conceived children push the boundaries of existing laws, creating problems previous generations of lawmakers did not need to consider. This article examines the challenges posed by after-born children in the area of intestate succession law. More specifically, using the province of Ontario as a case study, this article argues that the definitions of “child” and “issue” in the Succession Law Reform Act [“SLRA”] subject after-born children to inheritance-related deprivations on the basis of birth status alone. Creating a new class of bastard, this article argues that discriminating against a group of children for no reason above and beyond the way in which they came into this world is reminiscent of Canada’s treatment of children born out of wedlock in the previous century. In order to contextualize the discrimination potentially faced by the after-born, this article begins by examining the legal deprivations resulting from legislation passed in Ontario condemning children born out of wedlock to illegitimate status in the past. No court in Ontario — or Canada at large — has yet had the opportunity to consider the inheritance rights of after-born children. Consequently, the article follows with a comparative analysis of the statutes and case law on point in the United States, United Kingdom, and Australia; it does so in order to evaluate the various interests at stake should Ontario choose to reform the SLRA.*

*Why bastard? wherefore base?
When my dimensions are as well compact,
My mind as generous, and my shape as true,
As honest madam's issue? Why brand they us
With base? with baseness? bastardy? base,
base?*¹

— Edmund, *King Lear*, Act I, Scene II

INTRODUCTION

Representations of bastard children as “threatening pretender[s] to the legal family’s property” have a rich and complicated history in both literature and law.² In fact, the archetype of the bastard as private property usurper can trace its origins all the way back to the Old Testament. In *Judges*, the story is told of Gideon, a man with “threescore and ten sons of his body begotten: for he had many wives.”³ Gideon additionally kept a concubine who bore him a son, whom he named Abimelech. After his father’s passing, Abimelech — an ambitious man

¹ William Shakespeare, *King Lear*, ed by Jonathan Bate and Eric Rasmussen (New York: Modern Library, 2009). The bastard as usurper and murderer is an archetype that appears, time and time again, in European literature. In *King Lear*, Edmund is the main antagonist of the play. As the illegitimate son of the Earl of Gloucester, and younger brother to Edgar, the Earl’s legitimate son, Edmund resolves to become Earl himself by escaping the rules of primogeniture and getting rid of both his brother and father.

² Lisa Zunshine, *Bastards and Foundlings: Illegitimacy in Eighteenth-Century England* (Columbus: The Ohio State University Press, 2005) at 2. The author provides a compelling interdisciplinary study of the multiplicity of cultural meanings attached to illegitimacy during the English Enlightenment; Zunshine places a special emphasis on interpretations of bastardy in “canonical” texts, including Jane Austen’s *Emma* and Henry Fielding’s *Tom Jones*.

³ *Judges* 8: 30-31.

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who wanted nothing less than the title of King of Israel — murdered all but one of his brothers on his path to usurp the throne:

Abimelech hired vain and light persons, which followed him. And he went unto his father's house at Ophrah, and slew his brethren the sons of [Gideon] . . . , upon one stone.⁴

Abimelech is a legendary “proto-bastard”; he symbolizes primary qualities that have come to be associated with bastard children over time, namely, parricide, murder, and usurpation.⁵ In other words, the belief that bastards are, quite simply, very bad people is well documented in fabled stories and legends. The consequences of those beliefs, however, transcend fictional narratives and biblical cautionary tales. Indeed, hostile feelings towards bastards legislated into law create real disabilities related to lineage, maintenance and support, and inheritance rights.⁶

In its contemporary usage, the word ‘bastard’ is a “term of abuse, almost a swear word”; it is more often used “insultingly and metaphorically,” than as a reference to its literal or legal ascriptions.⁷ In law, however, the word ‘bastard’ constituted a barometer for legitimacy; it reflected and reinforced the traditional Christian belief that “premarital and extramarital sexuality were sinful.”⁸ In short, bastards were the

⁴ *Ibid* at 9: 4-5.

⁵ Jenny Teichman, *Illegitimacy: An Examination of Bastardy* (Ithaca: Cornell University Press, 1982) at 127.

⁶ Teichman, *supra* note 5 at 103.

⁷ *Ibid* at 126.

⁸ Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969* (Toronto: University of Toronto Press, 2007) at 14.

illegitimate product of sin; for not only “[were they] begotten, [they were] born out of matrimony.”⁹ In consequence of their illegitimate legal birth status, bastards were determined to be *filius nullius*, or, the child of no one at common law. And, despite the “obvious [biological] absurdity” of implying that a child has no relations or kin, it demonstrates the “primacy of legally sanctioned social norms over the alleged facts of biology and birth.”¹⁰

This paper seeks to disentangle legally sanctioned social norms related to biological procreation and birth; it will do so by arguing that a new generation of bastards has recently been created in law. More specifically, while the last century has seen a progressive mitigation of the social and economic consequences of illegitimacy for children in Canada,¹¹ legal deprivations related to birth status continue to exist for particular classes of children. As a result, this paper will focus exclusively on one such class, namely, posthumously conceived children — otherwise known as the “after-born child” in law.¹²

After-born children are anachronistic aberrations; indeed, undermining any commonsense understanding of procreation, a posthumous child is conceived *after* the death of

⁹ Sir W Blackstone, *Commentaries on the Laws of England* (New York: Wildly and Sons, 1967) at 454.

¹⁰ Roxanne Mykitiuk, “Beyond Conception: Legal Determinations of Filiation in the Context of Assisted Reproductive Technologies” (2002) 39:4 Osgoode Hall LJ 771 at 782.

¹¹ Chambers, *supra* note 8 at 3. Alberta was the last province to abolish the legal status of illegitimacy in Canada; it did so in 1991 (*Hilstad Estate*, [2008] ABQB 570 at para 9).

¹² Charles P Kindregan Jr, “Dead Dads: Thawing an Heir from the Freezer” (2009) 35 Wm Mitchell L Rev 433 at 434.

one of its biological parents.¹³ In consequence of recent developments in reproductive technology, which enable the cryopreservation of human gametes, the concept of a “fertile decedent” has, quite literally, sprung to life. While a remarkable achievement for reproductive medical science, this *sui generis* category of children “push[es] the bounds of existing laws,” creating problems previous generations of lawmakers did not need to consider.¹⁴ For instance, two preliminary questions raised by the complicated nature of the conception of after-born children include, firstly, whether or not an after-born child can legally be classified as the child of his or her deceased biological donor parent, and secondly, if an after-born child can legally be classified as the child of a decedent, does he or she have the right to inherit from that deceased parent’s estate?¹⁵

This paper will focus on the inheritance rights of posthumously conceived children.¹⁶ And, to further narrow its

¹³ *Ibid.*

¹⁴ Kristen M Benvenuti Pytel, “Left Out No Longer: A Call for Advancement in Legislation for Posthumously Conceived Children” (Fall 2009/Winter 2010) 11 *JL & Soc’y* 70 at 71.

¹⁵ Jenna M F Suppon, “Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children” (2010) 48 *Fam Cts L Rev* 228 at 229.

¹⁶ Interestingly, some authors argue that, because the law holds that death ends a marriage, it would be reasonable for the law to treat posthumously conceived children as if they were non-marital children. Browne C. Lewis, for instance, posits that it would “bring clarity to the situation because every state has an intestacy statute specifically dealing with the inheritance rights of non-marital children.” Not a single court or legislature, however, which has considered the inheritance rights of posthumously conceived children, has decided to follow that route. Browne C Lewis, “Dead Men Reproducing: Responding to the Existence of After Death Children” (2009) 16 *Geo Mason L Rev* 403 at 411.

scope, the paper will limit its analysis to [a] fact patterns involving women using the cryopreserved sperm of their deceased husband or common law partner, [b] situations of intestate succession, and [c] the province of Ontario.

To be clear, there are a variety of circumstances in which individuals seek to procreate using the gametes of a deceased donor. Indeed, posthumous conception fact patterns are not exclusively represented by situations whereby a recently widowed woman uses the cryopreserved sperm of her deceased husband to produce a child. For starters, while the practice is remarkably less common, conception can also occur by using the preserved egg of a deceased woman.¹⁷ For instance, there are scenarios involving husbands seeking to retrieve the eggs of their wives who are recently “deceased, brain-dead, or in a coma or persistent vegetative state.”¹⁸ Furthermore, posthumous conception does not necessarily occur in the context of an opposite-sex relationship,¹⁹ nor is it

¹⁷ “Egg freezing is a relatively recent scientific breakthrough and is still considered experimental. It’s estimated that between 100 to 200 babies have been born from frozen eggs [worldwide]”. Ruth Zafran, “Dying to Be a Father: Legal Paternity in Cases of Posthumous Conception” (2007) 8 *Houston Journal of Health Law & Policy* 47 at 54-55.

¹⁸ Morgan Kirkland Wood, “It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children” (2010) 44 *Ga L Rev* 873 at 878. “Egg donation is significantly more onerous and dangerous than sperm donation because ova can only be retrieved surgically from a woman’s ovaries. Further, the difficulties associated with freezing ova means that egg donation is generally restricted to fresh ova which results in fewer ova and poses greater risk of contracting body-fluid bone pathogens, such as HIV”: Angela Cameron, Vanessa Gruben & Fiona Kelly, “De-Anonymising Sperm Donors in Canada: Some Doubts and Directions” (2010) 26 *Can J Fam L* 95 at 100.

¹⁹ In 2005, the *Civil Marriage Act*, SC 2005 c 33 was enacted making it possible for same-sex couples across Canada to marry civilly.

automatically confined to scenarios where the deceased donor was formerly married to or in a common law relationship with the individual seeking to use their gametes posthumously.²⁰ In fact, for many Canadians, including infertile opposite-sex couples, same-sex couples, and single women, anonymous sperm donation constitutes the primary method for establishing a family.²¹

The decision to focus exclusively on one fact pattern, namely, women conceiving children with the sperm of their deceased husband or common law partner — in other words, a *known* male genetic progenitor — largely reflects three factual realities. First, a majority of cases litigated in the context of inheritance rights for after-born children to date involve women seeking the right to use the sperm of their deceased

“[S]ame-sex couples are recognized within Canadian family law on footing identical to that for opposite-sex couples. . . . Canada’s recognition of same-sex couples has put it . . . at the cutting edge of family developments”. Robert Leckey, “Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past” (2009) 15:8 IRPP Choices 44 at 15.

²⁰ Between the 2001 and 2006 censuses, the number of “unmarried-couple families grew by nearly one-fifth (18.9%), a rate more than five times faster than that for married couples” By 2006, unmarried-couple families accounted for 15.5% of all census families. *Ibid* at 13.

²¹ Kelly D Jordan, “Annotation: *Pratten v. British Columbia (Attorney General)*” (2011) 99 RFL (6th) 411 at 411. Surrogacy arrangements also make it possible for same-sex couples and opposite-sex couples to conceive a child posthumously. A surrogacy arrangement involves a woman (i.e. the surrogate mother) agreeing to carry a child to term for another individual or couple. For instance, a gay couple could rely on a surrogate to have a child using a donated egg and one of the men’s donated sperm. The laws governing surrogacy are complex in Canada and raise a host of legal questions related to posthumously conceived children that are beyond the scope of this article. See Malcolm Dort, “Unheard Voices: Adoption Narratives of Same-Sex Male Couples” (2010) Can J Fam L 289.

husband or common law partner to reproduce. Second, there are significant gendered differences between sperm and egg donation that warrant individualized attention that is not possible in a single paper.²² And third, several of the statutes thus far enacted which deal explicitly with the inheritance rights of posthumously conceived children incorporate conditional language premised on surviving spouses in marriage or marriage-like relationships.²³ In short, while there are a myriad of ways in which after-born children can come into this world, the courts and legislatures have overwhelmingly been exposed to only one such scenario.²⁴

²² See Cameron, Gruben & Kelly, *supra* note 18 at 98.

²³ Alberta Law Reform Institute, *Succession and Posthumously Conceived Children* (Report # 23, January 2012) at 17 [ALRI].

²⁴ The rights of posthumously conceived children have been considered — albeit exceptionally — in scenarios that are different from the traditional fact pattern outlined above. For instance, in an internationally precedent setting case, an Israeli court ruled that a family could extract the eggs from the ovaries of their deceased daughter after she was killed in a car accident; the court granted the family's petition to have her eggs harvested and frozen: "Dead Girl's Eggs Can be Taken", *The [Montreal] Gazette* (9 August 2011) online: <montrealgazette.com>. This decision departs dramatically from the posthumous reproduction guidelines published in Israel in 2003. Indeed, after consulting with medical, legal, bioethics, and Jewish law experts, the attorney general established guidelines based on the assumption that "a man who lived in a loving relationship with a woman would want her to have his genetic child after his death even if he never had the opportunity to formally express such a desire": Vardit Ravitsky, "Posthumous Reproduction Guidelines in Israel" (2004) 34:2 *The Hastings Center Report* 6 at 6-7. The guidelines limited the approval of posthumous requests to female ex-partners and denied rights to any other party, including a deceased's parents. Furthermore, the guidelines authorized courts to allow the extraction of sperm from the cadaver of a recently deceased man even in the absence of his explicit consent. This presumed consent guideline was justified on the basis that, as a deceased man, the

The other stated analytical restrictions in this paper, namely, intestate succession in the province of Ontario, are also representative of three factual realities. First, posthumously conceived children challenge the definitions of both “child” and “issue” under Ontario’s *Succession Law Reform Act* [“*SLRA*”].²⁵ Second, the entitlement of after-born children to take on an intestacy has yet to be litigated in the Ontario courts.²⁶ In fact, *no* court in Canada has yet had the opportunity to consider the inheritance rights of after-born children. The decision to focus on Ontario, however, is in large part related to the author’s desire to examine a single legislative scheme comprehensively; statutes and case law outside of Ontario, however, including jurisdictions outside of Canada, will additionally be examined for comparative purposes. Third, the discrimination of children on the basis of birth status has a particularly long and fascinating legislative history in Ontario. Consequently, by comparing the legal treatment of bastards in the previous century with the deprivations potentially to be experienced by after-born children today, the paper will anchor its discussion of discrimination on the basis of birth status and

decendent would not be coerced into taking on parental obligations; while a posthumously conceived child could be registered legally as the child of the deceased, such registration would not entail that he or she be entitled to inheritance rights.

²⁵ *Succession Law Reform Act*, RSO 1990, c S.26 at s 1.1 [SLRA]. The statutory definition of “child” under the *SLRA* includes, “a child conceived before and born alive after the parent’s death”; an “issue” includes, “a descendant conceived before and born alive after the person’s death.” The implications of the *SLRA*’s definitions of both “child” and “issue” will be discussed at length in Section III, *infra* note 154.

²⁶ Clare E. Burns & Anastasia Sumakova, “Mission Impossible: Estate Planning and Assisted Human Reproduction” (2010) 60 ETR (3d) 59.

argue that, absent legislative reform, after-born children will unnecessarily be deprived of intestate inheritance rights.²⁷

This paper does not seek to argue, however, that the experiences of bastard children in the past are an uncanny reflection of those to be had by after-born children today. More specifically, despite the parallels that can be drawn between bastards and after-born children, the overall analogy is less than perfectly compatible and can only be extended so far. In fact, in addition to inheritance-related deprivations, posthumously conceived children are, by definition, born into single-parent or step/blended families — alternative family forms, in other words, that are each equipped with their own set of social obstacles and legal hurdles.²⁸ The policy implications of these barriers, therefore, will also be addressed, albeit briefly and tangentially, in this paper.

The paper will begin by introducing posthumous conception and outlining the reasons for which it is used (Section I). In order to contextualize the discrimination potentially faced by after-born children, the paper will follow with an examination of [a] the evolution of legislation passed in Ontario condemning children born out of wedlock to illegitimate status, and [b] the legal deprivations resulting from such laws (Section II). The paper will proceed by introducing the legislative scheme of the *SLRA* and addressing the definitional legal issues posed by after-born children (Section III). The paper will conclude by examining “the sparse case law on point, and the few statutes [enacted]” that specifically address the inheritance rights of posthumously conceived

²⁷ Chambers, *supra* note 8.

²⁸ Manitoba Law Reform Commission, *Posthumously Conceived Children: Intestate Succession and Dependents Relief* (Report # 118, November 2008) at 16 [MLRC].

children;²⁹ it will do so in order to evaluate the various interests at stake should Ontario choose to reform the *SLRA* (Section IV).

**SECTION I:
‘DEADBEAT DADS: AFTER-BORN CHILDREN AND
CREATING LIFE FROM THE GRAVE**

After-born children are created through unconventional means, brought up in non-traditional family structures, and confront statutory regimes that never anticipated the likelihood of their existence. The following section, as a result, seeks to provide background information on the circumstances that made it possible for deceased biological donor parents to create life from their graves. Specifically, this section will consider: [a] the origins of cryopreservation, [b] the definition of an after-born child, and [c] the families in which posthumously conceived children are born into.

The Origins of Cryopreservation

On January 26th, 2003, as war with Iraq loomed and thousands of American soldiers were preparing to be deployed to the Middle East, *USA Today* published an article describing a modern-day, unconventional pre-departure ritual of the troops, namely, banking their sperm before shipping out:³⁰

[Some soldiers] say it's fear of infertility, not death, that [leads] them to a room in a cryonics lab, where they produc[e] semen [. . .] [to be]

²⁹ Morgan Kirkland Wood, “It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children” (2010) 44 Ga L Rev 873 at 880.

³⁰ Valerie Alvord, “Some Troops Freeze Sperm Before Deploying”, *USA Today* (27 January 2003) 1A at 1A.

frozen in liquid nitrogen. The men must designate who will take custody of the sperm in the event of their death.³¹

For many soldiers, the fear of exposure to chemical or biological weapons, and its potential harm on their reproductive systems, served as the catalyst for visiting a sperm bank and freezing their semen before deployment.³² Cryopreservation — or, the assisted reproductive technology method of freezing sperm in nitrogen — has made it possible for men to preserve their genetic material for subsequent use.³³ Changing traditional conceptions of the order of steps required for human procreation, the process of cryopreservation was only successfully performed for the first time in 1949.³⁴

Men have been freezing their sperm for decades. Indeed, after scientific experiments determined that [a] the addition of a small amount of glycerol before freezing would increase the survival rate of sperm, and [b] sperm could be preserved for tens, possibly hundreds of years, the scientific community began recommending that widows use their husbands' frozen sperm to produce children if they were killed in battle.³⁵ In the 1960s, the cryopreservation of sperm was

³¹ *Ibid.*

³² Kindregan Jr, *supra* note 12 at 436. Soldiers are not the only men who bank their sperm; additional candidates include, but are not limited to, cancer patients whose treatments may render them sterile or athletes predisposed to groin injuries.

³³ Robert Matthew Harper, “Dead Hand Problem: Why New York’s Estates, Powers and Trusts Law Should be Amended to Treat Posthumously Conceived Children as Decedents’ Issue and Descendants” (2008) 21 Quinipiac Prob LJ 267 at 270.

³⁴ *Ibid.*

³⁵ Sheri Gilbert, “Fatherhood from the Grave: An Analysis of Postmortem Insemination” (1993) 22 Hofstra L Rev 521 at 525. The

made available to Apollo astronauts, thus ensuring the possibility of fathering healthy children from space should their missions have detrimental consequences on their bodies. Interestingly, the activity at sperm banks significantly increases during times of war. For instance, during the Vietnam War, US soldiers sent their frozen sperm back to their wives with the expectation of being fathers upon their arrival home. Furthermore, soldier requests for the cryopreservation of sperm during the Persian Gulf War was also remarkable.³⁶ Most of these men intended on using the sperm themselves in the future in order to continue the genetic line of their respective families.³⁷

What happens, however, if a man dies and his widow or girlfriend wishes to procreate using the sperm of her deceased partner? This problem has actually been discussed in legal academia for over forty years.³⁸ For instance, in 1962, W. Barton Leach, a law professor at Harvard University, predicted that the “new phenomenon of sperm banks, created to protect the issue of astronauts from mutations caused by ionizing radiation in space,” would threaten the common law rule against perpetuities.³⁹ Indeed, because sperm could potentially be preserved for an indefinite period, Professor Leach anticipated that nothing would prevent an astronaut’s widow from conceiving a child “long after a life in being plus twenty-

origins of cryopreservation date back to the 1770s. It was only in 1866, however, when an Italian scientist, Paolo Mantegazza, discovered that sperm could withstand freezing. In 1949, the cryopreservation process became successful.

³⁶ *Ibid* at 525-526.

³⁷ Kristine S Knaplund, “Postmortem Conception and a Father’s Last Will” (2004) 46 *Ariz L Rev* 91 at 92.

³⁸ *Ibid*.

³⁹ *Ibid*.

one year, thus invalidating bequests that once would have been routinely upheld.”⁴⁰ Almost prophetically, Professor Leach’s predication came true: fifteen years after the publication of his article, *The Sydney Morning Herald* reported that a widow had successfully given birth to a child using the cryopreserved sperm of her deceased husband.⁴¹

A man cryopreserving his sperm does not necessarily imply that he wants children postmortem; indeed, the freezing of sperm is used for a variety of reasons and in a multitude of circumstances.⁴² In some instances, the unforeseeable death of a loved one can create a situation whereby sperm becomes available and the deceased donor, as a result, does not anticipate or consent to his genetic material being used posthumously.⁴³ In other situations, however, a biological donor parent will have explicitly consented to the use of his frozen sperm. For instance, if a man is seriously ill, he might authorize a particular person to use his sperm to produce a child. The above examples elucidate the complex and multifaceted reasons for which sperm is frozen. The instances in which an after-born child is the resulting product of conception, however, are more exhaustively defined in law. Consequently, it is important to elaborate on the qualifying criteria of a posthumously conceived child.⁴⁴

⁴⁰ W Barton Leach, “Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent” (1962) 48 ABA J 942 at 943.

⁴¹ *Sydney Morning Herald* (July 12th, 1977), cited in Carolyn Sappideen, “Life After Death — Sperm Banks, Wills and Perpetuities” (1979) 53 Austl L J 311 at 311.

⁴² *Supra* note 32.

⁴³ Kindregan Jr, *supra* note 12 at 436

⁴⁴ *Ibid* at 434-5.

Defining After-Born Children

For the purposes of this paper, an after-born child is defined as someone who is conceived *after* the death of one of its biological donor parents; this definition excludes: [1] a pretermitted child who was born or adopted after the execution of a will,⁴⁵ and [2] a child who is conceived through sexual intercourse during the lifetime of its biological donor parent but is not born until after the biological donor parent's death.⁴⁶ Scenarios in which a biological donor father impregnates a woman during his lifetime and the resulting child is born subsequent to his death do not raise the same kinds of legal issues as using the cryopreserved sperm of a deceased man to conceive children.⁴⁷ Consequently, the remainder of this paper will focus on the legal questions posed by children that have been conceived after the death of a biological donor parent, namely, the father, via reproductive technology.

There are currently no statistics available on the number of women who have conceived and given birth to a posthumously conceived child; nor is there any available data on the number of women who plan to do so in the future.⁴⁸ It is possible, however, to deduce the number of successfully conceived after-born children by examining, first, advances in reproductive technology that have facilitated the occurrence of posthumous conception, and second, the number of requests for

⁴⁵ *SLRA*, *supra* note 25. Section 1.1 provides that a “child” includes, “a child *conceived before and born alive after the parent’s death*”. Thus, a child in gestation who so qualifies is the legal heir of its parent even if that parent dies prior to the child’s birth (emphasis added).

⁴⁶ By definition, a child conceived through sexual intercourse is not a child of assisted reproduction. Kindregan Jr, *supra* note 12 at 434-435.

⁴⁷ *Ibid* at 435.

⁴⁸ Knaplund, *supra* note 37 at 93.

sperm after men have died.⁴⁹ For instance, since the availability of cryopreservation in the 1940s, it has become a common practice. In fact, in 1999, 99% of clinics reporting to the Centers for Disease Control in the United States offered cryopreservation as an assisted method of reproductive technology for patients;⁵⁰ in 1988, however, only 74% of clinics did so.⁵¹ Furthermore, the number of requests to harvest the sperm of a dead man is also an indicative measurement of the number of children conceived posthumously; indeed, requests to preserve the sperm of a dead man only occur when an after-born child is desired.⁵² Consequently, the fact that, between 1980 and 1995, forty fertility clinics reported a total of eighty-two requests being made for the postmortem retrieval of sperm — with over 50% of those requests being made in 1995 — is probative of its progressive prevalence.⁵³ In short, the freezing of sperm for the purposes of posthumous conception is

⁴⁹ *Ibid.*

⁵⁰ Centers for Disease Control, *1999 National Report on Assisted Reproductive Technology Success Rates*, online: <<http://www.cdc.gov/reproductivehealth/ART99/index99.htm>> at 57.

⁵¹ US Gen Acct Office Rep to the Chairman, Subcomm on Regulation, Bus Opportunities & Energy, Common on Small Bus, HR, Doc No 90-24, Dec 1989 at 32.

⁵² Knaplund, *supra* note 37 at 93.

⁵³ Susan Kerr, “Post-Mortem Sperm Procurement: Is it Legal?” (1999) 3 *DePaul J Health Care L* 39 at 45. Not all fertility clinics, however, permitted the use of frozen sperm by a widow or girlfriend after a man’s death. For instance, a 1998 survey of 324 assisted reproductive technology clinics determined that 45% of responding clinics prohibited the posthumous use of sperm to conceive a child; thirty-five percent of clinics, by contrast, allowed such use: Judy Stern *et al*, “Access to Services at Assisted Reproductive Technology Clinics: A Survey of Policies and Practices” [2001] 184 *American Journal of Obstetrics and Gynecology* 591 at 595.

not the science of tomorrow and will likely become more common with each passing year.⁵⁴

Despite the increasing prevalence of successfully conceived after-born children, the barriers to posthumous conception are significant.⁵⁵ More specifically, after obtaining frozen sperm, three obstacles remain: [1] the use of frozen sperm over fresh sperm is accompanied by a drop in the number of viable sperm;⁵⁶ [2] cost; and [3] problems related to proving paternity.⁵⁷ First, the use of frozen semen requires the assistance of some type of reproductive technique.⁵⁸ And, the

⁵⁴ Benjamin C Carpenter, “A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, And How to Fix It” (2011) 21 Cornell JL & Pub Pol’y 347 at 350. “Today, researchers estimate that over 30,000 children are born each year who were conceived from frozen sperm, and almost 29,000 in vitro fertilization transfers each year use frozen embryos”.

⁵⁵ “The best evidence we have that postmortem conception has occurred is the babies themselves. Newspapers . . . repor[t] . . . instances of successful pregnancies using a deceased man’s sperm. . . . [C]ourt cases have addressed the issue of whether children conceived after their fathers’ deaths are entitled to inherit in intestacy and thus eligible to receive Social Security benefits”. Knaplund, *supra* note 37 at 92-93.

⁵⁶ MC Schiewe *et al*, “Cryopreservation of Intact Testis Biopsies for ICSI” (1997) 68 Supp Fertility & Sterility 115. The article cited a study that demonstrated that, when sperm was cryopreserved without preliminary processing, only 30% survived freezing and thawing.

⁵⁷ Knaplund, *supra* note 37 at 96.

⁵⁸ An assisted reproductive technique is a requirement of successful posthumous conception because the sperm must be “thawed, rehydrated, and cleansed prior to insemination”. Emily McAllister, “Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance” (1994) 29 Real Prop Prob & Tr J 55 at 63.

reproductive technique that most often accompanies cryopreservation, for instance, is artificial insemination. Artificial insemination using frozen sperm, however, has a success rate of between 8% and 10%; using fresh sperm, by contrast, yields a success rate of between 16% and 18%.⁵⁹ The second obstacle, namely, cost, refers to the expensive nature of procedures such as artificial insemination. One cycle of artificial insemination can cost anywhere between \$300 - \$700; most women undergo 3 to 6 cycles before successfully becoming pregnant or trying another technique, including in vitro fertilization ["IVF"].⁶⁰

The complexity and multifaceted nature of the third barrier, specifically, obstacles to proving paternity, is well beyond the scope of this paper. As a precursor to Section II, however, on the evolution of bastardy laws in Ontario, certain issues related to legal presumptions of paternity are deserving of the reader's attention. Consequently, the paper will briefly address why historical approaches to paternity are important considerations in the context of posthumous conception.

The belief that biological relatedness is at the center of all parent-child relationships justifies how categories of filiation are organized in law. Indeed, the legal category of paternity is understood to provide the "quintessential illustration of the relationship between natural facts, social construction, and legal ideology."⁶¹ For instance, before the advent of genetic testing, it was impossible to determine with any certitude the exact biological relationship between a father and his child. Consequently, legal presumptions of paternity consciously rectified this "lack of certainty in the biological

⁵⁹ Knaplund, *supra* note 37 at 96.

⁶⁰ *Ibid* at 97.

⁶¹ Mykitiuk, *supra* note 10 at 779.

reality of paternity.”⁶² More specifically, at common law, a man’s legal connection to a child’s *mother* established his biological connection to a child in law. In other words, according to the still-existent maxim *pater est quem nuptiae demonstrant* — or, by marriage the father is demonstrated — a man was assumed to be the father of a child if he was married to that child’s mother when she gave birth; no evidence was required to establish the paternity of a child born within the sanctity of marriage.⁶³

Paternity by presumption — fittingly referred to as “the legal fiction of biological fatherhood in marriage”⁶⁴ — serves to maintain normative beliefs regarding the naturalness of physical intimacy when it is confined to the sacred monogamous relationship of husband and wife in marriage.⁶⁵ What the paternity presumption also reveals, however, is the extent to which the “idea of ‘nature’ has come to mean ‘biology’; therefore, the idea of relatedness, has, to a large extent, been ‘biologized.’”⁶⁶ In the context of paternity by presumption, after-born children are legal enigmas; they simultaneously undermine normative societal beliefs that the

⁶² T Caulfield, “Paternity Testing in the Genetic Era” (1996) 17 Health L Can 19 at 21.

⁶³ Mykitiuk, *supra* note 10 at 780. The maxim *pater est quem nuptiae demonstrant* is codified in law; for instance, s 8.1.1 of the Ontario *Children’s Law Reform Act* states, “[u]nless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances: (1) The person is married to the mother of the child at the time of the birth of the child.” RSO 1990, c C.12 [CLRA].

⁶⁴ S Sevenhuijsen, “The Gendered Juridification of Parenthood” (1992) 1 Soc & Leg Stud 71 at 74.

⁶⁵ Mykitiuk, *supra* note 10 at 781.

⁶⁶ Caulfield, *supra* note 62 at 20.

law seeks to preserve against the facts of biology, while buttressing the belief that biological relatedness is the essence of the parent-child relationship.⁶⁷ More specifically, because marriage ends at death, a posthumously conceived child will never technically be a child born within a marriage.⁶⁸ Put in another way, from a legal perspective, an after-born child is, by definition, born into an alternative family structure that diverges from the traditionally sanctified model outlined above — and this, irrespective of the fact that after-born children are often the product of two people who were in a marriage or marriage-like relationship.⁶⁹

The Families of the After-Born

The conception of an after-born child ultimately depends on the death of one of its biological donor parents. An after-born child's life, in consequence, is contingent upon him or her joining one of two non-traditional family forms, namely, [1] a one-parent family ["OPF"], and [2] a step/blended family.⁷⁰ Thus, in addition to inheritance-related deprivations elaborated upon in depth in Sections III and IV of this paper, after-born children are born into alternative family structures that are each equipped with their own set of structural and legal disadvantages. More specifically, because both OPFs and step/blended families represent categories of relationships that are often at odds with — or that have outpaced — existing legal frameworks for families, after-born children are born into a life ascribed by one of the quintessential contemporary family law challenges of today, namely, balancing “intention to

⁶⁷ Mykitiuk, *supra* note 10 at 781.

⁶⁸ Wood, *supra* note 29 at 878.

⁶⁹ MLRC, *supra* note 28 at 16.

⁷⁰ *Ibid.*

become a parent, [and] the social fact of having given care and genetic links to a child.”⁷¹

The first non-traditional family form of interest, namely, OPFs, are created in the following descending order of frequency: (1) A couple separates after a cohabitation or a marriage and one of the ex-spouses has physical custody of the children; (2) a woman gives birth to a child and does not live with the child’s father or any other partner, male or female;⁷² (3) a father or a mother is widowed; and (4) a single (divorced, never-married, or widowed) man or woman adopts a child.⁷³

Given the variety of circumstances in which a OPF can come into existence, it is not surprising that this family model is of particular interest in public policy debates. Indeed, in addition to challenging Canadian values which continue to dictate, firstly, that children should be raised by *two* people, and secondly, that these parents should be married — or, at a very minimum, cohabiting — OPFs differ from the normative two-parent family model in other significant ways, including their higher poverty rate, dependence on welfare, and in their children’s social outcomes.⁷⁴ Furthermore, while only a minority of Canadian families fall into the OPF structure, most are headed by lone *female* parents. In fact, in 2006, 15.9% of

⁷¹ Leckey, *supra* note 19 at 21.

⁷² Anne-Marie Ambert, *Contemporary Family Trends: One Parent Families: Characteristics, Causes, Consequences, and Issues* (Ottawa: The Vanier Institute of the Family, 2006) at 5 [Ambert]. The author refers here to non-conjugal births .

⁷³ *Ibid.* In official statistics, however, such families are generally included in category (2).

⁷⁴ *Ibid.*

Canadian families identified themselves as a OPF; of the 15.9% OPFs accounted for, 12.7% were headed by women.⁷⁵

Coined in the 1970s, the term “feminization of poverty” refers to the overwhelming concentration of poverty among women, particularly in female-headed households.⁷⁶ As a lived reality, the feminization of poverty represents more than a lack of income or state of financial need for women; rather, it additionally implies “the absence of choice, the denial of opportunity, the inability to achieve life goals, and ultimately, the loss of hope.”⁷⁷ In 2007, approximately 1.22 million women aged 18 or older were living in poverty in Canada.⁷⁸ Women who are lone-parent heads of families, however, “have

⁷⁵ Anne Milan, Mireille Vézina & Carrie Wells, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006* (Ottawa: Statistics Canada, 2007) at 8, 15. In 2001, there were 1,311,190 OPFs in Canada; of those families, 1,065,360 were headed by female parents. In 2006, there were 1,414,060 OPFs in Canada; of those families, 1,132,290 were headed by female parents. Between 2001 and 2006, OPFs in Canada grew by 7.8%.

⁷⁶ Monica Townson, *Women’s Poverty and the Recession* (Ottawa: Canadian Centre for Policy Alternatives, 2009) at 10. Gender creates a cleavage that cuts across all groups marginalized in Canada, including women from racialized communities, immigrants, Aboriginals, and women with disabilities.

⁷⁷ Megan Thibos, Danielle Lavin-Loucks & Marcus Martin, *The Feminization of Poverty* (Dallas: J Macdonald Williams Institute, 2007) at 1. The United Nations has similarly defined poverty much more broadly than simply a lack of income. Specifically, the United Nations Office of the High Commissioner for Human Rights has defined poverty as follows: “[A] human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights” (Townson, *supra* note 76 at 10).

⁷⁸ Townson, *supra* note 76 at 10.

one of the highest poverty rates of any group within Canada's population."⁷⁹ In 2009, female lone-parents' incomes were, on average, \$7,500 below the poverty line; the incidence of low income among these families was nearly *five times* as high as that of two-parent families with children.⁸⁰ The causes of poverty among women in lone-parent households are understandably complex; their roots, however, can be located "in the way [women] are treated when they are in paid employment and the situation in which they find themselves if they are outside paid employment."⁸¹

More women are working in the paid labour force than ever before; their rate of participation, however, has not been accompanied by wage parity with men,⁸² nor has it been buttressed by adequate income support and social services.⁸³ For starters, in the last six years alone, women have seen [1] the right to pay equity at the federal public service level

⁷⁹ *Ibid* at 28.

⁸⁰ Statistics Canada, *Income in Canada* (Ottawa: Statistics Canada Catalogue no 75-202-XIE, 2009). The "poverty line" in this context is based on the Low-Income Cut-Offs ["LICOs"] calculated by Statistics Canada. LICOs represent an income threshold where a family is likely to spend 20% more of its income on food, shelter and clothing than the average family, leaving less income available for other expenses such as health, education, transportation and recreation.

⁸¹ Townson, *supra* note 76 at 6.

⁸² *Ibid*. Women's wages still lag far behind men: "In 2008, for example, 82% of women in the age group 25 to 44 . . . were in the paid work force. But women earned only 65.7% of the average earnings of men That's almost no improvement over where they were 10 years earlier in 1998 when they earned 62.8% of the average earnings of men".

⁸³ *Ibid* at 25.

restricted,⁸⁴ [2] the renegeing of signed agreements between the federal and provincial governments to establish a national system of early learning and child care,⁸⁵ and [3] the termination of research activities at Status of Women Canada — an agency with the explicit mandate of promoting women’s equality.⁸⁶ Indeed, Ontario itself has witnessed the expiration, and subsequent non-renewal, of \$63 million worth of federal funding supporting 22,000 child care spaces in the province.⁸⁷ Furthermore, few provinces in Canada have programs directly aimed at ameliorating poverty for women who head OPFs.⁸⁸

⁸⁴ *Ibid.* The *Public Sector Equitable Compensation Act* makes employers and bargaining agents *jointly* accountable for ensuring equitable compensation through established wage-setting practices, rather than through a separate pay equity process or through a complaint-based litigation. Critics of the amendment argue that it undermines the principle that pay equity is a right: Aaron Wherry, “Is this the Quiet End to Pay Equity?” *Macleans’s* (21 February 2009), online: *Macleans.ca* <<http://www.macleans.ca>>.

⁸⁵ *Ibid* at 24. In 2004, the Organization for Economic Co-operation and Development released a report that described Canada’s child care system as a “chronically underfunded patchwork of programs with no overarching goals.” In fact, the report ranked Canada *last* among developed countries with respect to [1] access to early learning and child care spaces, and [2] public investment. Furthermore, the report concluded that there was a “shortage of available regulated child care spaces — enough for fewer than 20% of children aged six and younger with working parents”.

⁸⁶ *Ibid* at 8. See also Susan Boyd, Margot Young, Gwen Brodksy & Shelagh Day, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007). The authors discuss how, in recent years, Canadians have seen the retrenchment of social programs and the restructuring of the welfare state along neo-liberal lines. At both the federal and provincial level, social programs “have been cut back, eliminated, or recast in exclusionary and punitive forms”.

⁸⁷ *Ibid* at 5. The provincial government contributed \$18 million to save as many as 9,000 child care spaces.

⁸⁸ *Ibid* at 29.

For instance, while “[m]any jurisdictions seems to believe federal and provincial child benefits are a good way of addressing the poverty of [female-headed OPFs],” the National Council of Welfare points out that a majority of welfare families with children have seen little improvement in total income — and this, irrespective of the fact that the federal government has increased its spending on child benefits dramatically since 1998.⁸⁹

Children are poor because their parents are poor; for those living in OPFs, however, additional obstacles are ascribed to the family structure.⁹⁰ For instance, it has been documented that children living in OPFs are more likely than children living with two parents to: [1] exhibit behavioural problems, including hyperactivity, aggressiveness, fighting, and hostility; [2] do less well and stay less long in school; and [3] be unemployed and do less well economically as an adult.⁹¹

⁸⁹ *Ibid.* According to the National Council of Welfare, when adjusted for inflation, the majority of welfare incomes peaked in 1994 or earlier. “When the peak-year welfare incomes were compared with 2006 welfare incomes, some of the losses were staggering In Ontario, for example, a lone parent’s income decreased by over \$5,900”.

⁹⁰ *Ibid* at 11.

⁹¹ Ambert, *supra* note 72 at 15. To serve as an important contrast, an interesting study published in 2010 found that children raised by lesbian mothers — whether the mother was partnered or single — scored very similarly to children raised by opposite-sex parents on measures of development and social behavior. Between 1986 and 1992, Nanette Gartrell and Henny Bos studied the children of 154 planned lesbian families from their conception until they reached adulthood. The researchers observed: “[T]he 17-year-old daughters and sons of lesbian mothers were rated significantly higher in social, school/academic, and total competence and significantly lower in social problems, rule-breaking, aggressive, and externalizing problem behavior than their age-matched counterparts [raised in families consisting of opposite-sex parents]”: Nanette Gartrell & Henny Bos,

Interestingly, OPFs resulting from the death of a parent are identified as having mitigated negative economic consequences because, similar to two-parent families, they gain access to survivor benefits, life insurance, pension plans, and other inheritance-related assets.⁹² However, for reasons discussed later in this paper, it remains unclear in Canada whether after-born children have the right to access any of the above-listed benefits in situations of intestate succession.⁹³

On top of the structural vulnerabilities outlined above, single mother-led OPFs must additionally confront the larger political and social discourse of “children *needing* a ‘father’ or ‘father figure’ in order to thrive.”⁹⁴ Indeed, reticent to recognize the right of women to parent alone, courts in Canada have been willing to insert a father figure, including known sperm donors, into a single mother’s household “in order to create a dyadic nuclear family.”⁹⁵ For instance, in the 1997

“US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents” (2010) 126:1 *Pediatrics* 1 at 1.

⁹² *Ibid* at 7.

⁹³ Section III, *infra* note 154; Section IV, *infra* note 186.

⁹⁴ Cameron, Gruben & Kelly, *supra* note 18 at 120.

⁹⁵ *Ibid* at 122. Outside of a few provinces in Canada, there is currently a lack of legislation in the country addressing the legal parentage of children born via sperm donation. In consequence of this legislative void, it is not clear who a child’s legal parents might be in the assisted reproductive context. Without the protection of the law, “[f]amilies are particularly concerned that . . . donors might intervene in their established relationships and pose a threat to their family security”: Cameron, Gruben & Kelly, *supra* note 18 at 108. In Alberta, the *Family Law Act* explicitly states that a sperm donor who is not in a “relationship of interdependence of some permanence” with a female person does not enjoy the legal status of a parent to the resulting offspring conceived using his sperm; SA c F-4.5 at s 13:3. Similarly, in Quebec, section 538.2 of the *Civil Code* states that, “the

Alberta Court of Appeal decision, *Johnston-Steeves v Lee*, a man was awarded extensive access rights to a child against the wishes of a single mother by choice, and irrespective of the fact that the mother characterized the man as nothing more than a known sperm donor.⁹⁶ Furthermore, in a string of cases coming out of the province of Quebec, a number of non-biological, social lesbian mothers were denied legal parenting rights “due to the presence or the actions of a known donor.”⁹⁷ Indeed, with the underlying assumption being that a father figure inserted into a woman-headed family is better than no father figure at all, the Quebec Court of Appeal in *A v B, C and X* designated a known sperm donor as a child’s father to the exclusion of the biological lesbian mother’s former partner, the non-biological, social lesbian mother.⁹⁸ In this case, the sperm donor had minimal contact with the child and candidly acknowledged his role as a donor — not a father — of the child. The lesbian social mother, by contrast, who actively raised the child from birth, was not awarded parental rights.⁹⁹

contribution of genetic material for the purposes of a third-party parental project does not create any bond of filiation between the contributor and the child born of the parental project”; SQ 1991, c 64 [CCQ]. The Alberta and Quebec provisions apply to opposite-sex and same-sex couples who produce a child via assisted human reproductive technology.

⁹⁶ *Johnston-Steeves v Lee* (1997), 33 RFL (4th) 278 (CA) at para 19, [1998] 3 WWR 410. The Court of Appeal rejected the mother’s s 7 claim that she had a right under the *Canadian Charter of Human Rights and Freedoms* to decide what type of family she would create in order to raise her child: “We reject the suggestion that s.7 creates a right for the custodial parent to decide on a family model which excludes the other parent [fro]m the life of the child, especially where such a model is inconsistent with the best interests of the child”.

⁹⁷ Cameron, Gruben & Kelly, *supra* note 18 at 124.

⁹⁸ [2007] JQ no 1896, 2007 RDF 217.

⁹⁹ Cameron, Gruben & Kelly, *supra* note 18 at 126-7. See also *S.G. v L.C.*, [2004] RJQ 1685, [2004] RDF 517 (Sup Ct) and *L.O. v S.J.*,

In Canada, a man who is not the biological donor parent of a child conceived using assisted reproductive technologies may also acquire status as a legal parent.¹⁰⁰ Indeed, in certain circumstances, namely, in step/blended families — the second non-traditional family structure of interest in this section — a man may be awarded parental rights and be held liable for its accompanying obligations. Step/blended families are the product of adults re-partnering and bringing children from previous relationships into a new family structure.¹⁰¹ More specifically, a stepfamily is created when a single parent begins living with, or marries, an individual or another single parent. Men and women can enter stepfamilies as a stepparent, a biological parent, or both, and through a number of different pathways. A blended family is a subcategory of stepfamily; it generally refers to stepfamilies with a common child. For many individuals, becoming a

[2006] JQ No 450, [2006] RJQ 775 (Sup Ct). The holding in *A v B, C and X* is arguably inconsistent with the current state of the law in Quebec. Importantly, Quebec is one of the few provinces in Canada to have explicitly addressed the parental status of social lesbian mothers in lesbian families created in the assisted reproductive context. For instance, s 539.1 of the *CCQ* provides that where both parents are women, “the rights and obligations assigned by law to the father, insofar as they differ from the mother's, are assigned to the mother who did not give birth to the child,” *CCQ*, *supra* note 95. Similar provisions exist in Nova Scotia (*Children's Act*, RSY 2002, c 31 at s 13), Newfoundland and Labrador (*Children's Law Act*, RSNL 1990, c C-13 at s 12(6)), and the Yukon (*Children's Act*, RSY 2002, c 31 at s 13). In Nova Scotia, for instance, the *Birth Registration Regulations* state that, where a child is conceived through assisted reproductive technologies, the spouse of the mother is deemed to be the child's other parent. The term “spouse” is gender neutral and seemingly applies to either a male or female partner.

¹⁰⁰ *Ibid* at 106.

¹⁰¹ *Ibid* at 11.

stepparent is the first time experiencing both conjugal *and* parental life.¹⁰² In 2006, there were over half a million stepfamilies in Canada; a majority of this group was comprised of a couple and the *mother's* children.¹⁰³

If an after-born child is not born into a OPF, he or she is likely already a member of — or will eventually join — a step/blended family. Despite the obvious financial benefits for children of living in a family with two potential income earners, step/blended families come equipped with their own unique set of economic and social issues.¹⁰⁴ For instance, empirical studies have demonstrated that the relationship between stepparents and their stepchildren are perceived to be of inferior quality as compared with those of biological parents and their children; stepfathers in particular are often more detached from a child than a biological parent.¹⁰⁵ Furthermore, in the context of after-born children, it is particularly interesting that a stepparent is more likely to take on a parental role if his or her stepchild infrequently has contact with the non-residential biological parent. Given the absolute impossibility of an after born child having a relationship with — let alone seeing on a frequent basis — his or her deceased non-residential biological donor parent, it might be easier for a stepparent to form a relationship with an after-born child. This

¹⁰² Heather Juby, Céline Le Bourdais & Nicole Marcil-Gratton, *A Step Further: Parenthood in Blended Families* (Montreal: Centre interuniversitaire d'études démographiques, 2001) at 1.

¹⁰³ Statistics Canada, *General Social Survey* (Ottawa: StatsCan, 2006).

¹⁰⁴ Carol Rogerson, "The Child Support Obligations of Step-Parents" (2001) 18 Can J Fam L 9 at 21. Stepfathers' contribution to household incomes generally raises the overall standard of living of a household and improves children's material well-being.

¹⁰⁵ *Ibid.* The author concedes that statistical differences are "admittedly small and many step-parents and step-children do form positive relationships that are meaningful and important".

factor might work against stepparents, however, should they ever find themselves in court after the dissolution of their step/blended family and not wanting to pay child support for their (after-born) stepchild.¹⁰⁶

In *Chartier v. Chartier* ["*Chartier*"], the Supreme Court of Canada ["SCC"] was asked to determine whether a person, having stood in the place of a parent during the course of a marriage, could unilaterally terminate the relationship.¹⁰⁷ The implications of the decision extend beyond the fact that the SCC answered this question in the negative. Indeed, *Chartier* carries "broader implications for the way in which the social roles and obligations of step-parents are conceived."¹⁰⁸ More specifically, the SCC articulated multiple factors to be taken into consideration when deciding whether or not a stepparent should be ordered to pay child support after the dissolution of a step/blended family. One factor, namely, the nature or existence of the child's relationship with the absent biological parent, is of particular significance for after-born children.¹⁰⁹

The cases involving absent biological fathers reveal a pattern of courts wanting not just to ensure adequate financial provision for children, but also to provide replacement social fathers for children whose biological fathers have abandoned them [or died]. . . . [Cases such as *Chartier*] are informed by pervasive cultural assumptions of "normal" families consisting of children with one mother and one father, and judges appear eager to label as a father any male

¹⁰⁶ *Ibid* at 64.

¹⁰⁷ *Chartier v Chartier*, [1999] 1 SCR 242, 168 DLR (4th) 540 [*Chartier* cited to SCR].

¹⁰⁸ Rogerson, *supra* note 104 at 64.

¹⁰⁹ *Chartier*, *supra* note 107 at para 39.

Introducing the Next Class of Bastard

who steps into a situation where children have no apparent father.¹¹⁰

In summary, after-born children are born into one of two non-traditional family models that each comes equipped with its own set of social and legal vulnerabilities. As a member of either a female-led OPF or step/blended family, after-born children risk exposure to structural disadvantages ranging from limited financial resources to a detached parental figure. After-born children have no control over the way in which they come into this world. They are not the only group of children, however, who have borne the burden of the ascribed traits of their family structure in Canadian history. Indeed, children born out of wedlock in Canada similarly confronted deprivations resulting from the manner in which they were conceived.¹¹¹ Consequently, before moving on to inheritance-related issues for the after-born in Ontario, the following section will examine how historical-legal constructions of the parent-child relationship resulted in real disabilities for a particular group of children in this country. More specifically, in an effort to demonstrate how the after-born in Ontario will be deprived of fundamental legal rights on the basis of their *parents'* relationship, the following section will argue that, in certain circumstances, parallels can be drawn between the experiences of bastard children in the past and those to be had by posthumously conceived children today.¹¹² It will do so by examining [a] the *filius nullius* rule, and [b] illegitimacy statutes in Ontario in the twentieth century.

¹¹⁰ Rogerson, *supra* note 104 at 103-4.

¹¹¹ Chambers, *supra* note 8.

¹¹² Leckey, *supra* note 19 at 19.

**SECTION II:
THE ORIGINAL BASTARD: ASSESSING THE
EVOLUTION OF ILLEGITIMACY LAWS IN ONTARIO**

The origin of laws condemning children born out of wedlock to illegitimate status in Ontario — and Canada at large — find their roots in England.¹¹³ While in the ancient world problems of illegitimacy were resolved by eradicating the problem at its source, namely, killing the mother carrying a bastard so as to avoid “[q]uestions and difficulties about guardianship, custody and property of illegitimate children,”¹¹⁴ the common law of England instead chose to punish and ostracize bastard children with the legal designation of ‘illegitimate’; the debilitating social and economic consequences of the label, consequently, reflect the legislative bargain made by the state in acknowledgment of the bastard’s illicit existence.¹¹⁵

The Filius Nullius Rule

As stated in the introduction of this paper, the child born to an unwed mother was considered the child of nobody at common law.¹¹⁶ Indeed, in 1857, William Blackstone asserted that, “the incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can he have heirs, but of his own body.”¹¹⁷ At law, in other words, illegitimate children had no legal relations and few rights. For instance, because bastards could not legally belong to a lineage, they could also not

¹¹³ Chambers, *supra* note 8 at 15.

¹¹⁴ Teichman, *supra* note 5 at 53.

¹¹⁵ Chambers, *supra* note 8 at 3.

¹¹⁶ Mykitiuk, *supra* note 10 at 781.

¹¹⁷ Blackstone, *supra* note 9 at 459.

logically be affixed with a legal surname.¹¹⁸ Furthermore, bastards “could not establish future biological lineage,”¹¹⁹ and, as a result of being kin to nobody, they also had “no ancestors from whom any inheritable blood could be derived.”¹²⁰ Consequently, given that bastards were not allowed to have any inheritable blood in them, they were not eligible to inherit from their parents nor could they make claims on their parents for support. In fact, succession statutes presumptively treated the word ‘child’ as applying only to children born to married parents.¹²¹ In short, society transformed the illegitimate child into a “scapegoat and visited upon it [a] life long brand.”¹²²

England’s first legislative attempt at regulating the rights of bastard children can be found in her *Poor Laws*.¹²³ Enacted in 1576, the statute provided for the punishment of the

¹¹⁸ Mykitiuk, *supra* note 10 at 782. Bastards could acquire a surname, however, by nickname or reputation.

¹¹⁹ *Ibid.*

¹²⁰ Blackstone, *supra* note 9 at 459.

¹²¹ Nicholas Bala, “The Evolving Canadian Definition of the Family: Towards a Pluralistic and Functional Approach” (1994) 8 *International Journal of Law and the Family* 293 at 301.

¹²² Charlotte Whitton, “Children’s Rights and the Tax” (29 May 1943) *Saturday Night* at 20.

¹²³ *An Act for Setting the Poor on Work*, 1576, 18 Elizabeth, c 3. The impetus for the legislation had less to do with the care of illegitimate children than it did with the enclosure movement laying the ideological foundations for the “hegemony of private property and the market economy in the countryside”; Lance van Sittert, “Holding the Line: The Rural Enclosure Movement in the Cape Colony, c 1865-1910” (2002) 43 *Journal of African History* 95 at 95. Indeed, as the process of sealing off common lands and converting them into private property advanced in England, it quickly became important for individual parents to bear responsibility for the maintenance and support of their children.

mother and the reputed father of an illegitimate child. Specifically, the law empowered the state to charge either parent with the support of a bastard child. While claims for support were rendered enforceable under the statute, the number of awards actually granted was limited by constraints on proof of paternity under subsequent affiliation laws, including the imposition of quasi-criminal legal standards such as requiring a mother's paternity testimony to be corroborated.¹²⁴ For instance, under the *Poor Law Amendment Act* of 1834, bastard children became the sole responsibility of their mothers; if a mother came to rely on a parish for support, however, the parish could sue a father for reimbursement only if a mother's paternity claim was corroborated by a third party. The rationale behind this evidentiary requirement was to ensure that orders were not made on the basis of fabricated assertions to "trap wealthy men."¹²⁵ Indeed, the statute went so far as to state that, "no part of the monies paid by such putative fathers in pursuance of such order shall at any time be paid to the mother of such bastard child, nor in any way applied to the maintenance and support of such mother."¹²⁶

The laws of England were essential in shaping the legal ideology of administrators in the colonies; they were still adapted and customized, however, to meet the perceived needs of local constituents. Upper Canada, for instance, did not receive or apply England's *Poor Laws*. This decision does not reflect, however, a greater tolerance of children born out of wedlock in the colony, nor does it imply the existence of an alternative bastardy regime buttressed by other mechanisms of support. Indeed, lawmakers in Upper Canada shared "punitive

¹²⁴ Wanda Wieggers, "Fatherhood and Misattributed Genetic Paternity in Family Law" (2011) 36 Queen's LJ 623 at 631.

¹²⁵ Chambers, *supra* note 8 at 16.

¹²⁶ Martha Bailey, "Servant Girls and Masters: The Tort of Seduction and the Support of Bastards" (1991) 10 Can J Fam L 150 at 152.

attitudes towards illegitimacy that were reinforced by the dominant Christian religious orders.”¹²⁷ Instead, bastard children were born into a legislative abyss characterized by [1] the conspicuous absence of a system of public relief, and [2] a process for establishing affiliation. In the New World, neither the mother nor the putative father could be held responsible for the support of an illegitimate child. Furthermore, without establishing poor laws, there was no incentive to build poorhouses or have the local community care for children born out of wedlock. Bastard children were often left to private orphanages that operated more like “baby farms [. . .] housed under appalling conditions [. . .] where they too often died.”¹²⁸ The situation of bastard children remained unchanged and largely unchallenged in Ontario until the twentieth century.¹²⁹

Illegitimacy Statutes in Ontario in the Twentieth Century

In 1921, Ontario — and the rest of Canada — quickly recognized the importance of addressing the growing population of single mothers in the aftermath of the First World War. Indeed, while “[the] widows of men killed on the battlefield were [easily] . . . pitied and supported (if reluctantly) by the burgeoning state bureaucracy of the post-war period,” the plight of other single mothers could no longer justifiably be ignored.¹³⁰ Consequently, rather than incentivize sexual relations outside of the traditional Canadian legal definition of the family, namely, “the relationship of a married man and woman and their biological . . . children,”¹³¹ Ontario legislated into law a reform package trilogy consisting of mechanisms by

¹²⁷ Chambers, *supra* note 8 at 16.

¹²⁸ *Ibid* at 17.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

¹³¹ Bala, *supra* note 121 at 293.

which single mothers of bastard children could legitimate their illegitimate children.¹³² Specifically, Ontario enacted the following three statutes: [1] *An Act Respecting the Legitimation of Children by the Subsequent Inter-marriage of their Parents*;¹³³ [2] *An Act Respecting the Adoption of Children*,¹³⁴ and [3] *An Act for the Protection of the Children of Unmarried Parents Act* [“CUPA”].¹³⁵

The three statutes were collectively designed to mitigate the consequences of illegitimacy for children in Ontario by providing different outlets of support for children excluded under the Ontario *Mothers’ Allowance Act*.¹³⁶ More

¹³² Chambers, *supra* note 8 at 17.

¹³³ *An Act Respecting the Legitimation of Children by the Subsequent Inter-marriage of their Parents*, SO 1921, c 53 [*Legitimation Act*]. The *Legitimation Act* was the first piece of legislation passed in the child welfare package; it allowed for the “subsequent legitimation of children, born outside of lawful wedlock, whose biological parents later married” (Chambers, *supra* note 8 at 27). It provided couples with an opportunity to ensure that their child would not be affixed with the bastard label. Furthermore, it guaranteed that a child would not be precluded from inheriting in the event of an intestate succession.

¹³⁴ *An Act Respecting the Adoption of Children*, SO 1921, c 55 [*Adoption Act*]. The *Adoption Act* represented a significant departure from the common law: for the first time in the province’s history, children could be adopted by either strangers or kin. Until 1921, adoption was only possible in Ontario through private members’ bills in the provincial legislature. The province based its legislation on that of Massachusetts — the first state in the United States to amend the common law and provide a means for “formalizing adoptions and giving familial status to the non-biological child” (Chambers, *supra* note 8 at 28).

¹³⁵ *An Act for the Protection of the Children of Unmarried Parents Act*, SO 1921, c 54 [*CUPA*].

¹³⁶ *Mothers’ Allowance Act*, SO 1921, c 79.

specifically, given that the *Mothers' Allowance Act* was initially enacted solely for the purposes of supporting “fit and proper” widows, single mothers with bastard children were consciously overlooked.¹³⁷ Indeed, while the moral regulation of Ontario’s single mothers is beyond the purview of this paper, readers should be cognizant of the fact that income security for single mothers was not initially based on need; rather, it was contingent on adherence to strict moral standards, namely, “the desire to maintain a hegemonic, Anglo-Saxon, middle-class model of family life and sexual restraint.”¹³⁸

Of the three laws passed in the 1921 reform package, the third statute, namely, *CUPA*, was the most degrading and punitive towards unwed mothers; it was designed as a last resort mechanism by which unwed mothers could obtain financial support from the putative fathers of their children. Specifically, the law undermined the common law assumption that a mother was the *de facto* guardian of her illegitimate child. Section 10 provided that a provincial officer “may upon his own application be appointed guardian of a child born out of wedlock either *alone* or jointly with the mother of such child.”¹³⁹ Further, it was the state — and not the mother — who was authorized to sue the putative father for support. The state had provided unwed mothers with mechanisms for either

¹³⁷ Margaret Hillyard Little, “‘Manhunts and Bingo Blabs’: The Moral Regulation of Ontario Single Mothers” (1994) 19:2 *The Canadian Journal of Sociology* 233 at 236. This policy was expanded over time to include a variety of single mothers. According to the author, each category of single mother was placed on a hierarchy of worthiness: “Widows were considered [the] most deserving and received the least scrutiny. Women with incapacitated husbands were the second group to receive the allowance. . . . Deserted wives, on the other hand, were considerably less worthy according to [Ontario *Mothers' Allowance*] administrators”.

¹³⁸ Chambers, *supra* note 8 at 24.

¹³⁹ *CUPA*, *supra* note 135 at s 10 (emphasis added).

legitimizing their bastard child or releasing it for adoption.¹⁴⁰ The *CUPA*, consequently, was a last attempt by the state to privatize the costs of reproduction. Put in another way, the law would prevent illegitimate children from “becoming a burden on society” if they were unsuccessfully placed in a normative family.¹⁴¹

Although ostensibly about child welfare, *CUPA* did little to actually ameliorate the social and economic circumstances of illegitimate children. First, a father ordered to pay support under this statute did not acquire any meaningful status with regard to his child. Consequently, beyond maintenance, a child did not have any claims against his father. Second, the child remained *filius nullius*, without rights of inheritance or membership in the father’s family. Thus, in a “patriarchal world [where] carrying [a] father’s name had legal, symbolic, and social importance, [this law] did nothing to reduce the stigma to which the illegitimate child was subjected.”¹⁴² In short, in an effort to encourage formation of state-sanctioned traditional family forms, *CUPA* reinforced and perpetuated discriminatory stereotypes of illegitimate children and their mothers. Bastard children were destined to receive limited and precarious economic relief for no reason above and beyond their parents’ relationship.¹⁴³

Analysis

In 2012, there is a cross-Canada statutory abolition of the legal

¹⁴⁰ *Legitimation Act*, *supra* note 133; *Adoption Act*, *supra* note 134.

¹⁴¹ Chambers, *supra* note 8 at 30.

¹⁴² *Ibid* at 31.

¹⁴³ Lori Chambers, “Illegitimate Children and the Children of Unmarried Parents Act” in Edgar-André Montigny & Lori Chambers, eds, *Ontario Since Confederation: A Reader* (Toronto: University of Toronto Press, 2000) at 250.

distinction between children born to married parents and children born to unmarried parents.¹⁴⁴ Indeed, as the percentage of children born out of wedlock began to rise sharply throughout the country in the 1960s, the concept of illegitimacy began to lose its legal persuasiveness.¹⁴⁵ By the end of the 1990s, approximately one-third of Canadian children satisfied the common law definition of a bastard.¹⁴⁶ Consequently, rather than relegate a third of the country's children to illegitimate legal status, lawmakers were forced to consider how to specify in law that all children were to be afforded identical treatment, regardless of the marital status of their parents. Ontario, for instance, was the first province in Canada to formally abolish the legal distinction between children born inside and outside of marriage.¹⁴⁷ Specifically, in 1978, the *Children's Law Reform Act* ["CLRA"] was enacted. Section 1(4) states:

[a]ny distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.¹⁴⁸

¹⁴⁴ Colleen Sheppard, "Intimacy, Rights and the Parent-Child Relationship: Rethinking Freedom of Association in Canada" (2004) *National Journal of Constitutional Law* 104 at 147.

¹⁴⁵ Leckey, *supra* note 19 at 19.

¹⁴⁶ Heather Juby, Nicole Marcil-Gratton & Céline Le Bourdais, *When Parents Separate: Further Findings From the National Longitudinal Survey of Children and Youth: Research Report* (Canada: Department of Justice, 2004) at 6-7.

¹⁴⁷ Bala, *supra* note 121 at 301.

¹⁴⁸ *CLRA*, *supra* note 63 at s (4). Section 1(3) of the *SLRA* — the "Relationship of persons born outside marriage" provision — now reflects s 1(4) of the *CLRA* and states: "[i]n this Act, and in any will

The above provision reflects the severance of the relationship between a child's legal status and his or her parents' relationship. Today, filial bonds "connect children directly to parents, largely unmediated by . . . their parents' marital status".¹⁴⁹ While historically it was justifiable to deprive children of fundamental legal rights, including the right to a surname, the right to maintenance and support, and the right to inherit, exclusively on the basis of the circumstances of their birth, Canadians now live in a new era of equality rights. Indeed, under the *Canadian Charter of Rights and Freedoms*,¹⁵⁰ it has been determined by the courts that birth status is an unenumerated and analogous ground of prohibited discrimination.¹⁵¹ Consequently, and in light of contemporary legislative enactments, it seems incongruent with the present status quo to suggest that a group of Canadian children can legally be subject to rights-related deprivations for reasons surrounding the manner in which they were conceived.

The following section of this paper will demonstrate, however, that discriminatory treatment on the basis of birth status is not a relic of a bygone era. Indeed, absent legislative

unless a contrary intention is shown in the will, a reference to a person in terms of a relationship to another person determined by blood or marriage shall be deemed to include a person who comes within the description despite the fact that he or she or any other person through whom the relationship is traced was born outside marriage": *SLRA*, *supra* note 25.

¹⁴⁹ Leckey, *supra* note 19 at 19. See also, for instance, s 522 of the *CCQ*: "All children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth" (*supra* note 95).

¹⁵⁰ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 at s 15.

¹⁵¹ Bala, *supra* note 121 at 301.

reform, it follows that after-born children in Ontario will be dispossessed of intestate inheritance rights in a manner that raises similar issues to the province's treatment of bastard children in the previous century.¹⁵² Specifically, the section will describe how posthumously conceived children await discrimination in light of the provisions of the *SLRA*. The section will begin by detailing how after-born children pose particular problems for the definitions contained in the *SLRA*; it will proceed by defending the assertion that Ontario must enact legislative reform in order to avoid creating a new and unofficial category of bastard in law.¹⁵³

**SECTION III:
THE NEW BASTARD: ASSESSING THE
DEFINITIONAL IMPLICATIONS OF THE
SUCCESSION LAW REFORM ACT FOR AFTER-BORN
CHILDREN**

When parents die without leaving wills, the intestate succession laws of the relevant jurisdiction govern their children's inheritance rights.¹⁵⁴ One of the primary goals of intestacy law is to "effectuate the decedent's likely intent in the distribution of his [or her] property."¹⁵⁵ Put in another way, intestacy statutes create default wills that approximate the distributive scheme a decedent would have chosen had he or she engaged in formal estate planning prior to death.¹⁵⁶ In so doing,

¹⁵² Mykitiuk, *supra* note 10 at 773.

¹⁵³ Burns & Sumakova, *supra* note 26 at 67.

¹⁵⁴ *Ibid.*

¹⁵⁵ Susan N Gary, "Adapting Intestacy Laws to Changing Families" (2000) 18 *Law & Inequality* 1:4 at 7-8.

¹⁵⁶ Lee-ford Tritt, "Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession" (2009) 62 *SMU L Rev* 367 at 380-381.

intestacy statutes presume that decedents want their property devolving to their families. In practical terms, the consequences of this legislative presumption include: [1] the exclusion of individuals whom the decedent might have considered a child and might have preferred as a recipient of his or her property; and [2] the inclusion of individuals with whom the decedent might not have had a relationship or was even ignorant to their existence.¹⁵⁷

Posthumously conceived children fall into the second of the above-enumerated categories. More specifically, given that after-born children are conceived following the death of one of their biological donor parents, it is, quite literally, impossible for that child to have had a relationship with the deceased. It is logical to assume that a decedent would intend for his or her estate to pass on to a child that he or she “actively raised and nurtured within his [or her] family.”¹⁵⁸ It also makes sense that a decedent would be less likely to intend for his or her estate to pass onto a child that he or she did not even know “simply on account of a biological connection or legal presumption.”¹⁵⁹

What makes no sense, however, is for the law to statutorily bar a child from inheriting on the estate of its parent in intestacy simply on account of the way in which that child came into existence — circumstances over which that child had no control. Indeed, the SCC has explicitly condemned judicial interpretations of statutes that discriminate against children on the basis of birth status. In *Brule v Plummer*,¹⁶⁰ Laskin, C.J.C.,

¹⁵⁷ *Ibid* at 382.

¹⁵⁸ Megan Pendleton, “Intestate Inheritance Claims: Determining a Child’s Right to Inherit When Biological and Presumptive Paternity Overlap” (2008) 29:6 *Cardozo L Rev* 2823 at 2826-27.

¹⁵⁹ *Ibid* at 2827.

¹⁶⁰ [1979] 2 SCR 343, 94 DLR (3d) 481 at 360 [*Brule*].

Introducing the Next Class of Bastard

answered the following when considering whether a child born out of wedlock could be considered a preferred beneficiary within the meaning of section 164(2) of *The Insurance Act* (1960):¹⁶¹

There are, I think, three questions that present themselves at this point. First, is there any reason, on principles of construction or from the standpoint of context, to narrow the ordinary meaning of “children” to exclude illegitimate children? Second, is there any clear course of decision that would impel this Court to such a result? Third, is there any reason of policy, either reflected in the enactment under discussion or from a more general standpoint, to limit the right of a father or a mother to designate a natural born child as his or her preferred beneficiary? I would answer all three questions in the negative.¹⁶²

Part II of the *SLRA* governs intestate succession in Ontario; “[i]n particular, it sets out the entitlement of spouses, children and remoter issue.”¹⁶³ Because of their posthumously conceived status, it remains unclear whether or not after-born children can take on intestacy. This legislative ambiguity is largely a result of the definitions provided in the *SLRA*. Specifically, section 1.1 of the *SLRA* defines “child” as including “a child conceived before and born alive after the parent’s death,” and “issue” as including “a descendant

¹⁶¹ *The Insurance Act*, RSO 1960, c 190. S 164(2) stated: “Subject to section 173, preferred beneficiaries are the husband, wife, children, adopted children, grandchildren, children of adopted children, father, mother and adopting parents of the person whose life is insured”.

¹⁶² *Brule*, *supra* note 160 at 360.

¹⁶³ *Burns & Sumakova*, *supra* note 26 at 67.

conceived before and born alive after the person's death."¹⁶⁴ In addition, sections 47(1) and 47(2) state the following:

[W]here a person dies intestate in respect of property and leaves issue surviving him or her, the property shall be distributed, subject to the rights of the spouse, if any, equally among his or her issue who are of the nearest degree in which there are issue surviving him or her.

[W]here any issue of the degree entitled under subsection (1) has predeceased the intestate, the share of such issue shall be distributed among his or her issue in the manner set out in subsection (1) and the share devolving upon any issue of that and subsequent degrees who predecease the intestate shall be similarly distributed.¹⁶⁵

In short, when an individual dies intestate, the only family members entitled to inherit from their estate are those who satisfy the *SLRA*'s prescribed definitions of "spouse", "child", and "issue."¹⁶⁶

The definitions of "child" and "issue" in the *SLRA* pose a particular problem for after-born children; specifically, a literal reading of the definitions' inclusion of the word "conception" would preclude after-born children from becoming heirs in the event of intestate succession. A child conceived before the death of its intestate parent and who is in the mother's womb at the time of death satisfies the *SLRA*'s

¹⁶⁴ *SLRA*, *supra* note 25 at s 1.1.

¹⁶⁵ *Ibid* at ss 47(1)-47(2) (emphasis added).

¹⁶⁶ Burns & Sumakova, *supra* note 26 at 67.

definition of both “child” and “issue.”¹⁶⁷ In contrast, a child who is not only born, but also *conceived* after the death of its intestate parent, is a *prima facie* challenge to section 1.1’s definition of both “child” and “issue.”¹⁶⁸

While it must be conceded that neither definition explicitly excludes such children from becoming heirs, the Canadian courts have not yet had an opportunity to consider whether an after-born child has been “conceived before death” within the meaning of the *SLRA*.¹⁶⁹ Furthermore, there is little doubt that the drafters of the above provisions did not have the after-born in mind when considering the wording of the definitions. Indeed, the language is based on [1] a rule that has existed unchanged for over a thousand years, namely, that all heirs must be living or in gestation at the time of a decedent’s death, and [2] a reproductive reality that preceded the discovery of cryopreservation and the possibility of having viable frozen sperm.¹⁷⁰ Put in another way, “posthumous conception was literally science fiction both when the

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid* at 67-8. According to the authors, an additional challenge posed by the definitions of “child” and “issue” in the *SLRA* (for after-born children) center around presumptions regarding linear genetic connections. Specifically, “[t]he word “descendant” implies a threshold lineal genetic connection between a deceased person and an heir which will often be absent in the assisted reproduction context. Although, there may be a genetic connection (when intended parents are the genetic parents of a child born to a gestational carrier), when donated genetic material is used, such connection will not exist.” Since the following section of this paper will focus on case law involving a particular fact pattern, namely, children conceived posthumously using the sperm of their mother’s deceased partner, the paper will not address the issues posed by the lineal genetic element of the *SLRA*’s definitions.

¹⁶⁹ *Ibid* at 68.

¹⁷⁰ Carpenter, *supra* note 54 at 409.

[traditional] rule was established” and when the drafters codified it in the *SLRA*.¹⁷¹ The most obvious and seemingly effective way of resolving the question as to whether or not after-born children are to be included in the *SLRA*'s definition of both “child” and “issue” is legislative reform; this is unlikely to occur, however, “in the near future given the corollary policy debates that are likely to arise in the context of any legislative discussion of the concept of conception.”¹⁷²

Ontario's silence on the treatment of after-born children on intestacy is not an isolated legislative gap in the country. Indeed, to date, the intestacy regimes of *most* Canadian provinces, including Québec,¹⁷³ Alberta,¹⁷⁴ Manitoba,¹⁷⁵ New Brunswick,¹⁷⁶ Newfoundland and Labrador,¹⁷⁷ Nova Scotia,¹⁷⁸ Prince Edward Island,¹⁷⁹ and Saskatchewan,¹⁸⁰ have similarly failed to address the

¹⁷¹ Burns & Sumakova, *supra* note 26 at 363.

¹⁷² *Ibid.* In order to avoid uncertainty, the authors encourage parents to protect their after-born children by executing wills. Indeed, testamentary dispositions leaving property explicitly to a predetermined after-born child do not pose the same legal issues. For instance, if a man dies with a validly executed will and leaves his estate to his children, the question becomes whether or not a posthumously conceived child should be included in the will's definition of “children”.

¹⁷³ *CCQ*, *supra* note 95 at s 617.

¹⁷⁴ *Wills and Succession Act*, SA 2010, c W-12.2 at s 58(2).

¹⁷⁵ *The Intestate Succession Act*, CCSM c 185 at s 1(3).

¹⁷⁶ *Devolution of Estates Act*, RSNB 1973, c D-9 at s 30.

¹⁷⁷ *Intestate Succession Act*, RSNL 1990, c I-21 at s 12.

¹⁷⁸ *Intestate Succession Act*, RSNS 1989, c 236 at s 12.

¹⁷⁹ *Probate Act*, RSPEI 1988, c P-21 at s 95.

¹⁸⁰ *The Intestate Succession Act, 1996*, SS 1996, c I-13.1 at s 14.

challenges posed by children conceived posthumously.¹⁸¹ British Columbia, by contrast, recently amended the *Wills, Estates and Succession Act* to give after-born children inheritance rights from a deceased biological donor parent on intestacy. Though the British Columbia statute is not yet in force, the following amendment is envisioned:

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

- (a) a person who was married to, or in a marriage-like relationship with, the deceased person when that person died gives written notice, within 180 days from the issue of a representation grant, to the deceased person's personal representative, beneficiaries and intestate successors that the person may use the human reproductive material of the deceased person to conceive a child through assisted reproduction;
- (b) the descendant is born within 2 years after the deceased person's death and lives for at least 5 days;
- (c) the deceased person is the descendant's parent under Part 3 of the *Family Law Act*.¹⁸²

¹⁸¹ ALRI, *supra* note 23 at 17.

¹⁸² See Bill 4, *Wills, Estates and Succession Act*, 1st Sess, 39th Parl, British Columbia, 2009, online: British Columbia Legislative Assembly <http://www.leg.bc.ca/39th1st/3rd_read/gov04-3.htm> [Bill 4].

The above provision was one of many outlined in a 172-page white paper detailing how the province intended on revamping its outdated, and three-decade-old, *Family Relations Act*.¹⁸³ Family law practitioners across the country commended British Columbia for its cutting-edge —albeit controversial— solutions to unforeseen contemporary family law issues. Indeed, Toronto family law expert and editor of the *Reports of Family Law*, Philip Epstein, said many other provinces, including Ontario, could learn from British Columbia's efforts.¹⁸⁴

British Columbia is not the only jurisdiction to have considered the inheritance rights of children conceived posthumously. Other jurisdictions, including the United States, the United Kingdom, and Australia, have begun to do so both in court and in their respective legislatures. Consequently, the following section of this paper will evaluate the diverging outcomes in law of the above-named jurisdictions with respect to the intestate succession rights of posthumously conceived children; it will do so by considering cases which address posthumous conception issues, and the few legislatures which have enacted statutes that specifically deal with the inheritance rights of posthumously conceived children. The section will conclude with a discussion of the various interests at stake should Ontario choose to reform the *SLRA*. Specifically, the section will consider the following elements: [1] delay of distribution; [2] notice to interested parties; [3] the marital status of the parents; and [4] consent of the deceased.¹⁸⁵

¹⁸³ RSBC 1996, c 128.

¹⁸⁴ Cristin Schmitz, “BC Poised For Massive Family Law Overhaul” 30 :17 *The Lawyer’s Weekly* (10 September 2010).

¹⁸⁵ MLRC, *supra* note 28 at 17.

**SECTION IV:
LIFE AFTER DEATH: A CALL FOR ADVANCEMENT
IN LEGISLATION FOR AFTER-BORN CHILDREN**

The issues raised by posthumously conceived children in the context of intestate succession are no longer just theoretical.¹⁸⁶ Indeed, a number of courts outside of Canada have begun applying existing statutes to novel questions never before anticipated by their original drafters. The judicial outcomes to date have been inconsistent but for one common holding, namely, an appeal to the legislature of their respective jurisdiction to address the questions posed by after-born children in a comprehensive and thoughtful way. Only a few legislatures, however, have answered this call to action.¹⁸⁷

Outside of British Columbia,¹⁸⁸ lawmakers in the United States, United Kingdom, and Australia are leading the way in devising legislative answers to the questions raised by the after-born. Most jurisdictions, however, have chosen to either ignore or exclude after-born children for the purposes of intestate inheritance.¹⁸⁹ For instance, in the United States, thirty-three states have not addressed whether or not an after-born child can take on his or her deceased biological donor parent's intestacy.¹⁹⁰ Seventeen states, by contrast, have directly addressed this issue and are more or less evenly split on the outcome. Specifically, eight states have granted intestate inheritance rights to after-born children and nine states have

¹⁸⁶ Carpenter, *supra* note 54 at 350.

¹⁸⁷ *Ibid.*

¹⁸⁸ Bill 4, *supra* note 182.

¹⁸⁹ Carpenter, *supra* note 54 at 350.

¹⁹⁰ *Ibid.* at 401. The author provides a detailed table outlining the approaches to after-born children for probate purposes by jurisdiction in the United States.

denied such rights to posthumously conceived children. Of the states that have granted status to after-born children, six have done so via their legislatures,¹⁹¹ and two have done so through their courts.¹⁹² Of the nine states that have denied inheritance rights to posthumously conceived children, seven have done so by statute,¹⁹³ and two have done so in court.¹⁹⁴ Interestingly, “of the four court cases that have established the law in their respective jurisdictions, the courts split while construing essentially identical provisions.”¹⁹⁵ In short, there is no consensus regarding the best approach or the most appropriate goals for a statutory solution to the challenges raised by the after-born; this confusing legislative landscape has forced

¹⁹¹ Namely, California (*Cal Prob Code* at §§249.5-249.8 [*Cal Prob Code*]); Colorado (*Colo Rev Stat Ann* at §15-11-120 [*Colo Rev Stat Ann*]); Florida (*Fla Stat Ann* at §742.17(4) [*Fla Stat Ann*]); Iowa (*Iowa Code Ann* at §633.220) [*Iowa Code Ann*]); Louisiana (*La Rev Stat Ann* at §9:391.1(A) [*La Rev Stat Ann*]); and North Dakota (*ND Cent Code Ann* at §30.1-04-19 [*ND Cent Code Ann*]).

¹⁹² Namely, Massachusetts (*Woodward v Comm'r of Soc Sec*, 760 NE (2d) 257 (Mass 2002) [*Woodward*]); and New Jersey (*In re Estate of Kolacy*, 753 A (2d) 1257 (NJ Sup Ct Ch Div 2000) [*In re Estate of Kolacy*]).

¹⁹³ Namely, Georgia (*Ga Code Ann* at §53-2-1(b)(1) [*Ga Code Ann*]); Idaho (*Idaho Code Ann* at §15-2-108 [*Idaho Code Ann*]); Minnesota (*Minn Stat Ann* at §524.2-120(10) [*Minn Stat Ann*]); South Carolina (*SC Code Ann* at §62-2-108 [*SC Code Ann*]); South Dakota (*SD Codified Laws* at §29A-2-108 [*SD Codified Laws*]); New York (*NY Est. Powers & Trusts Law* at §5-3.2(a)-(b)); and Virginia (*Va Code Ann* at §20-164 [*Va Code Ann*]). A court has recognized, however, after-born children for class-gift purposes in New York in *In re Martin B.*, 841 NYS (2d) 207, 212 (Sur Ct 2007).

¹⁹⁴ Namely, Arkansas (*Finley v Astrue*, 270 SW (3d) 849 (Ark 2008) [*Finley*]); and New Hampshire (*Khabbaz ex rel Eng v Comm'r, Soc Sec Admin.*, 930 A (2d) 1180 at 1182 (NH 2007) [*Khabbaz*]).

¹⁹⁵ Carpenter, *supra* note 54 at 402.

courts to settle cases surrounding these children with little guidance.¹⁹⁶

The Judicial Approach: Case Law Disentitling After-Born Children from Inheriting

The following US cases, namely, *Finley v. Astrue* [“*Finley*”],¹⁹⁷ *Khabbaz ex rel. Eng v. Comm’r, Soc Sec Admin* [“*Khabbaz*”],¹⁹⁸ and *Stephen v. Commissioner* [“*Stephen*”],¹⁹⁹ describe three situations whereby after-born children were prevented from receiving survivor benefits under the *Social Security Act* [“*SSA*”] in consequence of the intestacy laws of the relevant state jurisdiction.²⁰⁰ By way of legal background, it should be noted that, in the social security context, the “[US] Code provides for the application of the intestate distribution laws of the state in which the decedent is domiciled at the time of his or her death.”²⁰¹ Consequently, if the state where a decedent was domiciled at the time of his or her death excludes biological children from the class of intestate beneficiaries, a decedent’s biological children will be prohibited from receiving social security survivor benefits.²⁰² The *SSA* provides important economic support for families after a parental death.²⁰³ For instance, if a child were dependent on a worker

¹⁹⁶ Suppon, *supra* note 15 at 229.

¹⁹⁷ *Finley*, *supra* note 194.

¹⁹⁸ *Khabbaz*, *supra* note 194.

¹⁹⁹ *Stephen v Commissioner*, 386 F Supp (2d) 1257 (MD Fla, 2005) [*Stephen*].

²⁰⁰ *Social Security Act*, 42 USC at §416(h)(2)(A) (West 2004) [*SSA*]. This provision mirrors s 1.1 of the *SLRA*, *supra* note 25.

²⁰¹ Harper, *supra* note 33 at 274.

²⁰² *Ibid* at 275.

²⁰³ Carpenter, *supra* note 54 at 384.

who was fully insured under the *SSA* at the time of his or her death, the child would be eligible to receive monthly benefits.²⁰⁴ Furthermore, if a worker's spouse is responsible for providing primary care to an eligible child, he or she can also receive monthly benefits until the child reaches the age of sixteen or is no longer disabled.²⁰⁵ In 2010, the average monthly award to an eligible child was \$750.²⁰⁶ Thus, "for an "average" family with one child, the annual survivor benefits to the child and surviving spouse would total \$18,840."²⁰⁷

Finley v. Astrue

In *Finley*, the Supreme Court of Arkansas was asked to determine whether or not a child, created as an embryo through IVF during his parent's marriage, but implanted into his mother's womb after the death of his biological donor father, could inherit from the decedent under Arkansas intestacy law as a surviving child.²⁰⁸ In order to inherit on an intestacy in

²⁰⁴ A child who is dependent on the worker at the time of his or her death can receive monthly benefits if the child is not married and [1] is under eighteen years of age, [2] is under nineteen years of age and in high school, or [3] is under a disability the child attained before the age of twenty-two, *SSA*, *supra* note 200 at §202(d)(1)(B).

²⁰⁵ *Carpenter*, *supra* note 54 at 384. "The amount payable to a survivor equals 75% of the decedent's primary insurance amount, which is the monthly benefit amount that would have been payable to the worker upon initial entitlement at full retirement age." A family's maximum provision, however, limits the total benefits to a family to between 150% and 188% of the worker's primary insurance amount.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid* at 384-5. The aggregate amount over eighteen years would total \$306, 000.

²⁰⁸ *Finley*, *supra* note 194 at 850. The petitioner impregnated herself with an embryo following the death of her husband. The embryo resulted from the egg and sperm deposits that were made by the petitioner and her husband during their marriage together.

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Arkansas, a child must at least have been “born after, but conceived before the decedent’s death.”²⁰⁹ The petitioner in this case, (unsuccessfully) argued that, because her child resulted from an embryo created prior to her husband’s death, the child satisfied the requirements of the *SSA*, namely, being conceived before a decedent’s death.²¹⁰ The petitioner posited that if the court accepted her argument, her child would be deemed to “inherit in the same manner as if born in the lifetime of the intestate,” and thus would be eligible for social security benefits.²¹¹ The court, however, concluded that the petitioner “did not conceive her child during her husband’s life as required for the child to take as the husband’s intestate distributee.”²¹² In addition, while acknowledging that the *SSA* did not provide a definition of “conceive”, the court refused to usurp the Arkansas legislature’s role of defining when conception occurs:

[While IVF] and other methods of assisted reproduction are new technologies that created new legal issues not addressed by already-existing law, . . . [defining the term “conceive”] would be making a determination that would implicate many public policy concerns, including, but certainly not limited to, the finality of estates.²¹³

The holding in *Finley* does not account for children conceived posthumously. More specifically, given that the court did not find embryo creation equivalent to conception,

²⁰⁹ *Ibid* at 853.

²¹⁰ *Ibid*.

²¹¹ *Ibid* at 851.

²¹² Harper, *supra* note 33 at 278.

²¹³ *Finley*, *supra* note 194 at 854-55.

the law applied in *Finley* is only relevant for posthumous children conceived *during* the lifetime of their biological donor father. What *Finley* does represent for the after-born child, however, is the problematic nature of applying outdated laws to novel legal issues.²¹⁴ Indeed, despite [1] the surviving parent reproducing a child within a year of her husband's death, and [2] having a strong indication of the father's intent to conceive — he did, after all, participate in the couple's conception plan through the creation of an embryo — the court refused to take the place of the legislature. In fact, the court urged the General Assembly to consider issues such as consent and time limitations, among other things, in the context of intestate succession for after-born children: "intestacy succession statutes [need to be revisited] to address issues involved in the instant case and those that have not but will likely evolve."²¹⁵ In other words, legislation needs to be created in this area "so [that] individuals in similar situations can predict the likely outcome of their actions and not be left in a *Finley* situation, where the law does not even encompass the manner in which this [after-born] child came into the world."²¹⁶

Khabbaz ex rel Eng v. Comm'r, Soc Sec Admin

Similar to *Finley*, the Supreme Court of New Hampshire held in *Khabbaz* that a child conceived via artificial insemination after her biological donor father, Rumzi Khabbaz, died was not eligible to inherit from the decedent as his surviving issue under New Hampshire intestacy law. Consequently, Donna Eng, the surviving parent, was unable to get social security survivor benefits for Christine, her posthumously conceived

²¹⁴ Pytel, *supra* note 14 at 80.

²¹⁵ *Finley*, *supra* note 194 at 855.

²¹⁶ Pytel, *supra* note 14 at 80-81.

child.²¹⁷ Eng put forward an array of arguments that were ultimately rejected by the court for being “inconsistent with [its] practice of construing statutes that deal with a similar subject matter [in such a way] that they do not contradict each other.”²¹⁸

First, Eng argued that Christine should be classified as a “surviving issue” based on the language of the state’s intestacy statute. The court, however, relying on its interpretation of the word “surviving”, reasoned that, because Christine was conceived after her biological donor father’s death, she could not legally be recognized as his surviving heir. In fact, the court went so far as to state that, “[no after-born child] is a ‘surviving issue’ within the plain meaning of the [New Hampshire] statute.”²¹⁹ Interestingly, Eng argued that, in the alternative, Christine was a non-marital child because she was not married to her husband at the time the child was conceived. Eng wanted Christine to be treated as a child born out of wedlock so that she could “avail herself of the process the legislature had established for non-marital children to have the opportunity to inherit from their fathers.”²²⁰ The court rejected this argument for two reasons: [1] the legislature enacted the statute to protect children whose parents were not married *prior* to their births — Eng and her husband, consequently, were not among the class of persons intended to

²¹⁷ *Khabbaz, supra* note 194. After Khabbaz was diagnosed with a terminal illness, he began banking his sperm for his wife. Khabbaz executed a consent form authorizing Eng to use the sperm to conceive his child. Khabbaz also indicated he wanted to be acknowledged as the legal father if Eng conceived a child through artificial insemination using his sperm. The couple already had one biological child. Khabbaz died in 1998 and Christine was born in 2000.

²¹⁸ *Ibid* at 1186.

²¹⁹ *Ibid* at 1184.

²²⁰ Lewis, *supra* note 16 at 421.

be protected by the statute,²²¹ and [2] Christine could not be categorized as an illegitimate child because the state's statutory scheme considered children conceived via artificial insemination by a married woman to be legitimate.²²² Eng's final argument was based on public policy; it was similarly rejected by the court:

[W]e agree with the special concurrence that "the intestacy statute . . . essentially leaves an entire class of posthumous[ly conceived] children unprotected." However, the present statute requires that result. To reach the opposite result . . . would require us to add words to a statute. . . . We reserve such matters of public policy for the legislature.²²³

For the purposes of this paper, the above passage from *Khabbaz* is especially revealing. Indeed, the court openly admits that the legislative situation in New Hampshire leaves an entire class of children unprotected in situations of intestacy. The implications of this statement become even clearer when one considers the fact that *Khabbaz's* other biological child, born prior to the birth of Christine, was eligible to inherit from *Khabbaz* as his surviving issue under New Hampshire's intestacy statute. In other words, despite both children being

²²¹ *Khabbaz*, *supra* note 194 at 1185 citing *NH Rev Stat Ann* at §561:4(II). "A child born of unwed parents shall inherit from or through his father as if born in lawful wedlock, under any of the following conditions: (a) Intermarriage of the parents after the birth of the child. (b) Acknowledgment of paternity or legitimation by the father. (c) A court decree adjudges the decedent to be the father before his death. (d) Paternity is established after the death of the father by clear and convincing evidence. (e) The decedent had adopted the child".

²²² *Ibid.*

²²³ *Ibid* at 1186.

conceived with Khabbaz's sperm, the court differentiated — and thus, discriminated — between two biological children on the basis of the timing of their conception. In essence, “the court penalized Christine because of the circumstances of her birth. The Supreme Court [in both Canada and the United States] has renounced that approach with regard to non-marital children.”²²⁴

Stephen v. Commissioner

In *Stephen* — as in both *Finley* and *Khabbaz* — a child was denied social security benefits on the basis of his posthumously conceived status. This case arose in Florida when the Social Security Administration denied a surviving parent's application for social security benefits on behalf of her son.²²⁵ The *SSA* requires the Commissioner to determine whether or not a child is entitled to receive child's survivor benefits; guidance is provided by regulations which further instruct how to determine a child's status.²²⁶ For instance, one regulation states that, “[a] child is eligible for benefits as the insured's “natural child” if he could inherit the insured's personal property as his natural child under state inheritance laws.”²²⁷ Under Florida's intestacy laws, however, “a child conceived from the sperm of a person who died before the transfer of sperm to a woman's body is not eligible for a claim against the decedent's estate

²²⁴ Lewis, *supra* note 16 at 423. See *Trimble v Gordon*, 430 US 762 (1977); and *Brule*, *supra* note 160.

²²⁵ *Stephen*, *supra* note 199. Michelle and Gar Stephen were married for one month before Gar died of a heart attack. Michelle extracted her husband's sperm the day after his death and cryopreserved it. Robert was born three and a half years later using the preserved sperm of his deceased biological donor father.

²²⁶ *Ibid* at 1262 (citing *SSA*, *supra* note 200 at §402(d)).

²²⁷ *Ibid* at 1263 (citing *Code of Federal Regulations* at §404.355(a)(1) (2009)).

unless the child has been provided for by the decedent's will."²²⁸ In *Stephen*, there was no will; irrespective of this fact, the court ultimately concluded that Robert, the after-born child in this case, could not receive social security benefits because he was not a dependent of the decedent at the time of his death. The court, in other words, ruled that Robert was not a surviving heir because he did not meet all of the requirements of the *SSA*, namely, being a dependent of the deceased at the time of his death.²²⁹

Unlike Arkansas and New Hampshire, Florida law specifically addresses and *excludes* posthumously conceived children from inheriting in the event of intestacy. Explicit legislative guidance regarding the rights of after-born children, however, does not necessarily result in fair or just outcomes. Indeed, Florida's "hard-lined approach [resulted in a] poor decision for posthumously conceived children [in *Stephen*]."²³⁰ In *Stephen*, it was not until *after* the death of her husband that the wife chose to cryopreserve his sperm. Consequently, it would have been virtually impossible for the petitioner in this case to satisfy the requirements of Florida intestacy law, namely, for a deceased sperm donor to provide for a posthumously conceived child in his will. In other words, the law in Florida requires deceased biological donor fathers to have both expressly intended for and consented to a posthumous conception.²³¹

The facts in *Stephen*, as a result, may not have "len[t] themselves for the court to have decided otherwise," given that the deceased biological father's sperm was extracted after his

²²⁸ *Ibid* at 1264 (citing *Fla Stat Ann* at §742.17, *supra* note 191) (emphasis added).

²²⁹ *Ibid* at 1265.

²³⁰ Pytel, *supra* note 14 at 85.

²³¹ Lewis, *supra* note 16 at 403.

death and he provided no indication of intent.²³² Florida's current law is thus problematic; despite a father clearly indicating both his intent and consent, there will likely be scenarios where an after-born child is not expressly provided for in a will. In short, while Florida's bright-line rule of strictly cutting off after-born children not provided for in a will may make for easy determinations, it risks producing unjust decisions that fail to reflect either the needs of an after-born child or the desires of a decedent — hallmark functions of intestacy statutes.²³³

The Judicial Approach: Case Law Entitling After-Born Children to Inherit

The courts in *Finley*, *Khabbaz*, and *Stephen* denied posthumously conceived children inheritance rights on the basis of their birth status; these cases are examples of the most restrictive approach to the inheritance challenges posed by these children.²³⁴ Indeed, an approach that automatically denies after-born children rights is “particularly harsh and does not promote the best interests of the child.”²³⁵ As a result, the next subsection will examine two other US cases, namely, *Woodward v. Commissioner of Social Security* [“*Woodward*”],²³⁶ and *Gillett-Netting v. Barnhart* [“*Gillett-Netting*”],²³⁷ where after-born children were granted inheritance rights under the intestacy statutes of the respective states in question. All of these cases focused heavily on the

²³² Pytel, *supra* note 14 at 85.

²³³ *Ibid.*

²³⁴ Suppon, *supra* note 15 at 235.

²³⁵ *Ibid.*

²³⁶ *Woodward*, *supra* note 192.

²³⁷ *Gillett-Netting v. Barnhart*, 371 F (3d) 593 (9th Cir 2004) [*Gillett-Netting*].

“overwhelming state interest of protecting children in their analy[ses].”²³⁸

Woodward v. Commissioner of Social Security

Woodward is considered to be one of the most notable decisions to date regarding the rights of posthumously conceived children.²³⁹ The Supreme Court of Massachusetts was asked to answer the following question:

If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts’ law of intestate succession?²⁴⁰

The court answered a qualified “yes” to the above question. More specifically, the court argued that, in “certain limited circumstances, a child resulting from posthumous reproduction

²³⁸ Suppon, *supra* note 15 at 235.

²³⁹ *Ibid* at 232.

²⁴⁰ *Woodward*, *supra* note 192 at 259. In *Woodward*, Lauren and Warren Woodward learned three years into their marriage that Warren had leukemia. The couple had no children at the time and subsequently learnt that Warren’s treatment might leave him sterile. Consequently, the couple decided to bank a quantity of Warren’s sperm. After undergoing an unsuccessful bone marrow transplant, Warren died in 1993. Two years later, Lauren gave birth to twin girls conceived via artificial insemination using Warren’s preserved sperm. Lauren then filed for social security benefits on behalf of her twin girls. Her application was first rejected by the Social Security Administration “on the ground that she had not established that the twins were the husband’s “children” within the meaning of the Act”.

may enjoy the inheritance rights of “issue” under the Massachusetts intestacy statute.”²⁴¹ These limited circumstances exist when the following elements of a four-prong test are satisfied: [1] a genetic relationship between the child and the decedent is established; [2] the decedent consented to posthumous conception; [3] the decedent consented to supporting any resulting child; and [4] the child’s birth was within a “reasonable time” after the death of his or her biological donor parent.²⁴² The court relied on three powerful interests in laying out these prongs, namely, the best interests of the child, the orderly administration of estates, and the reproductive rights of the biological donor parent.²⁴³

After taking into consideration the above interests, the *Woodward* court granted a set of posthumously conceived twins inheritance rights. The court began their analysis with the following statement: “[i]n this developing and relatively unchartered area of human relations, bright-line rules are not favored unless the applicable statute requires them.”²⁴⁴ Unlike the Florida statute under evaluation in *Stephen*, the court in *Woodward* determined that the Massachusetts intestacy statute did not require a bright-line rule and “[did not] contain an express, affirmative requirement that posthumous children must “be in existence” as of the date of the decedent’s death.”²⁴⁵ Consequently, the court in this case was able to fashion an interpretation of existing legislation in such a way that produced a beneficial outcome for after-born children. Indeed, in the absence of an express legislative directive, the court concluded that automatically barring posthumously

²⁴¹ *Ibid.*

²⁴² *Ibid* at 265.

²⁴³ *Ibid.*

²⁴⁴ *Ibid* at 264.

²⁴⁵ *Ibid.*

conceived children from taking under their deceased biological donor parent's estate would be unjust:

Posthumously conceived children may not come into the world the way the majority of children do. *But they are children nonetheless.* We may assume that the Legislature intended that such children be "entitled," in so far as possible, "to the same rights and protections of the law" as children conceived before death.²⁴⁶

Gillett-Netting v. Barnhart

Like the plaintiff in *Woodward*, the plaintiff in *Gillett-Netting*, Rhonda Gillett-Netting, impregnated herself with the cryopreserved sperm of her deceased husband, gave birth to twin daughters, and sought social security survivor benefits on behalf of her twins.²⁴⁷ The twins were denied social security benefits by the Social Security Administration on the ground that they were not actually dependent upon the insured decedent:

The administrative law judge held that "the last possible time to determine dependents [*sic*] on the wage earner's account is the date of the death of the wage earner." Therefore, children

²⁴⁶ *Ibid* at 266 (emphasis added).

²⁴⁷ *Gillett-Netting*, *supra* note 237 at 594-95. When Robert Netting was diagnosed with cancer, he and his wife, Rhonda, were trying to have a baby. After Robert's doctors informed him that his chemotherapy might render him sterile, he banked his sperm to allow him and his wife to continue trying to conceive should he become sterile. Robert confirmed that he wanted Rhonda to have their children using his frozen sperm if he ended up dying from his cancer. Robert died in 1994. After Robert's death, Rhonda underwent IVF using her eggs and Robert's sperm. The twins were born in 1996.

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conceived after the wage earner's death cannot be deemed dependent on the wage earner.²⁴⁸

Gillett-Netting appealed the district court's decision to the Ninth Circuit of the US Court of Appeals and argued that it was a violation of equal protection of the laws to apply the *SSA* to deny her children benefits. On appeal, the court held that Gillett-Netting's posthumously conceived children were entitled to social security benefits because they were considered "legitimate children" under Arizona state law.²⁴⁹

The Ninth Circuit of the US Court of Appeals began their analysis by noting that, "developing reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by [after-born] children."²⁵⁰ The court looked no further than the law on child legitimacy in Arizona to adjudge that the posthumously conceived children in this case were the decedent's legitimate children and were thus entitled to benefits. More specifically, the court concluded that the *SSA* only required an applicant to prove a child's dependency to receive benefits if the child's parentage was disputed. Under the law of Arizona, however, "[e]very child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock."²⁵¹ Consequently, because the statute made parentage undisputed, the court held that the posthumously conceived children were "deemed dependent under the [*SSA*] and need not demonstrate actual dependency nor deemed dependency" to receive benefits.²⁵² In

²⁴⁸ *Ibid* at 595.

²⁴⁹ *Ibid* at 599.

²⁵⁰ *Ibid* at 595.

²⁵¹ *Arizona Revised Statutes Ann* at §8-601 (2007).

²⁵² *Gillett-Netting*, *supra* note 237 at 599.

other words, similar to the court in *Woodward*, the court in *Gillett-Netting* found a way to interpret existing legislation in a way that would allow after-born children to receive benefits.²⁵³

Analysis

The inconsistent and divergent outcomes of on-point case law dealing with the rights of posthumously conceived children are a reflection of the current legislative landscape of intestate succession law. More specifically, because most state legislatures have not enacted statutes that explicitly deal with the inheritance rights of posthumously conceived children, the courts have been left to resolve the issue on a case-by-case, ad hoc basis.²⁵⁴ What stands at the center of this legislative void, however, are children. Posthumously conceived children have no control over the way in which they come into this world.²⁵⁵ Consequently, it is every state legislature's responsibility to protect these children by devising comprehensive legislation that weighs the competing interests at stake.²⁵⁶

A legislative solution is the only way to definitively avoid the inconsistencies that have emerged in court and "provide parameters for which future individuals in this situation can follow to achieve important rights and benefits for their posthumously conceived children."²⁵⁷ Indeed, even cases such as *Woodward*, which undoubtedly provide beneficial results for after-born children, are too restrictive and fail to consider the panoply of ways in which these children come into existence. For instance, the requirement in the *Woodward* four-

²⁵³ Pytel, *supra* note 14 at 90.

²⁵⁴ Lewis, *supra* note 16 at 412.

²⁵⁵ *Woodward*, *supra* note 192 at 266.

²⁵⁶ Pytel, *supra* note 14 at 90.

²⁵⁷ *Ibid.*

pronged test that a deceased biological donor parent consent “not only to posthumous conception specifically, but also to support any resulting child,” is too limiting and would automatically preclude a posthumously conceived child resulting from the unexpected death of a parent.²⁵⁸ Furthermore, states such as Florida, which have expressly dealt with *some* aspects of posthumous conception with the provision of straightforward, statutory bright-line rules, essentially preclude courts from undertaking analyses which consider the rights of both posthumously conceived children and their deceased biological donor parents.²⁵⁹ Consequently, the following subsection will detail considerations to take into account when promulgating legislation that adequately addresses the issues arising from the after-born; it will do so, first, by examining statutes enacted in the United Kingdom, Australia, and the United States — jurisdictions, in other words, with laws currently in force that govern the rights of posthumously conceived children — and second, after considering the experience and recommendations of other jurisdictions, will reconcile the competing interests to be weighed should Ontario choose to amend the *SLRA*.²⁶⁰

The Legislative Approach: An Analysis of Existing Statutes Relating to After-Born Children

In its report, *Human Artificial Reproduction and Related Matters* [“Report”], the Ontario Law Reform Commission [“OLRC”] recommended giving inheritance rights to posthumously conceived children so as not to discriminate against them. Specifically, the OLRC recommended amending the *SLRA* to include the following provision:

²⁵⁸ Suppon, *supra* note 15 at 235.

²⁵⁹ Pytel, *supra* note 14 at 90.

²⁶⁰ MLRC, *supra* note 28 at 17.

21(2) A child conceived posthumously with the sperm of the mother's husband or partner should be entitled to inheritance rights *in respect of any undistributed estate* once the child is born or is en ventre sa mère, as if the child were conceived while the husband or partner was alive.²⁶¹

Published in 1985, the Report's recommendation was never acted upon or implemented. The application of this provision was ultimately deemed "impracticable, or unacceptably disruptive where the estate has already been distributed according to . . . the law of intestate succession."²⁶² Furthermore, it was believed that "[d]istributions made should not be . . . postponed simply because [sperm] is held in cryopreservation."²⁶³ The above provision is one of the only documented attempts by Ontario lawmakers to regulate the rights of posthumously conceived children. Put in another way, for twenty-seven years, the rights of the after-born have remained up in the air.²⁶⁴

Leaving the *SLRA* untouched would be unwise. Indeed, "sooner or later the issue[s] raised [by after-born children will] arise, and when [they do], the matter [will] have to be decided by a court action in an adversarial forum."²⁶⁵ If the cost of a lawsuit does not deter a mother or father from bringing an

²⁶¹ Ontario Law Reform Commission, *Report on Human Artificial Reproduction and Related Matters*, vol 2 (Ministry of the Attorney General, 1985) at 278. The Commission did not, apparently, consider the possibility of a posthumously conceived child being born of a deceased woman through surrogacy (emphasis added) [OLRC].

²⁶² *Ibid* at 182.

²⁶³ *Ibid*.

²⁶⁴ MLRC, *supra* note 28 at 17.

²⁶⁵ *Ibid* at 15.

action on behalf of their posthumously conceived child, the following barrier likely will: there is no certainty of outcome in the interpretation of the *SLRA* as it now reads. Indeed, if on-point US jurisprudence has demonstrated anything, it is that similarly worded legislation can result in a variety of — and often contradicting — interpretations.²⁶⁶ Furthermore, if a claim were successful, the court would still have to qualify its decision by attaching to the ruling conditional criteria to be satisfied. A court might also reject a claim by declaring itself to be an inappropriate forum to decide matters with such obvious public policy ramifications.²⁶⁷ In short, doing nothing is not a reasonable or responsible legislative response to the challenges posed by after-born children.²⁶⁸

Explicit Legislative Exclusion of After-Born Children

One possible legislative response to the challenges posed by after-born children is to expressly deny them inheritance rights. Indeed, this legal approach is endorsed by several states in the United States, the United Kingdom, and in New South Wales, Australia. For instance, posthumously conceived children are explicitly prohibited from taking on their biological donor father's intestacy in the United Kingdom. In 2003, the British legislature passed into law the *Human Fertilisation and Embryology (Deceased Fathers) Act* [*Deceased Fathers Act*].²⁶⁹ The *Deceased Fathers Act* was specifically enacted to “make provisions about the circumstances in which, and the extent to which, a man is to be treated in law as the father of a child where the child has resulted from certain fertility

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Human Fertilisation and Embryology (Deceased Fathers) Act 2003* (UK), c 24 [*Deceased Fathers Act*].

treatments undertaken after the man's death.²⁷⁰ The 2003 law also amended section 28(6) of the *Human Fertilisation and Embryology Act 1990* ["HFEA"].²⁷¹ Subsection 28(6) of HFEA stated:

Where . . . the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child.²⁷²

Under the *Deceased Fathers Act*, a deceased man is allowed to be treated as the father of a child, where, prior to his death, he consented to the use of his sperm or an embryo conceived with the use of his sperm.²⁷³ However, while the law

²⁷⁰ *Ibid* at Preamble.

²⁷¹ Human Fertilisation and Embryology Act 1990 (UK), c 37 [HFEA].

²⁷² *Ibid* at s 28(6).

²⁷³ *Deceased Fathers Act*, *supra* note 269 at s 1(5A). The provision reads: "If — (a) a child has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination, (b) the creation of the embryo carried by her was brought about by using the sperm of a man after his death, or the creation of the embryo was brought about using the sperm of a man before his death but the embryo was placed in the woman after his death, (c) the woman was a party to a marriage with the man immediately before his death, (d) the man consented in writing (and did not withdraw the consent) — (i) to the use of his sperm after his death which brought about the creation of the embryo carried by the woman or (as the case may be) to the placing in the woman after his death of the embryo which was brought about using his sperm before his death, and (ii) to being treated for the purpose mentioned in subsection (5I) below as the father of any resulting child, (e) the woman has elected in writing not later than the end of the period of 42 days from the day on which the child was born for the man to be treated for the purpose mentioned in subsection (5I) below as the father of the child, and (f) no-one else is to be treated as the father of the child by virtue of subsection (2) or (3) above or by virtue of

provides for a man to be registered as the father of a child conceived after his death, it confines this legal treatment to very limited purposes. More specifically, section 29(3B) provides that a deceased biological father “is to be treated in law as not being the father of the child for *any other purpose*.”²⁷⁴ In other words, if a posthumously conceived child is registered as the child of a deceased man, he or she “acquires no rights as regards that man or his estate in relation to succession, aliment, or legal rights.”²⁷⁵ Consequently, while this law provides a degree of certainty — there is a blanket prohibition against after-born children taking on an intestacy — it arguably fails to consider the best interests and wishes of both the deceased and his posthumously conceived child.²⁷⁶

The jurisdiction of New South Wales, Australia, additionally precludes posthumously conceived children from taking on an intestacy. In 2007, the New South Wales Law Reform Commission [“NSW Commission”] recommended excluding after-born children from intestate succession rights. In their report, *Uniform Succession Laws: Intestacy*, the NSW Commission recommended that, “[t]he model laws should make it clear that persons born after the death of the intestate must have been in the uterus of their mother before the death of the intestate in order to gain any entitlement on intestacy.”²⁷⁷

adoption or the child being treated as mentioned in paragraph (a) or (b) of subsection (5) above, then the man shall be treated for the purpose mentioned in subsection (5I) below as the father of the child”.

²⁷⁴ *Ibid* at s 29(3B) (emphasis added).

²⁷⁵ Roderick R M Paisley, “The Succession Rights of the Unborn Child” (2006) 10 *Edinburgh Law Review* 28 at 58.

²⁷⁶ MLRC, *supra* note 28 at 16.

²⁷⁷ Austl, New South Wales, New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No 116) at

The NSW Commission was primarily concerned that the inclusion of posthumously conceived children would generate delays and complexity in the distribution of estates, “especially when the number of people in a generation have to be determined for the purposes of *per stirpes* distribution.”²⁷⁸ In addition, this problem could be further compounded in situations dealing with collateral kin of the estate. The NSW Commission preferred the “simple approach of disregarding [after-born children]” for the purposes of intestate succession.²⁷⁹ Consequently, New South Wales decided to retain and limit intestate succession rights to the child en ventre sa mère. Indeed, for the purposes of the *Succession Amendment (Intestacy) Act 2009*, a “posthumous child” is defined as a child “who is born after the person’s death after a period of gestation in the uterus that commenced before the person’s death and survives the person for at least 30 days after birth.”²⁸⁰

Explicit Legislative Inclusion of After-Born Children

Rather than expressly deny after-born children rights, an alternative legislative response is to enact laws allowing for after-born children to inherit in situations of intestacy. Unlike the United Kingdom, no US state currently expressly prohibits the recognition of after-born children for *all purposes*.²⁸¹ Instead, and as of 2011, twelve states in the United States have enacted statutes providing rights for posthumously conceived

129, online: Lawlink <[http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/r116.pdf/\\$file/r116.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/r116.pdf/$file/r116.pdf)>.

²⁷⁸ *Ibid* at 128.

²⁷⁹ *Ibid*.

²⁸⁰ *Succession Amendment (Intestacy) Act 2009*, No 29, 2009 at s 107.

²⁸¹ Kindregan Jr, *supra* note 12 at 442. See *Deceased Fathers Act*, *supra* note 268 at s 29(3B).

children in *some* capacity.²⁸² Furthermore, the number of states addressing the rights of these children will likely increase in the upcoming year. Indeed, as this paper was being written, the US Supreme Court announced that it would decide in 2012 whether children conceived through IVF after the death of their biological donor parent are entitled to survivor benefits under the *SSA*. The justices “agreed to hear an appeal by the Obama administration of a ruling by a US appeals court for a woman who seeks benefits for her twins conceived by artificial insemination after her husband’s death.”²⁸³ In its appeal, administration lawyers said the Social Security Administration has received more than 100 applications for survivor benefits by after-born children; the rate of such applications has increased significantly in recent years.²⁸⁴

US state legislatures which have chosen to enact laws addressing the inheritance rights of posthumously conceived children have done so by considering one of the following three approaches, namely, [1] adopting the *Uniform Parentage Act* provision on posthumously conceived children [“*UPA*”],²⁸⁵ [2] broadening the definition of “children” in the state’s

²⁸² Wood, *supra* note 29 at 895.

²⁸³ James Vicini, “Supreme Court to Hear In Vitro Fertilization Benefits” (16 November 2011) *Reuters*, online: Reuters <<http://au.news.yahoo.com/queensland/a/-/odd/11704720/supreme-court-to-hear-in-vitro-fertilization-benefits/>>. The case involves Karen Capato, a mother who sued in a New Jersey federal court after her request for social security benefits for her twins was denied. In 1999, her husband, Robert Capato, deposited sperm at a fertility clinic after being diagnosed with esophageal cancer. He died in March 2002, and his wife subsequently underwent IVF. She gave birth to twins in September 2003. The Supreme Court case is *Astrue v Capato*, No 11-159.

²⁸⁴ *Ibid.*

²⁸⁵ *Unif Parentage Act (2000) §707 (amended 2002) [UPA]*.

respective intestacy statute to include after-born children, and [3] designating all the legal rights of after-born children in a separate statute. No state has yet to adopt the second of the above three constructions. Consequently, the two remaining frameworks will be discussed briefly below.²⁸⁶

The adoption of the *UPA* provision on posthumously conceived children is the most commonly followed course of action; states modify the provision as necessary to render it compatible with its overall intestacy scheme. The *UPA* “provides a template for many legislatures. . . . [It] contains an explicit consent requirement for an individual to gain recognition as the parent of [an after-born] child.”²⁸⁷ Specifically, section 707 states:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after the death, the deceased individual would be a parent of the child.²⁸⁸

Seven states, namely, Colorado,²⁸⁹ Delaware,²⁹⁰ North Dakota,²⁹¹ Texas,²⁹² Utah,²⁹³ Washington,²⁹⁴ and Wyoming,²⁹⁵

²⁸⁶ Wood, *supra* note 29 at 889-890.

²⁸⁷ *Ibid.*

²⁸⁸ *UPA*, *supra* note 284.

²⁸⁹ *Colo Rev Stat Ann*, *supra* note 191.

²⁹⁰ *Del Code Ann tit 13* at §8-707 (2009).

²⁹¹ *ND Cent Code*, *supra* note 191.

²⁹² *Tex Fam Code Ann* at §160.707 (Vernon 2008) [*Tex Fam Code Ann*].

have adopted and customized the *UPA* provision, thus limiting an after-born child's right to inherit to situations where the deceased biological donor parent consented to posthumous conception in a record completed before his or her death.²⁹⁶ An example of a modification made to the *UPA* by state legislatures includes the deletion of the word "individual" at the beginning of section 707 in Texas, Utah, and Washington, and substituting it for the word "spouse"; this makes clear that "those states did not wish to legalize consent to posthumous reproduction by unmarried persons."²⁹⁷ The Texas statute also requires that the record containing the consent of the deceased person be maintained by a licensed physician.²⁹⁸

Six states, namely, California,²⁹⁹ Florida,³⁰⁰ Louisiana,³⁰¹ Ohio,³⁰² Virginia,³⁰³ and Iowa,³⁰⁴ have adopted the third approach and legislated into law unique statutes, distinct from their general intestacy regimes, in order to set forth the rights of children conceived posthumously.³⁰⁵ For

²⁹³ *Utah Code Ann.* at §78B-15-707 (2008).

²⁹⁴ *Wash Rev Code Ann* at §26.26.730 (West 2005).

²⁹⁵ *Wyo Stat Ann* at §14-2-907 (2009).

²⁹⁶ Wood, *supra* note 29 at 890.

²⁹⁷ Kindregan, Jr, *supra* note 12 at 442.

²⁹⁸ *Tex Fam Code Ann*, *supra* note 292.

²⁹⁹ *Cal Prob Code*, *supra* note 191.

³⁰⁰ *Fla Stat Ann*, *supra* note 191.

³⁰¹ *La Rev Stat Ann*, *supra* note 191.

³⁰² *Ohio Rev Code Ann* at §2105.14 (West 2005).

³⁰³ *Va Code Ann.*, *supra* note 193.

³⁰⁴ *Iowa Code Ann*, *supra* note 191.

³⁰⁵ Wood, *supra* note 29 at 891.

instance, Virginia's statute employs a time restriction to curtail when a posthumously conceived child can legally participate in an intestacy. Virginia law provides at section 20-158(B) that an egg or sperm donor whose gametic material subsequently results in the creation of an embryo but dies before that embryo is implanted, is not the parent of the resulting child unless "implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure" or "the person consents to be a parent in writing executed before the implantation."³⁰⁶ If this provision were taken alone, it would "leave open the possibility of recognizing in [an after-born] child any of the various rights that stem from a parental relationship".³⁰⁷ Another statute, however, effectively negates the protections provided in section 20-158(B) by stating that an after-born child can only inherit from his or her deceased biological donor parent if born within ten months of that parent's death.³⁰⁸

Louisiana and California permit an after-born child to inherit from a deceased biological donor parent on the condition that he or she satisfies multiple specific requirements. For instance, in Louisiana, a posthumously conceived child can only inherit if a probate court receives the prior consent in writing from the deceased biological donor parent "permitting the surviving spouse's use of his [or her] gametes, that the child is born to the surviving spouse and conceived using the gametes of the deceased, and that the child is born within three years of the decedent's death."³⁰⁹ The Louisiana statute additionally permits an heir or legatee of the decedent, whose

³⁰⁶ *Va Code Ann*, *supra* note 193. Interestingly, the statute addresses utero implantation of embryos but not methods using preserved sperm or eggs.

³⁰⁷ Wood, *supra* note 29 at 891.

³⁰⁸ *Va Code Ann*, *supra* note 193 at §20-164.

³⁰⁹ *La Rev Stat Ann*, *supra* note 191 at §9:391.1(A).

share in the estate will be reduced if the after-born child is deemed an heir of the deceased, to bring an action to disavow paternity within one year of the after-born child's birth.³¹⁰

California's statute is the most comprehensive attempt to regulate posthumous reproduction by legislation to date.³¹¹ The statute deems a posthumously conceived child to have been born during the lifetime of his or her deceased biological donor parent if the following statutory requirements are satisfied: [1] the decedent must, in a signed and dated writing that appoints an agent to control the use of the genetic material, consent to the use of his or her genetic material for posthumous conception;³¹² [2] the appointed agent must within four months of the decedent's death give written notice by certified mail, return receipt requested, that the decedent's genetic material is available for posthumous conception to a person having power to control the distribution of the decedent's estate,³¹³ and [3] the child must be conceived using the decedent's genetic material within two years of the decedent's death.³¹⁴ This statute, consequently, recognizes "the real potential for posthumous reproduction, and solves several problems," including, "the need for specific consent requirements, the need for a relative proximity of conception to the time of a parent's death, and the need for the estate administrator to close the

³¹⁰ *Ibid* at § 9:391.1(B).

³¹¹ Kindregan, Jr, *supra* note 12 at 443. The California courts were the first to struggle with the issues created by the possibility of posthumous conception. In 1993, the Second District California Court of Appeal was asked to decide if an unmarried woman, who had been designated by will to have the right to use the sperm of her deceased boyfriend, should be allowed to receive his cryopreserved sperm.

³¹² *Cal Prob Code*, *supra* note 191 at §249.5(a).

³¹³ *Ibid* at §249.5(b).

³¹⁴ *Ibid* at §249.5(c).

estate and make distribution in a reasonable time after the parent's death."³¹⁵

Analysis

Ontario has arrived at the proverbial fork in the road: leaving the *SLRA* untouched would be unwise, consequently, the province must definitively choose whether or not to expressly include or exclude posthumously conceived children from its intestacy regime. Both legislative options have their respective advantages and disadvantages. As a result, the following subsection will break down the strengths and weaknesses of each approach before recommending specific conditions for the Ontario legislature. In particular, the subsection will consider the following two benefits of excluding after-born children for the purposes of intestacy: [1] administrative efficiency; and [2] consistency with the traditional rule that all heirs must be living or in gestation at the time of a decedent's passing.³¹⁶ By contrast, the following two benefits of including after-born children for the purposes of intestacy will also be considered: [1] respect for the traditional principles of intestacy law; and [2] children's best interests.³¹⁷

The Benefits of Legislatively Excluding After-Born Children

Administrative Efficiency

The primary reason cited for legislatively excluding after-born children from a jurisdiction's intestacy regime is that it provides certainty and efficiency in the administration of estates.³¹⁸ Indeed, administrative ease is a conceptual tool

³¹⁵ Kindregan Jr, *supra* note 12 at 443.

³¹⁶ Carpenter, *supra* note 54 at 405.

³¹⁷ *Ibid* at 415.

³¹⁸ MLRC, *supra* note 28 at 15.

designed to prevent fraudulent claims and provide finality for the distributees receiving assets from an estate.³¹⁹ As will be seen later on in this section, however, legislatures can mitigate these concerns by mandating specific conditions to be satisfied before an after-born child can take on an intestacy.³²⁰ Consequently, while administrative efficiency is the strongest argument in favour of excluding after-born children for all purposes, it is excessive and unnecessary.³²¹

Firstly, fraudulent claims are of lesser concern in the context of posthumous reproduction. Given the advancement of today's genetic testing capabilities, "combined with the medical involvement needed to successfully thaw and transfer genetic material," it is virtually impossible for a child to bring forward a fraudulent claim.³²² What *is* foreseeable, however, is for a surviving partner or spouse to forge or fabricate information regarding a deceased donor's intent should a legislature require that a decedent have consented to supporting after-born children resulting from the posthumous use of his or her gametic material. These concerns are largely eradicated, however, by imposing heightened standards of proof or by creating time limitations.³²³ For instance, a legislature could incorporate a time condition that mirrors British Columbia's, namely, that a "descendant [be] born within 2 years after the deceased person's death and liv[e] for at least 5 days,"³²⁴ or implement an additional evidentiary consent requirement like

³¹⁹ See, for instance, *Khabbaz*, *supra* note 194 (the court pointed out that "waiting for the potential birth of a posthumously conceived child could tie up estate distributions indefinitely").

³²⁰ Section IV, *infra* note 362.

³²¹ Carpenter, *supra* note 54 at 406.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ Bill 4, *supra* note 182.

that of Texas's, namely, that records containing the consent of the deceased be maintained by a licensed physician.³²⁵

Secondly, concerns regarding an heir's expectation of a speedy administration are blown out of proportion given the reality of existing probate practices and statutes.³²⁶ Indeed, "[t]o the surprise (and dismay) of many heirs, the distribution of a decedent's assets is rarely an immediate event"; in fact, it is often quite a lengthy process.³²⁷ For instance, a prudent executor will take into account the following considerations before distributing a decedent's assets, namely, the payment of income and estate taxes, the disposition of creditor claims and dependants' relief applications, the liquidation of real estate, the winding down of businesses, and locating all potential heirs.³²⁸ The primary responsibility of an executor, in other words, is to ensure that each party receives his or her appropriate share of an estate and not, for instance, that each party receive their share promptly.³²⁹

Thirdly, it is important to recognize the fact that, when a decedent dies intestate and is married at the time of his or her death, "a significant portion of the estate could be distributed in the "ordinary course" of administration, notwithstanding the potential that a posthumously conceived child may be later born."³³⁰ In Ontario, for instance, an intestate's surviving spouse is entitled to the *entire* estate of a decedent if he or she

³²⁵ *Tex Fam Code Ann*, *supra* note 292.

³²⁶ Carpenter, *supra* note 54 at 406.

³²⁷ *Ibid.*

³²⁸ *Ibid* at 407.

³²⁹ *Ibid.*

³³⁰ *Ibid.*

died without leaving issue.³³¹ If an intestate dies leaving issue, by contrast, a surviving spouse is still entitled to both a preferential and distributive share of the deceased's estate; specifically, in addition to his or her distributive share which varies with the number of children or issue surviving, a surviving spouse is entitled to the first \$200,000 of a decedent's intestate estate.³³² Accordingly, the birth of a posthumously conceived child would not delay or impinge upon an executor's ability to administer those amounts to a surviving spouse after an estate's debts and expenses were paid.³³³ This is particularly true in light of the fact that, more often than not, default rules in intestacy regimes apply to decedents of modest means who did not engage in any formal estate planning.³³⁴ Put in another way, it is possible (and even

³³¹ *SLRA, supra* note 25 at ss 44. Section 44 states: "Where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property *absolutely*" (emphasis added).

³³² *Ibid* at ss 45(1)-(3). Section 45(1) states: "Subject to subsection (3), where a person dies intestate in respect of property having a net value of not more than the preferential share and is survived by a spouse and issue, the spouse is entitled to the property *absolutely*".

³³³ Carpenter, *supra* note 54 at 409. "Granted, there are situations where a posthumously conceived child would alter the result, and the executor may wish to retain control of the assets until a child is born or the frozen material is destroyed. For instance, . . . whenever a couple is not married, a posthumously conceived child would always change the result. The estate would be distributed first to the decedent's children, then parents, then siblings (and so on). Thus, if the unmarried decedent had no children while living, the decedent's parents (or siblings, if no parent survived) would receive the decedent's entire intestate estate. However, if a posthumously conceived child were born, that child would be entitled to the entire intestate estate and would, in effect, "divest" the decedent's parents of their share".

³³⁴ *Ibid* 412-13.

likely) that the aggregate value of an intestate estate will not exceed \$200,000; the surviving spouse, as a result, would be entitled to the assets of the entire estate.

In short, while a desire to avoid inconveniencing presumptive heirs is a compelling argument, it should not be prioritized over ensuring that all parties, including after-born children, receive a fair share of an intestate's estate. Furthermore, potential heirs are subject to delayed distribution in a host of other circumstances that involve a waiting period of time to determine whether or not they will inherit from a decedent's intestate estate. In fact, "if this 'waiting period' is reasonably limited, any delay would be both foreseeable and short term — a luxury not always available to the heirs when other claims remain pending."³³⁵

Consistency with the Traditional Rule

A second possible benefit of expressly excluding after-born children from an intestacy regime is consistency with the traditional rule that all heirs must be living or in gestation at the time of a decedent's death.³³⁶ Traditional rules should only be extended to novel situations, however, when the underlying principles of the rule still stand.³³⁷ This is not the case in the context of posthumous reproduction. More specifically, the "reality that the traditional rule responded to has changed dramatically over the past fifty years, and the traditional rule simply was not intended to address the scenarios possible today."³³⁸ Indeed, the traditional rule can trace its origins all the way back to Rome at a time when posthumous reproduction

³³⁵ *Ibid* at 409.

³³⁶ *Ibid* at 409.

³³⁷ *Ibid*

³³⁸ *Ibid*

was over one thousand years away from becoming a scientific possibility.³³⁹ The purpose of the traditional rule is thus outdated and no longer covers the panoply of ways in which children are now conceived and will likely be conceived in the future.³⁴⁰

Succession law has departed from its origins in other circumstances to keep pace with a changing society.³⁴¹ As seen earlier in this paper, bastard children were precluded from inheriting under common law and early statutes because the law refused to recognize a parent-child relationship between children born out of wedlock and either parent. In time, however, children born outside of marriage were granted equivalent rights of inheritance with children born within marriage.³⁴² The traditional rule was discarded, in other words, “despite that the underlying facts were no different when the rule was established than they are today.”³⁴³ What did change, however, was society’s attitude towards bastards coupled with a newfound desire to protect the best interests of children with no control over the way in which they were conceived.³⁴⁴

³³⁹ Knaplund, *supra* note 37 at 105-08.

³⁴⁰ Carpenter, *supra* note 54 at 409. Just as IVF and cryopreservation were once deemed science fiction, new methods of assisted reproduction will continue to emerge: “For instance, human cloning and “designer babies” are foreseeable, scientists are developing artificial wombs in which an embryo could develop completely outside of the body, and some scientists believe artificial sperm may be developed from bone marrow” (Carpenter, *supra* note 54 at 368).

³⁴¹ *Ibid* 409.

³⁴² *Supra* note 148.

³⁴³ Carpenter, *supra* note 54 at 410-11.

³⁴⁴ *Ibid*.

In the context of after-born children, the underlying facts have changed dramatically since the traditional rule was established. Legislatures should thus feel free to address the concerns of these children in a “fresh and proactive way”; indeed, statutory answers to the questions raised by the after-born will be misguided if the traditional rule serves as the polestar.³⁴⁵ Just as society’s attitude towards children born out of wedlock evolved, so too will its view of posthumous conception and its resulting children. The law, in short, must similarly evolve.³⁴⁶

The Benefits of Legislatively Including After-Born Children

Respect for Traditional Principles of Intestacy Law

One possible benefit of expressly including posthumously conceived children in a jurisdiction’s intestacy regime is that denying them rights would run counter to hallmark principles of probate law, namely, [a] achieving a decedent’s likely intent, and [b] the transmission of property from deceased intestates to their families, including spouses, children, and other blood relatives.³⁴⁷ Indeed, intestacy statutes such as the *SLRA* “represent a legislative attempt to provide citizens a distributive scheme that mirrors the intent of most decedents.”³⁴⁸

Firstly, a blanket rule that refuses to recognize after-born children for the purposes of inheritance captures the intent of *some* — not all — decedents who freeze their genetic material. In fact, rather than reflecting the desires of a majority

³⁴⁵ *Ibid* at 411.

³⁴⁶ *Ibid*.

³⁴⁷ Tritt, *supra* note 156.

³⁴⁸ Carpenter, *supra* note 54 at 415.

of deceased biological donor parents, the rule unreasonably prohibits inquiries into a decedent's intent, including situations where intent to provide for an after-born child is undisputed.³⁴⁹ Furthermore, as will be detailed in Section IV(d), it is possible to honor this principle of probate law by conditioning an after-born child's status as an heir on the deceased's intent to support children resulting from posthumous conception.³⁵⁰

Secondly, a primary goal of intestate succession law is to "transmit property to the presumed objects of the intestate's bounty — the family."³⁵¹ Apart from common law partners and spouses, bounty means *blood* relations. And after-born children, for instance, *are* blood relatives.³⁵² Indeed, from this perspective, the only difference between an after-born child and his or her already existing biological sibling is chronological. After-born children are biologically related to the intestate in the exact same degree as others who may take shares; as a result, "they ought to have the same status in the intestacy, and in the family."³⁵³

Children's Best Interests

A second possible benefit of including after-born children in the intestacy scheme of a jurisdiction is that it would be in their best interests to do so.³⁵⁴ Refusing to grant status to after-born children has collateral effects above and beyond the inability to receive a share of their deceased biological donor parent's estate; possible repercussions include the inability of an after-

³⁴⁹ *Ibid.*

³⁵⁰ *Infra* note 397.

³⁵¹ MLRC, *supra* note 28 at 19.

³⁵² *Ibid.*

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

born child to inherit *through* — as opposed to directly — his or her deceased biological donor parent, and receive other benefits independent of the estate.³⁵⁵ As described earlier, inheritance-related benefits are invaluable and can become a substantial source of practical support for the after-born and their families.³⁵⁶ States should facilitate the ability of families to financially look after their own children. Indeed, when children are not supported at home, they become a burden on the public purse — an outcome especially likely for the after-born given the surrounding circumstances of their family structures.³⁵⁷ In short, posthumously conceived children should be able to look to the intestate succession regime of their state for support before seeking it from the state.³⁵⁸

For the reasons outlined above, the perceived benefits of legislatively excluding after-born children from a jurisdiction's intestacy regime "may sound compelling in theory, but are minimal in application."³⁵⁹ Indeed, rather than uphold an antiquated rule of shrinking relevance, or prioritize the convenience of potential heirs, the overriding concerns of succession law must be effectuating a decedent's likely intent and protecting the best interests of his or her children.³⁶⁰ After-born children should not be punished for the manner in which they are created. Instead, "a better approach would be to at least leave the door open to these children to share in assets otherwise available to a decedent's heirs, subject to [particular] conditions".³⁶¹ The paper will detail below how administrative

³⁵⁵ Carpenter, *supra* note 54 at 415.

³⁵⁶ *Ibid* at 384-5.

³⁵⁷ *Supra* note 70.

³⁵⁸ MLRC, *supra* note 28 at 16.

³⁵⁹ Carpenter, *supra* note 54 at 414.

³⁶⁰ *Ibid* at 409.

³⁶¹ *Ibid* at 415.

efficiency, effectuating a decedent's likely intent, and protecting the best interests of children can be achieved by balancing the following conditions in a posthumous reproduction context: [1] delay of distribution; [2] notice to interested parties; [3] marital status of the parents; and [4] consent of the deceased.³⁶²

Balancing Act: Juggling the Interests at Stake When Extending Inheritance Rights to After-Born Children

The extension of inheritance rights to posthumously conceived children necessarily implicates the interests of other parties; those rights, consequently, need to be carefully balanced and limited. Above and beyond the interests of posthumously conceived children, there are important concerns in need of being addressed, including the rights of other claimants, the procreative control of the deceased, and the importance of not leaving those in charge of intestate administration in a quandary over when and how to distribute property.³⁶³

As stated earlier in this paper, the OLRC recommended in its 1985 Report that after-born children be entitled to a share of whatever remained undistributed in the intestate's estate up to the date of their birth or gestation.³⁶⁴ In other words, "[t]here would be no recall of undistributed shares and no freezing of the estate after the death to await the possible appearance of [an after-born] child."³⁶⁵ After-born children would only take the appropriate proportionate share of the remaining estate and "no effort would be required to bring them up to parity with those who had already received shares".³⁶⁶ The OLRC approach is,

³⁶² *Ibid.*

³⁶³ *Ibid* at 17.

³⁶⁴ OLRC, *supra* note 261 at 278.

³⁶⁵ MLRC, *supra* note 28 at 17.

³⁶⁶ *Ibid.*

on one hand, an advantageous one. For instance, if an after-born child is only entitled to whatever remained undistributed in the estate up to the date of their birth or gestation, there would be no subsequent need to set a time limit for the delay of distribution; this model also avoids the necessity of informing interested parties that a posthumous conception is a possibility and having to detail its attending consequences.³⁶⁷

On the other hand, the OLRC model is a “shabby treatment of [after-born] children, awarding them whatever crumbs may happen to be left on the table when they come into existence, and not a full share by right.”³⁶⁸ Furthermore, this model fails to consider the wishes of the deceased intestate concerning the use of his or her gametic material posthumously for the purposes of conception. Consequently, this legislative approach to the inclusion of after-born children inadequately balances all the competing interests at stake.³⁶⁹ Should Ontario choose to reform the *SLRA* in favour of after-born children, the province must consider balancing the following legislative conditions.

Delay of Distribution

Ontario needs to consider whether an after-born child must be born within a specific time period after a biological donor parent’s death before a decedent’s estate can be administered.³⁷⁰ It is important to do so because it provides finality to the administrative process where an after-born child could potentially divest other distributees of all or a part of their share of a decedent’s estate.³⁷¹ Without a time limitation,

³⁶⁷ OLRC, *supra* note 261 at 278.

³⁶⁸ MLRC, *supra* note 28 at 17-18.

³⁶⁹ *Ibid.*

³⁷⁰ Carpenter, *supra* note 54 at 424.

³⁷¹ *Ibid.* at 425.

an estate could remain open indefinitely as an executor awaits the birth of an after-born child — an event in which there is no guarantee will actually happen.³⁷² Furthermore, the chosen time limit needs to be responsive to — and reflective of — the situation at hand. Indeed, a surviving spouse or partner must be given a realistic and unpressured amount of time to grieve in order to make the life-altering decision of parenting a posthumously conceived child.³⁷³ Examples of statutory time limits include Louisiana's, which requires an after-born child's birth to occur within three years of the death of the biological donor parent, and California's, which mandates only that a child be in utero within two years of the biological donor parent's death.³⁷⁴ Both states delay the administration of an intestate's estate by up to three years. The justifications given for a two or three year conception window include: [1] it provides a grieving spouse or partner with an appropriate amount of time to prepare emotionally for a posthumous conception; [2] it provides a sufficient amount of time for a surviving spouse or partner to become pregnant if initial attempts are unsuccessful; and [3] it provides a strict cutoff date on which both executors and distributees can rely.³⁷⁵

In light of the above considerations, it is clear that a time limitation period needs to be of a reasonable duration. That being said, each of the above considerations can be satisfied without establishing an *absolute* cutoff. More specifically, “[a]n approach that limits [executor] and transferee liability after a certain point, but does not close the door completely, still satisfies each of these goals.”³⁷⁶ Indeed,

³⁷² *Ibid.*

³⁷³ MLRC, *supra* note 28 at 18.

³⁷⁴ *La Rev Stat Ann, supra* note 191 at §9:391.1.A; *Cal Prob Code, supra* note 191 at §249.5.

³⁷⁵ Carpenter, *supra* note 54 at 425.

³⁷⁶ *Ibid* at 425-6.

if an after-born child arrives after the limitation period expires, he or she should still be entitled to receive a share of any assets that remain undistributed in the estate. Put in another way, an executor should have the discretion to retain assets for a surviving partner or spouse who is trying to get pregnant but who has failed to conceive an after-born child within the limitation period. This distinction is important. The overall purpose of the limitation period should relate to liability for distributions, and not, for instance, a child's ability to inherit as an heir.³⁷⁷ Consequently, once a limitation period ends, an executor should be free to distribute an estate's assets to the proper devisees/beneficiaries as they then stand, and neither "the [executor] nor the recipient shall have any liability to later-born children for doing so."³⁷⁸

Notice to Interested Parties

A second condition the Ontario legislature must consider is whether a surviving spouse or partner should provide an executor or other fiduciary in charge of a decedent's estate with notice that the deceased has genetic material available for the purposes of conceiving a child posthumously.³⁷⁹ California is currently the only jurisdiction in the United States with a notice requirement.³⁸⁰ Specifically, California requires that the person

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ MLRC, *supra* note 28 at 19. If the person in control of an estate also happens to be a potential user of the reproductive material in question, written notice should be given to all interested parties that the deceased's gametic material is available for the purpose of posthumous conception.

³⁸⁰ *Cal Prob Code, supra* note 191 at §249.5(b). British Columbia has a written notice requirement in the context of testate succession: "Written notice must be given to the deceased person's personal representative who is responsible for administering the will and to people whose interest in the estate may be affected by the use of the

in control of a deceased's genetic material notify each person with control over the decedent's assets that that person intends to use the genetic material; notice must also be provided no later than four months from the date a decedent's death certificate is issued or the date a judgment is entered declaring the decedent's death.³⁸¹ Furthermore, failure to provide notice automatically precludes an after-born child from participating in his or her biological donor parent's intestacy.³⁸²

Like California, Ontario should establish a notice requirement. Unlike California, however, the failure of a surviving spouse or partner to notify an executor of his or her intent to use a decedent's genetic material should not bar an after-born child from receiving assets. Indeed, similar to the time period limitation, a child's status as an heir should not depend on the satisfaction of a procedural requirement over which neither the child or the decedent has any control. Instead, "the survivor's failure to provide such notice should simply limit the fiduciary and recipient's liability for distributions made after the notice period expires without knowledge by the fiduciary of the survivor's intent to have the decedent's [after-born child]."³⁸³ Furthermore, if an executor receives notice after the period has lapsed for notifying the appropriate parties, he or she should have the discretion to retain all or some of the remaining undistributed assets of the

deceased's eggs, sperm or embryo (e.g., other children)": British Columbia, Ministry of Attorney General, *White Paper on Family Relations Act Reform: Proposals for a New Family Law Act* (2010) at 33.

³⁸¹ Carpenter, *supra* note 54 at 423.

³⁸² *Ibid.*

³⁸³ *Ibid.*

estate for the duration of the time limitation period outlined earlier.³⁸⁴

An appropriate time limit for the notice requirement could mirror the limitation period set forth in the *SLRA* for launching dependants' relief applications. Specifically, section 61.1 states that all applications must be made "after six months from the grant of letters probate of the will or of letters of administration."³⁸⁵ During the limitation period, the administrator cannot distribute any part of the estate — except for paying out creditors — because "the whole of the net estate must be available for payment to those judged in need of relief."³⁸⁶ It makes no sense, consequently, to have a shorter notice period for after-born children since no distribution of the estate could be made anyways. However, similar to the limitation period in the *SLRA*, judges should be given the discretion to extend the time limit to account for the fact that a six-month period might not be a sufficient amount of time for a grieving spouse or partner to give such notice.³⁸⁷

³⁸⁴ *Supra* note 375 "Unlike a creditor's claim . . . this is not a business deal or third-party interaction. It is a (potential) future child of the decedent — whom the decedent had consented to support" (Carpenter, *supra* note 54 at 424).

³⁸⁵ *SLRA*, *supra* note 25 at s 61.1.

³⁸⁶ MLRC, *supra* note 28 at 19.

³⁸⁷ *Ibid.* Section 61.2 of the *SLRA* states: "The court, if it considers it proper, may allow an application to be made at any time as to any portion of the estate remaining undistributed at the date of the application" (*SLRA*, *supra* note 25). Six months should be a sufficient amount of time for a grieving spouse or partner to give notice because it is merely notice of the *availability* of gametic material for posthumous use and not notice of an actual intention to use it.

Marital Status of the Parents

A third condition the Ontario legislature must consider is whether a deceased biological donor parent must have been married to the surviving party at the time of his or her death in order for an after-born child to participate in an intestacy.³⁸⁸ In British Columbia's forthcoming statute, for instance, an after-born child will only be deemed an heir if there is proof that the deceased gave written consent to use his or her genetic material posthumously to a person who was "married to, or in a marriage-like relationship with, the deceased person when that person died."³⁸⁹ Similarly, Louisiana and Iowa both require that the parties be married at the time of a decedent's death in order for a future after-born child to be granted the status of an heir.³⁹⁰ In California, Colorado, and North Dakota, by contrast, an after-born child can be deemed an heir irrespective of the deceased biological donor parent's relationship to the surviving party.³⁹¹

Given that a primary theme of this paper is the condemnation of discrimination on the basis of birth status, it would be counterintuitive to recommend that Ontario include the marital status of the parents as a legitimate condition for determining an after-born child's status as an heir. Indeed, in addition to being incompatible with sections 1(4) of the *CLRA* and 1(3) of the *SLRA*, requiring the parties to have been married at the time of the biological donor parent's death would reconnect a relationship long severed in the province, namely, a child's legal status and his or her parent's

³⁸⁸ Carpenter, *supra* note 54 at 427.

³⁸⁹ *Family Law Act*, SBC 2011, c 25 at s 28(1)(c)(i).

³⁹⁰ *Iowa Code Ann*, *supra* note 191 at §633.220A; *La Rev Stat Ann*, *supra* note 191 at §9:391.1(A).

³⁹¹ *Cal Prob Code*, *supra* note 191 at §249.5; *Colo Rev Stat Ann*, *supra* note 191; *ND Cent Code Ann*, *supra* note 191.

relationship.³⁹² Furthermore, including a marital status condition would run counter to two important functions of intestate succession law, specifically, effectuating a decedent's likely intent, and protecting the best interests of an intestate's children. If a legislature is concerned with carrying out the intent of the deceased, "it is purely anecdotal whether more married individuals would consent to the posthumous use of their genetic material than would single individuals in a committed relationship."³⁹³ In fact, if Ontario restricted intestate inheritance rights to after-born children whose parents were married, the statute would, in nearly every instance, fail to provide support to any child whether or not their parents were married.³⁹⁴ As explained earlier in this paper, surviving spouses are entitled in a majority of cases to all or a substantial portion of an intestate's estate regardless of whether the decedent left children or issue.³⁹⁵ Consequently, if a goal of Ontario is to protect the best interests of children, the marital status of a biological donor parent should not be relevant.³⁹⁶

Consent of the Deceased

A fourth condition the Ontario legislature must consider is the kind and degree of consent required by a biological donor parent to the posthumous use of his or her genetic material.³⁹⁷

While scholars uniformly support a consent requirement, they disagree on its exact formulation.³⁹⁸ For instance, some

³⁹² Leckey, *supra* note 19 at 19.

³⁹³ Carpenter, *supra* note 54 at 427.

³⁹⁴ *Ibid* at 427-8.

³⁹⁵ *SLRA*, *supra* note 25 at ss 44-5.

³⁹⁶ Carpenter, *supra* note 54 at 427.

³⁹⁷ *Ibid* at 418.

³⁹⁸ *Ibid* at 419.

academics argue that if a decedent consented to the posthumous use of his or her genetic material, that person should be “deemed to have consented to provide support as a matter of law.”³⁹⁹ Other scholars argue, however, that consent to support an after-born child should not be presumed and that a decedent’s intent should be the controlling factor. Accordingly, an after-born child should only be entitled to a share of the estate of his or her biological donor parent if that parent affirmatively consented to support him or her upon death.⁴⁰⁰

In *Woodward*, the Supreme Court of Massachusetts recognized the importance of respecting every individual’s reproductive rights, including deceased persons; “parenthood, [in other words], should not be thrust upon anyone.”⁴⁰¹ In response to that principle, the *Woodward* court held that proof of consent of the deceased to the use of his or her gametic material for the purposes of conceiving a child posthumously should be a condition of eligibility for after-born children to inherit in an intestate succession. Furthermore, proof of consent needs to be clear and convincing; “after all, the banking of such material may indicate only a wish to reproduce after some lifetime contingency, not necessarily a wish to reproduce after death.”⁴⁰²

³⁹⁹ Ronald Chester, “Freezing the Heir Apparent: A Dialogue on Postmortem Conception” (1996) 33 Hous L Rev 967 at 995. “By analogy, if an individual chooses to have sex with another, that individual will be financially responsible for a child conceived from that act, whether or not either individual intended for conception to occur” (Carpenter, *supra* note 54 at 419.)

⁴⁰⁰ Carpenter, *supra* note 54 at 419. “For instance, if a decedent had children during his life, he may authorize his wife or partner to use his genetic material to produce another child, but he may intend to share his estate only with the children he knew”.

⁴⁰¹ *Woodward*, *supra* note 192 at 266.

⁴⁰² MLRC, *supra* note 28 at 20.

Every single state in the United States that admits after-born children to intestate inheritance rights requires the consent of the deceased to posthumous conception. For instance, Louisiana stipulates that a decedent must have “specifically authorized in writing” the posthumous use of gametic material.⁴⁰³ California additionally requires that consent be “in writing . . . signed by the decedent and dated.”⁴⁰⁴ In Canada, by contrast, the *Assisted Human Reproduction Act* [“*AHRA*”]⁴⁰⁵ will have significant implications for any consent requirement enacted in relation to the use of gametic material posthumously. More specifically, the *AHRA* “creates a uniform federal scheme for the use of genetic material for reproductive purposes based on the free and informed consent of the donor,” regardless of whether the material is used by the donor himself or herself, the donor’s spouse or common law partner, or by a third party.⁴⁰⁶

The legal status of the *AHRA* is in doubt since the SCC rendered their decision on the constitutionality of various provisions contained therein.⁴⁰⁷ Indeed, in *Reference re Assisted Human Reproduction Act*, sections 8-12 of the *AHRA* were challenged as being *ultra vires* the legislative authority of Parliament.⁴⁰⁸ Section 8 of the statute deals specifically with consent-related issues. For instance, section 8(1) of the *AHRA* mandates that no person can use reproductive materials for the purpose of creating an embryo “unless the donor of the material has given written consent . . . to its use for that

⁴⁰³ *La Rev Stat Ann.*, *supra* note 191 at §9:391.1.A.

⁴⁰⁴ *Cal Prob Code*, *supra* note 191 at §249.5.

⁴⁰⁵ SC 2004, c 2 [*AHRA*].

⁴⁰⁶ Burns & Sumakova, *supra* note 26 at 59.

⁴⁰⁷ ALRI, *supra* note 23 at 8.

⁴⁰⁸ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 SCR 457 [*Reference re Assisted Human Reproduction Act*].

purpose.”⁴⁰⁹ Furthermore, section 8(2) states that human reproductive material cannot be removed from a donor’s body after the donor’s death for the purpose of creating an embryo “unless the donor of the material has given written consent . . . to its removal for that purpose.”⁴¹⁰

In a slim majority decision, the SCC ultimately concluded that the consent provisions under the *AHRA* are a valid exercise of the criminal law power:

At the heart of s. 8 lies the fundamental importance that we ascribe to human autonomy. . . . There is a consensus in society that the consensual use of reproductive material implicates fundamental notions of morality. This confirms that s. 8 is valid criminal law.⁴¹¹

In Canada, consequently, it would seem as though an after-born child could not lawfully be produced *without the written consent of the deceased*. In fact, the only regulations that have been promulgated under the *AHRA* to date are those related to section 8.⁴¹² In short, irrespective of the constitutional validity of section 8 of the *AHRA*, it would still be wise for the *SLRA* to include a requirement for the written consent of the deceased “to make clear that, even post-mortem, reproductive choice would be protected.”⁴¹³ Indeed, as emphasized by the SCC,

⁴⁰⁹ *AHRA*, *supra* note 405 at s 8.1.

⁴¹⁰ *Ibid* at s 8.2.

⁴¹¹ *Reference re Assisted Human Reproduction Act*, *supra* note 408 at para 90.

⁴¹² Barbara von Tigerstrom, “Federal Health Legislation and the *Assisted Human Reproduction Act Reference*” (2011) 74 Sask L Rev 33 at note 4.

⁴¹³ MLRC, *supra* note 28 at 21.

informed consent is the quintessential marker of human autonomy.⁴¹⁴

Consent to Inheritance Rights

In *Woodward*, the court delineated a two-fold consent requirement; more specifically, a deceased intestate would have to have consented to [1] posthumous conception, and [2] supporting the resulting after-born child(ren).⁴¹⁵ The objective of the second consent requirement is to ensure that the deceased donor intended to create after-born children with inheritance rights. Furthermore, this second requirement is an attempt by the court to differentiate between gametic donations by anonymous third parties and donations by parents specifically intending to produce after-born children. Sperm donation, for instance, is generally anonymous and confidential. By requiring proof of consent to support children produced from cryopreserved sperm, however, a legislature would shield anonymous donors from the legal responsibilities of parenthood and “encourage the socially beneficial practice of sperm donation.”⁴¹⁶ The inclusion of the second consent requirement in the *SLRA*, consequently, would provide an additional level of certainty and completeness.⁴¹⁷

⁴¹⁴ *Reference re Assisted Human Reproduction Act*, *supra* note 408 at para 90.

⁴¹⁵ *Woodward*, *supra* note 192 at 269.

⁴¹⁶ *Ibid.*

⁴¹⁷ MLRC, *supra* note 28 at 22. Not a single US statute which provides rights to posthumously conceived children includes this second consent requirement of support.

Inheritance from Other Relatives

The US case of *In re Estate of Kolacy*⁴¹⁸ stands for the principle that after-born children can inherit from both their deceased biological donor parent and — through their deceased parent — other relatives such as grandparents or collateral family members. Of the US statutes that admit inheritance rights to after-born children, none place limitations on the purposes for which parentage may be determined; consequently, “rights in intestacies from or through deceased [biological donor] parents may be inferred.”⁴¹⁹ The statutes in Louisiana and California,⁴²⁰ however, appear to limit after-born children’s inheritance rights to their respective biological donor parent’s estate. For instance, in Louisiana, the legislation states:

[A]ny child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit *from the decedent*, as the child would have had if the child had been in existence at the time of the death of the deceased parent.⁴²¹

On its face, “[t]here seems to be no principled reason to restrict [the] intestacy rights of [after-born] children” to their deceased

⁴¹⁸ *In re Estate of Kolacy*, *supra* note 192. In this case, the decedent contracted leukemia and deposited sperm in a New Jersey sperm bank in case his treatments rendered him sterile. Following the decedent’s death, his widow impregnated herself with the decedent’s preserved sperm. Twins were born 18 months after their biological donor father’s passing.

⁴¹⁹ MLRC, *supra* note 28 at 23.

⁴²⁰ *Cal Prob Code*, *supra* note 191 at §249.5.

⁴²¹ *La Rev Stat Ann*, *supra* note 191 at §9:391.1.A (emphasis added).

biological donor parent's estate.⁴²² Indeed, after-born children are biologically related to other family members; consequently, they too should have rights in intestacies above and beyond their deceased biological donor parent.⁴²³

CONCLUSION

Representations of bastard children as “threatening pretender[s] to the legal family's property” have a rich and complicated history in both literature and law.⁴²⁴ And while the archetype of the bastard as private property usurper can trace its origins all the way back to the Old Testament, so too can references to the need of protecting all of society's children. In *Psalm 127*, “A Song of Ascent”, children are perceived as a blessing from God:

3. Behold, children are a gift of the Lord; the fruit of the womb is a reward. 4. Like arrows in the hand of a warrior, so are the children of one's youth. 5. How blessed is the man whose quiver is full of them; they shall not be ashamed, when they speak with their enemies in the gate.⁴²⁵

Not all children, however, are protected equally. The advent of reproductive technologies, coupled with a legal system that cannot keep pace, has resulted in a new class of children being denied inheritance rights solely on the basis of the way they were conceived.⁴²⁶ Ontario has reached a point where making up its mind is the only prudent action available to lawmakers

⁴²² MLRC, *supra* note 28 at 24.

⁴²³ *Ibid.*

⁴²⁴ Zunshine, *supra* note 2.

⁴²⁵ *Psalm 127*: 3-5.

⁴²⁶ Suppon, *supra* note 15 at 229.

Introducing the Next Class of Bastard

regarding the rights of the after-born. And, unless it takes legislative action — by explicitly including after-born children in its intestacy scheme — the province risks dispossessing a group of children of fundamental rights in a manner reminiscent of its treatment of children born out of wedlock in the previous century.⁴²⁷