

NOTE

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Deferring to the Dead: A Uniquely American Approach to Providing for Posthumously Conceived Children

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INTRODUCTION

Many people fail to carefully consider the manner in which they would like their wealth and valued possessions to be handled after death.¹ Alternatively, but equally problematic, some people give significant thought to these matters, but fail to memorialize their wishes in a way the law recognizes.² In either scenario, the state intervenes; it makes decisions for the person who has died and, more significantly, for the loved ones who remain. Its decisions are based on its intestacy law which govern distribution when a person dies without a testamentary instrument and which are designed to distribute assets in the way the legislature believes most people would want.³ The laws are meant to “fulfil[] the donative intent of the average intestate decedent.”⁴ Only if donative intent is fulfilled are the laws a success.

Defining the wishes of the “average” intestate decedent is difficult, particularly in the relatively new but increasingly common scenario in which a decedent’s surviving partner gives birth to a posthumously (after death) conceived child. Posthumously conceived children are the result of careful family planning in which a family uses a combination of reproductive technologies to allow a mother to conceive a child after the child’s father has died.⁵ At present, intestacy laws throughout the United States approach this scenario in a variety of ways, with some states distributing a decedent’s assets to posthumously conceived children and some not.

The greatest impact of intestacy laws governing posthumously conceived children is actually not felt when surviving families pursue

¹ Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211 (2004).

² *Id.*

³ *Id.*

⁴ *Id.* at 211.

⁵ *Id.* For a technical discussion regarding the science behind various reproductive technologies, see *Assisted Reproductive Technologies*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/art.aspx> (last visited May 12, 2015).

Although it is possible (when reproductive technology is coupled with surrogacy) for children to be conceived after their mother’s death, this paper will focus on the more common scenario of children conceived after their father’s death. A related situation is that of a frozen embryo, created by two parents who intentionally created the embryo but perished before the embryos were implanted and born. There is some argument that this child more closely qualifies as a child “in being” under intestacy statutes since it was conceived prior to the parent’s death, thus rendering this complication moot, but case law has not yet developed around this issue. This category of cases will also not be addressed in this paper.

a decedent's home or tangible assets. Instead, families with posthumously conceived children are more likely to encounter these laws when they pursue the decedent's Social Security survivor benefits. The Social Security Administration requires U.S. courts to turn to intestacy laws of the state when determining an applicant's eligibility to receive Social Security benefits.⁶ Thus, a posthumously conceived child is eligible for benefits only if the child could inherit through the state's intestacy law.⁷ Usually, whether the child could inherit through the state's intestacy law depends on how the state defines a "child" within those laws and, more specifically, whether the state takes a position on whether posthumously conceived children fall within that definition.⁸ The lack of attention many states have given to the interplay between their intestacy laws and Social Security benefits is alarming.

In this paper, I will conclude that the state legislatures should uniformly allow posthumously conceived children to inherit from their deceased parent which will, in turn, allow courts to extend Social Security and other benefits to these children. By comparing the purposes underlying U.S. inheritance law to the purposes underlying French inheritance law, I will demonstrate that uniform inheritance for these children is consistent with the U.S.'s approach throughout the intestacy system. I will argue that values like equality and efficient estate administration emphasized within French inheritance law—and often cited as reasons against allowing posthumously conceived children to inherit—are not as prevalent in U.S. inheritance law. Instead, under U.S. law, efficiency often gives way to ensuring a decedent's intent is carried out. Legislatures must extend the American principles of intent-fulfillment to the context of granting inheritance rights to posthumously conceived children.

Other scholars and legal advocates have also argued for change in U.S. intestacy law that would allow posthumously conceived children to inherit from the estate of their deceased parent.⁹ These scholars have

⁶ ALBERTA L. REF. INST., REPORT NO. 23, SUCCESSION AND POSTHUMOUSLY CONCEIVED CHILDREN: REPORT FOR DISCUSSION 34 (2012). *See, e.g.*, *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (2002); *In re Estate of Kolacy*, 753 A.2d 1257 (2000); *Khabbaz v. Comm'r of Soc. Sec.*, 930 A.2d 1180 (2007); *Stephen v. Comm'r of Soc. Sec. Admin.*, 386 F.Supp. 2d 1257 (2005); *Comm'r of Soc. Sec. v. Capato*, 132 S. Ct. 2021 (2012).

⁷ ALBERTA L. REF. INST, *supra* note 6, at 34.

⁸ *Id.*

⁹ *See, e.g.*, Julie Goodwin, *Not All Children are Created Equal: A Proposal to Address Equal Protection Inheritance Rights of Posthumously Conceived Children*, 4 CONN. PUB.

grounded their conclusions in alternative theories, including Constitutional arguments involving the Equal Protection Clause,¹⁰ or moral arguments based on ensuring the dignity of the deceased.¹¹ My scholarship reaches the same conclusion, but by arguing from a historical and cultural perspective. In particular, I argue that allowing posthumously conceived children to inherit is consistent with the American approach to inheritance law and its emphasis on testamentary intent. In Part I, I will illustrate how the rights of a posthumously *conceived* child differ from those of a posthumously *born* child under current law, and I will explore the primary scenario in which American courts (both state and federal) have encountered these children's claims. In Part II, I will explain the historical roots of both the American inheritance law system and the French inheritance law system and how those roots persist in each country's modern law. Finally, in Part III, I will conclude that current law often fails to contemplate posthumously conceived children, thereby forcing courts to deny them rights in a way that is inconsistent with the rest of American inheritance law.

I

THE LAW AND TECHNOLOGY: LEGISLATURES STRUGGLE TO KEEP UP WITH THE CHANGING COMPOSITION OF THE MODERN FAMILY

The legislature's goal when drafting intestacy law is to effectuate an average person's intent, but it has been difficult for lawmakers to keep pace with all aspects of our complicated human lives. A hypothetical case is illustrative. Imagine a baby, Jane. Both of Jane's parents were looking forward to Jane joining them and their other children in their home, but Jane's father is tragically killed in a car accident while Jane

INT. L.J., 234 (2005); Charles P. Kindregan, *Dead Dads: Thawing an Heir from the Freezer*, 35 WM. MITCHELL L. REV. 433.

¹⁰ See Goodwin, *supra* note 9. But see *In re Estate of Kolacy*, 332 N.J. Super. 593, 599 (2000) (rejecting a constitutional challenge to intestacy law where plaintiffs argued that denying inheritance rights to posthumously conceived children "invidiously and irrationally discriminate[s]" though finding for plaintiffs on other grounds).

¹¹ Devon D. Williams, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, 34 CAMPBELL L. REV. 181, 200 (2011) (suggesting that legislatures should adopt a uniform set of rules, similar to the Wills Act, to address these issues; particularly when the posthumously conceived child will be produced not from preserved sperm, but from sperm retrieved from a man shortly after he dies).

is still in utero. As Jane will not be born for another seven months, her father will never have the chance to meet her.

After his death, the assets from Jane's father's estate will be distributed. If he is like approximately half of the citizens of the United States, he will not have left a will explaining the way he wishes for his assets to be divided.¹² Instead, the court will look to his state's intestacy statutes to determine "who takes what" from his estate because, when a person does not leave a will, intestacy statutes serve as a default.¹³ Note that, because they serve as a default, the statutes are designed to distribute a person's estate the way most people would want it distributed—to "close family members."¹⁴ In that aim, the Uniform Probate Code, a model for intestacy laws, provides thirteen different intestate distribution schemes; the schemes account for different family structures and consider "the number of people surviving the decedent and the relationship of the survivors to the intestate decedent."¹⁵ For example, when a person is married with children upon death, intestacy laws often dictate that the spouse, and sometimes the children, will take the estate.¹⁶

Jane's situation complicates this basic premise. She arguably does not fit neatly into the category of a "close family member" as she was not living outside of the womb at the time of her father's death. But Jane is far from the first child to find herself in this situation. Sadly, many children have encountered the same tragedy. Fortunately for Jane, intestacy statutes contemplate children in this situation.¹⁷ In every state, Jane will be able to inherit from her father in the same amounts as her already-living siblings.¹⁸ Because the Social Security Administration requires U.S. courts to turn to intestacy laws when

¹² Sheryl Nance-Nash, *Why More than Half of Americans Don't Have Wills*, DAILYFINANCE (Aug. 26, 2011, 3:05 PM), <http://www.dailyfinance.com/2011/08/26/what-america-thinks-about-estate-planning>.

¹³ Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 3 (2000). The statutes are also consulted when a person drafts a will, but the will is deemed ineffective for some reason, perhaps because it was ineffectively executed or because it was fraudulently executed.

¹⁴ *Id.*

¹⁵ UNIF. PROBATE CODE §§ 2-101 to 2-103 (amended 1993); Seidman, *supra* note 1, at 223.

¹⁶ See Gary, *supra* note 13, at 12.

¹⁷ *Posthumous Children*, U.S. DEPARTMENT OF STATE FOREIGN AFFAIRS MANUAL VOLUME 7—CONSULAR AFFAIRS, 7 FAM 1180, 1830 (2012).

¹⁸ Goodwin, *supra* note 9.

determining an applicant's eligibility to receive Social Security benefits, Jane should also be eligible to receive benefits through her father.

To many, the outcome in Jane's case likely feels like the logical one. After all, it seems like Jane's father would have expressly manifested his desire for Jane to inherit from him had anyone asked (or, more specifically, had he drafted a will). If intestacy laws are designed to effectuate most decedents' wishes, they should allow children like Jane to inherit. As far as U.S. courts are concerned, a case like Jane's can be easily decided in the child's favor using existing state statutes.¹⁹ But, as is often the case, advances in technology have further complicated the legal landscape surrounding these issues.

A. Many U.S. States Have Failed to Update Their Laws to Account for the Fact that a Child May Be Posthumously Conceived

Today, a child may be not only posthumously born, like Jane, but also posthumously conceived.²⁰ That is, a child's father may die before the child ever begins growing in the womb.²¹ Researchers have made tremendous strides in the area of reproductive technology such that now, with careful planning, a family may use a combination of reproductive technologies to allow a mother to conceive her partner's child long after the partner has died.²²

Why would a family want to do this? Consider the example of Robert and Karen Capato.²³ Shortly after Robert and Karen married in 1999, Robert was diagnosed with esophageal cancer.²⁴ Robert's doctors warned the couple that Robert's treatment might impair his ability to reproduce, so the couple chose to preserve some of Robert's sperm.²⁵ Still, they continued trying to conceive a child naturally, and they were successful.²⁶ In 2001, Karen gave birth to their son.²⁷

¹⁹ *Id.*

²⁰ Mary Kate Zago, *Second Class Children: The Intestate Inheritance Rights Denied to Posthumously Conceived Children and How Legislative Reform and Estate Planning Techniques Can Create Equality*, LAW SCHOOL STUDENT SCHOLARSHIP, PAPER 609, 3 (2014).

²¹ *Id.*

²² *Id.* For a technical discussion regarding the science behind various reproductive technologies, see U.S. Department of Health and Human Services, *supra* note 5.

²³ *Comm'r of Soc. Sec. v. Capato*, 132 S. Ct. 2021, 2026 (2012).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Karen and Robert hoped to have another child, but in 2002 Robert passed away from his illness.²⁸ After his death, Karen still wanted to provide her son with a sibling. So, Karen utilized the sperm she and her husband had preserved for this very reason.²⁹ Karen used the preserved sperm and other reproductive technology to continue trying to have another child.³⁰ In 2003, eighteen months after Robert's death, Karen gave birth to twin girls.³¹ The twins were thus both posthumously conceived *and* posthumously born.

Although Karen was thrilled at the miracle of her children's birth, her joy was soon dampened by legal realities she had not considered. When Robert's estate was being distributed, Karen encountered resistance in fulfilling what she contended were the girls' inheritance rights—Social Security survivor benefits.³² The case moved through the judicial system, and eventually the Supreme Court of the United States was asked to determine the twins' inheritance rights in *Commissioner of Social Security v. Capato*.³³ Specifically, the Court considered whether the children qualified to receive Robert's Social Security benefits under the Social Security Act.³⁴ The Court's analysis focused on state intestacy law in Florida, where Robert was domiciled, because the Act directed the Social Security Board to use state intestacy law to determine whether a benefit applicant qualified as a "child" of the insured.³⁵ Ultimately, the twins were denied status as "children" under the Act because their posthumous conception placed them outside the scope of Florida intestacy law's definition of "children."³⁶ The most significant result of the court's interpretation was that the twins, unlike their brother, were deemed to have no entitlement to Robert's Social Security survivor benefits.³⁷

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² As a result of cases like *Shapira v. Union National Bank*, 39 Ohio Misc. 28 (1974), a person generally has no constitutional right to inherit. However, a person does have a constitutional right to devise, as articulated in *Hodel v. Irving*, 481 U.S. 704 (1987). Karen Capato's argument for her children was grounded not in the U.S. Constitution, but in her interpretation of her state's intestacy law.

³³ *Capato*, 132 S. Ct. at 2026.

³⁴ *Id.*

³⁵ *Id.* at 2024–25.

³⁶ *Id.*

³⁷ *Id.*

Under *Capato*, it is clear that posthumously born children might be entitled to different rights depending on whether they were conceived before or after their father's death. Thus, a state's intestacy law will dictate a child's right to inheritance in some cases, and her right to Social Security benefits in all cases. Today, states differ in their approach to the issue.³⁸ Some states have considered the question, and determined that posthumously conceived children cannot inherit under intestacy law.³⁹ Some allow posthumously conceived children to inherit, but only if certain conditions are met.⁴⁰ States in this group might, for example, condition inheritance rights on the child being conceived within a certain time frame⁴¹ or on the mother providing a written promise that the decedent father approved of her use of the reproductive material.⁴² Perhaps most alarmingly, some states have yet to consider the question at all⁴³ despite the undeniable impact on eligibility for Social Security benefits.

One could speculate that, had he been asked, Robert Capato would have agreed that he would want any children his wife birthed from his preserved sperm to be entitled to full inheritance rights. Or, said another way, if Robert had amended his will before he died he likely would have provided for the twins.⁴⁴ If intestacy laws are to serve as a default

³⁸ KATHERINE DWYER, *Inheritance Rights of Posthumously Conceived Children in Other States*, OFFICE OF LEG. RESEARCH, REP. 2012-R-0319 (2012).

³⁹ *Id.* For example, in Oregon, posthumously conceived children cannot inherit because Oregon's intestacy law on the matter, ORS 112.075, only extends to children who are in gestation when their father dies. *See* OR. REV. STAT. 112.075 (2016). The law was drafted in 1969, before the technology at issue was commonplace.

⁴⁰ *Id.* The states are California, Colorado, Iowa, Louisiana, North Dakota, Texas, and Virginia. *See, e.g.*, CAL. PROB. CODE ANN. § 249.5(c) (West Supp. 2012); COLO. REV. STATE. ANN. § 15-11-120(11) (West 2011); IOWA CODE ANN. § 633.220(A)(1) (West Supp. 2012); LA. STAT. ANN. § 9:391.1(A) (West 2008); N.D. CENT. CODE ANN. § 30.1-04-19(11) (West 2009); TEX. FAM. CODE § 160.703; VA. CODE ANN. § 20-158(B).

⁴¹ *See, e.g.*, CAL. PROB. CODE ANN. § 249.5(c) (2012) (allowing inheritance if child is in utero within two years of parent's death); COLO. REV. STATE. ANN. § 15-11-120(11) (West 2011) (in utero within three years or born within 45 months); IOWA CODE ANN. § 633.220(A)(1) (West Supp. 2012) (born within two years); LA. STAT. ANN. § 9:391.1(A) (West 2008) (born within three years); N.D. CENT. CODE ANN. § 30.1-04-19(11) (West 2009) (in utero within three years or born within forty-five months).

⁴² *See, e.g.*, DEL. CODE ANN. tit. 13, § 8-704.

⁴³ *Id.*

⁴⁴ *Comm'r of Soc. Sec. v. Capato*, 132 S. Ct. 2021, 2023 (2012). Robert Capato did execute a will. The will provided for Karen and their son, but was not amended in the roughly two years between his son's birth and his own death, likely because of the progression of his illness. Regardless, the court would have used Florida's intestacy law for the purpose of determining if the twins were entitled to Robert's Social Security benefits, so the result would have been the same in terms of the benefits.

for what most people would want, and if it were demonstrated that most people would want their children conceived in this way to inherit, then state intestacy laws should reflect as much. Think back to Jane, the hypothetical child who was a developing fetus when her father died, and whom we determined was unequivocally entitled to inheritance rights under every state's intestacy laws. If the rationale in Jane's case had been applied by the Florida Legislature as it drafted its intestacy laws, and it had considered a family like the one in *Capato*, it might have defined its intestacy laws differently.

So why did the Florida legislature, and the legislatures of other states with similar laws, not have the *Capato* family in mind? The simplest answer is that technology has outpaced the law as it relates to inheritance rights. As one scholar noted, "inheritance law, which at first seems to be a fortress of the legitimate family, appears on closer inspection to be more like a museum."⁴⁵ Scientific advancements, to say nothing of social norms, are evolving at a pace that can be difficult for anyone to respond to, let alone elected officials who must make rules according to slow, formal processes.

B. A Major Purpose Underlying U.S. Inheritance Law—Ensuring a Decedent's Intent if Fulfilled—Is Frustrated By This Failure

The United States is not alone in needing to adapt to changing family structures.⁴⁶ Among the countries confronting these issues, however, the United States is somewhat unique in its overall approach to inheritance law.⁴⁷ In particular, the United States has consistently aimed to create an inheritance system that fulfills decedent's wishes to the greatest extent possible. This unique approach provides the argument needed to expand rights to posthumously conceived children that might not be persuasive in other countries. Where the historical and cultural traditions of U.S. intestacy law are compared to those of France, it is obvious that one of the strongest rationales for modifying U.S. law to provide greater rights for posthumously conceived children is that a more inclusive law better purports with American inheritance system goals. We must use American principles of intent-fulfillment to

⁴⁵ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW AND THE FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 289–90 (1989).

⁴⁶ Maya Sabatello, *Posthumously Conceived Children: An International and Human Rights Perspective*, 27 *J. L. & HEALTH* 29, 36 (2014).

⁴⁷ Adam J. Hirsch, *American History of Inheritance Law*, *OXFORD INT'L ENCYCLOPEDIA OF LEGAL HISTORY* (2009).

urge state legislatures to make posthumously conceived children and their families a priority and to update state laws accordingly

II A COUNTRY'S INHERITANCE LAWS CAN BE UNDERSTOOD THROUGH ITS HISTORICAL CONTEXT

The U.S.'s and France's differing approaches to inheritance law can be explained by the fact that the bodies of law developed along very different cultural and historical paths. These paths led to a fundamental difference in thinking regarding the appropriate emphasis within inheritance laws. In the U.S. system today, legislatures emphasize ensuring that a person's intent is carried out.⁴⁸ In the French system today, the emphasis is on ensuring that a person's estate can be efficiently administered by equally dividing assets between beneficiaries and then closed.⁴⁹ While these two goals—effectuating intent and ensuring efficiency—may complement each other at times, they do not always do so. When defining the inheritance rights of posthumously conceived children, the purposes conflict,⁵⁰ and lawmakers must decide which to give more weight. Although not a proponent of the position herself, Ellen Garside summarizes the argument that efficiency and fairness dictate that posthumously conceived children not inherit.⁵¹ She explains that “[a]llowing a child born some twenty years after the death of the gamete provider to claim his or her inheritance and force other heirs and legatees to reduce their inheritance will wreak havoc on stability of land titles” and fail to “protect the state's interest in stable land titles and the orderly disposition of property.”⁵² In short, critics of allowing these children to inherit fear that both the state and other existing children will be left wondering about the security of their rights.⁵³ Of course, as some state laws reflect, the twenty-year timeline Garside speaks of can easily be

⁴⁸ *Id.*

⁴⁹ Margaret H. Darrow, *Revolution in the House: Family, Class, and Inheritance in Southern France, 1775-1825*, PRINCETON LEGACY LIBRARY (1990).

⁵⁰ Rosalind Atherton, *En ventre sa frigidaire: posthumous children in the succession context*, 19 *LEGAL STUD.* 2, 139 (2006).

⁵¹ Ellen Garside, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 *LOY. L. REV.* 713, 730 (1996).

⁵² *Id.*

⁵³ *Id.*

shortened with legislation,⁵⁴ but the concern about finality persists even, for example, during a two-year timeline. Granting posthumously conceived children inheritance rights is not the “tidy” result.⁵⁵ Yet, as will be explained, it is the result most consistent with the rest of U.S. law, and U.S. lawmakers have often opted for less-tidy results when it means a decedent’s wishes are more likely to be fulfilled.

A. The Primary Purpose of U.S. Inheritance Law Is to Ensure a Decedent’s Intent Is Fulfilled

The primary purpose of U.S. inheritance law today is to “cure intent-defeating formalism.”⁵⁶ That purpose is not new. The history of American inheritance law can be conceptualized as existing within at least two periods: the colonial period through the nineteenth century and the twentieth century through modern day.⁵⁷ When the periods are considered together, it is clear that “American inheritance law has always been, and remains, marked by a robust freedom of testation that distinguishes our law from that of modern Britain and other countries in the western world.”⁵⁸ As American inheritance law was first derived from British law, the areas of departure are conspicuous.⁵⁹ They are also purposeful.⁶⁰ The periods are characterized by different legal developments in inheritance law, but a common theme unites the history: an emphasis on ensuring that the law does not interfere with a person’s ability to see her wishes carried out after her death.

The first period in the development of American inheritance law is the colonial period.⁶¹ The colonial period was a time in which Americans quickly began making changes to the formal inheritance

⁵⁴ See, e.g., CAL. PROB. CODE ANN. § 249.5(c) (West) (effective Jan. 1, 2006) (allowing inheritance if child is in utero within two years of parent’s death).

⁵⁵ Atherton, *supra* note 50, at 160.

⁵⁶ Seidman, *supra* note 1, at 220; see also UNIF. PROBATE CODE art. II, prefatory note (amended in 2008) (explaining the UPC drafters’ thinking behind the 1990 revisions to the Code which increased the share intestate spouses take from an estate by noting that, “[i]n the twenty or so years between the original promulgation of the Code [in 1969] and the 1990 revisions, several developments occurred that prompted the systematic round of review” including “the decline of formalism in favor of intent-serving policies”).

⁵⁷ Hirsch, *supra* note 47, at 235–40.

⁵⁸ *Id.* at 235.

⁵⁹ George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, 51 YALE L.J. 1280, 1296 (1942).

⁶⁰ *Id.*

⁶¹ Hirsch, *supra* note 47, at 235.

system they brought with them from England⁶² under which, depending on a person's social status, wealth, sex, and property, he might have limited or no control over the disposition of his property.⁶³ The colonists rejected many of those English traditions.⁶⁴ Instead, they "embraced freedom of testation from the beginning."⁶⁵ Most of the colonies largely eliminated restrictions on a person's ability to dictate what would happen to his estate at death.⁶⁶ For example, the colonists eliminated the rule of primogeniture that governed estate distribution in England under which the eldest son always inherited the family's land at his father's death.⁶⁷

In place of the British rules, the colonists adopted a new intestacy system that included drastic changes designed to effectuate a decedent's intent. For example, the majority of colonies' intestacy laws reflected the idea that, at a parent's death, the parent's property should be divided equally among the surviving children (instead of given entirely to the eldest son).⁶⁸ Massachusetts, which had such a rule, also allowed the courts substantial discretion to modify the rule's application as needed in specific cases.⁶⁹ For example, the court could give a widow the majority of the estate if there were young, surviving children.⁷⁰ This scheme represented such a "clear departure from the common law of England," that it was, in one Massachusetts case, challenged as a violation of the colony's charter, though it was eventually approved by royal authority.⁷¹

Other changes also supported the goal of carrying out the decedent's intent. In 1751, Virginia altered its laws to allow colonists to pass their estate using what are known as holographic wills.⁷² A holographic will

⁶² *Id.*

⁶³ Carole Shammas, *English Inheritance Law and its Transfer to the Colonies*, 31. AM. J. LEGAL HIST. 145, 145 (1987).

⁶⁴ *Id.*

⁶⁵ Hirsch, *supra* note 47, at 235.

⁶⁶ *Id.* Two restrictions were preserved. The first dictated that a surviving spouse had to receive a certain percentage of a deceased spouse's land, and the second restriction, placed on a person who had already inherited some property, allowed a deviser to limit his devisee's ability to leave property to someone outside the family's bloodline.

⁶⁷ *Id.* Rules of primogeniture dictate that an eldest son must inherit his family's land at his father's death.

⁶⁸ *Id.*

⁶⁹ Haskins, *supra* note 59, at 1296.

⁷⁰ *Id.*

⁷¹ *Id.* at 1295.

⁷² Hirsch, *supra* note 47, at 236.

is a will written by hand and not witnessed—two of the formal requirements of traditional wills.⁷³ Relaxing formalities “allowed the courts to give effect to the deceased’s intent, insofar as that intent could be ascertained.”⁷⁴

The Revolutionary era continued the pattern of making many changes in inheritance law. The evolving cultural and political landscape of the American Revolution “freed American lawmakers to innovate at their pleasure,” and shaped the development of inheritance law.⁷⁵ Thomas Jefferson and other revolutionary leaders commended the changes, believing that, to establish a republic, they “had to get rid of the system that consistently awarded power with power and aided in the unequal distribution of wealth.”⁷⁶ With the focus shifting away from wealth concentration and on to a decedent’s intent, the states also relaxed limits on who could inherit from a decedent.⁷⁷ The idea that children should inherit equally after the parent’s death (as opposed to the eldest son only) was spread to all states.⁷⁸ Restrictions on devisees’ ability to leave property to someone outside of the family’s bloodline, a restriction retained during the colonial period, was abolished.⁷⁹ Finally, the holographic will, once common only in Virginia, spread to other states.⁸⁰

During the nineteenth century, changes to inheritance law slowed, at least in comparison to the rate at which it developed earlier.⁸¹ In fact, the most relevant development during this time period was not to the law of intestacy but to the law surrounding *planned* distributions.⁸² This

⁷³ *Id.*

⁷⁴ Haskins, *supra* note 59, at 1297.

⁷⁵ Hirsch, *supra* note 47, at 236.

⁷⁶ Meggie Orgain, *Death Comes to Us All, But Through Inheritance, the Rich Can Get Richer: Inheritance and the Federal Estate Tax*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 173, 181 (2011).

⁷⁷ Hirsch, *supra* note 47, at 236.

⁷⁸ *Id.* In fact, even those states that had maintained that the eldest son should receive the largest portion of a parent’s estate adopted this more egalitarian rule during the revolutionary period. The states had previously cited religious doctrine to justify distributing the estate unequally, but these approaches were abandoned.

⁷⁹ *Id.* See also Shamas, *supra* note 46 (explaining that this change made particular sense in the American context where land was plentiful, but money (which could be used for compensating younger siblings in England) was not).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

development was the advent of the trust.⁸³ A trust allows its drafter to dictate which person can inherit from her, when that person can inherit from her, and how that person can use the inheritance once it is received.⁸⁴ Thus, although this change effected only planned inheritance arrangements, the U.S. legislature's selective adoption of trust law from Britain⁸⁵ further indicates a commitment to ensuring a person's intent can be fulfilled.

Changing family dynamics during the latter half of the twentieth century led to the second sea change in intestacy law that continues to the present day. Adjustments in the law during this period have been largely designed to adapt to the evolving structure of American families.⁸⁶ State legislatures recognized that American families were changing, and that current laws were no longer sufficient to account for things like multiple marriages.⁸⁷ They "responded by enacting more complex intestacy statutes to interpret probable intent in blended-family situations."⁸⁸ For example, most states have changed their intestacy laws to reflect the idea that a spouse should inherit the same amount from a deceased spouse in intestacy, regardless of whether the surviving spouse is the husband or wife.⁸⁹ Additionally, most states have adjusted their intestacy laws to account for the fact that a couple might bring children to their marriage from a previous marriage,⁹⁰ might have adopted children, and might have non-marital children.⁹¹ These types of changes are meant to ensure that all of the people most decedents would consider "family" will inherit through intestacy.⁹²

Although not the focus of this discussion, it is worth noting that the parallel body of modern testamentary law also has several features that allow a testator to fulfill her intent. For example, in most states testators are free to disinherit their independent *or* dependent children, and these children cannot assert a forced right to part of the estate.⁹³ Freedom to

⁸³ Dwyer, *supra* note 38, at 326.

⁸⁴ Hirsch, *supra* note 47, at 327.

⁸⁵ *Id.* at 326.

⁸⁶ *Id.* at 238.

⁸⁷ Seidman, *supra* note 1, at 220.

⁸⁸ Hirsch, *supra* note 47, at 238.

⁸⁹ *Id.* Previously, ideas about a woman's ability to support herself after the death of her husband led to unequal distributions in this area.

⁹⁰ *Id.*

⁹¹ See, e.g., UNIF. PROBATE CODE §§ 2-103, 2-114; see Seidman, *supra* note 1, at 220.

⁹² Seidman, *supra* note 1, at 220.

⁹³ See John H. Langbein, *In Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978).

disinherit leaves more assets for the testator to distribute in accord with her wishes. Further, if a testator's will is challenged based on her mental capacity, in many states, a jury (not a single judge) will be asked to ascertain her intent.⁹⁴ This ensures that a larger pool of people will consider what most accurately effectuates her intent.⁹⁵ These laws reflect an overarching goal in inheritance law of giving a person the freedom to ensure her wishes are carried out after her death.

The preceding features of U.S. intestacy law illustrate that legislatures have long intended to create a system where a decedent's wishes can be fulfilled. As will be explored in the following section, French inheritance law is not founded on the same principles and instead places greater weight on other values.

B. The Primary Purpose of French Inheritance Law Is to Ensure Equality Among Inheritors and the Efficient Administration of the Decedent's Estate

If the purpose of U.S. intestacy law is to “cure intent-defeating formalism,”⁹⁶ then the purpose of French inheritance law is to cure inequality and inefficiency. The contrasted purposes should not be surprising; French inheritance law reflects the different context in which it was developed.⁹⁷ In particular, the French Revolution affected the way the French conceptualize families and, in turn, how the country structures its inheritance laws.⁹⁸ During the French Revolution, multiple aspects of French family law were reformed,⁹⁹ including inheritance law.¹⁰⁰ Encouraging families to model equality and selflessness was seen as crucial to reviving France.¹⁰¹ Legislators worked to “inject the principles of liberty and equality into family relationships in order to create a family appropriate to the new regime.”¹⁰² During the first four years of the Revolution, drastic changes were made to promote these values, which often meant

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Seidman, *supra* note 1.

⁹⁷ Darrow, *supra* note 49.

⁹⁸ *Id.*

⁹⁹ *Id.* Other changes included: legalizing divorce and adoption, extending property rights to women, and limiting the power of husbands over their wives/fathers over their children.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

restricting what a person might do with property.¹⁰³ The law was changed to mandate that property of both a testator and an intestate decedent pass to his children in equal proportion.¹⁰⁴

The changes to inheritance law made during this time were not always welcomed.¹⁰⁵ Some families manipulated the new system in an effort to ensure one person, usually the oldest son, received the bulk of his parent's estate.¹⁰⁶ This was especially true in Southern France, which previously allowed substantial discretion to testators.¹⁰⁷ Nevertheless, over time the legislative desire for equality within the family defeated any desire to fulfill a person's wishes.¹⁰⁸

The Revolution's effect on inheritance law persists today. Modern French law continues to strive for equality, but that purpose has now been joined by a desire for efficiency. As a result, France, like many European countries, places numerous restrictions on a person's ability to exert control over property after death.¹⁰⁹

For example, one of the most prominent aspects of modern French inheritance law is its continued emphasis on ensuring a person's property passes to her children. Under modern law, if a person dies without a will, her children receive all of her assets.¹¹⁰ If she is married, her spouse receives a life interest in the decedent's property,¹¹¹ but at her death the property passes to the children.¹¹² The idea is equally pervasive in French testamentary law, where it shows up in the form of "forced heirship."¹¹³ A person with children can freely dispose of only *part* of her land; the remaining portion is "reserved" for her children.¹¹⁴ Even if she wanted to, a French testator could not exclude the child

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Shelly Krecizer-Levy, *Inheritance Legal Systems and the Intergenerational Bond*, 46 REAL PROP. TR. & EST. L.J. 495, 536 (2011).

¹¹⁰ *Legal Guide to French Succession Law and Inheritance Tax*, AHSTONKCI, <http://www.clefrance.co.uk/index.php/thebuyingprocess/french-succession-law-and-inheritance-tax#.VIYSPJErLIU> (last visited Feb. 1, 2015).

¹¹¹ *Id.* Alternatively, the spouse could chose to take one-fourth of the estate. The remaining three-fourths would pass to the children.

¹¹² *Id.*

¹¹³ Krecizer-Levy, *supra* note 109, at 535.

¹¹⁴ *Id.* at 536.

from her inheritance.¹¹⁵ The portion of the land that the government will deem “reserved” depends on the number of children the person has.¹¹⁶ In this way, an estate can be neatly proportioned and concluded. As these features of French inheritance law demonstrate, lawmakers prioritize efficiency and equality over other concerns when drafting inheritance law.

III

THE PURPOSES UNDERLYING U.S. INHERITANCE LAW ARE NOT BEING SERVED THROUGH STATES’ CURRENT APPROACH TO POSTHUMOUSLY CONCEIVED CHILDREN AND INHERITANCE

Despite some of the significant changes in U.S. inheritance law discussed throughout Part II of this paper, it is important to keep in mind that the described changes occurred over hundreds of years. The reality is that legislatures typically do not make inheritance laws a priority when updating existing law or drafting new law.¹¹⁷ When this reality is coupled with rapid changes in technology, a problem emerges.

The *Woodward* case, arising out of Massachusetts, provides a clear example of the challenge that arises when technology outpaces the legislature’s ability or desire to change laws.¹¹⁸ When tasked with determining the inheritance rights of a posthumously conceived child, the *Woodward* court found no modern law on the books to guide it.¹¹⁹ Instead, that court was forced to try to stretch existing intestacy laws to the situation before it.¹²⁰ Although the case was heard in 2002, the court was forced to apply a statute from 1836.¹²¹ Surely, the 1836 Massachusetts legislature did not contemplate the fact that a child could be created from preserved sperm and in vitro fertilization years after its parent had deceased.¹²² Still, the antiquated statute was the only law

¹¹⁵ See Miranda Ingram, *Property in France: Keep it in la famille Now and for Ever*, THE TELEGRAPH (Aug. 30, 2008, 12:01 AM) for one French lawyer’s advice on drafting around these laws to exclude children, noting that it is “virtually impossible” to do so.

¹¹⁶ Kreiczler-Levy, *supra* note 109, at 535.

¹¹⁷ Consider Oregon, which last overhauled its intestacy law structure in 1969. It is only revisiting the laws now, fifty years later. See S.B. 379 (27)(4), 2015 Gen. Assemb. (Or. 2015) (considering expressly providing for children conceived after decedent’s death).

¹¹⁸ *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 259 (2002).

¹¹⁹ *Id.*

¹²⁰ Hirsch, *supra* note 47, at 240.

¹²¹ See *Woodward*, 760 N.E.2d at 264.

¹²² Consider, again, Oregon, a state that revised its statutes in 1969. Although, relative to the statute at issue in *Woodward*, this statute was written recently; even the 1969 statute was

available. The court was thus left applying legislation created for “yesterday’s technologies and yesterday’s questions.”¹²³

An examination of U.S. case law demonstrates that the issues presented by *Woodward* and *Capato* are not isolated events. The courts have repeatedly been asked to tackle these issues with little legislative guidance. Judge Stanton of New Jersey’s Superior Court voiced his frustration with this issue in the 2000 case *In re Estate of William J. Kolacy*:

I think it would be helpful for the legislature to deal with these kinds of issues. In the meanwhile, life goes on, and people come into the courts seeking redress for present problems. We judges cannot simply put those problems on hold in the hope that someday (which may never come) the Legislature will deal with the problem in question. Simple justice requires us to do the best we can with the statutory law presently available.¹²⁴

The facts of *Kolacy*, which prompted those comments, are remarkably similar to those of *Capato*. In both, a married couple decided to preserve sperm after the husband received a life-threatening diagnosis and was told the treatment might make him infertile.¹²⁵ Also in both, a mother gave birth to twin girls eighteen months after her husband’s death, and, in both, the children were denied Social Security benefits.¹²⁶ Finally, as in *Capato*, to determine whether the children were eligible for benefits, the court turned to state intestacy law and, more specifically, the law’s definition of “children.”¹²⁷ Judge Stanton squarely acknowledged the problem the court faced in applying the law,¹²⁸

The simple fact is that when the legislature adopted N.J.S.A. 3B:5-8 it was not giving any thought whatever to the kind of problem we have in this case. To the extent that there was a conscious legislative intent about reproductive processes involved, the intent was undoubtedly to deal fairly and sensibly with children resulting from

written well before the technology discussed in this paper was commonplace. Thus, under ORS 112.075, inheritance rights currently only extend to children who are in gestation when their father dies.

¹²³ Shammass, *supra* note 63, at 146.

¹²⁴ *In re Estate of Kolacy*, 332 N.J. Super. 593, 602 (2000).

¹²⁵ *Id.* at 596.

¹²⁶ *Id.* at 596–97.

¹²⁷ *Id.*

¹²⁸ N.J. Stat. Ann. § 3B:5-8 (West) (effective Feb. 27, 2005) reads, “an individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.” The State argued that the statute simply did not address posthumously conceived children, so it would be inappropriate for the court to apply the law to them.

traditional sexual activity in which a man directly deposits sperm into the body of a woman The New Jersey Legislature has never addressed the problems posed in estate law by current human reproductive technology.¹²⁹

Reasoning that one underlying purpose of inheritance law is to allow children to inherit from their parents, the *Kolacy* court concluded that the twins should inherit under the statute.¹³⁰ This analysis was unique in expressing firm, decedent-intent based arguments in favor of posthumously conceived children.

Not all courts have adopted the same type of intent-fulfillment approach to deciding these cases. Like in *Capato*, the United States District Court in Florida denied inheritance rights to a posthumously conceived child in *Stephen v. Commissioner of United States*.¹³¹ The child in *Stephen* was born after his mother underwent in vitro fertilization, but the sperm had not been intentionally preserved for that purpose.¹³² Instead, the mother had extracted sperm from her husband immediately after his death.¹³³ Approximately three years after the father's death, the child was born.¹³⁴ He was denied Social Security benefits.¹³⁵ In addition to the slightly different factual circumstances, this case was also unique from the others discussed in that the court was able to turn to a law actually addressing posthumously conceived children specifically.¹³⁶ The law expressly mandated that a child conceived after his father died was not eligible for a claim against the father's estate unless the father provided for that child in a will.¹³⁷ In affirming the Social Security Administration's benefit denial, the court acknowledged that "no one would deny that Robert is a 'child' in the ordinary sense of the word" or that "Robert is the genetic child of Gar

¹²⁹ *In re Estate of Kolacy*, 332 N.J. Super. 593, 600 (2000).

¹³⁰ *Id.* at 602. The court did not directly address the subsequent question of whether the children were therefore entitled to Social Security benefits. Plaintiffs merely sought a declaration of rights by the New Jersey court. They were pursuing the benefits action within the Social Security Administration's appellate process.

¹³¹ *Stephen v. Comm'r of United States*, 386 F Supp. 2d 1257 (Dist. Ct. Fla. 2005).

¹³² *Id.* at 1258.

¹³³ *Id.* Mr. Gar Stephen died of a sudden heart attack.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ FLA. STAT. § 742.17 (West 1993).

¹³⁷ *Id.* The court explained further that even if Mr. Stephens had left a will, the outcome of the case would still be uncertain unless he clearly defined "child" within the will. *See In re Estate of Kolacy*, 332 N.J. Super. 593, 599 (2000).

Stephen.”¹³⁸ Despite the fact that the child’s existence met the common sense and scientific definition of a child, the court reasoned that the child fell outside the statutory definition because of the timing of his conception.¹³⁹

In 2007, a New Hampshire court in *Khabbaz v. Commissioner of Social Security Administration* also determined that a posthumously conceived child could not inherit.¹⁴⁰ As in the other cases, Mr. Khabbaz began preserving sperm when he received a diagnosis of a terminal illness.¹⁴¹ However, unlike in *Capato*, *Woodward*, *Stephen*, or *Kolacy*, Mr. Khabbaz took further precaution; he executed a consent form stating that he intended for his wife to use the sperm and that it was his “desire and intent to be legally recognized as the father of the child to the fullest extent allowable by the law.”¹⁴² Approximately two years after Mr. Khabbaz’s death, his wife gave birth.¹⁴³ The child was denied Social Security benefits.¹⁴⁴ New Hampshire law¹⁴⁵ dictates that an intestate estate pass to the decedent’s “surviving issue,”¹⁴⁶ and the court reasoned that the plain meaning of “surviving” requires that the person be alive or in existence *at the time of the decedent’s death*.¹⁴⁷ The child did not meet that definition.¹⁴⁸ The court distinguished its holding from *Woodward*¹⁴⁹ by noting that, unlike the Massachusetts statute at issue in *Woodward*, the legislative scheme in New Hampshire evinced an express intent to only provide for those that “survive” and that allowing posthumously conceived children to inherit would contradict that purpose.¹⁵⁰

As the case law illustrates, courts have repeatedly struggled with the inheritance rights of posthumously conceived children, most often in the context of determining eligibility for Social Security benefits.

¹³⁸ *Stephen v. Comm’r of United States*, 386 F. Supp. 2d 1257, 1264 (Dist. Ct. Fla. 2005).

¹³⁹ *Id.*

¹⁴⁰ *Khabbaz v. Comm’r of Soc. Sec. Admin.*, 930 A.2d 1180, 1190 (N.H. 2007).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ RSA 5611:1 reads “to the *surviving* issue of the decedent equally” (emphasis added).

¹⁴⁶ N.H. Rev. Stat. Ann. § 561:1 reads “to the *surviving* issue of the decedent equally” (emphasis added).

¹⁴⁷ *Id.*

¹⁴⁸ *Khabbaz v. Comm’r of Soc. Sec. Admin.*, 930 A.2d 1180, 1184 (N.H. 2007).

¹⁴⁹ *Id.* at 1186.

¹⁵⁰ *Id.* at 1184. The court apparently did not find Mr. Khabbaz’s written consent relevant; the opinion did not address Mr. Khabbaz’s express, written intent.

Often, the courts' analyses conclude by denying the children rights. When courts do extend rights to the children, they acknowledge that they are only able to do so by stretching existing statutes.¹⁵¹ This state of the law is inconsistent with the rest of U.S. inheritance law. The inconsistency can be largely explained by the rapid pace at which technology has changed the shape of American families, but the legislature has responded to changes in the family before.¹⁵² When they choose to do so again, the practice of focusing on a decedent's intent should continue.

CONCLUSION

The distinctive cultural and political development of the United States has provoked a unique approach to inheritance law that focuses on effectuating a decedent's intent. The trend began when the colonists chose to break from the British, and it continues today.¹⁵³ The persistence of this deference within U.S. law is made even more clear by contrasting U.S. law with a foreign body of law, like that of France. Unlike French law, which emphasizes finality and equality, U.S. law consistently favors carrying out decedents' intent. Unfortunately, not all states have applied this approach to their inheritance laws effecting posthumously conceived children.

As the numerous cases addressing Social Security benefit eligibility demonstrate, this is an active area of the law in which the courts need instruction. When addressing this problem by defining the rights of posthumously conceived children, legislatures will no doubt consider the competing goals of achieving efficiency and equality with that of effectuating intent.¹⁵⁴ They should remember that, if inefficiency is the downside of allowing posthumously conceived children to inherit, then fulfilling a decedent's intent is the benefit, which is the persistent goal of U.S. inheritance law. Further, given that people tend to harbor similar attitudes regarding estate distribution regardless of their age,

¹⁵¹ See, e.g., *Gillet-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (holding that two posthumously conceived children were entitled to survivor benefits because Arizona intestacy law did not expressly answer the question, allowing the court to base its decision solely on whether the children were "legitimate").

¹⁵² Hirsch, *supra* note 47, at 242-43.

¹⁵³ *Id.*

¹⁵⁴ Atherton, *supra* note 50.

education, occupation, income, or even wealth,¹⁵⁵ intestacy laws could easily be modified to better effectuate people's wishes by including some inheritance rights for posthumously conceived children.¹⁵⁶ The ideal law will maximize the likelihood of fulfilling a decedent's intent by presuming that a father who has frozen genetic material intends for children born from it to inherit from him, and will only allow that presumption to be overcome with contrary evidence.¹⁵⁷

As the law evolves, there will undoubtedly be questions to answer: How much time can elapse between a father's death and a child's birth before the inheritance right extinguishes? What are the in-being children to do in the meantime? Should there be a legal difference between children born from before-death intentionally preserved sperm and those born from sperm extracted after death? Although these questions are challenging, the case law demonstrates that simply ignoring them is an ineffective approach. Legislatures must accept the realities of changing technologies, and then work toward managing those realities. When American lawmakers take on this task, they should begin by considering what has always been at the heart of American intestacy law: effectuating a decedent's intent, even at the expense of efficiency. With these enduring values in mind, lawmakers should expressly extend intestacy inheritance rights to posthumously conceived children, thereby ensuring eligibility for Social Security survivor benefits for these unique children.

¹⁵⁵ Mary Louis Fallows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 3 LAW & SOC. INQUIRY 319, 390 (1978).

¹⁵⁶ Changes to intestacy law based on public sentiment are not unprecedented. For example, the Uniform Probate Code (the national model for intestacy law) was revised in 1990 to reflect survey data indicating most spouses preferred that their spouse take most of or all of the estate (revised to increase spousal share). See Seidman, *supra* note 1, at 220.

¹⁵⁷ Atherton, *supra* note 50, at 164. For example, if a father directed that sperm be destroyed at his death, the presumption would likely be rebutted.