

## ESTATE PLANNING FOR THE POSTHUMOUSLY CONCEIVED CHILD: A BLUEPRINT FOR THE SPERM DONOR

### I. INTRODUCTION

In 2003, Gayle Burns became pregnant through artificial insemination using the preserved sperm of her husband, who died from cancer two years earlier.<sup>1</sup> In his contractual agreement with the reproductive clinic, Michael Burns indicated his intent to prevent destruction of his sperm in the event of his death, his consent to assisted reproduction, and his desire to give his wife legal rights to his sperm upon his death.<sup>2</sup> Gayle acknowledged their discussion about having children and her husband's hope for her to conceive his child upon his death; he had even purchased a life insurance policy to provide for Gayle and their child.<sup>3</sup>

Despite Michael's proactive efforts to make known his intent to father a child posthumously, Gayle was initially denied social security benefits when she applied on behalf of their son.<sup>4</sup> The decision was subsequently reversed, but then reversed again based on Utah's prohibition of payments to posthumously conceived children (PCC).<sup>5</sup> Although Utah law requires the sperm donor to record his intent to "parent" a child conceived through assisted reproduction . . . in order to later be legally" recognized as the father, Michael's intent has thus far been ignored.<sup>6</sup> If the completed consent form and purchase of a life-insurance policy for the benefit of his future child were insufficient to declare Michael Burns' intent to parent and financially support the posthumously conceived child, it is difficult to imagine what additional hurdles might be imposed upon the donor during his lifetime to ensure his intent is carried out and the posthumously conceived child's inheritance rights are protected.<sup>7</sup>

Gayle Burns may have avoided the extensive litigation she has undertaken to secure benefits for her son if Utah's statute allowed the

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1. Jennifer Dobner, *Utah High Court to Hear Posthumous Benefits Case*, DESERET NEWS (Feb. 7, 2012, 3:36 PM), <http://www.deseretnews.com/article/700222993/Utah-high-court-to-hear-posthumous-benefits-case.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *See id.*

decedent's intent to govern in particular circumstances, thereby protecting the class of PCC born to donors who complied with the requisite statutory formalities.<sup>8</sup> A signed, written, and witnessed consent form that could not be contested without liability for legal fees and court-mandated acceptance would eliminate the need to rely on oral testimony from the family as to the decedent's intent.<sup>9</sup> Further, when a donor engages in estate planning during his lifetime for the purpose of financially providing for the after-born, whether a source of funds exists for the child's inheritance will be ascertainable at the donor's death, and such planning will reinforce his intent for the posthumous conception to occur, as indicated by the consent form.<sup>10</sup>

Cryopreservation and assisted reproductive technologies (ART) are often utilized by young, childless couples who are drained by their medical expenses and fail to engage in estate planning,<sup>11</sup> thereby amplifying the need for a statute that identifies the inheritance rights of these PCC and informs the donors of the requisite steps they must take to ensure their intent is carried out.<sup>12</sup> However, even if there are no assets in the decedent's estate to which the child could bring a claim, a consent form stipulating the donor's intent would be relevant to determine whether the after-born child may inherit through the estates of the decedent's relatives, or as a class member in their estate plans.<sup>13</sup>

Under the Social Security Act and the Supreme Court's *Capato* decision, PCC are only entitled to receive social security survivor benefits if the after-born heirs are eligible to inherit under the intestacy laws of the state where the wage earner was domiciled.<sup>14</sup> In light of this need for an unambiguous declaration of PCC's

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8. *See id.*; *infra* Part IV.A.

9. *See* Dobner, *supra* note 1; *cf.* MD. CODE ANN., EST. & TRUSTS § 17-104 (LexisNexis 2011) (imposing a court order and sanctions on any person who refuses to accept an acknowledged, statutory power of attorney).

10. *See infra* Part IV.E.

11. *See In re Estate of Kolacy*, 753 A.2d 1257, 1260 (N.J. Super. Ct. Ch. Div. 2000). Many couples resort to these techniques due to the diagnosis of a serious illness or the need for a treatment that can cause infertility. DIV. OF REPROD. HEALTH, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, 2009 ASSISTED REPRODUCTIVE TECHNOLOGY: SUCCESS RATES, NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 34 (2011).

12. *E.g.*, MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis Supp. 2012). State intestacy statutes govern the disposition of an individual's probate property when the decedent dies without a will. ANGELA M. VALLARIO, THE FUNDAMENTALS OF ESTATE PLANNING 5 (2012); *see also* EST. & TRUSTS §§ 3-101 to 3-105.

13. *In re Estate of Kolacy*, 753 A.2d at 1260.

14. *See infra* notes 75–80, 86–90 and accompanying text.

inheritance rights under state law, the increasing use of reproductive technology and incidence of PCC,<sup>15</sup> and the extensive litigation spotlighting PCC and their right to insurance benefits,<sup>16</sup> Maryland's General Assembly repealed and reenacted Maryland's after-born heirs statute in 2012.<sup>17</sup> The amended law confers inheritance rights upon PCC born within two years of the decedent's death if the donor provided written consent for the posthumous conception to occur and written consent to be the parent of the posthumously conceived child.<sup>18</sup> While there has been no litigation in Maryland to date by PCC seeking an award of insurance benefits, the amended statute should allow PCC to recover social security survivor benefits if the donor provided the requisite consent and the child is born within the statute of limitations period, as these PCC would be eligible to inherit under Maryland's intestacy law.<sup>19</sup> Yet despite this attempt to stem the uncertainty as to whether PCC are entitled to social security funds, the law fails to adequately protect the inheritance rights of PCC, and may likewise fail to secure their insurance benefits.<sup>20</sup>

This comment aims to illustrate why Maryland's intestacy statute is unsatisfactory and should be amended again to enumerate the circumstances under which PCC, conceived from banked sperm after the father's death, may inherit through their deceased father's estate.<sup>21</sup> The proposed statute would apply only when a decedent dies intestate or a testator bequeaths property to "my children;"<sup>22</sup> however, the statute would not be implicated when a testator names his spouse as the sole legatee of his estate plan.<sup>23</sup> Part II discusses the reproductive technology that has allowed children to be born years after the father's death, developments in Maryland and federal law related to the inheritance rights of PCC, and the inadequacy of Maryland's current after-born heirs statute. Part III explains why PCC should only be entitled to inherit from the deceased parent's estate in limited

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15. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 272 (Mass. 2002); *see* discussion *infra* Part II.A.

16. *See* discussion *infra* Part II.C.

17. EST. & TRUSTS § 3-107; H.B. 101, 430th Gen. Assemb., Reg. Sess., 2012 Md. Laws 4330-33. The previous law only allowed children conceived prior to the decedent's death to inherit from the estate, even if born after that parent's death. *See* discussion *infra* Part II.B.1.

18. EST. & TRUSTS § 3-107.

19. *See infra* Part II.B.2; notes 80, 86-90 and accompanying text.

20. *See infra* notes 60-69, 91-96 and accompanying text.

21. *See* discussion *infra* Parts II.B.3, IV.A.

22. *See infra* note 102.

23. *See* discussion *infra* Part IV.E.

circumstances, considering the interests of others affected by these new heirs. Part IV proposes a solution whereby Maryland donors would complete a consent form at the time of the donation, creating a signed, written, and witnessed record that expresses the intent for the posthumous reproduction to occur and the desire to financially provide for the child. While the proposed statute would maintain a presumption against inheritance rights for PCC, the donor may rebut this presumption by complying with these statutory formalities during his lifetime to unequivocally indicate his intent.<sup>24</sup> Lastly, in order to secure inheritance rights for his after-born child and a timely resolution of his estate, the proposed statute would require the donor to engage in estate planning during his lifetime to ensure a source of funds for the child's inheritance.<sup>25</sup> For example, the creation of an *inter vivos* or testamentary trust for the benefit of the donor's wife during her lifetime and then to his children would satisfy this final statutory requirement.<sup>26</sup> Such clearly manifested intent could hardly be contested.<sup>27</sup>

## II. ALTHOUGH MARYLAND LAW ADDRESSES THE INHERITANCE RIGHTS OF AFTER-BORN HEIRS, THE PREVALENCE OF NON-TRADITIONAL METHODS OF CONCEPTION AND THE NEED TO PROTECT THESE PCC REQUIRES AN ADDITIONAL AMENDMENT OF MARYLAND'S STATUTE

### A. *Due to Developments in the Field of Reproductive Technology, Conception is Increasingly Occurring via Non-Traditional Methods and Years After One Parent's Death*

In anticipation of Warren Woodward's leukemia treatment, he and his wife arranged to bank his sperm.<sup>28</sup> Two years after Warren's death, Lauren Woodward gave birth to twin girls who were "conceived through artificial insemination using the . . . preserved semen."<sup>29</sup> Recognizing the potential for posthumous reproduction to occur under a "variety of conditions" and "implicate other firmly established State and individual interests," the court rejected the idea

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24. See discussion *infra* Part IV.

25. See discussion *infra* Part IV.E.

26. See *infra* notes 159–61 and accompanying text.

27. See *supra* note 9 and accompanying text.

28. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 260 (Mass. 2002).

29. *Id.*

of using *any* bright-line rule to determine the inheritance rights of PCC, absent a legislative directive.<sup>30</sup>

Homologous inseminations raise concerns different than those presented by heterologous inseminations,<sup>31</sup> but that likewise should be addressed through written agreements.<sup>32</sup> When children are born to the surviving parent or partner from the decedent's stored semen specimens, the issue becomes whether PCC may inherit from the deceased father's estate.<sup>33</sup> However, a simple, bright-line rule that grants the child a right to the money raises practical concerns that would make such a solution administratively impracticable.<sup>34</sup>

With scientific advancements that preserve the viability of sperm and eggs years after their collection, Maryland must implement further amendments to its 2012 legislative framework that keep pace with this rapidly developing field in order to reduce uncertainty about the legal rights of PCC.<sup>35</sup> Various techniques manipulate the eggs,

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30. *Id.* at 262.

31. See Jacqueline Mroz, *From One Sperm Donor, 150 Children*, N.Y. TIMES, Sept. 6, 2011, at D1. Heterologous insemination refers to insemination by an anonymous donor. Lucy R. Dollens, Note, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 214 (2001). With recent heterologous inseminations, sperm specimens from a single donor can yield more than 150 offspring. Mroz, *supra*. While anonymous donors routinely sign written waivers with the sperm bank to preclude paternity claims by the children born from the banked sperm, Hecht v. Superior Court, 16 Cal. App. 4th 836, 848 (Cal. Ct. App. 1993), "unintended consanguinity" can create problems for offspring who are unknowingly related to one another but live nearby, potentially dating and engaging in accidental incest. Mroz, *supra*, at D6. Some sperm banks address this problem by limiting the number of births or units sold originating from a single donor and monitoring the geographic distribution of the children born from each donor. See, e.g., *Limitations on Donor Births*, FAIRFAX CRYOBANK, <http://fairfaxcryobank.com/ReadFirst.shtml> (last visited Jan. 6, 2012).

32. See, e.g., *Patient Form and Brochure Center, Semen Depositor Agreement*, CRYOGENIC LABORATORIES, <http://www.cryolab.com/forms.shtml> (last visited Sept. 5, 2012). Maryland's current after-born heirs law targets homologous inseminations, to the exclusion of heterologous inseminations. MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis Supp. 2012).

33. E. Donald Shapiro & Benedene Sonnenblick, *The Widow and the Sperm: The Law of Post-Mortem Insemination*, 1 J.L. & HEALTH 229, 244 (1985–87).

34. See discussion *infra* Part III.A. For example, how long should the estate remain open for? See *infra* text accompanying notes 93–96. What amount of assets should be reserved for the inheritance? See *infra* Part III.A. How can a sufficient inheritance be sheltered for additional PCC born in the future? See *infra* Part III.A. How can the inheritance of any children born during the decedent's lifetime be preserved and protected? See *infra* Part III.A.

35. Shapiro & Sonnenblick, *supra* note 33, at 233.

sperm, or both in order to increase fertility rates.<sup>36</sup> Still considered experimental because of its low success rate, oocyte cryopreservation is the freezing of a woman's eggs prior to fertilization.<sup>37</sup> Because only about 900 babies have been born to date from frozen eggs, whereas hundreds of thousands have been born from frozen sperm, this comment focuses on the ramifications of children posthumously conceived from banked sperm.<sup>38</sup>

Cryopreservation of sperm involves freezing the specimens at temperatures nearly minus 200 degrees Celsius and storing them in liquid nitrogen, sometimes for many years.<sup>39</sup> These non-traditional methods are used when medical treatment or disease, environmental toxins, or a pre-existing medical condition threatens the quality or production of the sperm and thereby creates a risk of reduced fertility or sterility.<sup>40</sup>

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36. Kristine S. Knaplund, *Legal Issues of Maternity and Inheritance for the Biotech Child of the 21<sup>st</sup> Century*, 43 REAL PROP., TR. & EST. L.J. 393, 395 (2008). Whereas only the sperm is handled in artificial insemination, ART involves the surgical removal of a woman's eggs from her ovaries. *What is Assisted Reproductive Technology?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, 1, <http://www.cdc.gov/ART> (last updated Aug. 1, 2012).
  37. *Oocyte Storage (Egg Freezing)*, FAIRFAX CRYOBANK, <http://www.fairfaxcryobank.com/OocyteStorage.shtml> (last visited Dec. 11, 2012); *Egg Freezing for Medical Indications*, NYU LANGONE MEDICAL CENTER, NYU FERTILITY CENTER, [http://www.nyufertilitycenter.org/egg\\_freezing/medical](http://www.nyufertilitycenter.org/egg_freezing/medical) (last visited Dec. 11, 2012).
  38. *Egg Freezing for Medical Indications*, *supra* note 37; *Cryopreservation Information Brochure*, PITTSBURGH CRYOBANK, 1, <http://www.pittsburghcryobank.com/cryoinfo.pdf> (last updated Feb. 28, 2003).
  39. *Sperm Banking, Keeping Hopes Alive*, CRYOGENIC LABORATORIES, <http://www.cryolab.com/pdf/CLI%20Sperm%20Banking%20Brochure.pdf> (last visited Dec. 11, 2012). Some scientists discovered the ability to preserve sperm stem cells for more than a century. Amy L. Komoroski, Comment, *After Woodward v. Commissioner of Social Services: Where do Posthumously Conceived Children Stand in the Line of Descent?*, 11 B.U. PUB. INT. L.J. 297, 297 (2002).
  40. *Sperm Banking, Keeping Hopes Alive*, *supra* note 39. Cryopreservation is commonly used by men who receive a diagnosis of testicular or prostate cancer, work in an occupation that exposes them to harmful chemicals or pollutants, desire insurance prior to undergoing a vasectomy, or suffer from oligozoospermia, a condition characterized by a low sperm count or sperm of poor quality. *Id.* If a man suffers from oligozoospermia, "banking consecutive specimens of semen" creates a concentrated deposit and ensures availability for use at critical times during the reproductive process. *Homologous Artificial Insemination*, 2 BRIT. MED. J. 154, 155 (1978). Oocyte cryopreservation is used for similar reasons, or by women who want to conceive at a later time but wish to preserve their eggs during their reproductive prime. *Oocyte Cryopreservation Program and Success Rates*, NYU LANGONE MEDICAL CENTER, NYU FERTILITY CENTER, [http://www.nyufertilitycenter.org/egg\\_freezing/success\\_rates](http://www.nyufertilitycenter.org/egg_freezing/success_rates) (last visited Dec. 11, 2012).

Because frozen sperm can be preserved for at least ten years,<sup>41</sup> Maryland's intestacy statute outlining the disposition of property must establish a more comprehensive framework to reconcile the competing interests of an efficient estate administration process and the protection of the inheritance rights of these PCC, who effectively are not recognized as descendants of the donor for inheritance purposes unless the donor complied with the statutory consent requirements and the children were born within two years of the decedent's death.<sup>42</sup>

*B. Despite Efforts to Expand the Legal Rights of PCC, Maryland's After-Born Heirs Law Remains Inadequate*

1. Maryland Previously Restricted Inheritance Rights to Children Conceived During the Decedent's Lifetime

Prior to its amendment in 2012, Maryland's after-born heirs statute allowed a child conceived during the decedent's lifetime—even if the child was born subsequent to the decedent's death—to inherit from that parent's estate.<sup>43</sup> However, this law precluded the growing class of PCC from inheriting from the deceased parent's estate, thereby preventing these after-born heirs from attaining legal status equal to those children conceived during both parents' lifetimes.<sup>44</sup>

2. Current Law Expands the Inheritance Rights of PCC

The enactment of House Bill 101, effective October 1, 2012, expands the potential for PCC to inherit through the decedent.<sup>45</sup> First, Maryland revised the definition of a child to include PCC of decedents who consented in writing for the posthumous conception to occur, in accordance with the requirements of section 20-111, and

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41. Jamie Rowsell, *Stayin' Alive: Postmortem Reproduction and Inheritance Rights*, 41 FAM. CT. REV. 400, 401 (2003).

42. MD. CODE ANN., EST. & TRUSTS § 3-107(b) (LexisNexis Supp. 2012); MD. CODE ANN., HEALTH-GEN. § 2-111 (LexisNexis Supp. 2012); *see also* discussion *infra* Parts III.A., IV.A.

43. MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis 2011) (amended 2012).

44. *See id.* In 2009, the number of children who were born and conceived using ART nearly doubled from those born in 2000. NAT'L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, *supra* note 11, at 65.

45. EST. & TRUSTS §§ 1-205(a)(2), 3-107. The new law affects three Maryland statutes, amending sections 1-205 (defining who constitutes a child) and 3-107 (providing which PCC are entitled to inherit under state intestacy law), and adding section 20-111 (describing the consent formalities). H.B. 101, 430th Gen. Assemb., Reg. Sess., 2012 Md. Laws 4330–32.

provided written consent to be the parent of the posthumously conceived child.<sup>46</sup> Maryland also overhauled its after-born heirs law. The amended statute retains the provision allowing a child conceived during the decedent's lifetime, but born subsequent to that parent's death, to inherit from that estate.<sup>47</sup> Moreover, PCC are entitled to inherit as children under the state's intestacy laws if: (1) the donor consented to the use of his genetic material towards posthumous conception in a writing signed by the donor, or signed by another person in the donor's presence and at his express direction, on or after October 1, 2012; (2) the donor provided written consent to be the parent of the posthumously conceived child; and (3) the child is born within two years of the decedent's death.<sup>48</sup>

### 3. Despite Increased Recognition of PCC and Their Inheritance Rights, Maryland's Statutes are Unsatisfactory

While the legislation signifies awareness of the need to clarify the law,<sup>49</sup> shortcomings in the statutes create the potential for litigation.<sup>50</sup> First, the statutory formalities are inadequate.<sup>51</sup> Without requiring the donor—or other person signing in his presence and at his direction—to create the writing before a notary public or other witnesses, the law causes concern of fraud and forgery.<sup>52</sup> Second, while the previous law required revision because it indiscriminately foreclosed an increasing number of children from receiving inheritance benefits,<sup>53</sup> the temporal restriction in the current law will likely have the same effect, since only children born within two years of the decedent's death will be entitled to inherit.<sup>54</sup> In fact, stipulating a two-year period risks delaying administration of the estate, thus conflicting

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46. EST. & TRUSTS §§ 1-205(a)(2), 20-111(b), (c).

47. EST. & TRUSTS § 3-107(a).

48. *Id.* §§ 3-107(b), 20-111(c). The law prohibits a person from using a known donor's sperm for the purpose of assisted reproduction after the donor's death without the donor's prior written and signed consent. *Id.* §§ 20-111(b)–(c). Individuals who use the genetic material of a donor who they know died and did not consent to the posthumous use of his sperm are guilty of a misdemeanor and subject to a fine. *Id.* §§ 20-111(b), (d).

49. H.B. 101, 430th Gen. Assemb., Reg. Sess., 2012 Md. Laws 4430–42.

50. *See infra* notes 46–62 and accompanying text.

51. *See* EST. & TRUSTS §§ 3-107(b)(1), 20-111(c); *infra* note 47 and accompanying text. A previous version of the House Bill required the donor's written consent to be acknowledged before a notary public, but this provision was stricken. H.B. 101, 430th Gen. Assemb., Reg. Sess. (Md. 2012) (as introduced to the Comm. on Health and Gov't Operations, Jan. 19, 2012).

52. *See* EST. & TRUSTS §§ 3-107 (b)(1), 20-111(c); *infra* Part IV.B.

53. *See supra* notes 39–40 and accompanying text.

54. EST. & TRUSTS § 3-107(b).

with the goal of a simple probate process.<sup>55</sup> A personal representative who postpones distributing the estate pending the two-year period to ensure no PCC are born compromises this desired efficiency.<sup>56</sup> Alternatively, a personal representative who distributed assets prior to the enactment of the law could be deemed to have done so inappropriately if a child is born within two years after the decedent's death.<sup>57</sup>

Several inconsistencies in the statutes will foster uncertainty about the inheritance rights of PCC. While the law mandates that the donor's consent for the posthumous use of his sperm be in accordance with the requirements of section 20-111, these same formalities are not imposed upon the donor's written consent to be the parent of the child.<sup>58</sup> Moreover, though the law will not apply retroactively,<sup>59</sup> it nonetheless has the potential to affect trusts already in existence. By declining to acknowledge the validity of consent given prior to October 1, 2012, even donors who complied with the statutory consent requirements during their lifetime may not have their intent honored.<sup>60</sup> However, the law fails to likewise condition its application to estates and trusts created on or after October 1, 2012, possibly impacting those created prior to this date.<sup>61</sup>

Yet the most litigious aspect is the inconsistency between the statute of limitations provision in the after-born heirs statute and the absence of such a limitations period in the section pertaining to these after-born heirs in the "Definition of Child" statute.<sup>62</sup> While the former imposes a two-year statute of limitations period, during which time the child must be born in order to inherit through the deceased parent's estate, the latter fails to incorporate this same two-year requirement.<sup>63</sup> For example, a posthumously conceived child born

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55. EST. & TRUSTS § 1-105; *see also infra* Part III.A.

56. *See* EST. & TRUSTS § 1-105; *infra* Part III.A.

57. *See* EST. & TRUSTS § 3-107(b)(3); *see also* EST. & TRUSTS § 10-103(b)(1) (allowing an individual to recover for the improper distribution of property).

58. *See* EST. & TRUSTS §§ 3-107(b), 20-111(c). Section 20-111(c) requires that the consent be in writing and signed by the donor, or signed by another person in the donor's presence and at his express direction. *Id.* § 20-111(c).

59. *See id.* §§ 3-107(b), 20-111(c) (providing that consent given on or after October 1, 2012, will be held valid if the statutory formalities are satisfied).

60. *See id.*

61. *See id.*

62. *Compare id.* § 3-107(b)(3) (requiring after-born heirs to be born within two years of the decedent's death to be eligible to inherit), *with id.* § 1-205(a)(2) (failing to provide a statute of limitations in defining which PCC will be considered a child within the meaning of the statute).

63. *Id.* §§ 1-205(a)(2), 3-107(b)(3).

three years after the decedent's death would be barred from inheritance benefits under section 3-107(b), but could be determined to be a child within the meaning of section 1-205(a)(2), where there is no operative statute of limitations.<sup>64</sup> Because the Social Security Act looks to state intestacy law in determining "who is a 'child'" and thus entitled to survivor benefits,<sup>65</sup> reliance on section 1-205(a)(2) could yield the conclusion that the child is entitled to social security benefits, notwithstanding the conflicting after-born heirs statute, which would deem that same child ineligible to inherit from the decedent's probate estate.<sup>66</sup> Because it is unclear which statute will control in determining whether PCC are eligible for social security benefits,<sup>67</sup> both statutes should have parallel language and consistent requirements to avoid ambiguities.

C. *PCC are Only Entitled to Social Security Survivor Benefits Where State Intestacy Law Confers Inheritance Rights upon These Children*

To date, the issue of inheritance rights for PCC has arisen in the context of social security benefit claims.<sup>68</sup> In these cases, the benefits derive from assets already set aside as a function of the wage earner's lifetime contributions into the social security system.<sup>69</sup> Thus, the funds are transferred outside of the probate process according to operation of law.<sup>70</sup> PCC inheriting from the decedent's probate estate present a distinguishable situation: any assets titled solely in the donor's name are probate assets that will be subject to the estate administration process and will pass according to the terms of his

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64. *See id.*

65. *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2026, 2032 (2012).

66. *See* EST. & TRUSTS §§ 1-205(a)(2), 3-107(b).

67. *See Capato*, 132 S. Ct. at 2032–33.

68. *See, e.g., Beeler v. Astrue*, 651 F.3d 954, 956–57 (8th Cir. 2011); *Schafer v. Astrue*, 641 F.3d 49, 51 (4th Cir. 2011); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 260–61 (Mass. 2002).

69. *Survivors Planner: How Much Would Your Survivors Receive?* SOC. SECURITY, <http://www.socialsecurity.gov/survivorplan/onyourown5.htm> (last modified Apr. 24, 2012); *see also* cases cited *supra* note 68.

70. *See* VALLARIO, *supra* note 12, at 18, 69; *Survivors Planner: How Much Would Your Survivors Receive?*, *supra* note 69; *Survivors Planner: How You Apply for Survivors Benefits*, SOC. SECURITY, <http://www.socialsecurity.gov/survivorplan/howtoapply.htm#ht=1> (last modified Mar. 30, 2012) (explaining that the Social Security Administration handles survivor benefits claims). Other nonprobate arrangements include trusts, life insurance, retirement accounts, and joint bank accounts. VALLARIO, *supra* note 12, at 18. Title to these assets "passes automatically by contract, by operation of law, or by inter vivos transfer outside the probate administration process." *Id.*

will; if the donor dies intestate, the probate assets are distributed pursuant to the state's intestacy laws.<sup>71</sup> However, if the donor creates a trust for the benefit of his after-born child, any funds allocated to the trust would constitute nonprobate assets that would pass according to the terms of the instrument.<sup>72</sup>

Until recently, jurisdictions were split as to whether PCC were entitled to inherit from the deceased parent in the context of social security benefits.<sup>73</sup> The divergence of opinion stemmed from whether an after-born child is a "child" within the meaning of the Social Security Act and therefore entitled to survivor benefits.<sup>74</sup> An internal manual for employees contains an explicit provision pertaining to children conceived after the wage earner's death.<sup>75</sup> The section states that "[a] child conceived by artificial means" posthumously cannot inherit, unless "he or she has inheritance rights under applicable State intestacy law."<sup>76</sup> The variance amongst circuits was due to the Social Security Administration's deference to each state's intestacy statutes in determining who constitutes a "child" within the meaning of the statutory language.<sup>77</sup> Thus, a posthumously conceived child is only an eligible applicant for social

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71. VALLARIO, *supra* note 12, at 69.

72. *See id.*

73. *See* cases cited *supra* note 68. The Supreme Court granted the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit to ultimately decide the issue. *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 631 F.3d 626, 627, 632 (3d Cir. 2011), *cert. granted sub nom. Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 576 (2011) (No. 11-159), *rev'd* 132 S. Ct. 2021 (2012).

74. 42 U.S.C. §§ 402(d), 416(e) (2006). The Ninth Circuit held that posthumously conceived twins were entitled to social security benefits, construing both the Act and the meaning of "dependency" liberally. *Gillett-Netting v. Barnhart*, 371 F.3d 593, 598-99 (9th Cir. 2004), *abrogated by Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012). There, the Court acknowledged that although Arizona law lacks a statute specifically applicable to PCC, all children are the legitimate children of their natural parents. *Gillett-Netting*, 371 F.3d at 599. In *Estate of Kolacy*, the court also acknowledged the void in New Jersey's laws concerning posthumous conception, ultimately deciding that the after-born twins were legal heirs under the intestacy laws. *In re Estate of Kolacy*, 753 A.2d 1257, 1263-64 (N.J. Super. Ct. Ch. Div. 2000). Extrapolating the legislative intent for children to inherit from and through their parents, and the decedent's intent for his wife to bear his children, the court also adopted a liberal reading of the legislative posture. *Id.* at 1262, 1264.

75. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM: SECTION GN 00306.001C(C)(1) DETERMINING STATUS AS A CHILD (Oct. 21, 2008), *available at* <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200306001>.

76. *Id.*

77. 42 U.S.C. § 416(h)(2)(A).

security benefits if the child would be an heir under the intestacy laws in the state where the insured wage earner was domiciled at death.<sup>78</sup>

Maryland courts have yet to weigh in on PCC's entitlement to social security survivor benefits. However, the Fourth Circuit held in *Schafer v. Astrue* that the posthumously conceived child was not entitled to social security survivor benefits because the child was not an heir under Virginia's intestacy law.<sup>79</sup> This court and other courts denying benefits to after-born children have applied *Chevron* deference—allowing a government agency's reasonable interpretation of a statute it administers to prevail when the statute is ambiguous or silent on an issue<sup>80</sup>—to uphold the Social Security Administration's interpretation of the statute, despite acknowledging a range of feasible interpretations or even more reasonable ones.<sup>81</sup> Notwithstanding the recent amendments to Maryland's laws,<sup>82</sup> the remaining states comprising the Fourth Circuit preclude PCC from inheriting under state intestacy law unless conceived during the decedent's lifetime.<sup>83</sup>

On May 21, 2012, the Supreme Court denied Robert Capato's posthumously conceived twins from inheriting social security survivor benefits.<sup>84</sup> In reversing the Court of Appeals for the Third Circuit, the Court afforded *Chevron* deference to the Social Security Administration's interpretation of the Social Security Act and held that the PCC are only entitled to social security survivor benefits if

78. *Id.*

79. *Schafer v. Astrue*, 641 F.3d 49, 51 (4th Cir. 2011). Virginia intestacy law was determinative because the decedent was domiciled there at the time of his death. *Id.* at 51–52.

80. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

81. *See, e.g., Beeler v. Astrue*, 651 F.3d 954, 959 (8th Cir. 2011); *Schafer*, 641 F.3d at 54. A logical interpretation of the word “child” could include any biological children, including those only born after a parent's death due to unfortunate circumstances. *Schafer*, 641 F.3d at 54.

82. MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis Supp. 2012).

83. In Virginia, only children conceived before the decedent's death are entitled to inherit. VA. CODE ANN. § 64.1-8.1 (2007). Although children born from assisted conception after the decedent's death may inherit if determined to be a relative of the decedent, the statute is silent as to whether these offspring must be conceived prior to the decedent's death. *Id.* West Virginia requires the child be conceived during the decedent's lifetime in order to inherit from the decedent's estate. W. VA. CODE § 42-1-8 (2010). North and South Carolina both allow the decedent's issue to inherit if born within ten months of the death. N.C. GEN. STAT. § 29-9 (2011); S.C. CODE ANN. § 62-2-108 (2007).

84. *See Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2023, 2026 (2012). It is undisputed that these children are the biological children of the decedent. Brief in Opposition at 5, *Capato ex rel. B.N.C. v. Comm'r of Soc. Sec.*, 132 S. Ct. 2021 (2012) (No. 11-159).

they are eligible to inherit under state intestacy law.<sup>85</sup> Since states vary in their treatment of after-born heirs, whether PCC are entitled to survivor benefits will ultimately hinge upon the law of the state where the decedent was domiciled.<sup>86</sup> Because Florida's after-born heirs statute limits inheritance rights to children conceived during the decedent's lifetime,<sup>87</sup> Capato's posthumously conceived twins, born eighteen months after his death, were barred from receiving benefits.<sup>88</sup>

In light of *Capato*, Maryland's amended intestacy scheme has a two-fold effect.<sup>89</sup> First, a posthumously conceived child is recognized as a "child" under Maryland law if the donor complied with the statutory consent requirements, without regard to when the child is born relative to the decedent's death.<sup>90</sup> Next, PCC are prohibited from inheriting as heirs of the decedent's estate, unless the donor complied with the statutory consent requirements and the child is born within two years of the donor's death.<sup>91</sup> Because state intestacy law governs in determining if a posthumously conceived child is entitled to social security benefits,<sup>92</sup> whether the after-born heirs law or the definition of a child controls may result in different outcomes.<sup>93</sup> However, after-born heirs will only have inheritance rights to the decedent's estate if their surviving parent conceives quickly enough to provide the child with statutory protection.<sup>94</sup>

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85. See *Capato*, 132 S. Ct. at 2033–34. The Court reasoned that the primary purpose of the Social Security Act is to protect those relatives who were dependent upon the wage earner during his lifetime, and moreover, Congress could not have anticipated the current reproductive technology when the Act was originally enacted or amended, in 1939 and 1965, respectively. *Id.* at 2026.

86. See *id.* at 2032; compare CAL. PROB. CODE § 249.5 (West Supp. 2012) (allowing PCC to inherit if the decedent and the individual designated to control the genetic material comply with statutory formalities), with sources cited *supra* note 83 (providing state intestacy statutes that deny inheritance rights to PCC).

87. FLA. STAT. § 732.106 (West 2010).

88. *Capato*, 132 S. Ct. at 2025–26.

89. See MD. CODE ANN., EST. & TRUSTS §§ 1-205, 3-107 (LexisNexis Supp. 2012).

90. See EST. & TRUSTS § 1-205(a)(2) (failing to provide a statute of limitations in stipulating which PCC are included in the definition of a child); *Capato*, 132 S. Ct. at 2032. Social security benefits are conferred to an individual recognized as a "child" under the state's intestacy law. 42 U.S.C. §§ 402(d), 416(h)(2)(A) (2006); see also *supra* notes 58–62 and accompanying text.

91. EST. & TRUSTS §§ 3-107(b), 20-111.

92. See *Capato*, 132 S. Ct. at 2033.

93. See *supra* notes 58–63 and accompanying text.

94. See EST. & TRUSTS § 3-107(b).

III. TO ADVANCE THE LEGISLATIVE GOAL OF  
STREAMLINING THE ESTATE ADMINISTRATION  
PROCESS AND EFFECTUATING THE DECEDENT'S  
INTENT, PCC SHOULD ONLY BE ENTITLED TO INHERIT  
FROM THE DECEASED PARENT'S ESTATE UNDER  
LIMITED CIRCUMSTANCES

A. *Establishing a Bright-Line Rule Granting Inheritance Rights to  
All PCC Would Frustrate the Probate Goals of Administrative  
Convenience and Affect the Inheritance of Other Beneficiaries or  
Heirs Entitled to Take Under Will or Intestacy*

Allowing PCC to claim an inheritance from the deceased parent's estate creates a myriad of dilemmas for legislators, families, and estate planners.<sup>95</sup> In rejecting a bright-line approach either granting or denying inheritance rights for all PCC, the *Woodward* court attempted to balance these interests.<sup>96</sup> The court identified the state concerns as protecting the child's interests, preserving the reproductive rights of the deceased genetic parent, and efficiently administering the estate, including "preventing fraudulent claims against the estate."<sup>97</sup>

In fact, a bright-line rule that grants inheritance rights to all PCC would protract the estate administration process, since multiple children could be conceived many years after the decedent's death.<sup>98</sup> The potential for several births generates greater uncertainty: the personal representative cannot predict what amount of the decedent's assets should be reserved for the unborn and unascertained heirs, and this in turn would delay the distribution of any nonspecific bequests to the known heirs.<sup>99</sup> Moreover, the estate would need to remain open for an indefinite period until each child is born and capable of

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95. DEP'T OF HEALTH & SOC. SEC., REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY, 1984, Cmnd. 9314, at 4-7, 55 (U.K.). The purpose of the report was to consider ethical issues arising in the field and to present potential legislation. *Id.* at 1, 55.

96. *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 262, 264-65 (Mass. 2002).

97. *Id.* at 264-66.

98. *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000).

99. See MD. CODE ANN., EST. & TRUSTS § 7-401 (LexisNexis 2011). A specific bequest is a testamentary transfer of a particular item and is most protected if there are insufficient assets at the testator's death to implement all provisions of the will. See EST. & TRUSTS § 9-103(b)(7); VALLARIO, *supra* note 12, at 88-89.

inheriting.<sup>100</sup> Failing to wrap up the estate within a certain timeframe would frustrate the legislative intent and the goals of the probate laws, which seek to provide an efficient, prompt administrative process and to minimize estate expenses.<sup>101</sup>

A statute mandating that PCC receive a fixed dollar amount or percentage, either based on the value of the probate estate or based on an elaborate framework accounting for both probate and nonprobate assets, would provide an unworkable solution.<sup>102</sup> The personal representative would still be confronted with the uncertainties of the number of PCC that could eventually be born and the amount to reserve for their inheritances.<sup>103</sup> If the surviving parent chooses to conceive five years after her husband's death, or has difficulty becoming pregnant immediately, the administration of the decedent's estate would be stalled and other heirs would be unable to claim their shares.<sup>104</sup> Alternatively, if a child were born several years after the estate has been settled, the statute of limitations would make it nearly impossible to reclaim assets that have already been distributed.<sup>105</sup> Furthermore, if the mother opts to have multiple children from the cryopreserved specimens, the estate would need to remain open until all PCC are born so each could be assured an inheritance.<sup>106</sup> Only after all after-born children come into being could the estate be distributed and settled.<sup>107</sup> Finally, because intestacy laws only become relevant when a person dies without a will—or with a will that is invalid or incomplete—there will be uncertainty as to whether the decedent intended the after-born child to be born or to inherit from his estate and hold equal status to those children born during his lifetime.<sup>108</sup> This inability to predict the decedent's intent could prompt claims and delay the estate administration process by

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100. See *In re Estate of Kolacy*, 753 A.2d at 1262. This scenario would apply if the decedent dies intestate or if the testator named his children as legatees with a class designation, such as “my children.” See VALLARIO, *supra* note 12, at 82.

101. See EST. & TRUSTS §§ 1-105, 7-101, 10-103; *Woodward*, 760 N.E.2d at 266. For example, keeping the estate open indefinitely would increase expenses by prolonging the period for which commissions are paid to the executor or corporate trustee of a trust, ultimately reducing the inheritance of the heirs.

102. *But cf.* UNIF. PROBATE CODE § 2-202 (amended 2010); EST. & TRUSTS §§ 3-102 to 103 (providing the method for apportioning the decedent's estate to the surviving spouse and issue).

103. See *supra* notes 94–97 and accompanying text.

104. See EST. & TRUSTS § 7-101; *Woodward*, 760 N.E.2d at 268.

105. EST. & TRUSTS § 10-103.

106. See *supra* text accompanying notes 94–96.

107. See *supra* text accompanying notes 95–98.

108. EST. & TRUSTS § 3-101.

involving extrinsic evidence to shed light on the decedent's intent.<sup>109</sup> Gayle Burns' attempt to secure benefits for her son exemplifies this process, as the oral record consisting of the decedent's conversations with his wife and family about wanting to become a father will be of paramount importance in establishing his intent.<sup>110</sup>

*B. A Donor May Use a Consent Form That Complies with the Statutory Formalities to Give Disposition Instructions for His Stored Semen Specimens*

The Food and Drug Administration regulates the donation of human cells, tissues, and cellular and tissue-based products, and sperm banks must comply with particular registration, recordkeeping, and donor screening requirements.<sup>111</sup> However, sperm bank consent forms are not uniform and vary in their language.<sup>112</sup>

If the donor indicates his intent for the disposition of the sperm specimens upon his death, the bequest should be carried out as long as he complied with the statutory requirements of a signed, witnessed writing.<sup>113</sup> The formalities encompassed in a consent form would be akin to those required for a valid will and would allow the donor to express his intent at the time of the sperm donation.<sup>114</sup> Because of the presumption against inheritance rights for PCC, a donor who fails to comply with these formalities or indicates that the stored specimens be destroyed upon his death would simply waive the child's right to inherit through his estate.<sup>115</sup>

Yet in order for a bequest of banked sperm to be found valid, such specimens must be bequeathable.<sup>116</sup> The property dimension of sperm specimens was considered but dismissed by a French court in one of the first cases involving post-mortem insemination.<sup>117</sup> There, the family of a French citizen brought a breach of contract claim against a sperm bank that refused to deliver the banked specimens to the decedent's widow.<sup>118</sup> Acknowledging that the arcane laws did not contemplate modern methods of reproduction, the court nonetheless declined to accept the plaintiffs' contention that the specimens were a

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109. See *Woodward*, 760 N.E.2d at 269–70.

110. Dobner, *supra* note 1.

111. 21 C.F.R. §§ 1271.1–3, 127.55 (2012).

112. See *infra* notes 141–44 and accompanying text.

113. See discussion *infra* Part IV.B.

114. See EST. & TRUSTS § 4-102; see *infra* Part IV.B.

115. See *infra* Part IV.A–B.

116. See *infra* text accompanying notes 117–18, 121–23.

117. Shapiro & Sonnenblick, *supra* note 33, at 229–32.

118. *Id.* at 229–30.

bailed, material good that must be returned to the bailor's heir upon the bailor's death.<sup>119</sup> Refusing to qualify the sperm specimens as inheritable property or to consider property rights, the court held that the decedent's intent should be the deciding factor, citing the special relationship between sperm and the individual's fundamental right to choose to conceive.<sup>120</sup>

Almost ten years after the French court refused to consider that property rights should affect the disposition of banked semen specimens upon their donor's death, a California court established that such specimens are in fact "a unique type of 'property'" and bequeathable.<sup>121</sup> In *Hecht v. Kane*, the Court held that although not joined to an egg at the time, the deceased donor's banked semen specimens constituted "property," due to their potential to create life.<sup>122</sup>

The case was distinguishable from *Moore v. Regents of University of California*, in which Moore was unsuccessful in his conversion claim when the physician performing Moore's leukemia treatment used his excised cells for medical research without Moore's permission.<sup>123</sup> The *Moore* court decided that the patient failed to retain a sufficient ownership interest in the cells or to maintain an expectation of possession of the cells after their removal to warrant a conversion claim.<sup>124</sup> However, in elevating the semen specimens to property-like status, the *Hecht* court found the decedent had an ownership interest and retained "decision-making authority as to the use of his sperm for reproduction" at the time of his death.<sup>125</sup> Though the court did not assess the validity of the decedent's will or the contract concerning the disposition of the semen, the decision provided that the specimens can be included in the estate and, consequently, disposed of according to the decedent's intent.<sup>126</sup> Because stored semen specimens are a bequeathable part of the decedent's estate, a form that disposes of this property and complies with the signed, witnessed writing formalities should be given effect.<sup>127</sup>

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119. *Id.* at 232.

120. *Id.* at 232-33.

121. *See Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 283-84 (Cal. Ct. App. 1993); Shapiro & Sonnenblick, *supra* note 33, at 230, 233.

122. *Hecht*, 20 Cal. Rptr. 2d at 283.

123. *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 480-81 (Cal. 1990).

124. *Id.* at 488-89.

125. *Hecht*, 20 Cal. Rptr. 2d at 283.

126. *See id.* at 283-84.

127. *See id.* at 283; *supra* Part III.B.

IV. MARYLAND'S STATUTE SHOULD CREATE A PRESUMPTION AGAINST INHERITANCE BUT ALLOW PCC TO INHERIT FROM THEIR FATHER'S ESTATE IF HE SATISFIES FOUR REQUIREMENTS DURING HIS LIFETIME.

A. *To Reconcile the Competing Interests of the Legislature and PCC, After-Born Heirs Should be Entitled to Inherit from Their Deceased Parent in Certain Circumstances*

To advance the legislative goal of streamlining the estate administration process<sup>128</sup> while simultaneously effectuating the decedent's intent, PCC should only be entitled to inherit from the deceased parent's estate under limited circumstances. Maryland should authorize this presumption against inheritance by statute, declaring that PCC are not entitled to inherit from or through the decedent's estate unless he (1) completed a signed, witnessed writing at the time of the sperm donation, (2) consented to the posthumous reproduction, (3) unequivocally indicated intent to financially provide for that child, and (4) engaged in estate planning in order to create a source for that child's inheritance.<sup>129</sup> By demarcating assets for the after-born child's inheritance, the probate estate may be distributed and wrapped up in a timely manner.<sup>130</sup>

Such a strict inheritance statute would reconcile the competing interests of the legislature and other heirs, who desire an efficient estate administration process and protection of their inheritance, respectively,<sup>131</sup> while protecting the PCC and preserving their ability to inherit.<sup>132</sup> Because the inheritance would be limited to funds set aside for the purpose of providing for the after-born child and probate assets would be off-limits, the personal representative could distribute the probate estate according to the terms of the decedent's will without interfering with the after-born's share.<sup>133</sup>

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128. See MD. CODE ANN., EST. & TRUSTS § 1-105 (LexisNexis 2011).

129. See discussion *infra* Part IV.B-E; *supra* Part II.A.

130. See *infra* Part IV.E.

131. See *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 264-66 (Mass. 2002).

132. See *supra* Part III.A.

133. See *infra* Part IV.E.

*B. A Written, Signed, and Witnessed Consent Form Completed at the Time of the Donation Would Demonstrate the Donor's Intent for the Specimens*

Current law permits a donor to furnish only a signed writing in order to comply with the statutory consent requirements.<sup>134</sup> However, the formalities imposed upon testators executing their wills are similarly necessary for men donating sperm as a contingency in the event of their death.<sup>135</sup> Requiring a signed, witnessed writing serves protective, ritual, evidentiary, and channeling functions.<sup>136</sup> Creating a physical record of the donor's wishes ensures the decedent's intent for the sperm specimens is known.<sup>137</sup> Additionally, the witnesses can be called to testify if the disposition of the specimens is contested.<sup>138</sup>

*C. For a Posthumously Conceived Child to Inherit from the Deceased Father's Estate, the Donor Must Provide Written Consent for the Posthumous Reproduction to Occur*

Even if state law ultimately dictates the legal rights of after-born heirs,<sup>139</sup> a consent form completed at the time of the donation allows the donor to make his intent regarding the ultimate disposition of the semen specimens known.<sup>140</sup> By allowing the donor to specify his intent for the specimens after his death, neither his family nor the courts are forced to speculate.<sup>141</sup> These consent forms are analogous to a transfer on death designation, creating a nonprobate arrangement whereby the specimens pass according to the contract terms.<sup>142</sup>

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134. MD. CODE ANN., EST. & TRUSTS §§ 3-107(b), 20-111(c) (LexisNexis Supp. 2012). The written records are not required to be witnessed. *Id.* §§ 3-107, 20-111(c).

135. *See* MD. CODE ANN., EST. & TRUSTS § 4-102 (LexisNexis 2011).

136. JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, *ESTATES AND TRUSTS* 225 (Robert C. Clark et al. eds., 3d ed. 2007). Channeling refers to the use of standardized formalities to ensure that the instrument passes "efficiently through the legal system." *Id.* at 226.

137. *See id.* at 226.

138. *See id.*

139. MD. CODE ANN., EST. & TRUSTS § 3-107 (LexisNexis Supp. 2012).

140. *See Patient Form and Brochure Center, Semen Depositor Agreement*, *supra* note 32.

141. *See id.* at 2-3; *Semen Specimen Use and Release Authorization*, FAIRFAX CRYOBANK, 2 (Aug. 17, 2010), <http://www.fairfaxcryobank.com/forms.shtml>.

142. *See VALLARIO*, *supra* note 12, at 69; *Patient Form and Brochure Center, Semen Depositor Agreement*, *supra* note 32.

Though sperm bank consent forms vary in scope, most cover the disposition of the specimens upon the donor's death.<sup>143</sup> Some forms require the donor to indicate whether the specimens should be destroyed or released to a named individual.<sup>144</sup> Others establish destruction of the specimens as the default, unless the donor provided a signed, written, and notarized statement indicating his intent for a child to be born posthumously and to transfer ownership of the specimens to a designee.<sup>145</sup> One agreement requires the donor to list the dates for which the cryopreservation agreement is effective; the semen is disposed of beyond the specified date.<sup>146</sup> The Fertility Center of California allows the donor to specify an individual, as well as that person's successor, to receive and make all decisions related to the specimen upon the donor's death.<sup>147</sup>

Despite these variations amongst the forms, the donor's intent concerning posthumous reproduction will be ascertainable as long as he completes a consent form that indicates whether the specimens should be maintained for use by the designee or destroyed upon his death. The forms thus allow the donor to satisfy or fail the second prong of the proposed statute at the time of the donation: the intent element is met if he transfers ownership of the specimens to his partner and consents to their use towards posthumous reproduction.<sup>148</sup>

However, the donor fails to express the requisite intent for the child's posthumous reproduction when he indicates that the specimens should be destroyed, or if the consent form is silent<sup>149</sup> and

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143. See, e.g., *Patient Form and Brochure Center, Semen Depositor Agreement*, supra note 32, at 2–3; *Sperm Cryopreservation and Storage Agreement*, UNIVERSITY WOMEN'S HEALTHCARE–FERTILITY CENTER, <http://www.universitywomenshealthcare.com/infertility/patients/sperm-cryopreservation-agreement.pdf> (last visited Dec. 11, 2012).

144. See, e.g., *Patient Form and Brochure Center, Semen Depositor Agreement*, supra note 32, at 2–3.

145. See, e.g., *id.*

146. *Consent/Agreement for Cryopreservation and Storage of Semen*, SPERM BANK OF CALIFORNIA, <http://www.spermbankcalifornia.com/media/ConsentAgreement-for-Cryopreservation-and-Storage-of-Semen1.pdf> (last visited Dec. 11, 2012).

147. *Ultimate Disposition of Semen Specimens*, SPERM BANK OF CALIFORNIA, <http://spermbankcalifornia.com/media/Ultimate-Disposition-of-Semen-Specimens1.pdf> (last visited Dec. 11, 2012).

148. MD. CODE ANN., EST. & TRUSTS § 3-107(b) (LexisNexis Supp. 2012); e.g., *Patient Form and Brochure Center, Semen Depositor Agreement*, supra note 32, at 2–3; see also *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 269 (Mass. 2002).

149. See *Woodward*, 760 N.E.2d at 269 (citing Anne Reichman Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. REV. 901, 951 (1997)).

does not bequeath the specimens to a designated recipient.<sup>150</sup> Consequently, the posthumously conceived child would be barred from inheriting from the decedent's estate.<sup>151</sup>

*D. To Ensure the Posthumously Conceived Child Is Eligible for Inheritance Benefits, the Donor Must Unequivocally State His Intent to Financially Provide for that Child*

Under current Maryland law, the donor must consent to be the parent of the posthumously conceived child;<sup>152</sup> however, the legal implications of this requirement are ambiguous in light of the fact that PCC are only conceived after the donor's death, never knowing their father and without any chance of a traditional parent-child relationship. In fact, consent forms generally contain a waiver exempting the donor from legal obligations with respect to the resulting child, and instead, the person who purchases the donated sperm and conceives from the specimen becomes "solely responsible for [the child's] support and custody."<sup>153</sup> If a donor wants to ensure his posthumously conceived child is provided for, he would need to proactively indicate his desire to financially support the child.<sup>154</sup> For example, some centers explicitly address posthumous reproduction in their agreements:

A client may become a biological parent after his death . . . . For a client to be recognized as the legal parent of a future child, there must be a written and notarized statement signed by the client during his lifetime stating he *intends to parent* after his death and granting ownership of stored specimen to a designee. Ownership of the specimens, with the authority to control the use of the stored specimen will transfer to the designee, according to the wishes expressed by the client depositor. Ownership or use of the specimens after the client depositor's death does not automatically grant legal status to the child that the client depositor is the father.

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150. See, e.g., *Patient Form and Brochure Center, Semen Depositor Agreement*, *supra* note 32; *supra* Part IV.A.

151. See *supra* Part IV.A.

152. EST. & TRUSTS § 3-107(b)(2).

153. *Terms of Use*, FAIRFAX CRYOBANK, 2 (June 1, 2012), [http://www.fairfaxcryobank.com/documents/DIS.40p.1OFFXTermsOfUse\\_WEB\\_DS.pdf](http://www.fairfaxcryobank.com/documents/DIS.40p.1OFFXTermsOfUse_WEB_DS.pdf). The form states, "The donor has given up all of his rights and is released from any obligations to children born using his sperm." *Id.*

154. See *Woodward*, 760 N.E.2d at 269; *Patient Form and Brochure Center, Semen Depositor Agreement*, *supra* note 32.

*Without the client's written declaration of intent to parent, the child would not be afforded legal rights of inheritance or support.* PRIOR TO USING THE SPECIMEN, PLEASE CONSULT WITH AN EXPERIENCED ATTORNEY REGARDING THE LEGAL RIGHTS OF INHERITANCE OR SUPPORT OF A CHILD BORN AFTER THE DEPOSITOR'S DEATH.<sup>155</sup>

This model consent form acknowledges the need for a formal, written statement that expresses the donor's intent to father a child posthumously and bequeaths the specimen to a designated recipient.<sup>156</sup> However, the form defers the issue of the posthumously conceived child's inheritance, thus exemplifying the need to clarify this part of the law.<sup>157</sup>

While the forms establish a default that removes the donor from liability for the child, and therefore, create a sufficient waiver for heterologous inseminations, donors in homologous inseminations can draft around this standard language by unequivocally expressing the intent to financially support the child.<sup>158</sup> The donor can accomplish this at the time of the donation, and a consent form that complies with the statutory formalities may confirm the donor's desire to provide pecuniary support in addition to providing dispositive instructions for the stored specimens.<sup>159</sup> Requiring the donor to consent in a written record to provide financial support to the posthumously conceived child adds precision to the current statutory language, which is undefined and fails to explain the effect, if any, of consenting to be the parent of the child.<sup>160</sup>

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155. *Patient Form and Brochure Center, Semen Depositor Agreement*, *supra* note 32, at 2 (emphasis added).

156. *Id.* In the case of homologous insemination using a stored embryo, the specimen could automatically pass to the survivor upon the donor's death. DEP'T OF HEALTH & SOC. SEC., *supra* note 95, at 37–38, 56, 85. This effectively gives nonprobate status to the specimen so that upon the death of one owner, the property passes automatically to the survivor by operation of law. *See VALLARIO, supra* note 12, at 18, 23. However, this recommendation was specifically based on stored embryos, in which both the man and the woman in the couple have a vested interest. DEP'T OF HEALTH & SOC. SEC., *supra* note 95, at 37–38, 56, 85. The issue at bar is distinguishable because when the stored specimen is limited to sperm, the woman does not yet have an ownership interest in the gametic material. *See id.*

157. *See Patient Form and Brochure Center, Semen Depositor Agreement, supra* note 32, at 2.

158. *See Woodward*, 760 N.E.2d at 269; *Patient Form and Brochure Center, Semen Depositor Agreement, supra* note 32, at 2; *Terms of Use, supra* note 153, at 1–2.

159. *See* discussion *supra* Part IV.A-C.

160. *See* MD. CODE ANN., EST & TRUSTS § 3-107(b) (LexisNexis Supp. 2012).

*E. Granting Inheritance Rights to PCC Will Only Be Administratively Feasible if the Decedent Engaged in Estate Planning During His Lifetime and Created a Source of Funds for the After-Born Child's Inheritance*

Even if the donor meets the two-fold consent requirement, allowing PCC to inherit from the probate estate does not eliminate several problems, such as: (1) determining the amount of assets to be reserved for the child; (2) allowing the personal representative to proceed with distributing the remainder of the estate; (3) protecting the inheritance of the decedent's other children; or (4) guaranteeing the posthumously conceived child will receive an inheritance at all if born beyond the statute of limitations period.<sup>161</sup> These uncertainties would be removed under the statute proposed by this comment if Maryland requires the decedent to engage in estate planning during his lifetime, such that the after-born heir would have an inheritance reserved in the form of an *inter vivos* or testamentary trust.<sup>162</sup> For example, the donor could bequeath his residuary estate in trust to his wife for life and then to his children. To further ensure that the donor's intent is carried out with respect to supporting the after-born child, the definitional section of the trust should expressly stipulate that any reference to "child," "children," "descendant," or "descendants," however expressed, shall be construed to include any legitimate descendants, including a child or descendant conceived after the donor's death.<sup>163</sup>

Imposing a statutory requirement that any PCC inherit from a nonprobate source of assets also obviates the need to either amend the statute of limitations pertaining to the closing of an estate,<sup>164</sup> or impose a statute of limitations within which time the PCC must be born in order to inherit.<sup>165</sup> To maintain an efficient system where the estate is wrapped up within a maximum timeframe, a statute of

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161. See *id.* at § 3-107(B)(3); MD. CODE ANN., EST. & TRUSTS 10-103(b)(1) (LexisNexis 2011); Woodward, 760 N.E.2d at 259; discussion *supra* Part III.A.

162. In Maryland, a trust established for the benefit of the unborn child would not violate the rule against perpetuities as long as the trust document states that the rule against perpetuities does not apply and the trustee has power to dispose of the property "for any period of time beyond the period that is required for an interest . . . to vest." EST. & TRUSTS § 11-102(b)(5).

163. See VALLARIO, *supra* note 12, at 101-02.

164. See EST. & TRUSTS § 10-103(b)(1) (establishing a statute of limitations with respect to closing estates).

165. See EST. & TRUSTS § 3-107(b)(3).

limitations should exist beyond which claims are barred.<sup>166</sup> Currently, the personal representative will be “discharged from any claim or demand of any interested person” if the fiduciary is not involved with any pending action one year after the estate is closed.<sup>167</sup> Claims regarding the improper distribution of property, however, must be brought within three years of the decedent’s death or one year from the time of the distribution of property, whichever is later.<sup>168</sup> The purpose of this law is the timely resolution of the estate, prompt devolution of the property to the heirs, and the preservation of assets for those children already alive and entitled to take under the decedent’s will or the laws of intestacy.<sup>169</sup> Making the probate assets off-limits in satisfying the after-born child’s share would allow the personal representative to proceed with administering the estate and distributing assets to other beneficiaries without infringing on their shares.<sup>170</sup>

Some might argue this short timeframe of three years should be increased.<sup>171</sup> First, specimens can remain viable for upwards of ten years.<sup>172</sup> The surviving partner should not be pressured to conceive immediately, especially while still mourning her partner’s death.<sup>173</sup> Alternatively, the woman may have difficulty conceiving and be unable to become pregnant within the statute of limitations period.<sup>174</sup> The two-year period mandated in the current after-born heirs statute fails to acknowledge these considerations.<sup>175</sup> But the problem of keeping the estate open indefinitely in order to reserve assets for the inheritance of an after-born child, who could be born upwards of ten years after the decedent’s death, becomes a non-issue if the inheritance originates from a trust.<sup>176</sup> Under the proposal set forth in this comment, the current statute of limitations can remain in force,<sup>177</sup> and the probate estate can be settled immediately without sacrificing the after-born child’s inheritance. It also preserves the protective feature of the statute of limitations by preventing the existing

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166. See EST. & TRUSTS §§ 1-105(a), 10-103; *Schafer v. Astrue*, 641 F.3d 49, 59 (4th Cir. 2011); *In re Estate of Kolacy*, 753 A.2d 1257, 1262 (N.J. Super. Ct. Ch. Div. 2000).

167. EST. & TRUSTS § 10-103(a)(1).

168. *Id.* at § 10-103(b)(1).

169. *Schafer*, 641 F.3d at 59; *In re Estate of Kolacy*, 753 A.2d at 1262.

170. *In re Estate of Kolacy*, 753 A.2d at 1262.

171. See EST. & TRUSTS § 10-103(b)(1)(i).

172. *In re Estate of Kolacy*, 753 A.2d at 1261.

173. See *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 268 (Mass. 2002).

174. *Id.*

175. See MD. CODE ANN., EST. & TRUSTS § 3-107(b)(3) (LexisNexis Supp. 2012).

176. See *In re Estate of Kolacy*, 753 A.2d at 1261–62.

177. MD. CODE ANN., EST. & TRUSTS § 10-103(b)(1) (LexisNexis 2011).

children, either beneficiaries under the will or heirs under the laws of intestacy, from receiving reduced benefits due to the subsequent births of the PCC.<sup>178</sup> By statutorily requiring the donor to create an estate plan that includes an *inter vivos* or testamentary trust, whether the after-born child is entitled to inherit and whether a source for the inheritance exists will be known at the donor's death. Further, since the inheritance is reserved in trust, the current statute of limitations can remain in effect, thereby ensuring the timely resolution of the estate.<sup>179</sup>

## V. CONCLUSION

After losing their husbands to cancer, a heart attack, and leukemia, respectively, Gayle Burns, Janice Schafer, and Patti Beeler all conceived with the sperm their husbands banked prior to receiving medical treatment.<sup>180</sup> For these women, and those like them who will apply for and be denied social security benefits for their PCC in the months and years ahead, state intestacy laws have become a disastrous focal point of courts' decisions.<sup>181</sup>

To keep pace with the advancements in reproductive technologies, Maryland should further amend its current after-born heirs statute so as not to preclude a growing class of children from receiving inheritance benefits from their deceased fathers.<sup>182</sup> The amended law should create a presumption against inheritance for children conceived posthumously from their father's banked sperm.<sup>183</sup> In order for PCC to be entitled to inherit as heirs of their father's probate estate or as class members described in the will or trust of the decedent or one of his relative's, the child's parent or guardian must produce the decedent's signed, witnessed writing; a consent form completed at the time of the donation would satisfy this statutory requirement.<sup>184</sup> The writing must express the donor's unequivocal intent for the posthumous reproduction to occur and the intent to provide pecuniary support for the child.<sup>185</sup> This witnessed writing

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178. See Schafer v. Astrue, 641 F.3d 49, 59 (4th Cir. 2011); Woodward, 760 N.E.2d at 266.

179. See EST. & TRUSTS §§ 7-101, 10-103(b)(1); *supra* notes 165–167 and accompanying text.

180. Beeler v. Astrue, 651 F.3d 954, 956-57; Schafer, 641 F.3d at 51; Dobner, *supra* note 1.

181. See *supra* Part II.C.

182. See *supra* Part II.

183. See *supra* Part IV.A.

184. See *supra* Part IV.B.

185. See Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 269 (Mass. 2002); *supra* Part IV.C–D.

requirement will minimize fraudulent claims and prevent prolonged proceedings whereby extrinsic evidence is needed to prove the decedent's intent.<sup>186</sup> Lastly, the decedent must have engaged in estate planning during his lifetime, creating a trust to protect the after-born child's inheritance.<sup>187</sup> Without a source of funds reserved for the posthumously conceived child, the child's right to inherit will be void.<sup>188</sup> By prohibiting PCC from accessing probate assets, the personal representative can continue to administer the estate in a timely manner, and the inheritance of the decedent's other heirs remains protected.<sup>189</sup>

Although this solution expands the inheritance rights of PCC, the restrictive nature of the proposed statute ensures that PCC are not receiving a financial windfall every time a widow chooses to have a child using her deceased husband's banked semen.<sup>190</sup> Only when a donor has taken calculated steps to ensure his after-born child is financially supported will the child have a claim to an inheritance.<sup>191</sup> By avoiding a bright-line rule that either allows or denies inheritance rights to PCC, the competing interests of the legislature and donor are reconciled.<sup>192</sup>

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186. See *Woodward*, 760 N.E.2d at 263–64.

187. See *supra* Part IV.E.

188. See *supra* Part IV.E.

189. See MD. CODE ANN., EST. & TRUSTS § 7-101 (LexisNexis 2011); *supra* Part IV.E.

190. See *supra* Part IV.A.

191. See *supra* Part IV.D-E.

192. See *supra* Parts III.A, IV.A.

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