Heir(ing) on the Side of Caution: Are Intestacy Laws Too Strict for Posthumous Children Seeking to Inherit Social Security Benefits?

I. INTRODUCTION

Consider a world where human procreation dramatically declines and a fertility crisis ensues that could endanger human life.[1] Such a crisis could become a stark reality, illustrated in a recent study that predicts the median sperm count in men could reach zero by 2045.[2] This may be partly attributed to several endocrine-disrupting chemicals widely found in consumer products and lifestyle factors that include obesity, stress, smoking, and alcohol consumption.[3] If sperm counts do in fact plummet, most couples may have to resort to assisted reproductive technology ("ART").[4] This phenomenon can create many legal issues for after-born children, such as posthumously conceived children seeking to inherit Social Security survivor benefits from a deceased parent.[5] It is already complex as is because a child today can have as many as five different parents,[6] and people are already producing children with the genes of three people.[7] Furthermore, other ART techniques are likely to develop as technology continues to advance which may further complicate the system.[8]

Accordingly, social and legal consequences will likely follow if legislatures are not pressured to consider future, emerging technological developments. Legislatures should thus aim to proactively recognize and address the inevitable consequences of modernity by moving towards a more uniform system that would allow posthumously conceived children the ability to receive similar inheritance rights as other children. If sperm counts do in fact decline, and people resort to ART out of necessity by using donor sperm in lieu of the male's sperm, then it will become even more difficult for posthumously conceived children to inherit survivor benefits from their legal, non-genetic parent.[9] Even if sperm counts do not decline at a catastrophic level predicted in the study, the inheritance problem will likely continue given technological advancements outpacing the law. In the case of same-sex parents, one parent is not biologically related to the

child, which further raises questions regarding whether a non-genetic, posthumously conceived child may qualify for Social Security survivor benefits.[10]

Because the Social Security Act "piggybacks" on state intestacy laws, and many legislatures have not addressed the issue of inheritance for posthumously conceived children, this creates great inconsistencies amongst states.[11] California's state intestacy law, one of twenty-four states to address inheritance of posthumously conceived children, does not help address this problem because the statute's stringent requirements allow inheritance only if certain conditions are satisfied and only in the event that a child is conceived after the death of a genetic parent.[12] California errs on the side of caution by focusing on whether the deceased, genetic parent intended to be both a posthumous parent and have a financial obligation to that child, though this perspective fails to promote or protect the child's best interests.

This Comment will address the variance in state intestacy laws and how legislatures are failing to keep up with technological advancements; thus, challenging "our collective notions about family and the significance of biology in assigning parental rights."[13] The delay in legislative change is problematic because science is outpacing the law, as many children are being conceived via assisted reproduction and other technological developments, which will exacerbate the already-existing issue of many posthumously conceived children not being afforded the same inheritance rights as all children. Although Congress is unlikely to have contemplated future advancements in posthumous conception when drafting the Social Security Act, it is prudent that state legislatures address such advancements by reforming outdated and strict intestacy laws in order to provide more certainty and uniformity. This Comment will focus on California's strict compliance standard under its intestacy law regarding posthumously

conceived children and will advocate a more lenient standard for states to adopt and proposals that legislatures may consider.

Part II discusses the Social Security Act ("The Act"), assisted reproduction, a brief overview of state intestacy laws with an emphasis on California's various requirements, and how California's stringent intestate law can cause detrimental ramifications in the future as technology continues to develop. Part III examines and critiques a recent Ninth Circuit decision that deals with the interpretation of the California intestate law, *Delzer v. Berryhill*, and the unanimous Supreme Court opinion in *Astrue v. Capato*, which resolved the circuit split regarding whether state intestacy laws have a role in defining "child" under the Act. Part IV proposes solutions on how jurisdictions can resolve the inheritance issue of posthumously conceived children in the Social Security context while keeping up with reproductive biotechnology advancements. Specifically, Part IV emphasizes that in the interest of public policy, state legislatures, like California, should relax strict intestacy laws and adopt a lenient standard that considers the decedent's implied consent or overt actions during their lifetime, in a manner similar to how courts can enforce contracts despite the absence of any writing. Part V briefly concludes.

II. BACKGROUND

A. The History and Framework of the Social Security Act

On August 14, 1935, the Social Security Act was signed into law by President Franklin D. Roosevelt, which created a retirement program to pay retired workers over the age of sixty-five continued income.[14] A significant change occurred in 1939 when the Act was amended and transformed into a "family-based economic security program" providing "payments to the

spouse and minor children of a retired worker (so-called dependents benefits) and survivors benefits . . . to the family in the event of the premature death of a covered worker."[15]

In *Mathews v. Lucas*, an opinion delivered by Justice Blackmun, the United States Supreme Court noted that the purpose of providing Social Security survivor benefits to minor children was not to benefit them but "was intended just 'to replace the support lost by a child when his father . . . dies . . . .'"[16] Additionally, subsequent courts have found that the nature of the Act is "remedial, to be construed liberally."[17] Importantly, Congress did not contemplate assisted reproductive technology and posthumously conceived children when the Act was signed into law or amended in 1939.[18]

Under the Act, a child is entitled to benefits if the child: (1) meets the Act's definition of "child," (2) files an application, (3) is dependent[19] on the insured individual at the time of the wage earner's death, (4) is unmarried at the time of the application filing and either (a) under eighteen years old or a full-time elementary or secondary school student under nineteen years old or (b) under a disability which began before twenty-two years old.[20] The term "child," under the Act, is defined as "(1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse [who meets certain conditions]."[21]

A posthumous child, conceived through assisted reproduction, is eligible for Social Security survivor benefits from their decedent parent based solely on the respective state intestacy laws, *i.e.*, it depends on whether the child would be considered an heir under state law.[22] Thus, state intestacy laws are not only drafted with the purpose of distributing the estate's personal property but also to determine whether a child qualifies for survivor benefits under the Act.

If the applicant, or posthumously conceived child in this scenario, is unable to meet the requirements set forth under the Act's provision, 42 U.S.C. Section 416(h)(2)(A), they may still nevertheless acquire "child" status under the Act if one of the following is satisfied: (1) the insured individual and other parent went through a marriage ceremony;[23] (2) the insured individual acknowledged in writing that the applicant is his or her child;[24] or (3) upon proof that the insured individual was "living with or contributing to the support of the applicant" when the insured died.[25] The unanimous ruling in *Astrue v. Capato*, discussed further below, reinforces this interpretation.[26] However, the Supreme Court's ruling in *Astrue*, by upholding the Social Security Administration's ("SSA") interpretation to defer to state intestacy laws in determining whether the posthumously conceived child qualifies as a "child" under the Act, has created a lack of consistency among the states.[27]

B. The Procedural Steps in Applying for Survivor Benefits

To apply for benefits under the Act, the surviving parent of a posthumously conceived child has two years from the date of the wage earner's death to file an application with the SSA on behalf of the child seeking child insurance benefits.[28] The Commissioner of Social Security reviews the application and determines whether the child can legally inherit from the insured decedent's estate under the appropriate state intestacy law.[29] If the Commissioner determines the child is ineligible to inherit survivor benefits and denies the application, the surviving parent may then appeal the decision with the SSA.[30] If the SSA agrees with the Commissioner's decision and affirms, the surviving parent may obtain a review of the decision and timely file a civil action in the appropriate federal district court to challenge it.[31]

After the lawsuit commences, if the district court upholds the SSA's denial of benefits, the surviving parent may appeal to the circuit court, which reviews legal questions de novo.[32] On

the other hand, questions of fact are determined by looking at whether the district court's denial was based on "substantial evidence" to support its finding.[33] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[34] If the court finds that the Commissioner's findings are supported by substantial evidence, it "shall be conclusive."[35] On the other hand, if the Commissioner's denial is based on the plaintiff's failure to submit proof under the relevant posthumous inheritance statute, then "the court shall review only the question of conformity with such regulations and the validity of such regulations."[36]

Finally, the district court may remand the case back to the Commissioner only if there is a showing of: (1) additional evidence that is new and material, and (2) good cause for the claimant's failure to present such evidence earlier in the proceedings.[37] Additional evidence is deemed "material" allowing for remand "only when there is a *reasonable possibility* that the new evidence would have changed the outcome of the Secretary's determination had it been before him."[38] Regarding the "good cause" requirement, it is liberally applied and may be established where "the evidence did not exist at the time of the ALJ's decision."[39]

C. The Proliferation of Assisted Reproduction and the Evolution of Family

Posthumous conception is not a novel concept.[40] Previous generations have recognized the possibility of a child being born after the death of a parent.[41] In 1978, the world's first "fresh" test tube baby was conceived via in vitro fertilization ("IVF").[42] Then, in 1984, the first child was born from a cryopreserved, or frozen, embryo which raised considerable debate in ethics, religious, and legal circles, partly because a frozen embryo has the ability to be stored long-term and can be viable for centuries.[43] Some fertility clinics and hospitals even advertise

the indefinite use of the cryopreserved embryos, which gives couples time before making the decision to undergo assisted reproduction.[44]

Assisted reproductive technology encompasses many fertility techniques that allow couples to achieve pregnancy and live birth without sexual intercourse.[45] There are two categories of fertilization: internal (in vivo) and external (in vitro).[46] Internal fertilization is characterized as a procedure occurring "inside the uterus of the woman who is to become pregnant." In general, internal fertilization includes two procedures: artificial insemination ("AI") and gamete intrafallopian transfer ("GIFT") wherein fertilization does not typically occur outside the woman's uterus. External fertilization is characterized as occurring "outside the uterus and is followed by the implantation of the fertilized egg (embryo) into the uterus of the woman who is to become pregnant." Furthermore, external fertilization is usually referred to as IVF, the fertilized embryo can be frozen, or cryopreserved, before insertion into the uterus.[47] The cryopreserved gametes or embryos, when ready to be implanted in the uterus for the IVF procedure, are then placed in a thawing cycle which has the possibility of altering the embryos' survival rate.[48]

The expansion of assisted reproductive techniques provides significant possibilities for individuals that (1) were recently diagnosed with certain conditions that may make them sterile in the future; (2) lack a partner; (3) desire to delay childbearing to focus on one's career; (4) experience age-related or environmentally induced infertility; (5) face financial instability; (6) are deployed in the military; and (7) other life events. The availability of assisted reproduction has become a trend for the modern family, with about 3.5 million children who have been conceived by this technology.[49] However, not all states recognize or explicitly address

posthumously conceived children, and some states impose strict requirements that make it harder for a posthumous child to inherit, despite the proliferation of assisted reproduction.[50]

D. Summary of the Existing Model Acts

There are four relevant model statutes which attempt to address the legal status of posthumously conceived children, which some states have adopted. These include: (1) the Uniform Status of Children of Assisted Conception Act ("USCACA"); (2) the Uniform Parentage Act ("UPA"); (3) the Uniform Probate Code ("UPC"); and (4) the Restatement (Third) of Property: Wills and Other Donative Transfers ("Restatement").

Starting with the strictest code, the USCACA did not grant posthumously conceived children inheritance rights and provided that "[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[51] Only two states, North Dakota and Virginia, adopted the USCACA.[52] However, both of those states have since amended its intestacy laws to provide for posthumously conceived children, albeit with different requirements.[53]

Second, in 2000, the UPA superseded the USCACA,[54] and amended the code to include a section regarding posthumously conceived children.[55] The UPA was then amended in 2017 and provided that:

> If an individual who consented in a record to assisted reproduction by a woman who agreed to give birth to a child dies before a transfer of gametes or embryos, the deceased individual is a parent of a child conceived by the assisted reproduction only if: (1) either: (A) the individual consented in a record that if assisted reproduction were to occur after the death of the individual, the individual would be a parent of the child; or (B) the individual's intent to be a parent of a child conceived by assisted reproduction after the individual's death is established by clear-and-convincing evidence; and (2) either: (A) the embryo is in utero not later than [36] months after the individual's death; or (B) the child is born not later than [45] months after the individual's death.[56]

California, Connecticut, Maine, Rhode Island, Vermont, and Washington have adopted the UPA to some degree.[57] The UPA amended the above provision in 2017 to be consistent with the UPC approach, which "provides that an individual is 'treated as the other parent' if it can be shown, 'considering all the facts and circumstances,' that the individual consented to the assisted reproduction."[58]

Third, the UPC,[59] amended recently in 2019, has provided a more consistent formula given that it also considers "the possibility that a child may have more than two parents, and therefore more than two sets of grandparents."[60] Although the UPC has not become a standardized law, it is far more lenient than the USCACA and the UPA and has been adopted, in whole or in part, by nearly twenty states. Finally, the Restatement, in contrast to the other Acts, suggests a lenient, fact-sensitive approach because it does not impose a time restriction for when the embryo must be implanted after the parent's death, and there is no requirement that the decedent express their intent in a written instrument.[61] Many state legislatures such as California, Colorado, Florida, Iowa, Louisiana, and North Dakota have passed statutes that outline requirements when a posthumously conceived child may inherit in the event that their parent did not write a will. However, statutes such as California's provides rights for only a limited class of posthumously conceived children and has a more restrictive approach, based on the UPA.

1. A Visual Overview of State Intestacy Laws

State intestacy laws vary partly because: (1) many of the states have adopted in part or in full the various model acts mentioned above and (2) many legislatures have not addressed posthumously conceived children or have excluded such children from inheritance. The variance in state intestacy laws, at the very least, is discriminatory given that the lack of uniformity results

in divergent outcomes: "[i]n one state [posthumously conceived children] are the children of their deceased parent, while in a neighboring state they are treated as strangers to their parent."[62] An illustration in the Appendix is provided to present a visual overview of the number of states that recognize posthumously conceived children for probate purposes, the states that exclude them, and the states where it still remains unclear.

2. California Probate Code's Stringent Requirements Under Section 249.5

The California Probate Code ("CPC") governs intestate succession and provides the distribution process of a decedent's estate.[63] The CPC's history "can be traced to 1850 when the Legislature enacted 'An Act to regulate the Settlement of the Estates of Deceased Persons.'"[64] The California State Bar Committee noted the CPC has had hundreds of amendments to its provisions since 1973; however, such revisions were neither substantial nor substantive.[65]

On February 9, 2004, the California Assembly introduced and read Assembly Bill 1910, which added Section 249.5.[66] The Assembly had several readings of the bill during its regular session and discussed during its third meeting how the bill focuses on the inheritance rights of posthumously conceived children considering technological advancements.[67] Throughout the reading process, the Assembly also brought up various unresolved issues, one being: "[s]hould the bill limit the type of genetic material to be used in creating a child which will be recognized under California law as an heir?"[68] The Assembly responded: "the bill does not distinguish between 'gametes' (sperm and eggs) and other genetic material. Instead, the bill focuses on the intent of the decedent. Probate experts note that ultimately, it will be human concerns and values that will determine how these issues are decided, not the technology."

On May 20, 2004, Assembly Bill 1910 passed,[69] however, within a month, the bill had a series of proposed amendments.[70] Finally, Section 249.5 went into effect on January 1, 2005,

and was most recently amended on January 1, 2006.[71] In comparing the previous 2005 version and latest 2006 version, the latter added minor text[72] and deleted the requirement that "at least one competent witness" be present at the time the decedent expresses his or her intent in a signed writing.[73] The deletion of this added requirement may suggest that the legislature realized the impracticality for a person to fulfill all of the conditions set forth under Section 249.5.[74]

In sum, as of the latest 2006 legislation, Section 249.5 provides that a posthumously conceived child must prove by clear and convincing evidence that: (1) in a signed writing, the decedent consented to the genetic material's use and appointed an agent to control that material; (2) within four months of the decedent's death, the appointed agent provided written notice to the estate distributor that the material was available for conception; and (3) the child was conceived within two years of the decedent's death.[75]

The strict compliance view of Section 249.5 is not in the interest of public policy and does not promote the best interests of posthumously conceived children. Although the writing requirement and time limitation may assist in preventing fraudulent claims and avoid complexity in the estate administration process, it is too restrictive and fails to strike an appropriate balance in considering a posthumous child's best interests. Given that technology is rapidly advancing and more couples will likely resort to assisted reproduction, it is imperative that California amends Section 249.5. Currently, there is no proposed legislation to amend Section 249.5,[76] which suggests that the legislature is not pressured to consider assisted reproduction technological advancements.

III. CURRENT STATE OF THE LAW

A. Analyzing the Various Judicial Approaches

In *Astrue v. Capato*, the Supreme Court resolved a circuit split regarding posthumously conceived children and inheritance.[77] In sum, the Court followed the SSA's interpretation by deferring to state intestacy laws in the event that the decedent died intestate or omitted from their will the intent to become financially responsible for a posthumous child. In order to fully understand *Astrue* and what the Court failed to consider in its ultimate holding, this Comment will discuss and provide a general overview of the following preceding case law: (1) *Hecht v. Superior Court*; (2) *In re Estate of Kolacy*; (3) *Woodward v. Commissioner of Social Security*; and (4) *Gillett-Netting v. Barnhart*. Finally, a recent Ninth Circuit decision interpreting Section 249.5, *Delzer v. Berryhill*, will also be discussed and analyzed below.

1. Hecht v. Superior Court

In *Hecht*, the California Court of Appeal held that decedent, William E. Kane, maintained an ownership interest over his cryogenically-preserved sperm, and his unambiguous intent set forth in his will to bequeath the sperm to his girlfriend, Deborah Hecht, did not violate public policy.[78] There, the decedent stored fifteen vials of his sperm in a sperm bank before committing suicide.[79] At the sperm bank, he signed a release of his sperm to Ms. Hecht and expressed in his will that he intended for Ms. Hecht use his sperm, if she desired.[80] However, the decedent's surviving children, from a previous marriage, objected to Ms. Hecht's collection of the sperm and ordered its destruction.[81] The court, in reversing the trial court's decision to destroy the sperm, focused on two main elements: ownership and intent by reasoning that, because the decedent maintained an ownership interest over his genetic material and unambiguously

expressed his intent to bequeath his sperm to Ms. Hecht in his will, he had a postmortem right to control his genetic material.[82]

2. In re Estate of Kolacy

In *In re Estate of Kolacy*, a New Jersey court held that twins born eighteen months after their father's death qualified as heirs of his estate under New Jersey intestate law.[83] There, the decedent, William Kolacy, like many of the decedents in subsequent cases, was diagnosed with cancer and chose to deposit his sperm before beginning chemotherapy.[84] Unfortunately, Mr. Kolacy died from cancer and his wife, Mariantonia Kolacy, filed a lawsuit seeking to obtain a judicial declaration that her twins, conceived and born after Mr. Kolacy's death using his sperm, were his intestate heirs.[85] The court focused on legislative intent and found that:

> [A]lthough the Legislature has not dealt with the kind of issue presented [here] . . . it has manifested a general intent that the children of a decedent should be amply provided for with respect to property passing from him or through him as the result of a death. . . . The general intent should prevail over a restrictive, literal reading . . . which did not consciously purport to deal with [this] kind of problem.[86]

However, the court qualified its finding by noting that a child biologically related to the decedent should be granted inheritance rights unless "doing so would unfairly intrude on the rights of other persons or would cause serious problems in terms of the orderly administration of estates."[87] Ultimately, this opinion is persuasive because it illustrates a method that California state courts can adopt: focusing on the legislative intent of Section 249.5 and forgoing the restrictive, literal reading of the intestate law in certain circumstances. Furthermore, focusing on the legislative intent would be a better approach given Section 249.5's ambiguity because, in *Delzer v. Berryhill*, the Ninth Circuit was unable to ascertain whether the term "genetic material" under the section encompassed sperm or only meant embryo. Thus, if California focuses on the

goals of the legislators at the time of Section 249.5's passage, it would provide a stronger framework and more clarity for future cases.

3. Woodward v. Commissioner of Social Security

The *Woodward* court held that posthumously conceived children qualify as heirs under Massachusetts law if the following three-part test is satisfied: (1) there is a genetic relationship between the posthumously conceived child and decedent, (2) the decedent affirmatively consented to the posthumous conception, and (3) the decedent affirmatively consented to supporting the posthumous child.[88] There, the decedent, Warren Woodward, was diagnosed with cancer and arranged for his sperm to be deposited in a sperm bank.[89] After his death, his wife, Lauren Woodward, used the sperm and conceived twins via artificial insemination.[90] Ms. Woodward attempted to claim survivor benefits for her children, though, the SSA denied such benefits because Ms. Woodward did not establish the twins were considered her husband's "children" under the Social Security Act.[91]

The Supreme Judicial Court of Massachusetts considered "three powerful State interests" in answering the issue of whether posthumously conceived children that are genetically related to the decedent may inherit under state law: "the best interests of children, the State's interest in the orderly administration of estates, and the reproductive rights of the genetic parent."[92]

Although the Massachusetts law does not consider posthumously conceived children seeking to inherit from a non-genetic parent and provides inheritance rights in limited circumstances, its emphasis on the "three powerful State interests" is effective because it accounts for the child's best interest—a critical focus that the California courts have failed to consider, and should address in interpreting Section 249.5.

4. Gillett-Netting v. Barnhart

In *Gillett-Netting*, the Ninth Circuit held, in a case of first impression, that posthumously conceived children were eligible for benefits under the Act if biological paternity was undisputed under Arizona intestacy law.[93] There, the decedent deposited his semen after being diagnosed with cancer; however, after the decedent's death, Ms. Gillet-Netting underwent IVF, became pregnant with twins, and upon giving birth, filed an application on their behalf for survivor benefits.[94] The SSA denied the claim, finding that the children were not dependent on their father at the time of his death, and the district court affirmed.[95]

Reviewing the district court's holding de novo, the Ninth Circuit found that Ms. Gillet-Netting's children were legitimate and thus dependent, given that the decedent was fully insured under the Act, the children were unmarried minors, and biologically related to him, and their mother filed an application on their behalf.[96]

Gillett-Netting is important because the Ninth Circuit, in its discussion, lends credence to the view that technology has outpaced law reform, which have not directly addressed the legal issues created by posthumous conception. The theme of this case repeats itself in the Supreme Court's decision, *Astrue v. Capato*, which has led to even more inconsistency and unpredictability for the inheritance rights of posthumously conceived children.

B. The Significance and Impact of Astrue v. Capato

Justice Ginsburg, delivering the unanimous opinion in *Astrue v. Capato*, ultimately abrogated *Gillet-Netting*.[97] In *Astrue*, Ms. Capato gave birth to twins eighteen months after her husband died from cancer.[98] Similar to *Gillet-Netting*, the Social Security Administration denied survivor benefits and the district court affirmed.[99] When Ms. Capato appealed, the Third Circuit reversed and concluded that, regardless of state intestacy law, the biological relationship between the

children and decedent was sufficient for survivor benefits under the Act.[100] In the opinion, Circuit Judge Barry noted "the intersection of new reproductive technologies and what is required to qualify for child survivor benefits [such that one] cannot help but observe that this is, indeed, a new world."[101]

The Supreme Court granted certiorari to address the circuit split in the law regarding what provision applies in determining a posthumously conceived child's eligibility for survivor benefits under the Act.[102] The debate surrounded two key provisions under the Act: sections 416(e) and 416(h), which considered whether a posthumously conceived child fulfills the definition of "child."[103] Ms. Capato argued that the Act's definition of "child" under 42 U.S.C. section 416(e) means the child or legally adopted child of an insured individual; however, the Court noted that the Act's two sections 416(h)(2) and 416(h)(3)(C), entitle biological children to benefits only if they qualify under state intestacy laws or satisfy one of the statutory alternatives.[104] Thus, the Court, in deferring to the Act's interpretation, concluded that the "reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime."[105]

By deferring to the Social Security Administration, the Court may be signaling its reluctance to involve itself in administrative agency decisions as well as "avoid[ing] . . . burdensome case-by-case determinations."[106] Furthermore, although the Court was likely concerned with issues of federalism and allocating states some leeway in adopting intestacy laws, one main concern is that the Court's decision failed to consider the variance in state laws which creates a lack of uniformity in posthumous child cases.[107] Specifically, this lack of uniformity will likely be twofold in states that do not even account for posthumous children, or states where, like California, the requirements are too stringent. Moreover, Justice Breyer, during oral argument,

raised a similar concern by stating that, "every State has a dozen different variations; there are uniform acts, there are things you have to acknowledge in writing. It's a very complicated subject."[108] Perhaps, though, there is a silver lining and the Court's decision will apply pressure on state legislators to achieve uniformity and institute a system that considers new reproductive technologies. However, this seems unlikely given that it has now been ten years since the *Astrue* decision and California has no pending legislation to amend Section 249.5.

C. The Ninth Circuit's Approach in Applying California's State Intestacy Law in Delzer v. Berryhill

In a recent decision, *Delzer v. Berryhill*, the Ninth Circuit held that under California's intestacy law, the surviving spouse failed to submit a written instrument that proves, by clear and convincing evidence, that the decedent consented to the use of his genetic material after his death.[109] There, Owen and Stephanie Delzer decided to undergo fertility treatment after being unable to conceive a child naturally.[110] On October 8, 1988, before beginning the procedure, the Delzers signed a series of documents, including an informed consent form, which consented to the physician's performance and outlined the procedure, risks involved, and available alternatives.[111] The procedure began shortly thereafter, and Mr. Delzer deposited sperm that was allocated to produce embryos, with another two extra vials of sperm to be cryopreserved as "back-up" if the initial embryos were not successful.[112] Unfortunately, the initial embryos did not result in a pregnancy and Mr. Delzer, diagnosed with terminal cancer, died a few months later; however, Ms. Delzer subsequently used the "back-up" sperm and became pregnant with twins.[113]

Ms. Delzer filed an application on behalf of her children for survivor benefits, which was denied by the SSA.[114] A hearing before an Administrative Law Judge ("ALJ") occurred and the

ALJ noted that, although Mr. Delzer signed consent forms authorizing the use of frozen embryos after his death, this authorization was limited to the continued use of embryos existing at the time of his death, not embryos produced from the "back-up" sperm after his death.[115] Ms. Delzer commenced a lawsuit in the district court then appealed when the court ultimately affirmed the ALJ's denial of benefits.[116]

The question of law presented before the Ninth Circuit panel was whether the Delzer children were eligible to inherit Social Security survivor benefits under the California Probate Code.[117] Specifically, the issue was whether Mr. Delzer's signing of the October 1988 consent form, providing consent to the "embryos [he] create[d] with [his] wife," was a sufficient writing to prove, by clear and convincing evidence, that Mr. Delzer intended his "back-up" sperm to create embryos after his death.

Ms. Delzer's counsel persuasively argued that the California Probate Code did not expressly require the decedent to specifically consent to a type of genetic material, but only required general consent of his or her genetic material for posthumous conception.[118] Thus, the consent form that Mr. Delzer signed satisfied California's law because the writing "clearly expressed" the use of his genetic material for posthumous conception.[119] In opposition, the Social Security Administration's counsel argued that the contents of the consent forms specifically addressed embryos, not the "back-up" frozen sperm and not genetic material generally.[120] Thus, it was unreasonable to assume that Mr. Delzer intended to the general use of his genetic material.[121] The Social Security Administration counsel also emphasized that although this specific issue is novel, technology is evolving such that courts will likely confront similar issues in the future with "increasing frequency."[122] This forward-looking perspective is important because California does not provide all posthumously conceived children with inheritance rights such that

a narrow interpretation of the statute or failure to consider its legislative intent will further limit the class of posthumously conceived children to inherit in the future.

The Ninth Circuit, seemingly uncertain about the California Probate Code's interpretation after oral arguments, certified a question of law to the California Supreme Court to determine the outcome of the appeal. However, the California Supreme Court denied the Ninth Circuit's request for certification.[123] After, the Ninth Circuit entered judgment affirming the district court and noting that "[t]his disposition is not appropriate for publication and is not precedent."[124] Despite California's denial to the Ninth Circuit's request for certification, the Ninth Circuit, in a subsequent *Delzer* decision, found that decedent's signing of the cryopreservation agreement to deposit his sperm was an insufficient writing to satisfy the consent requirement under California law.[125] In its holding, the Ninth Circuit panel failed to consider the legislative intent of the California Probate Code, as mentioned above, and also placed a further limitation to require that the writing specify the *type* of genetic material, thus, making it again more difficult and restrictive in protecting posthumously conceived children.

Astrue and *Delzer* are both problematic for the future of assisted reproduction. Applying state laws will create inconsistent and unequal results for posthumously conceived children. California is a state that errs on the side of caution and requires clear evidence that the decedent was willing to take financial responsibility of a posthumous child. However, this approach fails to consider that the decedent's willingness to deposit sperm could also create a presumption that the decedent wanted a child and that, de facto, the decedent wanted the child to benefit as any other child. Adding another layer to the mix, in a world where now people can have children with multiple parents, California's an example of an intestacy law that does not account for those

advancements. Its strict adherence will ultimately create more inconsistency and inequality to the future of posthumously conceived children and their inheritance rights.

IV. SOLUTIONS

A. Legal Proposals to Assist in the Advancements of Posthumous Conception

1. More Lenient Standard Accounting for Implied Contract Theories

Under section 249.5 of the California Probate Code, certain conditions must be satisfied for a posthumously conceived children to inherit Social Security survivor benefits—namely, the child's representative must prove, by "clear and convincing evidence," that the decedent consented to use of specific genetic material in a formal writing.[126] Although this bright-line rule may provide for more certainty, it can also be interpreted as underinclusive because it fails to consider the context of different scenarios in which posthumously conceived children are born, which is illustrated in the many cases discussed above.

Posthumous conception usually occurs in the context of urgency and uncertainty when there is a terminally ill partner or a sudden death, which may not allow for the decedent to comply with a set of strict formalities. This may lead to a scenario where the decedent's intentions are not furthered after death, thus, directly impacting familial systems. Therefore, it is imperative that legislatures, like California, amend the respective intestacy laws to a more lenient approach by providing a lower standard, such as by the preponderance of the evidence, and considering implied contract theories for more equitable results.

A lenient and fact-sensitive approach that coincides with the Restatement (Third) of Property will likely further the decedent's intentions, rather than inhibit them.[127] The Restatement not only considers reproductive technology advancements, but also allows for the inheritance of survivor benefits from a legal, non-genetic parent: "[i]n general . . . a child [of

assisted reproductive technologies] should be treated as part of the family of the parent or parents who treat the child as their own and raise the child, one or both of whom might not be the child's genetic parent." Further, in support of an implied theory approach, there is a strong argument that "if the decedent planned to procreate [by depositing sperm], one may reasonably assume that the decedent also intended to support the resulting child financially." This presumption should supersede a strict writing requirement, shifting the burden on the opponent of posthumous conception to rebut the presumption with proof that the decedent did not intend to procreate, despite his affirmative acts in depositing his sperm in a clinic for cryopreservation, before death.

However, there are concerns worth addressing for a more lenient approach. Although the best interests of posthumously conceived children is paramount, it is also vital to place certain time limits that would prevent a woman from abusing the system for improper reasons such as financial gain. Further, there is an argument that a system with too much leniency can also encourage women to have children when, on average, single mother's may not have as many resources to provide for their children compared to a two-parent home. This may have an adverse effect on a child's best interests in the long run. However, this adverse effect may not be so adverse in reality because it rests on an assumption that the woman would remain single and not enter into a new partnership that could contribute to a child's life and wellbeing.[128] Thus, although section 249.5 of the California Probate Code is stringent in some respects by requiring the decedent's intent be delineated in a writing, the two-year time frame should stand because it is an appropriate safeguard that would also allow for the orderly administration of estates.

2. Uniform Regulatory Approach for ART Clinics to Adopt

In addition to a proposed lenient approach in California, another step that all states can take towards uniformity is to require a consistent regulation for ART clinics to adopt. This

regulation could be included as a provision in clinic agreements, which would help strengthen the presumption that the decedent consented to deposit sperm *and* be a parent to a posthumously conceived child in the event of death. For example, the form can state, "if Assisted Reproduction were to occur after death, the deceased individual would be a Parent of the Child." This language would allow the courts to infer the decedent's intent *at the time* of the sperm deposit, thus, establishing more certainty in posthumous cases.

3. High-level Commission

Another solution that may help achieve reform towards a lenient standard is for the California legislature to appoint a temporary, high-level commission that would allow for a systematic reexamination of the California Probate Code in accordance with modern society. Other states and countries have used this method to revise existing probate laws, such as New York and Maine, which resulted in a presentation to the respective legislatures of "a fully modern, integrated and consistent Probate Code." Reform is necessary in California and other states because problems will develop as ART technology continue to develop, and a stringent and disparate system would not be ideal. Thus, a high-level commission could easily resolve and contribute a lenient-like, uniform proposal that would not only contribute to California, but also would be timely and valuable to many states.

V. CONCLUSION

In the modernized world we live in today, legislatures should consider technological developments in assistive reproductive techniques and reform outdated and restrictive intestacy laws. If the future of ART becomes increasingly advanced, and more couples must resort to these technologies as an inevitable consequence of modernity, a posthumously conceived child's inheritance rights will become even more limiting. Thus, to prevent the complexity in the court

system as technology continues to grow, California and other state legislatures with restrictive intestacy laws should consider adopting a more lenient approach to protect posthumous children whose parent or parents deposited sperm for cryopreservation. Additionally, there are other steps that can be taken towards a more forward-looking approach such as by requiring clinics to contain an enforceable provision consenting posthumous conception after death. Finally, the appointment of a high-level commission to conduct special studies on how to better improve intestacy laws in view of technological advancements should also be considered and may be valuable in moving toward uniformity among the states.

APPENDIX: A VISUAL OF THE VARYING STATE INTESTACY LAWS

Includes posthumously conceived children for probate purposes	Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, New Hampshire, Massachusetts, New Mexico, New Jersey, New York, North Dakota, Oregon, Texas, Utah, Vermont, Virginia, Washington, Wyoming
Excludes posthumously conceived children for probate purposes	Georgia, Idaho, Indiana, Michigan, Minnesota, Nebraska, Rhode Island, South Carolina, South Dakota
Unclear whether posthumously conceived children are included or excluded for probate purposes	Alaska, Arizona, District of Columbia, Hawaii, Kansas, Kentucky, Mississippi, Missouri, Montana, Nevada, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, West Virginia, Wisconsin

[1] Niels E. Skakkebaek et al., *Male Reproductive Disorders and Fertility Trends: Influences of Environment and Genetic Susceptibility*, AM. PHYSIOLOGICAL SOC'Y (Nov. 18, 2015), https://journals.physiology.org/doi/full/10.1152/physrev.00017.2015.

[2] *See generally* Hagai Levine et al., *Temporal Trends in Sperm Count: A Systematic Review and Meta-Regression Analysis*, 23 HUM. REPROD. UPDATE 647 (July 25, 2017).

[3] Hurdle, *supra* note 2.

[4] Zoe Corbyn, *Shanna Swan: 'Most Couples May Have to Use Assisted Reproduction by 2045'*, THE GUARDIAN (Mar. 28, 2021), https://www.theguardian.com/society/2021/mar/28/shanna-swan-fertility-reproduction-count-down.

[5] John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991).

[6] Hill, *supra* note 5 (discussing that a child can have as many as five parents).

[7] *See* Daniel Green, *Assessing Parental Rights for Children with Genetic Material from Three Parents*, 19 MINN. J.L. SCI. & TECH. 251, 251–53 (2018).

[8] *See* Sonia M. Suter, *A Brave New World of Designer Babies?*, 22 BERKELEY TECH. L. J. 898, 930 (2007).

[9] Benjamin C. Carpenter, *A Chip off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J. L. & PUB. POL'Y 347, 362 (2011).

[10] Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1591 (2013).

[11] Mark Strasser, Capato, *Art, and the Provision of Benefits to After-Born Children*, 2013 MICH. ST. L. REV. 1341, 1341 (2013).

[12] *See* CAL. PROB. CODE §§ 249.5–249.8; Kristine S. Knaplund, *Reimagining Postmortem Conception*, 37 GA. ST. U. L. REV. 905, 911 n.42 (2021).

[13] Sharon L. Klein, *The Issue with Issue: Rights of Posthumously Conceived Children*, WILMINGTON TRUST.

[14] *Historical Background and Development of Social Security*, SOC. SEC. ADMIN. https://www.ssa.gov/history/briefhistory3.html.

[15] *See Historical Background and Development of Social Security*, *supra* note 14.

[16] Mathews v. Lucas, 427 U.S. 495, 507, 516 (1976).

[17] *See* Doran v. Schweiker, 681 F.2d 605, 607 (9th Cir. 1982).

[18] Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 544 (2012).

[19] *See Lucas*, 427 U.S. at 495.

[20] 42 U.S.C. § 402(d)(1)(A)–(C); *see Astrue*, 566 U.S. at 547 (2012).

[21] 42 U.S.C. § 416(e).

[22] 42 U.S.C. § 416(h)(2)(A).

[23] 42 U.S.C. § 416(h)(2)(B).

[24] 42 U.S.C. § 416(h)(3)(C)(i).

[25] 42 U.S.C. § 416(h)(3)(C)(ii).

[26] *See Astrue v. Capato*, 566 U.S. 541, 548–49 (2012).

[27] *See* 42 U.S.C. § 416(h)(2)(A); *see also supra*, Section II.D.1.

[28] *If You Are The Survivor*, SOC. SEC. ADMIN. https://www.ssa.gov/benefits/survivors/ifyou.html.

[29] *See id.*; 42 U.S.C. § 416(h)(2)(A).

[30] *See id.*

[31] 42 U.S.C. § 405(g).

[32] *See* Daubert v. Sullivan, 905 F.2d 266, 268 (9th Cir. 1990).

[33] *See* Walters v. Comm'r of Soc. Sec., 127 F.3d 525, 528 (6th Cir. 1997) (applying substantial evidence standard); Shaw *ex rel.* Roberts v. Heckler, 781 F.2d 675, 677 (9th Cir. 1985) (same).

[34] *See Shaw*, 781 F.2d at 677.

[35] 42 U.S.C. § 405(g).

[36] *See* Daubert v. Sullivan, 905 F.2d 266, 268–71 (9th Cir. 1990).

[37] *See id.*

[38] *See* Booz v. Sec. of Health & Hum. Servs., 734 F.2d 1378, 1380 (9th Cir. 1984).

[39] *See* Burton v. Heckler, 724 F.2d 1415, 1417–18 (9th Cir. 1984).

[40] *See* Kristine S. Knaplund, *Postmortem Conception and A Father's Last Will*, 46 ARIZ. L. REV. 91, 107–08 (2004).

[41] *See* Knaplund, *supra* note 40.

[42] *World's First "Test Tube" Baby Born*, HISTORY (July 25, 1978).

[43] Ma Y, Liu X, Shi G, et al., *Storage Time of Cryopreserved Embryos and Pregnancy Outcomes: A Dose-Response Meta-Analysis*, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7938942.

[44] *See* MIDWEST FERTILITY, https://www.midwestfertility.com/fertility-treatments/cryopreservation/ (embryos can be stored indefinitely).

[45] ZEV ROSENWAKS & PAUL M. WASSARMAN, HUMAN FERTILITY: METHODS AND PROTOCOLS, 171 (2014).

[46] RESTATEMENT (THIRD) OF WILLS AND OTHER DONATIVE TRANSFERS § 14.8 cmt. b (AM. L. INST. 2011).

[47] *See* RESTATEMENT (THIRD) OF WILLS AND OTHER DONATIVE TRANSFERS, *supra* note 46.

[48] *See* Tae Hoon Jang et al., *Cryopreservation and Its Clinical Applications*, 6(1) INTEGRATIVE MED. RSCH. 12, 13 (2017).

[49] Carpenter, *supra* note 9, at 357.

[50] *See* MINN. STAT. § 524.2–120 subd. 10 (West 2010); FLA. STAT. § 732.106 (West 2010).

[51] UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 4(b) (1988).

[52] *See* Lawrence K. Furbish, *Uniform Status of Children of Assisted Conception Act*, OLR RESEARCH REPORT (Aug. 25, 1999).

[53] N.D. CENT. CODE §§ 30.1-04-04, 30.1-04-19(11); VA. CODE ANN. § 20-158(B).

[54] *See* Mary F. Radford, *Post-Mortem Sperm Retrieval and the Social Security Administration: How Modern Reproductive Technology Makes Strange Bedfellows*, 2 TEX S. UNIV. THURGOOD MARSHALL SCH. OF L.J. OF MOD. ISSUES ESTS. & EST. PLAN. 33, 39 (2009).

[55] *See* UNIF. PROBATE ACT (2017).

[56] *See id.*

[57] UNIFORM LAW COMMISSION, *Parentage Act*.

[58] UNIF. PROBATE CODE § 2-120(f).

[59] Russell Niles, *Probate Reform in California*, 31 HASTINGS L. J. 185, 186 (1979).

[60] https://www.uniformlaws.org/committees/community-home?CommunityKey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3. California is not a state that has adopted the UPC.

[61] *See* Carpenter, *supra* note 9, at 50.

[62] Jenna M. F. Suppon, *Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children*, 48 FAM CT. REV. 228, 233 (2010).

[63] B. E. WITKIN, SUMMARY OF CALIFORNIA LAW § 87 (11th ed. 2021).

[64] LEGIS. INTENT SERV., INC. http://www.legintent.com/california-probate-code-statutory-history/#:~:text=Probate%20Code%3A%20The%20current%20Probate,and%20Code%20of%20Civil%20Procedure.

[65] *See* Niles, *supra* note 60, at 187–89.

[66] Cal. Assemb. Journal, 2003–2004 Reg. Sess., No. 149.

[67] Cal. Bill Analysis, A.B. 1910, 2004 Assemb. (Cal. Apr. 27, 2004).

[68] Cal. Bill Analysis, A.B. 1910, 2004 Assemb. (Cal. May 4, 2004).

[69] Cal. Senate Journal, A.B. 1910, 2003–2004 Reg. Sess., No. 208.

[70] Cal. Senate Journal, A.B. 1910, 2003–2004 Reg. Sess., No. 222.

[71] CAL. PROB. CODE § 249.5 (West 2005); CAL. PROB. CODE § 249.5 (West 2006).

[72] *See* CAL. PROB. CODE § 249.5 (West 2005); CAL. PROB. CODE § 249.5 (West 2006).

[73] *See* CAL. PROB. CODE § 249.5 (West 2005); CAL. PROB. CODE § 249.5 (West 2006).

[74] *See* CAL. PROB. CODE § 249.5 (West 2005); CAL. PROB. CODE § 249.5 (West 2006).

[75] CAL. PROB. CODE § 249.5 (West 2006).

[76] *See* CAL. PROB. CODE § 249.5 (West 2005); CAL. PROB. CODE § 249.5 (West 2006).

[77] 566 U.S. 541, 548–49 (2012).

[78] 16 Cal.App.4th 836, 850 (1993).

[79] *See id.* at 840.

[80] *See id.*

[81] *See id.* at 844.

[82] *See id.*

[83] In re Estate of Kolacy, 735 A.2d 1257, 1258 (N.J. Super. Ct. Ch. Div. 2000).

[84] *Id.*

[85] *Id.*

[86] *Id.* at 1262.

[87] In re Estate of Kolacy, 735 A.2d. at 1262.

[88] Woodward v. Comm'r Soc. Security, 760 N.E.2d 257, 259 (Mass. 2002).

[89] *Id.* at 260.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] 371 F.3d 593, 599 (9th Cir. 2004).

[94] *Id.* at 595.

[95] *Id.*

[96] *Gillet-Netting*, 371 F.3d at 598.

[97] Astrue v. Capato *ex rel.* B.N.C., 566 U.S. 541, 550 (2012).

[98] *Id.* at 544.

[99] *Id.* at 545.

[100] *Id.* at 546.

[101] Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 627 (3d Cir. 2011).

[102] *Astrue*, 566 U.S. at 546.

[103] *See id.* at 547.

[104] *Id.* at 544–45.

[105] *Id.* at 545.

[106] Emily Edwards, *Pepperdine University School of Law Legal Summaries*, 33 NAT'L ASS'N ADMIN. L. JUDICIARY 439, 445 (2013).

[107] Jennifer Matystik, *Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After* Astrue v. Capato, 28 BERKELEY J. GENDER L. & JUST. 269, 278–79 (2013).

[108] See Oral Argument, 44:53, https://www.oyez.org/cases/2011/11-159.

[109] 722 F. App'x 700, 701 (9th Cir. 2018).

[110] Delzer v. Berryhill, 886 F.3d 1282, 1283 (9th Cir. 2018).

[111] *Id.*

[112] *Id.*

[113] *Id.* at 1284.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Oral Argument at 1:06, *Delzer*, https://www.youtube.com/watch?v=bp-Ydge2W4w.

[118] *Delzer*, 886 F.3d at 1286; *see also* CAL. PROB. CODE § 249.5(a) (West 2006).

[119] *Delzer*, 886 F.3d at 1286.

[120] *Id.*

[121] *Id.*

[122] Oral Argument, *supra* note 117, at 17:45.

[123] *Delzer*, 886 F.3d 1282 (9th Cir. 2018) (No. 16-56203), Dkt. 35.

[124] Delzer v. Berryhill, 722 Fed. App'x 700 (9th Cir. 2018).

[125] 722 F. App'x at 701.

[126] CAL. PROB. CODE § 249.5 (West 2006).

[127] RESTATEMENT (THIRD) OF WILLS AND OTHER DONATIVE TRANSFERS § 2.5 (1999). *See* R.S. v. R.S., 670 P.2d 923, 928 (Kan. Ct. App. 1983) (implied contract theories applied in family law).

[128] Elizabeth Thomson et al., *Remarriage, Cohabitation, Changes in Mothering Behavior* 63 J. MARRIAGE & FAM. 370, 371 (2001).