Frozen in Time: Planning for the Posthumously Conceived Child

Posthumously conceived children are becoming more than a theoretical concept with recent advances in reproductive technology. This article examines the inheritance rights of posthumously conceived children and addresses control issues of genetic material after the death of the donor.

With recent advances in the field of reproductive technology, estate planning attorneys must ensure that their clients’ wishes regarding posthumously conceived children are thoughtfully discussed and adequately reflected in their estate planning documents. In the past, a child would be born after the death of his or her parent only if the father died during the pregnancy or the mother died during delivery. Statutory law developed a method of protecting an afterborn child to permit that child to inherit from the deceased father or mother. For example, the Colorado Probate Code provides:

[r]elatives of the decedent conceived before the decedent’s death but born thereafter inherit as if they had been born in the lifetime of the decedent if the relative lives one hundred twenty hours or more after birth.
In other words, a child “conceived” during the parents’ lives is protected under the inheritance laws even if born after a parent’s death and is considered a lawful heir.4

Today, however, advances in reproductive technology allow for conception of a child after the death of a parent, thus providing a new meaning to the definition of “afterborn child.” This article discusses the current state of the law concerning posthumously conceived children, outstanding issues with the law, and steps an attorney should follow to make sure clients are adequately informed of their options.

Cryopreservation—Creating the Possibility of Posthumous Conception

Genetic material—that is, embryos, semen, or eggs—can be stored for many years through a method known as cryopreservation (the technology of freezing used to preserve individual gametes and embryos). This allows for the conception of a child long after the death of one or both of the genetic parents.5 Individuals opt for cryopreservation of their genetic material for numerous reasons.

Cryopreservation of sperm may be done by a man who: is assigned to combat zones during war time; is diagnosed with cancer or a terminal illness; or is engaging in a dangerous profession, such as that of a firefighter, police officer, or athlete.6 Such cryopreservation could enable, with proper authorization, a spouse or girlfriend to use the stored sperm after the man’s death, thereby allowing for the possibility of conception after the death of the male donor.

A woman who has difficulty becoming pregnant may undergo in vitro fertilization, whereby her eggs are extracted and fertilized by sperm in a laboratory, and the resulting embryo is transferred to the woman’s uterus.7 Because in vitro fertilization is not always successful, numerous embryos are created in the process and cryopreserved.

Accordingly, a couple’s embryos may be stored for many years, leading to the possibility of conception after the death of either individual. For instance, a woman may implant the cryopreserved embryo years after the death of her husband. Additionally, a man may use the cryopreserved embryo after the death of his wife with the assistance of a surrogate. In either scenario, a child could be conceived years after the death of a biological parent.

Additionally, recent technological advances allow a woman to cryopreserve unfertilized eggs. This provides a woman the opportunity to potentially preserve her fertility before the decline in fertility that results from the natural aging process.8 The long-term preservation of eggs could result in a child’s birth after the death of the genetic mother.

A procedure called post-mortem sperm procurement allows a widow to obtain viable sperm from her deceased husband’s cadaver.9 The legality and ethical implications of such post-mortem sperm procurement is a contested issue.10 However, at this time, there is at least a possibility that by retrieving sperm after the death of her husband, a woman could conceive after his death.
Thus, a child may be posthumously conceived in the following situations:

- use of cryopreserved sperm by a widow or girlfriend to conceive after the death of the sperm donor
- use of cryopreserved embryos for conception after the death of the male or female who donated the sperm or egg
- use of a cryopreserved egg after the death of an egg donor
- post-mortem sperm procurement by a widow or authorized medical agent for posthumous conception.

In light of these technological advances, a few states, including Colorado, have enacted “statutes explicitly defining the inheritance rights of posthumously conceived children.”

**Colorado Statutory Law and Posthumous Conception**

Colorado has adopted language similar to that in the Uniform Parentage Act (UPA) to address the issue of posthumously conceived children. Specifically, CRS § 19-4-106 provides:

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

Therefore, absent consent in a record, the death of a [spouse] whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased.

By its use of the term “spouse,” this provision appears to limit the application of the right to consent in a written record to the parental status of a posthumously conceived child to married individuals. On the other hand, some states, such as Delaware and Wyoming, have adopted the UPA without any variations to the official text, which uses the term “individual.” For example, § 14-2-907 of the Delaware Code provides:

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

Statutes referring to an “individual” are more inclusive, because they do not limit the application to married persons. Whether a court would uphold an unmarried individual’s written consent in Colorado has not been addressed.

The official comment to this section of the UPA states that it is designed primarily to avoid the problems of intestate succession[,] which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a
However, the statute is not limited on its face to application to intestate estates, and also would apply in determining the descendants under a will or trust of a decedent. Therefore, an estate planning attorney should advise clients to address posthumously conceived children in their estate planning documents.

**Estate Planning Considerations**

Although CRS § 19-4-106 attempts to address the issue of the inheritance rights of a posthumously conceived child, there are many gaps in the law that the estate planning attorney must be sure to address with the client. It is useful to see how courts have addressed the issue in the absence of any statutory authority, and then to consider how CRS § 19-4-106 would apply to various scenarios. It also is important to consider possible control issues on the death and disability of the donor of the genetic material.

**Class of Persons**

A recent New York County Surrogate Court decision addressed whether posthumously conceived children were included in the definitions of “issue” and “descendants” in the decedent’s trust agreements. Martin, the grantor, executed seven trust agreements—one of which was governed by New York law and the rest by the law of the District of Columbia—providing for distributions to his issue or descendants. Prior to Martin’s death on July 9, 2001, his son James died from Hodgkin’s lymphoma. In anticipation of his impending death, James cryopreserved his sperm for later use by his wife. James’s wife used the cryopreserved sperm and gave birth to two children in 2004 and 2006.

On Martin’s death, the trust agreements gave the trustees discretion to distribute principal to his issue during his wife Abigail’s life. On her death, Abigail was given a special testamentary power of appointment over the trust principal, which was limited to Martin’s issue or descendants. In the event Abigail did not exercise such power, the principal was to be distributed for the benefit of Martin’s surviving issue.

Because Martin’s trusts did not address posthumously conceived children, the trustees brought an action to determine if they were authorized to distribute principal to James’s posthumously conceived children. Therefore, the issue before the New York County Surrogate Court was whether James’s posthumously conceived children were the grantor’s issue and descendants.

The court noted neither New York nor the District of Columbia had adopted the UPA or any similar statute addressing posthumous conception with respect to inheritance rights. In the absence of a controlling statute dealing precisely with the status of posthumously conceived children, the court analyzed the New York legislature’s policies with respect to children conceived by artificial insemination and also noted that New York inheritance laws protect afterborn children only if
conceived during the testator’s lifetime.\textsuperscript{25}

The court then analyzed the provisions of UPA, as well as other state statutes specifically addressing the status of posthumously conceived children,\textsuperscript{26} and acknowledged the struggle to balance the finality and certainty of administration of estates with the rights of children born as a result of scientific advances.\textsuperscript{27} With respect to the concern of finality of administration of the estate, the court noted that all of James’s cryopreserved sperm had been destroyed, thereby closing the class of his children.\textsuperscript{28}

The court relied on the rationale of the \textit{Restatement (Third) of Property} that if an individual considers a child to be his or her own, so should the laws as set forth in § 14.8 of the \textit{Restatement}:

Unless the language or circumstances indicate that the transferor had a different intention, a child of assisted reproduction [must be] treated for class-gift purposes as a child of a person who consented to function as a parent to the child and who functioned in that capacity or was prevented from doing so by an event such as death or incapacity.\textsuperscript{29}

The court considered the rationale of the \textit{Restatement} to be consistent with the New York Supreme Court’s rationale with respect to adopted children in \textit{Matter of Park}.\textsuperscript{30} Accordingly, the court held “where a governing instrument is silent, a child born of the new biotechnology with the consent of [his or her] parent [is] entitled to the same rights ‘for all purposes as those of a natural child.’” \textsuperscript{31} Because Martin’s instruments did not address posthumously conceived children but provided that “upon the death of the grantor’s wife, the trust fund would benefit his sons and their families equally,” the court applied a “sympathetic reading” of the trust agreements and held that Martin intended to include “all members of his bloodline to receive their share.”\textsuperscript{32} The court noted the need for “comprehensive legislation to resolve the issues raised by the advances in biotechnology” and sent copies of the decision to the Judiciary Committees of the New York State Senate and Assembly.\textsuperscript{33}

\textbf{Inheritance Rights Under Colorado Law}

There would have been a different result under the UPA as adopted by Colorado. Under the Act, a posthumously conceived child would not be included in the definition of issue or descendants absent a clear provision to the contrary in the estate planning document. Therefore, estate planners in Colorado should determine the possibility of posthumously conceived children and discuss the client’s intent regarding the participation of such children in the estate. The planner must ensure that the estate planning documents reflect the client’s preference and intent with respect to the inheritance rights of a posthumously conceived child.\textsuperscript{34}

Specifically, during consultation, an estate planning attorney should determine whether genetic material—that is, embryos, semen, or eggs—have been stored, and whether the client plans to store genetic material in the future or use a surrogate to achieve reproduction. If so, the estate planning documents should address whether a
posthumously conceived child is included or excluded as the client’s descendant.  

Moreover, a client’s children or grandchildren could have posthumously conceived children. Thus, because an individual can define terms such as “descendants” or “issue” in his or her estate planning documents, the estate planning attorney also should consider addressing whether posthumously conceived grandchildren and great-grandchildren should be included in property distributions to a class of persons.

Similar to CRS § 19-4-106, this drafting approach requires the written declaration of the parent of the posthumously conceived child for the child to be included in the parents’ estate. It is unclear whether the grantor could include all posthumously conceived children regardless of whether a written declaration was executed by a descendant.

Colorado courts have held that in construing a will or trust, the testator/grantor’s intent must be carried out unless such intent is contrary to public policy or the law. A court might find that a testator/grantor may provide for any posthumously conceived children in his or her will or trust, because the testator/grantor ultimately can provide for any individual regardless of familial relationship status. Therefore, although the descendant may not be considered the “parent” of a posthumously conceived child because he or she did not execute a written declaration in accordance with the Colorado statute, the grantor may provide for such posthumously conceived child. However, such provision might be found to be contrary to public policy as expressed by CRS § 19-4-106, which provides that a deceased “parent” must consent in writing that he or she intends to be the parent of a posthumously conceived child.

If a client does not want posthumously conceived children to be included as beneficiaries to his or her estate, “defining ‘children’ as those born within 10 months of the client’s death would prevent uncertainties.” Future beneficiaries also could be limited to a child’s descendant born within ten months of the child’s death. Another drafting approach is to include the following provision when defining “children” or a class of persons: any posthumously conceived child shall not be considered the child or descendant of such father or mother.

**Timely Distribution of an Estate**

CRS § 19-4-106 does not provide a time limit to posthumous conception. Accordingly, a posthumously conceived child theoretically would have the right to inherit years after his or her parent’s estate is administered, potentially leaving him or her nothing to inherit.

Although the estate planning documents could provide that the parent’s estate cannot be administered without accounting for such a child, it is impossible to prevent this in an intestate succession situation. It is unclear at what point a court would approve distributions to the heirs if there is a possibility of a posthumously conceived child and the decedent expressed his or her wishes that any such child be included as an heir. Keeping the estate open indefinitely is inconsistent with
Colorado’s policy favoring expeditious, timely, and final settlement of estates, which is evidenced by several relevant statutory provisions including the purpose and rules of construction of the Colorado Probate Code. Specifically, CRS § 15-10-102(2)(c) provides:

[t]he underlying purposes and policies of this code are . . . [t]o promote a speedy and efficient system for settling the estate of the decedent and making distributions to his successors.

Providing for a posthumously conceived child in a trust for his or her benefit will allow an estate to close more quickly without foregoing the inheritance rights of such child. An attorney also might suggest inclusion of a time limit in any estate planning documents, whereby the posthumous conception must be achieved or the claim for inheritance established within a period of years or a “reasonable time.” Moreover, if posthumously conceived children are provided for in a trust, alternative beneficiaries should be designated in the event no posthumously conceived children are born.

Consent to Implantation on Incapacity or Disability

A situation might arise where embryos are cryopreserved for in vitro fertilization and one spouse becomes incapacitated or disabled. An estate planner should consider discussing with clients whether they wish to allow implantation of such embryo on the disability of the other spouse. The planner should include in the medical power of attorney a provision that allows the client’s agent to consent to or disallow the implantation of a cryopreserved embryo on such incapacity or disability.

Sample Trust Provision

The following is one example of a trust provision addressing the issue of posthumously conceived children and grandchildren:

Children: All references to “my children” in this trust shall refer only to any child born to or adopted by my husband and me after the date of this trust agreement. “Any child born” to my husband and me shall include a posthumously conceived child by me by means of assisted reproduction whereby I provided the egg and my husband provided the sperm, as long as (1) such child is born during my husband’s lifetime and (2) my husband has acted as such child’s legal guardian unless he was unable to do so as a result of his death or disability. On the written declaration of any descendant of me and my husband and subject to any restrictions contained in such written declaration, a posthumously conceived child by means of assisted reproduction whereby such descendant provided either the sperm or the egg shall be considered a child of such descendant and a descendant of the descendant’s ancestors.
Because this issue is not addressed in Colorado statutes and has not been addressed by Colorado courts, clients should be advised that it is unclear whether the facility or clinic will adhere to such a provision in the medical power of attorney. The issue also might be addressed in the provider contract.

Consent to Post-Mortem Sperm Procurement

The legality and ethical implications of post-mortem sperm procurement are contested. Because the surviving spouse or next-of-kin has the right to consent to or deny permission to perform an autopsy or organ procurement procedure, some argue that the surviving spouse or next-of-kin should have the right to consent to post-mortem sperm procurement. However, others argue that such procedure should not be performed without prior written consent or evidence of such consent.

For example, a committee from the American Bar Association’s Section of Family Law has approved a Proposed Model Act Governing Assisted Reproduction that addresses post-mortem sperm procurement. Section 205 of this Proposed Model Act provides:

1. Each person and/or entity that collects gametes or embryos from cryopreserved tissue, or from deceased or incompetent persons, shall first obtain a written consent executed prior to death or incompetency by the person from whom the gametes or embryos are to be collected. In the event of an emergency where, in the opinion of the treating physician, loss of viability would occur as a result of delay, and where there is genuine question as to the existence of a written permission, an exception is permissible.
2. If gametes or embryos are collected pursuant to paragraph 1 of this Section, transfer of gametes or of an embryo is expressly prohibited unless approved by a court of law. Absence of a writing as described in Paragraph 1 authorizing use of such gametes or embryos except in an emergency situation shall constitute a presumption of non-consent.
3. Any person or entity not acting in accordance with Paragraph 1 may be subject to civil and/or criminal liability as provided in law.

Although this is a proposed Act, it provides insight into the views of attorneys practicing in the area of family law with respect to post-mortem sperm procurement. In April 1998, the New York State Task Force on Life and Law issued a report that set forth numerous recommendations regarding posthumous reproduction, including the following provision:

Gametes should generally not be retrieved without informed consent. New York should enact legislation prohibiting the retrieval of gametes from deceased persons or living individuals incapable of providing informed consent, unless the individual consented to the retrieval of gametes under the particular circumstances, in writing, when able to do so, or the person seeking to retrieve the gametes establishes extraordinary circumstances in a judicial proceeding.

Additionally, in 1994, a panel of experts at New York Hospital developed a set of
guidelines addressing post-mortem sperm procurement. Pursuant to such guidelines, post-mortem sperm retrieval should be authorized only if the wife of the deceased individual provides evidence that the deceased husband would have consented to such procurement—for example, if he was undergoing fertility treatment, was actively attempting conception, or had expressed a plan to attempt conception in the immediate future. The guidelines also provide that the widow should be the only individual for whom such sperm should be used for conception.

The issue of post-mortem sperm procurement has not been addressed in Colorado. Additionally, it does not appear that any Colorado hospitals have adopted the New York Hospital or similar guidelines regarding post-mortem sperm procurement. Accordingly, it is unclear whether a Colorado hospital or medical facility would allow post-mortem sperm procurement even if the decedent had expressed such intention in a written declaration prior to death.

Despite the uncertainty of the legality of post-mortem sperm procurement in Colorado, an estate planner may wish to address this issue with clients, particularly if the clients have undergone or plan to undergo assisted reproduction. In the event a client agrees to allow his spouse to retrieve sperm after his death, such individual should execute a document reflecting such intent.

On the other hand, if the client intends to prevent post-mortem sperm procurement, such intent should be reflected in an executed document. In either case, such provision may be included in a medical power of attorney. However, the planner should advise the clients that it is unclear whether a hospital or medical facility will adhere to such provision in light of the absence of clear authority with respect to this issue.

**Updating Current Wills and Trusts**

A practicing attorney also should consider whether to send a letter to former or current clients to ensure existing estate plans adequately reflect the clients’ intent in the wake of the new reproductive technologies. Whether such letter is appropriate likely will be determined by the attorney on a case-by-case basis.

**Genetic Materials as Personal Property**

Because genetic materials—including sperm, embryos, and eggs—are reproductive cells, there is some debate as to whether such genetic materials should be considered part of the body or separate property with property rights. The leading case addressing whether sperm is property that can be subject to disposition under a will is *Hecht v. Superior Court*. There, William Kane bequeathed his stored sperm to his girlfriend, Deborah Hecht. The appellate court held that the “decedent’s interest in the sperm vials amounted to a personal property interest and the vials could be considered devisable probate property.”

In light of genetic material potentially being devisable property, an estate planning attorney should ensure that estate planning documents reflect the clients’ intent with respect to disposition of such genetic material on death. If the clients wish to
devise the genetic material to an individual or research facility, such bequest should be explicit in the estate planning documents.\textsuperscript{57} If the clients wish to have such genetic material destroyed on death, this should be addressed in the estate planning documents.\textsuperscript{58}

**Provider Contracts**

When an individual or couple decides to cryopreserve genetic material, the fertility clinic likely will have an agreement for such individual or couple to sign regarding informed consent and the disposition of such genetic material in the event of death, divorce, or other circumstances. Whether these provider contracts would control inheritance issues is not clear.\textsuperscript{59}

Several Colorado fertility clinics have informed consent agreements that include provisions regarding the disposition of cryopreserved eggs on the death of one of the individuals. For instance, the Fertility Center of Colorado provides that on the death of the patient or partner, all title to the remaining cryopreserved genetic material will pass to the Fertility Center with the right to use or dispose of such genetic material: (1) for research, examination, or training; or (2) to be thawed and discarded.\textsuperscript{60} The couple may choose either option if both sign a single writing expressing their preferred option in the presence of an authorized representative of the Fertility Center.\textsuperscript{61} The couple also may agree in a writing signed by both that the survivor can remain in the program if the executed agreement has been filed with the Fertility Center.

The Colorado Center for Reproductive Medicine has a participation agreement and informed consent that provides five options regarding the disposition of the cryopreserved embryos on the death of the husband or wife:

1. donate the embryo for use by another couple;
2. use for research;
3. use at the discretion of the Colorado Center for Reproductive Medicine;
4. thaw without undergoing any further development or use for any purpose; or
5. use in the program by the survivor.\textsuperscript{62} The couple may choose one of these five options in a written agreement that is signed in the presence of an authorized representative of the Colorado Center for Reproductive Medicine or executed by both parties and notarized and filed with the Colorado Center for Reproductive Medicine.

**Validity of Disposition Provisions**

In the absence of a statute addressing such agreements, it is unclear whether the Colorado courts would uphold provisions regarding the disposition of genetic material on divorce or death. Although Colorado courts have yet to address this issue, numerous courts in other jurisdictions have addressed whether the provisions
of a provider contract regarding disposition of genetic material on divorce will be upheld.

Some courts have held that provider contracts are valid and should be upheld. For instance, the Tennessee Supreme Court addressed whether an in vitro fertilization agreement should be upheld even though an agreement did not exist in the case. The Court held that:

an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors.

However, the Court noted that such agreements should be subject to future modification but, absent such modification, should be binding on both parties.

The New York Court of Appeals upheld the provider contract signed by a husband and wife that provided for the donation to research of the cryopreserved embryos if the couple no longer wished to initiate pregnancy or were unable to make a decision with respect to the disposition of such embryos. The Texas Court of Appeals recently upheld the agreement between a former husband and wife that provided for the discarding of any frozen embryos in the event of divorce. In this case, the former wife sought possession of the frozen embryos to have a genetic child, but the court held that the agreement was valid and did not violate public policy.

However, other courts have found that upholding prior agreements regarding the disposition of embryos when a party has changed his or her mind violates public policy. The Iowa Supreme Court held that, in light of the highly emotional nature of reproductive decisions, an individual should have the right to make familial and reproductive decisions based on his or her current views and values. The Court noted that Iowa statute provides that all provisions in a will in favor of a testator’s spouse automatically are revoked on divorce to support its finding that contracts do not always express the parties’ intent once a mutual undertaking has ended. To account for changed intentions of either party, the Court held that disposition agreements between donors and fertility clinics are valid unless a party later objects to the dispositional provision.

The New Jersey Court of Appeals held that an in vitro fertilization contract, whereby the former husband and wife agreed that in the event of a divorce, the embryos would be relinquished to the fertility clinic, was unenforceable. The court reasoned that a “contract to procreate is contrary to New Jersey public policy.”

The Massachusetts Supreme Court held that a consent form signed by the former husband and wife specifying that the preembryos were to be returned to the wife for implantation on separation was an unenforceable contract. The court set forth the following reasons to support its finding that the contract was unenforceable: (1) the consent form’s primary purpose was to explain the benefits and risks of freezing the
preembryos; (2) the consent form indicated that it was binding should the parties later disagree as to the disposition; (3) the consent form did not provide a duration provision; (4) the consent form did not define “become separated”; and (5) the consent form was not a binding separation agreement authorized by statute.75

Although these cases address the validity of provider contracts with respect to divorce, they indicate the uncertain application of contract provisions as they relate to disposition of genetic material on a donor’s death. Additionally, even though provider contracts may permit the surviving spouse to remain in the program, it is unclear whether this type of contractual provision would satisfy the requirement under CRS § 19-4-106 that the deceased spouse consent to being a parent.

In light of the absence of clear authority with respect to the validity of provider contracts regarding the disposition of genetic material on death, it is important for an estate planning attorney to ensure that estate planning documents reflect the client’s intent with respect to disposition of such genetic material on his or her death. If the provider agreement covers disposition on the client’s death, the agreement should be reviewed to ensure that the client’s estate planning documents are consistent. If the client’s intention has changed since the execution of such agreement, the practitioner should advise the client to execute a new agreement with the fertility clinic that adequately reflects his or her intention or send a copy of the executed will to such clinic.

Conclusion

The advances in the field of reproductive technology require estate planning attorneys to address numerous issues to ensure a client’s estate plan reflects his or her intent. In light of the potential for posthumously conceived children, an estate planner should thoughtfully discuss with the client whether such posthumously conceived children should be included or excluded from the estate, and draft the estate planning documents accordingly. Moreover, if such client has stored genetic material, a planner should ensure that the client’s estate planning documents adequately address the disposition of such genetic material on the client’s death.

Additionally, if a client has cryopreserved genetic material, a planner should ensure the medical power of attorney reflects the client’s intent regarding the use, if any, of such genetic material on such client’s disability. For instance, the client may wish to give his or her spouse the authority to implant cryopreserved embryos even after such client’s disability. The planner also should address whether the client intends to allow for post-mortem sperm retrieval. Such intent also may be set forth in a medical power of attorney. Given the uncertainty of provider contracts regarding the disposition of genetic material on death, a planner should ensure the fertility clinic or health care facility has a copy of the client’s current will reflecting his or her intent regarding the disposition of such genetic material, as well as a medical power of attorney reflecting the client’s intent regarding use of genetic material on disability and post-mortem sperm procurement.

With the continuing advances in the field of reproductive technology, estate planners must continue to monitor such advances to ensure that new issues are thoughtfully discussed with their clients and are adequately reflected in all estate
planning documents.

Notes

2. CRS § 15-11-108.
3. Id.
5. Id. at 219.
6. Id. at 220.
7. The Fertility Institute website is available at www.fertility-docs.com/egg_freezing.phtml.
8. Id.
12. CRS § 19-4-106.
14. CRS § 19-4-106. See also Kindregan and McBrien, supra note 1 at 231.
17. Daar, supra note 13 at 588.
18. See UPA § 707, cmt., which provides: “[o]f course, an individual who wants to explicitly provide for such children in his or her will may do so.”
19. The Florida legislature enacted a statute regarding posthumous conception that requires a decedent to provide for the posthumously conceived child in his or her will, or such child will not be eligible for a claim against the decedent’s estate. Fla.Stat.Ann. § 742.17.
21. Martin B., supra note 20 at 199.
22. Id. at 199-200.
23. Id. at 200.
24. Id. at 202.
25. Volkmer, supra note 20 at 43.
26. Id.
27. Martin B., supra note 20 at 203-04.
28. Id.
29. Id. at 204.
31. Id.
32. Id. at 204-05.
33. Id. at 205.
35. Id.
38. Id.
39. Other states provide such a time limit; e.g., La. Rev. Stat. Ann. § 391.1, which provides: any child conceived after the death of a decedent, who specifically authorized in writing his surviving spouse to use his gametes, shall be deemed the child of such decedent with all rights, including the capacity to inherit from the decedent, as the child would have had if the child had been in existence at the time of death of the deceased parent, provided the child was born to the surviving spouse, using the gametes of the decedent, within three years of the death of the decedent. (emphasis added). Cal.Prob. Code § 249.5 provides a time limit of posthumous conception within two years of the decedent’s death.
40. Kindregan and McBrien, supra note 1 at 231.
41. CRS § 15-10-102.
42. Id.
44. Id. See also Krier, supra note 36 at 52.
45. Gary, supra note 34 at 17.
46. Knaplund, supra note 10 at 94.
47. Kerr, supra note 9 at 69.
48. Daar, supra note 13 at 563.
50. Id. at § 205.
52. Such guidelines include four general considerations: “(1) issues of consent, (2) medical contradictions, (3) resource availability, and (4) a one year specimen waiting period for bereavement and recipient evaluation.” Summary of New York Hospital Guidelines for Consideration of Requests for Post-Mortem Sperm Retrieval, available at www.cornellurology.com/guidelines.shtml.
53. Krier, supra note 36 at 53.
56. Id.
57. Kindregan and McBrien, supra note 1 at 316. Of course, if the genetic material is
a cryopreserved embryo, there are issues with respect to the fact that there potentially is joint ownership in such embryo.

58. *Id.*

59. The Florida legislature has enacted a statute requiring a couple and the treating physician to execute a written agreement providing for the disposition of eggs, sperm, or preembryos in such event: A commissioning couple and the treating physician shall enter into a written agreement that provides for the disposition of the commissioning couple’s eggs, sperm, and preembryos in the event of a divorce, the death of a spouse, or any other unforeseen circumstance. Fla.Stat.Ann. § 742.17.

60. The Fertility Center of Colorado, “Consent for Cryopreservation and Storage of Fertilized Eggs” (on file with authors).

61. *Id.*

62. Colorado Center for Reproductive Medicine, “Cryopreservation Program Participation Agreement and Informed Consent” (on file with authors).


64. *Id.*

65. *Id.*


68. *Id.* at 50, *cert. denied*, No. 07-926, 2008 WL 135203 at *1 (March 17, 2008).

69. *In re Marriage of Witten*, 672 N.W.2d 768, 782 (Iowa 2003).

70. *Id.*

71. *Id.*


73. *Id.* at 619.


75. *Id.* at 1056-57.

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