ESTATES ON ICE: THE CASE FOR THE PATERNITY AND SUCCESSION RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN

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Contents

Introduction and History

In 1866, Paolo Mantegazza was experimenting with the freezing of human sperm. He was a physiologist primarily, but fittingly, he was also a writer of fiction. He supposed that, one day, banks of "iced" sperm might be constructed, and children might be conceived after their fathers had died:[1]

> It might even be that a husband who has died on a battle-field can fecundate his own wife after he has been reduced to a corpse and produce legitimate children after his death.

It would be around a century before Mantegazza's fiction became reality,[2] but with developments in sperm freezing, the "posthumously conceived child" became possible.

Children conceived before but born after the death of their fathers, so called "posthumously born children" have existed for time immemorial.[3] The paternity – or legal fatherhood – and succession rights of these children, who lawyers describe as *en ventre sa mère* ("in the mother's womb"), have long been recognised. The paternity and succession rights of the new posthumously *conceived* child have been of interest only recently.

Legal commentators had discussed the unique succession issues created by posthumous conception as early as the 1960s,[4] but public interest was roused in the 1980s by the Rios case.[5] Californian couple Elsa and Mario Rios were killed in a plane crash in 1984. Two embryos created by the couple in 1981, sat frozen in a Melbourne hospital laboratory.[6] The controversy focused on whether the embryos were entitled to benefit from the estate. The matter prompted a study by the Australian Law Reform Commission, which recommended that the embryos have no legal rights.[7]

The Rios case concerned only the *contingency* of posthumous conception. Legal consideration of a living and breathing child began around the turn of the 21st century. Courts in the United States began to be asked to determine whether posthumously conceived children could receive social security benefits,[8] and this usually required consideration of the status and succession rights of the child.[9]

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1 Georges David and Wendel S Price *Artificial Insemination and Semen Preservation* (Plenum Press, New York, 1980) at 52.

2 JK Sherman "Research on Frozen Human Semen" (1964) 15 Fertility and Sterility 485.

3 History is full of famous examples, including Sir Isaac Newton, who was born 3 months after his father had died.

4 Early examples of serious academic commentary include: W Barton Leach "Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent" (1962) 48 ABAJ 942; and G P Smith II "Through a Test Tube Darkly: Artificial Insemination and the Law" (1968) 67 Michigan LR 127.

5 For press coverage, see for example: "Australia Dispute Arises Over Embryos" *The New York Times* (online ed, New York, 23 June 1984); and Sandra Blakeslee "New Issue in Embryo Case Raised Over Use of Donor" *The New York Times* (online ed, New York, 21 June 1984).

6 See Rosalind Atherton "*En ventre sa fridgidaire*: posthumous children in the succession context" (1999) 19 LS 139 at n 2.

7 The Committee to Consider the Social, Legal and Ethical Issues Arising from In Vitro Fertilisation *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* (168, 1984) (Vic) at [2.18]–[2.19].

8 Early cases include: *Hart v Shalala* No 94-3944 (ED La 1994); *In re Estate of Kolacy* 723 A2d 1257 (NJ Super Ct Ch Div 2000); *Woodward v Commissioner of Social Security* 760 NE 2d 257 (Mass 2002); *Gillett-Netting v Barnhart* 371 F 3d 593 (9th Cir 2004); and *Stephen ex rel Stephen v Barnhart* 386 F Supp 2d 1257 (MD Fla 2005).

9 Social Security benefits are only available where the child can inherit under the state's intestacy system, as is discussed in Chapter 3 Part II. See also *Astrue v Capato* 556 US 541 (2012); and Browne C Lewis "Dead Men Reproducing: Responding to the Existence of Afterdeath Children" (2009) 16 Geo Mason L Rev 403 at 405–406.

The first such consideration came in *Hart v Shalala*.[10] Edward Hart had deposited sperm before receiving chemotherapy. He had told his wife Nancy that he wanted her to continue with their plans to have a child even if he died. His treatment was unsuccessful. Three months after his death Nancy became pregnant with Judith Hart, Edward's biological daughter, using his stored sperm. Nancy filed a claim for Social Security benefits on Judith's behalf, but these were denied by the Social Security Administration. At a hearing requested by Nancy, Torres J awarded Judith with survivor's benefits, largely based on policy reasoning:[11] Edward appeared to have intended to father and support Judith.

The decision was overturned on appeal: Torres J had not applied proper law, which clearly stated that Judith could not be Edward's legal child.[12] The Harts might be entitled to some sympathy nonetheless.

I New Zealand, and Re Lee

The paternity and succession rights of posthumously conceived children have not yet arisen for legal determination in New Zealand, but there is little doubt that they soon will. The recent case of *Re Lee* may be foretelling of things to come.[13]

Mr Lee died suddenly while his long term de facto partner, Ms Long,[14] was pregnant with their first child.[15] Ms Long sought an order allowing the collection of sperm from Mr Lee's body with a view to conceiving a second child at a later date. His whole family was supportive.[16] Although he had neither consented to nor explicitly considered the possibility of posthumous conception,[17] there was evidence to suggest that he had wished for their unborn first child to have a sibling.[18] The court observed that: "On the facts, it is difficult to envisage a more deserving case for an order to be made."[19]

This case highlights questions that lie at the heart of this dissertation. If Ms Long is able to use Mr Lee's sperm to conceive a child, will Mr Lee be the child's legal father? Should he be? Will the child have any succession rights to Mr Lee's estate? Should it?

II The Structure of this Dissertation

This dissertation is split into four chapters.

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10 *Hart v Shalala*, above n 8, the details of which are summarised in: Ronald Chester "Freezing the Heir Apparent: A Dialouge on Posthumous Conception, Parental Responsibility, and Inheritance" (1996) 33 Hous L Rev 967 at 988–992; Gloria J Banks "Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children" (1999) 32 Loy LAL Rev 251; and Atherton, above n 6, at 157. The succession rights of a posthumously conceived child had indirectly arisen as an issue 7 years earlier in *Hecht v Superior Court* 20 Cal Rptr 2d 275 (Ct App 1993), but the court had declined to examine the rights of not-yet posthumously conceived children; saying it was: "unlikely that the estate would be subject to claims" at 290.

11 See Atherton, above n 6, at 158.

12 See Banks, above n 10, at 254; and Atherton, above n 6, at 157–158.

13 *Re Lee* [2017] NZHC 3263, (sometimes alternatively referred to as *Re Long*).

14 The names are fictional, and the date of Mr Lee's death is not given. This was done in order to protect the privacy of the family while still allowing public dissemination of the judgment. See [3] of the judgment and the accompanying footnote.

15 Ms Long later gave birth to a healthy baby boy.

16 At [10].

17 At [7].

18 This evidence came both from Ms Long (at [5] and [8]) and Mr Lee's extended family (at [10]).

19 At [10].

Chapter One describes the application of current New Zealand law to posthumously conceived children. I will show that posthumously conceived children currently have no legal relationship of paternity with the deceased man, and consequently, no succession rights against him unless they are explicitly provided for by a will or trust instrument.

Chapter Two assesses this result normatively. I will argue that the deceased man should be recognised as the legal father of the posthumously conceived child where he was the partner of the mother and consented to posthumous reproduction. I will then argue that the child should be entitled to succeed from the deceased's estate where paternity is recognised.

Chapter Three examines the ways selected other jurisdictions have protected the succession rights of posthumously conceived children.

Chapter Four proposes a solution which allows posthumously conceived children to succeed from their fathers, and outlines the considerable complexity of the necessary amendments.

For convenience, this dissertation is limited to posthumous fatherhood. Conception that takes place after the death of the genetic mother is less likely to lead to legal issues because the surrogate mother inevitably required will be deemed the legal mother under the Status of Children Act 1969.[20]

[20] Status of Children Act 1969, s 17. There are also significant technical difficulties with the posthumous collection of eggs, because the woman usually needs to be ovulating. See Nicola Peart "Alternative Means of Reproduction" in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thompson Reuters, Wellington, 2015) 515 at 557.

Chapter One: Current New Zealand Law

This chapter discusses the paternity and succession rights a posthumously conceived child currently has in New Zealand, but also covers the legality of posthumous conception, as the consent requirements explored will serve as the basis for theoretical analysis later in this dissertation.

Firstly, the law relating to the collection of sperm in conjunction with artificial reproduction is examined. Mr Lee of *Re Lee* was dead when questions around the lawfulness of the collection of his sperm arose. In other cases, the gametes might be collected shortly before death, while the person is comatose, or the gametes may have been collected and stored with consent while the gamete provider was alive. Secondly, I will discuss the legality of the posthumous use of sperm, or embryos created during the deceased's lifetime. Thirdly, I will address the current status, or paternity, of a posthumously conceived child. Finally, the succession rights of these children under current New Zealand law are explained. Paternity is crucial to many succession rights including: the construction of any will which refers to "my children";[21] whether the child is "issue" for the purposes of an intestacy;[22] and the entitlement to a claim for maintenance under the Family Protection Act 1955 as "children of the deceased".[23]

I Collection of Sperm for ART purposes

Posthumous conception necessarily employs assisted reproductive technology ("**ART**") such as artificial insemination, *in vitro* fertilisation, or gamete-intra-fallopian-transfer. Sperm used must have been collected at some earlier time. This may be from a living, comatose, or deceased man, and different law governs the collection in each case. Common to all these circumstances is the primacy of the Human Assisted Reproductive Technology Act 2004 ("**HART Act**").

A The HART Act

In isolation, the HART Act creates little substantive law. It instead creates a framework for regulating ART procedures,[24] and establishes guiding principles which relevantly include that no ART procedure be performed on an individual without their "informed consent".[25]

Parliament has largely delegated the regulation, development, and administration of ART policy to two committees established under the Act: the Advisory Committee on Assisted Reproductive Technology ("**ACART**"),[26] and the Ethics Committee on Assisted Reproductive Technology ("**ECART**").[27] ACART is charged with the preparation of guidelines on ART matters,[28] and it is on the basis of these

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21 Status of Children Act 1969, s 7 provides that paternity of a child be determinative of "the construction of any will or other testamentary disposition or of any instrument creating a trust".
22 Administration Act 1969, s 77. Section 2 states that children conceived yet unborn count as "issue" for the purposes of the Act.
23 Family Protection Act 1955, s 3.
24 Human Assisted Reproductive Technology Act 2004, s 3.
25 Section 4(d).
26 Section 32
27 Section 27.
28 Sections 35 and 36.

guidelines that ECART approves applications for "assisted reproductive procedures" on a case-by-case basis.[29] "Assisted reproductive procedure" is defined broadly in order to catch any novel procedures which may arise, but most relevantly to posthumous conception, includes "the implantation into a human being of human gametes or human embryos".[30]

"Established" procedures are excluded from the class of "assisted reproductive procedures",[31] and are in the Human Assisted Reproductive Technology Order 2005 ("**HART Order**").[32] These procedures are sufficiently routine and socially accepted such that they do not require the approval of ECART, and include artificial insemination, IVF fertilisation, and sperm and embryo cryopreservation.[33] Part 2 of the Order details specific exceptions to these generally established procedures. Other procedures are prohibited, but of no relevance to posthumous conception.[34]

Crucially, ART procedures require ECART approval unless they are "established" under the HART Order. The collection of sperm is an established procedure under the HART Order,[35] and so does not require the approval of ECART. This appears to be so whether or not the man is deceased or otherwise. However, the HART Act requires "informed consent" before any reproductive procedure is allowed to take place.[36] What will constitute informed consent is unclear,[37] but provided it is given, there appears to be nothing stopping collection from proceeding.

B Collection from a Deceased Man

Until *Re Lee*, the collection of sperm from a deceased man who had not explicitly consented was unclear. Several Australian jurisdictions have been able to rely on their human tissue legislation to retrieve gametes without consent,[38] but our Human Tissue Act 2008 excludes gametes specifically.[39] The only relevant ACART guidelines on the matter are the *Guidelines for the Use, Storage and Disposal of Sperm from a Deceased Man* (2000) ("**2000 *Guidelines***"), which state that collection of sperm from a deceased or comatose man without his prior written consent is unethical.[40] This did not stop the High Court in *Re Lee* authorising the collection of Mr Lee's sperm.[41]

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29 Sections 16, 18, and 29. If the procedure is not covered by a relevant guideline, ECART must refer the application to ACART: s 19.

30 Section 5.

31 Section 5.

32 Promulgated under s 6(1) of the Human Assisted Reproductive Technology Act, by Order in Council after advice from ACART. See also Human Assisted Reproductive Technology Act 2004, s 35(b)(ii) and (iii).

33 Human Assisted Reproductive Technology Order 2005, sch 1, pt 1.

34 Schedule 1. Section 8 provides that anyone undertaking such a procedure commits an offence. See also ss 9–15 which outlaw other specific activities.

35 Human Assisted Reproductive Technology Order 2005, sch, pt 1.

36 Human Assisted Reproductive Technology Act 2004, s 4(d).

37 Nicola Peart "Life Beyond Death: Regulating Posthumous Reproduction in New Zealand" (2015) 46 VUWLR 725 at 732. This lack of clarity was mentioned in a recent ACART consultation document: Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (3 July 2018) at 17.

38 Peart, above n 37, at 737.

39 Human Tissue Act 2008, s 7(2).

40 Advisory Committee on Assisted Reproductive Technology *Guidelines for the Use, Storage, and Disposal of Sperm from a Deceased Man* (2000) at [2.3].

41 This was essentially due to the age of the 2000 Guidelines, which were originally created by ACART's predecessor, the National Ethics Committee on Assisted Human Reproduction. Heath J heard evidence from the then chairperson of ACART, Alison Douglass, that ACART were reviewing the guidelines, and it seems that the court decided they were not helpful: *Re Lee*, above n 13, at [56]–[60].

Whilst the Court thought that the collection of sperm from a deceased man without explicit consent should require ECART approval,[42] it noted that ECART would not be able to convene in time: sperm is only viable if recovered within 48 hours of death.[43] Heath J found that the Court could employ its inherent jurisdiction to allow the collection of sperm,[44] as this would ensure ECART was able to later determine the substantive application for its use.[45] The Court were quick to use their newfound discretion to allow the collection of Mr Lee's sperm.

The extent to which this relies on deserving factors such as the cooperation of the family,[46] cultural considerations,[47] and a desire for one child to have a sibling remains to be seen.[48] It is expected that the new guidelines currently being drafted by ACART will clarify the area.[49]

C Collection from a Comatose Man

The 2000 *Guidelines* also ostensibly preclude the removal of sperm from a comatose man without written consent, but are likely to be all but ignored by the courts, as was done in *Re Lee*. Indeed, in *Re M*, the wife of a comatose man obtained a declaration that the removal of his sperm without his consent was lawful.[50] In contrast to a deceased man, but only in some circumstances, another person,[51] or the court,[52] may consent on the comatose man's behalf, provided it is in his interests.[53]

D Collection from a Living, Competent Man

A living man who is competent may choose to store his sperm in a variety of circumstances including: for the purposes of assisted reproduction with a partner, prior to a medical procedure which puts future reproduction at risk,[54] or during the donation of sperm. Usually the clinic with which the sperm is stored will require the originator to indicate on a consent from that either: (a) they refuse to consent to

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42 *Re Lee*, above n 13, at [55] and [95]. This conclusion actually appears to rest on a misconstruction of sch, pt 2, cl 5 of the HART Order 2005. It is more likely that the collection of sperm from a deceased man is an established procedure generally under the schedule, and that the carve out in cl 5 applies only to use without consent, and not to collection. The collection of sperm from a deceased man is probably an established procedure for the purposes of s 5 of the HART Act. See also Nicola Peart, above n 37, at p 732.

43 The court heard evidence to this effect: *Re Lee*, above n 13, at [16]. See also Anne M Jequier and Melissa Zhang "Practical Problems in the Posthumous Retrieval of Sperm" (2014) 29 Human Reproduction 2615.

44 As to standing, the court noted that applications would almost invariably be from the wife or partner of the deceased, but Heath J stated that: "I do not rule out the possibility of some other person with sufficient interest making an application, though the more remote that person's interest, the less likely it is that a Court may make an interim order", at [109].

45 *Re Lee*, above n 13, at [100]. There are numerous questions about the ethical and (more troublingly) legal ramifications of this, but they are beyond the scope of this dissertation. For further detail on the legal issues, see Nicola Peart "*Re Lee*" [2018] NZLJ 59 at p 60

46 At [10].

47 It seems that Mr Lee's desire to have children was, at least in part, "based on traditional ethnic values": see [6].

48 At [5] and [10].

49 ACART are currently reviewing the old Guidelines for the Use, Storage and Disposal of Sperm from a Deceased Man (2000). See <https://acart.health.govt.nz/work-programme>. So far, a consultation document has been issued: Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (3 July 2018).

50 *Re M* [2014] NZHC 757. The decision was made urgently, and no reasons are given. The application was made on the advice of ECART themselves. As with *Re Lee*, above n 13, this case involved preserving the possibility of having a genetic sibling for a living child. More detail about this case can be found in: Peart, above n 45.

51 For example under Right 7(4) of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996, promulgated under the Health and Disability Commissioner Act 1994, s 74(1).

52 For example under the *parens patriae* jurisdiction: Judicature Act 1908, ss 16 and 17.

53 For discussion see Peart, above n 37, at p 733 – 736, and *Re Lee*, above n 13, at [103]–[105].

54 Examples include a vasectomy, chemo or radio therapy, or gender reassignment therapy.

posthumous use of the sperm, or (b) they consent to posthumous use by a named person.[55] This is required by the 2000 *Guidelines*.[56]

II Use of Sperm or Embryos Originating from a Deceased Man

The use of sperm or embryos originating from a deceased man currently depends upon their consent, but the exact requirements are unclear. In contrast to collection, use of sperm or embryos is only an established procedure if the man consented to a "specific use" before he died.[57] Where there is no such consent, posthumous use of sperm or embryos will require ECART approval,[58] which would presumably involve account of the guiding principle of informed consent within the HART framework.[59]

It is unclear exactly what constitutes consent to a "specific use", or whether the consent needs to be written, or may be inferred. These issues with the current framework were acknowledged in a recent ACART consultation document on posthumous reproduction.[60] Consent to posthumous use by a widow, or specifically named person would likely satisfy the term however.

It is possible that posthumous conception is occurring in New Zealand fertility clinics already, but the incidence cannot be stated with any certainty. Posthumous conception faces few hurdles where "specific consent" was given, but otherwise enters the grey-area of ECART approval.

III Paternity of Posthumously Conceived Children

The paternity of children is governed by the Status of Children Act 1969 ("**SCA**"). The Act is in two parts: pt 1 deals with the status of children generally, and pt 2 deals with the status of children conceived as a result of donor assisted human reproduction ("**AHR**") procedures.[61] As shall be shown, posthumous reproduction is not specifically contemplated at any point throughout, but becomes entangled in pt 2.

A Status of Children Act, Part 1

Section 5 sets up a general presumption:

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55 Anecdotally, this is true of the relevant consent form employed by Genea Oxford Fertility (Christchurch). See also: Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (3 July 2018) at [116].

56 Advisory Committee on Assisted Reproductive Technologies *Guidelines for the Use, Storage, and Disposal of Sperm from a Deceased Man* (2000) at [2.0].

57 Human Assisted Reproductive Technology Order 2005, sch, pt 2, cl 5.

58 This is exactly the jurisdiction the Court were concerned with preserving in *Re Lee*, above n 13. ECART minutes show that they have declined a number of applications for the posthumous use of sperm without any prior consent. Minutes can be found at <https://ecart.health.govt.nz/meetings>.

59 Human Assisted Reproductive Technology Act 2004, s 4(d).

60 Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (3 July 2018) at [39] and [43]. The document also notes that the "specific use" may be inconsistent with the 2000 *Guidelines*, which refer to "a specific person within a specified timeframe" at [2.2].

61 Whilst the HART Act refers to assisted reproductive procedures, the SCA refers to assisted human reproduction. There is no significant difference.

5 Presumptions as to parenthood

(1) A child born to a woman during her marriage, or within 10 months after the marriage has been dissolved by death or otherwise, shall, in the absence of evidence to the contrary, be presumed to be the child of its mother and her husband, or former husband, as the case may be.

(2) Every question of fact that arises in applying subsection (1) shall be decided on a balance of probabilities.

This provision is designed to confer paternity on posthumously born children. As a purely legal matter, s 5 has the potential to apply to a posthumously conceived child. However, as has been observed academically,[62] it will almost never apply to posthumously conceived children because it allows only one month to conceive the child.[63] This is unlikely to be enough time to gain approval from ECART, and conception may require multiple attempts.

Section 7(1) of the Status of Children Act exhaustively lists the circumstances in which the relationship of father and child may be recognised for succession and Family Protection Act 1955 purposes (emphasis added):

(a) the father and the mother of the child were married to each other at the time of its *conception* or at some subsequent time; or
(b) subject to paragraph (c), paternity has been admitted (expressly or by implication) by or established against the father *in his lifetime*…
(c) paternity has been established by means of a declaration of paternity made under section 10—
    (i) after the death of the father…

It appears that paragraph (a) cannot be applicable to posthumously conceived children by definition. However, there may be some room for contention around whether "conception" in this context refers to the beginning of pregnancy, or the fertilisation of an egg by a sperm. This will implicate children born as a result of the posthumous implantation of an embryo created during the man's lifetime, and is discussed in Part III(C) below.

Paragraph (b) requires paternity to be admitted or established during the man's lifetime, and is thus not helpful in determining the paternity of posthumously conceived children.

Paragraph (c) makes reference to a declaration of paternity made by the Family or High Court.[64] An application for such a declaration may be made after the death of the father,[65] by anyone with a proper interest in the result.[66] The mother of a posthumously conceived child might ostensibly use a declaration to establish the paternity of the late genetic father.

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62 Peart, above n 37, at 741.

63 The 10-month time limit corresponds to the maximum duration of a pregnancy. The average (median) length of a pregnancy is about 268 days (8.81 average months) after ovulation, or 282 days (9.27 average months) after the last menstrual period. Natural conception is expected to occur within 24 hours following ovulation: AM Jukic and others "Length of human pregnancy and contributors to its natural variation" (2013) 28 Human Reproduction 2848.

64 Status of Children Act 1969, s 10.

65 Sections 7(1)(c)(i) and 10(2).

66 Or anyone else with a proper interest in the result. Eligible persons are defined in Status of Children Act, s 10(1).

However, pt 2 of the Act creates a different approach.

B Status of Children Act, Part 2

As has been pointed out elsewhere, the application of pt 2 to posthumous conception is awkward.[67] Part 2 was created in 1987 as a response to the uncertainty created by new AHR procedures,[68] however, Parliamentary debate entirely focused on the status of the child with respect to donors, and it appears that posthumously conceived children were never considered.[69]

Despite declaring itself to apply to AHR procedures, pt 2 really only deals with the small fraction of such procedures that involve a gamete donor.[70] The majority of couples seeking fertility treatment will not actually fall within the part where the sperm is derived from the mother's partner.

The deceased father cannot be considered a "partner" of the mother, as the marriage, civil union, or de facto relationship dissolves on death. [71] Posthumously conceived children will always be non-marital.[72] There is little room for argument here given that both "partner" and "partnered woman" are defined in the present tense:[73] "*is* married or in a civil union" or "*is* living … as a de facto partner". Unless she has re-partnered since the death of the genetic father, the mother is not considered a "partnered woman", and is therefore a "woman acting alone".[74] Sperm of the deceased is therefore "semen produced by a man who is not her partner",[75] and treated identically to donor sperm. Use of the deceased's sperm or embryos derived therefrom is considered an AHR procedure when: (a) the sperm is used in an artificial insemination procedure,[76] (b) the sperm is used to fertilise an ovum, and the resulting embryo is used in an implantation procedure,[77] or (c) the sperm, or an embryo derived from it, is used in an intra-fallopian transfer procedure.[78] This appears to cover the range of techniques currently available.

As long as the use of a deceased partner's sperm is considered an "AHR procedure", the deceased will not be the father of the resulting child "for any purpose".[79] If the mother has a new partner, then they will be the parent despite the use of the deceased's sperm,[80] otherwise the child is legally fatherless.

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67 Peart, above n 37, at 742.

68 The scheme was added by the Status of Children Amendment Act 1987 (1987 No 185), which confusingly did not amend the principal Act, but acted as a standalone. The scheme was further updated in 2004 and incorporated into the principal Act, but these updates mainly involved greater contemplation of homosexual and other non-heterosexual relationships.

69 See (13 August 1986) 473 NZPD 3868 and (30 June 1987) 482 NZPD 10105 for debate on the original 1987 amendments.

70 Status of Children Act s 15.

71 Status of Children Act, s 14(1).

72 This conclusion was also expressed in *Woodward*, above n 8.

73 Section 14(1) (emphasis added). This point has been made by Peart, above n 37, at 742.

74 Status of Children Act, s 14(1). If the woman has re-partnered, and the new partner consents to the AHR procedure, then the new partner would be considered the father of the posthumously conceived child, by operation of s 18.

75 Sections 15, 18, 21, and 22.

76 Status of Children Act, s 15(1)(a). This applies whether or not the sperm is used on its own, or mixed with the sperm of a current (or some other past) partner: see s 15(2).

77 Status of Children Act, s 15(b) and (c). Paragraph (b) involves the use of the mother's own ovum to generate the embryo, while para (c) involves a donor ovum (and so the mother is not genetically related to the child).

78 Status of Children Act, s15(d) – (g). Again, the section applies to the use of the mother's own ovum (paras (d) and (g)) or a donor ovum (paras (e) and (f)), and covers both the sperm itself being used (paras (d) and (e)) or an embryo derived from the sperm being used (paras (f) and (g)). See s 15(2) for definitions.

79 Status of Children Act, s 21. Note that the section allows the originator to become the father if he later becomes the mother's partner, but this will never apply to a posthumous conception scenario, for obvious reasons. See also Nicola Peart "Alternative Means of Reproduction" in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) 515 at 538.

80 Status of Children Act, s 21 and 18.

Importantly, s 26 provides that pt 2 trumps evidence of paternity under pt 1, including a conflicting declaration made under s 10.

As artificial as it seems, the SCA treats the deceased as if he is a donor when his surviving partner wishes to use his stored sperm. The High Court encountered an analogously artificial result in *P v K*.[81] A lesbian couple and a gay couple had come to an agreement whereby a child would be conceived via the artificial insemination of one of the women with sperm provided by one of the men. The child would then be shared between the couples.[82] Eventually the relationship between the couples deteriorated, and the genetic father wanted to affirm his intended paternity of the child. The court observed that the fact of artificial insemination created something of an anomaly:[83]

> Hypothetically, had this child's conception resulted from a single act of sexual intercourse or a transitory heterosexual relationship, his father's rights would have been unimpaired. It is anomalous, particularly having regard to the factual matrix of this case, that this father's rights are nominal only. Yet the policy of the [Status of Children Act] is clear.

The court decided that the wording of the statute was too clear to be overcome.[84] The court also made reference to "a marked reluctance to dilute statutes which prescribe or change status" that is exhibited by the judiciary.[85]

For the same reasons, it is unlikely the clear application of the SCA would be departed from in a posthumous conception context, even though treating the deceased as a donor may be against his and the mother's intentions.

C Embryos Fertilised During the Father's Lifetime

Whether children born from embryos formed before the originator's death are posthumously conceived children at all depends on the definition of "conception", which is not defined in any statute.[86] If conception is synonymous with fertilisation,[87] then any child resulting from an embryo fertilised before the father's death is technically not posthumously conceived. Some commentators uncritically accept this definition, and draw a distinction between posthumously conceived and "posthumously implanted" children.[88]

However, this definition is too simplistic. The Oxford Concise Medical Dictionary defines conception as:[89] "the start of pregnancy, when a male germ cell (sperm) fertilizes a female germ cell (ovum) in the

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81 *P v K* [2003] 2 NZLR 787, [2003] NZFLR 489.

82 Such an arrangement is usually referred to as a "co-parenting arrangement". These arrangements are becoming increasingly common.

83 At [94].

84 At [95].

85 At [96].

86 This issue was explicitly raised in the Arkansas case of *Finley v Astrue* 270 SW 3d 849 (Ark 2008), but unhelpfully, the Supreme Court of Arkansas refrained from determining when "conception" occurs.

87 This is intended to mean the fusion of an egg and sperm leading to the formation of an embryo.

88 Ralph Brashier *Inheritance Law and Evolving Family* (Temple University Press, Philadelphia, 2004) at 192.

89 *Concise Medical Dictionary* (8th ed, Oxford University Press, Oxford, 2010).

Fallopian tube". This definition requires that conception occur within the Fallopian tube, excluding *in vitro* fertilisation.

This "start of a pregnancy" definition of conception appears to have been intended in the SCA, given that "becomes pregnant as a result of an AHR procedure" is used to refer to the same event as "conception" throughout pt 2. The definition also ensures that posthumous reproduction resulting from both embryos and sperm are treated alike, which is attractive given their similarities. Neither of the two Australian states that deal with posthumous conception in their status of children Acts have drawn any distinction between the posthumous use of sperm and embryos fertilised *inter vivos*.[90]

D Conclusions on paternity

Deceased genetic fathers of posthumously conceived children will be precluded from paternity by the SCA,[91] but only because it assumes all non-partner sperm providers are donors. This result is somewhat unsatisfactory, and reform would be necessary to clarify the paternity of posthumously conceived children. As was said in Parliament when the AHR provisions were originally added:[92] "[i]f the children exist, their status must be dealt with". That sentiment must apply to posthumously conceived children as much as it did to children born from donor sperm.

IV Succession and Other Legal Rights of Posthumously Conceived Children

Most death entitlements depend on the status of the child, and will therefore not be available to a posthumously conceived child. Before particular entitlements are examined however, it is useful to explain a mechanism which succession law consistently uses to protect posthumously born children.

As a matter of "fictitious legal interpretation",[93] children conceived but not yet born at death are "deemed to be already born" at the date of death,[94] in certain circumstances. This is available as a rule of testamentary construction,[95] and codified within the Administration Act 1969,[96] and Perpetuities Act 1964,[97] to enable the posthumously born child to take under the will or intestacy. I will refer to it as the "*en ventre sa mère* construction".

A Intestate Succession

Intestacies are governed by the Administration Act 1969. "Issue of the intestate" are entitled to succeed on intestacy to a portion of the estate as provided in the intestacy rules.[98] "Issue" is not defined in the

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90 Status of Children Act 1974 (Vic), s 37, and Family Relationships Act 1975 (SA), s 10C.

91 The Law Commission seems to have expressed a contrary view in 2004: Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at 5.83 and 5.84. No reasons are given, and it appears the Law Commission were wrong to reach this conclusion, even under the older Status of Children Amendment Act 1987.

92 (13 August 1986) 473 NZPD 3875, per Geoffrey Palmer.

93 This description can be traced back to *Blasson v Blasson* (1864) 2 D J & S 665 at 670, 46 ER 534 (Ch) at 563.

94 *Elliot v Joicey* [1935] AC 209 (HL) at 238.

95 *Elliot v Joicey*, above n 94. See also *Wood-Luxford v Wood* [2013] NZSC 153.

96 Section 2(1).

97 Section 2.

98 Administration Act 1969, s 77.

Act, but the courts have interpreted the term to mean legal children and further descendants.[99] For the reasons mentioned in Part III above, our SCA recognises no legal relationship between the child and the deceased, and therefore the child cannot be issue of the deceased.

Issue are also required to be "living at death" in order to succeed,[100] but, as mentioned above, the Act employs the legal fiction that treats issue *en ventre sa mère* at death as having been living at death provided they are subsequently born alive.[101]

This legal fiction was controversially stretched to include frozen embryos in the Tasmanian case *Estate of K*.[102] Some have called such embryos *en ventre sa frigidaire*.[103] The court asked:[104]

> As a matter of policy, should the law distinguish between a child, *en ventre sa mère*, and his or her sibling who was at the same time a frozen embryo?

Slicer J concluded that an embryo should be cloaked with the same legal fiction, but it is quite unlikely that such a principle would ever be applied in New Zealand. Again, our SCA precludes its application,[105] but at any rate, it may stretch the rights of a frozen embryo too far.[106]

B Family Protection

The Family Protection Act 1955 ("**FPA**") gives the courts a wide discretionary power to order that provision be made from an estate in favour of an applicant from a small class of relatives.

The "children of the deceased" are members of the small class of relatives entitled to claim provision from the estate.[107] Given the above conclusions as to paternity above, posthumously conceived children will not be entitled to claim.[108] However, unlike grandchildren and stepchildren, there is no stipulation in the Act that children be living at the time of death.[109] The entitlement to claim turns entirely on paternity.

Enforcement of a "moral duty" is heavily imbedded in judicial discretion under the FPA. This duty will be considered in relation to posthumous conception further in Chapter Four.

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99 *Re Berkett* High Court Christchurch M621-97, 7 May 1998. See also *West v Weston* (1998) 44 NSWLR 657.

100 Administration Act 1969, s 78.

101 Section 2(1).

102 *Estate of K* (1996) 5 Tas R 365.

103 Meaning something akin to "in the belly of its fridge". The description was coined by a student of Professor W Barton Leach and used in Leach, above n 4, at 943, n 3; Rosalind Atherton "Between a Fridge and a Hard Place: The Case of the Frozen Embryos or Children en ventre sa fridgidaire" (1998) 6 APLJ 53; and Atherton, above n 6.

104 At 371.

105 This criticism was actually levelled against *Estate of K* itself, given that the relevant Status of Children Act 1974 (Tas) operates in the same way as our own: Atherton, above n 6, at 158; and Atherton, above n 103.

106 Nicola Peart "The Legal Status of Life before Birth" in Peter Skegg and Ron Paterson (eds) *Health Law in New Zealand* (Thomson Reuters, Wellington, 2015) at 561.

107 Family Protection Act 1955, s 3(1)(b).

108 Status of Children Act 1969, s 7.

109 Grandchildren must have been living at the death: Family Protection Act 1955, s 3(1)(c). Stepchildren must have been living at the time the deceased entered into the relevant legal relationship with their parent: s 2(1).

C Testamentary Dispositions and Trusts

Testamentary dispositions and trust deeds require construction. The basic principle of testamentary construction is that the will is interpreted to give effect to the testator's intention, but the last few decades have seen an increased focus on the actual, rather than expressed, intention of the testator.[110]

There may be testamentary dispositions to "children" that ostensibly favour a posthumously conceived child. Take the facts of *Hart v Shalala*.[111] The deceased had no children at death, and had consented to posthumous conception. A court might then construe "children" in favour of the posthumous child the deceased obviously intended, especially given the courts try to avoid creating partial intestacies.[112]

The problem with this approach is the SCA, which states that, for the purposes of "the construction of any will or other testamentary disposition or of any instrument creating a trust", the relationship of father and child turns on paternity.[113] It might be possible to prove that the deceased intended to refer to "children" in the sense of "offspring" rather than the legal sense, however this would make for a difficult case, and the likelihood of success is unclear.

If the deceased explicitly provides for them, posthumously conceived children could succeed from a will or trust. But new issues are raised. The "class closing rules" of construction presume that the testator intended the members of a class of beneficiaries to be assessed at the date of distribution, unless a contrary intention can be found.[114] Where there is nothing to suggest distribution should not occur immediately, then the class will close at the date of the testator's death.[115] Where the distribution is not immediate, for example, because of a life interest, or because the testator appears to have contemplated future offspring,[116] the class will close at the expiration of the postponement period (such as the life interest),[117] or as soon as one beneficiary is entitled to take.[118]

All of these rules can be excluded as a matter of construction, but their application would often close a class gift to "posthumously conceived children" as soon as one was born,[119] so only the first would be entitled to the gift.

This raises the question of how long a gift would remain available if no beneficiary is born. When it is unclear when the gift will vest (for example, because it is not clear when a child will be conceived), the current Perpetuities Act 1964 requires the executor to hold up the distribution of the gift for a period specified in the will or trust;[120] or until the wife can no longer bear children, which is presumed to be

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110 For a useful discussion of the difference, and the tension between these approaches, see: Roger Kerridge and Julian Rivers "The Construction of Wills" (2000) 116 LQR 287.

111 *Hart v Shalala*, above n 8.

112 Rosalind Croucher and Prue Vines *Succession: Families, Property and Death* (4th ed, LexisNexis, Chatswood (NSW), 2013) at 453.

113 Status of Children Act 1969, s 7.

114 *Re Estate of Tilly Thompson* HC Auckland CIV 2007-404-5177, 27 February 2008 at [15]–[21].

115 *In re Chartres, Farman v Barrett* [1927] 1 Ch 466 at 471. I should point out that this why the *en ventre sa mère* construction treats the child as if it had been born at the death of the deceased.

116 Nicky Richardson *Wills and Succession* (online looseleaf ed, LexisNexis) at [6.23]–[6.25].

117 *Re Downes' Trusts* (1876) 4 Ch D 210.

118 This is called the rule in *Andrews v Partington* after *Andrews v Partington* (1791) 3Bro CC401, 29 ER 610.

119 Applying the rule in *Andrews v Partington*.

120 Perpetuities Act 1964, s 8. Section 6(1) allows the specification of a perpetuity period up to 80 years. Where none is specified, the period would is the life in being plus 21 years: s 8(4).

when she is 55 years old.[121] The new Trusts Bill 2017 is set to abolish the Perpetuities Act 1964 in favour of a 125-year limit on all trust arrangements.[122] In practice a gift to posthumously conceived children would only need to be held up for around 10 years, which is the maximum period sperm can be stored without ECART's approval.[123] Once it was clear no children could be conceived, the gift would lapse. A "Benjamin order" could be probably be used to close the estate sooner where it could be proved to a court's satisfaction that no further beneficiaries would arise.[124]

V Conclusions

Summarily, posthumous conception is an established procedure where the deceased consented to the "specific use" of his sperm. No ECART approval is required. Where he did not consent, ECART must approve conception on a case-by-case basis. The resulting child will have no legal relationship with its father in all cases because the SCA treats him identically to a donor. Consequently, the child will have no succession rights unless specifically contemplated by a will or trust instrument.

121 Section 7. This presumption is rebuttable.
122 Trusts Bill 2017 (290-1), cl 16.
123 Human Assisted Reproduection Act 2004, ss 10–10D.
124 The order is named after *Re Benjamin* [1902] 1 Ch 723. For an application in New Zealand see *Re Plato* [1989] 2 NZLR 360.

Chapter Two: The Case for Reform

> *Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless.*
>
> -- Chief Justice Marshall in *Woodward v Commissioner of Social Security.*[125]

I An Opening for Discussion in New Zealand

As discussed in the previous chapter, the range of circumstances in which posthumous conception is allowed in New Zealand is currently small and indeterminate, but this may not be the case for long. ACART is currently reviewing the 2000 *Guidelines*,[126] and is intending to promulgate new guidelines regulating posthumous reproduction.

ACART's consultation document focuses heavily on what should constitute consent.[127] New guidelines might allow posthumous reproduction where the deceased's consent was written, verbal, or can be inferred. Consent may even be presumed, provided there is no objection to posthumous reproduction. If ACART accepts inferred consent, Ms Long of *Re Lee* will not be prevented from using Mr Lee's sperm for lack of prior specific consent. ACART may instead insist on prior written consent, but this will not rule out posthumous conception altogether. The deceased may have authorised the use of his sperm in his will,[128] or a consent form created when he stored his sperm at a clinic.

The status and succession rights of posthumously conceived children will need clarification, no matter what level of consent is eventually required for their conception. Posthumously conceived children are unlikely to ever be a large class,[129] but posthumously conceived children will exist, and as was said in Parliament when pt 2 was originally added to the SCA:[130] "[i]f the children exist, their status must be dealt with". In a sense, the SCA does "deal with" posthumously conceived children, but the result is uncontemplated. Posthumous conception is not sperm donation, and specific circumstances deserve specific consideration. This chapter argues that, as a matter of policy and theory, posthumously conceived children should be entitled to paternity and succession rights.

The remainder of this chapter is in three parts. Part II describes fundamental interests implicated in the paternity and succession rights of posthumously conceived children. Parts III and IV make normative cases. Part III argues that the deceased who consents to posthumous conception should be recognised as the legal father of the resulting child in certain circumstances. Part IV argues that, ideally, paternity should encompass full succession rights.

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125 *Woodward v Commissioner of Social Security*, above n 8, at 266.

126 Advisory Committee on Assisted Reproductive Technology *Guidelines for the Use, Storage, and Disposal of Sperm from a Deceased Man* (2000).

127 Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (3 July 2018). See particularly 18 and the policy options discussed from 19 onwards.

128 This factual possibility arose in the peculiar US case *Hecht*, above n 10.

129 For example, in Israel, which has very permissive consent requirements, most collected gametes are not ultimately used. See Arich Raziel and others "Nationwide Use of Postmortem Retrieved Sperm in Israel: A Follow-up Report" (2011) 95 Am Soc'y for Reprod Med 2693 at 2693–2695.

130 (13 August 1986) 473 NZPD 3875, per Geoffrey Palmer.

II Three Fundamental Interests

Three interests are considered to be fundamental to establishing a normative position on the paternity and succession rights of posthumously conceived children:[131] the deceased's interest in having his intentions respected, the State's interests in orderly and certain distribution of the deceased estate, and the interests of the child. Each is discussed in turn below. These interests will not usually align, and a compromise will need to be found.

Other interests arise beyond these, such as the those of the surviving partner, and of other beneficiaries or heirs of the estate,[132] but these are not *fundamental* to the paternity and succession rights of the child. The surviving partner may have an interest in conceiving a child,[133] but for the purposes of status and succession, the mother's interests align with the child's. Other beneficiaries or heirs share the State's interest in timely administration. They also have an interest in receiving as large a share as possible,[134] but this must capitulate to the just entitlement of another beneficiary, and is thus inextricably linked to the State's interest in the accurate determination of beneficiaries, such that it need not be discussed separately.[135]

A The Interests of the Deceased Genetic Father

Philosophers debate whether a deceased person can have interests at all if they cannot be wronged,[136] but whatever the theoretical underpinnings, it is clear that our law frequently protects a deceased's interests, and pre-mortem expressions thereof.[137] For example, it is an offence to improperly or indecently interfere with a dead human body or human remains under the Crimes Act 1961.[138] The Human Tissue Act 2008 respects the informed consent or objection of the deceased.[139]

The deceased will sometimes have an interest in posthumous conception. He may have wanted a child to inherit the family name or family wealth, or carry on the family business. He may have altruistically allowed his partner to use his sperm in accordance with her life-long desire to be a mother. In *Hart v*

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131 This dissertation will use the term "fundamental interests", however in the United States, these interests are considered "State interests" for the purpose of rational basis review. The three interests were expounded in *Woodward v Commissioner of Social Security*, above n 8, at p 265. See also: Maya Sabatello "Posthumously Conceived Children: An International Human Rights Perspective" (2014) 27 J L & Health 29; Jenna M F Suppon "Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children" (2010) 48 FCCR 228; and Courtney Retter "Introducing the Next Class of Bastard: An Assessment of the Definitional Implications of the Succession Law Reform Act for After-Born Children" (2011) 27 Can J Fam L 147.

132 Some commentators see the interests of other beneficiaries separately: Morgan K Wood "It Takes a Village: Considering the Other Interests at Stake When Extending Inheritance Rights to Posthumously Conceived Children" (2010) 44 Ga L Rev 873 at 901.

133 For judicial consideration of a woman's interest in reproduction, see the landmark UK case *Evans v United Kingdom* [2006] 1 FCR 585 (ECHR). Ms Evans sought to use embryos that had previously been created with her ex-partner, even though he had withdrawn his consent.

134 Wood, above n 132, at 904.

135 The court in *Woodward* arguably also treated the interests of other beneficiaries and creditors as ingredients within the broader interest of the State: *Woodward v Commissioner of Social Security*, above n 8, at 266.

136 See for example: Ernest Partridge "Posthumous Interests and Posthumous Respect" (1981) 91 Ethics 243; and James Stacey Taylor *Death, Posthumous Harm, and Bioethics* (Taylor and Francis, New York, 2012).

137 It is possible that what the law is protecting is not the interests of the deceased exactly, so much as the sentiment, and therefore interests, of the living; but this is beyond the scope of this dissertation.

138 Crimes Act 1961, s 150(b). This section was discussed in *Re Lee*, above n 13, at [73]–[75].

139 Human Tissue Act 2008, s 9. While a deceased's informed consent to organ donation is sufficient, the tissue will normally not be taken if family members object.

Shalala, Edward wanted Nancy to continue with the family they had planned together.[140] In *Re Lee*, it was possible to infer that Mr Lee wanted to father a sibling for his first child.[141]

On the other hand, the deceased may have an interest in not fathering a child after death, perhaps because he would never be able to have a relationship with the child, does not want to disrupt the disposition of his estate.

The law routinely assumes the intentions of the deceased where they are unclear. Relevant examples include the construction of "children" in wills to refer to children *in utero*;[142] and the intestacy rules,[143] which presume that the deceased wished to benefit his family.[144]

B The Interests of the State

The State has two relevant interests in the estate administration context:[145] the clear determination of beneficiaries, and the timely administration and distribution of estates.

1 Clear determination of beneficiaries

Where an administrator is considering a class of beneficiaries for the purposes of a testamentary bequest or an intestacy, they need to be certain who is "in" and who is "out".[146] This interest has been the impetus behind measures in the SCA, and Administration Act 1969, which clearly provide paternity and intestate succession rights respectively to children *en ventre sa mère* at the father's death.[147] Ideally, determination of beneficiaries is uncomplicated, but in some cases establishing paternity may require DNA testing, or court processes.[148]

2 Timely administration and distribution of the estate

During administration, the estate is frozen.[149] The administrator is the full owner of all the property in the estate.[150] They have fiduciary obligations to administer the estate, but these are not entirely analogous to those of a trustee, and are better thought of as "duties in respect of the assets".[151] The

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140 See discussion of *Hart v Shalala*, above n 8.

141 *Re Lee*, above n 13. The Court were careful not to actually make this inference, but it was certainly available.

142 Croucher and Vines, above n 112, at 47.

143 Administration Act 1969, s 77.

144 As discussed below, the administration of estates to living people is inherently socially beneficial because it returns property into circulation, however western law generally places importance on the presumed interests of the deceased where possible: Jeffery W Sheehan "Late Father's Later Children" (2013) 15 JETLaw 983 at 1005. See also Retter, above n 131, at 187; Croucher and Vines, above n 112, at 185–186; and Nicola Peart and Prue Vines "Intestate Succession in Australia and New Zealand" in Kenneth Reid, Marius de Waal, and Reinhard Zimmermann (ed) *Comparative Succession Law: Volume II: Intestate Succession* (Oxford University Press, Oxford, 2015) 349 at 357.

145 *Woodward v Commissioner of Social Security*, above n 8, at 266.

146 *Woodward v Commissioner of Social Security*, above n 8, at 266–267; Atherton, above n 6, at 144–146. In the United States, much discussion is directed to promoting "stable land titles": see E J Garside "Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child" (1996) 41 Loyola LR 713.

147 Status of Children Act 1969, s 5; and Administration Act 1969, s 2(1).

148 Status of Children Act 1969, s 10(2).

149 Hence the title of this dissertation.

150 Administration Act 1969, s 24 and 25.

151 *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 at 707.

beneficiaries have a bare right to hold the administrator to account,[152] but no beneficial interest in the property until the administrator completes administration.[153]

Administration is complete when the administrator has performed all of their functions, and the residue of the estate has been ascertained; at this point the administrator becomes a trustee, and the beneficiaries gain a beneficial interest.[154] It is not necessary for all the estate property to have actually reached the beneficiaries. Prompt administration ensures that beneficiaries are taken out of limbo as to the quantum of their entitlement and the time at which it will be distributed.

Administration can be thwarted where a beneficiary cannot be found, but measures exist which allow the estate to be wound up nonetheless. In *Re Evans* a beneficiary did not turn up for 7 years, but the estate could be wound up earlier by taking out a missing beneficiary policy.[155] In *Re Plato* a Benjamin order was used to close the estate because a missing beneficiary was thought to have predeceased the deceased.[156]

It is equally important that actual distribution, or transfer of property, occurs promptly, so that property returns to the economy to be worked productively by the living.[157] This is the partial impetus behind measures such as the class closing rules and the Perpetuities Act 1964.

Whilst prompt administration and distribution are important, they are frequently delayed in order to protect other interests. Claims for provision from the bulk estate under the FPA or Law Reform (Testamentary Promises) Act 1949 ("**TPA**") disrupt the ascertainment of residue. Claimants are entitled to a reasonable period, but time limits ensure administration is not unduly delayed.[158] The FPA and TPA both "bar" applications for provision from the estate after the expiration of an application period,[159] but a court has the power to extend the application period, provided "final distribution" of the estate has not occurred.[160] Normally, "final distribution" is synonymous with administration;[161] but under the FPA, "final distribution" requires that all property be in the hands of the final capital beneficiaries.[162] This means that estate property may remain liable to be disturbed by FPA claims for a long time if assets are held on trust: certain administration capitulates to the social importance of family protection.

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152 For an example of this being applied, see *Oatridge v Oatridge* (2004) 1 NZTR 14-013.

153 In *Livingston*, above n 151, the beneficiary's estate did not have a sufficient beneficial interest in the residuary of another un-administered estate to justify including it within her own estate for the purposes of estate duty; *cf Rutherford v Rutherford* [2015] NZHC 878, where the residuary beneficiaries of an estate which included a "residence interest" were held to have beneficial ownership of the residence interest, because even though it was currently being held by another person, the administration was complete. They were not able to caveat the interest however, because it was not sufficiently specific.

154 *Rutherford*, above n 153, at [25].

155 *Re Evans* [1999] 2 All ER 777.

156 *Re Plato*, above n 124.

157 See Sheehan, above n 144, at 563–573.

158 For complete coverage of the rules, see W M Patterson *Law of Family Protection and Testamentary Promises* (3rd ed, LexisNexis, Wellington, 2004) at [17.5].

159 This is generally 12 months from the date of grant of administration: Family Protection Act 1955, s 9(2)(b); and Law Reform (Testamentary Promises) Act 1949, s 6. However, the FPA allows an extended two-year period for an application made on behalf of a person who is not of full age or mental capacity: s 9(2)(a). See Patterson, above n 158, at [16.6] onwards.

160 Family Protection Act 1955, s 9(1); and Law Reform (Testamentary Promises) Act 1949, s 6.

161 This was confirmed by the Privy Council in *Lilley v Public Trustee* [1981] 1 NZLR 41.

162 Family Protection Act 1955, s 2(4).

Administration and distribution issues are heavily implicated in normative considerations of the succession rights of posthumously conceived children, and discussed in further detail in Part IV of this chapter.

C The Interests of the Posthumously Conceived Child

The best interests of the child have been called an "overwhelmingly strong policy",[163] and "the overriding legislative concern".[164] This is for an important reason: a child has no control over its conception, and is not able to defend its own interests. The HART Act lists the "well-being of children born as a result of … an assisted reproductive procedure" as a central consideration in all decisions made under its framework.[165]

1 Nullius filius

A significant body of academic commentary analogises the position of the posthumously conceived child to that of the illegitimate child, previously thought to be confined to the history books.[166] As Blackstone put it, the illegitimate child was *nullius filius*, the "son of nobody", and hence "[could not] be heir to anyone".[167] In the early 18th century, this treatment was justified on the basis that bastardy, or illegitimacy, was seen as "an unlawful state of Birth, disabled by Divine and Humane Laws to succeed to Inheritance".[168]

New Zealand led the common law world by abolishing the status of illegitimacy in 1969.[169] Before then, the illegitimate child was owed no obligations by its father, and could not succeed as of right.[170] It was recognised by 1969 that the circumstances of its birth were "not the fault of [the] child",[171] and therefore "[d]ifference in the circumstances of birth as between a legitimate and illegitimate child need not, and should not, bring about unequal opportunities to the illegitimate child".[172] Differential treatment of children on the basis of their birth status is now at odds with New Zealand's commitment to the United Nations Convention on the Rights of the Child ("**UNCRC**") (discussed below).[173]

Atherton puts the analogy between the child who is *nullius filius* and the posthumously conceived child like this:[174]

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163 Suppon, above n 131, at 239.

164 *Woodward v Commissioner of Social Security*, above n 8, at 265.

165 Human Assisted Reproductive Technology Act 2004, s 4(a).

166 See for example: Atherton, above n 6; Cindy L Steeb "A Child Conceived After His Father's Death?: Posthumous Reproduction and Inheritance Rights. An Analysis of Ohio Statutes" (2000) 48 CLEV ST L REV 137; and Retter, above n 131.

167 W Blackstone *Commentaries on the Laws of England: A New Edition with Practical Notes by Joseph Chitty* (W Walker, London, 1826) vol 1 at 459.

168 J Brydall *Lex Spuriorum: or, The Law Relating to Bastardy: Collected from the Common, Civil and Ecclesiastical Laws* (Printed by the assigns of R and E Atkins, for T Osbone, London, 1703) at 4.

169 With the passing of the Status of Children Act 1969: see particularly s 3. The Australian jurisdictions followed suit in the 1970's. See Peart and Vines, above n 144, at 356; and Atherton, above n 6, at n 32.

170 The SCA has the most important effects on the paternity of the illegitimate child, but illegitimate children had acquired a limited amount of rights to succeed from their mother before it was passed. For example, the Administration Amendment Act 1944 treated the relationship between the mother and extra-marital child as legitimate for succession purposes. For further detail see Peart and Vines, above n 144, at n 60.

171 (16 May 1969) 360 NZPD 19 per Sir Leslie Munro.

172 (3 June 1969) 360 NZPD 478 per Mrs Tirikatene-Sullivan.

173 *Convention on the Rights of the Child* GA Res 44/25, A/RES/44/25 (1989) at art 2.1.

174 Atherton, above n 6, at 160.

> In the eighteenth century the principal incapacity of the illegitimate child … was that the child could not be an heir of anyone except his or her own body. Legislation which directly or indirectly achieves this result in the context of artificial conception is, in effect, reproducing this singular disability of one class of children.

If deceased men are properly thought of as the fathers of posthumously conceived children, then our current framework creates a class of "21st century bastards", cloaking the children with something like illegitimacy. However, the reasoning which led to the abolishment of illegitimacy seems to apply equally to posthumously conceived children. It is no fault of theirs that their conception has occurred after the death of their natural father, so it is unjust and regressive that they are therefore denied rights.[175]

2 Importance of paternity

Establishing the requisite relationship of paternity is therefore central to the child's interests. Obligations are only owed to the child if the father is legally recognised,[176] so the law frequently ensures recognition. In natural, sexual conception, paternity follows automatically from a genetic relationship,[177] with the singular exception of adoption, which severs legal relationships with the genetic parents in favour of the social parents.[178] Where ART is implicated, the SCA contains "deeming provisions" which deem the partner of the birth mother to be the legal parent.[179]

3 Support from the deceased

It will always be in the best interests of the child to receive financial support. Ordinarily both parents of a child will be required to maintain them, enforceable during the parents' lifetime through the Child Support Act 1991 and on death through the FPA. Where no will exists, the intestacy rules ensure the child inherits.[180]

4 Psychological considerations

It is well recognised in the law that children have an interest in knowing their genetic origins. The HART Act is concerned that "donor offspring be made aware of their genetic origins and be able to access information about those origins".[181] Psychological research also suggests that children attach significance to their parent's desire to have them.[182] Having the man responsible for their creation recognised as their legal father is therefore likely to be important to the child.

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175 Atherton, above n 6, 161; and see generally Retter, above n 131.
176 Status of Children Act 1969, s 7(1).
177 Status of Children Act 1969, ss 5, 7, 8, and 10. See also Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at [2.1]–[2.3]; and Zöe Lawton "Non-Consensual, Deceitful and Misattributed Paternity" (LLM Dissertation, Victoria University, Wellington, 2013) at 4.
178 Adoption Act 1955, s 16(2). For an application of this see *Hemmes v Young* [2005] NZSC 47.
179 Status of Children Act 1969, pt 2. The phrase "deeming provisions" is used by the Law Commission: *New Issues in Legal Parenthood* (NZLC PP54, 2004).
180 Administration Act, s 77.
181 Human Assisted Reproductive Technology Act 2004, s 4(e). See also s 3(f) and pt 3 generally.
182 Sabatello, above n 131, at 57.

Some commentary discusses the risks posed to the child by the fact of posthumous conception. One such risk is the "identity harm" caused by feeling that they were only created as a replacement for their deceased father.[183] Another supposed risk is that the family structure will be less than optimal because of the grief inherent in their conception, and the absence of a living father.[184] These arguments are important, but relevant only to whether posthumous conception should be permitted in the first place, and not to succession and paternity considerations. Once the child exists, altering its rights because of its supposedly suboptimal family structure is to rub salt in its wounds.

5 The Convention on the Rights of the Child

Although not strictly part of our domestic law, compliance with the UNCRC is one of our key international obligations,[185] and any analysis of the child's interests is incomplete without it.[186] Differential treatment of posthumously conceived children is likely inconsistent with art 2.1.[187] It protects the child against discrimination on the basis of the status of the parents.[188]

III The Case for Paternity

The case for paternity is less controversial than the case for succession rights.[189] This is demonstrated by the approaches of Victoria and the UK,[190] which allow the father to be added to the birth certificate, with no ensuing succession rights. I will refer to this as "bare legal fatherhood". I will justify the paternity of posthumously conceived children by reference firstly to the theoretical basis for paternity obligations, and secondly to the fundamental interests. I will assume throughout that posthumous conception will only ever occur with some level of consent. ACART has indicated that, at the very least, consent to posthumous conception could be presumed;[191] but posthumous conception is unlikely to ever be allowed in light of an objection.

A Theoretical Considerations

Only one person can be the legal father.[192] Part 1 of the SCA, which deals with natural conception scenarios and artificial conception between partners, bases paternity on a *biological relationship* with

183 Sabatello, above n 131, at 61. See also Ruth Landau "Planned Orphanhood" (1999) 49 Soc Sci & Med 185 at 188.

184 Sabatello, above n 131, at 58.

185 UNCRC, above n 173.

186 Relatedly, courts have generally held that the child's welfare pursuant to the UNCRC is relevant for paternity analysis under the SCA. See for example *L v R* FC Nelson FAM-2005-042-489, 21 September 2007 at [36].

187 This was acknowledged in UK Parliament before the 2004 amendments made to the Human Fertilisation and Embryology Act 1990 allowed bare legal fatherhood, see: (23 March 2001) 365 GBPD HC 643, per Tony Clark.

188 This could encompass the unmarried status of the parents, and conceivably the deceased status of the genetic father. If "parents" simply means legal parents, then naturally this argument is moot, but the approach in the UK seems to suggest that "parents" is not limited to its legal meaning.

189 This echoes the sentiment of Baroness Pitkeathley that the 2003 amendments to the HFEA in the UK were "not a controversial proposal": (4 July 2003) 650 GBPD HL 1148.

190 Human Fertilisation and Embryology Act 1990 (UK), s 28; Status of Children Act 1974 (Vic), ss 37–40.

191 Advisory Committee on Assisted Reproductive Technology *Posthumous Reproduction – a review of the current Guidelines for the Storage, Use, and Disposal of Sperm from a Deceased Man to take into account gametes and embryos* (3 July 2018) at [89], [100] and 24–28. Anecdotally, it is unlikely that ACART will be content with presumed consent, and will probably require inferred consent at the least.

192 *Hemmes v Young*, above n 178, at [15]. See also Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004). It would be more correct to say that only 2 people can be the parents, whether or not these people become fathers or mothers, but I have referred here to heterosexual couples, because posthumous conception is most likely to arise in these circumstances.

the child.[193] Part 2, which deals with donor AHR, bases paternity on the *psychological commitment* of the social father;[194] in all cases, this requires a relationship with the mother.[195]

In both parts however, paternity generally follows from consent to the reproduction. Theoretically, this is justified with the moral duty commonly considered to arise from "voluntary creation of need".[196] This principle derives from Blackstone,[197] who, referring to parents and their children, stated that:[198]

> By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed will be supported and preserved.

The principle has been questioned insofar as it is used to avoid support payments,[199] but generally it is regarded as the most plausible justification for paternity obligations.[200]

1 When is it appropriate to sever consent to reproduction from paternity?

(a) Natural conception

When a child is conceived naturally, the father is always the biological father, unless an adoption has occurred.[201] Provided he has consented to sexual activity, the father has voluntarily created need, and it is irrelevant whether he consented or intended to be the legal father.[202]

Sometimes the SCA stretches the reasonable limits of the moral duty. Even where the mother has deceitfully pricked the condom used during intercourse, there is little question that the man is the legal father,[203] notwithstanding shaky theoretical grounding.[204] This does have the practical benefit of certainty: the biological father will always be the legal one.[205]

(b) Artificial conception

For the partner of a woman using donor sperm, paternity flows irrefutably from consent to "the carrying out on [his] partner … of an AHR procedure that involves genetic material from a [donor]".[206] This

193 Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at [2.1]–[2.16].
194 Lawton, above n 177, at 4–9.
195 Status of Children Act 1969, ss 24 and 27.
196 See Neil Maddox "Inheritance and the Posthumously Conceived Child" (2017) Conveyancing and Property Lawyer 1, particularly at 8–9 and 11–13; and Sally Sheldon "Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?" (2003) 66 MLR 175.
197 Blackstone saw voluntary creation of need as a principle of natural law, but it is possible that the principle can be traced back further still.
198 W Blackstone, above n 167, at 446.
199 See generally Sheldon, above n 196.
200 Sheldon, above n 196, at 177.
201 Adoption Act 1955, s 16(2). See also *Hemmes v Young*, above n 178.
202 Law Commission *New Issues in Legal Parenthood* (NZLC PP54, 2004) at [3.33].
203 Lawton, above n 177, at 30–48.
204 A moral duty might still be said to stem from the voluntary act of intercourse; but it is also possible that the mother's actions could be considered akin to a *novus actus interveniens*.
205 Lawton, above n 177, at 34.
206 Status of Children Act 1969, s 18.

consent is presumed in the absence of evidence to the contrary.[207] Again, consent to reproduction is the voluntary, albeit presumed, act upon which the obligations of paternity may be crystallised.

The SCA severs consent to conception from paternity in the case of donor offspring. Donors consent to use of their sperm,[208] but are not the legal father of the child created.[209] Although the donor's voluntary consent has enabled creation of the child, policy reasons have required a severance of his paternity obligations.

As was discussed in Chapter One, a man is not a donor by intention, but by fact. As *P v K* shows, a man who is not the woman's partner is always a donor where artificial conception is involved, even if the intention was that he be the legal father.[210] Conversely, where the man providing the sperm is the woman's partner, he will never be a sperm donor for the purposes of the SCA.[211]

(c) Common threads

Summarily, the law only considers it appropriate to sever voluntary creation of need from paternity in sperm donation scenarios,[212] but assumes that all men whose sperm is used to artificially fertilise a woman who is not their partner are akin to donors. This assumption is not theoretically appropriate, as the next section will discuss.

2 Is it appropriate to treat the fathers of posthumously conceived children as donors?

At the time of conception, the deceased man is no longer the partner of the mother because he is dead. It might seem facetious to call this a technicality, but in many ways, it is.

Blackstone's moral duty is constituted of two limbs: a "voluntary act", and "need" (or a child), where the former is causative of the latter. Once consent to reproduction is given (the voluntary act), the temporal separation from conception (emergence of need) is theoretically unimportant. Provided a man does not withdraw his consent to artificial reproduction, he will owe a moral duty to provide for any "need" which arises. In a posthumous conception scenario like *Hart v Shalala*,[213] Edward had died by the time the need emerged, but crucially, the voluntary consent he expressed while alive has enabled Nancy to conceive, and so is still causative of the need. Death does not break this causation.

I argue therefore that the father of a posthumously conceived child is theoretically distinct from a donor because he was alive and partnered to the woman at the time of the voluntary act which eventually leads to conception: consent.[214] I demonstrated above that paternity is never severed from consent to reproduction where the latter occurs during a legal partnership, so it is theoretically consistent that a deceased man should owe obligations even if the need arises after he has died.

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207 Status of Children Act 1969, s 27.
208 The donation may be recipient-specific in cases of "known-donor" conception, or available for use by any unknown women.
209 Unless they later become the woman's partner: Status of Children Act 1969, ss 21 and 22.
210 *P v K*, above n 81.
211 See generally Zöe Lawton "Non-consensual Artificial Paternity" (2013) 7 NZFLJ 248.
212 And adoption of course, but here there is a new voluntary assumption of obligations to the child.
213 *Hart v Shalala*, above n 8.
214 A related point is made by Maddox, above n 196, at 11.

There is one exception to this: if the mother has re-partnered when the child is conceived, the new partner should be deemed the legal father. This result can be arrived at applying s 21 of the SCA *mutatis mutandis*, but it is theoretically justified because there is a new and intervening voluntary creation of need in the consent of the new partner. Only one man may be the father of the child,[215] even though two may have voluntarily taken part in its creation, and a later assumption of obligations should take priority over an earlier one, analogous to an adoption, especially where policy reasons indicate that the paternity of the social parent will be more beneficial to the child than the paternity of the biological father.

B Consideration of the Fundamental Interests

I have argued above that theoretically, the deceased's consent to posthumous conception is a voluntary creation of need sufficient to crystallise the obligations of paternity. Weighing the fundamental interests only reinforces this position.

1 Paternity favours the interests of the child

Legally fatherlessness is not socially intolerable: donor offspring born to a single mother have no legal father.[216] But having a legal father will almost always be better for the child where the circumstances indicate that the child is not donor offspring. There are both symbolic and practical benefits.

Symbolically, the child will benefit from knowing who their father was, and that he loved their mother.[217] Legal recognition of the genetic father will have the effect of validating the family and the child's role within it, and spare them the dissonance of being labelled fatherless.[218] Practically, and perhaps most compellingly, legal recognition of the father will buttress legal relationships to the whole extended family. This will ensure legal relationships with grandparents,[219] aunts, uncles, etc.[220] Relationships may be practically important if the child needs care at any point, and would have special symbolic and practical importance in cases like *Re Lee* and *Re Cresswell*, where the extended families were supportive and encouraging of posthumous conception.[221] Furthermore, legal recognition of the father will mean the difference between having a half or full-sibling. If Ms Long conceives a child using Mr Lee's sperm, it will currently only be a legal half-sibling of her and Mr Lee's firstborn, which does not reflect reality.

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215 *Hemmes v Young*, above n 178, at [15].

216 Status of Children Act 1969, s 22.

217 Chester, above n 10, at 1022; and Sabatello, above n 131, at 58.

218 Ruth Zaffran "Dying to be a Father: Legal Paternity in Cases of Posthumous Conception" (2008) 8 Hous J Health L & Pol'y 47 at 84. These sorts of concerns were borne out in Diane Blood's plight to get her late husband, Stephen, legally recognised on her posthumously conceived sons' birth certificates: Cherry Norton, "At last, Diane Blood can put the name of her husband on son's birth certificate" *The Independent* (online ed, London, 25 August 2000).

219 The rights of a children conceived after their father's death to succeed from their paternal grandparents was considered in *In re Martin B* 841 NYS2d 207 (NY 2007). The decision turned on the construction of "issue" and "descendants", but it highlights the importance of being able to trace legal relationships through the father.

220 Whether or not paternity ensures succession rights from these relatives depends on whether it is "bare legal fatherhood" (birth certificate only) or something more. In Victoria and the United Kingdom, the bare legal fatherhood is framed in a way which will not allow succession rights through the deceased based, for example on a testamentary bequest to "grandchildren" or decendants. See Status of Children Act, 1974 (Vic), s 37 and 40; and Human Fertilisation and Embryology Act 1990 (UK), s 28(5I) *cf In re Martin B*, above n 219.

221 *Re Lee*, above n 13; and *Re Cresswell* [2018] QSC 142.

While generally a child will benefit from having legal recognition of their biological father, where the mother has re-partnered, it is more likely that the child's interests favour the recognition of the new partner as the legal father, as he is better placed to provide love and nurture.[222] This also aligns with the theoretical exception raised above.

2 Paternity favours state interests

The main argument raised against the legal recognition of paternity is that of succession rights themselves. As is apparent from the bare legal fatherhood approaches taken in the United Kingdom and Victoria however, paternity can easily be separated from succession rights. Indeed, the House of Lords seemed to have wished they had appreciated this when the Human Fertilisation and Embryology Act 1990 was originally passed:[223]

> We never even thought of separating the registration of the biological father from the legal implications of his paternity. To make that separation now seems to me an admirable and simple solution, as it preserves the crucial aim of registration; namely, to record the historical truth.

Given the important statistical role birth certificates have as a source of demographic information,[224] the State arguably benefits from having the deceased man recorded as the legal father. Establishing paternity will also be uncomplicated given that the fertility clinic would keep clear records of the sperm or embryos used.

3 Paternity favours the interests of the deceased father

Whereas the interests of the State and the posthumously conceived child will largely be consistent across most scenarios, the interests of the deceased will vary. The father may have died moments before his partner, unaware of his death, successfully conceives a child through ART.[225] In *Hart v Shalala*, Edward had expressed an interest in being the father of a posthumously born child after a terminal diagnosis.[226] Recognising paternity in these scenarios would accord with his critical interests, and afford "continuity to the family that had been formed" by the couple.[227]

More problematic are the situations like those in *Re Lee*, where Mr Lee's interests need to be inferred.[228] In *Re Lee*, there was no explicit consent or objection to posthumous conception, but evidence that Mr Lee wanted to have a second child,[229] a sibling for their first.[230] This may be distinct from a desire to have a child after death however, as the deceased will never have a relationship with the child.

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222 Zaffran, above n 218.
223 (4 July 2003) 650 GBPD HL 1151 per Baroness Warnock.
224 Births, Deaths, Marriages, and Relationships Registration Act 1995, s 1A.
225 Some jurisdictions have provisions which deal with exactly this issue. Virginia, for example, allows the deceased man to be the legal father provided that: "(i) implantation occurs before notice of the death can reasonably be communicated to the physician performing the procedure or (ii) the person consents to be a parent in writing executed before the implantation." See Va Code Ann § 20-158. Note however that elsewhere Virginia restricts succession rights to children born within 10 months of the death: Va Code Ann § 20-164.
226 *Hart v Shalala*, above n 8.
227 Zaffran, above n 218, at 84.
228 *Re Lee*, above n 13.
229 At [5] and [10].
230 Recall that the couple's first child was *en ventre sa mère* at the time of Mr Lee's death.

On balance however, ECART should serve to sufficiently protect the deceased's interests. ECART is only likely to allow posthumous conception where it aligns with the inferable interests of the deceased.

C When Should We Recognise Paternity in Posthumously Conceived Children?

Other jurisdictions,[231] and commentators,[232] have focused on the consent of the deceased, but usually only in order to infer consent to be the legal parent. It is ultimately the consent to paternity that allows paternity to be recognised. As one commentator states:[233]

> [I]f a man consents to the use of his genetic material after his death, it should be presumed that he is also consenting to be legally recognized as a parent of the resulting child.

Yet other jurisdictions,[234] commentators,[235] and cases,[236] require consent both to reproduction, and to paternity.

It will be clear from the antecedent discussion that these approaches are incompatible with the theoretical underpinnings of our SCA to the extent that they require consent to paternity. It may be undesirable that a man be forced into legal parenthood against his intentions,[237] but the SCA requires this routinely provided there is consent to reproduction.

The simplest solution therefore is to recognise the deceased biological father as the legal father of a posthumously conceived child provided he was the legal partner of the mother when he consented to posthumous reproduction. Whatever form of consent is ultimately required by ACART should suffice as a legitimate theoretical basis for paternity obligations. Allowing the deceased to be the legal father will also favour all three fundamental interests. To do otherwise would only condemn the child to a form of illegitimacy,[238] and do nothing to enforce an obligation voluntarily entered into by the father during his lifetime.[239]

IV The Case for Succession Rights

The succession rights of posthumously conceived children will generally follow from a legal relationship of paternity, but succession rights involve further impact on the fundamental interests, and thus require separate normative justification. This was appreciated in *Estate of Kolacy*:[240]

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231 For examples of jurisdictions that focus on the consent to the use of sperm alone, see discussion of South Australia, Louisiana, Iowa, and California in Chapter Three below.

232 See for example: Chester, above n 10; Lewis, above n 9, at 428; Zaffran, above n 218, 87–89; Christine E Doucet "From *En Ventre Sa Mère* to Thawing an Heir: Posthumously Conceived Children and the Implications for Succession Law in Canada" (2013) 22 Dalhousie J Legal Stud 1 at 16.

233 Lewis, above n 9, at 428.

234 Examples include the United States Uniform Probate Code, and the approach taken in the United Kingdom.

235 See for example Wood, above n 132, at 905.

236 See for example *Woodward v Commissioner of Social Security*, above n 8, at 269–270.

237 See Lawton, above n 211.

238 See Atherton, above n 6; and Retter, above n 131.

239 See Chester, above n 10, at 1033.

240 *In re Estate of Kolacy,* above n 8, at 1262.

> [O]nce we establish … that a child is indeed the offspring of the decedent, we should routinely grant that child the legal status of being an heir of the decedent, unless doing so would unfairly intrude on the rights of other persons…

This part attempts to show that succession rights do not *unfairly* intrude on other interests. I begin by describing the nature of the administrative problems created by allowing posthumously conceived children to succeed. I then argue that succession rights should be available nonetheless. I will show that there are practicable ways to give effect to the posthumously conceived child's succession rights in the next two chapters.

A Administrative Issues with Posthumously Conceived Children

Posthumously born children create no inordinate delay to distribution;[241] but it has long been academically,[242] judicially,[243] and legislatively recognised that posthumously conceived children present a problem to the winding up of estates. These concerns were expressed by the Committee of Inquiry into Human Fertilisation and Embryology in the Warnock Report:[244]

> It is obviously essential that there should be some finality for those administering estates of deceased persons since, in such cases posthumous fertilisation could cause real problems of inheritance and succession. Account would have to be taken of issue who might be born years after the death.

The House of Lords echoed these concerns 20 years later, when considering the 2003 amendment to the HFEA, stating that it would be "impossible to wind up the father′s estate" if posthumously children could succeed, and were "lying in wait" to be born.[245] These concerns are often not fully explained, and so are unpacked below.

1 Certainty of objects

After administration, the administrator transitions to the office of trustee,[246] holding the undistributed entitlements on fixed trust for the beneficiaries.[247] It follows that administration is impossible if a valid trust cannot arise; and for a fixed trust to have certainty of objects, it must be possible to create a complete list of beneficiaries *at any given time*.[248] This does not actually create any problems for a disposition which includes posthumously conceived children. Entitlement of beneficiaries is contingent on their conception, but it is still possible to list the beneficiaries currently in existence at any given time, even if there are none. Posthumous conception thus poses no problem to the certainty of objects generally.

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241 Brashier, above n 88, at 193.

242 The issues that sperm banks created alongside the rule against perpetuities were being seriously discussed as far back as 1962: Leach, above n 4.

243 *Woodward v Commissioner of Social Security*, above n 8, at 267–268.

244 *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) (Cmnd 9314) ("**The Warnock Report**") at [10.9].

245 (4 July 2003) 650 GBPD HL 1151 per Baroness Warnock. See also (4 July 2003) 650 GBPD HL 1161 per Baroness Andrews.

246 *Rutherford v Rutherford*, above n 153, at [26].

247 As opposed to a discretionary trust, or a power of appointment.

248 Geraint W Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [4.03].

2 Ascertainment of the residue (certainty of subject matter)

Posthumously conceived children will hinder administration if they disrupt the ascertainment of the residue, however.[249] This will occur where the payment of a legacy is contingent on the existence of a posthumously conceived child: such as a legacy "to children conceived after my death"; or "children" where none currently exist.[250] The legacy cannot be paid in accordance with the administrator's duties until such a child is conceived, and the residue of the estate is unascertainable as long as the legacy may lapse. Therefore, administration will be delayed until no more conception is possible (the legacy lapses), or a child is born (the legacy is paid).

B Posthumously Conceived Children Should be Entitled to Succession Rights

The most effective protection of the State's interests is achieved simply by barring the succession rights of posthumously conceived children.[251] This is the approach taken in Victoria and the United Kingdom.[252] Posthumously conceived children in these jurisdictions can be registered as the offspring of their dead father, but they have no rights to their father's estate. This makes determination of beneficiaries and estate distribution uncomplicated, and does not necessarily leave the child without means.[253] The deceased may have provided for the child by will or trust and, if not, the child will still be able to derive support from the mother, who will probably have inherited from her late partner in place of the child and have more wealth available to her.

Although its simplicity and certainty are undoubtable, this approach does not adequately protect the "overriding" interests of the child.[254] In the UK, the ECHR and UNCRC were part of the impetus to provide bare legal fatherhood, but the lack of succession rights still creates discord with these instruments, because it treats posthumously conceived children detrimentally. Even while the House of Lords endorsed the withholding of succession rights, there was recognition elsewhere that it would impose a restriction traditionally associated with illegitimacy,[255] which is generally considered to have been fully repealed in the UK in 1987.[256]

To have no intestate succession rights from their father was previously the burden of the illegitimate child who was *nullius filius*. It is true that children born of donor sperm have no succession rights from their biological fathers, but this specific exception rests on a legislated lack of paternity. Where, for the reasons argued in Part III of this chapter, the deceased is properly recognised as the legal father, it would be regressive to impose this burden on children conceived, through no fault of their own, after their legal father has died. This would seem to be at odds with the thrust of the SCA,[257] which led the world

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249 *Rutherford v Rutherford*, above n 153, at [25].

250 I am assuming that the posthumously conceived child is entitled to succeed as a "child" of the deceased for the purposes of this example.

251 Brashier, above n 88, at 192.

252 Status of Children Act, 1974 (Vic), s 37 and 40; and Human Fertilisation and Embryology Act 1990 (UK), s 28(5I). See discussion in the next chapter.

253 Brashier, above n 88, at 192.

254 *Woodward v Commissioner of Social Security*, above n 8, at 265. See discussion of the interests of the child above, in Part II(C) of this chapter.

255 Sheila McLean "Consent and the law: review of the current provisions in the Human Fertilisation and Embryology Act 1990 for the UK Health Ministers" (1997) 3 *Human Reproduction Update* 593 at para 9.29.

256 Family Law Reform Act 1987 (UK).

257 See the Status of Children Act 1969, particularly s 3.

in the disestablishment of illegitimacy;[258] and at odds with New Zealand's commitment to the UNCRC.[259]

The father is not likely to have provided for a posthumous child because posthumous conception often occurs after an untimely or unexpected death, and the deceased will not have had time to arrange a testamentary bequest or trust. Additionally, to the extent that bare legal fatherhood is justified by the mother of the child obtaining the benefit *in lieu* of the child, there will still be issues where the deceased left other children to previous partnerships, and the estate was bequeathed to them in an old will which the deceased failed to update. Unusual family structures are the bread and butter of succession law.

I accept that allowing posthumously conceived children to succeed from their father may deleteriously encourage surviving partners to conceive in order obtain greater support from the estate, but the persuasiveness of this argument is easily overestimated. In its approval role, ECART can ensure that the partner is conceiving for the 'right reasons".

C Weighing the Interests

Summarily, the succession entitlements of posthumously conceived children will prevent timely administration if the size of the residue is contingent on their existence. Even where administration can occur, it will not always be clear when the class of beneficiaries is to be closed and the distribution made. In a testamentary context, nuanced testamentary construction, and particularly the class closing rules, will help to wind up the estate relatively promptly. But this will not always be possible, and beneficiaries may be unable to receive their distribution for an extended period.

These are significant concerns, but I argue that the State's interest should, and frequently does, capitulate to the interests of others. For example, distribution of parts of the estate many years after death routinely occurs where the deceased has created a testamentary trust; or died intestate, and the estate is held on statutory trust for the children until they obtain 18 years of age.[260]

A statutory mechanism could be created in order to ensure that administration and distribution were held up for a controlled period of time, while simultaneously ensuring that property was available to posthumously conceived children. This will be explored in the next two chapters.

V Conclusions

There is a fair amount of controversy over the propriety of posthumous conception.[261] Concerns that the child will be brought up without one biological parent, and a key male role model, are frequently

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258 See Atherton, above n 6, at n 32.
259 UNCRC, above n 173, at art 2.1.
260 Administration Act 1969, s 78(1).
261 See for example Julie McCandless and Sally Sheldon "'No Father Required'? The Welfare Assessment in the Human Fertilisation and Embryology Act" (2010) 18 Fem Leg Stud 201; Zaffran, above n 218; and Chester, above n 10.

countered with the reality that children have been without fathers for time immemorial.[262] A father may die, or desert the mother, while the child is *en ventre sa mère*. A child may be conceived from donor sperm, or adopted, by a single mother. Whether this is socially desirable is moot for present purposes. Robbing children of status and succession should not be done to punish the mother for, or deter the mother from, a socially unacceptable conception.

The existence of a posthumously conceived child is not a private issue. The State arguably has as much responsibility for the conception as the mother. It has assumed legal responsibility for controlling the incidence of posthumous conception, and therefore allows the children to exist. It should assume some responsibility toward allowing them the same rights and status as a pre-mortem child.

I have argued that, as a matter of theory and policy, a deceased man should be recognised as the father of a posthumously conceived child. In making the case that succession rights should follow paternity, I have described the importance of the State's interest in timely administration of estates, but have argued that the interests of the child are overwhelmingly important. The rest of this dissertation will show that there are practicable ways to allow posthumously conceived children to succeed.

[262] This comprised a significant portion of the discussion in the recent case of *Re Cresswell*, above n 221, particularly at [197] – [200]. See also *YZ v Infertility Treatment Authority* [2005] VCAT 2655 at [48]; *Re Denman* [2004] QSC 70, [2004] 2 Qd R 595 at 597; and *Re Edwards* [2011] NSWSC 478, (2011) 81 NSWLR 198 at 143–144.

Chapter Three: The Approaches of Other Jurisdictions

Victoria and the United Kingdom provide the posthumously conceived child with what I have called "bare legal fatherhood".[263] I have argued that this is not sufficient to protect the interests of the child. This chapter will examine the approaches of selected jurisdictions which allow succession rights.

I South Australia

Australia has a significant history of posthumous conception,[264] however, only South Australia and Victoria have dealt specifically with the status of the resulting children.[265] The Acts of the other Australian jurisdictions operate analogously to the SCA, precluding paternity where the father has died before the conception.[266] Only South Australia places no restrictions on succession rights, but the ability to realise these rights is highly unclear.

South Australian provides for the status of posthumously conceived children thus:[267]

> (5) If a woman becomes pregnant in consequence of a fertilisation procedure using the semen of a man—
>
> (a) who has died; and
>
> (b) who, immediately before his death, was the woman's husband, or was living with the woman in a qualifying relationship; and
>
> (c) who had consented to the use of the semen for the purposes of the fertilisation procedure,
>
> the man—
>
> (d) will be conclusively presumed to have caused the pregnancy; and
>
> (e) will be taken to be the father of any child born as a result of the pregnancy.

This provision closely aligns with the theoretical and policy arguments presented in Chapter Two. No consent to paternity is necessary, and the man will be the father provided he consented to reproduction and was the mother's partner before death.

The South Australian Law Reform Institute are currently considering whether posthumously conceived children should be entitled to family protection,[268] but my own interpretation suggests that such a child can currently do so. South Australian family protection legislation allows claims by "a child of the deceased person",[269] and defines "child" as a person recognised as such by virtue of the Family

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263 Status of Children Act 1974 (Vic), ss 37–10; Human Fertilisation and Embryology Act 1990 (UK), s 28.

264 For some of the judicial consideration of the use of sperm posthumously, see: *Re Cresswell*, above n 221; *Re H, AE (No 3)* (2013) 118 SASR 259; *Vallance & Marco* [2012] FamCA 653; *Re Edwards*, above n 262; and *AB v Attorney-General of Victoria* [2005] VSC 180.

265 Family Relationships Act 1975 (SA), s 10C(5); and Status of Children Act 1974 (Vic), ss 37–40. The South Australian statute has had provision for posthumously conceived children since the Reproductive Technology (Clinical Practices) (Miscellaneous) Amendment Act 2009 (SA). Victoria has had provision since the Assisted Reproductive Treatment Act 2008 (Vic).

266 Parentage Act 2004 (ACT), s 11; Status of Children Act 1996 (NSW), s 14; Artificial Conception Act 1985 (WA), s 6; Status of Children Act 1979 (NT), s 5D; Status of Children Act 1978 (Qd) ss 17–19; and Status of Children Act 1974 (Tas), s 10C.

267 Family Relationships Act 1975 (SA), s 10C(5).

268 South Australian Law Reform Institute *Cutting the cake: South Australian rules of intestacy* (Issues Paper 7, December 2015) at [111].

269 Inheritance (Family Provision) Act 1972 (SA), s 6(c). The Act also allows claims by "a child of the child of the deceased person": s 6(h).

Relationships Act.[270] Case law seems to confirm that there is no need to interpret "child" where the Family Relationships Act settles the status of the child.[271] A claim must be brought within six months of the death, but there is provision for this to be extended at the discretion of the Court.[272]

It is even more unclear whether a posthumously conceived child would be able to benefit in an intestacy. The South Australian intestacy statute requires that the intestate be "survived by a child" for that child to inherit,[273] but in a testamentary construction context, this has been seen as "ordinarily" requiring that the child be living at the testator's death.[274] It remains to be seen whether the legal fiction applied in *Estate of K* can be used to deem the child as having been living at the testator's death once born alive.[275]

II United States

The US is a hotspot for posthumous conception, because decisions about the use of sperm are largely left to local ethics committees. Because of this, the US boasts a rich tapestry of judicial, academic, and statutory approaches to the succession rights of posthumously conceived children. Meaningful traversal of the US tapestry is an undertaking beyond the scope of this dissertation.[276] That being said, there are a few preliminary points deserving of acknowledgement.

Essentially every US case on posthumous succession rights has arisen in the context of social security.[277] In order to receive social security survivor's benefits (a form of social insurance), a child must be legally entitled to inherit from the deceased under his or her state's intestacy system.[278] Status and succession are usually matters of state rather than federal law, and approaches vary considerably from state to state. Despite the federal context of Social Security benefits, the US Supreme Court in *Asture v Capato* affirmed that the eligibility of the posthumously conceived child turns on the state's own intestacy law.[279] The issue of equal protection of posthumously conceived children was raised, but the Court avoided any significant constitutional review of these laws,[280] finding them justified in "using reasonable presumptions to minimize the administrative burden".[281]

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270 Inheritance (Family Provision) Act 1972 (SA), s 4.

271 See for example *Re Athanassios Sinodinos* [1994] SASC 5116, which dealt with an application by "grandchildren" not actually related to the deceased, but deemed to be grandchildren nonetheless by s 7 of the Family Relationships Act 1975 (SA).

272 Inheritance (Family Provision) Act 1972 (SA), s 8.

273 Administration and Probate Act 1919 (SA), ss 72G and 72I.

274 *Napper v Miller* [2003] NSWSC 376 at [8]. The court traced this "ordinary definition" to *Knight v Knight* (1912) 14 CLR 86. See also *Eng Khabbaz v Commissioner, Social Security Administration* 930 A 2d 1180 (NH 2007), where a posthumously conceived child was held to not be "surviving issue" under intestacy law in New Hampshire, notwithstanding that the father had consented to the child.

275 *Estate of K*, above n 102. The Uniform Succession Laws Project actually recommended requiring that the child be *in utero* at death in order to inherit, but South Australia have not accepted these recommendations: see NSWLRC *Uniform Succession Laws: Intestacy* (Rep 116, 2007), at Rec 25 and [7.21]–[7.32].

276 For a thorough account of the current legal landscape in the US, see Joshua Rubenstein "Planning for life after death: laws of succession *v* the new biology" [2017] 23 Trusts & Trustees 40.

277 See Lewis, above n 9; Andrew T Peebles "Challenges and Inconsistencies Facing the Posthumously Conceived Child" (2014) 79 Mo L Rev 497; and Rubenstein, above n 276.

278 Social Security Act 42 USC § 416(h)(2)(A).

279 *Astrue v Capato*, above n 9.

280 For an overview of the generalised reluctance to undertake this review, see Sabatello, above n 131.

281 *Astrue v Capato*, above n 9, at 557. This sort of test is called "rational basis review" or, sometimes, "Chevron deference" in the US.

Individual state statutes range from allowing inheritance rights only where the child has been included in the will,[282] through allowing succession within a time-limit,[283] to simply failing to differentiate between posthumously born and posthumously conceived children.[284] I will discuss four of these "time-limit" solutions below, beginning with the Uniform Probate Code ("**UPC**"),[285] which states may choose to adopt; before the similar approaches of California, Louisiana, and Iowa are considered.

A The Uniform Probate Code

As a result of amendments in 2008, the Uniform Probate Code ("**UPC**") allows a deceased man to be the legal father of a posthumously conceived child if it can be established that he intended to be treated as such.[286] It also treats the child as if it had been *in utero* at the time of the father's death; provided it is conceived no later than 36 months, or born no later than 45 months after the father's death.[287] This allows the child to benefit in an intestacy.[288] The explanatory comment notes that the 36-month time limit is designed to allow for time spent grieving, arriving at a decision, and attempting to become pregnant.[289] The 36-month limit also coincides with the time in which a claimant is allowed to recover improperly distributed property from a distributee.[290] Although 19 states have adopted some form of the UPC, only Colorado and North Dakota have enacted the relevant amendments so far.[291]

B California

California law provides that a child conceived after the death of its genetic father is deemed to have been born in the lifetime of the deceased "for the purposes of determining rights to property" if the deceased consented in writing to posthumous reproduction, and the child was *in utero* within two years of death.[292] Cleverly, the law provides that, if given adequate notice of the possibility of posthumous conception,[293] the administrator is barred from distributing certain estate property until two years have passed since the death.[294] Distribution of property can proceed only where entitlement to it is not effected by the birth of a posthumously conceived child.

C Louisiana and Iowa

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282 Fla. Stat. § 742.17(4).

283 States include: Louisiana, La Rev Stat Ann § 9:391.1; Iowa, Iowa Code § 633.220A; California, Cal Prob Code § 249.5; and Colorado and North Dakota, which have both adopted the more recent forms of the Uniform Probate Code. All of these approaches are traversed in this Chapter.

284 This is the case for intestacy purposes in Washington DC. See DC Code § 19-314.

285 National Conference of Commissioners on Uniform State Laws *Uniform Probate Code* 8 ULA 59 (Uniform Law Commission, Chicago, 2010) (UPC).

286 UPC (2010), § 2-120(f)(2)(C).

287 UPC (2010), § 2-120(k).

288 UPC (2010), § 2-104(a)(2).

289 UPC (2010) § 2-120 comment, 63–64.

290 UPC (2010) § 3-1006. Presumably this would allow a posthumous child to recover their share of an intestacy, even after final distribution.

291 Joshua Rubenstein, above n 276. The UPC has not been as successfully adopted as other Uniform Codes, such as the Uniform Commercial Code (1952), which has been adopted by all jurisdictions.

292 Cal Prob Code § 249.5. There are certain manner and form requirements. For example: the consent must be signed and dated, and a person must be designated who will control the use of the genetic material.

293 Cal Prob Code § 249.5(b). Actual knowledge will also suffice: § 249.6(a).

294 Cal Prob Code § 249.6.

In Louisiana, a successor generally has to exist at the death of the deceased,[295] but an exception is made for a genetically related child who is born to the surviving partner within three years of the death.[296] Such a child is deemed to have been alive at the time of death.

Iowa law treats a posthumously conceived child as born during the lifetime of the deceased for the purposes of an intestacy where the deceased authorised the spouse to use their genetic material in writing, and the child is born within two years of death.[297]

III Summary

South Australia have boldly amended their status legislation to provide for the posthumously conceived child, but the ensuing succession rights have not been specifically considered or protected. Courts would be forced to deal with entitlement and administrative problems on an *ad hoc* basis.

All the US approaches operate through the same mechanism: they deem the child to have been living at the date of the death: a statutory version of the legal fiction applied in *Estate of K*.[298] The approaches differ in a variety of ways,[299] but of greatest relevance is the time limit within which a child can be born and still acquire succession rights.

The UPC allows the longest period: conception within three years.[300] This is particularly solicitous given the identical limitation period for recovery of property improperly distributed from the estate, which ensures that a posthumously conceived child would be able to recover its share of the estate. Iowa provides the strictest period: birth within two years of death. The ideal balance will be discussed in the next chapter.

As a solution to the administrative problems presented by posthumously conceived children, the Californian approach is the most nuanced. Unlike the UPC, which requires the child to disturb distributions, California provides for an administrative bar on distributions which might affect a posthumous child, ensuring that the child be adequately provided for should it be born. I explore the application of this mechanism in the New Zealand administrative context in the next chapter.

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295 La Civ Code Ann Art 939.

296 La Rev Stat § 9:391.1.

297 Iowa Code § 633.220A.

298 *Estate of K*, above n 102.

299 For example, Iowa and Louisiana both necessitate that the spouse be the other parent, but California and the UPC allow the deceased to have left the control of the sperm with any specified person.

300 The UPC actually has provision for both conception and birth: § 2-120(k) provides an alternative limit of birth within 45 months. The comments acknowledge that sometimes determining time of birth is easier than determining the time at which the child was *in utero* – especially if people are not performing the procedure in a proper medical facility.

Chapter Four: Conceiving of a Solution

South Australian status legislation allows for a relationship of paternity between the deceased and the posthumously conceived child, without further consideration of succession rights. Significant theoretical problems will arise if the SCA is similarly amended.[301] This Chapter explains those problems, followed by the further amendments to intestacy rights, and administration which are necessary to solve them. Finally, some comments are made about the succession rights of posthumously conceived children in the specific contexts of family protection and testamentary construction.

I Recognising Paternity in Posthumously Conceived Children

It will be clear from the arguments of Chapter Two that I favour paternity recognition where the deceased was the partner of the mother before his death, and he had consented to posthumous conception to the extent required by ECART/ACART. To this end the South Australian provision will serve as a good template.[302] A new provision could be added to pt 2 of the SCA that applied notwithstanding the provisions that treat the deceased as a donor.[303]

The remainder of this chapter will explain that succession rights should be time-limited, but I contend that paternity itself should be recognisable at any time after the death. This will create no significant impact on the State's interests, and further those of the deceased and child.

A The Effects of Granting Paternity Alone

Amending the SCA alone will leave a number of "loose ends", as evinced by the lack of clarity in South Australia.

The child would be entitled to benefit from testamentary bequests and trusts which benefited "children", subject to construction.[304] However, unless class closing rules can apply, their entitlement will freeze distribution of the bequest for an uncertain period. Where the bequest is a legacy, not even administration can be completed without the obtainment of a Benjamin order until the size of the residue is ascertainable.

The child would not be able to benefit in an intestacy without further reform. Issue must be "living at the death of the intestate" to succeed,[305] and the statutory exception only includes children "conceived but not born at the death".[306] This does not accord with any of the fundamental interests, or the

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301 It seems to be generally appreciated that uncertainty is present in South Australia, and options are being considered to deal with the problems. See: South Australian Law Reform Institute *Cutting the cake: South Australian rules of intestacy* (Issues Paper 7, December 2015) at [111]–[112].

302 Reproduced in Chapter Three above.

303 Sections 18 and 22.

304 Status of Children Act 1969, s 7.

305 Administration Act 1969, s 78.

306 Administration Act 1969, s 2(1).

theoretical basis for intestacy, which presumes that the deceased would have intended to benefit their legal children.[307]

The child would be able to claim under s 3(1)(b) of the FPA as of right as "children of the deceased", but if the estate has been finally distributed, the court would not be able to grant an extension of time in which to apply for provision.[308]

Where a posthumously conceived child is born and was entitled to the estate, or entitled to claim provision under the FPA, finding property to trace into will often be difficult. Distributions can be disturbed only in limited circumstances,[309] and disruption may be denied where the recipients have, in good faith, altered their position in reliance on the distribution.[310] Recovery from the administrator personally is possible, but they are protected from personal liability where property was distributed at least six months after the grant of administration, and without notice of an intention to claim from the estate.[311]

II Proposed Reform

Clearly amending the SCA alone will not sufficiently protect the succession rights of the posthumously conceived child, and will occasionally lead to uncertain administrative and distributive delays. To provide realisable succession rights and provide for certainty in administration, I propound a statutory mechanism similar to that employed in California. Firstly however, the intestacy rules would need to be amended to allow a posthumously conceived child to benefit in an intestacy.

A Intestacy

The posthumously conceived child can be granted rights to benefit in an intestacy simply by extending the exception in the Administration Act that allows children *in utero* at death to take in an intestacy so that it includes posthumously conceived children.[312] This could be achieved by omitting the requirement that the child be conceived at death. The provision could be reworded as follows:[313]

> References to a child or issue living at the death of any person include a child or issue who is ~~conceived but~~ not born at the death but who is subsequently born alive.

B The Proposed Administrative Mechanism

Bare succession rights under a testamentary or trust instrument, the intestacy rules, and the FPA mean little if there is no estate property still available when they are later conceived. The simplest solution is

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307 See above n 144.
308 Family Protection Act 1955, s 9(1).
309 Administration Act 1969, s 49.
310 Administration Act 1969, s 51.
311 Administration Act 1969, s 47(4). For further detail see Patterson, above n 158, at [7.11] onwards.
312 Administration Act 1969, s 2(1).
313 Administration Act 1969, s 2(1), edited.

therefore to ensure that the parts of the estate to which a posthumously conceived child would be entitled when born are still available and undistributed when the child is eventually born.

Such a system requires certainty. The administrator needs to be certain when estate distribution should be "frozen". The mere fact that sperm or embryos are on ice and available for use should not preclude administration without a clear indication that they may be used. The administrator also needs to be certain about what parts of the estate need to be frozen, and what parts can be administered.

This approach borrows heavily from California,[314] but is adjusted for the New Zealand context. The principles are as follows:

When property needs to be frozen

The administrator should be allowed to ignore the possibility of posthumously conceived children unless they have actual knowledge or notice is given thereof. This protects the State's interest in certain determination of beneficiaries.

What property is frozen

If the administrator acquires knowledge or receives notice of the possibility of posthumous conception, the administrator would be required to hold certain estate property for the duration of a "lapse period". Class closing rules should not apply for its duration.

Property only needs to be frozen where posthumously conceived children are entitled to it, or affect the entitlement to it, once born. Importantly, this means that where the property is to be split across a class (say "children"), the whole of the property needs to be held, because one or more beneficiaries may be conceived posthumously, and the proportional entitlements of the class cannot be determined until the expiration of the lapse period. In an intestacy, two thirds of the residue would need to be held, because the number or existence of issue is unclear; but the partner could be distributed the other third, as this is not affected. A trust should be created to hold a legacy affected by posthumously conceived children, so that administration could otherwise proceed. If an FPA claim is made on behalf of posthumously conceived children before they are conceived (discussed below, Part III(A)), then this becomes property to which they are entitled and hence also held.

Distribution

At the expiration of the lapse period, the property can be distributed to the beneficiaries as they may be entitled, or, if no beneficiaries are entitled, the entitlement should be considered to lapse, and be distributed as residue where the entitlement was a legacy, or according to the intestacy rules otherwise.

314 Cal Prob Code § 249.5–8.

Two parameters which arise out of this mechanism deserve further examination: the notice system, and the duration of the lapse period.

C The Notice System

To avoid further complications of the already arcane rules around time limits in estate administration, I suggest that the notice system accord these *mutatis mutandis*:[315]

(1) There is no bar on distributing the estate early, but the administrator is personally liable for distributions made within six months of the death or grant of administration.[316] This period should be apt for providing notice of the possibility of posthumous conception, and a posthumously conceived child could recover from the administrator for early distributions.
(2) Once notice in writing is provided to the administrator, they should be liable for any distributions of the relevant estate property until the lapse period has expired and no posthumous child has been conceived.[317]
(4) Where notice is given after six months, the administrator should not be liable for any distributions made after six months but before the date of notice.[318]
(5) The surviving partner should be able to give notice at any time before the sooner of the final distribution or expiration of the lapse period, although giving notice within 6 months would ensure that estate property was available or recoverable from the administrator.

D The Lapse Period

1 Duration

Necessarily this mechanism will withhold the distributions of other beneficiaries where their entitlement is dependent on the existence of posthumously conceived children, and so the lapse period should not be too long. In contrast, the interests of the prospective mother require that the lapse period is not too short.[319] The UPC employs a three-year lapse period, which was designed to:[320]

> …allow a surviving spouse or partner a period of grieving, time to make up his or her mind about whether to go forward with assisted reproduction, and a reasonable allowance for unsuccessful attempts to achieve a pregnancy.

Allowing time for grieving will ensure that partners do not rush into decisions while "in the freshness of grieving", as Marshall CJ put it in *Woodward*.[321] Often fertility clinics will impose a stand-down period on conception for this same reason.[322] Achieving pregnancy usually involves multiple

315 Administration Act 1969, ss 46–50.
316 Section 47(4).
317 Similar to the distributing with notice in s 47(4).
318 Similar protection is created by s 47(4).
319 *Woodward v Commissioner of Social Security*, above n 8, at 268; Wood, above n 132, at 902.
320 UPC (2010) § 2-120(k), comments at 63–64.
321 *Woodward v Commissioner of Social Security*, above n 8, at 268.
322 Even in the case of Diane Blood, the Belgian fertility clinic imposed a nine-month delay before Diane was allowed to conceive. See Jeremy Laurance "Diane Blood tells of joy at dead husband's child" *The Independent* (online ed, London, 29 June 1998).

insemination attempts,[323] or multiple embryo implantations.[324] Ensuring that the lapse period is adequate will also further the fundamental interests of posthumously conceived children, because they are more likely to obtain estate property, and less likely to feel that they are a product of grief.

2 Extension

The court should have the discretion to extend the duration of the lapse period. This will be important where the partner wants to conceive multiple children, and it is important that their succession rights are equivalent;[325] or where the partner has not been able to conceive but is still actively attempting to do so. The court would be able to assess the impact on other beneficiaries, and grant extensions on a case-by-case basis.

3 Birth or conception?

Louisiana and Iowa allow a child to benefit where it is *born* before the end of the lapse period, but California requires that a child be *in utero*. The former has the advantage of being more certain,[326] but given that conception will almost always occur in a fertility clinic, there will usually be accurate records of the time of conception. A lapse period relative to birth may have the added disadvantage of encouraging hasty or dangerous caesarian sections or inducements to ensure succession rights are available.[327] Framing the lapse period relative to conception is therefore more appropriate.

4 Conclusions

If extensions are available, then the default lapse period need not be particularly long. Requiring that the child be *conceived* within 2 years of the death would seem a just balance of the interests at stake. This would realistically allow the partner at least a year to attempt conception after any stand-down period for grieving.

III Further Comments on Specific Succession Entitlements

A Family Protection

If the deceased left a will which left all of his estate to his partner and others, then no property would be held for the posthumously conceived child. Children living or conceived at death would normally use the FPA to claim provision in these scenarios, but the posthumously conceived child may be born after the estate is distributed. Provision should be made for an application on behalf of potential

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323 It takes an average of around 7 insemination attempts to achieve pregnancy, although this depends heavily on age. See Monica Shah "Modern Reproductive Technologies: Legal Issues concerning Cryopreservation and Posthumous Conception" (1996) 17 J Leg Med 547 at 549.

324 As with insemination, IVF success is age dependent. 44% of women under 35, but only 11% of women aged 40–44, have a baby as a result of one IVF cycle. See Georgina Chambers "Women now have clearer statistics on whether IVF is likely to work" *The Conversation* (online ed, Melbourne, 24 July 2017).

325 Diane Blood's sons, Liam and Joel, were born around four years apart.

326 The UPC provides for both conception and birth, on the basis that including the latter will cover the situation where the procedure was done outside of a medical facility, and accurate records do not exist. See UPC (2010) § 2-120(k) comment at 64. This is unlikely to be of huge concern in New Zealand, where artificial reproduction is more tightly controlled.

327 Other commentators have made this point. See Wood, above n 132, at n 210; and Chester, above n 10, at 996.

posthumously conceived children. A court could determine the entitlement of potential unconceived children to provision, and the administrator could then hold that entitlement for the lapse period as above. The application should be made within the limits already imposed within the FPA: 2 years,[328] but an extension of time can be granted by a court before final distribution.[329] The surviving partner would need to act within 6 months to ensure that the full estate is either still available, or recoverable from the administrator personally.

1 Moral duty

The concept of moral duty originating out of voluntary creation of need was introduced in Chapter Two in order to justify the paternity of the deceased father in posthumous conception contexts. A similar but distinct form of moral duty is heavily imbedded in judicial consideration of claims under the FPA. Provision is founded on the social desirability of enforcing this moral duty, rather than the intentions of the deceased.[330]

The FPA itself refers to the moral duty of the deceased to the claimant only in the context of claims by grandchildren,[331] but moral duty has been the touchstone for *all* family protection applications since 1910, when the duty was famously first expounded in *Allardice v Allardice*:[332]

> It is the duty of the court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a breach of moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children.

A breach of moral duty by the deceased is determined as at the time of death,[333] and is judged against the hypothetical deceased who is aware of all current circumstances and future possibilities to which they should reasonably attend.[334] Thus, subjective awareness of circumstances that give rise to a moral duty is not necessary. The moral duty is generally referred to as that of a "*wise* and just testator".[335]

If the deceased has consented to posthumous reproduction, then a wise man in his circumstances could probably anticipate a moral duty to provide for the possibility of a child. But there may be situations where the deceased's consent was sufficient for ECART to allow conception, but insufficient to create a moral duty at the time of death. This would be especially likely if presumed or inferred consent is sufficient to allow posthumous conception, but will depend on the circumstances. Perhaps instead the man had consented, but his partner had indicated that she would not use the sperm.

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328 The application is made on behalf of a person who is not of full age, and will come within s 9(2)(a) of the Family Protection Act 1955.
329 Family Protection Act 1955, s 9(1).
330 *Wood-Luxford v Wood*, above n 95, at [22].
331 Family Protection Act 1955, s 3(2).
332 *Allardice v Allardice* (1910) 29 NZLR 959 at 972.
333 *Little v Angus* [1981] 1 NZLR 126 at 127. See generally Patterson above n 158, at 37–40.
334 See for example: *Coates v National Trustees* (1956) 95 CLR 494 at 526–527; and *Re Miller* [2001] NZFLR 352 at [43].
335 *Little v Angus*, above n 333, at 127 (emphasis added).

This is acceptable. As long as a posthumously conceived child can apply for provision as a "child of the deceased",[336] then the court will be able to determine whether a moral duty had arisen.

B Construction of Testamentary Bequests

Entitlement to a testamentary or trust disposition will always be a matter of construction, but with full status, a posthumously conceived child will be included within a bequest to "children" by default under the SCA,[337] and this entitlement could be held for the lapse period.

However, there may be complications involved in construing bequests to children "born" or "living" or "surviving" at the time of death in favour of the child. Children who are *en ventre sa mère* at death but later born alive are entitled to benefit from these bequests only because of the "fictitious legal interpretation",[338] which I have called the *en ventre sa mère* construction at various points. In summarising the law relating to this construction, the Supreme Court in *Wood-Luxford v Wood* explained that it is available only where:[339]

> …the effect of such construction [is] "necessary for the benefit of the unborn child" by enabling the child to receive a benefit to which he or she would have been entitled if actually born at the relevant date.[340] The acknowledged extension of the natural meaning of the words [is] justified because the child was necessarily "within the reason and motive of the gift".[341]

A posthumously conceived child seeking to be included within a bequest would have no trouble in proving that the construction would enable them to receive a benefit they would have been entitled to if born at the death of the testator provided they are his legal child.[342] However, a posthumously conceived child may not always be within the reason and motive of the gift.

The motive requirement reflects the importance of testamentary intention in the construction of wills.[343] It would probably be satisfied on the facts of *Hart v Shalala*,[344] where Edward intended and desired a posthumously conceived child; but would be more difficult to satisfy on the facts of *Re Lee*,[345] where there is no evidence that Mr Lee anticipated a posthumously conceived child. We might presume that he would have wanted to benefit the child, but it seems unlikely that this would suffice for "reason and motive", which seems to require actual contemplation.

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336 Family Protection Act 1955, s 3(1)(b).
337 Status of Children Act 1969, s 7.
338 *Blasson v Blasson* (1864), above n 93, at 563.
339 *Wood-Luxford v Wood*, above n 95, at [17].
340 A limitation referred to in *Elliot v Joicey*, above n 94, by Lord Tomlin at 215, Lord Russell at 222 and Lord Macmillan at 241.
341 As explained by Leach V-C, in *Trower v Butts* (1823) 1 Sim & St 181 at 184, 57 ER 72 (Ch) at 74, and approved as representing English law by Lord Russell in *Elliot v Joicey*, above n 94, at 218.
342 Legal paternity is determinative of the relationship of father and child for the purposes of succession and the construction of wills. See Status of Children Act, s 7.
343 *Wood-Luxford v Wood*, above n 95, at [20]–[21]. For a general overview of intentionalism in construction, see Kerridge and Rivers, above n 110.
344 *Hart v Shalala*, above n 8.
345 *Re Lee*, above n 13.

The time at which the will was made will probably be crucial. Wills made before consent to reproduction will be more amenable to the construction. In *Napper v Miller*,[346] the court refused to construe a disposition to "the … children of my son … who shall survive me" as applying to twins conceived after the testatrix's death. The case turned on the fact that a lawyer had drafted the will, and so the "ordinary" construction of "survive me" was preferred. Nonetheless, the case is interesting because whilst the testatrix was aware of the possibility of future children, she had been informed of the possibility seven years before the will was drafted. There being no children born in this time, it is likely that the possibility was too diffuse at the time of testation to be within the reason and motive.

Again, it is acceptable that construction be left to the courtroom. Where there is no entitlement to a bequest, the child is still entitled to make an FPA claim as discussed above; however, this may be unsuccessful for similar reasons. It is hoped that ECART will take the realisable succession rights of the child into account when approving its conception.

IV Conclusions

Posthumously conceived children can be granted theoretical succession rights simply by recognising their status, but tangible and realisable succession rights require more complex mechanisms. I have propounded one which freezes parts of the estate for a defined but extendable period.

It will need to be considered whether such a system should apply only to the deceased father, or to other relatives whose legal relationship can be traced through the father. Because the susceptibility of the father's estate is theoretically based on his voluntary assumption of obligations to the child, it may not be theoretically appropriate to apply this scheme to other relatives who have not assumed any obligations. However extended discussion on this point is outside the scope of this dissertation.

346 *Napper v Miller*, above n 274.

Final Conclusions

I have argued that a posthumously conceived child should be entitled to a legal relationship with its deceased father, and the succession rights which naturally follow, and that there are good theoretical and policy grounds for this. Posthumously conceived children do present difficulties to winding up estates, but these are usually overemphasised, and do not justify treating the children like *nullius filius*.

If Ms Long is able to conceive Mr Lee's child, it would have no legal relationship with its father, because New Zealand law currently fails to differentiate between posthumously conceived children and donor offspring. The law should be changed, but carefully. Amending the SCA would be a good start, but a significantly more complex response is required if succession rights against the deceased are to be practically available to posthumously conceived children. I have propounded the principles of a statutory mechanism similar to the one employed in California.

I end with two pleas. Firstly, that potential mothers are encouraged to seek legal advice on the status and succession rights of their posthumously conceived child. Secondly, that the issues outlined in this dissertation be considered when posthumous conception is being regulated, approved, or carried out. The State has assumed some responsibility for controlling posthumous conception, and it should be prepared to ensure that the laws of status and succession can deal adequately with the children when they arise. Who knows how routine they may become.

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