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Notes

A Dead Man's Tale: Regulating the Right to Bequeath Sperm in California

by

LISA M. BURKDAL* 

Introduction

In keeping with his mythic life,1 William E. Kane died with an extraordinary flourish, a profoundly romantic—and arguably egotisti-

* J.D. Candidate, 1995; B.A. University of California, Los Angeles, 1984. I would like to dedicate this Note to my husband, Thomas—first and ever in my heart.

1. Who was William Everett Kane? That he was wealthy is not disputed, but sources differ on other details of his life. See, e.g., Sharon Churcher, The Love Legacy of Kane: Mistress of the Man Who Claimed He Inspired Jeffrey Archer’s Hit Novel “Kane and Abel” Battles to Have His Child—Two Years After His Death, MAIL ON SUNDAY (London), Sept. 19, 1993, at 25, available in LEXIS, Nexis, News Library, CURNWS File (portraying Kane as a “millionaire businessman,” “London merchant banker,” and “international financier”); Lover Sues for Dead Man’s Sperm, SACRAMENTO BEE, June 4, 1993, at B5 (citing lawyers who characterize Kane as a “brilliant but eccentric real estate entrepreneur”); Lauren Blau, Sperm Case Argued on Appeal: Tug of War Over Custody of Deceased’s Sperm Rages, L.A. DAILY J., June 4, 1993, at 2 (describing Kane as a “Malibu resident who was qualified to practice law but worked mostly as a financial consultant and strategist for corporations”).

Kane’s former wife, Sandra McMahan Irwin, an attorney, met him at Princeton University. Churcher, supra. Kane graduated Phi Beta Kappa from Princeton, attended Columbia University as a Fulbright scholar, and was an honors student at Yale Law School. Jeff Kramer, Progeny or Property?: Frozen Sperm Held in Limbo During Fight over Will, L.A. TIMES, Sept. 27, 1992, at B1, B3. Irwin remembered Kane as a dashing figure who cut “dazzling” business deals worth millions. Churcher, supra. She recalled frequent social occasions when they lived in London at which Kane and his friend, novelist Jeffrey Archer, would awe the other guests—including, at one such event, Margaret Thatcher—with lively discussions of politics and business transactions. Id. Kane himself claimed that he was the model for Jeffrey Archer’s character “Kane” in his novel Kane and Abel, the story of a ruthless, rich American businessman. Id.

But there may have been a dark side to Kane. He professed to leading a “double life,” serving the United States as an undercover intelligence agent in diplomatic and military strategy. Id. He spoke of his experiences in Laos during the Vietnam War, authored a book about civil conflict in South America, and claimed to have participated in the war against Iraq via a secured telephone line from his home. Kramer, supra. Apparently in connection with his alleged espionage activities, Kane left instructions in his will ordering
cal—gesture that would rally men’s rights activists and ultimately establish legal precedent in America: he bequeathed fifteen vials of his sperm, cryogenically preserved in a sperm bank, to his longtime companion, Deborah Ellen Hecht, for the purpose of conceiving his child after his death. Shortly before committing suicide, Kane wrote a letter to Hecht, expressing his love for her and his hope that she would choose to bear their child. He had even considered what name the child should have, directing that if it were a girl she should be named Wyatt Ellen Kane and, if a boy, Joshua Everett Kane. Kane also left a letter for his children—not only for his two adult children from his former marriage, but also for his “posthumous offspring.” Addressing his potential future child or children, he declared, “I have loved you in my dreams, even though I never got to see you born.” Kane

the destruction of any personal papers that could compromise the security of the United States. Last Will and Testament, dated Sept. 27, 1991, at 4 (copy on file with author). However, Kane’s reputation as a “teller of extraordinary tales,” a man “brilliant but deliberately enigmatic,” casts doubt as to whether he actually led a life of international intrigue. Pam Lambert & Stanley Young, Frozen Assets: A Millionaire’s Suicide Leaves His Lover and His Family Battling over His Estate—and His Sperm, PEOPLE, Feb. 22, 1993, at 75. “Told that he maintained a hot line to the White House, was friendly with Oliver North and had helped George Bush design a new world order, Kane’s friends and co-workers never knew where James Bond left off and Walter Mitty began.” David Margolick, Battle Royal at the Sperm Bank, S.F. CHRON., May 15, 1994, (This World), at 6. Irwin said that Kane spent a “lifetime spinning tall stories . . . [and at his death] he could no longer tell the difference between fact and fiction.” Churcher, supra.

Perhaps most revealing of Kane’s persona is a letter that he wrote shortly before his suicide, in which he called his life “an object of self-sculpture—a personal creation [of] which I am still proud. In truth, death for me is not the opposite of life; it is a form of life’s punctuation.” Hecht v. Superior Court (Kane), 20 Cal. Rptr. 2d 275, 277 (Ct. App. 1993), review denied, 1993 Cal. LEXIS 4768 (Cal. Sept. 2, 1993) (en banc).

2. See infra notes 23, 25-26 and accompanying text.
3. See infra note 22.
4. In October 1991, in preparation for taking his own life, Kane deposited 15 vials of his sperm at California Cryobank, Inc., a sperm bank located in Los Angeles, California. The account was governed by a “Specimen Storage Agreement,” signed by Kane on September 24, 1991, in which he authorized the sperm bank to release the sperm to Hecht or to Hecht’s physician, and which furthermore directed the sperm bank, in the event of his death, either to continue storing the sperm at the discretion of the executor of his estate or to release the sperm to the executor. In his will dated September 27, 1991, three days after he entered into the agreement with the sperm bank, Kane appointed Hecht as the executor of his estate and specifically bequeathed all of the frozen sperm to her. In a provision of his will called “Statement of Wishes,” Kane indicated that the sperm should be used by Hecht for impregnation, “should she so desire,” and expressed his wish that certain personal effects be preserved for their future child or children. Hecht, 20 Cal. Rptr. 2d at 276-77.

5. See Lambert & Young, supra note 1, at 76.
6. See Kramer, supra note 1.
7. Hecht, 20 Cal. Rptr. 2d at 277.
8. Id.
Kane's unusual bequest spawned a fierce legal battle over the ownership of the sperm between Hecht and Kane's children, William Everett Kane, Jr., and Katharine Elizabeth Kane, represented by their mother and Kane's former wife, attorney Sandra McMahan Irwin. Calling their father's desire for a posthumous baby "egotistic and irresponsible," the children urged the probate court to order the destruction of the sperm to prevent the birth of a fatherless child, the disruption of their existing family, and "additional emotional, psychological and financial stress." Moreover, they stated, they did "not wish to be troubled for the rest of their lives with worries about the fate of their half-sibling(s)." Hecht countered by arguing that the sperm rightfully belonged to her, either by virtue of Kane's having designated her to receive the sperm in his agreement with the sperm bank or through the specific bequest in his will, and that destruction of the sperm "would violate her rights to privacy and procreation under the federal and California Constitutions."

When the probate court found the children's arguments more persuasive and accordingly ordered the destruction of the sperm, 

9. Id. at 276. Kane killed himself in the penthouse suite of the Mirage Hotel in Las Vegas. Margolick, supra note 1. He left a handwritten note "informing the hotel's managers that his decision had nothing to do with the quality of their service." Id. at 7. Given that Kane was "a man who spent a lifetime embellishing his biography and playing mind games with those he loved," id., it seems fitting that he chose to die in a place called the "Mirage."

10. Kane's family and friends believe that he "would have thoroughly enjoyed the spectacle he ... unleashed. Bill Kane, they say, laughed all the way to the sperm bank." Margolick, supra note 1, at 7.

Kane's estate is estimated to have had a value of one million dollars at the time of his death. Maura Dolan, High Court Lets Stand Ruling Allowing Man to Will Sperm, L.A. Times, Sept. 3, 1993, at B3. In December 1991, Kane's children each filed separate will contests challenging the disposition of the estate, the bulk of which was left to Hecht. Hecht, 20 Cal. Rptr. 2d at 277. After the parties entered into a settlement agreement, a dispute arose as to whether the sperm was included in the estate and therefore subject to the settlement agreement (whereby Hecht would receive 20% of the sperm) or whether Kane had gifted the sperm to Hecht prior to his death pursuant to the terms of his agreement with the sperm bank. Id. at 277-79. The administrator of Kane's estate filed a petition with the probate court requesting instructions for the disposition of the sperm and a determination as to whether any child conceived from the sperm would be entitled to share in Kane's estate. Id. at 278. Four possible resolutions of the dispute were suggested to the court, including destruction of the sperm. Id. at 279.

11. Hecht, 20 Cal. Rptr. 2d at 279.

12. Id.

13. Id.

14. When asked for the legal foundation for its ruling, the court answered, "It really does not matter, does it? If I am right, I am right and if I am wrong, I am wrong." In addition, the court commented that "we are all agreed that we are forging new frontiers
Hecht appealed. The California Court of Appeal determined that the probate court had abused its discretion, holding:

[A]t the time of his death, [Kane] had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute "property" within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.

Furthermore, the appellate court declared that it was "aware of no statutes in California which contain a 'statement of public policy which reveals an interest that could justify infringing on gamete-providers' decisional authority.'" Kane's children petitioned the California Supreme Court for review of the appellate court's decision, but to no avail—the high court denied review, allowing the appellate court's ruling to stand.

Although the California judiciary determined that a man has the right to bequeath his sperm, the ruling did not resolve the issue of the ownership of the sperm in Hecht, and the case was remanded to the trial court for further proceedings. In March 1994, the trial court ruled that the sperm would be divided pursuant to the parties' settlement agreement, thus awarding Hecht three of the fifteen vials.

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because science has run ahead of the common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories.” Id. at n.3.

15. Id. at 291.
16. “'Property' means anything that may be the subject of ownership and includes both real and personal property and any interest therein.” CAL. PROB. CODE § 62 (West 1991).
17. Hecht, 20 Cal. Rptr. 2d at 283. Although an in-depth critique of the appellate court's decision is beyond the scope of this Note, it bears mentioning that the court distinguished the facts in Hecht from the facts in Moore v. Regents of Univ. of Cal., 793 P.2d 479 (Cal. 1990). Id. at 280-81. The court noted that in Moore the California Supreme Court recognized that the legislature enacted specialized laws to govern the disposition of human tissue in light of specific policy goals; thus, general property law did not apply to such tissue, and the plaintiff failed to state a claim under general property law for the conversion of his excised cells. Id. Pointing to the critical difference between the two cases, the appellate court noted that Moore did not expect to continue to possess his tissue once it had been removed from his body, whereas, in the instant case, Kane both intended and expected to continue to control his sperm even after it had been deposited with the sperm bank, as evidenced by his agreement with the sperm bank. Id. at n.4.
18. Id. at 289 (citing Davis v. Davis, 842 S.W.2d 588, 602 (Tenn. 1992)). Davis involved a dispute over the disposition of frozen embryos following the divorce of the embryos' progenitors. In reaching its decision, the Hecht court relied substantially on the analysis in Davis.

20. Hecht, 20 Cal. Rptr. 2d at 291.
Kane's children promptly appealed. As of this writing, it remains to be seen whether Hecht will ultimately obtain any of Kane's sperm.

Regardless of the outcome with respect to Kane's sperm, the Hecht case set a precedent in America that received a warm wel-

22. Henry Weinstein, Judges Rule Man Can Bequeath Sperm in Will, L.A. TIMES, June 19, 1993, at B1. Marvin L. Rudnick, Hecht's attorney, said of the Hecht decision: "This is the first time in history that an American court has ruled that sperm is property, that it can be willed and that a deceased person can father a child." Id. at B8.

Although the Hecht decision establishes legal precedent in the United States, it does not mark the first time that a woman has sought the sperm of her deceased mate. In 1977 Kim Casali, the "Love Is" cartoonist, gave birth to a boy, her third son by her husband, Roberto, who had died 16 months earlier of cancer. Lori B. Andrews, Brave New Baby, STUDENT LAW., Dec. 1983, at 25, 28; Paternity: Life After Death, ECONOMIST (Britain), July 16, 1977, at 23. Roberto had stored specimens of his sperm prior to he began chemotherapy treatment for cancer. See Andrews, supra. I am not aware that Casali experienced any difficulty in obtaining her husband's sperm after his death or that anyone opposed her pregnancy (other than that the Vatican castigated her after the novel circumstances of her son's birth became known). See Paternity: Life After Death, supra.

More controversial was Parpalaix v. CECOS, a 1984 French case cited by the Hecht court. Hecht, 20 Cal. Rptr. 2d at 287-88 (citing Judgment of Aug. 1, 1984 (Parpalaix v. CECOS), Trib. gr. inst., Gazette du Palais [G.P.], Sept. 15, 1984, at 11). Like Casali's husband, Corinne Parpalaix's husband, Alain, suffered from cancer; he deposited one specimen of sperm prior to commencing chemotherapy. E. Donald Shapiro & Benedene Sonnenblick, The Widow and the Sperm: The Law of Post-Mortem Insemination, 1 J.L. & Health 229, 229 (1986-87). Alain did not leave any instructions with the sperm bank as to the disposition of his sperm in the event of his death. Id. at 229-30. After his death, the sperm bank refused to release Alain's sperm to Corinne, just "as other centers had denied the requests of other widows." Id. at 230 (footnote omitted). Corinne and Alain's parents sued, basing their legal claim to the sperm on their status as Alain's "natural heirs" and also arguing passionately that Corinne had a "moral right" to "give life to this child, the fruit of a love that she goes on expressing with quiet determination. . . . her most sacred right." Id. at 230-31 (footnote omitted). The sperm bank resisted on the grounds that its duty was to the depositor, not to the depositor's next-of-kin; moreover, it viewed the sperm deposit as uninheritable in the same manner that a limb or other portion of the body is uninheritable, in the absence of the depositor's clear wishes to the contrary; and, finally, it raised the specter of "all sorts of abuses" should the sperm be released to others, including the possibility of lesbian couples bearing children through the use of donor sperm. Id. at 231. The French court, while acknowledging that the laws of inheritance and paternity would in effect bar a posthumously conceived child from inheriting through the father, ruled in favor of Corinne. Id. at 231-33. The court found that a human being has a fundamental right "to conceive or not to conceive," and thus the only question was whether Alain intended to conceive. Id. at 232 (footnote omitted). Because Corinne and Alain's parents were in the best position to know Alain's intent, their testimony about his desire for a child was persuasive. Id. at 232. Subsequently, Corinne was artificially inseminated with Alain's sperm, but she did not become pregnant. Id. at 233.

More recent cases have been called a "veritable mini-baby boom among the dead." Maggie Gallagher, About Sperm: The Ultimate Deadbeat Dads, NEWSDAY, Feb. 1, 1995, (Viewpoints), at A28. In December 1994, Anthony Baez died—perhaps by murder—while in police custody. At the behest of his widow, a physician removed sperm from the dead man's body so that the decedent "could, in the future, become a father." Id. A week later, a woman who had heard about the Baez case made the same request after her husband was
come from both men’s rights groups and several bioethics scholars. During the course of the litigation, men’s movement activists demanded that Kane’s last wishes be fulfilled. They joined Hecht in arguing that a man has the right to do what he pleases with his body—and his sperm. Another segment of society agreed. When the decision was announced, it was hailed by bioethics experts as “another significant step in the law of bioethics as courts move into unchartered territory where science has outpaced the law.”

Hecht is regarded as consistent with the general trend in the law of new reproductive technology of permitting gamete-providers to decide the fate of their reproductive cells.

Other responses to Hecht focused on the social ramifications of a man’s right to bequeath sperm, ranging from dire warnings of “a killed in an accident. Jeff Stryker, Conceiving Justice: From Which Dead Men and For Which Survivors Should Sperm Be Harvested?, Recorder (San Francisco), Mar. 31, 1995, (Commentary), at 6. Meanwhile, 14 inmates on San Quentin’s death row have sued for the right to preserve their sperm “for insemination with willing women,” and a Louisiana woman has begun a landmark suit seeking Social Security benefits for her daughter who, having been conceived after the father’s death from cancer, is regarded as “fatherless” under state law and therefore ineligible for survivor’s benefits. Ellen Goodman, The Law vs. New Fact of Life, Boston Globe, Jan. 26, 1995, (Op-Ed), at 13.

23. Churcher, supra note 1 (calling Hecht the “heroine of the new and growing men’s rights movement” and referring to the case as “the male equivalent of the abortion controversy in America”).
24. See infra notes 27-28 and accompanying text.
25. See Churcher, supra note 1.

I have long been perplexed by the aims and aspirations of the burgeoning “men’s movement” in America, while wishing it well in a general, woolly sort of way . . . . Deborah Hecht has become an icon among leading activists in the men’s movement. Her argument—and theirs—is that men have the right to do exactly what they like with their own bodies and sperm. Perhaps the sex war in America is drawing to some sort of surreal close. The frontliners on either side are fighting, it seems, for the same thing: the right to bring fatherless children into the world.

Id.
27. Weinstein, supra note 22, at B8.
28. Id.
29. Although the Hecht decision specifically addressed a man’s property interest in his sperm, it seems reasonable to assume that, should the question ever arise, a court would find that a woman has a like interest in her ova. Currently, it is almost impossible to successfully preserve human ova cryogenically. See Kathleen Doheny, A Priceless Possibility, L.A. Times, Mar. 19, 1995, at E6. The ova often suffer damage after freezing and fail to develop into a normal embryo. Christine A. Djalleta, A Twinkle in a Decedent’s Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology, 67 Temp. L. Rev., 335, 337 (1994).

Obviously, if a man wished to procreate by the cryogenically preserved egg of a deceased woman, he would face the burden of engaging the services of a surrogate mother. It
generation of sperm bank orphans" to the prospect of "pursuing immortality by saving gametes for anyone to use, even eons after one's own death." 

While such hypotheses are intriguing, this Note does not attempt to investigate the possible impact of posthumous conception on reproductive practices, the risks and benefits of parenthood after death, the emotional burdens that posthumous conception may impose on a child, or similar social issues.

Instead, this Note assumes that some men will want to exercise this unique property right and therefore attempts to introduce the precept of paternal responsibility into the new procreative context established by Hecht. If, as the court stated in Hecht, frozen sperm is to be regarded as "an interim category [between person and property] that entitles [it] to special respect because of [its] potential for human life," it is reasonable for the state to attach special responsibilities and consequences to a bequest or contractual conveyance of such

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30. Churcher, supra note 1.


32. For a discussion of such issues, see id.; Gallagher, supra note 22 (questioning whether society has "an obligation to stretch its institutions—from probate law to Social Security to medical insurance—to facilitate . . . the desire to procreate with the dead"); Goodman, supra note 22 (considering on the one hand whether society "should discourage the idea of building a future from the grave," but on the other hand recognizing that a posthumously conceived child can be a gift); Stryker, supra note 22 (urging that, now that "alternative insemination" includes the "macabre variation of harvesting sperm from the newly dead," it is time for societal debate and public regulation). For a discussion of the public policy arguments advanced by Kane's children, see Momjian, supra note 18.

33. The cryogenic preservation of sperm may be a reassuring safeguard for men whose work or health poses risk to their reproductive systems. See, e.g., Shapiro, supra note 31 (suggesting that freezing one's gametes may be attractive for persons engaged in hazardous occupations, such as soldiers); Shapiro & Sonnenblick, supra note 22, at 235 (describing how the option of storing sperm was offered to astronauts in 1961 so that they could still father children in the event that space travel damaged their reproductive abilities); Paternity: Life After Death, supra note 22 and Shapiro & Sonnenblick, supra note 22, at 229, 235 (relating how two terminally ill men, Roberto Casali and Alain Parpalaix, cryogenically preserved their sperm in the hope that their wives would bear their children after their deaths).

But the storing of sperm may have an adverse impact on some women. While having a loved one's sperm available for procreation may help to relieve a family's grief over a man's untimely death, one can easily envision the enormous pressure that may be brought to bear on his widow or longtime girlfriend to undergo artificial insemination, pregnancy, childbirth, and the burdens of parenthood for the sake of carrying on the deceased male's "family line"—a choice that may not be in the woman's best interests.

34. Hecht v. Superior Court (Kane), 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993) (citing Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992)). In Davis the court decided that embryos were not "persons" under Tennessee law, but neither were they "property"; instead, they fell into an "interim" category. Id. at 283 (citing Davis, 842 S.W.2d at 597).
property to protect the welfare and rights of the human life that may result. Since existing law governing parental obligations of support and a child’s inheritance rights currently extends its greatest protection to the child conceived by coitus when the parents’ intent to procreate is signified by marriage, the posthumously conceived child, also the product of an intent to procreate, should fall within this protection. However, in drafting new legislation for these special circumstances, a balance must be struck between ensuring that the posthumously conceived child is accorded the same rights as children conceived by coitus in a committed relationship and the need for efficiency in settling the affairs of a deceased.

This Note shows how existing California law excludes the posthumously conceived child and proposes guidelines for new legislation governing these special circumstances. Part I of this Note examines how children born after their fathers’ deaths are affected differently by laws governing support and inheritance depending upon whether they were conceived posthumously or by coitus. To alleviate the disadvantages suffered by the posthumously conceived child, Part II offers a justification grounded in theories of intent-based parenthood for restricting a man’s power over the testamentary disposition of his property and circumscribing the rights of his heirs under inheritance law when he chooses to bequeath or contractually convey his sperm for procreation after his death. Part III reviews other states’ legislation affecting the paternity or inheritance rights of the posthumously conceived child and concludes that these laws continue to adhere to rules based on an outdated notion of reproduction. Finally, Part IV proposes guidelines for new legislation, attempting to provide for the posthumously conceived child without impacting the established legislative scheme of property devolution beyond tolerable limits.

I. The Treatment of the Posthumous Child Under Existing California Law

Until relatively recently in the history of humanity, reproduction could occur by only one means: coitus. Legends and stories about conception by other means notwithstanding, this basic rule of human biology served as a solid foundation in the development of the law. It required that a man engage in sexual intercourse during his lifetime in order to become a father. Once a man died, his opportunity to become a parent died with him. Thus, the date of a man’s death natu-

35. See generally infra Part I.
36. See Shapiro & Sonnenblick, supra note 22, at 229 n.3 (noting that ancient Jewish law recognized that it was possible for a woman to conceive “while bathing in water into which a man had discharged semen,” or by lying on sheets upon which a man had left semen).
rally became a cutoff date: jurists never imagined that a person could be conceived after that date, much less that such a person might demand a child's rights against a man's estate.

Subpart A of Part I explains the importance of paternity as the basis for a child's access to the benefits that accrue from the father-child relationship and illustrates the obstacles encountered by the posthumously conceived child in establishing paternity. Subpart B describes the various sources of child support available from a man's estate and discusses how the posthumously conceived child is precluded from access to these sources. Subpart C addresses the problems faced by the posthumously conceived child in attempting to claim a share of the father's estate, either as an intestate heir or under the father's will. The development of modern methods of reproduction has fast outpaced the law, leaving a wide gap. Until the law catches up, the posthumously conceived child will be denied benefits to which she should be entitled.

A. The Importance of Establishing Paternity

The California Legislature recognizes the importance of establishing paternity for every child. In its statement of purpose for a program designed to establish a conclusive presumption of paternity through a voluntary declaration signed by the father at the time of a child's birth, the legislature declared:

(a) There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development.

(b) A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine and establish paternity and is in the public interest.37

Proof of paternity is essential before a child can access the rights and benefits that flow from the father-child relationship. As the law now stands, the methods for proving paternity for a child born after

37. CAL. FAM. CODE § 7570 (West 1994).
the father’s death are most favorable for the child conceived by coitus by a couple who were married or attempted to marry; harshly restrictive for the child conceived by coitus and whose parents made no effort to marry; and unattainable for the posthumously conceived child.

The child conceived by coitus and born after her father’s death to parents whose commitment to one another was evidenced by marriage or an attempt to marry is accorded a statutory presumption of paternity. Under these circumstances, if the child is born within 300 days (the standard nine months of human gestation plus allowance for late delivery) after the man’s death, the man is presumed to be the child’s natural father, and the child enjoys all the benefits and rights stemming from the father-child relationship.

In contrast, the child conceived by coitus and born after her father’s death to parents who were not married and made no attempt to marry must file an action to establish paternity pursuant to Family Code section 7630(c), which is available to a child who has no presumed father. But, even if successful, a paternity action under section 7630(c) secures limited economic benefits to the child. For example, it will not result in the establishment of the father-child relationship for purposes of intestate succession unless the court order is

38. Family Code sections 7540 and 7611 provide in pertinent part:

7540. [T]he child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

7611. A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) of Part 2 or in any of the following subdivisions: (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of the cohabitation.

CAL. FAM. CODE §§ 7540, 7611(a)-(b) (West 1994).

While it is technically possible for a woman to whom a man has bequeathed or contractually conveyed his sperm to have herself artificially inseminated immediately after his death and bear a child within the 300-day period, it seems unlikely that she would meet the deadline, given that she may be uninformed about the importance of the timing, preoccupied with grief and the affairs of her deceased mate, or simply unable to conceive immediately. On the other hand, if a woman were to become pregnant shortly after the man’s death, this rigid deadline may encourage some women to induce early labor so as to give birth within the 300-day period and secure for her child the economic benefits that flow from paternity.

39. CAL. FAM. CODE § 7630(c) (West 1994).
entered during the father’s lifetime. When the child is born after the father’s death, this requirement demands that a paternity action be filed and resolved within the gestation period and before the father’s death, an unlikely occurrence given the sluggishness of the court system. However, even if a successful Family Code section 7630(c) action fails to procure a child’s inheritance rights because the order was entered after the father’s death, it will nonetheless permit the child to petition to receive a family allowance during the administration of the decedent’s estate. Unfortunately, by the time the child has been born and paternity established, the estate may no longer be open. These rigid timing requirements make securing benefits for the child conceived by coitus and born after the father’s death much more difficult when the parents never attempted to marry. The legislature justifies these restrictions on the grounds that problems of proof arise after a father passes away and dubious paternity claims may interfere with the orderly distribution of a decedent’s estate.

The posthumously conceived child is precluded from proving that her father was the man who bequeathed or contractually conveyed his sperm to the child’s mother. Paragraph (b) of Family Code section 7631 flatly denies a means of establishing paternity under these circumstances, stating that “[t]he donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman

40. In order for a Family Code § 7630(c) action to establish the father-child relationship for purposes of a child’s rights under intestacy law, either a court order determining paternity must have been entered during the father’s lifetime or clear and convincing evidence must show that the father openly held out the child as his own. Cal. Prob. Code § 6453(b)(1)-(2) (West Supp. 1995). Obviously, the latter requirement cannot be met if the child is born after her father’s death.

Former Probate Code § 6408 was recently replaced by §§ 6450-6455. Paragraphs (1) and (2) of § 6453(b) continue the substance of § 6408(f), with one intriguing exception: the addition of paragraph (3). Under paragraph (3), the parent-child relationship may be established pursuant to a Family Code § 7630(c) action when “[i]t was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.” Paragraph (3) was not included in the recommended legislative changes proposed by the California Law Revision Commission. 23 Cal. L. Revision Comm’n Rep. 991, 1005 (1993). Thus, we are left without the benefit of the Commission’s guidance as to the purpose of this addition. It remains to be seen whether the child conceived by coitus and born after her father’s death to parents who neither married nor attempted to marry may establish paternity under paragraph (3) for purposes of intestate succession.

41. See Cal. Fam. Code § 7633 (West 1994) (permitting a paternity action to be filed prior to the child’s birth).

42. Cal. Prob. Code § 6540(a)(2) (West 1991). A minor child is entitled to a family allowance during the administration of a deceased parent’s estate regardless of whether the child is born of a marital relationship or out of wedlock. Estate of Woodward, 40 Cal. Rptr. 781, 784 (Ct. App. 1964). “[T]he right to a family allowance does not rest upon, or equate with, the right of inheritance.” Id. at 782 (citing Estate of Myers, 1 P.2d 1013, 1015 (Cal. Dist. Ct. App. 1931)).

43. See infra note 56 and accompanying text.
other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.” This statute prevents a finding of paternity even if the woman was the donor’s wife at the time of the donor’s death; since marriage is deemed to have terminated upon the death of either spouse, at the time the posthumous artificial insemination occurred her status would have changed from a wife to “a woman other than the donor’s wife.” It should be noted that this provision was intended to provide men with “a statutory vehicle for donating semen . . . without fear of liability for child support”; thus, its drafters did not contemplate circumstances such as those arising in Hecht, in which the sperm donor intended to procreate and be recognized as the resulting child’s father.

It appears that the only way to circumvent the preclusion of donor paternity under Family Code section 7613(b) is by insemination without the aid of a physician. In Jhordan C. v. Mary K., a man provided semen to an unmarried woman so that she could inseminate herself in the privacy of her home. She intended to raise the child with a close woman friend. After the child was born, the donor was able to establish that he was the child’s father, despite the woman’s protests. The court ruled that because the woman had undertaken to inseminate herself, rather than seeking the aid of a physician, the statute (now Family Code section 7613(b)) did not protect her child from the donor’s paternity claims. However, the use of frozen sperm without the expertise of a physician would render it unlikely that insemination would result in conception. Whereas in Jhordan the donor produced the semen at the woman’s home and the woman used it for insemination immediately thereafter, self-insemination would be much more difficult to achieve when the sperm has been cryogenically preserved and must be thawed, rehydrated, and cleansed prior to insertion. Nonetheless, if self-insemination were successful, the woman could bring an action to establish paternity under Family Code section 7630(c) and realize the same limited family allowance benefits available to the child conceived by coitus and born after the father’s death to a couple who made no attempt to marry. (For

44. CAL. FAM. CODE § 7613(b) (West 1994).
45. See, e.g., CAL. FAM. CODE § 7611 (a)-(b), cited supra note 38 (acknowledging that marriage is terminated by death).
47. 224 Cal. Rptr. 530 (Ct. App. 1986).
48. Id. at 531.
49. Id. at 532.
50. See Emily McAllister, Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance, 29 REAL PROP., PROB. & TR. J., 55, 63 (1994).
51. CAL. FAM. CODE § 7630(c) (West 1994).
52. See supra note 42 and accompanying text.
purposes of the remainder of this Note, it is assumed that self-insemination of cryogenically preserved sperm is not a viable option.)

Obviously, neither the posthumous child conceived by coitus by a couple who never attempted to marry nor the posthumously conceived child derive any benefit from statutory presumptions of paternity that flow from a man’s conduct after a child’s birth.\(^{53}\)

The harsh effects that may result under California law for failing to determine paternity during a man’s lifetime when a statutory presumption is unavailable seem perplexing in light of the advent of DNA testing.\(^{54}\) Despite the legislature’s recognition of a compelling state interest in establishing paternity for every child,\(^{55}\) it has repeatedly rejected more permissive means of proof such as DNA testing, insisting that the current restrictive rules are necessary to provide a "just and orderly distribution of property at death" and to "discourage dubious paternity claims made after a father’s death for the sole purpose of inheritance."\(^{56}\) One California court, while observing that "perhaps only the proverbial ostrich with its head in the sand would dispute the fact remarkable progress has been made in these areas in recent years,"\(^{57}\) nevertheless declined to hold that the limitations upon the means of proving paternity after a father’s death violated the

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53. Family Code section 7611 provides that a man is presumed to be the natural father of a child if:

(c) After the child’s birth, he and the child’s natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: (1) With his consent, he is named as the child’s father on the child’s birth certificate; (2) He is obligated to support the child under a written voluntary promise or by court order.

(d) He receives the child into his home and openly holds out the child as his natural child.

CAL. FAM. CODE § 7611 (c)-(d) (West 1994). The program providing for the establishment of paternity by voluntary declaration also requires particular conduct by the father after the child’s birth, specifically, the execution of a declaration. CAL. FAM. CODE §§ 7570-7577 (West 1994).

54. As an Ohio court noted:

[The bottom line to denying an illegitimate child equal inheritance rights is that there is a substantial problem of proof of paternity, especially after the alleged father is dead. Today, however, we are entering a new era. Science has developed a means to irrefutably prove the identity of an illegitimate child’s father. No longer are we dependent upon fallible testimony, nor are we concerned that the decedent cannot be present to defend himself. The accuracy and infallibility of the DNA test are nothing short of remarkable. We live in a modern and scientific society, and the law must keep pace with these developments.]


55. See supra note 37 and accompanying text.

56. Estate of Sanders, 3 Cal. Rptr. 2d 536, 544 (Ct. App. 1992) (footnote omitted). Since 1983, the legislature has repeatedly reaffirmed its position on this issue. Id.

57. Id.
constitutional requirement of equal protection. The court cited a United States Supreme Court decision in which a similar but even more restrictive New York statute was sustained in the face of an equal protection challenge. In that case, the United States Supreme Court concluded that the restrictions were substantially related to the state interest of providing an "orderly disposition of a decedent's property in cases involving paternity claims, which present difficult problems of proof when the father is no longer alive."

The California court recommended that arguments for modernizing the methods of establishing paternity in light of scientific advances be addressed to the legislature. In view of the legislature's refusal to reconsider its proof of paternity rules in the past, however, such arguments likely would be to no avail. The legislature's preferred approach to a postmortem paternity claim has been to award a presumption of paternity to children conceived by coitus by a couple whose intent to procreate is evidenced by marriage or an attempt to marry and to force children conceived by coitus by a couple who never attempted to marry to procure limited rights through litigation.

As the circumstances of the posthumously conceived child most closely resemble that of a child born from a committed relationship, new legislation should be drafted to allow a paternity presumption in such child's favor and to create an exception from the preclusion of paternity under Family Code section 7613, which was never meant to apply in situations exemplified by Hecht.

58. Id. at 544-45.
59. Id. at 545 (citing Lalli v. Lalli, 439 U.S. 259 (1978)).
60. Id. In Lalli the Supreme Court noted:
We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased fathers without serious disruption of the administration of estates and that, as applied to such individuals, [the New York statute] appears to operate unfairly. But few statutory classifications are entirely free from the criticism that they sometimes produce inequitable results. Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.

Sanders, 3 Cal. Rptr. 2d at 545 n.20 (citing Lalli, 439 U.S. at 272-73).
61. Sanders, 3 Cal. Rptr. 2d at 545.
62. See supra note 56 and accompanying text.
63. See supra note 38 and accompanying text.
64. See supra note 39 and accompanying text.
B. Parent’s Duty to Support Minor Child

In California, each parent has an equal responsibility to support a minor child in the manner suitable to the child’s circumstances.65 Generally, this duty continues until the child attains the age of nineteen, marries, or completes the twelfth grade of high school, whichever occurs first.66 Parents owe the duty of support to a minor child irrespective of whether the child was born within a marital relationship or out of wedlock.67

California follows the common-law rule that terminates a parent’s liability for the support of a minor child upon the parent’s death.68 However, there are four exceptions to this rule: a family allowance is provided for the minor child’s support during the administration of the deceased parent’s estate;69 an obligation of support fixed by a divorce decree survives the deceased parent’s death and is chargeable against the estate;70 a “pauper’s provision” permits county or state authorities to claim assets from the deceased parent’s estate if upon the parent’s death the minor child will be dependent upon the state for support or confined in a state institution at the expense of the state;71 and a written promise to support a child, growing out of a

65. CAL. FAM. CODE § 3900 (West 1994).
66. Family Code § 3901(a) states: “The duty of support imposed by Section 3900 continues as to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting, until the time the child completes the 12th grade or attains the age of 19 years, whichever occurs first.” CAL. FAM. CODE § 3901(a) (West 1994).
67. CAL. FAM. CODE § 3900 (West 1994).
69. CAL. PROB. CODE § 6540 (West 1991).
70. Newman v. Burwell, 15 P.2d 511 (Cal. 1932). Commentators have noted the strange result under California law that the child of divorced parents is entitled to continued support after her parent’s death as fixed by the divorce decree, but continued support is denied to the child of a unified family. Jack Leavitt, Scope and Effectiveness of No Contest Clauses in Last Wills and Testaments, 15 HASTINGS L.J. 45, 89 (1963); Kathryn Gehrels, Liability of Estate of Divorced Father for Support of Minor Child, 22 CAL. L. REV. 79, 85 (1933-34) (calling this result “ludicrous” in that it makes it more “advantageous to be a child whose family life has been sufficiently upset as to necessitate court interference”). One possible rationale for this rule is that it serves to guard against the risk that a divorced parent may disinherit a child from a former marriage. Gehrels, supra at 84. Yet, a child of a unified family who is denied continued support may also be disinherited.
71. Family Code § 3952 states:

If a parent chargeable with the support of a child dies leaving the child chargeable to the county or leaving the child confined in a state institution to be cared for in whole or in part at the expense of the state, and the parent leaves an estate sufficient for the child’s support, the supervisors of the county or the director of the state department having jurisdiction over the institution may claim provision for the child’s support from the parent’s estate, and for this purpose has the same remedies as a creditor against the estate of the parent and may obtain reimburse-
presumed or alleged father-child relationship, will be enforced according to its terms. As applied to the child born after the father's death, access to these sources of support varies depending on the child's ability to establish paternity, the existence of an enforceable obligation of postmortem support, and available financial resources.

The family allowance is viewed as a temporary extension of a parent's lifetime obligation to support a minor child. Sums needed for living expenses are paid from the decedent's estate to support the child during the period of the estate's administration. The judge has the discretion to make the payments retroactive, but not earlier than the date of death. Because a lifetime support obligation includes all of the parent's children, whether born in or out of wedlock, the family allowance, as an extension of that all-inclusive obligation, is available to any child who can establish paternity prior to the close of the estate. The child born after her father's death who enjoys the benefit of a statutory presumption of paternity because her parents were married or had attempted to marry is eligible to petition for a family allowance immediately upon birth. In contrast, the child born after the father's death whose parents never attempted to marry must first prove paternity. If the estate is still open after such a child has been born and a court order of paternity entered, the child may then petition for a family allowance. No family allowance is available to the posthumously conceived child, however, because the law does not give her the means of establishing paternity.

The second source of postmortem support, an obligation fixed by a divorce decree that survives the obligor's death, has limited application for the child born after the father's death. This source of support is available only to a child whose parents had been married, when sexual intercourse and conception occurred in time for a support pro-

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72. Family Code § 7614(a) states: "A promise in writing to furnish support for a child, growing out of a presumed or alleged father and child relationship, does not require consideration and . . . is enforceable according to its terms." CAL. FAM. CODE § 7614(a) (West 1994).


74. According to Black's Law Dictionary, the administration of a decedent's estate usually involves: "(1) the collection of the decedent's assets; (2) payment of debts and claims against the estate; (3) payment of estate taxes; [and] (4) distribution of the remainder of the estate among those entitled thereto." BLACK'S LAW DICTIONARY 44 (6th ed. 1990). This process may take several months or, for large estates or estates involving complicated issues such as a will contest or the sale of a business, even years.

75. CAL. PROB. CODE § 6542 (West 1991).
vision for the unborn child to be included in the divorce decree, and when the father then died prior to the child’s birth—no doubt a rare sequence of events. Obviously, no such source of support would be available to the child conceived by coitus whose parents had never attempted to marry, because without marriage there could be no divorce decree. And, again, the posthumously conceived child is excluded at the outset because of the inability to prove the father-child relationship.

Like the family allowance, the “pauper’s provision” applies to any minor child for whom paternity can be established, providing it appears that the child will be indigent. However, as with the requirements for obtaining a family allowance, the claim made by the county or state authorities must meet the filing deadlines imposed under the Probate Code. When a child is in gestation at the time of her father’s death and it appears that after her birth the child will be indigent or placed in a state institution, a claim likely could be made within the time allowed. But the delay caused by the necessity of establishing paternity for a child whose parents never attempted to marry may prevent the timely filing of a claim. Again, the posthumously conceived child is excluded from the benefits of the “pauper’s provision” for lack of the means to establish the father-child relationship.

Finally, the postmortem source of child support that may apply to any child born after the father’s death: a written promise to support a child, growing out of a presumed or alleged father-child relationship, which by its terms survives the promisor’s death. At first blush, this provision appears to offer a solution for the child for whom the other support options are difficult or impossible to obtain. There is no need to prove paternity, since the father-child relationship may be merely “alleged”; since the promise was signed during the father’s lifetime, there are no deadlines or filing requirements to meet, making the promise an enforceable obligation against the father’s estate from the moment of his death; and, in the case of a posthumously conceived child, the father can simply include a condition that DNA testing confirm his paternity. However, two major problems arise under this method. First, obtaining the father’s signature on such a document may be difficult. Some men are simply uninterested in providing for children that result from an uncommitted relationship. Second, without complex restrictions, a blanket promise to support posthu-

76. See supra note 71.
78. See supra note 72.
79. “[T]he vast majority of unwed fathers have been unknown, unavailable, or simply uninterested.” Marjorie Maguire Shultz, Reproductive Technology and Intent-Based
mously conceived children could seriously disrupt the orderly distribution of a decedent’s estate. One or more of such children could be born many years after the decedent’s death, and the estate would have to be held open during that time until all possible beneficiaries could be ascertained. It is unlikely that the state, given its strong interest in the efficient administration of estates, would tolerate such a situation. Hence, a written promise to support a posthumously conceived child, to be enforceable, likely would require the assistance of an attorney, a costly prospect that a man facing his death (e.g., in anticipation of joining a battlefield in wartime or suffering from a terminal illness) may neglect to pursue. Of the four sources of support, an effective, enforceable written promise may be the most difficult to procure.

In most cases, child support, other than a temporary family allowance permitted when paternity is established and filing deadlines are met, is not legally attainable for the child born after the father’s death. Instead, the child’s mother must bear the entire burden of support. Sometimes this burden is eased by a testamentary disposition in the mother’s favor, the benefits of a life insurance policy, or, if she is a widow, an intestate share of the estate. But, in the absence of a legal obligation that survives his death, the decision whether to provide for a child born after a man’s death is left to the man’s discretion. While this Note is concerned primarily with the welfare of the posthumously conceived child, the curious state of the law raises the larger question of why a parent’s powers of testamentary disposition should not be subordinated to the duty to care for a minor child that he has brought into the world. In *Estate of Smith*, the court remarked, “The neces-

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“The non-payment of child support by fathers provides another index of fathers’ apparent willingness and ability to detach from their children and their children’s needs.” Shultz, *supra* at 307 n.23 (citations omitted).

80. See *supra* note 56 and accompanying text.

81. The California Legislature has acknowledged the importance of child support and has initiated a program for the voluntary establishment of paternity in part to make it easier to ensure that a father meets his legal responsibility to care for his children. See *supra* note 37 and accompanying text.

However, there remains the problem of support after a man’s death. Hecht may have anticipated this problem. Kane’s children alleged that Hecht knew of Kane’s desire to end his life and that “Hecht convinced [Kane] to allow her to have his child after his death and to leave her a substantial amount of his property to raise and care for this child.” Hecht v. Superior Court (Kane), 20 Cal. Rptr. 2d 275, 279 n.2 (Ct. App. 1993).

82. At least one commentator has advocated that the common-law doctrine holding that a parent’s support obligation terminates at death should be changed to conform to “modern” thought, *i.e.*, that the support obligation should survive the parent’s death and should be enforceable against the estate. See Gehrels, *supra* note 70, at 86 (footnote omitted).
sity for the support of the minor is the same, whether the father be alive or dead . . . . Surely no obligation can exceed in importance that which the father owes to his offspring."83

C. Child’s Inheritance Rights

The California Legislature has the absolute power to control the inheritance rights of its citizens, under both testamentary and intestate schemes.84 This plenary power includes the authority to determine whom a testator may designate to receive the testator’s property after death.85 Whether inheritance statutes agree with notions of natural right and justice is immaterial—the whole matter falls within legislative discretion.86 One of the legislature’s primary goals in regulating the transfer of property upon death is to promote the efficient settling of a decedent’s estate.87

(1) Posthumous Child’s Rights Under Intestacy Law

If a person dies without a will, or if the will does not effectively dispose of a portion of the estate, the estate or the affected portion will be distributed to the decedent’s heirs according to the law of intestate succession.88 The persons eligible to inherit property as a decedent’s heirs are determined by statute.89

The posthumously conceived child90 is excluded from heirship by operation of Probate Code section 6407.91 This section permits a relative of the decedent who is born after the decedent’s death to take by intestate succession only if the relative was conceived before the decedent’s death. Thus, the date of death serves as a convenient cutoff date.92

However, even if a child is conceived before her father’s death and born afterwards, she must still establish the parent-child relationship in accordance with Probate Code section 6453 before she will be

83. Id. at 85 (citing Estate of Smith, 254 P. 567, 569 (Cal. 1927)).
84. Hecht, 20 Cal. Rptr. 2d at 280 (citing Harkness v. Harkness, 23 Cal. Rptr. 175, 179 (Dist. Ct. App. 1962)).
86. See Hecht, 20 Cal. Rptr. 2d at 280 (citing Harkness, 23 Cal. Rptr. at 179).
87. See supra note 56 and accompanying text.
89. Id.
90. It is assumed that if the decedent died without a will, he conveyed his sperm pursuant to a contract with the sperm bank.
91. “Relatives of the decedent conceived before the decedent’s death but born thereafter inherit as if they had been born in the lifetime of the decedent.” CAL. PROB. CODE §6407 (West 1991)
92. The Hecht court acknowledged that, in view of this statute, it was unlikely that Kane’s estate would be subject to claims by his posthumous offspring. Hecht v. Superior Court (Kane), 20 Cal. Rptr. 2d 275, 290 (Ct. App. 1993).
considered an heir. If such a child was conceived by a couple who were married or attempted to marry, she has the benefit of a presumption of paternity, and thus qualifies as her father's intestate heir.

The requirements are more stringent under section 6453 for a posthumous child conceived by a couple who never attempted to marry. Such a child must file an action to establish paternity pursuant to Family Code section 7630(c) and must meet an additional requirement imposed under the intestate succession statute: the court order declaring paternity must be entered during the father's lifetime. When the child is born after the father's death, this requirement demands that a paternity action be filed and resolved within the gestation period and prior to the father's death, thus imposing great time pressure. The legislature has defended these restrictions as necessary to discourage dubious paternity claims and to promote the efficient settling of a decedent's estate.

In light of the foregoing, it is likely that of children born after their fathers' deaths, only the child conceived by coitus by a couple who were married or attempted to marry will enjoy the right to receive a share of the father's estate by intestate succession.

(2) Wills and the Posthumous Child

In California, any person eighteen years or older who is of sound mind may make a will. The testator's intent as expressed in the will

93. Section 6453 provides:
   For the purpose of determining whether a person is a "natural parent" as that term is used in this chapter:
   (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code.
   (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist:
      (1) A court order was entered during the father's lifetime declaring paternity.
      (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own.
      (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence.

94. See supra note 40 and accompanying text.
95. CAL. FAM. CODE § 7630(c) (West 1994).
96. See supra note 93. Obviously, the alternative requirement that clear and convincing evidence show that the father openly held out the child as his own cannot be met if the child is born after the father's death.
97. See CAL. FAM. CODE § 7633 (West 1994) (permitting a paternity action to be filed prior to the child's birth).
98. See supra note 56 and accompanying text.
controls the disposition of the testator's property, and statutory rules of will construction apply only when the testator's intent is not indicated or is ambiguous. Thus, if a testator anticipates the birth of a child after his death, whether conceived by coitus or posthumously conceived, and the testator wishes to provide for that child, specific provisions in favor of that child likely will be respected by the probate court and discourage those who would be the alternate takers from contesting the provision.

The need for specificity cannot be overemphasized with respect to a bequest in favor of a child born after the father's death. A general or ambiguous bequest will be interpreted using standard rules of construction that tend to exclude both the posthumously conceived child and the child born after the father's death who was conceived by a couple that never attempted to marry. For example, if a father devises property in a class gift to "my children," a child who cannot establish paternity will be excluded from the gift through the operation of a statute that provides that "persons born out of wedlock...are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession." Thus, if the requisite father-child relationship cannot be established for purposes of intestate succession, that child also is excluded from generally phrased gifts in a will. Normally, then, in the absence of a contrary intention, only the posthumous child born to parents who were married or attempted to marry will benefit under a class gift.

While there may be many more ramifications under the law of trusts and estates for a child born after the father's death, the scope of this Note permits mention of only two that are of particular interest: the rule against perpetuities and the pretermitted child statute.

If a father anticipates that a child may be born after his death, either conceived in coitus or from his frozen sperm, and provides for his future child, California's statutory rule against perpetuities holds that the child's interest must vest or terminate within ninety years (i.e., the child must be born within ninety years of the father's death, or the
interest must terminate). Obviously, if the child were conceived through sexual intercourse, the child will be born within the perpetuities period. But there is no such certainty with respect to the posthumously conceived child: the father’s sperm could remain frozen for years, perhaps decades, before insemination is even attempted. In the meantime, the administration of the father’s estate or trust will be hampered by waiting for a beneficiary who may never be born. One can easily envision the frustration and resentment of relatives who were already living at the man’s death and whose expectation of an inheritance has been postponed or thwarted entirely by his decision to procreate after death.

If a father does not anticipate the birth of a child after his death or if other circumstances, such as illness, prevent him from altering his will to provide for a child born after the execution of the will and there is no evidence that the omission was intentional, a pretermitted child statute applies. The statute operates on the presumption that the omission was unintentional and revokes the will to the extent necessary to give the child the same share of the estate that the child would have received had the testator died intestate. Again, if a child cannot take under intestate succession because she cannot establish paternity, the pretermitted child statute will be of no help; accordingly, of children born after a father’s death, only the child who enjoys a presumption of paternity because she was conceived by coitus by parents who were married or attempted to marry will be able to benefit from this statute.

Thus, through a properly drawn will, a child born after her father’s death may be designated as a beneficiary, regardless of the time of conception or the marital status of the parents. However, great care must be taken to specifically provide by name for the child who cannot establish paternity, and, if a future interest is created for the posthumously conceived child, the bequest must be drafted to comply with the rule against perpetuities. Unfortunately, given the time, energy, and cost that estate planning demands, it is likely that a man who has deposited his sperm prior to debilitating treatment for a terminal illness, or who faces other physical risk, will neglect to make or amend his will. This situation places the posthumously conceived child at a disadvantage: her inheritance rights depend on the affirmative act of an ill or otherwise distracted man.

II. Assigning Paternal Responsibility Based on Intent to Procreate

Social policy mandates that some person or persons be assigned the task of investing the enormous amounts of time, energy, and money to rear each child brought into the world. Throughout most of our history, prior to the advent of birth control, reproduction was condoned only within the confines of the marital relationship; powerful social pressures, reinforced by law, religion, and family norms, demanded chastity from the unmarried. Hence, entering into marriage signified an intent to engage in sexual intercourse and, therefore, to procreate. Consequently, the decision to marry brought with it society's assignment to the married couple of the moral and legal responsibility for caring for the children born from their union. For the husband, this assignment of responsibility took the form of the legal presumption of paternity.

Although scientific advances can now ascertain paternity with very little room for doubt, the historical method of determining paternity based on the social norm of marriage is deeply ingrained in our legal system, and legislatures are resistant to change. In 1989 the United States Supreme Court upheld a California statute that prevented a biological father or child from challenging the presumption of paternity accorded the mother's husband, stating that biology was "irrelevant" to legal paternity. And, as discussed previously, the legislature has severely curtailed the means whereby a child whose parents never attempted to marry can establish paternity for purposes of inheritance.

In light of the California Legislature's reluctance to embrace DNA testing or other modern methods of establishing paternity, biology should not be the primary consideration in identifying the legal father of the posthumously conceived child; rather, the intent of the man who deposits his sperm in a sperm bank should be the deciding factor. In essence, an intent to procreate indirectly formed the historical, social basis for existing law, which assigns a presumption of paternity based on marriage or an attempt to marry, and so it should for the man who fathers a child after his death.

108. Id. at 305.
109. See id.
110. See id.
111. Id. at 317.
112. Id. at 317-18.
113. See supra note 56 and accompanying text.
115. See supra notes 95-98 and accompanying text.
If a man chooses to exercise his property rights in his sperm and bequeath it for purposes of procreation after his death, there can be no doubt as to his intent to father a child. Either a man’s will or the terms of his agreement with the sperm bank will indicate how his sperm should be disposed of upon his death and for what purpose. In the wake of the Hecht decision, sperm banks probably will take great care to document a man’s wishes in this respect.

But choice brings with it moral responsibility for the consequences. And, during one’s lifetime, the choice to procreate imposes a legal responsibility as well—that of rearing one’s child. If a man elects to father a child after his death, he will not be able to serve in several important parental roles, such as companion, teacher, and role model; but he can still be a financial provider.

The California Legislature has declared that there is a compelling state interest in ensuring that a child receives financial support from the parents. If the state can require that a divorced man with children enter into an agreement of support that survives his death and becomes an enforceable obligation against his estate, the state should make the same demand of the man who consciously and purposefully elects to procreate after his death.

While one can speculate that in most cases such a man would bequeath a portion of his estate to the intended mother of his posthumous child for the benefit of the child, there is no guarantee; one need only revisit Hecht to see the problems that can arise. In court documents, Kane’s children alleged that Hecht had “convinced [Kane] to allow her to have his child after his death and to leave her a substantial amount of his property to raise and care for this child.” Although Kane left the bulk of his estate to Hecht, stating in his will that his adult children “are financially secure and therefore [I] leave
them nothing other than [a parcel of land]," the ensuing will contest and tentative settlement agreements suggest that a good portion, if not most, of the estate will be distributed to Kane’s adult children, and not to Hecht. Had Kane’s estate been subject to an enforceable support obligation, the interests of other beneficiaries would have been subordinated to the needs of Kane’s potential future child or children.

Under existing law, a man who intends to father a child after his death is not required to provide support for that child, nor can that child claim part of the estate as either an intestate heir or pretermitted child. It is likely that, historically, a man was excused under the common law from his duty of support upon his early death because the whim of fate decreed that he die and leave minor children surviving him—he did not have a choice in the matter. But, after Hecht, a man can choose, and he should not make this choice lightly. New legislation should be enacted to protect the posthumously conceived child and ensure that a man who desires to procreate from his grave meets his parental responsibility to the extent he is able.

III. Other States’ Approaches

Louisiana, North Dakota, and Virginia have enacted legislation specifically directed toward the special circumstances of children born through assisted conception. These statutes affect the paternity or inheritance rights of the posthumously conceived child.

(I) Louisiana

Louisiana’s statute provides:

To be capable of receiving by donation inter vivos, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation mortis causa, an unborn child must be in utero at the time of the death of the testator. In either case, the donation has effect only if the child is born alive.

The Revision Commission explains that the substance of the “source” statute (dated 1870) has not changed; rather, this new statute merely “modernized the language” to reflect recent developments in reproductive technology. The new statute makes it clear that neither an unfertilized gamete nor a fertilized embryo may receive a gift or

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123. Hecht, 20 Cal. Rptr. 2d at 277.
124. See supra note 68 and accompanying text.
125. See supra note 91 and accompanying text.
126. See supra note 106 and accompanying text.
inheri unless it had been implanted in utero "prior to the time the donation inter vivos is made or the testator dies." Thus, under this statute, the posthumously conceived child is precluded from inheriting from the father. Only the man's unfertilized, cryogenically preserved sperm would be in existence at the time of his death; neither insemination nor implantation would yet have occurred.

The posthumously conceived child is also denied other benefits because of Louisiana law. As Nancy Hart of New Orleans discovered, Louisiana law provides that a man is a "natural father" only if he was alive at the time of conception. Nancy's daughter Judith was conceived and born after the death of Nancy's husband, Ed Hart, who had deposited sperm with a fertility clinic prior to undergoing chemotherapy. Louisiana law would not allow Nancy to list Ed as the legal father on Judith's birth certificate. Because Judith did not have a legal father under the applicable state law, the U.S. Department of Heath and Human Services denied Judith $700 per month in Social Security survivor's benefits.

Nancy is suing the state of Louisiana and the federal government on the grounds that the law is unconstitutional. Her lawyer said, "We plan to show, using this set of facts, logic and reason, that the law is outdated and must be put aside." It remains to be seen whether Nancy will succeed.

(2) North Dakota

North Dakota's statute provides in pertinent part: "A person who dies before a conception using his sperm or her egg is not a parent of any resulting child born of the conception."

This statute is based upon the Uniform Status of Children of Assisted Conception Act. The Committee comment explains the purpose of the statute:

"[The above-cited statute] is designed to provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death. The death of the person whose genetic material is ... used in conceiving an embryo ... would end the potential parenthood of the deceased. . . ."

"... It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's

128. Id. cmt.
130. Id.
131. Id.
genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their wills may do so.\textsuperscript{134}

This statute offers a simplistic solution to a more complex problem. It seeks to avoid disturbing the rights of those already living at the time of the gamete-provider’s death and to ensure the unimpeded settlement of the estate, without due regard for fairness to the resulting child. As illustrated by the observation that the decedent can voluntarily provide for the child by will, the posthumously conceived child’s inheritance rights turn upon the affirmative act of the parent—a parent who may be either too ill or too concerned with other matters to make or amend a will.

(3) Virginia

The relevant Virginia statutes provide:

§ 64.1-8.1. Afterborn heirs.—Relatives of the decedent conceived before his death but born thereafter, and children resulting from assisted conception born after decedent’s death who are determined to be relatives of the decedent as provided in . . . (§ 20-156 et seq.) . . . shall inherit as if they had been born during the lifetime of the decedent.\textsuperscript{135}

§ 20-158. . . . B. Death of Spouse.—Any child resulting from the insemination of a wife’s ovum using her husband’s sperm, with his consent, is the child of the husband and wife notwithstanding that, during the ten-month period immediately preceding the birth, either party died.

However, any person who dies before in utero implantation of an embryo resulting from the union of his sperm or her ovum with another gamete, whether or not the other gamete is that of the person’s spouse, is not the parent of any resulting child unless (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.\textsuperscript{136}

§ 20-164. A child whose status as a child is declared or negated by this chapter is the child only of his parent or parents as determined under this chapter . . . for all purposes including, but not limited to, (i) intestate succession; (ii) probate law exemptions, allowances, or other protections for children in a parent’s estate; and (iii) determining eligibility of the child or its descendants to share in a donative transfer from any person as an individual or as a member of a class determined by reference to the relationship. However, a child born more than ten months after the death of a parent shall not

\textsuperscript{134} Id. cmt.
\textsuperscript{135} VA. CODE ANN. § 64.1-8.1 (Michie Supp. 1994).
\textsuperscript{136} VA. CODE ANN. § 20-158 (Michie Supp. 1994).
be recognized as such parent's child for the purposes of subdivisions (i), (ii) and (iii) of this section.\textsuperscript{137}

When a child is posthumously conceived from sperm bequeathed or contractually conveyed at the father's death, these statutes construed together deny the child inheritance rights under intestate succession, protective rights in the father's probate proceeding, and beneficiary status for donative transfers made with reference to the father-child relationship unless the child is born within ten months after the father's death. These rights and benefits also will be denied if the parents were not married and the insemination method is used, even if the child is born within the ten-month period. For unmarried couples, then, it would appear more advantageous to use the implantation method with a written consent to be a parent; however, the birth still must occur within the ten-month period.

The rigid deadline of these statutes seems harsh. While technically possible to meet, a woman to whom a man has bequeathed or contractually conveyed his sperm may be too consumed with grief over the loss of her mate or preoccupied with handling his affairs to immediately seek insemination. Even if she attempts insemination promptly after the man's death, she may be unable to conceive right away. Moreover, the deadline may encourage some women to induce early labor so that the birth will occur in time and the child will receive the rights and benefits attendant to the father-child relationship.

(4) Analysis

The Louisiana, North Dakota, and Virginia Legislatures have failed to respond to the unique circumstances of the posthumously conceived child. Even though drafted to take into account new reproductive methods, these statutes adhere to rules of paternity and property devolution that are based on an obsolete notion of procreation. In Louisiana and North Dakota, the date of death still serves as the cutoff date by which conception must have occurred in order for the resulting child to claim rights and benefits accruing from the parent-child relationship. Although Virginia does not mandate that conception must take place prior to the gamete-provider's death, the period within which the birth must occur achieves the same effect: it is the same period in which birth normally occurs following conception by sexual intercourse.

Rather than forcing the posthumously conceived child to conform to an outdated legislative scheme, the law should acknowledge a decedent's new, expanded "window of fertility" and respond in kind.

\textsuperscript{137} VA. CODE ANN. § 20-164 (Michie Supp. 1994) (emphasis added).
IV. Amending California Law

The California Legislature has the power to restrict the rights of its citizens to dispose of their property upon death. In view of the unique reproductive attributes of sperm, the state could justify placing reasonable conditions on a man's exercise of his property rights in semen at his death in order to protect the resulting child. The legislature's concern about dubious paternity claims and its interest in promoting the efficient settling of a decedent's estate can be accommodated without impacting the existing legislative scheme beyond tolerable limits. The following proposals could help to achieve these goals.

A. Preliminary Considerations

In keeping with an individual's reproductive freedoms protected by the United States Constitution, a husband's property interest in his frozen sperm should be characterized as his separate property. Accordingly, Family Code section 770 should be amended to expressly provide that the separate property of a married person includes his or her cryogenically preserved genetic material. The progenitor's spouse should be precluded from acquiring an interest in the progenitor's gametes in the event of the dissolution of the marriage or the death of the progenitor, unless the progenitor specifically directs otherwise in the sperm or ova bank agreement.

In addition, the persons who may qualify as the recipient of the sperm should be restricted. These restrictions should not mandate a marital relationship, however. As the Hecht court noted, it is not against California public policy to inseminate an unmarried woman. Rather, these restrictions should focus upon the prohibition of "incestuous procreation," when the man and the woman are related by blood, and "stranger procreation," when a man simply designates a "willing woman," or uses an equally indefinite description. Some minimum level of relationship and commitment during the couple's lifetime should be required on public policy grounds.

138. See supra note 84 and accompanying text.
139. See supra note 56 and accompanying text.
140. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2807 (1992) (recognizing that the law "affords constitutional protection to personal decisions relating to marriage, procreation, conception, [and] family relationships").
141. CAL. FAM. CODE § 770 (West 1994).
142. Hecht v. Superior Court (Kane), 20 Cal. Rptr. 2d 275, 286 (Ct. App. 1993).
143. See Djalleita, supra note 29, at 363-64 (arguing that "an individual should not be able to leave gametes . . . to his or her sibling, parent, or child").
144. A minimum standard of commitment is already used by physicians who have been requested to harvest sperm from the bodies of dead men. In the two cases described in the Gallagher and Stryker articles, supra note 22, the couples were married. In one case, the
designated woman's death or waiver, the deposited sperm should be
destroyed by the sperm bank; the designee should not have the right
to bequeath or contractually convey the sperm further.

B. Establishing Contingent Paternity and Obligation of Support by
Voluntary Declaration

Two statutes currently in existence can be adapted to enable a
man who desires to father a child after his death to establish his pater-
nity and subject his estate to a support obligation: Family Code sec-
tions 7570-7577, providing a means of voluntary declaration of
paternity,145 and Family Code section 7614, relating to the written
promise to support a child growing out of a presumed or alleged fa-
ther-child relationship.146 In conjunction with adaptations made to
these statutes, an exception should be created under Family Code sec-
tion 7613(b) to allow the man to be treated in law as the natural father
of the posthumously conceived child.

At the time a man contacts a sperm bank and indicates that upon
his death his sperm should be made available to a designated person
for the purpose of procreation, the sperm bank should inform him
that it is prohibited by law from accepting his sperm deposit unless he
signs a document relating to paternity and support, with his signature
acknowledged by a notary public. With respect to paternity, the docu-
ment should provide that the person signing intends to father a child
after his death and accepts paternity for that child, and that his volun-
tary acceptance of paternity is contingent upon both a physician's
written verification that his sperm was used to conceive the child147
and, after the child is born, confirmation through DNA testing that
the child is his biological offspring.148 The document should also in-
clude a notice provision similar to that incorporated in the voluntary

infertility specialist stated that he would not have performed the procedure for an "unsta-
ble relationship." Stryker, supra note 22. The other doctor "refused to harvest sperm from
a dead man for a woman who was 'merely' the common-law wife of the deceased." Id.
146. CAL. FAM. CODE § 7614 (West 1994).
147. See Shapiro & Sonnenblick, supra note 22, at 245 n.124 (citing Winthrop Thies, A
Look to the Future: Property Rights and the Posthumously Conceived Child, 110 TR. &
Est. 992, 923 (1971)). Thies suggested that both the woman and the physician should exe-
cute an affidavit after each artificial insemination, attesting that the procedure was con-
ducted with the decedent's sperm.
148. A few samples of the decedent's sperm should be retained by the sperm bank for
purposes of DNA testing after the child's birth.

The requirements of the certificate and the DNA testing are meant to assure the man
that the child he will posthumously support is his own, and not to serve as the basis of
establishing his paternity; rather, his voluntary statement of intent in the contract with the
sperm bank should suffice to award him a presumption of paternity.
declaration of paternity advising the man of the legal consequences of the document, particularly the implications of his support obligation and its affect upon his testamentary rights.

With respect to the support obligation, the document should provide that the man agrees that the testamentary disposition of his property is subject to an obligation to support his posthumously conceived child, and that this obligation overrides all purported transfers of property at death, including those passing by contract, such as life insurance policies, or by operation of law, such as joint tenancy property. There should also be a recapture provision so that property may be retrieved from transferees when it was conveyed prior to the father's death with the intent to avoid his support obligation. An exception would make unnecessary any setting aside of estate property for child support when all or the bulk of the decedent's property passes to the woman who is designated as the recipient of the sperm. If there is more than enough property in the estate to support the posthumously conceived child, the portion in excess of that amount will pass under the normal laws of testamentary disposition or intestate succession. A written promise containing these provisions should fulfill the requirements of Family Code section 7614 and thus be enforceable against the man's estate.

C. Efficiency and Estate Issues

To accommodate the need for the efficient settling of a decedent's estate, a limitation should be placed on the time period during which a child can be posthumously conceived and still be entitled to receive benefits from the father's estate. For this purpose, legislation should be passed to keep open a decedent's "window of fertility" until the first to occur of: two years after the date of his death; the death or (re)marriage of the woman to whom he bequeathed or contractually conveyed his sperm; and the woman's written, notarized statement, filed with a court, that she does not intend to attempt to conceive a child, or any additional children, using the decedent's sperm. An

149. CAL. FAM. CODE § 7574 (West 1994).

150. There is precedent for such a recapture provision in California law. When a person transfers quasi-community property to a person other than the surviving spouse for less than fair consideration, thereby defeating the surviving spouse's expectancy in the property, one-half of the property may be restored to the decedent's estate. CAL. PROB. CODE § 102 (West 1991).

151. See supra note 72.

152. The maximum number of years by which a decedent's "window of fertility" may be kept open should not be left to the decedent's discretion. Otherwise, his estate could remain unsettled for many years, burdening the court system and causing frustration and resentment among family members who were already living at his death. Therefore, to the extent that a testator purports to provide for a child who is conceived beyond the statutory "window," his will should be ineffective.
extension of the two-year "window" may be granted for periods when
the woman's access to the sperm was impeded by litigation, or on ac-
count of extended illness, injury, or other hardship. During the statu-
tory "window of fertility," the estate will be managed by the personal
representative and family allowance payments may be made to eligi-
ble persons. Preliminary distributions should be permitted with cau-
tion, however, because there should be sufficient assets left in the
estate to allow for the possibility of multiple posthumously conceived
children. To ensure that no problem will arise under the rule against
perpetuities (e.g., when an interest has been held in trust for several
decades and a descendant's "window of fertility" threatens to violate
the rule), the statutory "window of fertility" provision should be made
expressly subordinate to the perpetuities law;153 if the nonvesting of a
particular interest may violate the perpetuities provision because of
the expanded fertility period, then the interest must vest in the next
successor as though the fertility period had ended without the concep-
tion of the beneficiary.

If a child is conceived during the expanded "window of fertility,"
that child will be accorded all rights of inheritance enjoyed by a child
conceived during the father's lifetime.154 If the father left a will that
does not specifically mention the child, she will be treated as a
pretermitted child; or, if the father died intestate, she will take a share
of the estate as an intestate heir. Although the father may intention-
ally elect not to provide for the posthumously conceived child in his
will,155 the support obligation will guarantee that the child receives a
share of the estate.156

With respect to donative transfers made by others, the posthu-
mosously conceived child will be eligible to share either as an individual
or as a member of a class determined by reference to the father-child
relationship. If the transfer is testamentary and becomes effective
during the father's statutory "window of fertility," the transferor's es-
tate necessarily must be kept open until it is determined whether con-
ception will occur. Of course, a transferor may avoid this result
simply by including a clause in the will which excludes such posthu-
mosously conceived persons.

Upon the close of the decedent's "window of fertility," the estate
will be distributed. The recipient of the sperm may continue to at-
tempt to conceive children using the decedent's semen; however, any

154. Although conception must occur during the two-year "window," the actual birth
may occur after this period has expired. If conception occurs, the child's share of the estate
will not vest unless the child is born alive and meets any survival requirements.
156. See supra notes 145-151 and accompanying text.
child thereafter conceived will not be entitled to any support or inheritance from the father’s estate.

Given the rare cases in which this issue is likely to arise, a two-year delay should not unduly burden the probate court. Nor should the postponement of distribution cause substantial hardship to the persons interested in the decedent’s estate. In fact, in court documents filed by Kane’s children, they proposed keeping their father’s estate open for a two-year period from the date of an order directing distribution of the sperm to allow for children to be conceived and born.157

Conclusion

Legislation consistent with the guidelines described above will give the posthumously conceived child the opportunity to enjoy the same rights as other children, tempered by the need for the orderly distribution of a decedent’s estate. Although Hecht established that a man has a property interest in and the power of disposition over his sperm, the California Legislature has the authority to restrict that right to further its compelling state interest in the well-being of children. A man’s decision to father a child after his death should be entered into seriously and with the utmost concern for the child. If the recommendations made in this Note are followed, there should be no qualms about dubious claims of paternity and no substantial impediment to the efficient settling of the decedent’s affairs. Regrettably, the posthumously conceived child will be deprived of the companionship of her biological father; surely there is no need for her to suffer from the lack of his financial support, as well. It is time for the law to reflect the new reproductive technology.

157. Hecht v. Superior Court (Kane), 20 Cal. Rptr. 2d 275 (Ct. App. 1993); Opposition of Real Parties in Interest William Everett Kane, Jr., Katharine E. Kane, and Robert L. Greene, Administrator CTA of the Estate of William E. Kane to Petition for Writ of Mandate/Prohibition in the First Instance and/or Other Extraordinary Relief at 30 (filed Mar. 13, 1993) (copy on file with author).