LEGAL UPDATE

POSTHUMOUS CONCEPTION: THE BIRTH OF A NEW CLASS

WOODWARD V. COMMISSIONER OF SOCIAL SECURITY

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I. INTRODUCTION

On September 6, 2001, the Supreme Judicial Court of Massachusetts heard arguments on the issue of whether a child conceived through artificial insemination after her biological father's death is the deceased parent's child for purposes of birth records and Social Security benefits.[1] Shortly thereafter, on January 2, 2002, the Court issued a ruling that children can be the legal heirs of a dead parent as long as (1) a genetic relationship exists between the child and the decedent and (2) the decedent affirmatively consented to posthumous conceptions and to support any resulting child.[2]

Distribution of Social Security benefits falls well within the established body of intestate succession law in Massachusetts, but the particular circumstances of this case render it one of first impression in the state. Although most states have developed ways to deal with posthumous *birth*, where conception occurred before the death of the father, only a handful of jurisdictions have attempted to address the issue of posthumous *conception*.[3]

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[1] *See* Jason M. Scally, *SJC to Hear Arguments on Intestate Rights of Children: Artificially Inseminated, Born After Father Died*, 29 MASS. LAW. WKLY. 2841 (August 27, 2001). *See generally* Plaintiff's Brief, *Woodward v. Comm'r of Soc. Sec.* (No. SJC-08490); Defendant's Brief, *Woodward v. Comm'r of Soc. Sec.* (No. SJC-08490); Defendant's Reply Brief, *Woodward v. Comm'r of Soc. Sec.* (No. SJC-08490).

[2] *See* Woodward v. Comm'r of Soc. Sec., No. SJC-08490, 2002 Mass. LEXIS 1, *2 (Mass. January 2, 2002).

[3] *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (1993); *see also* Va. Code Ann. § 20-156 to 165 (Michie Supp. 1997); N.D. Cent. Code 14-18-04 (Michie Supp. 1997); Fla. Stat. Ann. § 742.17 (West 1997).

As reproductive and medical technologies continue to develop, however, there is increasing pressure upon the legal system to clearly define the rights of this newly created class of children. This legal update briefly describes posthumous conception, identifies the federal and state statutory law that is relevant to resolving this issue in Massachusetts, and discusses the recently decided case before the Massachusetts Supreme Judicial Court.

II. POSTHUMOUS CONCEPTION

Reproductive technology today may enable assisted conception in a variety of ways. The most commonly known method of assisted reproduction is artificial insemination, defined as "the introduction of semen into the vagina other than by coitus."[4] Heterologous insemination refers to artificial insemination whereby the semen is supplied by a donor who is not the mother's husband.[5] Homologous insemination is artificial insemination that utilizes the mother's husband's semen.[6] Although artificial insemination itself is not a new medical development, its use and implementation has increased over the years as a result of improvements made to the techniques and methods by which artificial insemination may be performed.

Posthumous conception has been defined as "the beginning of the human gestational process after the death of one or both biological parents."[7] Through technological advancements in artificial insemination methods and in the preservation of human semen, ova, and embryos, posthumous conception has become an increasingly viable option for couples who are unable to have children by traditional methods of reproduction.[8] In particular, cryopreservation is a particularly popular technique of posthumous conception, whereby human semen, ova, and embryos may be frozen and preserved at very

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[4] STEDMAN'S MEDICAL DICTIONARY 876 (26th ed. 1995).

[5] *See id.*

[6] *See id.*

[7] Gloria Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 258 (1999) (citing Ronald Chester, *Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance*, 33 HOUS. L. REV. 967, 976-79 (1996); Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 95-100 (1994); John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1030-35 (1994); Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. & POL'Y REV. 57, 62-64 (1995); Lisa M. Burkdall, Note, *A Dead Man's Tale: Regulating the Right to Bequeath Sperm in California*, 46 HASTINGS L.J. 875, 883-88 (1995); Ellen J. Garside, Comment, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713, 713 (1996); Sherri Gilbert, Note, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521, 555-58 (1993)).

[8] *See* Monica Shah, Comment, *Modern Reproductive Technologies: Legal Issues Concerning Cryopreservation and Posthumous Conception*, 17 J. LEGAL MED. 547, 550 (1996).

low temperatures for extended periods of time after extraction from the donor source.[9] Because of the lengthy period of time over which human semen, ova, and embryos may be preserved, children may be conceived after the death of a particular donor, raising numerous legal issues relating to parental relationship and intestate succession.

III. THE STATE OF THE LAW

A. *Federal Law*

The Social Security Act (the "Act") provides for the distribution of social security insurance benefits of the deceased insured individual to his or her surviving spouse and children.[10] Under the Act, insurance benefits are payable to the "child" of a deceased insured individual "if such child . . . was dependent upon such individual . . . at the time of . . .death,"[11] and payable to the surviving spouse who is caring for such children.[12]

> In determining whether an applicant is the child . . . of a fully or currently insured individual . . . the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the state in which [the] insured individual . . . was domiciled at the time of his death.[13]

So long as certain relationship provisions of the Act are met, a child will be deemed dependent and entitled to social security benefits without an actual showing of dependency.[14] Dependency may be found where the child could inherit the insured's personal property as the insured's natural child under the state laws of intestate succession.[15]

Section 4(b) of the Uniform Status of Children of Assisted Conception Act (the "USCACA") provides that "an individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual's egg or sperm, is not a parent of the resulting child."[16] The purpose of this provision is to:

> provide finality for the determination of parenthood of those whose genetic material is utilized in the procreation process after their death . . . It is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material

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[9] *See id.*

[10] *See* 42 U.S.C. §§ 402(d), 402(g) (2000).

[11] 42 U.S.C. § 402(d)(1)(c).

[12] *See* 42 U.S.C. § 402(g)(1).

[13] 42 U.S.C. § 416(h)(2)(A).

[14] *See* 42 U.S.C. § 402(d)(3).

[15] *See* 20 C.F.R. §§ 404.355, 404.361(a) (2001).

[16] Unif. Status of Children of Assisted Conception Act § 4(b), 9B U.L.A. 186, 189-90 (Supp. 1996).

> 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.[17]

This provision of the USCACA addresses the *relationship status* of posthumously conceived children, but it does not go so far as to determine the interests of these children in intestate succession or social security entitlements.

B. *Massachusetts Law*

The Massachusetts law of intestate succession is embodied in Massachusetts General Laws, chapter 190, in which both parties of *Woodward v. Commissioner of Social Security Administration* find support for their arguments.[18] In particular, both plaintiff and defendant focus upon sections 7 and 8 of chapter 190. The relevant language of section 7 reads:

> A person born out of wedlock whose parents have intermarried and whose father has *acknowledged* him as his child or has been *adjudged* his father . . . shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock.[19]

Thus, this provision recognizes two methods by which an illegitimate child may establish a right to inherit as heir of the putative father: acknowledgement by the putative father of his paternity or a judgment establishing his paternity.[20] Addressing the specific circumstance of posthumous children, section 8 of chapter 190 provides:

> Inheritance or succession by right of representation is the taking by the descendants of a deceased heir of the same share or right in the estate of another person as their parent would have taken if living. *Posthumous children shall be considered as living at the death of their parent.* [21]

The phrase "posthumous children," however, is not defined in any provision of the statute.[22]

IV. WOODWARD V. COMMISSIONER OF SOCIAL SECURITY

A. *Background*

Upon learning that his leukemia required chemotherapy treatment that would likely render him sterile, Warren Woodward ("Warren") and his wife

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[17] *Id.* at 190.

[18] *See generally* MASS. GEN. LAWS ch. 190 (2001); *see also* Plaintiff's Brief at 14-32, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490); Defendant's Brief at 16-23, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490).

[19] MASS. GEN. LAWS ch. 190, § 7 (emphasis added).

[20] *See id*.

[21] MASS. GEN. LAWS ch. 190, § 8 (emphasis added).

[22] *See generally* MASS. GEN. LAWS ch. 190.

Lauren Woodward ("Lauren") decided to preserve a quantity of his sperm so that they might have children in the future whether or not Warren survived his leukemia.[23] Warren died in October 1993 as a result of a failed bone marrow transplant, and Lauren was successfully impregnated by artificial insemination of Warren's preserved sperm in February 1995 and gave birth to her twin daughters Michayla and Mackenzie in October 1995.[24]

In January 1996, Lauren filed an application with the Social Security Administration (the "SSA") for survivors' benefits on behalf of herself and her twin daughters.[25] Before a determination was made upon her application, Lauren learned that she needed to submit a birth certificate recognizing Warren as the father of the twin daughters.[26] On October 23, 1996, Lauren successfully obtained a Judgment of Paternity and Order to Amend Birth Certificates from the Essex Probate Court, declaring Warren to be the father of the twins.[27] Despite having forwarded copies of the Judgment of Paternity to the SSA, Lauren's claims remained disapproved.[28] Because she had exhausted her administrative remedies,[29] Lauren filed a motion to reverse the decision of the Commissioner in federal district court.[30] On January 2, 2001, after considering the briefs and hearing arguments of counsel on the motions, district court Judge Rya W. Zobel certified the following question to the Massachusetts Supreme Judicial Court pursuant to Supreme Judicial Court Rule 1:03:

> If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?[31]

Subsequent to all the administrative proceedings and to the Certification Order by district court Judge Zobel, Lauren obtained birth certificates from the

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[23] *See* Plaintiff's Brief at 4-5, Woodward v. Comm'r of Soc. Sec. (No. 08490).

[24] *See id.* at 5.

[25] *See id.* at 1-2.

[26] *See id.* at 6.

[27] *See id.* at 6.

[28] *See id.* at 2-4.

[29] *See id.* at 6-8.

[30] *See id.* at 4.

[31] Certification Order at 4, Woodward v. Apfel (D. Mass. 2001) (No. 00-10124-RWZ). The Massachusetts Supreme Judicial Court "may answer questions of law certified to it . . . when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court." MASS. SUP. JUD. CT. R. 1:03 § 1 (2001).

City Clerk of Beverly listing Warren as the father of Michayla and Mackenzie.[32] Both parties submitted briefs to the Supreme Judicial Court.[33]

B. *Issues and Arguments*

Under Massachusetts law of intestate succession, Lauren argued that her twin daughters Michayla and MacKenzie were entitled to inherit from their father's estate. In response, the SSA argued that Massachusetts law is clear in that it does not provide for posthumously conceived children to inherit from a sperm donor's estate. The following issues and arguments were raised by the parties.

First, Lauren argued that the Massachusetts intestacy statutes explicitly recognize posthumously conceived children as heirs of the decedent.[34] Because the statute does not provide a definition of "posthumous children," Lauren pointed to the definitions contained in Black's Law Dictionary[35] and Webster's Dictionary[36] to substantiate her argument that Michayla and Mackenzie are Warren's posthumous children. Relying upon these definitions, the lack of any distinctions made with regard to conception, and the failure of the SSA to show what was in the mind of the Massachusetts legislature when they drafted the language of section 8, Lauren contended that Michayla and Mackenzie were born after Warren's death and therefore qualify as "posthumous children."[37]

In response, the SSA drew a very firm distinction between posthumously born children and posthumously conceived children, pointing to the failure of the statutory language to expressly recognize posthumously conceived children as heirs of the decedent. [38] The SSA argued that intestate law was largely determined by statute,[39] but acknowledged that case law was significant in complementing the state statutory scheme.[40] In particular, one case held that "a child will be considered in being, from *conception* to the time of its birth, in

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[32] *See* Plaintiff's Brief at 9, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[33] *See* Plaintiff's Brief, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490); Defendant's Brief, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490); Defendant's Reply Brief, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490).

[34] *See* Plaintiff's Brief at 14, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490).

[35] Black's Law Dictionary defines "posthumous child" as a "[c]hild born after the death of his or her father." BLACK'S LAW DICTIONARY 1167 (Sixth ed. 1991).

[36] Webster's Dictionary defines "posthumous" as "[b]orn after the death of the father; published after the death of the author; existing after one's decease." NEW WEBSTER'S DICTIONARY 173 (1991).

[37] *See* Plaintiff's Brief at 15-17, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490).

[38] *See* Defendant's Brief at 16-20, Woodward v. Comm'r of Soc. Sec. (No. SJC-08490).

[39] *See id.* at 17 (citing Cassidy v. Truscott, 287 Mass. 515, 520-21 (1934); Belknap, NEWHALL'S SETTLEMENT OF ESTATES AND FIDUCIARY LAW IN MASSACHUSETTS § 24.2 (5th ed. 1997)).

[40] *See* Defendant's Brief at 17, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

all cases where it will be for the benefit of such child to be considered."[41] This holding by the Massachusetts Supreme Judicial Court and other similar judicial decisions led the SSA to conclude that the term "posthumous children" as used in the language of the Massachusetts intestacy statutes was intended to include only those who were *in utero* prior to the father's death.[42] Because Michayla and Mackenzie were not conceived at the time of Warren's death, the SSA contended that they do not qualify as "posthumous children" under Massachusetts General Laws, chapter 190.

Second, Lauren claimed the law in Massachusetts governing paternity actions affords a basis for the Probate Court adjudication which established Warren's fatherhood of Michayla and Mackenzie.[43] Lauren argued that Warren's "consent to and participation in withdrawal of a quantity of his sperm for the sole purpose of artificial insemination" constitute sufficient acknowledgement by Warren of the twins conceived, such that they may be considered heirs under section 7 of chapter 190.[44] Also, Lauren argued that Warren has been adjudged to be the father of the twins by the Essex County Probate Court, and, therefore, provides an additional basis by which an illegitimate child may inherit from the putative father under section 7.[45]

In response, the SSA pointed to several deficiencies in Lauren's argument. As a preliminary matter, the SSA emphasized that paternity may be established if the putative father has acknowledged himself as the child's father *during the father's lifetime*.[46] The SSA argued that because the twins were not conceived during his lifetime and because a person cannot acknowledge a relationship with non-existent persons, Warren could not have acknowledged himself as their father.[47] Further, the SSA argued that such *acknowledgement must be made personally* and cannot be made by a representative of the father's estate.[48] Here, the Probate Court proceeding was predicated upon the stipulations for voluntary acknowledgement of parentage executed by Lauren as mother and Lauren as administratrix of Warren's Estate.[49] Finally, the SSA

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[41] Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834). This decision was held only two years before the Massachusetts legislature enacted the language regarding posthumous children. *See* Defendant's Brief at 18, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[42] *See* Defendant's Brief at 18-19, Woodward v. Comm'r of Soc. Sec. (SJC-08490) (citing Dexter v. Attorney General, 224 Mass. 215, 217-18 (1916); Bowen v. Hoxie, 137 Mass. 527 (1884)).

[43] *See* Plaintiff's Brief at 17-23, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[44] *Id* at 18.

[45] *See id.* at 18-19.

[46] *See* Defendant's Brief at 20-21, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[47] *See id.*

[48] *See* Defendant's Reply Brief at 3-4, Woodward v. Comm'r of Soc. Sec. (SJC-08490). "Voluntary acknowledgements of parentage may be executed by the mother and the putative father." MASS. GEN. LAWS 209C § 5(b) (2001).

[49] *See* Defendant's Brief at 22, Woodward v. Comm'r of Soc. Sec. (SJC-08490); Defendant's Reply Brief at 3-4, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

claimed that Probate Court judgment is not binding because the SSA was not a party to the proceeding and because the district court expressly ruled that it was not binding.[50] Lauren contended that despite not having been a party, the SSA received notice of the proceeding and failed to respond and that the SSA may not now complain about the invalidity of the proceeding and judgment.[51]

Third, Lauren asserted that under Massachusetts General Laws, chapter 46, section 19, the issuance of the birth certificate by the Beverly City Clerk naming Warren as the father of Michayla and Mackenzie is prima facie evidence of his fatherhood.[52] The language of section 19 reads: "The record of the town clerk relative to a birth, marriage or death shall be *prima facie* evidence of the facts recorded."[53] The SSA did not respond to this point in its briefs.

Fourth, both parties looked to the probable intent of the Massachusetts legislature in support of their respective arguments. Although Lauren claimed that the language of the state intestacy statute is plain upon its face and that an examination of legislative intent was therefore unnecessary,[54] the SSA pointed to two instances in which the state legislature refused to recognize sperm donors as the legal father of children conceived by assisted reproduction: (1) chapter 46, section 4B of the Massachusetts General Laws and (2) the procedural requirements embodied in several provisions of Massachusetts General Laws, chapter 209C.[55] The SSA argued that section 4B, in

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[50] *See* Defendant's Reply Brief at 4-7, Woodward v. Comm'r of Soc. Sec. (SJC-08490). District Court Judge Zobel held:

> Under the *Gray v. Richardson* framework, while the SSA is not strictly speaking bound by a decision in a State court proceeding to which the agency was not a party, the agency must nonetheless accept the determination made by the State court if: (1) an issue in a claim for social security benefits has been previously determined by a State court of competent jurisdiction; (2) this issue was genuinely contested before the State court by parties with opposing interest; (3) the issue falls within the general category of domestic relations law; and (4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the state.

Certification Order, Woodward v. Apfel (D. Mass. 2001) (No. 00-10124-RWZ). Because the SSA was not a party to the proceeding, the Probate Court judgment is not required to be given dispositive weight. *See id.*

[51] *See* Plaintiff's Brief at 19, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[52] *See id.* at 24.

[53] MASS. GEN. LAWS ch. 46, § 19 (2001).

[54] *See* Plaintiff's Brief at 25, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[55] *See* Defendant's Brief at 23-26, Woodward v. Comm'r of Soc. Sec. (SJC-08490). Where a "marriage has been terminated by annulment or by the death of either spouse, paternity of the putative father may only be established by filing a complaint to establish paternity as provided in this chapter." MASS. GEN. LAWS ch. 209C, § 5(b) (2001). There is a presumption of fatherhood granted to a man if "he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce." MASS. GEN. LAWS ch. 209C, § 6(a)(1) (2001). Finally, a court may order the mother, child, and putative father to submit to genetic

recognizing a child born to a married woman by artificial insemination with the consent of her husband to be the legitimate child of the mother and husband, reflected the understanding that, in some instances, a child conceived by the donation of sperm to a mother may not be considered the legitimate child of mother and donor.[56] Although Lauren conceded to this understanding of legislative intent, she argued that Section 4B cannot be interpreted to be a general prohibition against posthumously conceived children having a legally recognized father under state law.[57] The SSA also claimed that the procedural requirements of determining parentage showed a presumption against finding parentage in the genetic donor of a posthumously conceived child.[58] Again, Lauren argued that a reading of these provisions should be limited to the rules that they establish and cannot justifiably be interpreted to bar a finding of paternity in all posthumous conception cases.[59]

In connection with finding legislative intent, Lauren raised the argument that a prohibition against the right of posthumously conceived children to inherit from their fathers' estates would be violative of the Equal Rights Amendment of the Massachusetts Constitution.[60] Lauren insisted that a strict level of scrutiny is required to ensure that any statutory classifications that would deny the right of illegitimate children to inherit be narrowly tailored so as to effectuate a legitimate state interest of avoiding fraudulent claims against the estate of a man who died intestate.[61] For support, Lauren relied on cases that involved disparate treatment of illegitimate and legitimate children[62] and disparate treatment of an illegitimate child's right in inheritance from the father as compared to from the mother.[63] The SSA disagreed with her concern, finding Lauren's characterization of the classification as inaccurate.[64] The SSA maintained that the classification suggested here is between those

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marker tests in a paternity action, but such results are not "admissible absent sufficient evidence of intercourse between the mother and the putative father during the period of probable conception." MASS. GEN. LAWS ch. 209C, § 17 (2001).

[56] *See* Defendant's Brief at 24, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[57] *See* Plaintiff's Brief at 25, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[58] *See* Defendant's Brief at 25, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[59] *See* Plaintiff's Brief at 26, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[60] *See id.* at 26-27. The Equal Rights Amendment of the Massachusetts Constitution provides:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

MASS. CONST. art. I.

[61] *See* Plaintiff's Brief at 26-29, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[62] *See* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).

[63] *See* Lowell v. Kowalski, 380 Mass. 663 (1980).

[64] *See* Defendant's Reply Brief at 8, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

conceived before and after the death of a genetic parent and does not warrant a heightened level of scrutiny as "suspect."[65] The SSA considered the strong state interests in making the classification asserted based upon an objective determination, not subjective criteria,[66] and contended that it is appropriate for the state to define legal parentage such that it encompasses not only genetics, but also issues of volition and relationship.[67]

Fifth, Lauren considered the public policy interest in guaranteeing posthumously conceived children the inheritance rights enjoyed by natural children under Massachusetts law of intestate succession.[68] Emphasizing the provision of equal rights and protections to all children, respect for liberty and privacy, and the existence of rights against forced procreation, Lauren articulated the argument that the actions, beliefs, and intent of the parties are of particular significance here and should dictate the determination to be made.[69] Although acknowledging that an inference of testamentary intent in this particular case may not necessarily be unreasonable, the SSA cited several hypothetical situations where the presumption of a decedent's testamentary intent would be inappropriate.[70] In citing these examples, the SSA sought to illustrate the point that there are an infinite number of circumstantial changes that could occur after the donor's death and before conception that weigh against establishing a presumed intent.[71] The SSA suggested to the court that it should more appropriately focus upon a determination of whether posthumously conceived children *as a class* should be entitled to inherit by intestate succession.[72]

The SSA makes one additional point, left unaddressed by Lauren, that the Uniform Statutes of Children of Assisted Conception Act and other state statutes have rejected the right in posthumously conceived children to inherit by intestate succession.[73] As mentioned above, the USCACA addresses the relational status of posthumously conceived children, but does not go so far as to address their interests with regard to intestate succession.[74] The states that have addressed legal status of posthumously conceived children (Florida,

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[65] *See id.* at 8-9.

[66] *See id.* at 10.

[67] *See id.* at 11.

[68] *See* Plaintiff's Brief at 29-32, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[69] *See id.* at 29-30.

[70] *See* Defendant's Brief at 27-29, Woodward v. Comm'r of Soc. Sec. (SJC-08490). In particular, the SSA noted cases in which (1) the decedent had preexisting children who would be disadvantaged by having their intestate share diminished, (2) the decedent's widow remarried after his death but before using his sperm, (3) sperm were withdrawn from the decedent after his death and without his consent, and (4) the sperm donor was not married to the mother but was a mere friend. *See id.*

[71] *See id.* at 29.

[72] *See id.* at 31.

[73] *See id.* at 32-35.

[74] *See supra* notes 16, 17.

North Dakota, and Virginia) have found no presumptive right in posthumously conceived children to inherit by intestate succession.[75] Thus, the SSA concluded that the prevailing legal authority requires a child to have been *in utero* at the time of the decedent's death in order to find an automatic or presumptive right to inherit.[76]

C. *The Court's Decision*

In rendering its decision, the Supreme Judicial Court first looked to the Massachusetts intestacy statute to determine whether the twins are the "issue" of Warren Woodward.[77] Finding no definition for decedent's "issue" in the statutory language, the Court nevertheless found a legislative intent to preserve wealth for consanguineous descendents by pointing to instances where non-marital children qualify as decedent's "issue" and to the inclusion of the "posthumous children" provision in the statute.[78] With regard to the definition of "posthumous conception" in particular, the Court noted that the Massachusetts Legislature failed to include an express, affirmative requirement that posthumous children must be in existence as of the date of decedent's death when it could have easily drafted language to accommodate such a condition.[79]

Ultimately, the court relied upon the underlying purposes behind the intestacy law and found that the question raised in this case implicated three powerful state interests.[80] Above all, the state seeks to promote the best interests of children.[81] The court noted that the legislature has been unequivocally clear in its efforts to ensure that all children be entitled to the same rights and protections of the law, was supportive of the assistive reproductive technologies that enable the conception of this class of children, and has failed to restrict posthumously conceived children from taking by intestacy.[82] The court argued that it may, therefore, assume a legislative intent that posthumously conceived children be entitled to the same rights as naturally conceived children.[83]

The court further asserted that the state has an interest "to provide certainty to heirs and creditors by effecting the orderly, prompt, and accurate administration of intestate estates."[84] The two identified ways in which this

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[75] *See* Defendant's Brief at 32-33, Woodward v. Comm'r of Soc. Sec. (SJC-08490).

[76] *See id.* at 34.

[77] *See* Woodward v. Comm'r of Soc. Sec., No. SJC-08490, 2002 Mass. LEXIS 1, *11-12 (Mass. January 2, 2002).

[78] *See id.* at *12-14.

[79] *See id.* at *16.

[80] *See id.* at *17.

[81] *See id.* at *18.

[82] *See id.* at *18-21.

[83] *See id.* at *21-22.

[84] *Id.* at *23.

interest has been promoted are by requiring certainty of filiation between the decedent and his issue and by establishing statutes of limitation for the commencement of claims against the intestate estate.[85] Finally, the court considered the state's interest in honoring the reproductive choices of individuals.[86] It is this state interest which led the court to establish a two-fold requirement that the deceased genetic parent's affirmative consent be proven with regard to the posthumous conception itself *and* the support of any resulting child.[87]

In light of these identified state interests, the Supreme Judicial Court concluded that limited circumstances may exist in which posthumously conceived children may enjoy the inheritance rights of "issue" under the Massachusetts intestacy law.[88] Only where the surviving parent or child's other legal representative is able to sufficiently prove the decedent's genetic relationship to the child and the decedent's affirmative consent to posthumous conception and to future support of any resulting child will the child's right to inherit by intestacy be upheld.[89]

V. CONCLUSION

Assisted conception is becoming a more prevalent method as reproductive technology improves and as adults in our society move away from traditional notions of family and reproduction. In connection with these developments, there has been mounting pressure to definitively establish the legal rights of this newly created class of children. The Massachusetts Supreme Judicial Court is the highest court of any state to rule on the question of posthumously conceived children and has broken new legal ground in an attempt to keep pace with scientific developments. Its decision stands to serve as a model for similar judicial or legislative resolutions to this issue in other states and could prompt action by the Massachusetts legislature as well. As the technology of assisted reproduction continues to advance, the complexity of moral, legal, social, and ethical challenges attendant thereto will undoubtedly bring this and related controversies into the realm of active debate.

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[85] *See id.* at *23.

[86] *See id.* at *30.

[87] *See id.* at *32-33.

[88] *See id.* at *41.

[89] *See id.* at *41.