

## To Be Continued: A Look at Posthumous Reproduction As It Relates to Today's Military

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### I. Introduction

Permitting families of recently deceased Soldiers to collect semen from the Soldier for the purpose of artificial insemination implicates many moral, ethical, and legal issues. This practice should therefore be limited to cases where the servicemember has voluntarily surrendered a specimen prior to death and has clearly indicated the intended disposition of such specimen in the event of his death or incapacity. Additionally, military benefit eligibility criteria should be redefined to encompass any children conceived from this process within a specified period from the servicemember's death. The following Sergeant (SGT) Smith and First Lieutenant (1LT) Perry hypotheticals demonstrate the perplexities raised by unanswered moral and legal questions surrounding sperm cryopreservation<sup>2</sup> as they may be presented in the military arena.

The first hypothetical concerns SGT John Smith, a twenty-three-year-old Army Reservist who was seriously wounded in Iraq. After being stabilized, he was medically evacuated to Brooke Army Medical Center in Fort Sam Houston Texas, where he was met by his parents and his fiancée. After what appeared to be a miraculous recovery during a two month period where SGT Smith was competently communicating with his family and physicians and had gained enough strength to move about with assistance, SGT Smith's health began to decline to the point where he entered a persistent vegetative state.<sup>3</sup> Before life support was removed, SGT Smith's parents, the next-of-kin and attorneys-in-fact pursuant to SGT Smith's Durable Power of Attorney for Health Care, petitioned the hospital to extract SGT Smith's sperm so that his fiancée may later bear his child.

The second hypothetical concerns First Lieutenant (1LT) James Perry, an Army officer stationed at Fort Carson, who received orders notifying him that he would be deploying to Afghanistan in six months. Before deploying, 1LT Perry and his wife visited a sperm bank, where he deposited several specimens. He explained to his wife that he was leaving the specimens as insurance that his legacy and his dream of having three children could be carried out even if he did not come back.

With recent advances in assistive reproduction technology<sup>4</sup> and the high rate of injury and death among military servicemembers stationed in Iraq and Afghanistan,<sup>5</sup> the military is ripe for issues surrounding the posthumous conception<sup>6</sup> of

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<sup>2</sup> Sperm Cryopreservation is an assistive reproduction technique wherein liquid nitrogen is used to freeze reproductive cells for future use. See Tyler Medical Clinic, *Sperm Cryopreservation*, <http://www.tylermedicalclinic.com/cryobank.html> (last visited May 14, 2008).

<sup>3</sup> See *In re Jobs*, 529 A. 2d 434, 438 (N.J. Sup. Ct. 1987).

Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heartbeat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

*Id.*

<sup>4</sup> Assistive Reproduction technology includes “all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, [and] zygote intrafallopian transfer . . . .” THE PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES ch. 2, § I.A.1.a.(i). (2004) [hereinafter PRESIDENT'S COUNCIL ON BIOETHICS] (citing 42 U.S.C. § 263a-7(1)), available at <http://www.bioethics.gov/reports/reproductionandresponsibility/index.html> (follow “Chapter Two: Assisted Reproduction” hyperlink). “Most methods of assisted reproduction involve five discrete phases: (1) collection and preparation of gametes; (2) fertilization; (3) transfer of an embryo . . . to a woman's uterus; (4) pregnancy; and (5) delivery and birth.” *Id.* § I.

<sup>5</sup> Since March 2003, there have been 3965 military fatalities resulting from the war on Terrorism. An additional 29,320 servicemembers have been wounded in action. Defense Manpower Data Center, Statistical Information Analysis Division, Global War on Terrorism - Operation Iraqi Freedom, available at <http://siadapp.dmdc.osd.mil/personnel/CASUALTY/OIF-Total.pdf> (last visited May 14, 2008).

children conceived to individuals killed on active duty.<sup>7</sup> Moreover, family members faced with the decisions associated with the medical care of brain dead individuals<sup>8</sup> or with the otherwise untimely death of their servicemember relative, are frequently seeking out options for continuing the legacy of their loved ones.<sup>9</sup> For many pursuing this goal, the only hope lays in the birth of a child, “the servicemember’s child,” a child who could bear his name and carry on his legacy. With that hope, these optimistic family members turn to posthumous reproduction.

Posthumous reproduction is the birth of a child after the death of a parent.<sup>10</sup> While posthumous births have always occurred, in cases where a husband died from illness, accident, or war before his pregnant wife could deliver their child,<sup>11</sup> advances in reproductive technologies have given birth to a whole new aspect of posthumous reproduction—conception after death of a parent. Various assistive reproductive procedures are being employed routinely to freeze sperm, eggs, and even embryos, later reviving them in a completely viable form.<sup>12</sup> Although the processes for achieving this wonder vary greatly, the majority of issues that arise concerning posthumous reproduction<sup>13</sup> can generally be traced back to the process of cryopreservation.

Sperm cryopreservation is the scientific process used to freeze a man’s sperm for later use. Using this process, collected sperm is frozen at a temperature of -196°C where it can be preserved for an indefinite amount of time.<sup>14</sup> Although this process, also known as “sperm-banking,” is typically employed by men who are about to undergo chemotherapy or a vasectomy,<sup>15</sup> rapid deployments into extremely perilous areas have spurred a huge interest in sperm-banking by servicemembers and their loved ones.<sup>16</sup>

Unfortunately, however, the myriad of issues surrounding the military family’s decision to bank sperm are vast. In addition, because of the unique nature of the military, they face many obstacles never contemplated by individuals in the civilian sector. For instance, in many cases, the injured servicemember, or his remains as the case may be, must remain under military care for examination and autopsy for an average of seven to ten days after death.<sup>17</sup> Even in instances where the remains can be released sooner, it is often too late for the family to have the servicemember’s sperm collected and cryopreserved.<sup>18</sup> Similarly, there are often issues regarding government control, consent and jurisdiction because of the

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<sup>6</sup> Posthumous conception occurs when a child is conceived via assistive reproduction technology after one or both genetic parents have died. See generally Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor’s Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 258 (Jan. 1999).

<sup>7</sup> See, e.g., Valerie Alvord, *Some Troops Freeze Sperm Before Deploying*, USA TODAY, Jan. 27 2003, at 1A; Ellen Gamerman, *For U.S. Troops, A Personal Mission*, BALT. SUN, Jan. 27, 2003, at 1A; Marilyn Dunlop, *Fearing Injury, Soldiers Bank Sperm*, TORONTO STAR, Feb. 13 1991, at A14 (referencing a campaign to inform military men that sperm banks were an option for them); Ivor Davis, *Posterity Insurance: AIDS, Infertility and Medical Advances Have Given Sperm Banks a Run on Their Frozen Assets*, CHI. TRIB., Apr. 26, 1988, at 1 (noting that sperm donors included men on military duty who were posted to possible war or volatile zones).

<sup>8</sup> Brain dead refers to a state wherein there is irreversible cessation of all functions of the brain, including the brain stem. UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 589 (1996).

<sup>9</sup> See, e.g., *Israeli Court: Family Can Have Dead Soldier’s Sperm*, CNN.com, Jan. 29, 2007, available at <http://cnn.worldnews.printthis.clickability.com/pt/cpt?action=cpt&title=Israeli+court%3A> (reporting of a families struggle to have a sample of their son’s sperm that was taken after he was shot four years ago by a sniper, released to them for insemination by a surrogate mother).

<sup>10</sup> John A. Robertson, *Symposium: Emerging Paradigms in Bioethics: Posthumous Reproduction*, 69 IND. L.J. 1027, 1027 (1994).

<sup>11</sup> *Id.*

<sup>12</sup> RICHARD M. LEBOVITZ, *NATURAL SELECTION IN FAMILY LAW* ch. 5.2 (2005), available at <http://www.biojuris.com/natural/5-2-0.html>.

<sup>13</sup> “Most current conflicts about posthumous reproduction arise from the ability to freeze and thaw gametes and embryos . . . . In each case, the question is whether the freezing, thawing, inseminating, implanting, and other activities that lead to posthumous offspring should occur or continue.” Robertson, *supra* note 10, at 1030.

<sup>14</sup> See CryoGam Colorado, LLC., *Sperm Banking*, <http://www.cryogam.com/Sperm%20Banking.html> (last visited 15 May, 2008).

<sup>15</sup> Teresa Burney, *War Boosts Sperm Deposits*, ST. PETERSBURG TIMES (Florida), Feb. 19, 1991, at 1B.

<sup>16</sup> See Ann Denogean, *Davis-Monthan Airmen Bank Sperm as They Gird for Conflict*, TUCSON CITIZEN, Feb. 15, 2003, at 1B; Gamerman, *supra* note 7, at 1A (citing Angela Cruz, the fiancée of an Army reservist who was scheduled to deploy who stated “[i]f he were to die over there, I’m definitely going to use the sperm sample (deposited by her fiancée) to get pregnant.”).

<sup>17</sup> FALLEN HEROS FUND, *HANDLING ESTATE MATTERS*, available at [http://www.fallenheroesfund.org/content/pdf/Handbook\\_Chapter\\_2\\_\\_6\\_1\\_6123.pdf](http://www.fallenheroesfund.org/content/pdf/Handbook_Chapter_2__6_1_6123.pdf) (last visited 15 May, 2008).

<sup>18</sup> Posthumous sperm retrievable for sperm cryopreservation is only medically feasible within the first twenty-four to thirty hours after death. CORNELL UNIVERSITY, DEP’T OF UROLOGY, *NEW YORK HOSPITAL GUIDELINES FOR CONSIDERATION OF REQUESTS FOR POST-MORTEM SPERM RETRIEVAL* (2006) [hereinafter N.Y. HOSP. GUIDELINES], available at <http://www.cornellurology.com/guidelines.shtml>.

effect of the transient nature of the military family and the unique relationship between the servicemember and the government.

Analyzing the hypothetical facts surrounding SGT Smith and 1LT Perry, this article will discuss four issues surrounding posthumous conception resulting from assistive reproduction technology by means of the posthumous removal and insemination of sperm<sup>19</sup> in cases where the servicemember clearly intended such a result, as well as in cases where the servicemember's desire was unknown. First, this article will then address the status of any resulting child and the right to government benefits of any child conceived posthumously from cryopreserved sperm. Second, this article will address the government's responsibility to make a Soldier's remains accessible for sperm retrieval in a reasonable amount of time following the servicemember's death and any government requirements to assist in such removal when the body cannot be released for sperm removal during the time period wherein cryopreservation is medically feasible. Third, this article will then propose an amendment to the definition of "child" as this term applies to those benefits payable to dependants of servicemembers who die on active duty. Finally, this article will propose appropriate disclosures and advice for servicemembers prior to deployment, on the issues of cryopreservation and consent.

## II. The Issue of Issue

At the time of a man's sudden death, intense bereavement may cause a woman to attempt to "hold on" to her deceased partner by requesting sperm retrieval. Denial, a normal process of self-deception that is part of the grief process following a tragic loss, may initially drive the wife to request the procedure. A pregnancy may be planned as an act of love or memorial in the face of death. Sperm preservation could provide the false impression that the man will live on through his retrieved sperm and its fertility potential.<sup>20</sup>

### A. Fundamental Right to Children

It is a widely accepted belief that all individuals possess a fundamental right to have children.<sup>21</sup> In *Skinner v. Oklahoma*,<sup>22</sup> the Supreme Court found that a law authorizing sterilization of certain felons interfered with marriage and procreation rights, which were among "the basic civil rights of man."<sup>23</sup> Similarly, in *Meyer v. Nebraska*,<sup>24</sup> the Court listed a person's right "to marry, establish a home and bring up children"<sup>25</sup> among those fundamental liberties guaranteed by the Constitution.

In striking down a law requiring habitual criminals to be sterilized, the Court in *Stanley v. Illinois*<sup>26</sup> opined: "The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man,' . . ."<sup>27</sup> This was made abundantly clear in *Eisenstadt v. Baird*, where the Court noted, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>28</sup> While these cases clearly affirm an individual's right to marry and

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<sup>19</sup> Although recent developments in assistive reproduction have expanded the possibility of gamete conservation for later conception, including the possibility of preserving eggs, this paper will not address this option due to the additional issues related to surrogacy that arise from this scenario. See, e.g., Jessica Weiner & Lori Andrews, *The Donor Egg: Emerging Issues in Liability and Paternity*, 25 FAM. ADVOC. 15 (2002); see *World's First Children Born from Frozen Egg and Sperm*, CHI. SUN-TIMES, Dec. 30, 2000 at 14. See, e.g., Jessica Weiner & Lori Andrews, *The Donor Egg: Emerging Issues in Liability and Paternity*, 25 FAM. ADVOC. 15 (2002).

<sup>20</sup> N.Y. HOSP. GUIDELINES, *supra* note 18.

<sup>21</sup> "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>22</sup> 316 U.S. 535 (1942).

<sup>23</sup> *Id.* at 541.

<sup>24</sup> 262 U.S. 390 (1923).

<sup>25</sup> *Id.* at 399; see KENNETH D. ALPERN, *THE ETHICS OF REPRODUCTIVE TECHNOLOGY* 252 (1992).

<sup>26</sup> 405 U.S. 645 (1972).

<sup>27</sup> *Id.* at 651 (quoting *Meyer*, 262 U.S. at 399; *Skinner*, 316 U.S. at 541).

<sup>28</sup> 405 U.S. 438, 454 (1972).

to have children, the Court has not been inclined to find such a right where one of the parties to the marriage has declined or withdrawn their consent to have children.<sup>29</sup> Moreover, the Court has clearly established that no one can be forced to parent a child against his or her wishes. However, the question remains unanswered as to whether consent to procreate can be inferred to an individual who has not made his desires known. While an argument can be made for allowing such an inference, there are equally strong reasons for disallowing it.

Posthumous conception . . . affects the deceased's interests, because it recasts the content and contours of the deceased's life. When it occurs without the person's consent, it deprives an individual of the opportunity to be the conclusive author of a highly significant chapter in his or her life. Indeed, this is one of the reasons why any attempted analogy between posthumous conception and organ donation fails. Controlling the fate of gametes is different from—and more significant than—controlling the fate of cadaveric organs, because procreation is central to an individual's identity in a way that organ donation is not. As the consequences of posthumous conception profoundly affect core values held by the deceased while alive, respect for autonomy requires that this procedure should not be permitted unless the deceased's consent is clear.<sup>30</sup>

Unfortunately, in cases such as the hypothetical SGT Smith where the desires of the servicemember are presumably unknown, the issue of consent is often anything but clear. In these cases, the courts and legislature are all silent as to whether a spouse or parent could lawfully consent to the cryopreservation of the servicemember's sperm and if so, what constitutes the proper use of such sperm.<sup>31</sup> This silence has led to a host of different outcomes as those left behind struggle to balance competing interests of fulfilling their loved one's lifelong dream of having children with the issues associated with pursuing the posthumous conception of such a child.<sup>32</sup>

In our hypothetical concerning SGT Smith, SGT Smith's parents, (the Smiths) the individuals making the request, were not only SGT Smith's next-of-kin, but also the named agents in SGT Smith's Durable Power of Attorney for Health Care (DPAHC).<sup>33</sup> This raises two issues with regard to the element of consent. First, generally, the DPAHC "enables patients to appoint persons legally authorized to make decisions for them concerning medical treatment when the patients become mentally incompetent."<sup>34</sup> Accordingly, consent given pursuant to a validly executed DPAHC serves as the lawful consent of the patient so long as such consent is limited to healthcare decisions about treatment and diagnostic procedures. "Treatment and Diagnostic procedures" are typically construed to include, "any care, treatment, service or procedure to maintain, diagnose, or treat an individual's physical or mental condition."<sup>35</sup> As retrieving semen or other reproductive matter for the purpose of later inseminating another individual, cannot be deemed to provide care or treatment to the patient from whom the reproductive matter is taken, consent to such a procedure given pursuant to a DPAHC is void.<sup>36</sup>

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<sup>29</sup> *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>30</sup> Anne Schiff, Editorial, *Posthumous Conception and the Need for Consent*, 170 MED. J. AUSTL. 53 (1998), available at <http://www/mja.com.au/public/issues/jan18/schiff/schiff.html>.

<sup>31</sup> There have been several civilian cases arising from the posthumous conception of children when sperm had been cryopreserved by the wife after the death of her husband; however, none of these cases specifically address the issue of the lawfulness of the removal and subsequent insemination of the sperm. See *Ex rel. Stephen v. Barnhart*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005); *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961 (D. Ariz. 2002); *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000); see also Laura A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881 (2000) (discussing the moral and legal issues arising out of a request from a mother to have her son, who had shot himself, kept alive long enough to have his sperm surgically removed so that she might one day become a grandmother).

<sup>32</sup> See Schiff, *supra* note 30, at 53.

Any attempt to formulate a coherent ethical framework in this area must be sensitive to the many interests at stake. In addition to considering the grieving family member's desire to produce a child, policymakers must identify and evaluate other important interests. For example, protecting the psychological well-being of the resulting child should receive serious attention. Might the child be adversely affected by being knowingly denied access to one biological parent? Also, the interests of the deceased's family are important, as posthumous conception of a child will probably have enduring emotional, psychological and financial implications for the family. However, the issue most easily overlooked, as the dead have no voice, concerns the interests of the deceased. Specifically, what significance ought to be afforded the deceased's interests when we have little or no evidence regarding his or her wishes for, or objections to, posthumous procreation?

*Id.*

<sup>33</sup> A durable power of attorney for healthcare is an advanced directive that survives the incompetence of the drafter. Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Health-Care Decisions Act § 2 (1993), available at <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/uhcda93.pdf>.

<sup>34</sup> Carson Strong, *Consent to Sperm Retrieval and Insemination After Death or Persistent Vegetative State*, 14 J.L. & HEALTH 243, 246 (1999/2000).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Similarly, the second consent issue arising out of the SGT Smith hypothetical relates to the consent of the next-of-kin. “In the absence of a living will<sup>37</sup> or DPAHC that is executed in compliance with applicable state statutes, . . . the next of kin has legal authority to consent to the providing or withholding of life-preserving medical treatment for mentally incompetent patients.”<sup>38</sup> In applying such consent, the next of kin is limited to acting in a manner consistent with the course of medical treatment the patient would have chosen if he were competent. Where the next-of-kin does not know what the patient would have chosen, he must act in the best interest of the patient.<sup>39</sup>

Although the argument could be made that consent from the next-of-kin of a mentally incompetent patient, to withdraw that patient’s sperm for later insemination, is valid as “consent for life preserving medical treatment,” this argument should not prevail. Such an argument implies that the consent of the next-of-kin could be substituted for any procedure that is “life preserving” notwithstanding whether the procedure is life preserving for the incompetent patient, or as in the case of sperm retrieval, for another, such as a possible future child. Therefore, unless applying the “substituted judgment” of the patient, in a case where the patient’s decision is known, the best-interest standard must be applied. Therefore, consent of life-preserving treatment is limited to only those procedures which are life-preserving to the patient himself.<sup>40</sup> In such cases, unless it is clear that posthumous conception was actually considered and desired by the servicemember prior to his incompetence, it should be avoided.<sup>41</sup> Accordingly, under this analysis, the Smiths’ request is denied.

That conclusion contrasts with the Government’s goal of avoiding interference with SGT Smith’s right to procreate. Thus, if it is deemed medically feasible to move SGT Smith, the family could be given an option to transport SGT Smith to another facility where his reproductive matter could be retrieved and then, after the procedure is completed, returning or transporting SGT Smith back to the military facility. A second option available to the family calls for the removal of the reproductive matter after SGT Smith’s death.<sup>42</sup> However, because of the relatively short time frame during which this procedure is medically feasible, this is only a viable option if the government foresees being able to release SGT Smith’s body within the first eighteen to twenty-four hours of his death. As such, mission requirements should be evaluated to ascertain any prevailing need to hold the body for an extended period beyond this timeframe, such as requirements for autopsy. If it is not likely that the government would be able to release the body within the first eighteen to twenty-four hour period, only the first option should be given to the Smiths. In essence, although the Government should not perform the requested procedure for the Smiths, government action that would further frustrate their desire to have the procedure performed should be minimized wherever possible.

When the living can only speculate about the deceased’s wishes, posthumous conception should not be permitted. Even if there is evidence that the deceased desired parenthood in life, it is a considerable leap to assume that he or she would have wished to become a parent posthumously. Evidence indicating a desire for the former does not necessarily support a conclusion that the latter was also desired.<sup>43</sup>

Where it is clear that the deceased did in fact intend for his sperm to be used for the posthumous conception of his offspring as in the hypothetical raised concerning 1LT Perry, different issues must be addressed—the most prevalent of which being whether advance consent to posthumous conception remains valid after death and, if so, how is it impacted by state legislation pertaining to artificial insemination.

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<sup>37</sup> A living will is a document executed by patients while competent that specifies “those life-sustaining medical procedures they would want provided and those they would want withheld, should they become terminally ill.” *Id.* Most living wills are derived from the Uniform Rights of the Terminally Ill Act which authorizes a person to manage decisions regarding life-sustaining treatment should he be unable to make medical treatment decisions due to an illness or condition deemed medically terminal. *Id.* This language would likely serve to prohibit consent to sperm retrieval or similar procedures by an agent acting pursuant to a Living Will. *Id.*

<sup>38</sup> *Id.* at 248.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Even after death, the rights of the next of kin at common law with respect to any interest in the deceased’s body would not normally permit removal of the deceased’s reproductive matter. *See id.* at 355. Similarly, as the Uniform Anatomical Gift Act (UAGA) permits limited postmortem removal of organs and tissue used for transplantation or therapy, it should not be considered to include or permit posthumous sperm retrieval. *Id.*

<sup>42</sup> This is the current policy in the Army. *See* Memorandum from Brigadier General William T. Bester, Deputy Chief of Staff for Operations, Health Policy and Services, to Commanders, MEDCOM Military Treatment Facilities, subject: Sperm Collection from Deceased Active Duty Army Personnel (4 Aug. 2000).

<sup>43</sup> Schiff, *supra* note 30, at 53 (discussing posthumous conception and the need for consent).

## B. New Age Conception

When he deposited his sperm for cryopreservation, 1LT Perry expressed his desires for his wife to use the cryopreserved specimens to have up to three children. The rights afforded by the Constitution necessitate protection of personal decisions “relating to marriage, procreation, contraception, family relationships, child rearing, and education.”<sup>44</sup> Applying this broadly, “[p]rocreative liberty includes not only the right not to procreate but a right to procreate; in essence, to do those things that will lead to biological descendants.”<sup>45</sup> This said, however, “[t]he Constitution does not forbid a State . . . from expressing a preference for normal childbirth. It follows that States are free to enact laws to provide a reasonable framework for a [person] to make a decision that has . . . profound and lasting meaning.”<sup>46</sup> Although there is little law directly regulating or otherwise addressing the right to have children,<sup>47</sup> this suggests that if a state or other government entity were to place reasonable limitations on the right to reproduce through assistive reproduction technology, such limitations would be upheld.

“Although the Uniform Parentage Act sets forth legal rules concerning the paternity of children conceived posthumously,”<sup>48</sup> it fails to address the issues of consent to artificial insemination or consent by the man or his next of kin with regard to the use of sperm for procreation.<sup>49</sup> This being the case, the states could address this issue otherwise. For instance, the states could limit an individual’s right to consent to postmortem sperm retrieval or the use of previously supplied sperm in much the same manner that they regulate contractual agreements or other conveyance actions. Under this reasoning, “if a man consents in advance to having his sperm harvested at his death, the male may have made an enforceable third party beneficiary contract with the doctor in favor of his intended female beneficiary.”<sup>50</sup> Accordingly, the state would apply standard contract law to resolve any issues concerning the validity of the agreement. Therefore, to ensure compliance with the Statute of Frauds for contracts performed after death, the state could require that such contract be made in writing and meet other standard requirements.<sup>51</sup>

Another means of dealing with the issue could be to apply property law concepts. In *Hecht v. Superior Court*,<sup>52</sup> William Kane cryopreserved fifteen vials of his sperm designating on his storage agreement that in the event of his death, the sperm bank should release the vials to his girlfriend, Deborah Hecht.<sup>53</sup> Kane also executed a will in which he left a large part of his estate to Hecht as well as the sperm, specifying that the sperm was so that Hecht could bear children by him if she desired.<sup>54</sup> Kane’s adult children contested the will and petitioned the court to have the sperm destroyed.<sup>55</sup> The trial court found in favor of the adult children and ordered that the sperm be destroyed;<sup>56</sup> however, the appeal’s court found that “at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking [sic] authority as to the use of his sperm for reproduction.”<sup>57</sup> Thus, they overturned the lower court decision by applying a property law analysis using ownership terminology and applying it to the personal property at issue,<sup>58</sup> thereby avoiding the matter of consent.<sup>59</sup>

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<sup>44</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>45</sup> Susan Kerr, *Post-Mortem Sperm Procurement: Is It Legal?* 3 DEPAUL J. HEALTH CARE L. 39, 70 (1999).

<sup>46</sup> Dwyer, *supra* note 31, at 889 (citing *Casey*, 505 U.S. at 872).

<sup>47</sup> Kerr, *supra* note 45, at 71.

<sup>48</sup> Strong, *supra* note 34, at 252.

<sup>49</sup> *Id.* at 252–53.

<sup>50</sup> Ronald Chester, *Double Trouble: Legal Solutions to the Medical Problems of Unconsented Sperm Harvesting and Drug-Induced Multiple Pregnancies*, 44 ST. LOUIS L.J. 451 n.12 (2000).

<sup>51</sup> *Id.*

<sup>52</sup> 16 Cal. App. 4th 836 (1993).

<sup>53</sup> *Id.* at 840.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 841, 843–44.

<sup>56</sup> *Id.* at 844 n.3 (noting that before ruling the court stated, “[o]bviously we are all agreed that we are forging new frontiers because science has run ahead of common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories.”).

<sup>57</sup> *Id.* at 850.

<sup>58</sup> *Id.*

<sup>59</sup> See Strong, *supra* note 34, at 253 (noting that the *Hecht* decision leaves open the argument that consent by the sperm provider prior to death is valid authority to permit postmortem insemination with the sperm provided).

Assuming the state would apply the contract or property law concepts discussed above to the 1LT Perry hypothetical, Mrs. Perry would likely be given the sperm since presumably 1LT Perry's intent to transfer ownership of the specimens was clear.<sup>60</sup> Seeing that there has been no legislative guidance on the matter of assistive reproduction,<sup>61</sup> Mrs. Perry would likely then be able to use the sperm for artificial conception without legal interference. For, as stated by the court in *Hecht*, "[i]t is not the role of the judiciary to inhibit the use of reproductive technology when the Legislature has not seen fit to do so; any such effort would raise serious questions in light of the fundamental nature of the rights of procreation and privacy."<sup>62</sup> Thus, although ethical questions may remain,<sup>63</sup> when the donating Soldier has clearly indicated his intent to convey reproductive matter and has physically deposited such matter in a means accessible to the recipient, the transfer should be permitted.

In cases where the servicemember has clearly demonstrated an intent to have his reproductive matter made available for use by a designated recipient for the express intent of posthumous conception, but has not physically made such matter available, still other issues arise. Although, as discussed previously, some courts have addressed the status of sperm and have applied property law concepts to it, none of these cases have considered the issue of whether sperm may be posthumously removed for distribution purposes.<sup>64</sup> Once again the absence of legislative guidance has resulted in a myriad of outcomes. In an effort to address this growing concern, the Ethics Committee of the American Society for Reproductive Medicine (ASRM) has distributed guidance to assisted reproduction facilities, stating that a spouse's request for the posthumous removal of sperm "without the prior consent or known wishes of the deceased spouse need not be honored."<sup>65</sup> They opine that since these requests pose judgmental questions, they should be considered individually in light of circumstances and relevant state law.<sup>66</sup>

In an attempt to maintain some level of consistency in these cases, many assistive reproduction facilities, and many hospitals, have adopted their own policies for addressing this issue.<sup>67</sup> These policies rely on evidence of the actions and discussions of the deceased prior to his death to determine whether there is a reasonable expectation that he would have consented to having his sperm used for procreation after his death. Most of these policies also go on to find that "as next of kin, the wife should have responsibility for giving permission for sperm retrieval and should maintain responsibility for storage and subsequent disposition of sperm."<sup>68</sup> The rationale is that the next of kin is typically vested with control of the deceased's remains<sup>69</sup> and is empowered with the ability to consent to anatomical gifts believed to be within the consent of the deceased.<sup>70</sup> Notwithstanding this ability to consent, the spouse is required to make the request for sperm retrieval in writing and retrieval is often limited to cases where the sperm will be used only to inseminate the deceased's spouse.<sup>71</sup> Inasmuch as

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<sup>60</sup> Although the hypothetical did not mention a written document, it is likely that Mrs. Perry could still prove 1LT Perry's clear intention to leave the sperm for her use in conceiving his child or children posthumously, based on his statement and any writing provided to the storage facility.

<sup>61</sup> Currently, there is no federal oversight of assisted reproduction technology that addresses the issue of consent or any other ethical concern raised in the area.

There is only one federal statute that aims at the regulation of assisted reproduction: the Fertility Clinic Success Rate and Certification Act of 1992 ("the Act"). The purposes of the statute and its related regulations are twofold: (1) to provide consumers with reliable and useful information about the efficiency of ART services offered by fertility clinics, and (2) to provide states with a model certification process for embryo laboratories."

PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, ch. 2, § III.A.1.

<sup>62</sup> *Hecht*, 16 Cal. App. 4th at 861 (quoting *Johnson v. Calvert*, 5 Cal. 4th 84, 100 (1993)).

<sup>63</sup> "Spouses should not automatically have the right to their dead partner's sperm . . . the intent to have a child with another living person does not necessarily translate into the rights to the use of your partner's gametes after they've died." Dinah Wisenberg Brin, *Dead Men's Sperm Raises Ethical Debate*, COLUMBIAN (Vancouver, Wash.), May 29, 1997, at A3 (quoting the executive director of the National Advisory Board on Ethics and Reproduction).

<sup>64</sup> See *Hecht*, 16 Cal. App. 4th at 861; *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>65</sup> The Ethics Committee of the American Society for Reproductive Medicine, *Posthumous Reproduction*, 82 FERTILITY & STERILITY SUPP. 1, S262, Sept. 2004.

<sup>66</sup> *Id.*

<sup>67</sup> Although ASRM provides guidance on ethical issues that the "actively encourage" compliance with, compliance of ART facilities and practitioners with these guidelines is entirely voluntary. What is more, ASRM's entire system of "professional self-regulation is voluntary" thus no penalties or consequences are accessed for violations, as such, there is a general lack of compliance with ARSM. PRESIDENT'S COUNCIL ON BIOETHICS, *supra* note 4, ch. 2, § 1. Accordingly, where state law is silent, the clinics are free to act in the manner they feel most appropriate under the circumstances. *Id.*

<sup>68</sup> N.Y. HOSP. GUIDELINES, *supra* note 18.

<sup>69</sup> Robertson, *supra* note 10, at 1034.

<sup>70</sup> N.Y. HOSP. GUIDELINES, *supra* note 18.

<sup>71</sup> *Id.*

the result of cases based on this scenario would be so tenuous and diverse on otherwise similarly situated individuals, absent concise legislation on the subject, cases that lack both clear intent and pre-death retrieved reproductive matter should be rejected as candidates for post-mortem assisted reproduction.

Having determined that posthumous insemination is sustainable in cases where the servicemember has consented to the use of his sperm for this purpose and has made the sperm available, we return to our hypothetical 1LT Perry to determine the status of the resulting child or children.

### III. Parental Status Determined by Location

Let us assume that 1LT Perry was killed in action. After a period of mourning and counseling, his wife Logan was inseminated with the sperm left to her by 1LT Perry. Twenty-two months after 1LT Perry's death, Logan gave birth to twin girls in her hometown, Baton Rouge, Louisiana. After the birth of the twins, Logan applied for Social Security benefits on behalf of the girls and for increased indemnity compensation payments from the Veterans Administration because she is now the mother of two of 1LT Perry's surviving children. Both actions were denied at the agency level initially and on appeal. Logan then filed an action in federal court.

#### A. Federal Silence

To date, there is no federal guidance on the issue of posthumous reproduction.<sup>72</sup> Although cases involving posthumously conceived children have been brought in a number of state and federal courts, with increased frequency since 1993, most of these cases have dealt exclusively with the issue of inheritance rights or benefits of some type.<sup>73</sup> In each of these cases, the federal court looked to underlying state law as a predicate for determining whether the posthumously conceived child was in fact a child of the decedent before determining whether the child was eligible to inherit or otherwise receive benefits as a descendant of the deceased.<sup>74</sup> Accordingly, the outcome varied depending on the law of the state where the conception occurred.<sup>75</sup>

Noting a need for consistency, the Uniform Parentage Act (UPA) was amended to address the issue of posthumous conception. The UPA eliminates the possibility of parentage posthumously in cases where an individual dies after having provided reproductive matter, unless he or she has provided written consent to the posthumous insemination and to becoming the parent of the resulting child.<sup>76</sup> Notwithstanding the increased number of cases arising out of this very issue, only seven states have codified the UPA, making it necessary to consider in detail the individual states laws on the subject.<sup>77</sup>

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<sup>72</sup> Although it is acknowledged that “[c]ryopreservation of sperm and embryos make posthumous parentage possible,” currently, there is no federal oversight of assisted reproduction technology that addresses the issue of posthumous conception. PRESIDENT’S COUNCIL ON BIOETHICS, *supra* note 4, ch. 2, § II.C.

<sup>73</sup> See, e.g., *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002); *Stephen v. Comm’r of Soc. Sec.*, 386 F. Supp. 2d 1257, 1259 (M.D. Fla. 2005); *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002); *In re Estate of Kolacy*, 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

<sup>74</sup> See, e.g., *Gillett-Netting*, 231 F. Supp. 2d at 963; *Stephen*, 386 F. Supp. 2d 1257 (finding child did not qualify as the decedent’s child under Florida intestacy law); *Woodward*, 760 N.E.2d 257 (finding posthumously conceived children entitled to inherit under applicable state law); *In re Estate of Kolacy*, 753 A.2d 1257 (finding posthumously conceived children entitled to inherit under applicable state law).

<sup>75</sup> See *In re Marriage of Adams*, 551 N.E.2d 635, 639 (Ill. 1990) (holding that the lower courts should have applied Florida law instead of Illinois law when determining parentage issues concerning a child conceived through artificial insemination when the insemination had occurred in Florida).

<sup>76</sup> The Uniform Parentage Act § 707 (UPA), entitled Parental Status of Deceased Individual, states that:

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

Uniform Parentage Act § 707 (2000) (amended 2002).

<sup>77</sup> The UPA has been codified by Colorado, Texas, Delaware, North Dakota, Utah, Washington, and Wyoming. It was considered for adoption in Minnesota and West Virginia but was not enacted. It is currently being considered by Alabama and New Mexico. *Id.* See Carole M. Bass, *What If You Die, and Then Have Children?*, EST. PLAN. & TAX’N, Apr. 2006, at 20, 26, available at [http://www.sonnenschein.com/docs/docs\\_te/Bass.pdf](http://www.sonnenschein.com/docs/docs_te/Bass.pdf).

## B. States Divided

As previously stated, few states currently address the issue of posthumously conceived children, addressing only inheritance rights benefits.<sup>78</sup> Those states, as well as states that have not yet enacted any legislation on the matter, disagree with regard to whether and when posthumously conceived children can lawfully be considered children of the deceased.

For instance, under Florida law, a posthumously conceived child must have been provided for in the deceased individual's will before such child can lawfully be considered a "child" of the decedent.<sup>79</sup> Similarly, Virginia and California treat the child as issue of the decedent only if there is written consent by the decedent<sup>80</sup> and the child is born within ten months of the decedent's death in Virginia,<sup>81</sup> or is in utero within two years of the decedent's death in California.<sup>82</sup>

Louisiana takes a similar position, recognizing the posthumous child as the child of the decedent if there is written consent by the decedent, the child's mother is the decedent's surviving spouse, and the child is born within three years of the decedent's death.<sup>83</sup> Contrary to this position, some states, like Arizona, treat all natural children as legitimate children of the decedent,<sup>84</sup> ignoring entirely the issue of posthumous conception. While still other states, like Idaho, consider the issue head-on and intentionally exclude children from posthumously implanted gametes from rights as a child of the decedent.<sup>85</sup>

With the parentage determination varying among states, it is foreseeable that there may be an inequitable distribution of benefits based on the designation of child as determined by state statute or case law. For instance, in *Gillett-Netting v. Barnhart*,<sup>86</sup> the Ninth Circuit considered the issue of whether twins conceived with cryopreserved sperm, eighteen months after the death of their father, were eligible to receive Social Security benefits as dependent children of the decedent.<sup>87</sup>

Shortly after getting married in 1993, Rhonda Gillett and her husband Robert Netting had begun trying to have a child, albeit unsuccessfully.<sup>88</sup> In 1994, Netting was diagnosed with cancer, but before beginning chemotherapy, he cryopreserved some of his sperm.<sup>89</sup> The facts revealed that when he deposited the sperm, Netting knew his sperm could possibly impregnate his wife after his death and Gillett continued fertility treatments throughout the duration of Netting's cancer treatments.<sup>90</sup> Notwithstanding this, and evidence from the decedent's wife that the decedent had requested her to continue to try and have children after his death, the district court determined that the children did not meet the definition of "child" under the Social Security Act.<sup>91</sup> Specifically, the district court found that the Social Security regulations required that the children prove that they could inherit from the decedent under the relevant intestacy laws and that they could meet all of the criteria that define a child under the intestacy laws of the state.<sup>92</sup>

On appeal, the twins were awarded benefits when the court determined that the Social Security Act's definition of child would only apply when parentage was in dispute.<sup>93</sup> Because Arizona treated all natural children as legitimate children,

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<sup>78</sup> Bass, *supra* note 77 at 26; *see also* Karen Salmon, *Determining the Inheritance Rights of Posthumously Conceived Children*, NEW ENG. SCH. OF L., Spring 2007 (advanced legal research paper), available at [http://www.nesl.edu/research/rsguides/Karen\\_Salmon.htm](http://www.nesl.edu/research/rsguides/Karen_Salmon.htm).

<sup>79</sup> *See* FLA. STAT. § 742.17(4) (2006).

<sup>80</sup> VA. CODE ANN. § 20-158 (LexisNexis 2006); CAL. PROB. CODE § 249.5 (2006).

<sup>81</sup> VA. CODE ANN. § 20-164.

<sup>82</sup> CAL. PROB. CODE § 249.5.

<sup>83</sup> LA. REV. STAT. ANN. § 9.391.1 (2008).

<sup>84</sup> ARIZ. REV. STAT. § 8-601 (2006).

<sup>85</sup> IDAHO CODE SEC. 15-2-108 (2005).

<sup>86</sup> 371 F.3d 593 (9th Cir. 2004).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Gillett-Netting v. Barnhart*, 231 F. Supp. 2d 961, 963 (D. Ariz. 2002).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 966-67.

<sup>93</sup> *Gillett-Netting*, 371 F.3d at 599.

parentage could not be in dispute.<sup>94</sup> The court then looked to the Social Security Act's dependency requirements and concluded that, notwithstanding the fact that the children could not show actual dependence on the decedent as they were not born during his lifetime, dependence could be presumed because of the Arizona statute deeming them legitimate,<sup>95</sup> and the fact that "[i]t is well-settled that all legitimate children automatically are considered to have been dependent on the insured individual."<sup>96</sup>

The courts in *In re Estate of Kolacy*,<sup>97</sup> and *Woodward v. Commissioner of Social Security*,<sup>98</sup> also found that posthumously conceived children were children of the decedent. Similar to the facts in *Gillett-Netting v. Barnhart*,<sup>99</sup> the decedent in *Kolacy* had cryopreserved sperm prior to undergoing chemotherapy treatment for cancer which ultimately took his life. Just as in *Gillett-Netting v. Barnhart*,<sup>100</sup> in *In re Estate of Kolacy*,<sup>101</sup> twins were conceived using cryopreserved sperm, after the decedent's death.<sup>102</sup> Initially, the court denied the *Kolacy* twins the right to receive their father's Social Security benefits because the Social Security Act only allows a child to collect the benefits of his deceased parent if he is entitled to inherit from his deceased parent's intestate estate, and because New Jersey does not recognize a posthumously conceived child born more than 300 days after the father's death as a child of the father eligible to receive benefits.<sup>103</sup> The court then applied New Jersey law which required that posthumously conceived children be born with the decedent's consent.<sup>104</sup> The court rationalized that the children were conceived of sperm intended for their mother's use.<sup>105</sup> The court went on to acknowledge the gap between the state intestacy law and the "basic legislative intent to enable children to take property from their parents,"<sup>106</sup> ultimately finding that the twins were children of the decedent.<sup>107</sup>

*Woodward* involved a similar situation with twins conceived using the frozen sperm of their deceased father who had died of cancer.<sup>108</sup> After learning that he had leukemia, Warren Woodward froze his sperm before undergoing a bone marrow transplant.<sup>109</sup> He died shortly thereafter.<sup>110</sup> Lauren Woodward retrieved the cryopreserved sperm for insemination and two years later, gave birth to twin girls.<sup>111</sup> After the birth of the twins, Lauren Woodward obtained a judgment listing Warren as the twin's father on the birth certificate.<sup>112</sup> The court in that case applied Massachusetts law and upheld the inheritance rights of the children.<sup>113</sup> Before coming to this conclusion, however, the *Woodward* court set out criteria to be fulfilled before a child can be considered "issue" under the intestacy laws of Massachusetts.<sup>114</sup>

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 598–99.

<sup>96</sup> *Id.* at 598.

<sup>97</sup> 753 A.2d 1257 (N.J. Super. Ct. Ch. Div. 2000).

<sup>98</sup> 760 N.E.2d 257 (Mass. 2002).

<sup>99</sup> *Gillett-Netting*, 371 F.3d at 598.

<sup>100</sup> *Id.* at 598–99.

<sup>101</sup> *In re Estate of Kolacy*, 753 A.2d at 1259.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> N.J. STAT. § 9:17-43 (2008).

<sup>105</sup> *In re Estate of Kolacy*, 753 A.2d at 1259.

<sup>106</sup> *Id.* at 1262.

<sup>107</sup> *Id.* at 1264.

<sup>108</sup> *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257 (Mass. 2002).

<sup>109</sup> *Id.* at 260.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 260–61.

<sup>113</sup> *Id.* at 260.

<sup>114</sup> *Id.* at 259, 272.

The court determined that the child must prove a genetic relationship between the child and the decedent.<sup>115</sup> The court also found that the child must show that the decedent affirmatively consented to the posthumous conception prior to death; and that the decedent affirmatively consented to the support of any resulting child.<sup>116</sup> After applying this criterion, the court found that legislative intent supported a ruling in favor of the descendants.<sup>117</sup> The Massachusetts Supreme Court noted that the term “posthumous children” was not defined in the state’s intestacy statutes,<sup>118</sup> yet, the court went on to hold that where all of these criteria were met, and there were no time limitations at issue, posthumously conceived and born children were “children” of the decedent eligible for benefits.<sup>119</sup>

This same criterion proved lacking however, when considered under New Hampshire law. In *Eng Khabbaz v. Commissioner, Social Security Administration*,<sup>120</sup> the facts indicated that before dying, Mr. Khabbaz had banked his sperm so that his wife could conceive a child through artificial insemination.<sup>121</sup> Mr. Khabbaz then executed a consent form indicating that the sperm was for his wife’s use, specifying in writing that he desired and intended to be legally recognized as the father of any resulting child.<sup>122</sup> After Mr. Khabbaz’s death his wife became pregnant using the inseminated sperm.<sup>123</sup> She later applied for social security survivor’s benefit for her daughter as the surviving child of Mr. Khabbaz.<sup>124</sup> The benefits were denied.<sup>125</sup> The court held that a posthumously conceived child was not a surviving child eligible to inherit from her father under New Hampshire intestate law<sup>126</sup> regardless of the intent or preparation of the father.<sup>127</sup> The court reasoned that although the issue of posthumously conceived children was not specifically addressed, the statutes clearly intended to provide for “surviving” issue.<sup>128</sup> Here, although there was no doubt that the child was in fact the issue of the deceased, she was not “surviving” issue, since in order to “survive” the father, the child would have necessarily had to already be in existence at the time of Mr. Khabbaz’s death.<sup>129</sup>

Applying Florida law, the court in *Stephen v. Commissioner of Social Security*<sup>130</sup> came to a similar conclusion, notwithstanding strikingly similar facts to those in *Gillett-Netting*.<sup>131</sup> In this case, a child was denied Social Security benefits after being found not to be a child of the decedent<sup>132</sup> because Florida had specifically addressed the issue of the rights of posthumously conceived children and the court found that the child did not “qualify” as the decedent’s child.<sup>133</sup> Unlike Arizona law, which had been silent on the issue, Florida law specifically limits the rights of posthumously conceived children unless they were provided for in the decedent’s will.<sup>134</sup> In so ruling, the court in *Stephen* distinguished the case from *Gillett-*

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 265–66.

<sup>118</sup> *Id.* at 264, 272.

<sup>119</sup> *Id.*

<sup>120</sup> 930 A.2d 1180 (N.H. 2007).

<sup>121</sup> *Id.* at 799.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 800.

<sup>126</sup> *Id.* at 802.

<sup>127</sup> *Id.* at 808. See Judge Broderick’s concurrence noting, “Mr. Khabbaz did not execute a will, but his intentions to have and to provide for his child were clear. Our reading of RSA 561:1, however, leaves Christine unprotected and ignores what we know to be his intent.” *Id.* (Broderick, J., concurring).

<sup>128</sup> *Id.* at 802.

<sup>129</sup> *Id.*

<sup>130</sup> 386 F. Supp. 2d 1257 (M.D. Fla. 2005).

<sup>131</sup> *Gillett-Netting v. Barnhart*, 371 F. 3d 593 (9th Cir. 2004).

<sup>132</sup> *Stephen*, 386 F. Supp. 2d at 1261.

<sup>133</sup> *Id.*

<sup>134</sup> See FLA. STAT. § 742.17(4) (2006).

*Netting*, citing the fact that Arizona law was silent on the issue of posthumously conceived children whereas Florida law was not.<sup>135</sup>

A similar approach was taken by the Arkansas Supreme Court in *Finley v. Astrue*.<sup>136</sup> The Finleys were a married couple who had pursued fertility treatments during the course of their marriage.<sup>137</sup> As part of those treatments, Mr. Finley willingly provided his sperm for use to fertilize his wife's eggs.<sup>138</sup> In June 2001, ten embryos were created.<sup>139</sup> Two of these embryos were implanted into Mrs. Finley's womb while four of the remaining embryos were frozen for preservation.<sup>140</sup> One month later, Mr. Finley died intestate.<sup>141</sup> Subsequently, Ms. Finley miscarried both fetuses.<sup>142</sup> In June 2002, Ms. Finley had two of the frozen embryos implanted into her womb.<sup>143</sup> She later gave birth to a child and filed for child's insurance benefits on behalf of her child as a surviving child of her husband.<sup>144</sup> Initially the claim was denied, but in 2006 an administrative law judge awarded child's insurance benefits.<sup>145</sup> An appeals council later reversed the decision and Ms. Finley filed her complaint with the district court.<sup>146</sup> Since, however, the federal issue of benefits eligibility would be tied to the question of whether the child would inherit as a surviving child under Arkansas state law, the parties filed a joint motion to stay the federal court proceeding and the issue was certified to state court. The state court considered whether an embryo created using in vitro fertilization during his parents' marriage and implanted into his mother's womb after the death of his father could inherit from his father as a surviving child.<sup>147</sup> The court determined that since under Arkansas law a posthumous heir could only inherit if he were conceived before the decedent's death, the Finley baby was not a surviving child.<sup>148</sup> In making this finding, the court rejected an argument that conception had occurred at the time of fertilization, holding that when enacted the Arkansas code had not intended to include a child created through in vitro fertilization and implanted after the father's death since it was enacted in 1969, years before technology even made such a thing possible.<sup>149</sup> Accordingly, in Arkansas, regardless of the father's intent, a posthumously conceived child is not a "surviving child" for inheritance or benefit purposes.

What all of these cases indicate is that "unless and until a uniform set of statutory laws gain a universal recognition, the status of posthumous children of assisted reproduction will remain doubtful and probably be the subject of conflicting judicial treatment."<sup>150</sup> This may have an even greater detrimental effect on military servicemembers and their families because of the increased transient rate of military families that increases the likelihood of more than one jurisdiction being applicable. For example, in our hypothetical, the Perry twins were born in Louisiana. However, prior to the deployment the Perrys lived in Colorado, where 1LT Perry had cryopreserved his sperm and where the insemination occurred. After learning that she was pregnant with twins, Logan decided to move back to Louisiana to be close to family. However, 1LT Perry was legally a resident of Florida.

As state laws have been deemed applicable, even when considering benefits under the Federal Social Security Act,<sup>151</sup> it can be concluded that state laws will also be fundamental in determining eligibility for many military survivor benefits. If

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<sup>135</sup> *Stephen*, 386 F. Supp. 2d at 1257.

<sup>136</sup> 372 Ark. 103 (2008).

<sup>137</sup> *Id.* at 105.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 106.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 107.

<sup>148</sup> *Id.* at 109–12.

<sup>149</sup> *Id.* at 110.

<sup>150</sup> Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 FAM. L.Q. 579, 583 (2005).

<sup>151</sup> See 42 U.S.C. § 416(h)(2)(A) (2000). With regard to determining eligibility of a child to collect social security benefits, the provision provides:

that were the case, Logan Perry's federal court action would likely be governed by ILT Perry's home state laws<sup>152</sup> since those laws would be determinative of whether the children would be found to be ILT Perry's heirs. To ascertain the logical impact of state law on military benefits as they relate to the eligibility of a posthumously conceived child, it should prove helpful to consider each of the benefits concerned.

#### IV. The Benefits at Stake

##### A. Dependent Status

Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless. We may assume that the Legislature intended that such children be "entitled," insofar as possible, "to the same rights and protections of the law" as children conceived before death.<sup>153</sup>

There are a number of benefits that individuals enjoy solely as a result of their sponsor's service on active duty.<sup>154</sup> Survivor benefits include different allowances that specified surviving family members are eligible to receive due to the deaths of their servicemember sponsor.<sup>155</sup> The requirements for eligibility for any of these benefits is usually met where the death of the servicemember occurred in the line of duty<sup>156</sup> while on active duty.<sup>157</sup>

Beyond this requirement, where children are concerned, there must be evidence that the beneficiary is indeed the child of the deceased servicemember.<sup>158</sup> Accordingly, "posthumous conception is relevant in certain claims for survivor's benefits because the conception and birth of the child applicant occurs after the death of his . . . putative wage earner parent,"<sup>159</sup> or in military terms, after the death of the veteran. A literal reading would lead one to believe that only those who are alive, and could thus, outlive the soldier, would be entitled to "survivor's" benefits. However, as this might result in children within the same family "having different survivor's status and benefits,"<sup>160</sup> courts have typically rejected such a literal approach with regard to Social Security benefits,<sup>161</sup> and should arguably reject it with regard to military survivors' benefits for the same reasons.

Moreover, as military survivor benefits often mirror Social Security benefits and includes them to some extent,<sup>162</sup> distribution of payments for survivors' benefits should be similar under both programs. As with Social Security benefits,

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In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, 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 such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

*Id.*

<sup>152</sup> John Doroghazi, *Gillett-Netting v. Barnhart and Unanswered Questions About Social Security Benefits for Posthumously Conceived Children*, 83 WASH. U. L.Q. 1597, 1616 (2005).

<sup>153</sup> *Woodward v. Comm'r of Soc. Sec.*, 760 N.E.2d 257, 266 (Mass. 2002).

<sup>154</sup> Major Joseph E. Cole, *Essential Estate Planning: Tools and Methodologies for the Military Practitioner*, ARMY LAW., Nov. 1999, at 1.

<sup>155</sup> Major Dana Chase, *Legal Assistance Notes: Person Authorized to Designate Disposition (PADD) Update*, ARMY LAW., Feb. 2006, at 25.

<sup>156</sup> An injury, disease, or death is considered to have occurred in the line of duty when, at the time the injury was suffered, the member was in active military service regardless of whether on active duty or in an authorized leave status, unless the injury resulted from the person's own willful misconduct. Cole, *supra* note 154, at 2.

<sup>157</sup> For purposes of benefits, active duty is defined as, "full-time duty in the armed forces." *Id.*

<sup>158</sup> 38 C.F.R. § 3.57 (2007).

<sup>159</sup> *Banks*, *supra* note 6, at 310.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (citing Robert J. Kerkes, *My Child . . . But not My Heir: Technology, the Law, and Post Mortem Conception*, 31 REAL PROP PROB. & TR. J. 213, 232-240 (1996)). *But see Eng Khabbaz v. Comm'r of Soc. Sec. Admin.*, 930 A.2d 1180 (N.H. 2007) (applying a literal definition to the term "survivor").

<sup>162</sup> Cole, *supra* note 154, at 3.

military survivor benefits are payable on a monthly basis to the beneficiary, depending on the relationship of the beneficiary to the deceased military sponsor.<sup>163</sup> Therefore, “[t]he establishment of an applicant’s relational status to a deceased wage earner is paramount in qualifying for survivor’s insurance under social security”<sup>164</sup> and is equally important when determining beneficiary status as a military survivor.<sup>165</sup> Both social security and military survivor benefits are payable to “a range of family members.”<sup>166</sup> Under both systems, qualifying family members include the spouse of the deceased as well as unmarried children under the age of eighteen.<sup>167</sup> Considering that monetary benefits are often decreased<sup>168</sup> or withheld<sup>169</sup> in cases where the deceased has no children, posthumous conception issues are not only relevant, but paramount.

## B. Monetary Concerns

Survivor benefits include several different allowances that surviving spouses, children, and other dependents are eligible to receive due to the death of their servicemember provider. These allowances include Dependency Indemnity Compensation (DIC) [38 U.S.C.S. §§ 1301–1323], Service Member’s Group Life Insurance (SGLI) [38 U.S.C.S. § 1970], Survivor Benefit Program (SBP) [10 U.S.C.S. § 1450], Dependent Education Assistance (DEA) [38 U.S.C.S. §§ 3501–3567], Social Security, death gratuity, and other benefits.<sup>170</sup>

### 1. Dependency and Indemnity Compensation

Dependency and indemnity compensation (DIC) is a monthly benefit paid by the Veteran’s Administration to eligible survivors of military servicemembers who died while serving on active duty and other specified deceased veterans.<sup>171</sup> Survivors eligible for DIC include spouses who were married to a servicemember who died on active duty and who is not currently remarried, and unmarried natural, step or adopted children of the deceased veteran under the age of eighteen.<sup>172</sup> Currently, DIC is paid to a surviving spouse at a monthly rate of \$1,091<sup>173</sup> and increases with inflation, for as long as the spouse maintains eligibility.<sup>174</sup> The spouse who has children receives an additional \$271 per child each month.<sup>175</sup> Where

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Eligibility for Social Security survivor benefits is determined by the “insured status” of the deceased. The survivors of a military member are eligible for Social Security due to the military status of the deceased. What this means is that even if a military member has not been employed for a long enough period of time to be either currently or fully insured under Social Security, the member will still be treated as if fully insured. The surviving spouse of a veteran is not entitled to monthly [Social Security] survivor benefits until the spouse has reached the age of sixty. However, the surviving spouse will receive benefits as a custodial parent for any child of the fully or currently insured individual who is under the age of sixteen.

*Id.*

<sup>163</sup> See 42 U.S.C.S. § 402(d) (LexisNexis 2008); see also DEP’T OF DEFENSE, YOUR GUIDE TO SURVIVOR BENEFITS, DFAS-CL 1340.3-G, Aug. 2006 [hereinafter GUIDE TO SURVIVOR BENEFITS], available at <http://www.dfas.mil/retiredpay/survivorbenefits/Your-Guide-to-Survivor-Benefits.pdf>.

<sup>164</sup> Banks, *supra* note 6, at 311.

<sup>165</sup> VETERANS AFF. ADMIN., ESTABLISHING RELATIONSHIP FOR A BIOLOGICAL CHILD, ADOPTED CHILD, AND STEPCHILD, at M21-1MR, Pt. III, iii, 5-G-2 (Aug. 14, 2006) [hereinafter M21-1MR], available at [http://www.warms.vba.va.gov/admin21/m21\\_1/mr/part3/subptiii/ch05/ch05\\_secg.doc](http://www.warms.vba.va.gov/admin21/m21_1/mr/part3/subptiii/ch05/ch05_secg.doc).

<sup>166</sup> Banks, *supra* note 6, at 311.

<sup>167</sup> See 42 U.S.C.S. § 402(d); see also 10 U.S.C.S. § 1487(11). In addition, there are provisions for children over eighteen and in college, or permanently disabled, to continue to receive benefits. *Id.*

<sup>168</sup> Under the VA system surviving spouses generally receive a basic rate of monetary benefits with additional payments assessed for dependant children.

<sup>169</sup> In order to be eligible to receive survivors’ benefits under Social Security the surviving spouse must be at least sixty years old or fifty years old if disabled. See 42 U.S.C.S. § 402(e), (f).

<sup>170</sup> Chase, *supra* note 155, at 25 (noting that children may be eligible for other benefits including, death gratuity, medical care, emergency money, and exchange and commissary privileges); see Dep’t of Veterans Aff., *Survivor Benefits*, <http://www.vba.va.gov/survivors/vabenefits.htm> (last visited May 23, 2008) [hereinafter *VA Survivor Benefits*].

<sup>171</sup> 38 U.S.C.S. § 1310.

<sup>172</sup> *Id.* § 1311.

<sup>173</sup> This rate is effective for the period from December 2007 through 30 November 2008. See Dep’t of Veterans Aff., *Dependency and Indemnity Compensation*, <http://www.vba.va.gov/bln/21/Rates/comp03.htm> (last visited May 23, 2008).

<sup>174</sup> 38 U.S.C.S. § 1311; see also Military.com, *Dependency and Indemnity Compensation*, <http://www.military.com/benefits/survivor-benefits/dependency-and-indemnity-compensation> (last visited May 23, 2008) [hereinafter *Military.com DIC*].

<sup>175</sup> 38 U.S.C.S. § 1311; see also *Military.com DIC*, *supra* note 174.

there is no eligible surviving spouse but there is an eligible child or children, an increased individual DIC payment is made.<sup>176</sup>

Under the facts in our hypothetical, Logan Perry stands to gain an additional \$542 per month if the Veterans Administration recognizes the twins as 1LT Perry's surviving children. Once the twins are so recognized, they would be entitled to such payment until they reach the age of eighteen.<sup>177</sup> Another significant fact is that even if Logan later remarries prior to attaining the age of fifty-seven, thereby losing her own entitlement to a DIC payment, the children would still maintain their entitlement.<sup>178</sup> In fact, the children's payment level would increase since they would no longer be living with an eligible surviving spouse but would be entitled to the child(ren) only payment amount.<sup>179</sup> Accordingly, over the course of eighteen years, the amount of benefits at issue for a posthumously conceived child, or as in this case children, are significant.

## 2. Servicemembers Group Life Insurance

Although it is not as likely that the benefits at stake for posthumously conceived children pursuant to an entitlement under the Servicemembers' Group Life Insurance (SGLI)<sup>180</sup> program are as great, they too should be considered. The SGLI is a life insurance program made available to all members of the Uniformed Services.<sup>181</sup> Originally enacted pursuant to the Servicemen's Group Life Insurance Act of 1965,<sup>182</sup> the SGLI was intended to provide insurance coverage for the servicemember and his designated beneficiaries notwithstanding the inherently hazardous nature of the servicemember's duties.<sup>183</sup> Active duty servicemembers<sup>184</sup> are automatically insured under the SGLI for the maximum amount of \$400,000<sup>185</sup> unless they file an election reducing the amount of insurance.<sup>186</sup> Upon the death of an active duty servicemember, the proceeds of this insurance are paid to designated beneficiaries under the policy.<sup>187</sup> If the servicemember has not designated a beneficiary, the proceeds of the policy are paid to the surviving spouse or, if none, to the children in equal shares.<sup>188</sup> Herein lies the opportunity for the posthumously conceived child to benefit.

Posthumously conceived children born to someone other than a surviving spouse would arguably be first in line to take pursuant to the statutory order of precedence in cases where the policy of an unmarried servicemember is distributed "by law." In these cases, just as in cases concerning other benefits, the definition of "child" will ultimately be determinative. Here, however, the various state interpretations of the term "child" will likely be less influential than in cases concerning other benefits. Moreover, because proceeds of the SGLI "do not pass by intestacy, but pass, rather, according to a federal statutory scheme wholly independent of the laws of intestate succession of any state,"<sup>189</sup> it is generally recognized that the definition of "child" as used in the SGLI incorporates the ordinary and natural use of the term.<sup>190</sup>

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<sup>176</sup> 38 U.S.C.S. § 1311; *see also* Military.com DIC, *supra* note 174.

<sup>177</sup> If after attaining the age of eighteen the twins are pursuing an education at an approved educational institution, they could maintain eligibility until they are twenty-three years old. 38 U.S.C.S. § 101(4)(A)(iii).

<sup>178</sup> DEPT. OF VETERANS AFFAIRS, DEPENDENTS AND INDEMNITY COMPENSATION (DIC) (2007) [hereinafter VA DIC], *available at* [http://www.vba.va.gov/benefit\\_facts/Dependents\\_and\\_Survivors/English/DICeg\\_0107.doc](http://www.vba.va.gov/benefit_facts/Dependents_and_Survivors/English/DICeg_0107.doc); *see also* Owings v. Brown, 8 Vet. App. 17, 18-19 (1995).

<sup>179</sup> VA VIC, *supra* note 174.

<sup>180</sup> 38 U.S.C.S. § 1970.

<sup>181</sup> VA *Survivor Benefits*, *supra* note 170.

<sup>182</sup> Pub. L. No. 89-214, 79 Stat. 881 (1965).

<sup>183</sup> *Ridgway v. Ridgway*, 454 U.S. 46 (1981).

<sup>184</sup> A 1996 amendment substituted the term "servicemember" for the term "servicemen." 38 U.S.C.S. 1970 history (amendments1996).

<sup>185</sup> This amount was increased from \$250,000 and became the standard permanent amount pursuant to the Servicemember's Group Life Insurance Enhancement Act of 2005. Servicemember's Group Life Insurance Enhancement Act of 2005, Pub. L. No. 109-80, 119 Stat. 2045.

<sup>186</sup> 38 U.S.C.S. § 1967(a)(3)(B).

<sup>187</sup> *Id.* § 1970(a).

<sup>188</sup> *Id.*; *see* Kathleen Moakler, *Thinking About the Unthinkable*, MIL. MONEY, Summer 2005, *available at* <http://www.militarymoney.com/money/1116614601>.

<sup>189</sup> *Manning v. Prudential Ins. Co.*, 330 F. Supp. 1198, 1200 (Md. 1971).

<sup>190</sup> *Id.*; *Cantrell v. Prudential Ins. Co.*, 477 S.W.2d 484 (Ark. 1972).

Specifically, in matters pertaining to the SGLI, “child” is defined as the natural, adopted or illegitimate child of the decedent where the “proof adduced . . . establishes unquestionably that the deceased was the natural father of the child.”<sup>191</sup> What is more, the Supreme Court has held that notwithstanding the generally restricted application of federal law in domestic matters, the Supremacy Clause necessitates that the Servicemen’s Group Life Insurance Act “prevail over and displace inconsistent state law.”<sup>192</sup> Therefore, in evaluating the “proof” of parentage, the requirements of state law on the subject are substituted for a statutory scheme that “provides (1) reliable determinations of paternity; (2) quick and efficient administration of the insurance proceeds; and (3) a pattern of distribution which parallels the insured’s own wishes, could they be discovered.”<sup>193</sup>

The statute provides that “child” includes legitimate children, legally adopted children, illegitimate children of the mother, and illegitimate children of the father who: he has acknowledged in a signed writing; he has been judicially ordered to support; he was, while living, judicially determined to be the father of; have a certified copy of a public birth record or church baptismal record wherein the decedent was named as the father and served as the informant; or, who have public records naming the deceased as the father with his knowledge.<sup>194</sup> This language would likely prove problematic to the posthumously conceived child, as was demonstrated by the case of *Prudential Ins. Co. v. Moorhead*.<sup>195</sup> Although that case involved a challenge to the statute by a posthumous illegitimate child,<sup>196</sup> the holding of the case is probably quite indicative of the outcome of a claim pursued by a posthumously conceived child under the statute.

In *Moorhead*, Billie-Joe Moorhead was born seven months after her father, William Moorhead, an active-duty Sailor, was killed in a motorcycle accident.<sup>197</sup> After Billie-Joe’s birth, a New York family court granted an order finding that William Moorhead was Billie-Joe’s father and a birth certificate was issued by the state listing him as her father.<sup>198</sup> Both the court finding of parentage and the birth certificate listing the deceased as Billie-Joe’s father had been obtained after the death of the servicemember and without his acknowledgement or consent, thus, the documents failed to operate to make Billie-Joe an eligible beneficiary under the statute.<sup>199</sup> Billie-Joe filed her action asserting that she was entitled to recover the SGLI proceeds as the servicemember’s daughter and that the requirements of the statute deprived her of due process and the equal protection rights guaranteed her by the Fifth Amendment.<sup>200</sup>

The Court of Appeals for the Fifth Circuit found that “[i]t is well settled constitutional law that statutory classifications based on illegitimacy are subject to intermediate or heightened scrutiny.”<sup>201</sup> Accordingly, the court sought to ascertain whether the statutory beneficiary requirements for illegitimate children to collect as a “child” pursuant to the SGLI were related to an important governmental objective.<sup>202</sup> The court noted that intermediate scrutiny was appropriate in cases involving illegitimate children to ensure that “additional strictures imposed” on them do not have a “constitutionally impermissible discriminatory purpose as their impetus. It is a response to the fear that legal hardship may be visited upon illegitimate children merely because of ‘society’s condemnation of irresponsible liaisons beyond the bonds of marriage.’”<sup>203</sup> The court went on to note that while intermediate scrutiny in such cases ensures a substantial relationship between the

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<sup>191</sup> *Rodriguez v. Rodriguez*, 329 F. Supp. 597, 599 (Cal. 1971) (citations omitted); see *Prudential Ins. Co. v. Jack*, 325 F. Supp 1194, 1196 (La. 1971) (finding that the legislative intent of the SGLI program included illegitimate children within the definition of the term “child” where there was a written acknowledgement of parentage).

<sup>192</sup> *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981).

<sup>193</sup> *Prudential Ins. Co. v. Moorhead*, 916 F.2d 261, 264 (5th Cir. 1990).

<sup>194</sup> 38 U.S.C.S. § 1965 (8) (LexisNexis 2008).

<sup>195</sup> *Moorhead*, 916 F.2d 261.

<sup>196</sup> The appellant in *Moorhead*, Billie-Joe Moorhead had been conceived “traditionally” however, her father who had never married her mother, was killed in an accident prior to Billie-Joe’s birth. *Id.* at 263.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 264 (citing *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 264 (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

statutory means and end, it does not serve to forbid a statutory scheme that serves a legitimate governmental function, even if the statute imposes an unavoidable “hardship on a particular individual subject to it.”<sup>204</sup>

To that end, the court recognized that the governmental interests of accurately determining paternity and efficiently distributing insurance proceeds were important governmental interests justifying the government act of statutorily classifying children based on legitimacy to ensure greater accuracy in matters related to paternity.<sup>205</sup> Having made this finding, the court noted that there was a need for a determination of paternity during the father’s lifetime, as was accomplished through the statutory provisions, because even “[t]he marvels of DNA testing . . . only solve the problem if the putative father can be tested.”<sup>206</sup> The court then went on to find that the five means for establishing paternity listed in the statute promoted the governmental interest in accuracy of paternity notwithstanding Appellant’s argument that only one of those five methods, the signed acknowledgment, was available to her because she was a posthumously born illegitimate child.<sup>207</sup> The court rejected this argument noting that “Congress . . . is not charged with making every option available to every illegitimate child—the fit between statutory purpose and statutory rule need not be perfect.”<sup>208</sup> Accordingly they found that the statutory language describing “child” pursuant to the SGLI was related to an important government interest, met the test of intermediate scrutiny and did not violate the equal protection clause.<sup>209</sup>

In finding against Billie-Joe, a posthumously born child, the court struck down most of the arguments likely to be asserted in a similar claim by a posthumously conceived child. However, in cases where the decedent leaves a signed written document indicating his desires with respect to posthumous conception, it is foreseeable that the writing would serve as a “signed acknowledgement” as required under the statute. Thus, that writing alone or the writing coupled with DNA documentation establishing that the child is the natural, i.e., biological, child of the servicemember should suffice in qualifying the posthumously conceived child as a “child” eligible to receive SGLI proceeds under the statute. Accordingly, under our hypothetical, the Perry twins, who are born to a surviving spouse, would have no claim. A child born under circumstances similar to the facts in *Hecht*,<sup>210</sup> however, would be a “child” eligible to receive proceeds paid pursuant to a claim under the SGLI because the decedent made his intent clear.

As posthumously conceived children would likely not be born until sometime after the distribution under the SGLI,<sup>211</sup> however, it is not likely that many issues will arise with regard to this benefit. Of course it is possible that the servicemember would name a trust or similar entity, for the benefit of his children, as the beneficiary under such a policy. If this were the case, it is foreseeable that issues would arise with regard to children already born and their interest as well as to the question of whether to leave the trust open if, at the time of the veteran’s death he does not yet have any children, but has left reproductive matter and something indicating his express desire that such matter be used for posthumous conception of a child or children.

In *Moorhead*,<sup>212</sup> the court stated in dicta “[t]o require that all disbursements be withheld for several years on the chance that a claim from an afterborn [sic] illegitimate might be forthcoming would be impractical.”<sup>213</sup> While the court may be correct in that such an indefinite requirement is impractical and in direct contrast to Congress’s stated interest in making quick insurance disbursements, in cases where a servicemember has left reproductive matter and a signed written statement of consent or acknowledgment to someone other than his spouse, a requirement withholding disbursement for a specified time period reasonable to accomplish the servicemember’s desires, should be considered. Moreover, if posthumously

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 265.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 266.

<sup>209</sup> *Id.*

<sup>210</sup> *Hecht v. Superior Court*, 16 Cal. App. 4th 836 (1993).

<sup>211</sup> Payments made pursuant to claims under the SGLI are typically made fairly quickly since the code states that if a claim has not been filed by the person entitled to receive the payment under the language of the code within one year of the servicemember’s death, payment should be made to the person who would be entitled to payment if the first person had predeceased the servicemember. 38 U.S.C.S. § 1970(b) (LexisNexis 2008). The code goes on to provide that if after two years of the servicemember’s death there has still not been a claim for payment made by a claimant entitled pursuant to the order of precedence in the statute, payment may be made to an equitably entitled claimant and that such a distribution would bar recovery by any other person. *Id.*

<sup>212</sup> *Moorhead*, 916 F.2d at 265.

<sup>213</sup> *Id.* at 265 n.4.

conceived children are recognized as children of the servicemember with regard to other survivor's benefits, they should be treated similarly with regard to the SGLI where this can be accomplished within the current statutory infrastructure.

### 3. Survivor Benefit Program

Another benefit likely affected is the Survivor Benefit Program (SBP)<sup>214</sup> benefits. The SBP provides monthly payments to the surviving spouse or children of servicemembers who die in the line of duty while serving on active duty.<sup>215</sup> Payments under the SBP are made at 55% of the member's would-be retired pay based on 100% disability.<sup>216</sup> Additionally, the SBP is automatically adjusted annually for cost-of-living increases although payments are subject to federal income taxes.<sup>217</sup> If the spouse remarries before age fifty-five, SBP payments cease.<sup>218</sup> However, the spouse could opt to have payments made to children until they reach age eighteen (or age twenty-two if enrolled in school).<sup>219</sup> If the subsequent marriage ends in death, divorce or annulment, SBP payments may be reinstated.<sup>220</sup> Remarriage after age fifty-five has no effect on payment eligibility.<sup>221</sup> Payments made pursuant to the SBP are offset by dependency and indemnity compensation (DIC) payments unless such payments were made to a spouse who remarried after age fifty-seven.<sup>222</sup>

As the SBP is paid only to the surviving spouse or surviving children, a claim would not likely be filed on behalf of posthumously conceived children pursuant to the SBP unless and until the surviving spouse desires to remarry or is in some other way disqualified. At such time, it is foreseeable that she would petition to have the benefit paid to the surviving posthumously conceived children. Thus, any decision with regard to the status or eligibility of posthumously conceived children to receive other survivor's benefits would likely be determinative of a claim under the SBP. Such a determination might also be fundamental in cases where a posthumously conceived child is born to a servicemember who had no surviving spouse. As in the other benefits analyses, a determinative factor in such a case would be whether the posthumously conceived child is a surviving dependent child of the servicemember.

Since the SBP plan is akin to an insurance policy in that it is typically set up as an annuity payable to a named beneficiary which acts as an income maintenance program for the servicemember's survivors,<sup>223</sup> the same reasoning applied in determining the proper interpretation of "child" under the SGLI should be applied with respect to the SBP. Furthermore, proceeds paid should pass in accordance with the "federal statutory scheme wholly independent of the laws on intestate succession of any state."<sup>224</sup> This being the case, the language of the statute must be consulted.

Like "child" under the SGLI, "dependent child" under the SBP is also statutorily defined.<sup>225</sup> Unlike the definition of child under the SGLI, however, dependent child under the SBP is not defined in great detail. Moreover, the statute provides only that a dependent child is a person who is the child of a person to whom the plan applies, who is unmarried and under eighteen or between eighteen and twenty-two if in school, or is unmarried and incapable of self support because of a mental or physical incapacity that existed before the child was eighteen or when the child was between eighteen and twenty-two and in school.<sup>226</sup> Accordingly, the language should be given its natural meaning.<sup>227</sup> This being said, the posthumously conceived

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<sup>214</sup> 10 U.S.C.S. § 1448.

<sup>215</sup> GUIDE TO SURVIVOR BENEFITS, *supra* note 163.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> 10 U.S.C.S. § 1450(b)(2).

<sup>219</sup> *See* GUIDE TO SURVIVOR BENEFITS, *supra* note 163.

<sup>220</sup> 10 U.S.C.S. § 1450(b)(3).

<sup>221</sup> *Id.* § 1450(k)(1).

<sup>222</sup> *Id.* § 1450(c)(1); 38 U.S.C.S. § 1311; *Sharp v. United States*, 80 Fed. Cl. 422, 441 (2008).

<sup>223</sup> *MacLean*, 62 Comp. Gen. 553 (1983).

<sup>224</sup> *Manning v. Prudential Ins. Co.*, 330 F. Supp. 1198, 1200 (Md. 1971).

<sup>225</sup> 10 U.S.C.S. § 1447(11)

<sup>226</sup> *Id.* § 1447(11) (listing child as including an adopted child, stepchild, foster child "or recognized natural child who lived with that person in a regular parent-child relationship").

<sup>227</sup> *Rodriguez v. Rodriguez*, 329 F. Supp. 597 (1971).

child is likely to be considered a “dependent child” under the statute since he would genetically be a “child of a person to whom the Plan applies.”<sup>228</sup>

This, however, may present other issues. Specifically, since under the statute, surviving dependent children take in equal shares, issues concerning distribution with respect to other children of the deceased may arise. Moreover, dependent child annuity coverage under an elected SBP has been deemed to include all dependent children, not only those who were alive at the time of the election.<sup>229</sup> Such coverage “extends automatically and involuntarily to any child[ ] . . . thereafter acquir[ed].”<sup>230</sup> Logically, this reasoning should be applied to the analogous situation of the automatic SBP. Therefore, where there is no surviving spouse, but there are surviving dependent children who receive payments pursuant to the SBP, it is foreseeable that after having received monthly payments for a considerable time, even a few years, these dependent children could receive substantially reduced shares of the SBP payment as the result of posthumously conceived children being born. To ensure the most equitable result in such cases, a reasonable time period should be specified after which, posthumously conceived children should be precluded from receiving payments where it means reducing already established payments to other beneficiaries.

#### 4. Survivor’s Benefits Generally

Since these and other military survivor’s benefits were established to ensure that the surviving dependents were not left destitute by the death of the servicemember,<sup>231</sup> a goal similar to that of Social Security,<sup>232</sup> it stands to reason that the analysis applied by courts in Social Security cases should also be applied to military beneficiaries. In Social Security cases, courts began by concluding that “the legislative intent behind [social security] payments [was] to support surviving children who were actually “dependent” upon the wage earner,”<sup>233</sup> an intent similar to that which underlies the allocation of Military survivor benefits.<sup>234</sup> The courts realized that this dependency could be presumed through the child’s “relational status” with the wage earner. This was based on a recognized congressional intent that the actual dependency would not need to be shown in instances where the child would be entitled to inherit under state laws; where a marriage was invalid due to legal impediment; or where a parent had acknowledged in writing that the child was his child before his death or had been decreed by a court to be the father of the child.<sup>235</sup> Since it is not likely that a posthumous child, conceived with or without the consent or knowledge of her father, could meet any of this criteria, it is probably more appropriate to rely on the statutory definitions of qualifying child and thereby eliminate the requirement for actual dependency.<sup>236</sup>

#### V. A Proposed Change

A “child of the veteran” is statutorily defined as an unmarried legitimate child, an illegitimate child, an adopted child, or a stepchild acquired before reaching the age of eighteen years old and “who is a member of the veteran’s household or was a member of the veteran’s household at the time of the veteran’s death,” and who is under eighteen when benefits are awarded or who became permanently incapable of self support before reaching the age of eighteen or who is under the age of twenty-three and pursuing an education at an approved school.<sup>237</sup>

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<sup>228</sup> 10 U.S.C.S. § 1447(11)(iii).

<sup>229</sup> MacLean, 62 Comp. Gen. 553 (1983).

<sup>230</sup> *Id.*.

<sup>231</sup> Cole, *supra* note 154, at 3.

<sup>232</sup> Banks, *supra* note 6, at 311.

<sup>233</sup> *Id.* at 314; *see also* Wolfe v. Sullivan, 988 F.2d 1025, 1028 (10th Cir. 1993).

<sup>234</sup> When a Servicemember dies, family members are offered several benefits to ease some of the financial burdens. *See* Military.com DIC, *supra* note 174.

<sup>235</sup> 42 U.S.C.S. § 416 (LexisNexis 2008).

<sup>236</sup> *See* U.S. DEP’T ARMY, REG. 40-400, PATIENT ADMINISTRATION (6 Feb. 2008) (defining family as a legitimate child or judicially legitimized unmarried child under the age of twenty-one regardless of dependency on the active duty or retired servicemember. The regulation also specifies that persons are also “family members” if the sponsor Soldier died while serving on active duty.).

<sup>237</sup> 38 C.F.R. § 3.57(a) (2007).

Looking at the face of this statutory language, it would appear that posthumously conceived children attempting to recover under this statute, will encounter the same problems encountered by the children in *Woodward*<sup>238</sup> and the other posthumous conception cases. Moreover, because the statute does not define the terms used to describe the child such as “legitimate” and “illegitimate,”<sup>239</sup> it is foreseeable that interpretation will be “totally reliant on inconsistent state laws.”<sup>240</sup> This would also prove detrimental to the child where, as is likely in a military case, the law applied is that of the father’s home of record, possibly a state with no real connection to the child and where the laws may be less favorable to the child.<sup>241</sup>

#### A. Child Defined

For this reason, the definition of child as applied to cases pertaining to military survivor’s benefits should be expanded to reduce the need to rely on state law for interpretation. It can be argued that the need for an expanded definition has already been made apparent because of issues arising in other cases.<sup>242</sup> Moreover, over the past several years, the Veteran’s Administration has been presented with questions pertaining to the eligibility of children because of the ambiguity of the definition and the varied results from having to apply many different state interpretations.<sup>243</sup>

To clarify the present definition of child, a change should be made to Topic 37 of the Veterans Administration’s manual titled, M21-1MR, Pt. III, Subpt. iii, 5.G, *Establishing the Relationship Between the Veteran and His/Her Biological Child*, expanding the categories of children affected. Topic 37 currently reads:

Evidence adequate to establish the child’s age as outlined in M21-1MR, Part III, Subpart iii, 5.F.33 is also adequate to establish the relationship of a biological child to a male veteran married to the child’s mother if the

- veteran was married to the child’s mother at the time of the child’s birth, and
- evidence shows that the veteran was the child’s father.<sup>244</sup>

If the veteran was not married to the child’s mother at the time of the child’s birth, acceptable proof of relationship consists of the following:

- a written acknowledgement signed by the veteran
- evidence that the veteran has been identified as the child’s father by judicial decree ordering him to contribute to the child’s support or for other purposes, and/or
- any other secondary evidence that reasonably supports a finding that a relationship exists, such as
  - a copy of the public record of birth or church record of baptism showing that the veteran was the informant and was named as the father of the child
  - certified statements of disinterested persons who state that the veteran accepted the child as his, and/or
  - information obtained from a service department, or public records such as those maintained by school or welfare agencies, that show the veteran, with his knowledge, was named as the father of the child.<sup>245</sup>

Moreover, the language in Section 37c. *Establishing a Child’s Relationship to Male Veteran Not Married to the Child’s Mother*, should be amended to include language stating that “if the veteran was not married to the child’s mother at the time of the child’s birth, acceptable proof of relationship consists of the following: documentation that the veteran was married to the child’s mother at the time of his death and the child is biologically related to the veteran or, a written document manifesting the veteran’s intent to convey reproductive matter to the child’s mother for insemination after his death together

<sup>238</sup> *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257 (Mass 2002).

<sup>239</sup> 38 C.F.R. § 3.57.

<sup>240</sup> Doroghazi, *supra* note 152, at 1616.

<sup>241</sup> *Id.* (citing *Stephen v. Comm’r of Soc. Sec.*, 386 F. Supp. 2d 1257 (M.D. Fla. 2005) (finding child did not qualify as the descendant’s child under Florida intestacy law)).

<sup>242</sup> 38 C.F.R. § 10.42 (2007) (Dep’t of Veterans Affairs, Claim of Child Other Than Legitimate Child).

<sup>243</sup> See Memorandum from the General Counsel to the Director, Compensation and Pension Service, subject: Apportionment of Benefits (July 1, 1994), available at <http://www.va.gov/ogc/docs/1994/PRC16-94.DOC>.

<sup>244</sup> M21-1MR, *supra* note 165, at 5-G-2, Topic 37b.

<sup>245</sup> *Id.* at 5-G-3, Topic 37c.

with documentation establishing that the child was: (1) conceived using such reproductive matter, and (2) born within three years of the veteran's death."

This change alone will effectively restore to posthumously conceived children the status of a legitimate child that they are effectively deprived of at birth. This is easily demonstrated by looking at the 1LT Perry hypothetical. With the change, the twins would clearly be eligible for benefits because their mother was married to 1LT Perry at the time of his death. The twins are biologically related to 1LT Perry, he consented to the posthumous conception, and the twins were born within three years of his death. In essence, this change would allow posthumously conceived children to receive survivors' benefits in the absence of their father while at the same time providing an avenue to prevent frivolous or untimely claims. This change will also help the servicemember maintain a sense of peace, knowing that if something were to happen to him, his desires would be carried out and his family would be cared for.

## B. Advice to the Soldier

For this same reason, Soldiers preparing to deploy should be briefed on cryopreservation as part of their Soldier Readiness Process Training. Moreover, the military has established the Soldier readiness process program to help ensure that all Soldiers are administratively ready for deployment, at all times.<sup>246</sup> In preparing for deployment, soldiers are given legal advice on issues pertaining to estate planning, medical directives and other personal matters such as family plans and control and maintenance of personal property through powers of attorney and other legal documents.<sup>247</sup> This would be an opportune time to discuss the servicemember's issues, concerns, and desires relating to posthumous reproduction. If the stories cited in the newspaper articles<sup>248</sup> are accurate depictions of what is taking place regularly, it is time for the military to step up to ensure that servicemembers are accurately and adequately informed. If this is done, last minute issues of consent and intent can be eliminated or reduced so that the level of stress on family members at critical times when emotions are high can be minimized.<sup>249</sup> Additionally, having the servicemember consider and express his desires up-front may help the military to avoid the uncomfortable position of having to deny that finale request made by servicemember's loved ones in their attempt to carry out what they believe are his last wishes,<sup>250</sup> or in their own effort to continue his legacy.

## VI. Conclusion

It is evident from reading headlines such as "*Fearing Injury, Soldiers Freeze Sperm*,"<sup>251</sup> "*War Boosts Sperm Deposits*,"<sup>252</sup> and "*Some Troops Freeze Sperm Before Deploying*,"<sup>253</sup> in popular newspapers, that posthumous conception will soon be a growing concern for the United States Military.<sup>254</sup> Already we have seen the fruition of these issues as newspapers recently reported "*Science Makes A New Father Of A Fallen American Soldier*"<sup>255</sup> as they introduced the world to seven-month-old Benton Drew Smith, the posthumously conceived child of Second Lieutenant Brian Smith who was killed in action in Iraq more than two years before his son's birth.<sup>256</sup> Although issues involving posthumous conception have already

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<sup>246</sup> See generally U.S. DEP'T OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, MOBILIZATION AND DEPLOYMENT PROCESSING) (28 May 2003).

<sup>247</sup> *Id.* para. 4-6b(1)(b).

<sup>248</sup> See generally Alvord, *supra* note 7, at 1A; Gamerman, *supra* note 6, at 1A; Dunlop, *supra* note 7, at A14 (referencing a campaign to inform military men that sperm banks were an option for them); Davis, *supra* note 7, at 1 (noting that sperm donors included men on military duty who were posted to possible war or volatile zones).

<sup>249</sup> See generally N.Y. HOSP. GUIDELINES, *supra* note 18 (briefly discussing the effect of bereavement on the decision making process).

<sup>250</sup> See generally Schiff, *supra* note 30.

<sup>251</sup> Dunlop, *supra* note 7, at A14.

<sup>252</sup> Teresa Burney, *War Boosts Sperm Deposits*, ST. PETERSBURG TIMES (Florida), Feb. 19, 1991, at 1B.

<sup>253</sup> Alvord, *supra* note 7, at 1A.

<sup>254</sup> See also Video: *Widow Gets Pregnant with Fallen Soldier's Frozen Sperm* (MSNBC.com), available at <http://today.msnbc.msn.com/id/21134540/vp/19070167#19070167> (last visited June 4, 2008).

<sup>255</sup> Gregg Zoroya, *Science Makes Fallen Soldier a Father*, USA TODAY, Feb. 12, 2007, at 1.

<sup>256</sup> *Id.*; see also Arthur Caplan, *Should Kids Be Conceived After a Parent Dies?*, MSNBC, June 27, 2007 (calling for legal limits on posthumous reproduction as the rising death toll in Iraq and Afghanistan is causing American women to be faced with the decision of whether they should have a dead Soldier's child), available at <http://www.msnbc.msn.com/id/17937817/>.

been considered by a handful of States, the unique nature and varied aspects of military service require that these concerns be addressed more broadly and in a more uniformed fashion.

As partial compensation for the unique and inherently dangerous nature of service in the military, servicemembers receive benefits and entitlements not necessarily common in other professions. Moreover, at times many aspects of military life can seem a bit paternalistic. To this extent Servicemembers receive free counseling on personal issues and even free legal advice to a certain extent. These services are provided to ensure that the servicemember and his family are adequately informed and cared for so that the servicemember is free to focus on the military mission. For these reasons, before deploying servicemembers are briefed on a number of topics, to include some degree of estate and family planning. Since it appears that issues concerning posthumous reproduction are of greater concern for servicemembers anticipating deployment, the military could use this opportunity to discuss these issues so that the servicemember can prepare the documentation necessary to ensure his desires are known and expressed in a way that would facilitate his desires being lawfully carried out if there were a need.

Along the same lines, military survivor's benefits were established to ensure that the families of servicemembers who had made the ultimate sacrifice for their country would be cared for in the servicemember's absence. This cannot be accomplished through a system that purports to provide a means of support to a particular group of individuals and then excludes an entire subsection of that group based on factor's that if changed would preclude the very existence of the group. If indeed benefits were established to provide for surviving spouses and children, all such children who are similarly situated should be considered. Accordingly, it is within reason to make a slight administrative accommodation to an already existing rule so that posthumously conceived children may have the same opportunities for support as other children of deceased veterans, which, very well might include their older siblings. This can be achieved by merely broadening the definition of "child" as the term is used in determining eligibility for survivors' benefits.

Although issues concerning posthumous reproduction are still relatively new, it is within the best interest of the military and its servicemembers to address foreseeable concerns and to eliminate any unnecessary government induced impediments. By implementing a few simple practices in its pre-deployment estate and family planning services and making an uncomplicated modification to a regulatory definition, the military would be better prepared to meet the needs of "this new kind of Military family."<sup>257</sup>

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<sup>257</sup> Gamerman, *supra* note 7, at 1A.