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BREAKING THE ICE: EXPANDING THE CLASS OF "ISSUE" TO INCLUDE POSTHUMOUSLY CONCEIVED CHILDREN

DANIEL C. PERRONE*

INTRODUCTION

People are pretty much alike. It's only that our differences are more susceptible to definition than our similarities.¹

Imagine you were a posthumously conceived child.² Your mother and father were just getting accustomed to married life, when your father was diagnosed with cancer. Suddenly, your parents' hopes and dreams of having a long, happy marriage—which included children—flashed before their eyes. Fearing the worst, your father deposited a sample of his semen at a sperm bank with instructions that it be cryopreserved, and that, in the event of his death, it be held subject to the directions of your mother. Shortly thereafter, your father succumbed to his illness and passed away. Following your father's death, your mother underwent numerous attempts to impregnate herself, until finally, three years later, she conceived a child—You.

Your paternal grandmother, having been a single mother herself, knew the difficulties that your mother would soon face and offered to help in any way possible. As the years passed, your grandmother filled the void left by your father's death and became a second mother to you, until she too passed away nearly ten years after you were born. To ensure that her family would be provided for, your grandmother executed a will that left her entire estate

² A posthumously conceived child is "a child conceived after the death of [his or her parent]—through . . . assisted reproduction. " William H. Danne, Jr., Annotation, Legal Status of Posthumously Conceived Child of Decedent, 17 A.L.R. 6th 593 (2006).
However, since you were not conceived during your father's lifetime, you may not be considered a permissible beneficiary of this "class gift." The above example illustrates a situation where a child was conceived after his or her father's death. It is important to note that it is also possible for a child to be conceived after the death of his or her mother. Imagine that your mother, a member of the United States' Armed Forces, had just learned that she would soon be deployed for combat. After receiving this news, your mother arranged to have her eggs frozen and, in the event of her untimely death, used by your father to conceive a child. Admittedly, this scenario differs from the above example, namely, because a surrogate mother would be needed to carry out this process. In the end, however, the result is the same—you face the possibility of being denied inheritance rights simply because of the unfortunate circumstances surrounding your conception.

Although you are probably wondering how it is possible that you may not qualify as a beneficiary of your grandmother's will, the answer is quite simple. In New York, legislative action has failed to keep pace with the rapid advancements in biotechnology. These advancements, specifically the ability to cryopreserve semen, eggs, and embryos, have enabled a person to produce a genetically related child even after his or her death. However, they have also led to a host of legal issues that have received only minimal attention.

In an effort to resolve one of the issues raised by the advancements in biotechnology, this Note addresses whether, and to what extent, New York's Estates, Powers and Trusts Law ("EPTL") should be amended to expand inheritance rights—under a class gift—to certain posthumously conceived children. Currently, New York's EPTL § 2-1.3 defines a class gift as "a disposition of property to persons described in any instrument as

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3 "Issue are the descendants in any degree from a common ancestor." N.Y. EST. POWERS & TRUSTS LAW § 1-2.10(a)(1) (McKinney 2008).
4 See infra text accompanying note 10.
5 See infra Part I.A.
6 A surrogate mother is "[a] woman who carries out the gestational function and gives birth to a child for another . . . typically on behalf of an infertile couple." BLACK'S LAW DICTIONARY 1106 (9th ed. 2009).
7 See infra Part II.A.
8 See infra text accompanying notes 21–24.
9 See Danne, Jr., supra note 2 (noting that only a limited number of decisions have addressed the question of the legal status of a posthumously conceived child); Jenna M. F. Suppon, Note, Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children, 48 FAM. CT. REV. 228, 229 (2010) ("The complicated nature of the conception of these children has led to a host of legal questions and issues that have received only minimal attention.").
the issue, children, descendants . . . (or by any term of like import) of the creator or of another . . . ."  

A disposition to beneficiaries described by those terms encompasses several types of children, including non-marital children and children conceived before, but born alive after, disposition of the gift becomes effective. It does not include posthumously conceived children. As a result, there is an increasing population of children who have been, or face the possibility of being, excluded from inheriting as members of the class of issue.

To remedy this problem, this Note proposes an amendment to New York's EPTL that would expand the class of issue to include certain posthumously conceived children. To do so, this amendment would focus on the grantor's intent to include the posthumously conceived child as a beneficiary of the class gift. Once, and if, such intent has been established, this amendment would impose three additional requirements that the child must satisfy to qualify as a class member. First, maternity or paternity must be established by clear and convincing evidence. Second, the deceased parent must have consented in writing to the posthumous use of his or her genetic material, as well as designated a person to control its use. Finally, the child must be conceived before a member of the class becomes entitled to distribution.

In essence, this amendment would treat posthumously conceived children like any other potential class member, provided that the above-mentioned requirements are satisfied. Those requirements are designed to act as safeguards to protect the grantor's intent, the rights of other class members, and the rights of posthumously conceived children. Moreover, they would greatly reduce any potential for fraud, while providing certainty and finality in the administration of estates.

For illustrative purposes, this Note focuses on situations where the creator of the class gift and the child's deceased parent are two different

10 N.Y. Est. Powers & Trusts Law § 2-1.3(a) (McKinney 2008).
11 Id. § 2-1.3(a)(3).
12 Id. § 2-1.3(a)(2).
13 See infra Part II.A.
15 See infra Part III.A.1.
16 See infra Part III.A.2.
17 See infra Part III.B.
individuals, such as in the hypotheticals presented above. In an effort to provide clarity throughout this Note, the term "grantor" refers to the creator of the class gift and the term "deceased parent" refers to the parent, or potential parent, of the posthumously conceived child. However, it is important to note that this amendment would apply with equal force to situations where the grantor and the deceased parent are the same person.

This Note is divided into three main parts. Part I of this Note will discuss the development of Artificial Reproductive Technologies ("ART"), as well as the increased use, and societal acceptance, of ART worldwide. It will explain the defining characteristics of a class gift, highlighting some of the legal issues and policy concerns raised by children conceived through the use of ART, specifically, posthumously conceived children. Part II will discuss the inadequacies of New York's current class gift statute, EPTL § 2-1.3. It will also analyze the In re Martin B. decision, which illustrates one of the new challenges that the legislature must face as a result of advancements in biotechnology. Part III will discuss possible amendments to New York's EPTL that would expand the class of "issue" to include certain posthumously conceived children. Next, it will compare this Note's proposed amendment to the New York State Assembly's proposed bill, illustrating the key differences between these proposals by way of the hypothetical posed at the beginning of this Note. Finally, it will address concerns that opponents have raised regarding the extension of inheritance rights to posthumously conceived children, explaining how the safeguards implemented by this Note's proposed amendment adequately address such concerns.

I. THE GROWING "CLASS" OF POSTHUMOUSLY CONCEIVED CHILDREN

This Section will explore the development of ART, as well as the issues raised by children conceived through the use of such technology, specifically, posthumously conceived children. Section A will provide a brief summary of the most commonly used methods of ART, illustrating the vast increase in use, and societal acceptance, of this technology. Section B will then explain what a "class gift" is, detailing the defining characteristics of such gifts. In addition, it will highlight some of the legal issues and policy concerns raised by posthumously conceived children in the context of class gifts.
A. The Science Behind Posthumous Conception

Initially, the development of ART brought hope to families who could not procreate by natural means.\(^{18}\) Since its inception, ART has enabled millions of people throughout the world to have biological children who otherwise would not have been able to do so.\(^{19}\) However, due to rapid advancements in biotechnology, the use of ART has been expanded to facilitate the process of posthumous conception.\(^{20}\)

ART encompasses a variety of technologies, "the oldest, simplest, and most widespread method is the [cryopreservation] of male sperm for later implantation in the woman or for the fertilization of an egg in vitro."\(^{21}\) Cryopreservation is a method employed to preserve reproductive material at extremely low temperatures for extended periods of time outside of the body.\(^{22}\) Cryopreservation has become so prevalent that it is common sperm bank policy to freeze all semen deposits to enhance preservation.\(^{23}\) As a result, reproductive materials, such as semen, eggs, and embryos, can be, and are being, preserved for periods of time that could exceed ten years, thus enabling a child to be conceived from such genetic material long after


\(^{20}\) See Jamie Rowsell, Stayin' Alive: Postmortem Reproduction and Inheritance Rights, 41 FAM. CT. REV. 400, 400 (2003) ("The scientific discovery of the ability to cryogenically freeze and preserve reproductive material and the ability to harvest gametes from the deceased has facilitated the process of postmortem reproduction."); Jenna Suppon, Note, Life After Death: The Need to Address the Legal Status of Posthumously Conceived Children, 48 FAM. CT. REV. 228, 230 (2010) (discussing how reproductive technology has made it possible for children to be conceived a number of years after the death of one of their biological parents).

\(^{21}\) Chester, supra note 18, at 973 (emphasis added). Other popular methods of assisted reproduction include: artificial insemination, in vitro fertilization, gamete intrafallopian transfer, and zygote intrafallopian transfer. Suppon, supra note 20, at 230. Each of those methods could be used to facilitate the process of posthumous conception. Id.

\(^{22}\) Rowsell, supra note 20, at 401; see Charles P. Kindregan, Jr. & Steven H. Snyder, Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology, 42 Fam L.Q. 203, 211 n.35 (2008). To facilitate this process, a small amount of glycerol is added to the reproductive material before freezing, to ensure that it remains viable after thawing, and it is stored in liquid nitrogen at temperature of minus 328 degrees Fahrenheit. Rowsell, supra note 20, at 401.

the death of his or her biological parent.24

The circumstances that motivate people to use ART vary widely. People suffering from serious illnesses, such as cancer or Hodgkin's lymphoma, have utilized ART to provide for the continuation of their lineage in the event of their untimely death or as insurance against future infertility due to sterilizing treatments.25 In addition, many soldiers being deployed for combat have utilized this technology by having their sperm or eggs frozen and stored to ensure their ability to produce a child in the event they do not return from battle, are so seriously injured they cannot conceive naturally, or are exposed to sterilizing chemical agents.26 Regardless of the motivating circumstances, those who use ART have one thing in common: the desire to have a genetically related child.27

Currently, ART is gaining widespread acceptance and societal approval. Since 1978, when the world's first "test tube"28 baby was born, more than three million babies have been produced through the use of ART.29 A study conducted in 2002 estimated that ART is now responsible for approximately 219,000 to 246,000 babies born each year worldwide.30 This marks a significant increase from 1989, just five years after the first birth from a frozen embryo occurred,31 when only 30,000 babies were born

24 See Rowsell, supra note 20, at 401; Gilbert, supra note 23, at 526 ("Sperm which has been stored for over ten years has produced healthy children.").

25 Gilbert, supra note 23, at 526 ("Other common uses for the storing of sperm for later insemination include insurance against future infertility due to chemotherapy or radiation treatment, vasectomy, or exposure to toxic substances.").

26 See Robert Harper, Dead Hand Problem: Why New York's Estates, Powers and Trusts Law Should Be Amended to Treat Posthumously Conceived Children As Decedents' Issue and Descendants, 21 QUINNIPIAC PROB. L.J. 267, 268-69 (2008) (discussing how soldiers marching off to war are using artificial reproduction technologies to ensure their ability to procreate); Gilbert, supra note 23, at 526 (stating that activity at sperm banks increases greatly in times of war).


28 For purposes of this Note, the term "test tube" baby refers to a child born through the use of in vitro fertilization.


30 Jacques de Mouzon et al., Int'l Comm. for Monitoring Assisted Reprod. Tech., World Collaborative Report on Assisted Reproductive Technology, 2002, 24 HUM. REPROD. 2310, 2316 (2009), available at http://humrep.oxfordjournals.org/content/24/9/2310.full.pdf. It is important to note that the term "ART" in this sentence encompasses all forms of Artificial Reproductive Technologies, including artificial insemination. Additionally, although this study was conducted in the year 2002, these figures represent the most recent data available.

worldwide as a result of ART. Additionally, that study found that in just two years, from 2000 to 2002, the number of ART procedures increased by more than twenty-five percent. As these figures demonstrate, the number of ART procedures, as well as the number of children produced therefrom, is growing steadily.

B. The Impact of Posthumously Conceived Children on Class Gifts

In New York, the Estates Powers and Trusts Law ("EPTL") governs the validity, effect, and interpretation of class gifts. Specifically, EPTL Section 2-1.3—New York State's class gift statute—defines a class gift as "a disposition of property to persons described in any instrument as the issue, children, descendants . . . (or by any other term of like import) of the creator or of another." There are two defining characteristics of a class gift. First, a "group label" is used to describe the beneficiaries. A group label identifies the beneficiaries by a common characteristic that is shared by all current and potential class members. In most cases, this common characteristic pertains to a degree of family relationship, such as "issue" or "descendants.

Second, the beneficiaries are intended to take as a group. This means that class membership is not static. Rather, class membership is "subject to fluctuation by increase or decrease." Increase in a class occurs when a new member is added to the class," such as when a child is born or

32 Horsey, supra note 29.
33 Mouzon, supra note 30, at 2314.
34 New York State's EPTL governs the validity, effect, and interpretation of class gifts of personal property where the grantor was domiciled in New York. See Margaret Valentine Turano, Practice Commentary, McKinney's Cons., Laws of N.Y., Book 17B, EST. POWERS & TRUSTS LAW § 3-5.1(c) (McKinney 2002); see also id. § 7-1.10. Additionally, New York State's EPTL governs the disposition of real property where that property is located within New York. N.Y. EST. POWERS & TRUSTS LAW § 3-5.1(b) (McKinney 2008).
35 N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a).
36 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1 (Tentative Draft No. 4, 2004). Although this is only a tentative draft, it has been approved in principle by the American Law Institute ("ALI"). Lawrence W. Waggoner, Class Gifts Under the Restatement (Third) of Property, 33 OHIO N.U. L. REV. 993, 995 (2007). Even though it has been approved by the ALI, it is important to note that the Restatement is not a binding source of law. Courts, however, have looked to such secondary sources for a reflection of the public's evolving attitude toward emerging legal issues, including the inheritance rights of posthumously conceived children. See, e.g., In re Martin B., 841 N.Y.S.2d 207, 211 (Sur. Ct. N.Y. Co. 2007).
37 See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1 cmt. c (Tentative Draft No. 4, 2004); Waggoner, supra note 36, at 995, 997.
38 See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS. § 13.1(a)(1) (Tentative Draft No. 4, 2004); Waggoner, supra note 36, at 995.
39 Waggoner, supra note 36, at 995.
adopted. On the other hand, decrease in class membership "occurs when a class member is excluded from the class on account of death . . . or some other reason." 

Fluctuation in class membership becomes important in determining the shares of each class member. Once a class member becomes entitled to distribution, the gift is divided among the then-entitled class members on a fractional basis. This means that an increase in class membership would result in an abatement of the existing class members' shares, whereas a decrease in class membership would result in an enlargement of the existing class members' shares.

At some point, the ability of a class to increase or decrease must come to an end. Certainty and finality in determining the members of a class are critical to society's interest in the orderly administration of estates. Accordingly, estates cannot be held open for years to allow for the mere possibility that a posthumously conceived child may come into existence at some indeterminable point in time. At the same time, however, donative intent and the rights of posthumously conceived children deserve respect and the legislature must take them into account.

In New York, the ability of a class to increase or decrease seemingly comes to an end when disposition of the class gift becomes effective.

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40 ReSTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1 cmt. h (Tentative Draft No. 4, 2004); accord Waggoner, supra note 36, at 1003.
41 Id. § 13.1 cmt. h (stating that two of the other reasons for decrease in class are when a class member is excluded from the class on account of divorce or disqualification); Waggoner, supra note 36, at 995.
42 ReSTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1(a)(2) (Tentative Draft No. 4, 2004); Waggoner, supra note 36, at 995.
43 ReSTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 13.1 cmt. h; accord Waggoner, supra note 36, at 1003.
44 Id. § 13.1 cmt. h.
45 In re Martin B., 841 N.Y.S.2d 207, 211 (Sur. Ct. N.Y. Co. 2007); David M. Becker, A Critical Look at Class Gifts and the Rule of Convenience, 42 REAL PROP. PROB. & TR. J. 491, 494 (2007) (stating that courts adopt the rule of convenience, which excludes potential family members from class gifts, to ensure "timely distribution in a manner that is administratively convenient to courts, representatives, and trustees").
48 See N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a)(2) (stating that a disposition of property to persons described as issue, includes "[c]hildren conceived before, but born alive after such disposition becomes effective") (emphasis added).
This does not occur when the class gift is actually distributed. Rather, the disposition of a class gift becomes effective when a class member becomes entitled to his or her share. For instance, if the class gift takes effect upon the grantor's death, as in the hypothetical posed at the beginning of this Note, the disposition of the class gift becomes effective when the grantor dies.

However, things are not always as they seem. EPTL Section 2-1.3 has failed to keep pace with the rapid advancements in biotechnology, such as the ability to cryopreserve semen, eggs, and embryos, which have made it possible for a person to produce a genetically related child even after he or she has passed away. As a result, there is an increasing population of children who have been, or may soon be, excluded as members of the class of issue, despite the fact that they otherwise qualify as members of that class.

II. WHO QUALIFIES AS "ISSUE" IN NEW YORK

This Section examines whether, and to what extent, posthumously conceived children, in New York, may inherit as members of the class of issue. Section A will discuss the current statutory provisions of EPTL § 2-1.3, which establish who qualifies as a member of the class of issue. Next, Section B will analyze the In re Martin B. decision—the only New York case to directly address the inheritance rights of posthumously conceived children in the context of a class gift.

A. New York's Current Statutory Provision for Class Gifts

New York's EPTL Section 2-1.3, read literally, seems to include posthumously conceived children as members of the class of issue. For

49 See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 15.1 cmt. b (Tentative Draft No. 4, 2004); see also In re Unborn Child, 683 N.Y.S.2d 366, 369 (Fam. Ct. Suffolk Co. 1998) ("Although the child's property interest is not realized until birth, it is recognized while the child is yet a fetus.") (quoting Gloria C. v. William C., 476 N.Y.S.2d 991, 995 (Fam. Ct. Richmond Co. 1984)).

50 RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 15.1, cmt. b.

51 Id. It is worth noting that the distribution date for a postponed class gift taking effect on the death of the income beneficiary is the time of death of the income beneficiary, not when the corpus of the trust is actually distributed. Id. For example, in In re Martin B., all seven trust instruments provided that, at Abigail's death, the principal was to be distributed to Martin B.'s issue. Martin B., 841 N.Y.S.2d at 208. In that case, Abigail was Martin B.'s wife, as well as the income beneficiary of the trusts. Id. Thus, the distribution date of those trusts would be the time of death of Abigail.

52 See infra Part II.A.

53 See supra note 14 and accompanying text.

54 See infra Part III.A.2.
instance, EPTL Section 2-1.3(a)(2) provides that a disposition of property to persons described in any instrument as issue, includes "[c]hildren conceived before, but born alive after such disposition becomes effective." On its face, this provision focuses on the time when disposition becomes effective, not on the circumstances surrounding the child's birth. Thus, it would seem that posthumously conceived children, conceived prior to disposition, would be included in the class of issue, despite having been conceived after the death of their biological parent.

Likewise, EPTL Section 2-1.3(a)(3) ostensibly bears upon the inheritance rights of posthumously conceived children. That section extends inheritance rights under a class gift to certain "non-marital children." EPTL Section 2-1.3(a)(3) creates a presumption that a non-marital child is the legitimate child of his mother and, therefore, is entitled to inherit as his mother's issue. On the other hand, a non-marital child must meet the burden of proof set forth in EPTL Section 4-1.2 to qualify as his father's issue. In other words, a non-marital child may inherit from his father and paternal kindred, only if paternity is established by clear and convincing evidence. Since posthumously conceived children are always non-marital children, they appear to qualify under this section, provided they satisfy Section 4-1.2.

However, a literal construction of these provisions proves to be problematic. These provisions were enacted in 1966, twelve years before the first successful in vitro fertilization was performed and eighteen years before the first birth from a frozen embryo occurred. In other words, EPTL Section 2-1.3 was enacted long before the legislature could have

55 N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a)(2) (emphasis added).
56 Id. § 2-1.3(a)(3).
57 Id. ("A non-marital child is the child of a mother."). It is likely that § 2-1.3(a)(3) adopted this presumption from § 4-1.2(a)(1), which provides that "[a] non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his paternal kindred." Id. § 4-1.2(a)(1); Margaret Valentine Turano, Supp. Practice Commentary, McKinney's Cons. Laws of N.Y., Book 17B, EST. POWERS & TRUSTS § 2-1.3 (2011) (explaining that a non-marital child will share in the gift if he or she meets the burden of proof set forth by § 4-1.2).
58 N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a)(3) (stating that a non-marital child is the child of a father if the child is entitled to inherit from such father under § 4-1.2).
59 Id. § 4-1.2(a)(2)(C); Cf. Helene S. Shapo, Matters of Life and Death: Inheritance Consequences of Reproductive Technologies, 25 HOFSTRA L. REV. 1091, 1099 (1997) (explaining that some states even allow the exhumation of a father's body after death for DNA testing to prove paternity with clear and convincing evidence).
61 See N.Y. EST. POWERS & TRUSTS LAW § 2-1.3.
62 See supra text accompanying note 28.
63 See supra text accompanying note 31.
anticipated that children could be posthumously conceived.\(^{64}\) Accordingly, as the practice commentary explains, EPTL Section 2-1.3 only extends inheritance rights to children that were conceived during their parents' lifetimes, not those conceived thereafter.\(^{65}\)

**B. The In re Martin B. Decision**

The *In re Martin B.* decision illustrates one of the new challenges that the New York State Legislature must address as a result of the rapid advancements in biotechnology. On December 31, 1969, Martin B., the grantor, executed seven trust agreements, which gave the trustees discretion to sprinkle principal to and among his issue during the life of his wife, Abigail.\(^{66}\) These instruments also provided that, at Abigail's death, the principal was to be distributed to Martin B.'s issue, unless Abigail exercised her special testamentary power to transfer the trusts' assets to other eligible appointees.\(^{67}\)

On July 9, 2001, Martin B. died, survived by Abigail and their son Lindsay, who had two adult children. Martin B. was predeceased by his son James.\(^{68}\) After being diagnosed with Hodgkin's lymphoma, James deposited a sample of his semen at a laboratory with instructions that it be cryopreserved, and that, in the event of his death, it be held subject to the directions of his wife, Nancy.\(^{69}\) When James died, on January 13, 2001, he had no children.\(^{70}\) Years later, Nancy underwent in vitro fertilization and gave birth to two boys, James Mitchell and Warren, three and five years after his death, respectively.\(^{71}\) As a result, the trustees brought this proceeding to determine whether James Mitchell and Warren were issue for purposes of the trusts' provisions, despite having been conceived several years after the death of their father.\(^{72}\)

The court began its discussion by noting that New York does not have a statute directly addressing the rights of posthumously conceived children.\(^{73}\)

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\(^{65}\) Id.; see also, Margaret Valentine Turano, Supp. Practice Commentary, McKinney's Cons. Laws of N.Y., Book 17B, EST. POWERS & TRUSTS § 2-1.3 (2007) ("[T]he legislature, when it referred to children born posthumously, meant children *in utero* at the decedent's death.").

\(^{66}\) *In re Martin B.*, 841 N.Y.S.2d at 207–08.

\(^{67}\) Id. at 208.

\(^{68}\) Id.

\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Id.

\(^{72}\) Id.

\(^{73}\) Id. at 209. At present, the court noted, the right of a posthumous child to inherit in intestacy (EPTL § 4-1.1) or as an after-born child under a will (EPTL § 5-3.2) is limited to a child conceived...
Since legislative action failed to keep pace with the progress of science, the court turned to other sources for a reflection of the public's evolving attitude toward assisted reproduction, including statutes in other jurisdictions that directly address this issue, model codes, and Restatements of the Law.\textsuperscript{74}

The court determined that these sources attempt to balance competing interests.\textsuperscript{75} "On the one hand, certainty and finality are critical to the public interests in the orderly administration of estates. On the other hand, the human desire to have children, albeit by biotechnology, deserves respect, as do the rights of the children born as a result of such scientific advances."\textsuperscript{76}

To achieve such balance, most jurisdictions require written consent to the posthumous use of genetic material and establish a cutoff date by which the child must be conceived, typically two to three years after the deceased parent's death.\textsuperscript{77}

Turning to the trustees' concerns, the court found that the absence of Martin B.'s specific intent to include James Mitchell and Warren as beneficiaries of the trusts was not controlling.\textsuperscript{78} Rather, the court stated that "where a governing instrument is silent, children born of this new during the decedent's lifetime. \textit{Id.} However, the court concluded that these provisions were not applicable to the case at hand because they only applied to intestacy and to wills where the after-born child was the child of the testator, rather than the child of a third party. \textit{Id.} at 209–10. Moreover, the court found that the concerns related to winding up a decedent's estate differ from those related to identifying whether a class disposition to a grantor's issue includes a child conceived after the father's death, but before the disposition became effective. \textit{Id.} at 210. The court also analyzed EPTL §§6-5.7 and 2-1.3. \textit{Id.} Although the court noted that these statutes, read literally, would allow posthumously conceived children to claim benefits as biological offspring, it ultimately concluded that the legislature did not anticipate that these provisions would apply to such children. \textit{Id.} Rather, the court stated that the legislature presumably contemplated that these provisions would apply only to children who were conceived during their parents' lifetimes. \textit{Id.}

\textsuperscript{74} \textit{Id.} at 209 ("In the absence of binding authority, courts must turn to less immediate sources for a reflection of the public's evolving attitude toward assisted reproduction—including statutes in other jurisdictions, model codes, scholarly discussions and Restatements of the law.").

\textsuperscript{75} See \textit{id.} at 211.

\textsuperscript{76} \textit{Id.}

\textsuperscript{77} See \textit{id.} at 210–11. In Louisiana, a posthumously conceived child may inherit from his or her father if the father consented in writing to the use of his semen and the child was born within three years of the father's death. \textit{Id.} at 210 (citing LA. REV. STAT. ANN. § 9:391.1 (2003)). Likewise, in California, the parent must have consented in writing to the posthumous use of genetic material and the child must have been conceived within two years of the parent's death. \textit{Id.} (citing CAL. PROB. CODE § 249.5 (Deering 2006)). The Uniform Parentage Act, which has been adopted, in part, by at least seven states, including Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming, requires written consent by both the man and the woman. \textit{Id.} at 210–11 (citing UNIF. PARENTAGE ACT § 704 (2000)).

\textsuperscript{78} \textit{Id.} at 211 ("Although it cannot be said that in 1969 the grantor contemplated that his 'issue' and 'descendants' would include children who were conceived after his son's death, the absence of specific intent should not necessarily preclude a determination that such children are members of the class of issue."). In support of this assertion the court adopted the rationale of the Restatement (Third) of Property: Wills and Other Donative Transfers § 14.8 (Tentative Draft No. 4, 2004), namely, if an individual considers a child to be his or her own, society through its laws should do so as well. \textit{Id.}
biotechnology with the consent of their parent are entitled to the same rights 'for all purposes as those of a natural child.' Since Martin B. intended to benefit all members of his lineage equally, the court held that James Mitchell and Warren were issue for all purposes of the trusts.

At the end of its opinion, the court stated that comprehensive legislation is necessary to resolve the issues raised by advancements in biotechnology. The court, therefore, stated that it was going to send a copy of its decision to the respective chairs of the Judiciary Committees of the New York State Senate and Assembly.

III. EXPANDING THE CLASS OF "ISSUE" TO INCLUDE POSTHUMOUSLY CONCEIVED CHILDREN

Posthumously conceived children and children conceived during their parents' lifetimes are essentially alike, yet New York's EPTL distinguishes them from one another merely because of the circumstances surrounding their birth. Section A will discuss two proposed amendments to New York's EPTL that would eliminate this distinction by expanding the class of issue to include certain posthumously conceived children. Section B will then address several arguments raised by those who oppose expanding inheritance rights to posthumously conceived children.

A. Amending New York's Estates, Powers and Trusts Law

To expand the class of issue to include certain posthumously conceived children, the New York State Legislature should enact legislation that directly addresses this issue. As mentioned earlier, certainty and finality in determining the members of a class are critical to society's interest in the orderly administration of estates. Currently, there is an absence of

79 Id. (quoting In re Park, 207 N.E.2d 859, 861 (N.Y. 1965)).
80 See id. at 211–12 (internal citations omitted):
Although James probably assumed that any children born as a result of the use of his preserved semen would share in his family's trusts, his intention is not controlling here. For purposes of determining the beneficiaries of these trusts, the controlling factor is the grantor's intent as gleaned from a reading of the trusts agreements. Such instruments provide that, upon the death of the grantor's wife, the trusts fund would benefit his sons and their families equally. In view of such overall dispositive scheme, a sympathetic reading of these instruments warrants the conclusion that the grantor intended all members of his bloodline to receive their share.

81 Id. at 212.
82 Id.
83 See supra text accompanying notes 75–77.
binding authority on this issue and, as a result, courts must turn to other, less immediate sources for a reflection of the public's attitude toward assisted reproduction. Rather than leave this issue to judicial interpretation, the New York State Legislature should enact legislation that directly addresses this issue and adequately provides for society's interest in the orderly administration of estates, as well as the rights of posthumously conceived children.

a. The New York State Assembly's Proposed Amendment

Several members of the New York State Assembly have sponsored a bill that would expand the class of issue to include certain posthumously conceived children. These Assembly members claim that it is imperative that this legislation be passed, as there is an increasing population of children who have been excluded as heirs of their parents' estates due to the inability of the law to keep pace with the rapid evolution of technology.

In an attempt to remedy this problem, they have sponsored a bill that would amend New York's EPTL by adding a new section: EPTL Section 4-1.3. Under this section, a posthumously conceived child would be considered the legitimate, non-marital child of his or her deceased parent. This enactment would entitle the posthumously conceived child to any and all rights, privileges, and benefits granted a non-marital child, including the right to inherit as the issue of his or her deceased parent and parental kindred.

To qualify under EPTL Section 4-1.3, three requirements must be satisfied. First, maternity or paternity must be established by clear and convincing evidence. Presumably, this requirement stems from the fact

84 See supra text accompanying notes 73–74.
85 Assembly Bill, supra note 14. This bill is sponsored by Assembly Members Crystal Peoples-Stokes, Darryl Towns, Deborah Glick, Earlene Hooper, Jonathan Bing, Keith Wright, Nick Perry, Vivian Cook, and William Boyland. Id. The most recent action regarding this bill occurred on January 4, 2012 when the proposed legislation was referred to the Judiciary Committee. Id.
86 Id.
87 Id. ("The estates, powers and trusts law is amended by adding a new section 4-1.3.").
88 Id. (stating that a child entitled to inherit under this section would be considered a non-marital child and the legitimate child of his or her maternal or paternal progenitor, as the case may be). 89 Id. ("Any and all rights, privileges and benefits granted a non-marital child, as defined in section 4-1.2 of this part, including rights to any support payments administered by a state department or agency, shall be granted to a posthumously conceived child provided the requirements of this section are met."). Since § 2-1.3(a)(3) extends inheritance rights under a class gift to non-marital children, it follows that such rights, privileges, and benefits would include the right to inherit under EPTL § 2-1.3(a)(3). See supra text accompanying notes 56–60.
90 Assembly Bill, supra note 14 (stating that paternity or maternity must be established by clear and convincing evidence); see Lawrence W. Waggoner, Class Gifts Under the Restatement (Third) of Property, 33 Ohio N.U.L. Rev. 993, 995 (2007).
that posthumously conceived children are non-marital children and, therefore, must qualify under EPTL Section 4-1.2 to inherit from or through their parents. Although EPTL § 4-1.2 creates a presumption of maternity, that presumption is stricken by this bill, which would require clear and convincing evidence of maternity or paternity.

Second, the deceased parent must have signed an instrument during his or her lifetime indicating that he or she intended to parent the future child and that it was his or her intent to provide support for the child. This requirement appears to follow other jurisdictions that have directly addressed the inheritance rights of posthumously conceived children. Both California and Louisiana require the deceased parent to have consented in writing to the posthumous use of his or her genetic material. However, this requirement seems most akin to that imposed by the Uniform Parentage Act ("UPA"). In addition to written consent, the UPA requires intent to be the parent of the child, which presumably encompasses providing support for the child.

Finally, the child must be conceived within two years of his or her parent's death. This requirement is in accord with the handful of jurisdictions that have enacted statutes directly addressing the inheritance rights of posthumously conceived children. For instance, in California a

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91 See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a) (McKinney 2010) (establishing the requirements that a non-marital child must satisfy in order to inherit from his mother or father, as well as his maternal or paternal kindred).
92 See id. (stating that "[a] non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.") (emphasis added).
93 Assembly Bill, supra note 14.
94 Id.
The deceased progenitor signed an instrument during his or her lifetime indicating his or her intent to parent the future child, and indicating his or her intent to provide support for such future child, provided that such instrument is acknowledged or executed or proved in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public.
95 See CAL. PROB. CODE § 249.5 (Deering 2006) (stating that the parent must have consented in writing to the posthumous use of his or her genetic material); LA. REV. STAT. ANN. § 9:391.1 (2012) (stating that a posthumously conceived child may inherit if the parent consented in writing to the use of genetic material).
96 DEL. UNIF. PARENTAGE ACT § 8-704 (2000) (stating that a man who intends to be a parent of a child must consent, in a record, to all forms of assisted reproduction); id. § 8-707 (2000) ("[T]he 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."). Currently, the Uniform Parentage Act has been adopted, in part, by seven states, including Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. See In re Martin B., 841 N.Y.S.2d 207, 210 (Sur. Ct. N.Y. Co. 2007).
97 Assembly Bill, supra note 14 (stating that a child conceived posthumously within two years of the date of death of his or her maternal or paternal progenitor shall be considered a non-marital child and the legitimate child of such maternal or paternal progenitor, as the case may be).
posthumously conceived child must have been conceived within two years of the deceased parent's death to inherit. Similarly, in Louisiana, a posthumously conceived child may inherit if the child was born within three years of the deceased parent's death.

The Assembly's proposed bill would be a step in the right direction toward extending inheritance rights to certain posthumously conceived children. However, in the context of a class gift, it simply does not go far enough to effectuate donative intent or to protect the rights of posthumously conceived children.

b. The Amendment that the New York State Legislature Should Enact

To address the inadequacies presented by EPTL Section 2-1.3 as well as those presented by the Assembly's proposed bill, this Note proposes an amendment to New York's EPTL that would focus on the grantor's intent to include the posthumously conceived child as a beneficiary of the class gift. Once such intent is established, this amendment would impose three additional requirements that must be satisfied in order for the child to qualify as a class member. First, maternity or paternity must be established by clear and convincing evidence. Second, the deceased parent must have consented in writing to the posthumous use of his or her genetic material. Finally, the child must be conceived before a class member becomes entitled to distribution.

As a threshold inquiry, it must be determined whether the posthumously conceived child was an intended beneficiary of the class gift. In the absence of a contrary intention, this amendment would create a presumption that the grantor intended to include the posthumously conceived child as a class member, thereby entitling him to inherit as a beneficiary of the class gift.

The reasoning behind this presumption is twofold. First, one of the defining characteristics of a class gift is that the beneficiaries are intended to take as a group. This means that membership of the class may increase or decrease prior to the time when a class member becomes entitled to his or her share. Thus, the grantor is, or at least should be, aware that new members may be added to the class through natural or artificial means.

98 See CAL. PROB. CODE § 249.5 (stating that in order for a posthumously conceived child to inherit, the child must have been conceived within two years of the decedent's death).
99 LA. REV. STAT. ANN. § 9:391.1 (2003) (stating that a posthumously conceived child may inherit if the child was born within three years of the decedent's death).
100 See supra Part I.B.
101 See supra text accompanying note 39.
Second, the term "class gift" refers to a disposition of property to beneficiaries who are described by a group label.\textsuperscript{102} There is no requirement that the grantor express his specific intent to benefit individual class members.\textsuperscript{103} In fact, if the grantor expresses his specific intent to benefit individual class members, a presumption could arise that the disposition is not a class gift, but is to the beneficiaries as individuals.\textsuperscript{104} Therefore, the grantor's intent to benefit all class members equally would be interpreted to include all those who otherwise qualify as class members, including those conceived posthumously through the use of ART.\textsuperscript{105}

Once it is determined that the grantor intended to include the posthumously conceived child as a beneficiary of the class gift, maternity or paternity must be established by clear and convincing evidence. This requirement stems from the fact that posthumously conceived children are non-marital children and must qualify under EPTL Section 4-1.2 to share in the gift.\textsuperscript{106}

There is, however, a matter that must be addressed regarding EPTL Section 4-1.2. As mentioned earlier, EPTL Section 4-1.2 creates a presumption of maternity.\textsuperscript{107} Due to advancements in biotechnology, however, it is now possible for a child to be conceived after his or her mother's death.\textsuperscript{108} Thus, similar to the Assembly's proposed bill, this amendment would eliminate the presumption of maternity by requiring clear and convincing evidence of maternity or paternity.\textsuperscript{109}

\textsuperscript{102} See supra Part I.B.
\textsuperscript{103} See supra text accompanying notes 35–37 (explaining that a class gift is a disposition of property to persons described by a group label, such as issue or descendants).
\textsuperscript{104} See Lawrence W. Waggoner, Class Gifts Under the Restatement (Third) of Property, 33 OHIO N.U. L. REV. 993, 995 (2007) ("If the terms of the disposition identify the beneficiaries by a group label and either by name or by the number of beneficiaries who then fit the group label . . . , the disposition is rebuttably presumed not to create a class gift, but is to the beneficiaries taking as individuals."); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 13.2(b)(2) (2011).
\textsuperscript{105} See supra text accompanying note 79.
\textsuperscript{107} See supra note 92.
\textsuperscript{108} See supra Part I.A (explaining how the ability to cryopreserve genetic material, such as semen, eggs, and embryos, has made it possible for children to be conceived a number of years after the death of one of their biological parents).
\textsuperscript{109} See supra text accompanying notes 90–93 (discussing how the Assembly's proposed bill has stricken the presumption of maternity by requiring clear and convincing evidence of maternity or paternity); Catherine Belfi, Note, Birth of a New Age: A Comprehensive Review of New York Inheritance Law Responding to Advances in Reproductive Technology, 24 ST. JOHN'S J. LEGAL COMMENT. 113, 141 (2009). Such evidence may include, but is not limited to, evidence derived from a genetic marker test. See N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C)(i); In re Estate of
Next, the deceased parent must have consented, in writing, to the posthumous use of his or her genetic material. Generally speaking, this requirement is in agreement with the weight of modern authority that has directly addressed this issue. However, it differs from the Assembly's proposed bill, which leaves open the question of who is entitled to use the deceased parent's genetic material and what restraints are imposed on such use.

To remedy this defect, this requirement would mandate that the deceased parent designate a person to control the use of his or her genetic material. Although most cases will likely involve married couples, the deceased parent may designate an unmarried man or woman, such as a boyfriend or girlfriend, to control the use of his or her genetic material. Even though the deceased parent must designate a person to control the use of his or her genetic material, the deceased parent would have complete authority to restrain its use and disposition to third parties. In other words, the deceased parent may limit the person or persons who are eligible to produce a child using his or her genetic material.

Finally, the child must be conceived before a member of the class becomes entitled to distribution. This requirement differs from the handful of jurisdictions that have enacted statutes addressing this issue, as well as from the bill proposed by the New York State Assembly. For instance, the Assembly's proposed bill closes the class of issue two years after the deceased parent's death, excluding all children born thereafter from inheriting as a beneficiary of the class gift. The imposition of such a rigid time constraint undermines one of the defining characteristics of a class gift: fluctuation by increase or decrease until the time when a class member becomes entitled to his or her share.

These rigid time constraints serve to perpetuate the archaic distinction between children conceived during their parents' lifetimes and those

110 See supra notes 95-96 and accompanying text.
111 See supra Part III.A.1.
112 E.g., In re Martin B., 841 N.Y.S.2d 207 (Sur. Ct. N.Y. Co. 2007). In that case, the deceased father, James, deposited a sample of his semen with instructions that it be held subject to the directions of his wife. Id. at 208.
113 See Hecht v. Superior Court, 59 Cal. Rptr.2d 222, 223-24 (Cal. Ct. App. 1996) (holding that the decedent had the right to determine whether his sperm could be used for reproductive purposes, and this right included the ability to authorize posthumous insemination of an unmarried woman, namely, Hecht's girlfriend, at the time of his death).
114 See supra text accompanying notes 97-99.
115 See supra note 97.
116 See supra text accompanying note 39.
conceived posthumously. In some instances, these time constraints have the effect of bestowing a superior status upon the posthumously conceived child. For example, a posthumously conceived child who is born after a class member becomes entitled to distribution, but before the two-year time period expires, would be entitled to inherit, despite the fact that the class would be closed to other future entrants. Additionally, by focusing on the date of the deceased parent's death, as opposed to the date when the disposition becomes effective, these rigid time constraints disrupt the public's interest in certainty and finality in the orderly administration of estates.\footnote{See infra Part III.B.}

In other instances, however, these time constraints place posthumously conceived children at an unfair disadvantage. For instance, they would prevent a posthumously conceived child from inheriting where the distribution date arises more than two years after the deceased parent's death, despite the fact that the child may have been conceived, or even living, prior to the time that disposition became effective. Thus, aside from placing posthumously conceived children at an unfair disadvantage, such rigid time constraints directly contradict the Assembly's justification for its proposal, namely, the fact that there is an increasing population of children who have been excluded as heirs of their parents' estates.\footnote{See supra text accompanying note 86.}

The third requirement imposed by this amendment would eliminate that archaic distinction, while providing for the orderly administration of estates. On one hand, this requirement would provide certainty and finality in the administration of estates by closing the class of issue on the date when a class member becomes entitled to distribution. This would prevent the occurrence of situations, where the posthumously conceived child would be entitled to inherit, despite being conceived after a class member became entitled to, or received, her share. On the other hand, it would respect the rights of posthumously conceived children by treating them like any other potential class members. In other words, this requirement would eliminate the distinction between children conceived during their parents' lifetimes and those conceived posthumously through the use of ART. In doing so, this requirement would adopt EPTL Section 2-1.3(a)(2)\footnote{N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a)(2) ("[A] disposition of property to persons described...as...issue...includes: [c]hildren conceived before, but born alive after such disposition becomes effective.")} as the third and final requirement that must be satisfied for a posthumously

\begin{footnotes}
117 See infra Part III.B.
118 See supra text accompanying note 86.
119 N.Y. EST. POWERS & TRUSTS LAW § 2-1.3(a)(2) ("[A] disposition of property to persons described...as...issue...includes: [c]hildren conceived before, but born alive after such disposition becomes effective.").
\end{footnotes}
conceived child to qualify as a member of the class of issue.\textsuperscript{120}

c. Do You Qualify as Your Grandmother's Issue?

Think back to the hypothetical posed at the beginning of this Note and ask yourself: do you qualify as your grandmother's issue? As you may have already realized, that answer depends on whether you apply this Note's proposed amendment ("Amendment 1"), or the Assembly's proposed bill ("Amendment 2"). Under Amendment 1, you qualify as a member of the class of your grandmother's issue. Amendment 2, on the other hand, reaches a different result and excludes you from the class of permissible beneficiaries under your grandmother's will. Although it may be difficult to understand how you could possibly be excluded from the class of your grandmother's issue, there are two main differences between these proposed amendments that cause these differing results.

First, these amendments employ two different class-closing rules. Similar to the statutes in other jurisdictions, Amendment 2 imposes a rigid two-year time constraint during which conception must occur.\textsuperscript{121} To put this in perspective, think back to the time you spent with your grandmother. The two of you had an extremely close and loving relationship for nearly ten years. So close that she became a second mother to you, yet Amendment 2 does not consider you to be her issue because you were not conceived within two years of your father’s death,\textsuperscript{122} despite the fact that you were born before any other class member became entitled to distribution.\textsuperscript{123} Amendment 1 avoids this unfair, arbitrary result by treating you like any other class member.\textsuperscript{124} Since you were born before any other class member was entitled to his or her share, you qualify as a member of the class of your grandmother's issue.\textsuperscript{125}

\textsuperscript{120} The third requirement of this Note's proposed amendment—that the child be conceived before a class member becomes entitled to distribution—merely adopts EPTL § 2-1.3(a)(2) as one of the requirements that must be satisfied in order for a posthumously conceived child to inherit. Even though the third requirement of this Note's proposed amendment is not in accord with the Assembly's proposed bill (or other jurisdictions for that matter), it is in accord with New York State's current law. Thus, this requirement would simply expand the breadth of New York State's current law in order to account for advancements in biotechnology.

\textsuperscript{121} See supra text accompanying notes 97–99.

\textsuperscript{122} See supra note 97.

\textsuperscript{123} Since you were born nearly ten years before your grandmother passed away, it is clear that you would have been well before any other class member became entitled to distribution. See supra note 51 and accompanying text (explaining that the disposition of a class gift—taking effect on the grantor’s death—becomes effective when the grantor dies).

\textsuperscript{124} See supra Part III.A.2.

\textsuperscript{125} See supra Part III.A.2 (requiring that the child must be conceived before a member of the class becomes entitled to distribution).
Second, Amendment 2 ignores the grantor's intent to benefit the posthumously conceived child. Rather, it focuses on the deceased parent's intent to support the child.\textsuperscript{126} Although your father instructed the sperm bank that his semen were to be held subject to your mother's directions, he failed to indicate his intent to provide you with support. That is not to say that he did not want to provide you with support, but that he merely failed to comply with a statutory formality. As a result, Amendment 2 precludes you from inheriting as your grandmother's issue. Under Amendment 1, however, your father's intent to support you is not controlling.\textsuperscript{127} Rather, the controlling factor is your grandmother's intent to include you within the class of permissible beneficiaries under her will.\textsuperscript{128} After all, it would be illogical to exclude you as a beneficiary under your grandmother's will, due to your father's failure to indicate his intent to provide you with support. Since your grandmother intended to benefit all members of her lineage equally, Amendment 1 effectuates her intent by including you as a beneficiary under her will.\textsuperscript{129}

**B. How This Note's Proposed Amendment Would Ease Opponent's Concerns**

It is often argued that granting posthumously conceived children inheritance rights may lead to fraud and other forms of unethical behavior that may negatively impact the distribution of estates.\textsuperscript{130} Essentially, the argument is that a person may undergo posthumous reproduction in order to graft his or her child onto the deceased parent's family tree for inheritance purposes.

Although it is a real concern that some people may be willing to exercise such extreme measures, this Note's proposed amendment would implement two safeguards to prevent such occurrences. First, the grantor must intend to benefit the posthumously conceived child.\textsuperscript{131} Admittedly, this requirement is not very stringent since there is a presumption that such

\textsuperscript{126} See supra note 94.

\textsuperscript{127} However, it is important to remember that there may be situations where the deceased parent is also the grantor. In such cases, the deceased parent's intent to benefit the child would be controlling.

\textsuperscript{128} See supra Part III.A.2.

\textsuperscript{129} See supra text accompanying note 105.


\textsuperscript{131} See supra Part III.A.2.
intent exists. However, if the grantor feels that this may become a problem, he could take steps to protect himself simply by expressing a contrary intention in the terms of the class gift.

Second, the deceased parent must have consented in writing to the posthumous use of his or her genetic material and designated a person to control its use. Since the deceased parent would be free to restrain the use of his or her genetic material, this safeguard poses a much higher threshold in which a posthumously conceived child must clear to qualify as a class member. For instance, if someone who was not entitled to use the deceased parent's genetic material used such genetic material to produce a child, that child would be precluded from claiming a share of the class gift. As a result, the opportunity for fraud is de minimis and should not stand in the way of expanding inheritance rights to posthumously conceived children.

It has also been argued that allowing posthumously conceived children to inherit as the issue of their deceased parents may infringe on the inheritance rights of existing class members. Some argue that expanding class membership to include posthumously conceived children will increase class membership, thereby resulting in an abatement of the existing members' shares. Applying this rationale, it could be argued that membership of a class should be closed off to any and all new members, including those born or adopted after the class gift is executed, because they too would reduce the shares of the existing class members.

That argument simply fails to understand what it means to take as a group. When executing a class gift, the grantor impliedly expresses his intent that class membership is subject to fluctuation by increase or decrease, until the time when a class member becomes entitled to his or her share. Thus, the grantor accounts for the possible abatement in the existing class members' shares when determining the disposition he wishes

132 Id.
133 This Note's proposed amendment would only create a presumption of intent in the absence of a contrary intention. Id. Thus, if the grantor provides otherwise in the terms of the class gift, the presumption would be rebutted and the child would not be entitled to a share of the gift.
134 Id.
135 Id.
137 See supra text accompanying note 43.
138 See supra Part I.B.
to bestow upon the class.

Opponents have also raised inefficiency of distribution as a problem with allowing posthumously conceived children to inherit.139 This argument is simply not borne out. Although society has a strong interest in identifying the persons interested in an estate and finality in its distribution,140 the concerns related to winding up the grantor's estate differ from those related to identifying whether the class of a grantor's issue includes a child conceived after one of his or her parent's death, but before a member of the class becomes entitled to distribution.141 Moreover, the requirement that the posthumously conceived child be conceived before a class member becomes entitled to distribution would provide certainty and finality in the administration of estates.142

These arguments do have some merit when considered in the context of the Assembly's proposed bill. The Assembly's proposed bill could infringe on the inheritance rights of other class members, as well as cause inefficiency in the distribution of estates. For instance, the Assembly's proposed bill requires the child to have been conceived within two years of his or her parent's death.143 By focusing on the date of the deceased parent's death, a situation could arise where a posthumously conceived child is entitled to inherit under the class gift, despite being born after a class member became entitled to, or even received, his or her share.144 Thus, the Assembly's proposed bill could create a situation where there would need to be an abatement in the existing class members' shares after they have already received, and possibly disposed of, their entitlement.145 However, once the safeguards of this Note's proposed amendment are satisfied, there is no reason to differentiate between posthumously conceived children and children conceived during their parents' lifetimes. As one court put it, "[p]osthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless."146

139 Rowsell, supra note 136, at 411 (stating that the issue of indeterminacy of estate distribution has been raised as a problem with posthumous children's ability to inherit); see also Suppon, supra note 136, at 239 (making the same argument as the Rowsell article).
140 See supra text accompanying note 76.
142 See supra Part III.A.2.
143 See supra note 97.
144 See supra Part III.A.2.
145 See supra text accompanying note 43.
CONCLUSION

In New York, the definition of "issue" has failed to keep pace with the rapid advancements in biotechnology. These advancements, specifically the ability to cryopreserve semen, eggs, and embryos, have made it possible for a person to produce a genetically related child even after his or her death. They have also led to a host of legal issues that have not yet been directly addressed by the New York State Legislature. As a result, innocent children are suffering the consequences of the legislature's failure to sync the law with technology. Clearly, the law needs reform to directly address the issues raised by posthumously conceived children.

To address this inadequacy, the New York State Legislature should enact the amendment proposed by this Note. This amendment would expand the class of issue to include certain posthumously conceived children, thereby providing posthumously conceived children with the same rights, benefits, and privileges that other children enjoy. Additionally, this amendment would ease opponents' concerns by implementing safeguards to prevent the occurrence of fraud, to protect the rights of other class members, and to protect society's interest in the orderly administration of estates. Thus, the New York State Legislature should enact the amendment proposed by this Note, making New York one of the few states that have acted to address the rights of posthumously conceived children.

147 See supra text accompanying notes 21-24.
148 See supra note 9.
149 See supra Introduction.
150 See supra Part III.B.
151 Although this paper proposes an amendment to New York State's EPTL, other states could, and should, benefit from this Note's proposal by using it as a model from which to amend their owns laws to reflect the rapid advancements in biotechnology.