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Dilemmas of Posthumous Adoptions

has been read by the undersigned. It is hereby recommended for acceptance by the faculty with credit to the amount of 3 semester hours.

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Whose Child Am I?

Dilemmas of Posthumous Adoptions and the Posthumous Child

A Master Thesis
Submitted to the Faculty
of
American Public University
by
Heather FayeLynn Boehm

In Partial Fulfillment of the
Requirements for the Degree
of
Masters of Arts
January 20, 2018
American Public University
Charles Town, WV
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DEDICATION

I dedicate this thesis to Steven Earl Murphy. Without your love and support, I never would have understood the power of a parent-child relationship and whether by virtual adoption, posthumous adoption, or my heart, you always made it clear “whose child I am.” In loving memory ~ May 30, 1953, to December 30, 2015.
The once traditional nuclear family structure has evolved in light of society’s technological and medical advancements, leading to the formation of various non-traditional families. The process of defining family structures has become a struggle as the desire to belong to these familial units combined advancements in gamete donation or extraction, posthumously conceived children, and posthumous adoptions, has created limitless possibilities in the familiar structure. These new familial structures have created new-fangled means of establishing parent-child relationships and this
conundrum leads us to contemplate what rights children born of these unions are entitled.

The founding fathers could not have conceptualized the advancements in science or changes of family structures, or created laws governing the rights afforded to them though their parent-child relationship. Hence, much of the determination of “whose child I am,” falls to interpretations of laws that were not specifically developed to address these issues. In seeking to answer, “Whose child am I,” this paper establishes that the doctrine of judicial precedent, fails to account for the creation of non-traditional families by means of posthumously conceived children or posthumous adoptions. It further asserts that changes in current laws are the only way to establish these familial units and determine what rights children born of these unions would be entitled.
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I. INTRODUCTION

“Family isn’t always blood; it’s the people in your life who want you in theirs. The ones who accept you for who you are. The ones who would do anything to see you smile, and who love you no matter what.” ~ Unknown

Identification of Familial Structure

When we envision the structure of a family, traditional analogy directs us towards the concept of a nuclear family wherein a mother and father begin a family through natural conception and thus with the birth of a child, the family structure is established. Yet, in an era of medical advancements wherein society encapsulates differentiating values, a family might be established under various pretenses such as on the stepparent conceptualization, a same-sex marriage, child or adult adoption, surrogacy, or through other means. This new era of advancements has skewed our traditional views of the nuclear family structure and heeded way for the formation of non-traditional families. As the family structure may be established by numerous means, children born of these unions are entitled to certain rights based on their parent-child relationship.

However, as these non-traditional families seek other ways in which to establish their family unit and the rights of their children, we start to see a new era of families and concerns begin to arise over whom exactly the child’s parent is and what rights the child

is entitled. This matter is further complicated in situations where the family seeks to adopt a child that has passed away or a child seeks to be adopted by a parent that has passed, or when a child is born following the death of one of their parents. These situations lead us to wonder what rights children born of these various unions would be entitled to, if they were the intended child of a deceased parent or if they become the legal child of an individual after their death.

In a world where gamete donation and extraction exist, along with the need to belong within a family unit, even more family structures have emerged. Which make us wonder, when we combine the various medical technologies with the non-traditional family structures how do we define, whose child we are? As we contemplate these advancements in the family structures and fight to assure that a child’s rights are protected, we are faced with the legal dilemmas that these children endure in attaining their family structure and the rights afforded to them though their parent-child relationship. The concept of Posthumous Adoptions and the Posthumous Child, have complicated this matter even further. As posthumous children emerge and the concept of posthumous adoptions evolved, the traditional family structure diverged even further setting stage for the unknown. ² With the limitless possibilities that evolved following the possibility of posthumous children and posthumous adoptions, the question of “whose child am I,” resonates.

II. BACKGROUND

“I am a child, all the world waits for my coming, all the earth watches with interest, to see what I shall become. The future hangs in the balance, for what I am, the world of tomorrow will be. I am a child. I have come into your world about which I know nothing. Why I came, I know not. How I came, I know not. I am curious. I am interested. I am a child. You hold in your hand my destiny. You determine, largely, whether I shall succeed or fail. Give me, I pray you, those things that make for happiness. Train me, I beg you, that I may be a blessing to the world.” ~ Mamie Gene Cole

Justification of the Familial Structure

When pondering the question of “whose child am I,” we need to establish what determines the familial structure and sets forth the rights afforded to the parties though their parent-child relationships. This familial evolution has set stage for the unknown and through the defining of concepts that seek to delineate the unknown and answer the question of “whose child am I,” an expansion of the traditional family structure is paramount. This expansion will ultimately provide justification of the new familial units and evidence that children born of or into these untraditional familial structures are entitled to rights based upon their parent-child relationship. As we seek to answer the question of “whose child am I,” we will see that there are various determinations of what

constitutes a “child” and this paper will highlight the need for a standard definition of a “child.”

Definitions

For all I ask, what is a child? Depending on where you look this answer will vary, as each legal realm seems to hold its own understanding of what a “child” is. For example the Social Security Act defines a “Child” as “the legal or adopted child of the insured or per certain restrictions and only in certain situations the stepchild, grandchild, or step grandchild of the insured.” ⁴ While the United States Federal Codes professes that, a “child” is defined as “every infant member of the species homo sapiens who is born alive at any stage of development.” ⁵ Now, while both of these definitions seem straightforward, they vary a lot in their determinations of what constitutes a “child,” furthermore, both definitions seem to lack certain aspects such as age determinations. The age determinations do appear in the Code of Federal Regulations definition of a child, which states a “child” is any individual under eighteen (twenty-two if enrolled fulltime in school) that is not married and is “not the head of a household,” but this definition lacks the quintessence to determine the various methods of becoming a “child.” ⁶ For this, we could look to the states to try to find a better definition, yet each states law varies which makes it even more problematic to define a “child.” Therefore, we may seek to define what a “child” is by looking to the Immigration and Nationality

⁶ 20 C.F.R. § 416.1856
Act, which claims that a “child” is any unmarried individual under twenty-one that is “the genetic, legitimated, or adopted son or daughter” of an individual.  

However, even this definition is not an all-encompassing definition of what a “child” is. While these definitions of a “child,” vary amongst different realms of the law, the biggest problem we come to is the lack of consistency in definitions. Specifically, many of the common law definitions of a “child” fail to encapsulate posthumously conceived children or children of posthumous adoptions and this lack of cohesion makes it challenging to establish the rights of a child per their parent-child relationship, as how can we establish their rights if we fail to delineate their status. Nevertheless, through the evolution of public policy and the advancement of common laws on the determinations of what constitutes a bastard child, orphan, or an undetermined child, we may be able to seek an encapsulating definition for the term “child” as a means of accurately portraying “whose child I am.”

Parent and Child Ascertained

As we work to define “whose child I am,” we need to ascertain who the parent is and this is difficult as the “presumption of parentage is applied differently in each state,” and establishing this parentage falls to the determination of what a child is. In the most basic and restricted use of ascertaining whom the parent is, only the blood related mother and father constitutes a parent, whether the child is the legitimate or illegitimate (bastard) child of the blood parents. However, with the emergence of new familial units,

7 I.N.A. § 101 (c)
along with the medical and technological advancements, parental roles have shifted so we look to the classification of the child. Whether a child is a legitimate or illegitimate child, a posthumously adopted child or posthumously conceived child, a filius nullius, or a filius populi, asserting who the child is through a standard all-encompassing definition of what constitutes a “child,” is the only way we may be able to determine the rights of these individuals.

**Legitimate/Bastard Child**

As we begin to examine the various categorizations of a child, such as the legitimate or bastard child, we begin to see that determining parentage is influenced by the assertion of the specific child. For example, if a child is the Product of a Rape, there is laws restricting the visitation and custody privileges of rapists. Therefore, in this situation it becomes more difficult to attain “whose child I am” and what rights a child born of this union would be entitled to per their parent child relationship. Now what happens when the child is classified as a Filius Nullius, the child of no one, or the Filius Populi, the child of the people or the state, who then is the parent’s child? Would it be the Parens Patriae, the parent of the nation, who establishes the parent child relationship or are these children simply deprived of the rights afforded to a child per the parent child relationship? In going beyond this, how do we classify children and recognize their rights in the modern era. The founding fathers could not have

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conceptualized many of the modern era’s medical or scientific advancements, much less the changes to the familial structures. So how could they have known there would be a need to create laws governing the rights of these individuals afforded to them though their parent-child relationship, specifically in the matter of posthumously conceived children or children of posthumous adoptions. This new evolution of children brings forth numerous legal and medico-legal conundrums that this country could not have envisioned at its inception.

**Posthumous Conception**

A child brought into this world through Posthumous Conception occurs when “the use of artificial insemination to reproduce after the death of one or both of the parents” takes place. 10 As this new evolution of children emerges, we begin to be faced with not only the ethical concerns, but also legal concerns. Posthumous conception can occur either through gamete extraction or gamete donation and since posthumous conception has not been around for very long, the laws that govern the rights of a child born through these means remains in the developmental stage.

Gamete donation occurs when one of the parents preserve their human semen, embryos, or eggs. Typically cryopreservation of these gamete, wherein the gamete is “preserved at very low temperatures for extended periods of time after extraction” from

the parent, is the procedure that is utilized in posthumous conceptions. 11 The extended period of time in which the gamete may be preserved, allows a child to be conceived after the death of one of the parents, which raises “numerous legal issues relating to parental relationship and intestate succession.” 12 With all of the advances in assistive reproductive technology, gamete donation offers options for Posthumous Reproduction but how with the possibility of children being conceived posthumously can we handle situations where the donor failed to provide written consent or how do we handle the terms of gamete storage following the death of the donor. 13 When diagnosed with cancer, many times men will store their gamete prior to beginning radiation or chemotherapy, to preserve their ability to reproduce. 14 This gamete donation opens the door to various legal questions as gamete donation can produce a child by three various means in which the legal recourse for each may be different. Some children may be created through gamete donation, wherein fertilization and conception occur before death of parent, but the child is born posthumously, while other children may be created through gamete donation wherein the fertilization, conception, and birth of child occur after the death of parent. 15 Should the rights of each of these children vary per their parent-child relationship or should they be entitled to the same rights as a child created through gamete donation wherein the fertilization and cryopreservation took place before the parent dies. Would the rights of these children

12 id.
14 id.
15 id.
change if the child were created by gamete that was not donated and was instead extracted following the death of one of the parents?

The very first case of Posthumous Gamete Extraction occurred in 1980. Yet the first Posthumous Gamete Extraction that lead to pregnancy did not occur until 1998, making the very first posthumously conceived child, born through gamete extraction, born in 1999. While this new era of technology raises questions about the ethical implications of the medical creation of a family,” the phenomenon of gamete extraction used to create a child posthumously, creates even more legal dilemmas when we begin to try to ascertain “whose child I am,” and the rights of the said child. Now, while there have been many historical cases of a child being born after the father’s death, gamete extraction expands on this occurrence by allowing the child to be conceived after the father’s death and even more astounding conceived after the mother’s death. These medical and technological advancements, allowing children to be born of either deceased fathers or deceased mothers, have “wrought havoc in matters of estate planning” and “in administering government survivor benefit programs.” Many of these issues arise because the births of these children can occur years after the death of their parent, leading us to the bigger problem of defining who is a “child” and what rights a child born through these means is entitled.

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20 *id.*
Through gamete extraction, the sperm of an individual can “be retrieved from a corpse, but time is of the essence to obtain a viable specimen.” Knowing, that time is of the essence how do we overcome the legal issue of who is entitled to the deceased specimen and do they have to have consent to proceed with the extraction. There have been cases in which widows have had to fight to be inseminated with their dead husband’s gamete, due to their failure to provide consent. There have also been instances where assisted reproduction has occurred after the death of a woman; however, this procedure of gamete extraction is a “vastly more complex process of initiating reproduction [that] presents new and significant challenges.” If a woman has not provided informed consent or directives “about who may use the oocytes upon death, how the eggs will be fertilized, who will act as a surrogate, and how to dispose of unused or remaining eggs,” then how can we say this is legally and morally the right thing to do.

In complex cases such as these, “moral appeals [may arise], from prospective parents, from future children and from all persons implicated in the process,” clearly showing us a need to review the laws governing such matters. Furthermore, with the advancements in both gamete donation and extraction and the numerous prospective

parents and familial structures that are created, how can we define “whose child I am?”

In the modern era where children can be conceived after the death of their mother or father, a need for these new familial structures “to be recognized in the array of family and inheritance law” and “incorporated into societal norms and values” needs to occur. Without review of the laws governing these matters and societies acceptance of these innovative familial units, how can we assure that the children born of these unions attain their constitutional rights under their parent-child relationship? As society tries to adapt to the changes in ways that we can create new human life and define a “child,” we begin to examine other contemporary ways of creating the parent-child relationship, such as through posthumous adoptions.

**Posthumous Adoption**

“The universal rule in all states is that the power to create the relationship of parent and child between persons not so related exists only by virtue of statutory authority,” but how can we speculate what rights a child is afforded when the parent-child relationship is sought after or established, following the death of either the parent or the child? In working to classify these family units and establish the child’s rights in situations where an individual seeks to adopt a child following their death or where a

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25 *id.*


child seeks to be adopted by someone they conceived as a parent following the parent’s
death, we are hit by laws that fail to account for these situations. It would make sense
that if a child is adopted the child would be entitled to the same rights and remedies
afforded to a biological or natural born child; however the Adoption Act itself “manifests
no provisions” authorizing “a posthumous order approving an adoption.”

However, some states hold provisions on posthumous adoptions, such as Utah’s Judicial Codes, wherein the states governing statutes hold that a “court may enter a final decree of adoption declaring that a child is adopted by both a deceased and a surviving adoptive parent.” These conflicting laws only create another conundrum in determining “whose child I am,” as in establishing these new familial structures created through posthumous adoptions; it becomes more difficult to determine the rights of the child. Maybe Chinese law has it right, as they have often held “that death is no obstacle to continued legal capacity [which] is evident in the procedures” resulting in posthumous adoptions.

Constitutional Right of a Child

In 1932, the Supreme Court determined that all children are entitled rights and to
deprive children of these rights is unconstitutional. It is the constitutional right of a
child to be privy to the parent-child relationship and that whether through virtual

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28 In Re Adoption of Bradfield, 642 P.2d 214 (1982).
29 Utah Code Ann. § 78B-6-136.5
adoption, loco parentis, Posthumous Adoption, or Posthumous Conception, failing to recognize these rights and their familial structure “clearly deprives them of something of great value.

Parent-Child Relationship

While the parent-child relationship was historically established at birth, this era of technological and medical advancements conjoined with social advancements to the familial structure has started a revolution in the law of determination of the parent-child relationship. In 1973, the Uniform Parentage Act pronounced, “the parent and child relationship extends equally to every child and every parent,” and the 1988 Uniform Status of Children of Assisted Technology established “legal parentage for children conceived other than by sexual intercourse,” both setting stage to protect the rights of all children per their parent-child relationship. 32 While the Uniform Parentage Act defines the parent-child relationship as the “legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations,” which covers natural born children and children of statutory adoptions but what about the various familial units.

In cases of virtual adoption, which “occur when a child was supposed to be legally adopted but his or her adoptive parents failed to satisfy the legal requirements of a formal adoption,” both the adoption and the rights of the child are formed with the

acknowledgement of the parent-child relationship. 33 This implied adoption occurs without a court order and works to establish the rights of a child under the parent-child relationship. 34 When an individual has agreed to adopt a child, yet a statutory adoption did not occur, through parol obligation, enacted upon during the lifetime of an individual, wherein they beseech and treat the child of another as his own, upon the death of said individual the child is entitled to rights based on their virtual adoption. Intestacy laws explicitly provide that in virtual adoptions all children have “the right to inherit from an intestate parent,” hence creating the bond of the parent-child relationship. 35

Even in Intestacy Law, which establishes the parent-child relationship and hence the rights of a familial unit created through virtual adoption, the definition of a "child" is not clear in statutory language, which makes it difficult to fathom a duty of support or determine inheritance rights. Nonetheless, even with the varying definition of a “child,” within intestacy law the rights of a child can still be established. Whether the “child” is a natural born child, an adopted child, or a child that merely maintained a parent child-relationship as in virtual adoption cases, the only way to determine the rights of these children is to look to the statutes themselves. By differentiating between each of these various definitions of a "child" under the intestacy statutes, we will be able to determine

“whether a child is entitled” rights under inheritance or intestate laws.  

There are other situations whereas an adult is determined to be in loco parentis and they assume the moral obligation towards a child that the biological parent would be bound in duty to make, and as such, the rights afforded to these children per their parent-child relationship prevail.  

This is evidenced under the Family Medical Leave Act, where it holds that an individual is entitled to the leave to take care of a “parent,” which includes individuals who stood in loco parentis to the employee when the employee was a son or daughter.  

With loco parentis, the parent-child relationship exists when an individual intends to take on the role of a parent and assume the normal duties commonly associated with parenthood, regardless of there being no legal or biological obligation.  

Through loco parentis we learn that there is various avenues to creating a parent-child relationship.

Now, while these avenues of establishing the parent-child relationship and the rights of the child per these family units have been around a lot longer than the new familial structures created through Posthumous Adoptions and Posthumously Conceived Children, they give us hope that we may find the answers. For instance, the answer to establishing “whose child I am” and the rights afforded to children of Posthumous Adoptions may be found by looking at the case of Stellmah v. Hunterdon, wherein it was established that “Legally adopted children shall, in every particular, be

36 Id. at 565.
38 29 C.F.R. § 825.122.
39 Id.
considered as natural children.” 40 Adoptions are statutorily created rights, that are “not recognized at common law” and while each state creates its own requirements and policies, most state adoption statutes are similar. 41 The main difference in these statutes seems to fall to the inclusion of various determinations of a “child” and the various methods of adoption. With adoption laws being purely statutory, courts must “consider the adoptive child’s best interest to be of the upmost importance” as the state has a compelling interest to find “stable permanent homes for adoptive children,” it would seem paramount that this should extend beyond normal adoptions to those of virtual adoptions and even posthumous adoptions. 42 As such, when familial units are created by means of virtual adoptions, adoption by estoppels, posthumous adoptions, or statutory adoptions, children of these unions are entitled to the same right and responsibilities of a biological child, “as an adopted child and a biological child are often regarded as one in the same.” 43

Now what about posthumously conceived children, how are their rights established per their parent child relationship when legislation is almost silent on what rights children are entitled to if they are conceived after their parents death. For the answers to this, we look to various statutes and recent case law that “suggests there may be a posthumous right to reproductive autonomy.” 44 In 2002, the Uniform Parentage Act addressed this problem as it declared that with written consent a man

43 Id. at 554.
can authorize the use of his gamete by a specified person, to which, many states enacted the “dead dad’s bill” based upon this provision. 45 The imploration of the “dead dad’s bill,” which affords rights to children conceived posthumously; helped to legally establish the rights of a child per their recognized familial relationship as their deceased parent is “granted de facto legal rights that can be enforced against the living.” 46 This “recognition of posthumous legal rights gives the dead significant moral standing within our legal system,” and by taking into account the wishes of the deceased along with the best wishes of the child, in establishing a new familial unit created through posthumous conception we can establish the parent-child relationship. 47

However, even as we contemplate all of these advancements in the family structures and fight to assure that a child’s rights are protected, the question of “whose child am I,” still resonates. In seeking to answer this question, we are again struck with the original dilemma of the lack of a standard definition of a “child.” Therefore, in an attempt to answer the question of “whose child am I,” we will again highlight the need for a standard definition of a “child” due to the variation of definitions amongst different realms of the law and the failure of many of the definitions to encapsulate posthumously conceived children or children of posthumous adoptions. By drawing attention to the fact that common law not only lacks the standard definition but that it also fails to account for advancements in science and changes to the family structure, we can identify the need for legislative reform. This legislative reform is needed to protect the

47 Id. at 764
rights of the children born of these unions and establishing the duty of support and inheritance rights, of the various non-traditional families, may be the way to encapsulate a more definitive definition.

III. LITERATURE REVIEW

Astrue v. Capato

One landmark case that worked to answer the unknown and sought to provide an answer to the question of “whose child I am” was the case of Astrue v. Capato. Astrue, not only evaluated the rights of a posthumously conceived child per the parent-child relationship, it also highlighted a failure in our system to establish the rights afforded to a child per the new familial structures of the era. 48 The rulings of Astrue were based off the Social Security Act’s definition of what constitutes a “child” and due to the lack of this definition to encapsulate the modern era’s new familial units, this case demonstrated the need for the creation of standardized definitions and the establishment of new precedents. 49 Astrue is a critical case because it clearly identifies a concern over the standard definition of what construes a “child,” and it brings forth the concerns over the rights and benefits a posthumously conceived child is entitled.

49 id.
In *Astrue*, with the assistance of in vitro fertilization Karen Capato was able to use her late husband Robert Capato’s donated gamete to conceive twin daughters posthumously eighteen months following his death. 50 Karen then sought Social Security survivor’s benefits for the posthumously conceived children and was denied the benefits by the Social Security Administration (SSA), following their determination that the term “child” only refers to “the child or legally adopted child of an individual.” 51 “The U.S. District Court for the District of New Jersey [then] affirmed the agency's decision,” holding that the children could only qualify for benefits if they were entitled to inherit from the deceased wage earner under state intestacy law. 52 Being that the case stemmed from Florida, the court concluded that Florida's laws stipulated that a posthumously born child “may inherit through intestate succession only if conceived during the decedent's lifetime.” 53

On appeal, Karen Capato relied on the definition of a child per 42 U.S.C. § 416(e), that proclaims the definition of a “child” to mean “the child or legally adopted child of an [insured] individual.” 54 The United States Court of Appeals, Third Circuit, sided with Karen Capato and held that the children were “clearly children under § 416(e) of the SSA because they were the biological children of a married couple” and the court rejected the stipulation of the lower court that intestacy law must first be applied. 55 In a unanimous decision by the Supreme Court, the case was reversed and remanded back

50 id.
53 id.
to the lower court, holding that posthumously conceived children cannot rely solely on a
genetic connection to the deceased to be classified as a “child” in order to qualify for
Social Security survivor’s benefits. 56 The Court determined that children, including
posthumously conceived children born via assisted reproduction technology, must
demonstrate that they are eligible to inherit from their deceased parent, either under
intestate succession or under one of the statutory alternatives to this requirement that
work to determine who is a “child” . 57 While, this case provided great insight and
direction for children who fall within their states definition of a “child” per state intestacy
law, what happens when the child does not fall within this standard? Is that child then
construed as the child of no one and determined to be a bastard child, as at common
Law, the bastard child is the child of no one. 58

Case/Counter Case

Child Ascertained

The case of *Wallace V. Blanchard*, demonstrates how at common law a bastard
child is the child of no one, which with the lack of a clear definition of a “child” as seen in
Astrue, it makes one wonder if the lack of a cohesive definition is spurring more

56 *id.*
57 *id.*
problems. 59 In *Wallace*, various definitions of a “child” arise as the definitions of the filius nullius, the son/child of no one, and the filius populi, a child of the people, are clarified. 60 Yet, this only raises further concerns, as if a “child” is considered either a filius nullius or a filius populi, the child is then classified as “having no father and being incapable of inheriting.” 61 What happens when a child is classified as “having no father and being incapable of inheriting” as in *Wallace*, or as implied per the determination that posthumously conceived children do not fall into the definition of a “child” per the SSA’s and certain intestacy law determinations. 62 Is this child then negated from having the opportunity to enjoy the rights of a parent-child relationship and as such subjected to the stigma of never being able to answer the question of “whose child am I.” Under common law dictation, this child would have no relatives, but what if these bastard children were adopted, would this change the determination of “whose child I am,” and encompass them under the definition of a “child.” 63

**Adoption**

When a statutory adoption occurs the “legally adopted children shall, in every particular, be considered as natural children.” 64 Meaning that by law this will hold a statutory adopted child as a “child” per all practical definitions of the term and it will

59 *Id.* at 191.
60 *Id.*
61 *Id.*
63 *Wallace*, 26 N.M. 181, 193 (1920).
afford said children with the constitutional rights afforded to them per their parent-child relationship. Now, what happens when transference of rights is initiated through other avenues of adoption? Virtual adoption and the rights afforded to a child per their parent-child relationship, should be the same as a statutory adoption right, as the establishment of the parent-child relationship and acknowledgement of this relationship is what makes the virtual adoption valid. 65

The case of Sanders v. Riley highlights this trend as it examines how a child is entitled to the rights of the parent-child relationship through virtual adoption. 66 The case of Sanders is important as it looks at the rights of an individual and her inheritance rights following the death of the individual she considered her father. 67 In Sanders, Clifford Riley [hereinafter Mr. Riley] died without a will and Shalanda Sanders and her half-brother Curtis Riley were in dispute over his estate. 68 While Mr. Riley was not Shalanda Sanders biological father, she grew up believing he was until she was introduced to her biological father when she was fourteen. 69 Even after meeting her biological father Shalanda never held out that he was her father instead, she always held that Mr. Sanders was her father. 70

In 2011, Shalanda’s mother killed both herself and Mr. Riley, each dying with multiple insurance policies. 71 Shortly after Mr. Riley’s demise Curtis and Shalanda completed life insurance affidavits together. In these affidavits, the two swore “under

66 Id. at 570.
67 Id. at 570-577.
68 Id.
69 Id. at 571-572.
70 Id. at 572.
71 Id.
penalty of perjury that they were the "children" and "heirs" of Mr. Riley," and together they submitted the documents to the insurance companies. Shortly thereafter, Curtis began to object to his half-sisters claim to any of his father's estate and Shalanda interjected by filing a request for heir determination in the probate court. Shalanda proclaimed that she was Mr. Riley's child and entitled to all rights per their parent-child relationship because Georgia Statutes hold "all children born in wedlock or within the usual period of gestation thereafter are legitimate" and that Mr. Riley agreed to be her father. After Shalanda claimed to be Mr. Riley's daughter by virtual adoption Curtis filed a motion for partial summary judgment claiming that there was not convincing evidence that his father intended to adopt Shalanda. The trial court agreed with Curtis; however, they erred when they determined that there was "no genuine issue as to any material fact regarding virtual adoption."

Virtual Adoption has long been recognized in Georgia, as the case of Crawford v. Wilson, defined the parol obligation of an individual to adopt a child that is enforced upon the death of the individual. Crawford, clearly identified how through this parol obligation, which has been "acted upon by all parties concerned… during the obligor's life," the child can "invoke the doctrine of virtual adoption." The case of Williams v. Murray falls along the same lines as Crawford, in that it establishes a virtual adoption after the death of the parent. This becomes important as this virtual adoption,

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72 Id. at 573.
73 id.
74 OCGA § 19-7-20(a); Sanders, 770 S.E.2d 570 (2015).
75 Sanders, 770 S.E.2d 570 (2015).
76 id.
77 Crawford v. Wilson, 139 Ga. 654 (1913).
78 id.
establishes the parent-child relationship and as the child, who may be an adult, invokes the doctrine of virtual adoption; their rights are established by assuring that they avoid “an unfair result from the application of intestacy statutes.” 79

As seen, in Sanders, Crawford, and Williams, it is possible to invoke the doctrine of virtual adoption as an adult to create the parent-child relationship posthumously. These cases may serve as a catalyst to reorganize and develop laws that encapsulate the parent-child relationship, following the death of one of the parties. As these virtual adoptions, even though not a statutory adoption, clearly established the parent-child relationship even after the death of one party, posthumously. Virtual Adoption rights may be the start of merging into the next generation of posthumous adoptions, wherein a child can posthumously establish their rights under the pretense of a previously imposed virtual adoption. 80 Now what would happen if we applied this pretense to almost adopted children, would these children be entitled to the same rights and would this assist in determining “whose child I am?”

In cases of “almost adopted children,” applying the Doctrine of Equitable Adoption will treat said children as a “posthumous child” wherein being classified as a posthumous child these children would be entitled to the rights and benefits, per their parent-child relationship, under Louisiana Civil Code article 29. 81 The case of Roche v. Big Moose Oil Field Trucking Service is a wrongful death action where a family that intended to adopt two children was suddenly devastated with the death of the

81 id.
presumptive adoptive father. 82 One month following the presumptive father’s death the mother signed the adoption order, but the posthumous adoption of the children failed to establish the children’s rights as they were adopted following the death of their father. 83

Roche is important as it shows flaws in the legal system as the “almost adopted” children “were not designated specifically in the statute[s] as survivors entitled to bring an action,” even though the children were completely dependent upon the father. 84 This case shows how the doctrine of equitable adoption should have applied and that as such the children of the action should have been treated as "posthumous children." 85 In being classified as posthumous children, these children would have been entitled to the rights and benefits, per their parent-child relationship, under Louisiana Civil Code article 29. 86

However, not all cases have determined that these children would be entitled to rights and benefits per their parent-child relationship. Lankford v. Wright purports that equitable adoption does not create the legal relationship of parent and child. 87 This case is not alone, as Johnson v. Rogers, came to the same conclusion. 88 Johnson stipulates virtual adoption only recognizes the inheritance rights of a child whose virtual

82 Roche v. Big Moose Oil Field Trucking Service, 381 So.2d 396 (1980).
83 Id. at 396-403.
84 Id.
85 Id. at 399.
86 Id. at 400.
adoptive parent died intestate and it “does not result in a legal adoption or the creation of a legal parent-child relationship.”  

On the other hand, *In re: The Adoption of A.R. JR.*, we see how the lack of judicial precedence over almost adopted children, virtually adopted children, and posthumously adopted children can leave families and children without rights. In this case, Antonio and Joyce Urbina filed a petition to adopt the children of the action in January 2016. Mr. and Mrs. Urbina had custody of the three children since 2013 and even though they were paternal cousins of the children, they sought to adopt the children and the “Arizona Department of Child Safety consented to the adoptions as well.” The adoption proceedings were advancing and soon the three children would have been entitled to the same rights of a biological child per their newly created parent-child relationship with Mr. and Mrs. Urbina. However, on the day of the adoption proceedings all of this was put to a halt as Mrs. Urbina suffered a stroke during the adoption hearing and the hearing had to be temporarily vacated.

Unfortunately, with the adoption hearing being vacated, the three children were not adopted on that day and their rights per their parent-child relationship were not established. Mrs. Urbina passed away a few weeks following her stroke and never had a chance to pursue another adoption hearing; however, her husband, along with the Pascua Yaqui Tribe, “filed a motion to allow Joyce to posthumously adopt the children.”

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89 *id.*
91 *id.*
92 *id.*
93 *id.*
Mr. Urbina argued that the children had regarded his wife as their mother and she portrayed herself as their mother which not only draws attention to the fact that this case seems to address the issue of almost adopted children, but the concept of virtually adopted children was brought to the forefront.  

However, the main concept that was invoked in this case was that of posthumous adoption. The children, who regarded Ms. Urbina as their mother, wanted their birth certificates to display as such. The request was denied and on appeal Mr. Urbina argued for the posthumous adoption, claiming that such an adoption should be granted “based on Arizona’s recognition of the doctrine of equitable [or virtual] adoption.” However, the courts did not side with Mr. Urbina, the courts concluded that the doctrine equitable/virtual adoption “only enforces in equity the benefits of adoption in the context of inheritance” and cannot apply to this case. The court specifically relayed that as that doctrine only applies to probate proceedings they cannot “read into a statute something which is not within the manifest intention of the legislature as gathered from the statute itself.”

This court case highlights the sad reality of the situation in that, these families believe that they have created a parent-child relationship and that their “child” is entitled to rights per this relationship, yet the relationship and rights may be non-existent in the eyes of the law. Maybe there is something to be sought here, in that the lack of judicial

94 id.  
95 id.  
96 id.  
97 id.  
98 id.  
99 id.
precedence and the encompassing of familial structures of the present deprives all of the ability to preserve what is in the best interests of the child and afford children of these unions the ability to attain rights per their parent child relationship.

Regardless, there may still be hope in the case of posthumous adoptions. The Adoption Act provides “for the entry of a final judgment of adoption if a child dies prior to the expiration of the statutory residency periods,” meaning that a child can be adopted posthumously.  

100 In the Adoption of Baby T., the question of whether “equitable and posthumous adoptions should be permitted and under what conditions,” stood at the forefront of the case.  

101 This case explained how many of the laws providing rights to the child per their parent-child relationship were created by legislature, as they were not available per common law. Specifically this case established that the rights and obligations afforded to parties of adoptions were established by legislature in their creation of The Adoption Act, as through common law there was no legal precedence. This case also describes how the Adoption Act is similar to the Utah Adoption Code, as they both provide “for the entry of a final judgment of adoption if a child dies prior to the expiration of the statutory residency periods.”  

102 This gives hope not just to families hoping to adopt a child that has passed away, but to children whose parents have passed away.

Conversely, even through all of this we begin to recognize the numerous flaws in the legal system. For example, in children that are “almost adopted,” their rights are not

100 id.
102 id.
ascertained. In the case of Roche, the posthumous adoption of the children failed to establish the children’s rights as they were adopted following the death of their father.  

103 In this case even though the children had been completely dependent upon the father, the adoption was not completed prior to his death, and as such, the children are “not designated specifically in the statute[s] as survivors entitled to bring an action.”  

104 Cases such as this show the need for legislative change, as failing to understand that the “the dynamic of the typical American family is rapidly evolving” clearly deprives these children of their constitutional right to be privy to the parent-child relationship.  

105 The case of Johnson v. Johnson, had it right when they declared that if a child is at “the center of a legal proceeding, the court will look to fulfill the best interests of the child and make decisions, which both reflects and enhances the child’s well-being.”  

106 Johnson, opened up the opportunity for children of the new era, as it challenged the long-standing belief that children of virtual adoptions are only afforded rights under Intestacy Law. Due to the nature of a virtual adoption being held as an equitable remedy, the doctrine of virtual adoption can be broadened and applied to other legal realms, giving children of these unions the same rights as a child that were “naturally born or formally adopted.”  

107 These cases serve to show creation of the new familial units, whether through statutory adoption, virtual adoption, or posthumous adoption,
entitles the children of such unions to identical rights per their parent-child relationship, as constraining the application of their rights would be detrimental to the children.  

IV. METHODOLOGY


Traditional common law jurisprudence

As the traditional family unit evolves and advancements in various reproductive technologies ensue, posthumously conceived children and familial units created through posthumous adoptions have become prevalent. The creation of these non-traditional families only works to bring the issue of what constitutes a family and what rights a child born of these unions would be entitled to, per their legally recognized parent-child relationship, to the forefront of many legal conundrums.  

Much of the reasoning behind this is that traditional common law jurisprudence fails to account for technology never dreamed of by past legal scholars and the creation of new family structures.

In working to incorporate common law or current laws governing the rights of the child, afforded to them through their parent-child relationship, it becomes obvious that “there may be no adequate precedent” to base our determinations on. 110 Hence, it becomes apparent that legislation needs to address these changes and establish a means by which posthumously conceived children and familial units created through posthumous adoptions have a “means by which they may achieve legal status.” 111 Without the legislative changes, these children would be “denied rights given all other children.” 112 The Restatement (Third) of Property, demonstrates a step in the right direction as a means of trying to provide protections to the rights of children born into these non-traditional familial structures.

**Restatement (Third) of Property**

The Restatement (Third) of Property addresses Assisted Reproductive Technology and more specifically the techniques utilized in the creation of Posthumously Conceived Children. The Restatement (Third) of Property explores gamete extraction and gamete donation and the rights afforded to children created through these techniques. 113 The Restatement (Third) of Property, proclaims that any child produced through assisted reproductive technology is entitled to rights per the

parent-child relationship, if the child was produced by the gamete of the deceased within a reasonable time and if the deceased “in circumstances indicating that the decedent would have approved the child’s right to inherit.” ¹¹⁴ This begins to establish rights for children born of this era and helps to classify these children, as they seek to attain the answer to “whose child I am.” In a case of first impression, In re Martin B. held that posthumously conceived children are entitled to rights as descendants under the Restatement (Third) of Property. ¹¹⁵

Review of Uniform Parentage Act & Uniform Status of Children of Assisted Conception Act

Uniform Parentage Act

Under the Uniform Parentage Act, the parent-child relationship is established when a man marries the child’s mother, he receives the child into the home, he holds the child out as his own, and acknowledges his paternity. ¹¹⁶ This almost sounds as if it is promoting virtual adoptions and that it could be used to support cases of posthumous adoptions. The Uniform Parentage Act also affords rights to posthumously born children through its proclamation that a child born after the father dies is considered a

posthumous child and the child is able to inherit from the father if the child is born within 300 days. 117

Furthermore, if the father engages in gamete donation and he provides the sperm or consents to the assisted reproduction, the parent-child relationship can be established under the Uniform Parentage Act. 118 The rights afforded to a child created through gamete extraction become a little more perplexing in that under the Uniform Parentage Act, if a child is created posthumously through gamete extraction, that child is only entitled to rights under the parent-child relationship if the parent consented. 119 Which is interesting as under the Restatement of Property the rules are not quite so rigid, namely because it holds that a child created through gamete extraction is entitled to rights per their parent-child relationship if they are born within a reasonable amount of time and the decedent would have approved the gamete extraction. 120

Uniform Status of Children of Assisted Conception Act

Under the Uniform Status of Children of Assisted Conception Act, the legal status of children is addressed. The main purpose behind the Uniform Status of Children of Assisted Conception Act is to support and protect the “security and wellbeing of children born through assisted conception.” 121 This act establishes that “children

117 id.
118 id.
119 id.
are the first priority,” and in this era of medical and technological advancements this act is used to “augment and clarify the rights of children born under the new technology.”

Now, while this program affords the rights to children created through assisted conception, the act fails to account for various familial structures such as posthumous conceptions. Unfortunately, while the Uniform Status of Children of Assisted Conception Act is designed to avoid issues of parentage and rights of the child conceived through assisted conception, it fails to encapsulate the concept that assistive technology is sometimes utilized to create a posthumous child. Furthermore, through this act the death of an individual “whose genetic material is either used in conceiving an embryo or in implanting an already existing embryo… end[s] the potential parenthood of the deceased.” Therefore, while the Uniform Status of Children of Assisted Conception Act affords rights to children of assisted conception, the only provision of the Act that provides for any protections of a posthumous child is “designed primarily to avoid the problems of intestate succession.” Meaning that this act fails to encapsulate many of the problems posthumously conceived children face in attaining their status as a child and the constitutional rights afforded to them. This act does highlight that an individual, who approves their genetic material to be used in the

123 Id. at 499.
124 Id. at 500.
creation of a posthumous child, can “provide explicitly for such children in their wills” and as such constitute the deceased as a parent.  

Variations: Social Security, Probate, Intestate Inheritance Rights, Descent and Distribution

Social Security

The Social Security Administration defines a “child” as only being “the child or legally adopted child of an individual.” Per this definition, any “child” that falls within this definition is entitled to the rights afforded to a child per their parent-child relationship, and every child within this definition “shall be entitled to a child’s insurance benefit.” However, as we have seen through various case analyses this definition is lacking and it fails to account for the medical and technological advancements. Specifically, as we mentioned in the case of Astrue, the Social Security Administrations definition of a “child” lacks to account for posthumously conceived children born of assisted reproduction and as such, this definition fails to hold the answer to “whose child am I.”

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125 id.
127 id
Probate

Therefore, we look to the probate code to determine if they have a definition of “child” that can serve and protect all potential avenues, as well as assist in determining the rights of children born into the new familial structures of the current era. Probate law specifically holds that adopted children are the decedents of their parents and parents’ ancestors, wherein all ties to biological relations are severed, with the exception to this rule being the stepparent adoption. This shows that as the parent-child relationship is severed between child and biological parent, the new parent-child relationship is established following the adoption. Thus, as probate law affords for the creation of rights per new familial ties the answer to the rights of the child in the era of posthumous adoptions and posthumously conceived children may be found in the intricacies of probate law.

The Uniform Probate Code holds that “a child, by definition is entitled to take for the purposes of intestate succession when there is a parent-child relationship.” Therefore, in the case of Posthumous Conception the provision to determine parent-child relationship clarifies that “posthumously conceived child should be considered in gestation at the time of the decedent’s death.” Furthermore, under the Uniform Probate Code the parent-child relationship can be established by an individual other

\[129\] UPC §2-114
\[131\] Id. at 275.
than the birth mother when there is a signed record indicating such, which affords rights
to children born through surrogacy and even to posthumously conceived children born
though their mothers ovum donation by a surrogate. 132

**Intestate Inheritance Rights**

Now, when an individual dies without a will, the Intestate Inheritance Rights
govern distribution of a probate estate. Generally, the parentage law of the state in
which an individual was domiciled at the time of their death determines who qualifies as
a “child” of the decedent. 133 However, this can be tricky as the laws can vary from
state to state and while some states provide for virtual/equitable adoptions, others
blatantly deny any affirmation of such. Now, most rules governing descent and
distribution rights of the child all rely on when the child was conceived. As such, if a
posthumous child is in utero at the time of the descent’s death then the child is
construed as having been born in the decedent's lifetime and as such, they are entitled
to receive the same share of an estate as if they were born during the descents lifetime. 134

**V. RESULTS**

132 *id.*
Advances in State Statutes and Codes, Definitions and their Differences

As we try to define the concepts that seek to delineate the unknown and answer the question of “whose child am I,” an expansion of the traditional family structure is paramount. This expansion will ultimately provide evidence that children born of or into these untraditional familial structures are entitled to rights based upon their parent-child relationship, but how do we conceptualize this when the laws governing their rights vary amongst various states. As each states definition of a “child,” and the rights afforded to these children varies amongst the various realms of the law, we begin to see that this lack of cohesion makes it difficult to establish the rights of a child per their parent-child relationship. However, through evaluating the various definitions and through the evolution of public policy the determinations of what constitutes a “child” may emerge and as such may be a means of accurately portraying “whose child I am.”

Arkansas Inheritance Code

Arkansas Inheritance Code does not encapsulate an all-encompassing definition of what a “child” is, nor does it accurately depict the rights of children born into the familial structures of the modern era. While the Arkansas Inheritance Code does hold a provision of posthumously children, it is a narrow definition holding that posthumously
born children can only inherit if they are conceived before descents death. 136 This code seems to lack the determination of children born through gamete extraction or posthumous adoptions, therefore we move along to the next state in search of a better portrayal of “whose child I am.”

**Delaware Code**

Now, the Delaware Code, while not perfect, does seem to encapsulate a new era of families better. The Delaware Code specifically holds that posthumously born children are considered as living at the death of their parent, regardless of conception time, as long as they are born alive. 136 While Delaware construes a posthumously born child a legitimate child entitled to rights per their parent-child relationship, the state’s statues go one step further and afford rights to all posthumously conceived and posthumously born children encompassing the rights of children not only created through gamete donation but also to those created through gamete extraction. 137

**District of Columbia Intestacy Laws**

Now, the District of Columbia’s Intestacy Laws are similar to the Delaware Code in that if a child of a descent is born after the party’s death, they are “entitled to the

136 59 Del. Laws, c. 384, § 1
137 *Id.*
same inheritance rights as if [they] were born before the death of the descent.” 138 However, the District of Columbia’s Intestacy Laws fail to account for the children created through gamete extraction or the family units created following a posthumous adoption.

**Kansas Intestacy Law**

Kansas Intestacy Law, is very interesting as this state’s definition of a “child” includes the concept of Posthumous Children 139 Kansas Intestacy Law specifically holds that posthumous children that were conceived by an individual, but born after their demise, are entitled to inheritance rights per their parent-child relationship. 140 Kansas Intestacy Law goes on further to clarify the definition of a “child.” Kansas Intestacy Law specifically holds that a “child” is not only a biological child, but that the definition of “child” also encompasses posthumous children and adopted children as provided by law; in addition to “children whose parentage is or has been determined under the Kansas parentage act or prior law.” 141 While the Intestacy Laws of Kansas encapsulate numerous familial structures and define the child in a more complete way, looking to other laws could potential assist in determining the all-encompassing definition of a “child” as we seek to answer, “Whose child I am” and as we seek to establish the rights afforded to each child per their parent-child relationship.

138 District of Columbia Intestacy Rights § 19-301.
140 *id.*
141 *id.*
Massachusetts

In looking to Massachusetts statutes, the gaps in Kansas’s Intestacy Laws may be filled, as Massachusetts statues hold that posthumous children are considered alive at the death of their parent, giving these children the same rights as prior born natural children. 142 Furthermore, this same statutes applies to any child conceived through artificial insemination with consent, therefore any posthumously conceived child conceived with consent can attain their rights per their parent-child relationship regardless of how long after the death of their parent they were conceived. 143

Limitations on the Law

As we evaluated the various legal authorities governing the rights afforded to a child per their parent-child relationship and we evaluated the various definitions of what constitutes a “child,” we begin to see many of the limitations on the law. The laws governing many of the states, such as Colorado, Delaware, Texas, Washington and Wyoming, hold that a deceased individual cannot be the parent of a posthumously conceived child unless the conception was consented to in a written record. 144 Hence, Posthumous Children can only inherit from their parents when the use of gamete

143 id.
donation or extraction was consented to in writing.  

145 This limitation fails to account for situations wherein consent was implied or failed to be obtained. Other limitations of the law fall to the time limit imposed on posthumous conceptions and posthumous births. While some state limit the determination of a child’s rights to children born within this timeframe, not all states adhere to strict time limits. Specifically, there is no time limit on posthumous conceptions in Colorado, Texas, or Washington.  

146 In other words, this means that a posthumously conceived child may be entitled to rights per their parent-child relationship, years following the death of their parent.

VI. DISCUSSION

Establishment of the Parent-Child Relationship

Through advancements in science and changes to the familial structure, the laws governing the rights afforded through the parent-child relationship, to posthumously conceived children, needs examined. Furthermore, in trying to establish the rights of children born into the modern era’s new familial units, we need to look not only at the posthumously conceived child, but we need to examine the familial unions established through posthumous adoptions. As we seek to establish the rights of these parities, we are beseeched with the same concerns over the lack of judicial precedence and we

145 id.
need to determine how exactly we can determine the child’s best interest in these types of adoption cases when either the child or the adoptive parent is already deceased.

**New Familial Structures**

In a world where posthumous children have emerged and the concept of posthumous adoptions has evolved, traditional family structures have diverged beyond the creation of non-traditional family structures as these evolving concepts have set stage for the unknown.  

Through our ever-advancing medical and scientific technology, plus the desire to belong to a family unit, the expansion of the traditional family structure is paramount and this will only lead to the progression of the laws in an effort to encapsulate and protect the rights of the children of these unions.

**Rights of the Child Established**

This will not be an easy task but through evaluating and contrasting the various determinations of what constitutes a “child” and establishing the rights of the children in cases of Posthumous Adoptions and the Posthumously Conceived Child, in accordance with their parent-child relationship, we can begin to highlight the need to change existing public policy and procedures.

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Dilemmas in Attaining Family Structure and Rights

With the demographics of families shifting amidst the era of Posthumous Adoptions and Posthumously Conceived Children, the “philosophical underpinnings of relationships are also changing” and concerns are arising. 148 This seismic shift in the familial structure, is one of cutting edge technology compounded by some of the most prevalent issues facing family law today, “yet scholars have been slow to engage with the structure and substance of the law in response” to the evolution or the dilemmas associated it. 149 As these various dilemmas emerge we need to evaluate how we can attain the sought after family structure and the rights afforded to children of these unions though their parent-child relationship, including the lack of cohesion in the definition of what constitutes a “child” and how to accurately determine “whose child I am” with these competing factors.

Competing Factors: Cohesion in Definitions

How can we even contemplate establishing the rights of a child, per their parent-child relationship, when we cannot even agree upon one cohesive definition of a “child?” This problem can be seen as we conceptualize the fact that most current legal

authorities deny posthumously conceived children the basic “rights given all other
children” because most definitions of a child fail to account for posthumous children and
as such these children “cannot be classified as either legitimate or illegitimate.”  
This failure to be classified as either a legitimate or illegitimate child leads to posthumous
children not being considered "children" and as such, they cannot receive the rights of a
“child” per their parent-child relationship “under current legal schemes.”  
This lack of
definition is unethical and immoral as failing to recognize the various methodologies of
bringing a child into the world and creating their various familial units, deems these
posthumously conceived children as being brought “into the world a parent-less child.”

Nevertheless, by creating standardized definitions and establishing new
precedents, then and only then will we be able to accurately answer the question of
“whose child I am,” when it comes to the children of Posthumous Adoptions and to
Posthumously Conceived Children. Hence, through the progression of changes, the
determination of “whose child am I,” in cases of Posthumous Adoptions and
conceptions, will be answered through the formation of new familial structures that
establish the rights afforded to the parties per their parent-child relationship and taking
into account the best interests of the child may be a step in the right direction.

151 Id. at 59.
152 Id.
Best interests of the child

The best interest of the child should be taken into account when determining the definition of a “child” and in working to determine the rights afforded to a child per their parent-child relationship. In making any determination that affects the rights afforded to a child, their best interests should always be the primary concern. 153 Statutory regulations on what constitutes a “child” and affords a child rights under their parent-child relationship may be inconsistent with the best interests of the child. The child’s best interests may be established through a virtual adoption, a posthumous adoption, or the acknowledgement that they are a posthumously conceived legal and legitimated child of a deceased parent, “thereby creating a new family structure” and their constitutional rights. 154

The State of North Dakota imposes this belief as their public policy specifically holds that statutory and virtual adoptions coexist and the “protection of the welfare and best interests of the children” is required. 155 However, determining what is best for a child is not as simple as it seems, as what is in a child’s best interests often “depends upon values and norms upon which reasonable people sometimes differ.” 156 This creates another legal dilemma, as “even when consensus exists, [on what is in a child’s best interests] there are substantial limits on the ability of courts to predict outcomes for

The only way to rectify this issue is through changes to the current laws that establish an all-encompassing definition of a “child” and determine what rights children born of these unions would be entitled.

Alternatively, we may be able to find another solution by taking note of how in 1988, the Constitution of the Federative Republic of Brazil consolidated various familial situations that had been accepted by society and integrated them into the legal system. The Constitution of the Federative Republic of Brazil recognized that new familial structures have emerged and challenged the common laws legal order. Instead of merely applying the Best interest of the child or relying on laws that were not specifically developed to address these issues, the Constitution of the Federative Republic of Brazil implores the tactic of socioaffectivity. Through socioaffectivity “the interests of all involved must be weighted, and the analysis of the issue should consider not only the affective bonds, but mainly the social repercussions (social) generated by these bonds (affectivity).” Therefore, if we were to encompass a socioaffective approach in determining the definition of a “child” and in determining, the rights afforded to a child per their parent-child relationship, we may finally find the means to effectively create “bonds, rights and obligations in the family” units and accurately determine “whose child I am.”

\[\text{157 Id. at 2.}\]
\[\text{158 Heloisa H. Barboza, Legal Effects of Socioaffective Kinship, 2 Revista da Faculdade de Direito da UERJ-RFD 24 (2013).}\]
\[\text{159 Id. at 117-135.}\]
\[\text{160 Id. at 117.}\]
\[\text{161 Id.}\]
Summary

While it is apparent that the modern era’s familial structures have undergone considerable reconstruction, the main task becomes the need to gain “legal recognition for the multiple variations of modern family life.” Through legislative reform that takes into account this new era of medical advancements and varying ideologies of what constitutes a parent-child relationship, we can begin to answer the question, “whose child am I.” Once we seek to answer this question, then we can determine how these children will be able to attain their family structure and the rights afforded to them though their parent-child relationship. Whether a child is a legitimate or illegitimate child, a posthumously adopted child or posthumously conceived child, a filius nullius, or a filius populi, the importance of establishing a standard all-encompassing definition of what constitutes a “child”, becomes evident in working to determine the rights of these individuals. In finding this more cohesive definition, we will be able to encapsulate the various forms of familial structures and when considering gamete extraction or donation, Posthumous Children, and adoptions yielded posthumously, it will help us to determine the answer to the question of “whose child am I.”

Recommendations

In a world where posthumous children have emerged and the concept of posthumous adoptions has evolved, understanding how traditional family structures

have diverged to create non-traditional family structures helps us to understand the legal dilemma that children born of these unions are enduring in trying to attain their constitutional rights based upon their parent-child relationship. While some states and various legal authorities have begun steps in recognizing the rights of these children, the inconsistency in legal realms, jurisdictions, and definitions, causes a failure in recognizing their status as a child and as such serves to deprive them of all rights under their parent-child relationship.

Nevertheless, through the evolution of public policy and the advancement of common laws, we will be able to encapsulate a cohesive definition for the term “child” and as such, take steps towards protecting the constitutional right every child is privy per the parent-child relationship. This legislative reform and the establishment of the all-encompassing definition of a “child,” encompassed with concepts that can be derived from various sources, such as Brazil’s enactment of socioaffective methods of determining familial structures or the Chinese concept that not even death is an end to legal capacity, should be the first step. Looking to Probate Laws and Intestate Laws, coupled with the various concepts that encapsulate posthumous conceptions and posthumous adoptions, we will finally be able to provide evidence that children born of or into these untraditional familial structures are entitled to rights based upon their parent-child relationship. Taking this and combining it with recognition of the current flaws in the legalities governing almost adopted children and equitable or virtually adopted children, combined with the assessment of the successes of statutory adoptions and the establishment of rights per loco parentis, we can take this newfangled definition and begin affirming the Constitutional rights of the children of
these. Moreover, by morphing these various legal authorities and pursuing legislative reform, an all-encompassing definition of a “child” will emerge and this definition will serve as the catalyst to answer the resounding question of “whose child I am.”