

Inheritance Rights for Posthumously Procreated Children: A Growing Challenge for the Law

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Date of submission

11 January 2018

Date published

17 May 2018

Editor Prof C Rautenbach

How to cite this article

d'Almaine J and Zaal FN
"Inheritance Rights for
Posthumously Procreated Children:
A Growing Challenge for the Law"
PER / PELJ 2018(21) - DOI
<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4211>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2018/v21i0a4211>

Abstract

Significant advances in cryogenic technology render it possible to freeze and store human gametes. Under appropriate laboratory conditions frozen gametes can remain viable for long periods of time. In consequence, it is possible for a child to be conceived and procreated after the death of one or both parents. This raises some challenging juristic problems. Amongst these are implications for the law of inheritance. Where a valid will expressly refers to a child who will be procreated after the testator's death, the child's right to inherit will be secured. However, where a will merely refers to children as a class, or with intestate succession, it becomes uncertain whether a posthumously procreated child has a right to inherit. South African legislation governing succession, the common law and the *Constitution of the Republic of South Africa*, 1996 all fail to provide definitive answers. Because of this and as the numbers of posthumously procreated children are likely to increase as artificial reproduction services become more widely available, there is a need for South African legislation to clarify their inheritance rights.

Keywords

Cryogenics; post-mortem conception; posthumous procreation; children's inheritance; *nasciturus* doctrine; intestate succession; posthumous child; *in vitro* fertilisation.

.....

1 Introduction

In this article we discuss some issues arising from developing medical capabilities in assisted human reproductive technology. We focus on inheritance rights for children posthumously procreated by implantation in a female's womb after the death of at least one parent.¹ For convenience, we use the concept of posthumous procreation narrowly to refer only to such children, and not to children born after a testator's death subsequent to natural conception.² Post-mortem artificial conception and implantation are possible as a result of artificial reproductive technologies involving *in vitro* fertilisation (IVF) and cryogenics. Where a valid will deals expressly with the possibility of a posthumously implanted heir, apportionment of a deceased person's estate is unlikely to be problematic.³ However, where, as is frequently the case, wills merely refer generally to classes of beneficiaries such as descendants or surviving children, the question of whether a such child is to be included becomes more difficult. Whether such a child should have a claim is also pertinent for the law of intestate succession.

Zago noted that failures by legislatures in many jurisdictions to keep the law abreast of advancing medical technology in the field of artificial procreation creates a group of "second-class children" arbitrarily denied inheritance rights.⁴ In this article our primary aim is to evaluate existing South African law with a view to establishing the extent to which it provides guidance concerning such rights. We establish a context in part 2 with some explanatory notes on relevant aspects of artificial procreation techniques and possibilities. In part 3 we discuss the South African succession legislation and show that it provides inadequate coverage on inheritance rights for beneficiaries procreated after the death of testators. In part 4 the extent to which South African common law provides answers is explored. We again conclude that it provides insufficient guidance for potential claimants. In part 5 we investigate whether the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) provides adequate direction. Yet again, our conclusion is negative. Finally, in the light of our analysis, we

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¹ Implantation and related artificial reproductive processes are explained in part 2 below.

² We clarify our use of terminology further in part 2 below.

³ This is discussed further in part 3 below.

⁴ Zago 2014 http://scholarship.shu.edu/student_scholarship/609.

suggest in our concluding part 6 that in order to protect children legislation is urgently needed to address the ambiguities and *lacunae* in the law.

2 Artificial reproduction techniques

In vitro fertilisation is well established for assisting infertile couples to have children. It involves the retrieval of eggs from the ovary of a female. These are combined with the sperm of a male donor and cultured in a laboratory.⁵ An embryo is formed by mingling chromosomes from the cells of the two parents. This occurs 22 to 30 hours after penetration of the ovum by spermatozoa. A resulting fertilised ovum, or egg, of the female parent may then be referred to as an embryo, or zygote.⁶ Once formed, an embryo can be implanted in the womb of a female and this may be followed by pregnancy and birth.⁷

It has become possible to delay the process of IVF. Cryogenics has been described as the science of freezing, subsequently thawing and then regenerating body parts.⁸ Since the late 1970s medical technicians have been able to freeze semen and eggs prior to combining them for fertilisation. After fertilisation, embryos can also be kept frozen prior to implantation.⁹ Viability can be retained for many years, provided the correct frozen conditions are maintained. Embryos may later be thawed and implanted in a female's uterus. Where this is done successfully, the cells continue to divide and develop until the mother gives birth.¹⁰ A significant consequence of the potential for long-term freezing is that procreation can occur long after the death of gamete donors.¹¹ If an egg is fertilised by semen only after the death of a parent, a resulting child has been conceived post-mortem. Alternatively, if a frozen embryo was already available but is utilised after the death of a parent, only implantation in a female's womb occurs post-

⁵ A couple might obtain gametes from an unknown donor. This may raise a question of who the lawful parents of a resulting child are. Generally, a married couple having consented or a mother giving birth to the child can result in designations of lawful parentage in terms of s 40 of the *Children's Act* 38 of 2005. For a detailed analysis of parental relationships covered by this section see Schäfer *Child Law in South Africa* 30-32.

⁶ This zygote subsequently divides into two cells after 24 to 36 hours, then four cells after 40 to 50 hours. Finally, from approximately 50 to 78 hours after insemination the zygote develops into a cluster of about 8 cells. See Human Fertilization Embryology Authority 2014 <http://www.hfea.gov.uk/IVF.html>.

⁷ Human Fertilization Embryology Authority 2014 <http://www.hfea.gov.uk/IVF.html>.

⁸ Diamond 1998 *NY Int'l L Rev* 78.

⁹ Diamond 1998 *NY Int'l L Rev* 78.

¹⁰ Human Fertilization Embryology Authority 2014 <http://www.hfea.gov.uk/IVF.html>.

¹¹ Shayne 2015 <https://www.hklaw.com/privatewealthblog/benefits-due-a-child> 28-29.

mortem. It should be noted that for the purposes of our analysis we use the terminology "posthumous procreation" to refer to children in both these categories. However, we do not include children who were either naturally conceived or artificially implanted in a mother's womb prior to the death of a testator, even if they were born afterwards.

It is even possible to remove and then freeze semen, and more recently female eggs, from the body of a donor who is recently deceased.¹² Adding to a need for appropriate legal solutions is the fact that the number of instances of the long-term freezing and storage of gametes is increasing internationally. Women wishing to delay childbearing in order to pursue career goals and persons of both sexes expecting to undergo dangerous military service, chemotherapy or other medical treatments which may reduce their fertility are often motivated to resort to cryopreservation of their gametes.¹³ It is thus becoming increasingly common for persons at risk of death or infertility to decide to preserve their gametes for possible future procreation.¹⁴ A surviving partner may subsequently seek to conceive a child as a genetic reminder or to fulfil the wishes of the deceased parent.¹⁵ Another factor increasing the utilisation of artificial procreation techniques is that costs are gradually diminishing as artificial reproduction services become more widely available and streamlined.¹⁶ Amongst the consequences are the increasing numbers of posthumously procreated children.

The possibilities of artificially procreating children after the death of one or both parents and the increasing utilisation of relevant medical technology raise difficult questions such as whether or when rights of inheritance should be accorded.¹⁷ It is only a matter of time before South African courts are

¹² Ethics Committee of the American Society for Reproductive Medicine 2013 *Fertil Steril* 1842; Bard and Penrose 2015 *Health Matrix* 229.

¹³ Diamond 1998 *NY Int'l L Rev* 80-81; Shayne 2015 <https://www.hklaw.com/private-wealthblog/benefits-due-a-child> 1.

¹⁴ Doucet 2013 *Dalhousie J Legal Stud* 2-3; Croucher 2017 *Trusts and Trustees* 67-68.

¹⁵ Alberta Law Reform Institute *Succession and Posthumously Conceived Children* para 15.

¹⁶ Doucet 2013 *Dalhousie J Legal Stud* 1-2.

¹⁷ Other issues not dealt with in this article include whether frozen gametes or embryos can be inherited; which of two separating spouses or partners can decide whether to utilise them; and when they must be preserved or destroyed. See, for example, Heaton *South African Law of Persons* 12 fn 51, where it is suggested that the maximum preservation time for frozen embryos should be four years. For a South African analysis of related divorce disputes see generally Moodley *Comparative Analysis*. Concerning citizenship rights for after-born children, see Alberta Law Reform Institute *Succession and Posthumously Conceived Children* para 19.

called upon to resolve such disputes. It is therefore pertinent to evaluate the extent to which existing South African legislation and common law provide relevant coverage.

3 Succession legislation

Anyone seeking guidance on inheritance rights for posthumously procreated children might understandably first turn to a consideration of legislation designed specifically to cover inheritance claims. Intestate succession is governed by the *Intestate Succession Act* 81 of 1987. Unfortunately, this does not provide any specific wording which could be interpreted as guiding inheritance claims by posthumously procreated child beneficiaries. Whether there are any circumstances in which such beneficiaries would be covered by this Act thus remains uncertain.

Where a testator has left a valid will, the *Wills Act* 7 of 1953 (*Wills Act*) becomes applicable. Since the primary purpose of this Act is to enable inheritances to be distributed in accordance with the wishes of testators, it is a good idea for anyone who freezes their gametes for possible future procreation to draft a will including clear instructions about inheritance shares for possible posthumous descendants.¹⁸ Where a will which is valid in terms of the *Wills Act* clearly provides for inheritance by a posthumously procreated child, such a child will be eligible for a share as indicated in the will. However, in the common situation where a will merely refers to unnamed children or issue as a broad category of beneficiaries, the position becomes less clear.

Section 2D(1)(c), as inserted into the *Wills Act* in 1992, deals specifically with broad category beneficiary designations.¹⁹ It reads:

In the interpretation of a will, unless the context otherwise indicates -.... (c) any benefit allocated to the children of a person, or to the members of a class of persons, mentioned in the will shall vest in the children of that person or those members of the class of persons who are alive at the time of the devolution of the benefit, or who have already been conceived at that time and who are later born alive.

As can be seen, this creates a presumption that benefits in a will due to children as a class, including distantly related children such as grandchildren, must be interpreted as extending to children conceived by the time of death of the testator and subsequently born alive unless there is

¹⁸ On suggested wording see Gary 2005 https://www.americanbar.org/content/dam/aba/publishing/probate_property_magazine 38.

¹⁹ Added by s 4 of the *Law of Succession Amendment Act* 43 of 1992.

evidence in the will of a contrary intention. A key requirement is clearly that children must have "already been conceived" at the time of the testator's death. What constitutes conception is not defined in the Act and so the drafters may have considered only the possibility of unassisted natural conception. A question which therefore arises is whether the conception requirement in section 2D(1)(c) can be met by posthumously procreated children. As noted in part 2 above, two distinctly different situations are possible: those in which a fertilised embryo already exists at the time of the testator's death and those in which male and female gametes have not yet been conjoined. If a court were to treat implantation in the mother's womb as analogous to natural conception, both categories of posthumous children would be excluded. On the other hand, if fertilisation were treated as analogous, the embryo category of posthumously conceived children could then benefit from section 2D(1)(c), provided a live birth subsequently occurred. In our submission fertilisation rather than implantation should be treated as equivalent to natural conception. This would be in accordance with the approach taken by modern medical scholars,²⁰ and could enable at least one category of posthumously procreated children to benefit from inheritances. However, it must be conceded that it is not possible to interpret section 2D(1)(c) to cover situations where male and female gametes were conjoined only after the death of a testator. This is because it cannot be claimed in such cases that conception occurred in time.

In conclusion, the current South African legislation covering intestate succession contains no relevant wording and thus offers no basis for claims by posthumously procreated children. That governing testate succession also provides no direct coverage. However, depending on how the conception requirement in section 2D(1)(c) of the *Wills Act* is interpreted, some posthumously procreated children could potentially benefit. Where gametes have not yet been conjoined, the section provides no basis for a claim.

4 The common law

With succession legislation providing little clarity and limited scope for claims, it may be considered whether the common law makes up for this by providing some direction on whether or when posthumously procreated children should be able to inherit. Arguably, courts might interpret the law in favour of some claims either by utilising their powers as upper guardians of

²⁰ See, for example, Peters 2006 *UC Davis L Rev* 202; Okohue *et al* 2009 *Afr J Reprod Health* 119; and Walmsley 2014 *Obstet Gynaecol Forum* 30.

all minors or by extending the *nasciturus* doctrine. Each of these possibilities will be considered separately.

Where there is no valid will, or a valid will refers only broadly to children as a class of beneficiaries, it is possible that a court could utilise its common law power as the upper guardian of all minors to support an interpretation in favour of an inheritance for a posthumously procreated child. As a rationale, the upper guardianship power enables an argument based on necessity. Need becomes a ground for the provision of support to any category of a vulnerable child. Peart contends that in common law jurisdictions there is no reason why this should not include a posthumously procreated child on whose behalf a succession claim has been brought.²¹ However, it is not clear whether a South African court would be willing to extend the *parens patriae* function to cover the pre-birth circumstances of posthumously procreated children, because in South African law legal personality is bestowed only at birth.²² The applicability of the upper guardianship power is thus uncertain.

As an alternative, the *nasciturus* doctrine has the advantage that it has developed specifically to take into account pre-birth circumstances. The principle *nasciturus pro iam nato habetur, quotiens de commodis eius agitur* evolved in Roman law.²³ In terms of this principle fetuses could be treated as already born if this was to their benefit.²⁴ It is notable that in Roman times the principle was applied in cases of succession.²⁵ In South African law the principle was received as the *nasciturus* doctrine. It has sometimes been regarded as a rule and sometimes as a mere fiction. Under the fiction, legal subjectivity begins only at birth, and benefits are kept open until birth.²⁶ The *nasciturus* rule, on the other hand, deems legal subjectivity to begin at conception if there is a benefit which would accrue to the foetus once it is born. This means that a foetus may receive rights prior to its birth.²⁷ Both the fiction and the rule require that a foetus must be born alive. Aside from birth, there are two other requirements. Firstly, the application of the doctrine must be beneficial to the foetus. Secondly, the conception of the foetus must have occurred before such a benefit accrued.²⁸

²¹ Peart 2015 VU W L Rev 735.

²² Pillay 2010 *Stell LR* 232. Also see Pickles 2013 *Stell LR* 148.

²³ See Justinian *Digest* 1.5.7, 1.5.26, 5.4.3.

²⁴ Johnston 1997 *CLJ* 90.

²⁵ Johnston 1997 *CLJ* 85; Boezaart "Child Law" 6.

²⁶ Boezaart "Child Law" 6.

²⁷ Boezaart "Child Law" 8.

²⁸ Boezaart "Child Law" 6.

It is important to note that the application of the doctrine has gradually been extended in some well-known South African leading cases. In *Chisholm v East Rand Property Mines Ltd* it was held that where a girl's father had been killed before her birth as a result of another's delict, she was entitled to a dependant's action for loss of support.²⁹ In *Shields v Shields* divorcing parents wished to include in their divorce order a condition that the father would not pay maintenance for a pregnant mother's child after its birth.³⁰ Although it did not expressly mention the *nasciturus* doctrine, the court protected the unborn child by denying the request.³¹ In *Ex Parte Boedel Steenkamp* a testator bequeathed his estate to his daughter and her children alive at the time of his death.³² The court held that the pregnant daughter's foetus should be presumed to be alive so as to inherit equally with its mother and siblings.³³ This ruling has since been regularly followed in South Africa and is incorporated in section 2D(1)(c) of the *Wills Act* as discussed above.³⁴

In *Pinchin v Santam Insurance* a pregnant woman was injured due to the negligence of a motor vehicle driver.³⁵ When her baby was four months old, he was diagnosed with cerebral palsy and brain damage, and an action for delictual compensation was brought against the driver. Although evidence of the cause of the harm was found to be insufficient the court was in principle willing to apply the *nasciturus* doctrine, had the evidence been more conclusive.³⁶ In *Christian League of Southern Africa v Rall* the court refused to extend the *nasciturus* doctrine so far as to protect against abortion.³⁷

These cases are important in showing that the *nasciturus* doctrine has gradually evolved in South African common law. While its application began with a dependency claim, it has been extended to paternal maintenance, succession and delict, but not to the prevention of abortion. Careful analysis will be required to decide whether the doctrine should be extended further as new issues arise. Clearly, assisted reproduction and cryogenics would not have been envisaged by the Roman jurists who originally formulated it.

²⁹ *Chisholm v East Rand Property Mines Ltd*. 1909 TH 297.

³⁰ *Shields v Shields* 1946 CPD 242.

³¹ Boezaart "Child Law" 8 fn 27 shows that other remedies besides the doctrine can be applied in maintenance requests.

³² *Ex Parte Boedel Steenkamp* 1962 3 SA 954 (O).

³³ *Ex Parte Boedel Steenkamp* 1962 3 SA 954 (O) 958. For a discussion of the court's reasoning, see Boezaart "Child Law" 7.

³⁴ Boezaart "Child Law" 7.

³⁵ *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W).

³⁶ *Pinchin v Santam Insurance Co Ltd* 1963 2 SA 254 (W) 260.

³⁷ *Christian League of Southern Africa v Rall* 1981 2 SA 821 (OPA).

However, the reported South African cases do show that there is a potential for ongoing interpretation to serve the needs of the present, including in the field of succession. This needs to be kept in mind in considering whether posthumously procreated children should be included in the doctrine.

As has been noted, a primary requirement is that an unborn child must stand to gain from the application of the *nasciturus* doctrine. As succession rights generally result in benefits, this requirement would likely be met where a posthumously procreated child seeks to inherit. The second requirement is that the benefit must accrue to the *nasciturus* after conception. This again raises the question of whether conception occurs when an embryo is fertilised or only when implantation into a female's womb subsequently occurs. In 1997, referring generally to *in vitro* fertilisation, Lupton submitted that the *nasciturus* doctrine should only be applied to benefit embryos already implanted into the womb of any intended mother.³⁸ However, as pointed out in part 3 above, in the present century legal and medical scholars, when referring to assisted reproduction, have tended to view conception as occurring when male sperm is used to fertilise a female egg before implantation.

Treating conception as occurring at fertilisation when sperm and an egg are conjoined replicates more closely the time of conception in unassisted natural procreation. Delaying conception by treating it as occurring only at implantation as proposed by Lupton could disadvantage many children. As explained in part 2 above, it is now possible to preserve gametes and embryos for many years before implantation. Thus, under Lupton's interpretation the legal moment of conception could be delayed and benefits lost in the meantime. It is therefore submitted that for the purposes of the *nasciturus* doctrine the moment of conception should be upon the completion of fertilisation.³⁹ This would mean that the traditional requirement that conception needs to occur before a benefit accrues would more frequently be met. However, under this approach there is still the same difficulty as with section 2D(1)(c) of the *Wills Act*. If gametes are conjoined only after a parent dies, this means that conception would have occurred after a benefit such as an inheritance accrued. A court might therefore well hold that the doctrine is inapplicable. In relation to the third requirement of the *nasciturus* doctrine, that the child must subsequently be born alive, there are no particular difficulties with posthumously procreated children. The

³⁸ Lupton 1997 TSAR 746. Also see Heaton *South African Law of Persons* 12.

³⁹ Peters 2006 *UC Davis L Rev* 199 points out that fertilisation during natural or artificial conception occurs over about 48 hours, rather than instantaneously.

usual well-established South African legal requirements would apply. There must be complete separation from the mother's body and the foetus must have lived independently.⁴⁰

In favour of the application of the *nasciturus* doctrine to posthumously procreated children is that the reason for its existence over many centuries has been to provide for children not yet born at the time that a benefit accrues. Its extension to posthumously procreated children would therefore be a logical step forward. In *Re Estate of the Late K and Re the Administration and Probate Act 1935: Ex Parte the Public Trustee* (the *K* case) the Tasmanian Supreme Court had to decide whether a posthumously procreated child could inherit from a father who predeceased it.⁴¹ Shortly after the father's death an embryo fertilised with his sperm was implanted in his ex-wife's womb and a child was subsequently born. In considering whether to extend a legal fiction in favour of a frozen embryo not yet implanted at the time of a father's death, the court, per Slicer J, queried whether:

[a]s a matter of policy, should the law distinguish between a child, *en ventre sa mere*, and his or her sibling who was at the same time a frozen embryo? Should a right by way of the application of a legal fiction be denied because medicine and technology have overtaken the circumstances extant in the 19th century when the legal fiction was applied?⁴²

Slicer J decided to extend the fiction and grant the inheritance because it would be illogical to presume that a testator would have wanted to include his child already in the mother's womb at the time of his death but not his child subsequently conceived by the same mother.⁴³

In keeping with the gradual expansion of the doctrine in South African law, and given its inherent flexibility, it would be possible to interpret the *nasciturus* doctrine just as Slicer J did in the *K* case. In order to achieve this, the time of conception would have to be regarded as the time of fertilisation, as suggested above. However, where it becomes much more difficult to apply the *nasciturus* doctrine is when fertilisation occurs only after the death of the testator. The doctrine provides no basis for withholding disbursement of an estate pending the possible conception of a child. Just as with the *Wills Act*, this leads to a technical distinction between frozen embryos in

⁴⁰ Pickles 2013 *Stell LR* 147. Any sign of life is sufficient to prove this. See Boezaart "Child Law" 6.

⁴¹ *Re Estate of the Late K and Re the Administration and Probate Act 1935: Ex Parte the Public Trustee* 1996 TASSC 24 (22 April 1996) (the *K* case).

⁴² The *K* case para 20.

⁴³ The *K* case para 29.

existence at the time of the death of the testator, and where frozen sperm and eggs have not yet been conjoined. The *nasciturus* doctrine provides no basis for inheritance in the latter situation.

5 Applicability of the Constitution

Given the limitations and uncertainties in both South African succession legislation and the common law, it is necessary to consider whether the *Constitution* provides guidance concerning inheritance claims by posthumously procreated children. With the *Constitution*, arguments of status, equality and the best interests of a child might all potentially be advanced in support of such claims. The scope for contentions based on each of these will be examined in turn.

5.1 The legal status of an unborn child

A primary question concerns children's pre-birth legal status or, more specifically, what constitutional rights can accrue prior to birth, if any. This needs to be evaluated in the light of the constitutional values and principles. As has been noted, in South African common law legal subjectivity is conferred upon a natural person only at birth,⁴⁴ and a foetus is therefore not a legal subject and consequently has no rights in law.⁴⁵ The question whether this common law position was altered by the *Constitution* arose in *Christian Lawyers Association of SA v Minister of Health* (the *Christian Lawyers* case).⁴⁶ This case involved an attempt to prevent a woman from terminating her pregnancy in terms of the *Choice on Termination of Pregnancy Act* 92 of 1996. The plaintiff sought to have this Act declared unconstitutional in the light of section 11 of the *Constitution*, which states that "everyone has the right to life". The plaintiff contended that this wording entails that a foetus has the right to life from the moment of conception. The defendants raised an exception that there was no cause of action as a foetus has no legal status and therefore no constitutional rights. The court had to decide whether the plaintiff was correct in contending that "everyone" in section 11 must include a foetus from the moment of conception.⁴⁷ The court noted that the *Constitution* did not contain any provisions expressly granting legal personality or protection to a foetus.⁴⁸ It recognised that section 12(2) of the *Constitution* grants everyone the right to make decisions

⁴⁴ Heaton *South African Law of Persons* 7.

⁴⁵ Heaton *South African Law of Persons* 5.

⁴⁶ *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T) (the *Christian Lawyers* case).

⁴⁷ The *Christian Lawyers* case 1117.

⁴⁸ The *Christian Lawyers* case 1120-1121.

regarding reproduction, but did not view this as according protection to a foetus.⁴⁹

Subsequently, in *H v Kingsbury Foetal Assessment Centre* the High Court once again refused to provide pre-birth protection.⁵⁰ Here a mother unsuccessfully claimed damages from a foetal assessment centre, asserting that if she had been informed by them of the abnormality of her foetus, she would have aborted her pregnancy. The court refused her claim on the grounds that it could not decide whether it is better to have no life or to live with disabilities.⁵¹ In reaching this conclusion it relied on *Stewart v Botha*.⁵² However, when the mother appealed to the Constitutional Court, the latter was critical of the *Stewart* decision as not taking sufficient account of the paramountcy of the best interests of the child in terms of section 28 of the *Constitution*.⁵³ Whilst the Constitutional Court did not reach a specific determination and referred the matter back to the High Court, it seemed to imply that what happens to children prior to birth can be relevant to claims on their behalf.⁵⁴ Whilst the Constitutional Court thus seemingly opened the door to claims based on pre-birth occurrences, there has so far been no reported case expressly affording constitutional rights to an unborn child.⁵⁵ In view of this, it is necessary to consider whether post-birth equality arguments may be relevant to posthumously procreated children.

5.2 The right to equality

It is trite that in South African law a child once born alive becomes a holder of constitutional rights. Included amongst these is the right to equality. This is conferred by section 9 of the *Constitution*, which gives everyone the equal protection and benefit of the law. What needs to be considered is whether a child's right to equality is violated if he or she is prevented from inheriting, due to having been implanted in a mother's womb after the death of the other parent. Answering this question requires discussion of the right to equality and the well-established test to determine whether there has been unfair discrimination. These will now be considered with particular reference to posthumously procreated children.

⁴⁹ The *Christian Lawyers* case 1121.

⁵⁰ *H v Kingsbury Foetal Assessment Centre (Pty) Ltd* 2014 ZAWCHC 61 (24 April 2014).

⁵¹ *H v Kingsbury Foetal Assessment Centre (Pty) Ltd* 2014 ZAWCHC 61 (24 April 2014) paras 20, 29.

⁵² *Stewart v Botha* 2008 6 SA 310 (SCA).

⁵³ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 52.

⁵⁴ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 52.

⁵⁵ Smit 2015 *De Rebus* 42.

An initial consideration is that as a reaction to the long history of severe and systematic discrimination in South Africa the principle of equality was established as foundational in the *Constitution*. Albertyn and Goldblatt rightly characterise it as the first and foremost of constitutional rights.⁵⁶ Section 1(a) of the *Constitution* states: "The Republic of South Africa is ... founded on the following values: (a) Human dignity, the achievement of equality, and the advancement of human rights and freedoms." This indicates that, as with any constitutional rights, the right to equality should be interpreted keeping in mind other constitutional values and also the interests that the right is meant to protect.⁵⁷ In *President of the Republic of South Africa v Hugo* (the *Hugo* case) the Constitutional Court emphasised the close relationship between the value of dignity and the principle of equality.⁵⁸ Goldstone J stated:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.⁵⁹

As pointed out by Deane, the theme of an "open and democratic society based on human dignity, equality and freedom runs like a golden thread through the Constitution."⁶⁰

On the connection between equality and dignity in the Bill of Rights Albertyn and Goldblatt noted that:

[r]ead across a series of cases ... the purpose of the equality right can be seen to promote a society where each person is accorded equal moral worth. The value of dignity ... has sometimes widened to include issues of ... material wellbeing.⁶¹

⁵⁶ Albertyn and Goldblatt 2006 http://www.chr.up.ac.za/chr_old/closa/chapters/Conference_Paper_on_the_Right_to_Equality.pdf 5.

⁵⁷ See Albertyn and Goldblatt 2006 http://www.chr.up.ac.za/chr_old/closa/chapters/Conference_Paper_on_the_Right_to_Equality.pdf 5.

⁵⁸ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (the *Hugo* case).

⁵⁹ The *Hugo* case para 41.

⁶⁰ Deane 2009 <http://uir.unisa.ac.za/bitstream/handle/10500/2012/10chapter9.pdf> 284.

⁶¹ Albertyn and Goldblatt 2006 http://www.chr.up.ac.za/chr_old/closa/chapters/Conference_Paper_on_the_Right_to_Equality.pdf 5.

Inheritance rights for posthumously procreated children clearly relate to their material wellbeing. It is therefore arguable that the value of dignity can be applied for the protection of such rights.

Section 9 of the *Constitution* describes the right to equality in detail as follows:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more of the following grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).

There were three foundational reported cases interpreting the right of equality as originally formulated in section 8 of the *Constitution of the Republic of South Africa Act 200 of 1993*.⁶² These are *Prinsloo v Van der Linde* (the *Prinsloo* case),⁶³ the *Hugo* case and *Harksen v Lane* (the *Harksen* case), which established a test to determine breaches of the right.⁶⁴ Section 8 differs somewhat from section 9 of the final *Constitution*. However, Ackerman J, in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, concluded that:

[t]he equality jurisprudence and analysis developed by this Court in relation to section 8 of the interim Constitution is applicable equally to section 9 of the 1996 Constitution, notwithstanding certain differences in the wording.⁶⁵

Therefore, the section 8 cases remain relevant.

In the *Prinsloo* case it was held that section 8 distinguishes between lawful and unlawful levels of discrimination.⁶⁶ Some differentiation, as long as it

⁶² Also referred to as the Interim Constitution.

⁶³ *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) (the *Prinsloo* case).

⁶⁴ *Harksen v Lane* 1998 1 SA 300 (CC) (the *Harksen* case) para 53.

⁶⁵ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 15.

⁶⁶ The *Prinsloo* case paras 23, 25-26.

does not amount to unfair discrimination, is necessary in society. It will be lawful provided it is rational, non-arbitrary, and does not manifest "naked preferences".⁶⁷ There must be a rational connection between the differentiation and its purpose. In particular, section 8(2) usefully set out grounds on which discrimination was presumed unfair, and other unspecified grounds for which unfairness must be proven.⁶⁸ In the *Hugo* case Goldstone J further interpreted section 8(2) as follows:

Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.⁶⁹

What is important here is the process formulated. To decide whether discrimination is unfair, both the complainant group and nature of the interests affected must be considered.

In the *Harksen* case the Constitutional Court developed this reasoning further. It created a two-stage test to determine whether there is unfair discrimination and thus a breach of the right to equality.⁷⁰ In applying the test the first question is whether there is differentiation between people or categories of people. If so, it will be lawful only if rationally connected to a legitimate purpose.⁷¹ More specifically, to pass constitutional muster in terms of section 9(1), differentiation must not be arbitrary.⁷² Stage two of the test requires questioning whether differentiation amounts to unfair discrimination. This can be divided into two sub-enquiries: whether there is discrimination, and if so, whether it is unfair. If based on a class category specified in section 9(2) of the *Constitution*, there is automatically discrimination.⁷³ If not, there is still discrimination where differentiation utilises characteristics with the potential to impair human dignity or otherwise affect persons adversely in a serious manner.

At the second stage of the *Harksen* test discrimination is certainly unfair if it utilises one of the section 9(2) classifications. If not, unfairness depends on

⁶⁷ The *Prinsloo* case para 25.

⁶⁸ The *Prinsloo* case paras 27-28.

⁶⁹ The *Hugo* case para 43.

⁷⁰ The *Harksen* case para 54.

⁷¹ The *Harksen* case para 54. Also see *East Zulu Motors (Pty) Limited v Empangeni/Ngwezelane Transitional Local Council* 1998 2 SA 61 (CC) para 24; and *Jooste v Score Supermarket* 1999 2 SA 1 (CC) para 17.

⁷² The *Harksen* case paras 27-28.

⁷³ The prohibited discrimination categories listed in s 9(2) of the *Constitution* are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

the impact of the discrimination on others in the same position as the person claiming the discrimination.⁷⁴ On the assessment of impact, Goldstone J concluded that there is no closed list of factors. Therefore, relevant factors may emerge as the equality jurisprudence develops.⁷⁵ As noted by Kruger, what needs to be kept in mind is the possibility of unfair indirect discrimination.⁷⁶ This may result when "seemingly neutral provisions have a discriminatory effect (impact) on the complainants."⁷⁷ Albertyn and Goldblatt have pointed out that applying the impact test to establish unfairness requires a contextual approach, noting particularly the effect on the dignity of the complainant.⁷⁸

The third and last stage of the *Harksen* test shifts attention to section 36 of the *Constitution*.⁷⁹ This allows for the limitation of any right referred to in the Bill of Rights "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."⁸⁰ The section includes a list of some of the factors to be taken into account, including notably "the nature and extent of the limitation" and whether there are "less restrictive means to achieve the purpose" intended.⁸¹ Thus, even if it is established that a person has been unfairly discriminated against, it is still necessary to consider whether the person's rights have been limited by such discrimination in a manner that is unlawful in terms of section 36. Although South African equality jurisprudence has developed considerably since the *Harksen* case, the test formulated in the latter continues to be utilised by our courts.⁸²

In applying the first stage of the *Harksen* test to a posthumously procreated child, if inheritance is denied there is undoubtedly differentiation between that child and one naturally conceived or implanted before the death of a testator, as the latter children are entitled to inherit, if necessary from the

⁷⁴ See Albertyn and Goldblatt 2006 http://www.chr.up.ac.za/chr_old/closa/chapters/Conference_Paper_on_the_Right_to_Equality.pdf 6.

⁷⁵ The *Harksen* case para 52.

⁷⁶ Kruger 2011 SALJ 490.

⁷⁷ Kruger 2011 SALJ 490.

⁷⁸ Albertyn and Goldblatt 2006 http://www.chr.up.ac.za/chr_old/closa/chapters/Conference_Paper_on_the_Right_to_Equality.pdf 7.

⁷⁹ The *Harksen* judgment actually referred to s 33 only, which was the then applicable limitations provision of the *Constitution of the Republic of South Africa Act 200 of 1993*. This has since been replaced by s 36 of the *Constitution of the Republic of South Africa, 1996*.

⁸⁰ Section 36(1) of the *Constitution*.

⁸¹ Sections 36(1)(c) and (e) of the *Constitution*.

⁸² For the influence of the test and some subsequent cases see, for example, Smith 2014 *AHRLJ* 614-629.

application of the *nasciturus* doctrine.⁸³ It must then be asked whether the differentiation serves a legitimate purpose. It could be argued that a legitimate purpose is the avoidance of practical difficulties resulting from delays in the distribution of estates where posthumously procreated children are involved. However, it was held in the Australian case of *K* that this was insufficient justification for the resulting discrimination between classes of children.⁸⁴ Therefore, it could possibly be argued similarly from a South African perspective that the practical difficulties of estate distribution do not constitute a sufficiently legitimate purpose for prohibiting inheritance.

In moving to the application of the second stage of the *Harksen* test, differentiation involving posthumously procreated children results purely from the delay in the initiation of the life process. This is not one of the listed characteristics in section 9(2) of the *Constitution*. It is therefore necessary to decide whether there is discrimination, and if so, whether it is unfair, taking into account its impact on after-born children. This can be done by comparing posthumously procreated children to other children. They are the same in all respects except for the time of procreation. However, posthumously procreated children denied inheritance rights would begin life with materially less than others, purely because of the delay in the start of their lives, over which they have no control. The denial of the inheritances permitted to other children would undoubtedly have a discriminatory effect. In Canada there have been concerns that the complete denial of inheritance for all posthumously procreated children constitutes unfair discrimination contravening the *Canadian Charter of Rights and Freedoms*.⁸⁵ It could be contended similarly that it contravenes section 9(2) of the South African *Constitution*. The impact is sufficiently serious to infringe dignity. So, arguably, the second stage of the *Harksen* test is met.

It will be remembered that the third stage of the test is the section 36 limitations enquiry. With this it is necessary to consider whether the denial of inheritance for posthumously procreated children is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It is submitted that the answer to this must be negative. Admittedly, a practical argument supporting the denial of inheritances is administrative difficulties. An executor would have to ensure that all surviving gametes are either implanted or destroyed before

⁸³ See Heaton *South African Law of Persons* 12-13.

⁸⁴ The *K* case paras 28-29. On this case see further part 3.1 above.

⁸⁵ Alberta Law Reform Institute *Assisted Reproduction after Death* para 43. The Canadian Charter of Rights and Freedoms is incorporated as a bill of rights in part 1 of the Canadian *Constitution Act*, 1982.

distributing an estate, which could take many years.⁸⁶ However, this must be weighed against the core constitutional values of equality and dignity, which are of the utmost importance in our democracy. In such a balance, denying a group of individuals benefits, because of the timing of their procreation might well be unfair. Applying two of the criteria in section 36(1), it should firstly be noted that the denial of any inheritance to all posthumously procreated children would be an extensive limitation. In terms of section 36(1)(c); the more extensive a limitation, the less likely it is to pass constitutional muster. Secondly, as noted above, section 36(1)(e) requires a consideration of whether other means can achieve the purpose of the discrimination in question. As will be discussed below, it is possible through the imposition of appropriate legislative conditions to substantially address the practical difficulties in winding up estates, which are the basis of the administrative argument against inheritance by posthumously procreated children.⁸⁷

It may be concluded that an equality argument supporting inheritance rights for posthumously procreated children could possibly be made. This is supported by the Constitutional Court's directive in *H v Fetal Assessment Centre*. As noted above, this required courts to take more account of pre-birth events when considering claims brought on behalf of children.⁸⁸

5.3 Scope for a best interests argument

As an alternative to an equality and anti-discrimination claim it could be contended that it is against the best interests of posthumously procreated children to deny them inheritance benefits. Being party to both the 1989 *UN Convention on the Rights of the Child* (1989) and the *African Charter on the Rights and Welfare of the Child* (1990), South Africa is legally obliged to uphold the best interests of children.⁸⁹ This is reinforced by section 28 of the *Constitution*, which is dedicated specifically to children's rights. In particular, it is stated in section 28(2) that "[a] child's best interests are of paramount importance in every matter concerning the child."

⁸⁶ See part 2 above.

⁸⁷ See part 6 below.

⁸⁸ See part 5.1 above.

⁸⁹ Article 2 of the *United Nations Convention on the Rights of the Child* (1989) prohibits discrimination against children, and art 3 requires that children's best interests "shall be a primary consideration". Art 3 of the *African Charter on the Rights and Welfare of the Child* (1990) prohibits discrimination against children and art 4 requires that the best interests of children "shall be the primary consideration" in all actions concerning them.

In view of the high standing in the *Constitution* of children's best interests as being paramount a best interests argument is potentially the strongest one for motivating benefits for posthumously procreated children. Furthermore, it has been claimed that in many other jurisdictions best interests of the child arguments on behalf of such children are beginning to receive more weight, as against administrative convenience in winding up estates.⁹⁰ However, there are some difficulties. Firstly, best interests' contentions would be two-sided in any case where there are other child beneficiaries who would have their inheritance shares delayed and diminished by that of a posthumously procreated child. Secondly, in the *Christian Lawyers* case the High Court reasoned that if the drafters of the *Constitution* had intended to protect an unborn child, this would have been stated expressly in section 28.⁹¹ It reasoned that in terms of that section age begins at birth, which therefore excludes a foetus.⁹² The court considered that if the *Constitution* were interpreted as affording a foetus rights, far-reaching consequences would ensue, which the drafters of the *Constitution* could not have contemplated without expressing themselves in no uncertain terms.⁹³ Pickles has pointed out that the court took something of a leap in holding that section 28 applies only to children already born. She contends that this presumption was based mainly on a view that many rights provided in section 28 are relevant only to children already born.⁹⁴ However, the ruling stands as a barrier to best interests' contentions on behalf of posthumously procreated children.

It is true that the Constitutional Court signalled in *H v Fetal Assessment Centre* that the courts need to change their approach and be more willing to consider pre-birth circumstances as potentially relevant to the best interests of children.⁹⁵ However, even where courts may be more open to this in the future, it must be remembered that children's best interests, although paramount, are not absolute. It was held by the Constitutional Court per Sachs J in *S v M* that the welfare principle as formulated in section 28(2), whilst of crucial importance, is capable of limitation and thus does not necessarily always trump every other consideration.⁹⁶ Moyo has pointed out

⁹⁰ Alberta Law Reform Institute *Succession and Posthumously Conceived Children* para 89.

⁹¹ The *Christian Lawyers* case 1121.

⁹² The *Christian Lawyers* case 1122.

⁹³ The *Christian Lawyers* case 1124.

⁹⁴ Pickles 2012 *PELJ* 416.

⁹⁵ *H v Fetal Assessment Centre* 2015 2 SA 193 (CC) para 52.

⁹⁶ *S v M* 2008 3 SA 232 (CC) paras 25-26.

that this ruling significantly reduces the power of best interests' arguments.⁹⁷ In situations of posthumously procreated children seeking inheritances it might be contended that their best interests should on the authority of *S v M* be trumped by those of other child beneficiaries or by the additional complications in winding up the estate. It must then be concluded that the outcome of a claim based on best interests appears unpredictable in South African law, as presently developed.

6 Conclusion

Medical technology has developed to the point where many persons can now realistically consider the option of freezing and preserving their gametes for the future procreation of a child. Where couples do this or an unknown donor is available there is even the possibility of cryogenically storing embryos which are already fertilised. As cryogenic technology becomes well-known and widely available, it is foreseeable that increasing numbers of children will be artificially procreated by means of processes initiated after the death of at least one parent. This will inevitably lead to inheritance claims by such children.

Our investigation of possible coverage concerning such claims in current South African law has revealed more questions than answers. Regarding intestate succession claims by posthumously procreated children, the *Intestate Succession Act* 81 of 1987 provides no answers at all. With testate succession, the *Wills Act* also provides no specific coverage. Although there are unlikely to be difficulties where valid wills clearly cover the possibility of posthumously procreated heirs, it is uncertain how the *Wills Act* would be interpreted where child beneficiaries are referred to as a general class. By introducing conception as a gateway requirement in such situations, section 2D(1)(c) of the Act simply raises the question of what precisely is meant by conception where artificial reproduction techniques have been utilised.

Not surprisingly, in view of its much earlier origins, the common law is of little assistance in making up for the shortcomings of South African succession legislation. The common law rule that legal personality is awarded only at birth renders it uncertain whether courts would use their power as the upper guardians of all minors to support inheritance claims brought on behalf of posthumously procreated children. Also, just as with

⁹⁷ Moyo 2012 *AHRLJ* 169.

the *Wills Act*, the *nasciturus* doctrine's requirement of conception as a *sine qua non* complicates and severely limits its application to such children.

Unfortunately, the *Constitution* does little to resolve uncertainties about the application of South African succession legislation and the common law. High Court holdings in the *Christian Lawyers* case and *H v Kingsbury Foetal Assessment Centre* that constitutional rights are subject to legal personality's beginning only at birth are admittedly rendered questionable by the Constitutional Court's undeveloped directive in *H v Fetal Assessment Centre* that courts may consider pre-birth circumstances.⁹⁸ That directive could arguably support a best interests' argument on behalf of posthumously procreated children. However, the Constitutional Court's earlier ruling in *S v M* that best interest arguments can be trumped, and the possibility that there may be contrary best interests of other child beneficiaries, leave the outcome of claims based on section 28(2) of the *Constitution* uncertain.⁹⁹

Equality claims based on section 9 of the *Constitution* are probably the best currently available option in building a case for inheritance by posthumously procreated children. As has been shown, it is relatively easy to prove unfair discrimination by utilising the *Harksen* case test. However, in opposition to such claims, a section 36 limitations contention based on the alleged impracticality of the disbursement of estates for unpredictably long periods of time could be put forward. A second opposing argument could be based on the limited applicability of the *Constitution* to pre-birth circumstances.¹⁰⁰

Our analysis of existing South African law has thus shown that there are ambiguities and uncertainties regarding the application of succession legislation, the common law and the *Constitution* on behalf of posthumously procreated children seeking inheritance benefits. There is thus a real danger of the emergence in South Africa of what Zago referred to as a group of second-class children denied inheritance rights.¹⁰¹ As noted by Atherton, to deny posthumously procreated children is to place them in the same position occupied for centuries by so-called illegitimate children, who were not permitted to inherit from their fathers and paternal relatives.¹⁰² Children have no control over how or when they are born, and therefore it is

⁹⁸ These three cases are discussed in part 5.1 above.

⁹⁹ Further uncertainty is introduced by the holding in the *Christian Lawyers* case that s 28 is not applicable to unborn children: see part 5.3 above.

¹⁰⁰ See the *Christian Lawyers* case as referred to in part 5.3 above.

¹⁰¹ Zago 2014 http://scholarship.shu.edu/student_scholarship/609 1 as cited in part 1 above.

¹⁰² Atherton 1999 *Leg Stud* 161.

necessary to limit differentiation against them as much as possible. Children should not face succession rights discrimination merely because they were procreated differently. In view of this, we recommend that clarifying legislation governing their inheritance eligibility needs to be promulgated. Commentators in other jurisdictions have contended that such legislation is essential, given the increasing availability of artificial procreation services.¹⁰³ In 2012 the Alberta Law Reform Institute concluded very similarly that because of the novel questions raised by inheritance claims by posthumously procreated children, legislation is essential.¹⁰⁴

It might be counter-argued that reliance should rather be placed on courts to develop South African law in an *ad hoc* manner as the need arises. Specifically, it might be contended that courts should use their power to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as directed in section 39(2) of the *Constitution*. However, Walters has pointed out that in many jurisdictions even where courts have been prepared to interpret traditional remedies in a progressive manner on behalf of posthumously procreated children, this has resulted in widely differing solutions that often fail to provide protection.¹⁰⁵ If this is left to the courts, uniform results are unlikely to be produced.¹⁰⁶ Reviews of case law in some jurisdictions support this contention, noting that courts are not consistent in such decisions.¹⁰⁷ In some jurisdictions the judges themselves have warned that such problems are too difficult for courts alone to solve, without at least some legislative guidance.¹⁰⁸ If such legislation is developed, aside from assisting courts it will also make it easier for couples to plan how to utilise artificial procreation services.¹⁰⁹

The primary purposes of this article have been to demonstrate the inadequacy of existing South African law and to motivate for legislation to address this. For reasons of space it is not possible to discuss in detail

¹⁰³ See, for example, Diamond 1998 *NY Int'l L Rev* 99; Gary 2005 https://www.americanbar.org/content/dam/aba/publishing/probate_property_magazine 35; Peebles 2013 *Mo L Rev* 515; Walters 2014 *Val U L Rev* 1267-1268; Thomasson 2013-2014 *Denv U L Rev* 738-739; and Croucher 2017 *Trusts and Trustees* 74-75.

¹⁰⁴ Alberta Law Reform Institute *Succession and Posthumously Conceived Children* para 88.

¹⁰⁵ Walters 2014 *Val U L Rev* 1267.

¹⁰⁶ Alberta Law Reform Institute *Succession and Posthumously Conceived Children* para 88.

¹⁰⁷ Black and Therriault 2010-2011 *Est Tr & Pensions J* 156.

¹⁰⁸ See Diamond 1998 *NY Int'l L Rev* 91-92; Peebles 2013 *Mo L Rev* 509; Walters 2014 *Val U L Rev* 1268; and Croucher 2017 *Trusts and Trustees* 79.

¹⁰⁹ On the advantages of legislation also see Doucet 2013 *Dalhousie J Legal Stud* 20.

possibilities for the wording of the proposed legislation. What can be suggested, however, is that section 2D(1)(c) of the *Wills Act* be supplemented to indicate that, with reference to artificially procreated children, conception means fertilisation in the sense of successfully conjoining an egg and sperm, even if this occurs *in vitro*. Concerning additional legislative provisions, it is important to point out that the major objection to claims by posthumously procreated children, namely, uncertainty and delay in the winding up of estates, can be addressed. Standard provisions in jurisdictions which have legislation combine a notice requirement and a final deadline.¹¹⁰ Typically, notice of intention to give birth to a posthumously procreated child must be given to an executor within a short period such as six months after the death of the testator.¹¹¹ If a child is then born within a further deadline period, which is typically between two and three years, the child will receive an inheritance.¹¹² Pending the possibility of birth, the executor keeps an appropriate share of the estate in trust. In the meanwhile, the other heirs receive proportional shares of the estate without having to wait. If a child is not born by the final deadline, the withheld portion is disbursed to the other heirs.¹¹³ A postponement of the complete division of estates pending the birth of a child is nothing new in South African law. As pointed out by Boezaart, it has become standard procedure for executors to delay the disbursement of inheritances where the pregnancy of a mother indicates that there may in the future be an additional beneficiary.¹¹⁴ Legislatively formalising this procedure on behalf of posthumously procreated children as suggested would greatly reduce the potential for discrimination against them. It would also bring South African law more in line with modern medical developments.

¹¹⁰ Walters 2014 *Val U L Rev* 1267.

¹¹¹ For example, s 8.1 of the British Columbia *Wills, Estates and Succession Act*, 2009 as amended in 2011 allows six months. Also see Wood 2010 *Ga L Rev* 907.

¹¹² For example, s 1.1 of the Ontario *Succession Law Reform Act*, 1990 as inserted on 1 January 2017 sets a deadline of three years. A period of two years is permitted by s 249.5 of the *California Probate Code*. Also see Thomasson 2013-2014 *Denv U L Rev* 739; and Wood 2010 *Ga L Rev* 906.

¹¹³ Walters 2014 *Val U L Rev* 1267.

¹¹⁴ Boezaart "Child Law" 6-7.

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List of Abbreviations

Afr J Reprod Health	African Journal of Reproductive Health
AHRLJ	African Human Rights Law Journal
CLJ	Cambridge Law Journal
Dalhousie J Legal Stud	Dalhousie Journal of Legal Studies
Denv U L Rev	Denver University Law Review
Est Tr & Pensions J	Estates, Trusts and Pensions Journal
Fertil Steril	Fertility and Sterility
Ga L Rev	Georgia Law Review
IVF	in vitro fertilisation
Leg Stud	Legal Studies
Mo L Rev	Missouri Law Review
NY Int'l L Rev	New York International Law Review
Obstet Gynaecol Forum	Obstetrics and Gynaecology Forum
PELJ	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
TSAR	Tydskrif vir die Suid Afrikaanse Reg
UC Davis L Rev	University of California Davis Law Review
Val U L Rev	Valparaiso University Law Review
VU W L Rev	Victoria University of Wellington Law Review