SOCIAL SECURITY SURVIVORS' BENEFITS IN SOUTH AFRICA: TOWARDS THE LEGISLATIVE REFORM CONCERNING POSTHUMOUSLY CONCEIVED CHILDREN

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DECLARATION

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work which has not been submitted before in whole or in part for any degree at any other university.

Plagirism declaration

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ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child
ART	Artificial Reproductive Technology
BBC	British Broadcasting Corporation
BCLR	Butterworts Constitutional Law Reports
B.C. L. Rev.	Boston College Law Review
B.C. Third World L. J.	Boston College Third World Law Journal
BRICS	Brazil, Russia, India, China and South Africa
Cal. App 4th	California. Appellate Court opinions 4th series
CC	Constitutional Court of South Africa
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
Conn. Pub. Int. L.J	Connecticut Public Interest Law Journal
D. Ariz.	The United States District Court for the District of Arizona
Dr.	Doctor
ESRR	Economic and Social Rights (in South Africa) Review
F. Supp.	Federal Supplement

Geo. Mason Law Review	George Mason Law Review
GEPF	Government Employees Pension Fund
GIFT	Gamete intrafallopian transfer
IHRIP	International Human Rights Internship Program (Institute of International Education)
ILO	International Labour Organisation
ISSA	International Social Security Association
J. Contemp. Health L. & Pol'y	Journal of Contemporary Health Law & Policy
LED	Local Economic Development
Loy. L.A. L. Rev.	The Loyola of Los Angeles Law Review
Melb. U. L. Rev	Melbourne University Law Review
Mo. L. Rev.	Missouri Law Review
NGO	Non-governmental organisation
NSWSC	Supreme Court of New South Wales
ODIMWA	Occupational Diseases in Mines and Works Amendment Act 208 of 1993
OED	Oxford English Dictionary
OAU	Organisation of African Unity
Org	Organisation
Para	Paragraph

PER/PELJ	Potchefstroom Electronic Law Journal
SA	South Africa
SACR	South African Criminal Law Reports
SADC	Southern African Development Community
SAJHR	South African Journal on Human Rights
SAPL	San Antonio Public
SANGOCO	South African National NGO Coalition
SASSA	The South African Social Security Agency
SLTSA	South African Law Teachers Association
TCI C. Tech. L. R.	Technical Career Institute College of Technology Law Review
UIA	Unemployment Insurance Act 63 of 2001
UIF	Unemployment Insurance fund
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNICEF	United Nations International Children's Emergency Fund
US/U.S.A.	United States / United States of America

WASHULQ	Washington University Law Quarterly American Bar Association Journal
Yale. Hum. Rts. & Dev. L. J.	Yale Human Rights & Development Law Journal

CHAPTER ONE
INTRODUCTION AND CONCEPTUAL FRAMEWORK

1 Introduction

The character of human life is one that is continuously surrounded by changes and advancements (for better or for worse), and we can relate the very same approach to medical science. Traditionally, human beings had the act of sexual intercourse as the only option for human reproduction.[1] Today, assisted reproductive technology offers human beings numerous options such as artificial insemination,[2] in vitro fertilisation,[3] surrogacy[4] and cryopreservation[5] to aid in procreation. As remarkable as these developments in medical science have been in giving prospective parents a 'second chance', the developments have also created an unforeseen, special class of children that are conceived and subsequently born after one or both genetic parents have died. This inevitably gives birth to the concept 'fertile decedent'.[6]

There are various circumstances in which people, besides those couples who experience infertility problems, seek the help of assisted reproductive technology. These circumstances include persons who are dying or are seriously ill, cancer patients undergoing chemotherapy, soldiers before their deployment and even those contemplating suicide.[7] Due to these technologies being accepted and commonly utilised internationally and in South Africa,[8] this may consequentially lead to the number of posthumously conceived children increasing.[9] Unfortunately, both South African law and international law dealing with this class of children is still either non-existent or inadequate. This is

[1] Naguit "The inadequacies of Missouri intestacy law: Addressing the rights of posthumously

[2] Droghazi defines artificial insemination as "introducing sperm into the woman's vagina, cervical canal, or uterus" ("*Gillett-Netting v Barnhart* and unanswered questions about social security benefits for posthumously conceived children" 2005 *Washington University Law Quarterly* (WASHULQ) 1601).

[3] Droghazi (n 2 above) defines in vitro fertilization as "removing ova, then adding sperm, and finally implanting any resulting pre-embryo(s) from the union of the sperm and the ova into the woman's womb."

[4] Droghazi (n 2 above) defines (gestational) surrogacy as "the sperm and egg providers enter into an agreement with a woman to gestate and give birth to the child and then release the child to them."

[5] Droghazi (n 2) 1597 defines cryopreservation as "the freezing of sperm for later use in assisted reproduction."

[6] Leach "Perpetuities in the atomic age: The sperm bank and the fertile decedent" 1962 *American Bar Association Journal* 942.

[7] In *Hecht v Superior Court* 16 Cal. App. 4th 836, 840-841 1993 a man executed a will bequeathing his cryo-preserved sperm to his girlfriend before committing suicide.

[8] Which is evident by the ever-growing number of fertility clinics and sperm banks (Meyer "How to conceive in style" *Sunday Tribune* 2012 (http://www.surgicalattractions.com/articles/how-to-conceive-style (17-06-2015)).

[9] Goodwin "Not all children are created equal: A proposal to address equal protection inheritance rights of posthumously conceived children" 2005 *Connecticut Public Interest Law Journal* 235 defines posthumously conceived children as "children who are not just born, but also conceived after the death of a parent."

somewhat understandable, since such conception was impossible earlier. Nonetheless, this is unacceptable due to the negative implications suffered by these children.

A research study that addresses the necessity for the present legal system to be developed is imperative for numerous reasons:

- Firstly, in order to address the uncertainty regarding the legal status of a posthumously conceived child. According to family law, death dissolves a marriage. This raises questions on the legitimacy of the child, which consequently raises questions regarding the paternity of the child. In other words, legally it cannot be readily presumed that the child is that of the deceased.

- Secondly, in order to determine whether or not a posthumously conceived child can acquire inheritance rights through a deceased parent. Despite the law of succession and social security being two distinct fields of law, they are both closely related when dealing with this issue. The point is that, whether before or after a death has occurred, legal questions relating to inheritance and survivors' benefits have to be addressed.

- Thirdly, in order to determine a posthumously conceived child's entitlement to social security benefits through a deceased parent.

Posthumously conceived children's eligibility or ineligibility for survivor benefits in the current legal system is not adequately regulated. The purpose of this research is to identify deficiencies within the current social security legal framework. The overall aim is to propose legislative reforms for the inclusion of posthumously conceived children within the social security legal framework and to make recommendations on how the legislature should regulate them within the social security legal framework and determine conditions for their eligibility.

In the quest to achieve the stated objective, the primary focus of the study will be on the South African social security law. Reference will be made to international jurisdictions, particularly the United States of America's case law, where the issues addressed in this study have come before the courts on numerous occasions.

This research is particularly significant given the fact that the existing body of knowledge on this issue is insufficient, particularly in South Africa. Therefore, the aim is to critique the devastating consequences unduly suffered by this category of children as a result of being ignored by the law and also to discuss the imperativeness for this meek reality to be changed.

It is clear that there are complex moral, ethical, social and religious issues surrounding the topic covered by the study. Nonetheless, it is important to note that this study is a legal enquiry and will only address these issues sparingly and where necessary.

2 *Problem Statement*

The problem existing in the social security survivor's benefits social security regime is that posthumously conceived children appear not to be appropriately catered for. Put differently, the current social security legal regime does not meaningfully address whether this class of children is entitled to survivor's benefits. When analysing various social security laws in South Africa dealing with children's entitlement to social security benefits, it is evident that no reason exists for posthumously conceived children to be treated differently. With the spirit envisaged by these laws, it is imperative that the legislature takes into serious consideration the challenges that are presented by posthumously conceived children, so that the law provides them with as much (social security) legal protection as may be afforded them.[10] The legislative provisions currently governing eligibility unfairly exclude posthumously conceived children from benefits for reasons that can no longer be justified.[11] Thus the legislature needs to reform the current legal framework because it is legally questionable to deny benefits to a class of children based on various laws that were written when posthumous conception was mere science fiction.

3 *Research Methodology*

This study will be solely conducted through a desk-bound or library-based research. The South African social security system will be the primary focus, whilst references will be made to foreign jurisdictions' legal systems, particularly the United States of America. Sources to be considered include laws, statutes, articles, books, case law, etcetera.

4 *Limitation of the study*

Notwithstanding the multidisciplinary nature of the death and survivors' benefits within the social security legal system, this study will only be a legal enquiry. Reference will nevertheless be made to other fields of study wherever and whenever necessary.

5 *Organisation of the Study*

This research is divided into four chapters, namely: introduction and conceptual framework; current legislative framework in South Africa; relevant foreign

[10] Robinson "Posthumously conceived children" 2012 *Technical Career Institute College of Technology Law Review* 12.

[11] Kennedy "Social security survivor benefits: Why congress must create a uniform standard of eligibility for posthumously conceived children" 2013 *Boston College Law Review* 854.

experience with posthumously conceived children; conclusion and recommendations.

5.1 Chapter 1: Introduction and conceptual framework

This chapter introduces the study and sets the framework for the research. This is achieved by describing, amongst others, the experiences that both the international community and South Africa have had with posthumously conceived children; the problem to be studied; the significance of the study; the limitation of the study; the proposed methodology; and the organisation of the study.

5.2 Chapter 2: Current legislative framework

Chapter 2 is the heart of the research, in that it critically analyses the following important issues: the impact of the Constitution of the Republic of South Africa, 1996 on posthumously conceived children's rights to social security survivor's benefits; the requirements for eligibility under the various social security schemes; the social security protection afforded in a selection of African and international organisations, namely: International Labour Organisation (ILO), South African Development Community (SADC) and the United Nation (UN).

5.3 Chapter 3: Relevant foreign experiences with posthumously conceived children

Chapter 3 critically examines the legal approaches adopted by foreign jurisdictions with regards to posthumously conceived children's entitlement to the social security law survivor's benefits. The particular foreign jurisdiction(s) analysed have been selected in view of their developed, long-standing social security survivors' benefits regimes. The main objective for critically examining foreign jurisdictions is ultimately to determine which lessons are to be learnt from them.

5.4 Chapter 4: Conclusions and recommendations

Chapter 4 provides a summary of the conclusions reached throughout the research and the key (legal, policy and other) recommendations for policy makers in the area of social security survivor's benefits in South Africa.

6 Concluding remarks

This introductory chapter asserts that the legislature's silent provisions pertaining to survivors' benefits, that may be viewed as restricting the rights of posthumously conceived children, need urgent explicit legislative reform. Certainly, the lack of clear, or just plain non-existent legislative statement regarding the rights of this class of children reflects the common phenomenon that the legal system is not yet up to date with developments of modern medical technologies.[12] This issue is most relevant in the case of assisted reproductive technologies, not least because developing disputes have often lead to legislative block.[13] Sadly, in the meantime, courts may be reluctant to interfere in the enactment of laws, as a matter of separation of powers. Thus it is disturbing that the only victims of this lack of comprehensive regulations are the children.[14]

Moving forward, this dissertation will seek to answer the following pertinent questions:

- Firstly, can it be said that the South African social security legislative framework dealing with survivor's benefits safeguards the rights and entitlements of posthumously conceived children?

- Secondly, referring to the current social security legislative framework, where exactly does its strengths (if any) or weaknesses exist?

- Thirdly, does the Constitution offer posthumously conceived children enough rights and protection to deem the current survivor benefits regime adequate? And if so, what rights and protection are provided, and to what extent?

- And furthermore, do the relevant ratified international conventions or organisations make mention of this class of children? If so, to what extent could they safeguard the rights of posthumously conceived children's social security rights?

[12] Mpedi "Posthoumasly conceived children and their (in)eligibility for survivors' benefits: Implications for the South African social security system" 2012 *Inaugural address* 10.
[13] According to Sabatello "Posthumously conceived children: An international and human rights perspective" 2014 *Journal of Law and Health* 52, "efforts to set up a legally binding universal framework that would sort out the possibilities and limits of ART have failed, and the international community has ultimately opted for a declaration. The Universal Declaration on Bioethics and Human Rights, promulgated in 2005, references in general terms new scientific and technological developments: however, it does not explicitly address ART. *See* Universal Declaration on Bioethics and Human Rights *United Nations Organization for Education, Science and Culture* (http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics-and-human-rights/ (10-07-2013)) (giving background information about the Declaration)."
[14] n 13 above.

- Moreover, does an in depth analysis into the ratified regional instruments yield any answers as to the eligibility of posthumously conceived children?

- Lastly, since death is one of the ways in which a marriage can be legally dissolved, it can be technically argued that these children are born outside of a marriage. Since the big question here relates to the legitimacy of a posthumously conceived child, can it thus be said that current treatment of posthumously conceived children is somehow reminiscent of the treatment illegitimate children once had?

CHAPTER **TWO**
CURRENT LEGISLATIVE FRAMEWORK

1 Introduction

The provisions for the current South African social security survivor's benefits are found in several statutes. Each statute has its own requirements to be met. The different requirements found in the various statutes have created inconsistencies. Thus, there are no uniform standards of eligibility for survivors' benefits in South Africa.[15]

By way of an example, the definition of 'children' in the various statutes collectively covers the majority of children,[16] including posthumous children.[17] However, posthumously conceived children are not specifically mentioned in these statutes. As previously stated in Chapter one, the legislature needs to keep up with developments in the medical field and regulate their conditions of eligibility in the absence of a precedent.

1 The Constitution of the Republic of South Africa

1.1 The Preamble of the Constitution

A fitting place to begin when evaluating the current South African legislative framework would be with the supreme law of the land,[18] the Constitution of the Republic of South Africa 1996 (the Constitution)[19] Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law to the extent of the inconsistency.[20] So far, the very fact that the South African social security legal system, though well developed, is riddled with inconsistencies, lends the Constitution, to a great extent, to serve as a legislative foundation of the social security system and, most importantly, as an adhesive that keeps the entire system together.[21] The reasons behind these observations are discussed below.

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[15] See Olivier "Death and survivors' benefits" in Olivier, Smit and Kalula *Social Security: A Legal Analysis* (2003) 302.
[16] Namely: legitimate, illegitimate, adopted, foster, extra-marital and step children.
[17] A posthumous child is a child that is born after the death of a parent.
[18] Section 2 of the Constitution.
[19] Constitution of the Republic of South Africa 108 of 1996.
[20] *Executive Council Western Cape Legislature v President of the Republic South Africa* 1995 (4) SA 877(CC).
[21] Mpedi, Kalula and Smit "Extending social security coverage to the excluded and marginalized: Perspectives on developments in South Africa" 2013 International Social Security Association

Liebenberg and Tilley argued in the below mentioned briefing paper,[22] that it is appropriate, due to the fact that the Constitution does expressly recognise the right to social security through the enactment of section 27, thus leading one to infer that the right to social security enjoys a greater level of protection than if it were simply incorporated in ordinary legislation. Therefore, the assumption can be made that South Africa is a social state[23] – this assumption is further based on the Preamble to the Constitution.[24] The Preamble stipulates what was hoped to be achieved through the enactment of a Constitution as the supreme law of the Republic. [25] The aims reflect the spirit and purpose of the Constitution, and must be taken into account when constitutional rights and obligations are to be interpreted, and when rights are to be limited. [26] The Preamble sheds light by including the purposes for which the Constitution was adopted,[27] as a result of the devastating effects the apartheid regime had on the quality of life of the majority of citizens in the Republic, and their enjoyment of socio-economic rights.[28] Two of these purposes, amongst others, are of particular importance for the purposes of this study. The reason for this is that these two purposes should serve as the foundation for which posthumously conceived children's access to survivors' benefits needs to be regulated. They serve as a reminder to the legislature that despite being a 'new class' of children, they are still living,

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Social: Security Coverage Extension in the BRICS A comparative study on the extension of coverage in Brazil, the Russian Federation, India, China, South Africa 138 (ISSA).

[22] Liebenberg and Tilley "Poverty and Social Security in South Africa" 1998 Briefing paper for the Poverty Hearings. South African National NGO Coalition used in the Human Resource Economic, Social and Cultural Rights Activism: A Training Resource "Module 11: Social security as a human right" *University of Minnesota Human Rights Resource Center* 4 (http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module11b.html (31-07-2014)). According to Liebenberg's briefing paper, at the time of drafting the final Constitution, a broad coalition of organisations campaigned successfully to ensure that a comprehensive set of socio-economic rights (including the right of access to social security) were entrenched as justiciable rights in the Bill of Rights. They argued that this was necessary to ensure that socio-economic rights enjoyed the same legal status and protection as civil and political rights.

[23] Mostert *The Constitutional Protection and regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany* (2002) 140. The assumption that South Africa is a 'social state' is based on the concept of Germany's 'Sozialstaat'. The 'Sozialstaat' comprises three elements, namely, social security, social justice and social welfare. All three elements are essentially put in place as the country's efforts to raise the general standard of living for society.

[24] De Wet "Can the social state principle in Germany guide state action in South Africa in the field of social and economic rights?" 1995 *South African Journal on Human Rights (SAJHR)* 30, 49. The trend in constitutional interpretation is to utilise the preamble whenever it may cast light on the meaning of a constitutional provision.

[25] Nyenti "Developing an appropriate adjudicative and institutional framework for effective social security provisioning in South Africa" 2012 *University of South Africa* 36.

[26] n 25 above. Furthermore in *S v Mlungu* 1995 3 SA 867 (CC) it had been declared that "the Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes."

[27] Chaskalson "The impact of seven years of constitutionalism on law and government in South Africa" 2001 *Potchefstroom University for Christian Higher Education: Constitution and Law IV: Colloquium on Local Government Law* 10.

[28] Jansen van Rensburg "A rights-based approach to the alleviation of poverty at local government level" 2001 *Potchefstroom University for Christian Higher Education: Constitution and Law IV: Colloquium on Local Government Law* 109.

breathing humans in dire need of protection too. The first purpose, as found in the Preamble, is to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.[29] The second purpose ultimately seeks to improve the quality of life for all South African's and free the potential of each person.[30] Both these aims indicate a commitment to guarantee everyone in society, including children, as a particularly vulnerable group, a certain minimum standard of living, below which they will no longer again be allowed to fall; and are, furthermore, a clear indication of the state's willingness to concretise the right to access to social security. [31] The Constitutional Court linked this commitment to a goal of transformation by pointing out that:

> "… the process of interpreting the Constitution must recognize the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a whole."[32]

1.2 Constitutional supremacy

Prior to the current constitutional dispensation as we know it, Parliament was sovereign.[33] For the writing of the final Constitution, the first constitutional principle in the transitional Constitution of 1993 had prescribed, *inter alia,* for "the establishment of one sovereign state, a common South African citizenship and a democratic system of government. Furthermore, Constitutional Principle VII determined that the judiciary shall have the power and jurisdiction to safeguard and enforce the Constitution and all the fundamental rights enshrined in it".[34] Both the first constitutional principle in the transitional Constitution of 1993 and the Constitutional Principle VII were declaring a constitutional sovereignty upon South Africa in its new constitutional dispensation. As such, due to the novelty in South Africa's history of a supreme constitution, its effect since 1994 on the entire legal system has been profound.

The supremacy of the Constitution and the entrenchment of the fundamental rights in the Bill of rights are contained in Chapter Two.[35] Thus any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be

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[29] n 27 above.
[30] n 27 above.
[31] Horsten *The Social Security Rights of Children in South Africa* (2003 thesis SA) 18.
[32] *The Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2000 10 BCLR 1079 (CC).
[33] Sarkin "The effect of constitutional borrowings and the drafting of South Africa's Bill of Rights and interpretation of human rights provisions" 1998 *Journal of Constitutional Law* 3.
[34] O'Malley Schedule 4 – Constitutional Principles *O'Malley Archives* (https://www.nelsonmandela.org/omalley/index.php/site/q/03lv02039/04lv02046/05lv02047/06lvo2065/07lv020884/08lv02088.htm(20-06-2015)).
[35] When the interim Constitution came into force on 27 April 1994, the doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state-sanctioned abuse. See Currie and De Waal *The Bill of Rights Handbook* (2013) 2.

fulfilled.[36] The doctrine of constitutional supremacy, which ultimately serves to limit governments' power, stems from constitutionalism, which is one of the basic principles underlying the new constitutional order.[37] Constitutionalism is based on the idea that government should at all times derive its powers from a written constitution and that its powers should be limited by those set out in the constitution.[38] Constitutional supremacy dictates that the state is obliged to conform to the rights contained in its Bill of Rights as they are said to bind the legislature, the executive, the judiciary and all organs of the state,[39] as well as to the extent foreseen by the Constitution,[40] natural and juristic persons.[41] Hence any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will not have the force of law.[42] The doctrine of constitutional supremacy plays a fundamental role in this study because it serves as the driving force and the justification for which the legislature needs to amend the pertinent social security laws and include posthumously conceived children as eligible dependents for survivors' benefits and prevent any further infringement of such children's constitutional rights. This dissertation argues that, due to its very nature, both the supremacy of the constitutional and legislative strategies need to be employed in evoking a revamp and reform in the current social security survivors' benefits system. It is only through this legislative strategy that posthumously conceived children can be deemed eligible for entitlements, while simultaneously fueling the doctrine of constitutional supremacy for constitutional change.

Furthermore, the common law is equally subject to the Constitution[43], by enjoining every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing common law.[44] It is for this reason that the Constitutional Court in *The Pharmaceutical Manufacturers Association of South Africa* stated:[45]

[36] Section 2 of the Constitution recognises the Constitution as the supreme law of the Republic.
[37] According to Currie and De Waal *The Bill of Rights handbook* (2013) 7, "the basic principles underlying the new constitutional order are constitutionalism, the rule of law, democracy and accountability, separation of powers and checks and balances, co-operative government and devolution of power. These principles tie the provisions of the Constitution together. They therefore influence the interpretation of many other provisions of the Constitution, including the provisions of the Bill of Rights, which must be interpreted consistently with them."
[38] Currie and De Waal (n 37) 8 defines constitutionalism as "the idea that government should derive its power from a written constitution and that its powers should be limited to those set out in the Constitution".
[39] In terms of section 8(1) of the Constitution the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state.
[40] In terms of section 8(2) of the Constitution, a provision in the Bill of Rights binds a natural or juristic person if, and to the extent that if, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the rights.
[41] n 20 above.
[42] Currie and De Waal (n 37) 2.
[43] Chaskalson (n 27) 7; In *Carmichele v Minister of Safety and Security* 2001 CCT 48/00 the court held that "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation".
[44] Section 39(2) of the Constitution.
[45] *The Pharmaceutical Manufacturers Association of South Africa* in re: *The ex parte Application of the President of the Republic of South Africa* 2000 3 BCLR 241 (CC).

> "There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."

Thus its important to note that regardless of the Constitutions refusal to acknowledge any othe other system of law being equivalent to it for *application* purposes, our Preamble does nevertheless envisage a spirit of transition when *interpreting* the Constitution. This means the Constitution remains as supreme law of the land, second to no other, whilst its transitional process of interpretation seeks to recognise its goals of a society based on democratic values, social values, social justice and fundamental human rights.

The contours of the South African legal system indeed reveal a constitutional state in which the values of the Constitution permeate all aspects of the law.[46] Hence when read together with the provisions relating to social security survivor benefits, the conclusion can be reached that a posthumously conceived child's entitlement to social security survivor benefits are in fact justiciable, as section two expressly states that the obligations imposed by the Constitution must be fulfilled.[47] As mentioned in the first chapter, despite the fact that the South African social security legal system is being developed with regards to survivor benefits, it is still riddled with inconsistencies. This lends the Constitution, to a great extent, to serve as a legislative foundation of the social security system and, most importantly, as an adhesive that keeps the entire system together.[48] The reasons behind these observations are discussed in greater detail below.

1.3 The Constitutional Values

Section one of the Constitution determines that the Republic of South Africa is one sovereign, democratic state founded on values of human dignity, the achievement of equality and the advancement of human rights and freedoms.[49] Constitutional values lie at the heart of the Bill of Rights,[50] and are important in the interpretation and enforcement of the rights entrenched in the Bill of Rights.[51] South Africa thus finds itself with a supreme constitution containing certain distinctive values and principles underpinning it and enshrined in it.[52] It

[46] Chaskalson (n 27) 7, these values are human dignity, the achievement of equality and the advancement of human rights and freedoms

[47] According to Horsten (n 31) 19, this means that the government is placed under an obligation to put systems into place to ensure that every South African has access to social security; See Jansen van Rensburg "Monitoring socio-economic rights" 1999 *Constitution and Law III Paper* 292.

[48] n 21 above.

[49] Section one of the Constitution.

[50] Nyenti (n 25) 37; *Mahlaule and Another v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

[51] Nyenti (n 25) 37.

[52] According to Beukes "Justice and other values: does the judiciary have a monopoly on their content" 1997 *SAPL* 439, 441 and 442. All of these values need to be read together with the Preamble of the Constitution, which contextualizes the Constitution by providing a backdrop and

thus follows that these values will have to be promoted when interpreting the right of access to social security. More specifically, these values will only be said to have been promoted when posthumously conceived children enjoy the same benefits as other children, and be deemed eligible for survivor benefits, thus freeing their potential as citizens of this Republic. By doing so, the legislature would be catering to this class of children's basic needs.[53] This would be in line with the Constitutional Courts' holding, that the fundamental rights in the Bill of Rights are entrenched because South Africa is a society that values human beings and wants to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.[54] Therefore a posthumously conceived child's entitlement to survivors' benefits through their right to access social security,[55] as is the case reality with all other rights, must be interpreted in the light of underlying constitutional values, as well the interests which that right is meant to protect.[56]

1.4 The right to equality

Section 9(1) of the Constitution provides "that everyone is equal before the law and has the right to equal protection and benefit of the law." One of the admirable features of the Constitution is its delegation to the state for its aim to achieving a society based on equality, dignity and freedom.[57] This assertion is evident from the wording of section 7(1) of the Constitution providing that "this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

Despite equality being described as a "treacherously simple concept",[58] it is, at its most basic and abstract, the formal idea that people who are similarly situated in relevant ways should be treated similarly.[59] Equality is a foundational value that informs constitutional interpretation, as well as a fundamental right.[60] The Constitutions' aim in achieving a society based on equality specifically can be viewed in a very serious light, as it expressly declares that everyone is equal before the law and has the right to equal protection before the law;[61] and that

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setting for the Constitution. The Preamble is the bedrock of the founding values contained in Constitution.

[53] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC).

[54] Jansen van Rensburg (n 28) 109.

[55] Section 27 of the Constitution.

[56] Nyenti (n 25) 38.

[57] Section 7(1) of the Constitution provides that "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".

[58] Holtmaat and Rikki "The concept of discrimination" 2004 *Academy of European Law Conference Paper* 2.

[59] Currie and De Waal (n 37) 210.

[60] n 56 above.

[61] Section 9(1) of the Constitution.

equality includes the full and equal enjoyment of rights and freedoms.[62] Furthermore, with the right to equality finding itself as the first right found in the Bill of Rights,[63] the Constitution declares that national legislation must be enacted to prevent or prohibit unfair discrimination.[64] According to Nyenti, the right to equality can form the basis for demands that rights are to be afforded to a person or category of persons.[65] To this end, special measures may be taken to ensure the protection or advancement of people who have been disadvantaged by discrimination in the past.[66]

Thus it goes without saying that this study is of the view that posthumously conceived children, like any other children, are worthy of the respect and protection of the law.[67] Posthumously conceived children, like any other children, are indeed similarly situated persons and thus, under the equality clause, are to be afforded similar treatment. Furthermore, this class of children as a category of vulnerable persons, is empowered by section 9 as a whole, to use the right to equality as the basis for demands for rights afforded to other similarly situated children. Ironically, the laws of exclusion and non-regulation of this class of children for survivor benefits, whilst including others, could be viewed as a direct violation of the Constitutions' instruction to the state to achieve a society based on equality, dignity and freedom.

1.4.1 Formal and substantive equality

The concept of equality in terms of our Constitution is divided into either formal or substantive equality. Formal equality on the one hand views everyone as equal bearers of rights[68] and treats all individuals in the same way, despite there being any differences between such individuals. The idea of formal equality can be traced back to Aristotle's dictum that equality meant "things that are alike should be treated alike".[69] Formal equality promotes individual justice as the basis for a moral claim to virtue and is reliant upon the proposition that fairness (the moral virtue) requires consistent or equal treatment.[70] Thus in terms of this concept of equality, which means sameness of treatment,[71] posthumously conceived children should not be treated differently from other children.

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[62] Section 9(2) of the Constitution.
[63] n 59 above.
[64] n 59 above.
[65] According to Nyenti (n 25) 39, "the social and economic status of social security applicants/beneficiaries has also been elevated to a ground in section 9(3), in terms of which a person may not be unfairly discriminated against".
[66] Such as posthumously conceived children.
[67] n 16 above.
[68] Currie and De Waal (n 37) 213.
[69] Aristotle *Ethica Nicomachea* 112-117, 1131a-1131b; Arckrill and Urmson (eds) W Ross *Translation Oxford University Press* (1980) (http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf (10-11-2014)).
[70] Wesson and Murray *Equality and social rights; an exploration in light of the South African Constitution* (2007) 751 Public Law.
[71] n 68 above.

Expressly deeming this class of children eligible for social security survivor benefits, in a formal sense, ensures that necessary, effective legislation will be put in place to protect their rights and interests.

Substantive equality, on the other hand, is not a concept trying to achieve sameness of treatment, it is a concept focusing rather on equality of outcomes.[72] In its quest to uphold its constitutional commitment, substantive equality requires the law, when determining the attainment of equality,[73] to safeguard equality of outcome whilst taking into account the actual social and economic disparities between groups or people.[74] The inclusion of section 9(2) in the equality clause illustrates the Constitution embracing and implementing a substantive concept of equality.[75] Thus unlike formal equality, substantive equality actually addresses the Constitution's commitment to carefully and thoroughly understand the impact that a history of discriminatory action had on a category of individuals or group.[76] The State has committed itself to substantive equality, which means that persons suffering from any disadvantage are entitled to extra protection.[77] This means that the State has a constitutional duty to ensure that the most vulnerable members of society are prioritised. As regards children's rights, this means that vulnerable groups of children (for example, children with disabilities, refugees, and posthumously conceived children) are entitled to special protection.[78]

Section 9 would demand that the legislature include posthumously conceived children into the legal framework and regulate the conditions of their eligibility for survivor benefits. A substantial approach to equality permits, recognises and requires positive measures of support to be extended for the needs of particular disadvantaged individuals and groups, to address inequality and remedy disadvantage by enabling them to enjoy full and equal access to their constitutional rights.[79] The need for the adoption of substantive equality is further necessitated by the Constitution's focus on particularly vulnerable and desperate persons. The state's constitutional obligations require that the state

[72] n 68 above, citing Loenen "The Equality Clause in the South African Constitution: Some remarks from a Comparative Perspective" 1997 *SAJHR* 405, 410. For example, on a formal concept of equality, equality is achieved if all children are educated according to the same school curriculum. Substantive equality on the other hand would require equality of outcome. If children with disabilities (deaf, for example) undergo the same school programme as other children they may very well end up receiving an education that is inadequate for their special needs. To realise the equality of treatment of these children it may therefore be necessary to treat them differently to everyone else.

[73] n 68 above.

[74] n 68 above.

[75] Section 9(2) of the Constitution provides that "Equality includes the full and equal enjoyment of rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance other persons, or categories, disadvantaged by unfair discrimination may be taken".

[76] Nyenti (n 25) 28.

[77] n 76 above.

[78] n 76 above.

[79] As O'Regan J observed in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 BCLR 752 (CC), the purpose of the constitutional equality clause is to prohibit patterns of group-based disadvantage and harm, and to permit positive steps to redress the effects of such discrimination.

protects particularly vulnerable and desperate persons and groups. The Constitutional Court has stated that the state has to make provision for the most vulnerable and desperate in society.[80] Thus, ironically as much as the concepts of formal equality and substantive equality are at polarity, both concepts support the view that posthumously conceived children are worthy of equal treatment and protection. Either as being equal bearers of rights and freedoms,[81] as is every child, or as being a special class in need of a distinct type of protection, so as to achieve an equality outcome.[82] Both these concepts, when applied to the objective of section 9, successfully advance the Constitution's aim to achieve a society based on equality, dignity and freedom.

1.4.2 Unfair discrimination

Discrimination is action that denies social participation or human rights to categories of people based on prejudice.[83] This includes treatment of an individual or group based on their actual or perceived membership of a certain group or social category 'in a way that is worse than the way people are usually treated.'[84] However, the equality clause does not prohibit discrimination but rather *unfair* discrimination. The implication of this terminology is that not all discrimination is unfair.[85] Fairness is a moral concept that distinguishes legitimate from illegitimate discrimination.[86] What then constitutes unfair discrimination? The impact of the discrimination on its victims will be the deciding factor.[87] Unfair discrimination 'principally means treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in equal.'[88] Legally unfair discrimination manifests when law or conduct, for no good reason, treats some people as inferior or incapable or less deserving of respect than others. It also occurs when law or conduct perpetuates or does nothing to remedy existing disadvantage and marginalisation.[89] Section 9(3), (4) and (5)[90] states that neither the State nor any

[80] Nyenti (n 25) 41; n 53 above.
[81] In terms of formal equality everyone is an equal bearer of rights.
[82] In terms of substantive equality individual needs are considered in order to achieve equality of outcome.
[83] Oxford dictionary *Oxford University Press* Retrieved 11 Dec 2004 (www.oed.com)(11-11-2014)).
[84] Cambridge dictionaries online *Cambridge University* Retrieved 29 March 2013 (www.cambridge.org)(11-11-2014)).
[85] Currie and De Waal (n 35) 223.
[86] n 85 above; Alberton "Equality" in Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* (2002) 105.
[87] *Harksen v Lane NO* 1998 (1) SA 300 (CC).
[88] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC). According to Currrie and De Waal, the value of dignity is thus of central importance to understanding unfair discrimination. Unfair discrimination is differential treatment that is hurtful or demeaning.
[89] n 86 above
[90] Section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(4) states that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection

individual may directly or indirectly unfairly discriminate against anyone on illegitimate grounds. Discrimination on illegitimate grounds is discrimination on the listed grounds found in section 9(3) and on the analogous grounds. [91]

1.4.3 The listed grounds

Differentiation on the basis of one of the grounds listed in section 9(3) is presumed to be unfair discrimination until the contrary is proved.[92] These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity.[93] A claim may be brought on 'one or more' of the listed grounds.[94] This is such due to there often being a complex relationship between these grounds.[95] The existence of a complex relationship between these groups in essence serves to illustrate how one act or omission can have far-reaching consequences.[96] A detailed analysis of the relevant listed acts of unfair discrimination suffered by posthumously conceived children due to the lack of or non-existence of legal recognition deeming them eligible for social security survivors' benefits is discussed below.

1.4.3.1 Birth

One could argue that the exclusion of posthumously conceived children or the lack of express legislation deeming them eligible for social security benefits, whilst including all categories of children, is identical to the treatment that illegitimate children were handed by the law.[97] Worldwide, 'illegitimate' children as they were referred to historically (and even now by some courts), suffered significant legal and societal discrimination.[98] These children had no legal right to parental support, intestate succession, or government benefits available to

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3. National legislation must be enacted to prevent or prohibit unfair discrimination. Section 9(5) of the Constitution provides that discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[91] In Currie and De Waal (n 37) 222-223 differentiation on a ground that is not on the list of presumptively illegitimate grounds of differentiation in section 9(3) will be discrimination if the ground is analogous to the listed grounds.

[92] Currie and De Waal (n 37) 227.

[93] Currie and De Waal *The Bill of Rights handbook* (2005) 249, citing *Harksen v Lane* (n 87).

[94] n 92 above.

[95] In *Harkson v Lane* (n 87), the Constitutional Court held that in some cases these grounds relate to immutable biological attributes or characteristics, in some to the associational life of human beings, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.

[96] In this case, it is an omission due to the lack of explicit legislation.

[97] The term "illegitimate" is derived from the Latin *illgitimus,* meaning "not in accordance with the law." An illegitimate child is one conceived and born outside of regulatory sanctions of marriage *Encyclopedia.com* (www.encyclopedia.com/topic/illegitimacy.aspx)(19-05-2015)); Bainham "Is legitimacy legitimate?" 2009 *Family Law* 673 explains that for years, the courts have used the term "illegitimate" or "the illegitimates" to refer to non-marital children. The use of the term itself, and its continuing usage today suggests that non-marital children are somehow different and inferior to marital children.

[98] Maldonado "Illegitimate harm: Law, stigma, and discrimination against non-marital children" 2013 *Florida Law Review* 346

marital children.[99] Another factual reason why posthumously conceived children do mirror to illegitimate children, is due to the fact that they are conceived and born after a parent dies, thus legally implying that they are children whose biological parents were not married at the time the child was conceived.[100] This treatment is indeed unconstitutional. In the *Bhe v Magistrate, Khayelitsha* case,[101] the Constitutional Court held that the prohibition of unfair discrimination on the ground of birth in section 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born.[102] While 'illegitimacy' is not specifically listed as a ground of unfair discrimination in section 9(3) it is covered by the listed ground of 'birth'. This means that any form of differentiation between the status of the children on grounds of the marital status of their parents at the time of their birth is presumed unfair.[103] The unsatisfactory regulation of the situation of posthumously conceived children appears to be in contravention of section 9(3), thus amounting to unfair discrimination on the grounds of birth. Posthumously conceived children may not have been conceived the same way as the majority of children. Nonetheless, they are children and their exclusion cannot be justifiable.[104] Furthermore, because these children do not choose the circumstances of their births, the State may be unwittingly unfairly discriminating against them by imposing disabilities on them despite them not being responsible for their own birth – this is both ineffectual and unjust.[105]

1.4.3.2 Sex, procreation and pregnancy

This particular ground seeks to demonstrate the far-reaching negative effects of the current unsatisfactory social security survivors' benefits regime. By the legislature inadequately regulating the conditions of eligibility for posthumously conceived children within the current legal framework, the legislature is indirectly unfairly discriminating against women on the grounds of sex and pregnancy. This is unfair discrimination on the grounds of pregnancy because women, who after the death of a spouse (still) wish to become parents and wish to utilise the services of modern reproductive technology, can be deterred from pursuing their aspirations of procreating due to the current negative implications of having a posthumously conceived child.[106] Furthermore,

[99] Maldonado (n 98) 347.
[100] Due to death of one spouse dissolving the marriage contract.
[101] *Bhe v Magistrate, Khayelitsha* 2005 (1) BCLR 1 (CC).
[102] n 91 above.
[103] n 91 above.
[104] Kennedy (n 11) 853.
[105] n 104 above.
[106] In Harwood "Posthumous reproduction" (http://uncpressblog.com/2011/05/19guest-post-karey-harwood-on-posthumous-conception/) (18-06-2015)), Karey discusses the far reaching negative implications of how inadequate legislation, plus ever developing modern reproductive technologies, combined with a human beings 'right to parenthood' have reached previously inconceivable levels. as seen in Israel when the people who were asserting their 'right to parenthood' and commissioning the creation of the posthumously conceived child were the grandparents. An Israeli couple, Mali and Dubi Ben-Yaakov, whose 27 year old son died single

discrimination on the basis of pregnancy could also be viewed as discrimination on the grounds of sex, since only women can fall pregnant.[107] The Constitution arguably provides woman with the affirmative right *to* procreate, as opposed to the right *not to* procreate, due to this right tying in with other fundamental rights. [108] The legislature should work towards reforming posthumously conceived children's legislative entitlements to survivors' benefits so as not to infringe upon the parents constitutionally protected rights to procreation, family relationships, parenting and marriage, just to name a few.[109] Mainly due to the fact that one's right to procreate, conceive and essentially raise one's child(ren) is an essential right, basic to humankind – fundamental to the very survival of a race,[110] regardless if such a right is practised posthumously.

1.4.3.3 Direct and indirect discrimination

There are two forms of discrimination related to unfair discrimination, namely direct and indirect discrimination. They are both prohibited by the Constitution, thus ensuring that all forms of discrimination, whether listed or analogous, are accounted for. Direct discrimination is easily identifiable and involves overt differential treatment between similarly situated persons on the basis of arbitrary grounds.[111] Indirect discrimination on the other hand, is not as easily recognisable, as it is a more subtle form of discrimination. It involves the application of policies and practices that are apparently neutral and do not explicitly distinguish between similarly situated persons, but that, in reality, have a disproportionate and negative effect on certain people and groups.[112]

In *Waters v Public Transport Corporation,*[113] the High Court summarised the distinction between direct and indirect discrimination as follows:

> Broadly speaking, direct discrimination occurs when one person is treated in a different manner (in a less favourable manner) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such 'equal' treatment is that the former is in fact treated less favourably than the latter.

Hence, despite the current social security legal framework seeming neutral in its treatment of all children,[114] it could be viewed as indirectly discriminating

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and childless, introduced a new dynamic to the posthumous conception saga when they sought to have their 'right to grandparenthood' legally acknowledged.

[107] *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC).

[108] Nolan "Posthumous conception: A private or public matter?" 1997 *Brigham Young University Journal of Public Law* 14.

[109] Nolan (n 108) 15.

[110] n 109 above.

[111] 'Discrimination Definition" *The Commission for Conciliation, Mediation and Arbitration* (www.ccma.org.za/UploadedMedia/InfoSheets_DISCRIMINATION%20-%20JAN%202002%281%29.html(7-10-2014)).

[112] n 111 above.

[113] *Waters v Public Transport Corporation* (1991) HCA 49.

against posthumously conceived children. This is because the manner in which it is administered, which leads to these children being unfairly discriminated against.

1.4.3.4 Human dignity

Section 10 of the Constitution states that "everyone has inherent dignity and the right to have their dignity respected and protected". Section 1 states that the Republic of South Africa is one sovereign democratic state founded on values of human dignity, the achievement of equality and the advancement of human rights and freedoms; while section 7(1) affirms, amongst others,[115] the democratic value of human dignity. The right to have one's dignity respected and protected is thus one of the core constitutional rights.[116] By including and recognising the right to dignity, the Bill of Rights sought to "safeguard and promote" the value of human dignity.[117]

Though we can be certain of the paramount importance of human dignity in the Constitution, we can be less certain of the meaning of the concept.[118] According to Chaskalson, its origins have been traced to Kantian moral philosophy, where human dignity is considered to be that which gives a person their intrinsic worth.[119] According to this philosophical thought, dignity is "above all price and so admits of no equivalent".[120] Despite it being a "difficult concept to capture in precise terms",[121] the value of human dignity accordingly also provides the basis for the right to equality – inasmuch as every person possesses human dignity in equal measure everyone must be treated as equally worthy of respect.[122] In *S v Makwanyane* the court in its pursuit of defining 'human dignity', pointed out that the right to dignity is intricately linked with other human rights: "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings:

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[114] It could be viewed as being neutral because no social security schemes expressly exclude or prohibit posthumously conceived children from receiving benefits, which, if they had, would have amounted to direct discrimination. The problem or discrimination lies in the fact that none of these schemes explicitly provide for these children's access to survivors' benefit. The lack of clear and precise law for posthumously conceived children on one hand, opposed to the inclusion of every other category of child on the other hand, could be seen as indirect discrimination.

[115] Namely the democratic values of equality and freedom

[116] De Waal, Currie and Erasmus *Bill of Rights Handbook* (2001) 230, recognise the right to human dignity as a core constitutional right. Section 10 does not, however, specifically grant a right to human dignity. Instead it recognises everyone's inherent dignity and grants them the right to have such inherent dignity respected and protected.

[117] Currie and De Waal (n 37) 251.

[118] According to n 107 above, "as is typical of its treatment of important abstractions in the Constitution, the Constitutional Court has not ventured a comprehensive definition of human dignity".

[119] Chaskalson "Human dignity as a foundational value in our constitutional order" 2000 *SAJHR* 204.

[120] Jones *Kant's Principle of Personality* (1971) 127.

[121] n 107 above.

[122] In *National Coalition for Gay and Lesbians Equality v Minister of Justice* 1999 (1) SA 6 (CC), the court held that "the rights of equality and dignity are closely related, as are the rights of dignity and privacy".

human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in …(the Bill of Rights)."[123]

Like equality and freedom, human dignity is also both a foundational value and a fundamental right that will inform the entire social security legislative framework.[124] This is such due to this right being one of the core constitutional rights.[125] Due to the fact that the aim of social security is to allow a person to live with human dignity,[126] it follows that the interpretation of the core value of human dignity will form the basis for the extent of justiciability of the right to social security. As all of the values contained in the Constitution need to be interpreted together, this is also an important step for constitutional values in the interpretation of socio-economic rights.[127] Section 10 makes it clear that not only does everyone have a right to human dignity, but that human dignity is inherent in each human being. Human dignity is something everyone is born with, something that no man can take and will ever be allowed to take away from another. Posthumously conceived children are thus legally and constitutionally entitled to have their right to human dignity respected and protected. Thus, the envisaged meaningful legal recognition of this class of children would be in line with the accepted approach that the universal aim of social security is to allow a person to live in a manner consistent with his/her right to human dignity.[128]

1.4.3.5 Marriage and family life

The family is recognised as the most natural and fundamental unit of society and requires the full protection of the state.[129] Therefore the right of all to marry and found a family is protected in human rights law, which upholds the positive right of all people to do such. It upholds the ideal of equal and consenting marriage and tries to guard against certain abuses which undermine these principles. What is of importance is that it is not prescriptive as to the types of families and marriages that are acceptable, recognising tacitly that there are many different and diverse forms of families and marriages in the Republic.[130] The right to marriage and a family life encompasses the right of an individual to belong to a family unit, the right of a couple to marry and live together, the right to bear children, the right of parents to raise their children and care for them, the right

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[123] *S v Makwanyane* 1995 (3) SA 391 (CC).
[124] Goolam "Human dignity – Our supreme constitutional value" 2000 Paper delivered at the International Conference on Development in the Contemporary Constitutional State 4.
[125] n 116 above.
[126] Horsten (n 31) 23; Venter "Die betekenis van die bepalings van die Grondwet die aanhef en hoofstuk 1" 1998 *Potchefstroomse Elektroniese Regstydskrif* 27 – 29 (http://www.puk.ac.za/lawper/tydskrif/1998v1.html (26-07-2002)).
[127] Horsten (n 31) 24; According to Sachs "Reflection on emerging themes" 1999 *ESRR* 14, these rights are about dignity and having meaningful control over one's life.
[128] Ben-Israel "Social security in the year of 2000: Potentialities and Problems" 2005 *Comparative Labour Law Journal* 139.
[129] Article 16(3) of The Universal Declaration of Human Rights.
[130] Naik "The right to a family" 2003 *Human Rights Education Association* (www.hrea.org/index.php?base_id=158 (28-10-2014).

of children to grow up with their parents – and is therefore grounded in the constitutional rights to privacy, self-fulfillment, and dignity.[131] Thus the ground of marital status discrimination seeks to make suspect the imposition of burdens on married persons that it does not impose on those who are not married.[132]

Where some people may celebrate the creation that is posthumously conceived children, other persons may view this new class of children as a violation of what Mother Nature stands for. As such, the negative perceptions and social discrimination suffered by posthumously conceived children will inevitably also be felt by the persons electing to utilise such modern reproductive technologies. An individual's right to belong to a family unit, an individual's wish to extend his or her family unit is something that should not be taken lightly or ignored by the law. Unfortunately, it can be argued that the lack of clear legislation pertaining to the rights or legal status of posthumously conceived children's survivor benefits eligibility could accrue to legal and societal discrimination by the State on the grounds of marriage and family life, [133] towards those individuals who wish to conceive through unconventional methods.

Another strong argument that would be in favour of the amendment of posthumously conceived children's eligibility for survivor benefits, and consequently stop the infringement of one's right to marriage and family life, is if the legislature would be cognisant of the likelihood that despite being conceived and born posthumously, children do not view their family structure as wronging them or their dignity in any way.[134] Unlike adults, who often frame familial structures as right or wrong, good or bad, children are particularly adept at developing strategies to comprehend complex family relationships.[135]

It is for this reason that the Constitution not only affords posthumously conceived children rights, but it was held in *Dawood*[136] that parents' right to dignity must be interpreted to afford protection to the institution of marriage and family life. Writing for the court, O'Regan J held that the court indeed protected the rights of persons to freely marry and raise a family.[137] Failure by the current legal framework to regulate the eligibility or ineligibility of

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[131] According to Merin " The right to family life and civil marriage under international law and its implementation in the state of Israel" 2005 *Boston College International and Comparative Law Review* 86, "in an era in which 'human dignity' is a protected fundamental constitutional right, effect should be given to the aspiration of a person to fulfill his personal being, and for this reason, his desire to belong to a family unit that he considers himself part of should be respected."

[132] Currie and De Waal (n 37) 232; n 87 above.

[133] Alsgaard "Recent developments decoupling marriage and procreation: A feminist argument for same-sex marriage" 2012 *Berkeley Journal of Gender, Law and Justice* 308 writes in his article that he is of the view that "if we think about marriage in the broader context, we will realize our concerns about marriage flow primarily from the fact that it usually involves children. On this view, we have a social justice in marriage not for its own sake, but because marriage traditionally is the institution in which procreation has occurred."

[134] Sabatello (n 13) 60; Moyal and Shelly "Future child's rights in new reproductive technology: Thinking outside the tube and maintaining the connections" 2010 *Family Court Review* 436.

[135] n 134 above; Mason and Tipper "Being related: How children define and create kinship" 2008 *Childhood* 441.

[136] *Dawood v Minister of Home Affairs* 2000 (3) 93 6 (CC).

[137] n 136 above.

posthumously conceived children undermines an individual's desire to have and raise a family after the death of a spouse. The legislature further fails to foresee that it could be impairing the ability of an individual to achieve personal fulfillment in an aspect of life that is of central significance.[138] Ultimately, this weak regulation causes a domino effect that not only violates the child's human dignity, but also his/her parent's human dignity caused by the infringement on their right to a family life.

1.5 Children's rights

A child, as a human being, is recognised by the law as a legal subject.[139] In other words, in the eyes of the law, a person[140] acquires certain rights, duties and capacities at birth.[141] This is so despite the limited legal capacity during the initial stages of life. As such, traditionally, children were only supposed to be seen and not heard;[142] as a result, their views and interests often did not matter. These and other entrenched beliefs about the place and position of children in our societies have left them vulnerable, making them susceptible to physical, psychological, emotional and sexual abuse. As such, the state of affairs in which children found, and still find themselves, warrants their protection.[143]

Section 28 of the Constitution provides a range of constitutional rights that provide protection exclusively for children.[144] These children's rights are in addition to the protection afforded to them in the remainder of the Bill of Rights. Apart from a few restrictions due to the limited scope of certain rights restricted

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[138] O'Regan in *Dawood v Minister of Home Affairs* (n 136).

[139] Dausab "The best interest of the child" (http://www.kas.de/upload/auslandshomepages/namibia/Children_Rights/Childrenh.pdf(08-10-2014)) 146.

[140] Boberg *The Law of Persons and Family, with Illustrative Cases* (1997) 3.

[141] Cronje *The South African Law of Persons and Family* (1990) 8.

[142] Dausab (n 139) 145.

[143] n 139 above.

[144] Section 28(1) of the Constitution provides that: "Every child has the right –

(a) to a name and nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected against exploitive labour practices;
(f) not to be required or permitted to perform work or provide services that –
    (i) are inappropriate for a person of that child's age; or
    (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under ss 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
(h) kept separately from detained persons over the age of 18 years; and
(i) treated in a manner, and kept in conditions, that take account of the child's age;
(j) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(k) not to be used directly in armed conflict, and to be protected in times of armed conflict."

exclusively for adults,[145] every child enjoys the same protection throughout the Bill of Rights as does his or her adult counterpart.[146] This section relates directly to the social security rights of children[147] and as such, its main objective is the protection of vulnerable children. Posthumously conceived children find themselves in a very unfortunate situation, due to the manner in which they are treated by the social security legislative framework.

Each child is afforded socio-economic rights, inclusive of the right to social security, which are all entrenched in the Constitution.[148] As such the Constitution places a duty on the State to ensure that each child is provided with these basic needs. By the current law not accommodating posthumously conceived children's access to their survivors' benefits leads to an infringement, as provided for by section 28.

To give effect to the duties imposed by section 28, the state has passed child-specific legislation setting clearly the rights of children and the responsibilities of the parents, the state and other duty bearers in relation to those rights.[149] These laws largely reflect the Constitution, and international and regional instruments which South Africa has ratified.[150]

1.5.1 The best interest standard

Simply put, the *best interest of the child* means considering the child before a decision affecting his or her life is made.[151] This principle was established in South African law in the 1940s,[152] but its influence was previously limited to family law and care proceedings.[153] This is a principle that has established itself through all matters and legislation affecting the wellbeing of a child, by following the lead of international instruments.[154] It is an overarching common law principle that has been used to assist primarily courts and other institutions in

[145] Namely, for example, the right to stand for public office, the right to vote.
[146] Currie and De Waal (n 37) 599 referencing *Bhe v Magistrate, Khayelitsha* (n 101).
[147] Robinson "Word and Action" (1996) 9.
[148] n 147 above.
[149] The primary laws relating to children that have been passed since 1994 are the South African Schools Act 84 of 1996; the Children's Act 38 of 2005; the Criminal (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and the Child Justice Act 75 of 2008. (Currie and De Waal (n 37) 600).
[150] Currie and De Waal (n 37) 600 states that "South Africa ratified the Convention on the Rights of the Child in 1995, the African Charter on the Rights and Welfare of the Child in 2000. The Hague Convention on International Child Abduction and the Hague Convention on Inter-Country Adoption have been both acceded to and were domesticated by the Children's Act. South African courts have on many occasions relied on these instruments and other documents such as General Comments of the Committee on the Rights of the Child."
[151] Section 28 (2) of the Constitution provides that: "A Child's best interests are of paramount importance in every matter concerning the child."
[152] *Fletcher v Fletcher* 1948 (1) SA 130 (A).
[153] Currie and De Waal (n 37) 619.
[154] One such example is Article 3 of the United Nations Convention on the Rights of the Child 1989.

decision-making processes. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of interests. These interests themselves are particularly sensitive.

In South Africa, the best interest of the child is a constitutional right of every child. Section 28(2) provides that a child's interests are of paramount importance in every matter concerning that child. The best interests of the child have been elevated to a standard[155] and a right[156] with the commencement of the Children's Act 38 of 2005.[157] Furthermore, the Children's Act stipulates in section 9 that the child's best interests is of paramount importance in all matters concerning the care, protection and wellbeing of a child. Despite the fundamental importance of this right and standard being clear, the Constitutional Court in *S v M* found that although the best interest principle is not absolute and not without problems, its purpose is to safeguard the interests of children individually and collectively. Thus the best interest principle is a child-centered approach aimed at protecting the needs and entitlements of children. The unique circumstances of a particular child will then determine the different factors to consider in order to secure the best interest of that child.[158]

As a standard and a right, the best interest yardstick is placed in the hands of the courts in their capacity as the upper guardians when hearing every matter dealing with children. Despite the courts being the child's upper guardians, in this unique circumstance pertaining to posthumously conceived children, this dissertation would like to assert that a legislative enactment approach seems more viable due to its comprehensive inclusive and extended process involving debates by the legislators and often benefits from comments by interested members of society.[159] The most promising aspect of the legislative route is that it sidesteps the need to wait indefinitely for an appropriate legal question to present itself before the courts in order to afford them the opportunity to articulate an appropriate answer.[160] Furthermore, the reality is that even if the courts were presented with such an opportunity, they are often slow and hesitant to overturn their jurisprudence.[161]

[155] Sections 7 and 9 of the Children's Act.
[156] Section 8 of the Children's Act.
[157] "Section 28(2) is not only a principle or standard that helps interpretation of other rights. It is a right in itself." (Currie and De Waal (n 37) 619).
[158] In *S v M* 2007 (2) SACR 539 (CC) the Court had to consider the application of the best interest principle by a sentencing court when dealing with a primary care-giver. The Court emphasised the need to take a child-centred approach when determining the best interest of the child and held that section 28 required that "Statutes must be interpreted and common law developed in a manner which favours protecting and advancing the interests of children; and courts must function in a manner which at all times shows due respect for children's rights".
[159] n 12 above.
[160] n 12 above.
[161] Mortonaro "Protecting children's rights inside of the schoolhouse gates: Ending corporal punishment in schools" 2014 *George Town Law Journal* 510.

The best interest standard is also placed in the hands of the legislature,[162] hence it must ensure that the standard is always adhered to and promoted when enacting or reforming legislation dealing with children. Therefore, it can be said that until legislative reforms have been implemented to ensure the social security coverage of these children, it would appear that the legislature is not placing a child's best interest as being paramount, thus violating section 28.

1.5.2 Section 27 of the Constitution

The Constitution introduced the concept of social security by including section 27.[163] Section 27 places a constitutional obligation on the state to provide access to social security to everyone.[164] Section 27 extends the right to access of social security to everyone. This includes appropriate social assistance in a case where they are unable to support themselves and their dependants.

From this provision, it can be inferred that a posthumously conceived child does indeed have a right to access social security, both as an individual ('everyone'), and as the deceased's natural offspring ('dependant'). Section 27(1)(c) indicates to more than one's constitutional right to access to social security. It could be argued that it also infers to posthumously conceived children's constitutionally protected access to survivors' benefits. Thus it is not fair that these children should continue being excluded and marginalised due to the absence of legislation expressly including them as eligible dependants for survivors' benefits. Moreover, posthumously conceived children should not be prejudiced because the underlying goal of the children's survivors' benefits are to replace the lost financial support of the deceased wage-earner in order to keep families together and give children the opportunity to grow up securely.[165] Thus, it is important for the law to recognise that posthumously conceived children deserve the same chance to become productive members of society as any other child, and if supporting one group is good for the future economic stability, then supporting the other is too.[166] The law recognising this class of children's social security rights would be in line with its directive of section 27(2)[167] to the state

[162] This statement rests on the assertion made by Currie and De Waal (n 35) 600, that "section 28(1)(c) places a duty on the state to ensure that a child is provided with their basic constitutional requirements and to support the family of the child with the means to meet those requirements, if the child is living with the family."

[163] Section 27 (1) of the Constitution provides "that everyone has the right to have access to –
(a) health care services, including reproductive health care;
(b) sufficient food and water; and
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[164] Horsten (n 31) 1.

[165] Kennedy (n 11) 826.

[166] Kennedy (n 11) 853.

[167] Section 27 (2) of the Constitution provides "the State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights."

to not only merely recognise and affirm the principle that everyone has the right to have access to social security theoretically, but rather to enforce this right.[168]

2 Social security in South Africa

The concept of social security is one that does not yet have a universally accepted and precise meaning.[169] Neither South African nor international literature provides a clear definition of the concept 'social security',[170] due to it being an elastic concept that varies from one country to another.[171] As such, even now the concepts of providing social security, or the obligation of the South African government to provide for social security, are still new. The issue of social security has developed rapidly since the latter part of the 20th century. In some of the democratic states, the obligation to provide social security is entrenched in their constitutions.[172] Before it was entrenched, it was up to the individual and the family to provide adequate protection for their families,[173] but today things have changed.[174]

Nonetheless, the most common definition follows the International Labour Organisation's (ILO) approach,[175] and defines social security on the basis of the so-called nine classical risks (namely, sickness, maternity, employment injury, unemployment, invalidity, old age, death, medical care and family) embodied in the Social Security (Minimum) Standards Convention 102 of 1952.[176] Consequentially, social security is perceived as:

> the protection that society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be covered by the stoppage or reduction of earnings resulting from sickness, maternity, employment injury,

[168] According to Fombad "An overview of the constitutional framework of the right to social security with special reference to South Africa" 2013 *African Journal of International and Comparative Law* 17, " what the South African approach shows is that the foundation to an effective and a rights-based approach to the right to social security is the Constitution. Many African constitutions do recognise the right to social security or many of the rights related to it. This in itself is not sufficient. A constitutionally entrenched right is only potentially effective if it is formulated in language that creates a sense of obligation on the State and is backed by a credible mechanism for ensuring that the State discharges its obligations".

[169] Mpedi "The concept of Social Security" lecture note on file with the author (2013) 4.

[170] Olivier "The concept of social security" in (n 15) 23. What has been generally accepted, however, is that the concept is not a fixed one.

[171] Fombad (n 168) 2.

[172] Countries like Germany, United States of America, England and Australia, to name a few. Rambau "The constitutional impact of social security in South Africa in the country of enforcement by the courts" 2004 *Rand Afrikaans University Digispace* (http://ujdigispace.uj.ac.za/bitstream/handle/10210/6238/L.P%20RAMBAU_2004_MA.pdf/sequence=3 (12-09-2014))1.

[173] Von Maydell *Fundamental Approaches and Concepts of Socials Security* (1997) in Blanpain *Law in Motion* The Hague: Kluwer Law International 1029.

[174] n 173 above.

[175] Social Security (Minimum) Standards Convention 102 of 1952.

[176] International Labour Organization Constitution.

> unemployment, invalidity, old age, death, provision of medical care and provision of subsidies for families with children.[177]

On the other hand, in an attempt to address the disparity, the South African White Paper for Social Welfare defines social protection as "policies that ensure adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age".[178] As seen from the definition in the White Paper on Social Welfare of 1997, it is evident that in some of the literature social protection is used interchangeably with social security.[179] Sometimes social security is distinguished from social protection. Where this is done, social protection is regarded as a broader concept that includes the protection provided between members of the family of a local community.[180] It could also be used in a narrower sense to refer to the measures addressed to the poorest, most vulnerable or excluded members of society.[181]

This definition is criticised as a description concerning the content of intended schemes rather than the content of social security.[182] As this description departs from a number of identified risks, there exists a danger that it leaves, amongst others, insufficient room for development regarding new social problems that might arise.[183] Kaim-Claudle submits that the difficulty is mainly caused by the different meanings attached to the notion of social security.[184] In South Africa particularly, the restrictive nature of the concept of social security has resulted in calls for a broader concept, 'social protection'. The concept social protection embraces "policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure risks, enhancing their capacity to protect themselves against hazards and interruption or loss of income".[185] The concept has been defined as the "body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (i.e. income from paid labour) or particular costs".[186] According to Mpedi, the goal of social security is to avert or minimise social risks and

[177] International Labour Organization (2000) 29.
[178] The South African Welfare White Paper, *Government Gazette* 18166 GN 1108 (08-1997).
[179] n 171 above; This is reflected in International Labour Organization, *World Labour Report* 2000: *Income Security and Social Protection in a Changing World,* International Labour Organization. 2000 13 (httpp://books.google.co.za/books?id=fjdseXaqU24&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (20-10-2012)).
[180] Fombad (n 168) 3 citing the International Labour Organization, *World Labour Report 2010/11. Providing Coverage in Times of Crisis and Beyond,* International Labour Organization Publications 2010 (http:www.ilo.org/publicenglish/protection/secsoc/downloads/policy/wssr.pdf (20-10-2012)).
[181] n 180 above as reflected in the International Labour Organization, *World Social Security Report. Providing Coverage in Times of Crisis and Beyond* 2010/2011, ILO Publications 2010 (http:www.ilo.org/publicenglish/protection/secsoc/downloads/policy/wssr.pdf (20-10-2012)).
[182] Pieters *Introduction into Basic Principles of Social Security* (1993) 1.
[183] Olivier warns in Olivier and Mpedi *The Complementary Role of Formal an Informal Social Security in Extending Social Protection: A South African Perspective* 2003 (Paper Delivered at SLTSA Conference on the Law Windhoek) against too narrow a definition of social security and is of the opinion that South Africa should adopt a wider social protection approach 1.
[184] Kaim-Claudle *Comparative Social Policy and Social Security – A Ten Country Study* (1968) 6-9.
[185] Asian Development Bank.
[186] Pieters (n 182) 2.

human damage by increasing capabilities and opportunities.[187] Other goals include providing an adequate standard of living and social safety net against destitution[188] through preventative measures.[189]

Despite the White Paper on Social Welfare describing the four elements of social security as private savings, social insurance, social assistance and social relief,[190] the South African social security system has to a large extent been constructed around social assistance and social insurance.[191] It is for this reason that this research focuses mainly on these two strategies.

2.1 Social insurance

Social insurance is a "mandatory contributory system of one kind or another or a regulated private sector provision, concerned with spreading of income over the life cycle or the pooling of risks".[192] Such systems or schemes are often supported by government and may be financed via taxation, without necessarily depriving them of their social insurance character.[193] Social insurance is normally aimed at poverty prevention and generally financed through contributions from covered employees, their employers and the government.[194] From the above description, it is evident that the South African social insurance system is largely linked to formal employment.[195] This results in a situation whereby the rural and urban poor and the informally employed are to a large extent being excluded and marginalised.[196]

Due to its inherent nature, children cannot contribute to social insurance schemes themselves and as such 'directly' benefit. The benefits accrued are as a rule linked to the existence of principal beneficiaries under different social insurance schemes.[197] This implies that coverage and contribution is limited to those who rendered services in the formal sector of employment.[198] A good example being survivors' benefits, in the event that a parent should pass away, the insurer will pay out to the deceased breadwinners' dependants. In terms of

[187] Mpedi (n 169) 7.
[188] Davis, Cheadle and Haysom *Fundamental Rights in the Constitution Commentary and Cases: a Comentary on Chapter 3 on the Fundamental Rights of the 1993 Constitution and Chapter 2 of the 1996 Contitution* (1997) 356, 357.
[189] Fultz and Pieris *The Social Protection of Migrant Workers in South Africa* (1997) 2.
[190] Lund "Understanding South Africa social security through recent household surveys: New opportunities and continuing gaps" 1999 *Development Southern African* 64.
[191] n 190 above.
[192] Mpedi (n 169) 4.
[193] Horsten (n 31) 11. An example hereof can be found in the Swedish system of notionally private unemployment insurance. Although the system is state regulated and 90 percent of the funding comes from the government, its administration is private. In South Africa, the Unemployment Insurance Fund is self-financing, but the state intervenes to cover any deficit.
[194] n 192 above.
[195] Olivier and Mpedi (n 183) 3. The situation has somewhat improved by, for example, the inclusion of domestic workers as members of the Unemployment Insurance Fund.
[196] n 195 above.
[197] Olivier "Death and survivors' benefits" (n 15) 301.
[198] n 197 above.

the Compensation for Occupational Injuries and Diseases Act,[199] a child under the age of 18 years of the deceased employee in question[200] can benefit from the fund.

It is important to state again that the payment of death and survivors' benefits is not covered as a separate contingency of social security measures in South Africa.[201] Furthermore, the definition of 'dependant' in the various social insurance schemes is not consistent,[202] thus leading to a situation where certain children under one scheme are eligible, whilst being ineligible under the other. Sadly though, posthumously conceived children are not included under any social insurance scheme as being eligible for survivors' benefits.

2.1.1 The Compensation Fund[203]

The Compensation Fund provides compensation in the form of medical care or benefits to workers who are injured during the course and scope of employment or become ill due to their work, including funding for the rehabilitation of disabled workers.[204] This fund also pays benefits to the families of workers who have died on the job. Contribution to this fund is mandatory in the formal economy because the Compensation Fund derives its revenue from levies paid by employers on the basis of the annual earnings of their employees.[205] In the event of an accident, injury or disease, an employee will be paid out on the basis of their earnings and the risks associated with the type of work or profession. This is known as assessment fees.[206] It is important to note that these assessment fees may increase or decrease according to an employer's accident costs.

If an employee incurs an accident or is diagnosed with a work-related disease, the employee or their dependants will be entitled to compensation by COIDA.[207] An accident is defined by COIDA as a personal injury, an illness or the death of the employee during the course of their employment. An occupational disease is defined as a disease that has arisen out of and in the course of employment.[208] Where an employee is guilty of serious and willful misconduct which causes an accident, such an employee will forfeit his entitlement to compensation unless:

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[199] Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[200] Or the child of his or her spouse, in terms of section 1(xv)(c) of COIDA.
[201] n 197 above.
[202] Olivier "Death and survivors' benefits" (n 15) 309.
[203] The Compensation Fund is established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).
[204] Preamble of the Compensation for Occupational Injuries and Diseases Act (COIDA).
[205] Brockenhoff "A review of the development of social security in South Africa: Monitoring the progressive realization of socio economic rights project" *Studies in Poverty and Inequality Institute* 2013 18. (http://spii.org.za/wp-content/uploads/2014/01/Working-Paper-6_Social-Security-policy-review.pdf (06-11-2014)).
[206] S 80 of COIDA.
[207] S 1(xxx) of COIDA.
[208] S 1(xxix) of COIDA.

the accident results in serious disablement,[209] or the employee dies as a result of the accident, leaving a dependant wholly financially dependent on him.[210]

The Compensation Fund operates on a no-fault system, which means that in the event of an injury or disease, amongst others, the employee is entitled to copensation without having to prove any other party was at fault for the accident.[211]

This Fund provides benefits to employees or their dependants for work-related injuries or occupational diseases, which are financed through employer contributions.[212]

Benefits are payable to children. A child is explained as follows:

> a child of any such relationship is included as a dependant, as well as a posthumous child,[213]a step-child, an adopted child, an extra-marital[214] child or a foster child. A very wide range of children is thus covered in order to include any other child, even if there is no relationship of legal dependency, if the child was living with the deceased.[215]

A very important legal distinction must be made between a posthumous child and a posthumously conceived child. A posthumous child is a child who is conceived during the lifetime of the employee but is born subsequent to their death. On the other hand, a posthumously conceived child is both conceived and subsequently born after the death of the employee. Based on this distinction, one may elect to infer that posthumously conceived children are tacitly protected, but in all reality COIDA does not expressly provide for this class of children, whereas posthumous children are indeed expressly provided for.

Thus based on the distinct difference between these two classes of children, its clear that poosthumously conceived children are excluded from the category of children who are deemed to be eligible 'children' to which survivor's benefits may be payable. Furthermore, these children are further deemed ineligible due to not being alive and living with the employee at the time of his or her death. Despite COIDA being enacted to provide a financial safety net for the employee or his dependants in the event of his death during the course and scope of his business, it seems as if a posthumously conceived child of such an employee will sadly be marginalised.

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[209] S 22(3)(a)(i) of COIDA.
[210] S 22(3)(a)(ii) of COIDA.
[211] The Compensation Fund National Treasury Preliminary Report 2nd Draft provides that "the no-fault system of compensation allows the employee to claim compensation without having to sue the employer" 3. (http://www.treasury.gov.za/publications/other/ssrr/Session%20One%20Papers/Compensation%20Fund%20Project%202nd%draft.pdf) (23-05-2015)).
[212] n 21 above.
[213] Section 1(d) of COIDA .
[214] n 213 above.
[215] Section 1(d - e) of COIDA further provides for both children over and under the age of 18. A child over the age of 18 years of the employee or of his or her spouse, who in the opinion of the Director-General was acting in the place of the parent; De Villiers and Giese (n 95) 33.

2.1.2 The Unemployment Insurance Fund[216]

Unemployment insurance system is a system offering subsistence income to eligible recipients to alleviate the harmful economic and social loss effects of income loss due to unemployment shocks. The unemployment insurance is prevalent in many industrialised economies in the world, but much less so in developing countries.[217]

With the onset of democracy in 1994, the statute governing unemployment insurance was repealed.[218] The Unemployment Insurance Act (Act No. 63 of 2001) came into effect on April 1, 2002.[219] Administratively, the monies are collected by the Unemployment Insurance Fund, which falls under the auspices of the Department of Labour. The Unemployment Insurance Fund system plays a key role in South Africa's social security architecture, particularly since it is the South Africa's only arm for the unemployed – more specifically, the portion of the unemployed who were previously employed.[220] Participation in the unemployment insurance scheme is compulsory in South Africa.[221] The Unemployment Insurance Fund is used to provide income replacement benefits including those for unemployment, illness, maternity, adoption and dependant.[222] The Fund is operated as an insurance scheme and is fully funded by the employee and employer contributions.[223] Coverage extends to employees who are or were contributors as defined in the Unemployment Insurance Act.[224]

In terms of the Unemployment Insurance Act;

> dependant's benefits are payable to the spouse or life partner of a contributor if he or she makes application "within six months of the death of the contributor."[225] If there is no surviving spouse or life partner, or no application by such a person is made within six months of the contributor's death,[226] any dependant child of a deceased contributor is entitled to the dependant's benefit.[227] Thus children only qualify if there is no spouse."[228]

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[216] The legislative framework for unemployment insurance in South Africa is provided for in two pieces of legislation: the Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 2 of 2002.

[217] Bhorat, Goga and Tseng "Unemployment insurance in South Africa: A descriptive overview of claimants and claims" 2013 *Development Policy Research Unit, University of Cape Town* 5.

[218] Bhorat, Goga and Tseng (n 217) 6; South Africa has a long history of unemployment insurance with the promulgation of the first Unemployment Insurance Act (Act No. 30 of 1966) (UIA) during apartheid.

[219] With the introduction of the amended act, the original Unemployment Insurance Act (Act No. 30 of 1966) was repealed with some transitional arrangements.

[220] n 217 above.

[221] Mpedi, Kalula and Smit ISSA (n 21) 141.

[222] n 217 above.

[223] Payable in terms of the Unemployment Insurance Contributions Act 4 of 2002.

[224] Olivier "Death and survivors' benefits (n 15) 306.

[225] Section 30 (1)(b) of the UIA states that "an application may be made within six months of the death of the contributor except that, on just cause shows, the Commissioner may accept an application after the six-month period".

[226] Section 30 (2)(b) of the UIA.

[227] Section 30(2)(a) of the UIA.

The apparently unfounded assumption is that the surviving spouse will look after the child/children and that for this reason the child can only claim if the spouse has not done so.[229] Posthumously conceived children are therefore ineligible in any case because children rank lower than the surviving spouse or life partner, thus substantially reducing any prospects of benefiting at all. The glaring reality is that no one can guarantee the surviving spouse or life partner with the care of the deceased's living children, let alone those that might be born sometime in the future.[230] The second reason for deeming posthumously conceived children automatically ineligible for survivors' benefits, is the six months time limit prescribed by the UIA for claiming.[231] Not only is the general gestational period nine months, assuming that the Commissioner would contemplate waiting indefinitely for such a child to be born a "just cause" seems rather doubtful.[232] Lastly, the simple fact that stepchildren and unborn children are expressly excluded by this act,[233] lends one to conclude that an urgent legislative revamp is needed.

2.1.3 The Mines and Works Compensation Fund[234]

Since the discovery of the major gold deposits on the Witwatersrand in 1886, gold mining has shaped South Africa for better and for worse.[235] South African mines have produced roughly forty percent of all gold ever mined on the planet.[236] Mine work is inherently dangerous and conditions in South Africa are particularly risky. Here exist the world's deepest gold mines and very narrow ore bodies, which have exposed workers to serious health hazards, including high concentrations of silica dust.[237] The relevance of providing this general background information is that due to the high number of deaths and illnesses caused by silicosis,[238] a series of commissions and laws regulating dust levels in the mines and establishing mechanisms for workers' compensation, including for silicosis was led.[239] This resulted in certain diseases being compensated under

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[228] De Villiers and Giese "A review of children's access to employment-based contributory social insurance benefits" 2008 48.
[229] Olivier "Death and survivors' benefits (n 15) 307.
[230] Mpedi (n 12) 6.
[231] n 230 above.
[232] n 230 above.
[233] n 228 above.
[234] The Mines and Works Compensation Fund is established in terms of the Occupational Diseases in Mines and Works Amendment Act 208 of 1993 (ODIMWA).
[235] Boyko, Darby, Goldberg and Milin "Fulfilling broken promises: Reforming the century-old compensation system for occupational lung disease in the South African mining sector" 2013 *Yale Global Health Justice Partnership* 10.
[236] "Chasing Gold: Then and Now" *American Museum of Natural History* (http://www.amnh.org/exhibitions/past-exhibitions/gold/incomparable-gold/chasing-gold-then-and-now (08=04-2013)).
[237] McCulloch "Hiding a pandemic: Dr. G.W.H. Sheepers and the politics of silicosis in South Africa" 2009 *Journal of Southern Africa Studies* 35.
[238] Silicosis is an inflammatory and fibrotic lung disease that also hinders the body's ability to control the mycobacteria that cause tuberculosis.
[239] McCulloch "Counting the cost: Gold mining and occupational disease in contemporary South Africa" 2009 *African Affairs* 108.

the Occupational Diseases in Mines and Works Act of 1973, due to the nature of the mining industry.

The Mines and Works Compensation Fund is financed by the levies on the owners of controlled mines. The Fund provides for the management of permanent, irreversible, incurable conditions.[240] The Mines and Works Compensation Fund provides compensation to past and present miners who have contracted lung-related diseases, including silicosis and tuberculosis, pneumoconiosis, permanent obstruction of airways and progressive systematic sclerosis, during the course and scope of their employment.[241]

What is important to note is that a "dependant" is not defined in the ODIMWA.[242] The Act provides the Commissioner with the discretion to designate who shall be regarded as a dependant.[243]

In terms of the Occupational Diseases in Mines and Works Amendment Act:

> the Commissioner's practice is to make payment of the lump sum exclusively to the widow, if alive. If there is no widow, it is practice of the Fund to pay to legal dependants who were also factually dependent on the deceased, and thereafter to any other *de facto* dependants.[244]

Posthumously conceived children are ineligible under ODIMWA because they rank lower than the widow, to whom payment is made "exclusively". They also fail to successfully pass the dependant requirements, due to neither being legally nor factually dependent on the income of the deceased at the time of his death. Sadly though, despite the ODIMWA making express provision for legal, factual and *de facto* dependants,[245] it is doubtful that the exclusion of posthumously conceived children will pass constitutional and equality muster, given the constitutional prohibition on unfair discrimination based on birth, marital status, and sexual orientation.[246]

[240] The Compensation Fund: Preliminary Report 2nd Draft *The National Treasury* 3 (http://www.treasury.gov.za/publications/other/ssr/Session%20OnePapers/Compensation%20Fund%20Project%202nd%20draft.pdf (12-11-2014).
[241] Mpedi, Kalula and Smit ISSA (n 21) 139.
[242] De Villiers and Giese (n 228) 43.
[243] Section 80(4) of the ODIMWA.
[244] n 242 above.
[245] De Villiers and Giese (n 228) 44 provides that "if there is no widow, it is practice of the Fund to pay legal dependants who were also factually dependant on the deceased, and therefore to any other *de facto* dependants. This would include all biological and adopted children of the deceased, or children placed formally under his or her foster care, as well as any ancestral relations of the deceased. Benefits are distributed equally between these people. Step-children, informal foster children, unborn children, posthumous children or any other child that the deceased did not owe a legal duty of support to, are not considered unless there are no legal dependants."
[246] Olivier "Death and survivors' benefits" (n 15) 303.

2.1.4 The Government Employees Pension Fund

The Government Employees Pension Fund is governed by the Government Employees Pension Law (1996). Its core business is to manage and administer pensions and other benefits for government employees in South Africa.[247] The Government Employees Pension Fund is a defined benefit pension fund, meaning that all pensions and related benefits are guaranteed and that members will never receive less than the benefits for which they qualify. The Government Employees Pension Fund manages both contributory and non-contributory benefits.[248]

Contributory benefits are based on the contribution that the members and their employers pay during each member's period of employment in government service. Based on these contributions, each member qualifies for certain guaranteed benefits on retirement, resignation, ill health, death or discharge.[249]

Non-contributory benefits differ from contributory benefits in that they are not based on member and employer contributions but are funded by the government. These include special pensions, post-retirement medical benefits, injury on duty payments, military pensions and pensions for former State Presidents, Parliamentary office-bearers, judges and magistrates.
Both a spouse[250] and children are beneficiaries in terms of the Government Employees Pension Fund.

In terms of the Government Employees Pension Fund:

> a child includes a natural or adopted child of the member or pensioner, under the age of 18, or a full time student under the age of 22, or any adult child who is disabled and factually dependant on the deceased. It includes extramarital children, but does not include foster children or stepchildren.[251] An orphan child whose parents, either natural or adopted, are deceased. If there is a spouse and orphans by a deceased spouse, the orphans are eligible for the deceased spouse's portion.[252]

The Government Employees Pension Fund has many weaknesses in that, despite both a spouse and child being deemed beneficiaries, a couple of categories of children have expressly been excluded,[253] this ultimately provides an impression that this particular fund is constitutionally insensitive to the directives provided in that a child's best interests and welfare are paramount in all matters concerning them. Not only does the Fund not make provision for posthumously conceived children, but posthumous children are also excluded. Posthumously

[247] Government Employees Pension Fund *Government Pensions Administrations Agency Member Guide* 4.
[248] Government Employees Pension Fund *Government Pensions Administrations Agency* home page.
[249] Government Employees Pension Fund *Government Pensions Administrations Agency* home page.
[250] Rule 1(25) of the Government Employees Pension Fund provides that a spouse includes a customary law marriage recognised in terms of the Recognition of Customary Marriages Act, a life partner or partner in a religious marriage.
[251] Rule 1(8) of the Government Employees Pension Fund.
[252] De Villiers and Giese (n 228) 55.
[253] Stepchildren and foster children.

conceived children are thus clearly not eligible for survivor benefits in terms of this Fund either.[254] The exclusion of both categories of children leads to the conclusion that the Fund was created at a time when such children could not have possibly been foreseen, thus justifying the urgent need for a comprehensive overhaul of the current social security survivors' benefits legislative framework.

2.2 Social assistance

Social assistance can be defined as a scheme which is generally financed from the general revenue of the country rather than from individual contributions, with statutory scales of benefits adjusted according to a person's means.[255] The primary goal of social assistance is to alleviate poverty.[256] As such, where there is little or insufficient social insurance, social assistance is legitimately expected to fill the gap.[257]

Social grants are used for social assistance in South Africa, which are non-contributory and means-tested benefits provided by the state to groups who are unable to provide for their own need, such as people with disabilities, elderly people, parents and children.[258]

2.2.1 Social assistance benefits

A variety of social assistance benefits are provided under the social grant system.[259] These benefits include the following: old-age grant, child support grant, disability grant, care dependency grant, foster-child grant and war veteran's grant.[260] Apart from these, social relief of distress may be available to qualifying individuals.[261] Almost all social assistance grants disbursed by The South African Social Security Agency are subject, in addition to eligibility conditions such as age, citizenship and/or residency, to the means test which varies from one grant to another.[262] These grants are administered in accordance with the Social Assistance Act and the South African Social Security Agency Act.[263]

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[254] This position is further aggravated by the fact that the Government Employees Pension Fund *Government Pensions Administrations Agency Member Guide* 12 explicitly states "if you have children, it is important to register them with GEPF". This assertion clearly implies that only children who are either born or conceived at the time of the members' death will be covered.
[255] Van der Berg "The means test for social assistance grants and its recent evolution" 2001 *Social Work* 125.
[256] n 169 above.
[257] For example, in the case of unemployment or maternity benefits.
[258] These grants are categorical in nature.
[259] Mpedi, Kalula and Smit ISSA (n 21) 142.
[260] n 169 above.
[261] n 169 above.
[262] n 259 above.
[263] The South African Social Security Agency (SASSA) in accordance with the Social Assistance Act 13 of 2004 and the South African Social Security Agency Act 9 of 2004.

The right to have access to social security is guaranteed under the South African Constitution, including appropriate social assistance if one is unable to support themselves and their dependants.[264] The realisation of the right to social security for children in South Africa is in the form of a child support grant, foster child grant, and care dependency grant.[265] It is important to note that the above grants are only available to children who have met the eligibility conditions in addition to the means test.

2.2.2 Relevant social assistance laws providing for survivors' benefits

2.2.2.1 Special pensions

South African special pensions are regulated by the Special Pensions Act No. 69 of 1996. This Act was enacted to give effect to section 189 of the Constitution,[266] which stated that provision shall be made for the disbursement of benefits in favour of persons (or their dependants) who made sacrifices or served in the public interest in the fight for democratic change in South Africa.[267] Three types of benefits are payable in accordance with the Act: pension, survivors' benefits and funeral benefits.[268]

Benefits regarding the death of the pensioner are paid to the surviving spouse(s) or dependants.[269] These benefits may be paid as a lump sum, a monthly pension or both. The definition, for purposes of survivors' benefits, of a dependant in terms of the Act reads as follows:[270]

> 'dependant', to mean an applicant in relation to a deceased member or pensioner, means-
>
> (a) any person in respect of whom the member or pensioner was legally liable for maintenance;

[264] S 27 of the Constitution.
[265] Mirugi-Mukundi "Realising the social security of children in South Africa, with particular reference to the child support grant" 2009 *Research Report Written for the Socio-Economics Rights Project of the Community Law Centre* 1.
[266] Manuel T, the then Minister of Finance stated that, "The House will recall that the Special Pensions Act No. 69 of 1996 gave effect to section 189 of the Interim Constitution, 1993 (Act No. 200 of 2003), in that it provides for the payment of pensions to persons who made sacrifices or served the public interest in establishing a non-racial democratic constitutional order and as a result were unable to or prevented from providing for pensions for a significant period, and for the payment of certain benefits to their survivors." (Special Pensions Amendment Bill, 2008, Address to the National Assembly by the Honourable Minister of Finance, 24 June 2008.)
[267] Section 189 of the Interim Constitution envisaged a non-contributory pension scheme in which members were not required to contribute to the monetary cost of their pensions, but rather through service and sacrifice for the establishment of the constitutional order.
[268] Section 14 of the Special Pensions Act.
[269] Section 1, under the definition of 'dependant' 1(b)(ii) of the Special Pensions Act states that a spouse "is the spouse of the member or pensioner, including a party to a customary union according to indiginous law and custom, or to a union recognised as a marriage under the tenets of any religion".
[270] Section 1, under the definition of 'dependant' (a) - (d).

(b) any person in respect of whom the member or pensioner was not legally liable for maintenance, if such a person-

(i) was, in the opinion of the Board at the time of the death of the member or pensioner in fact dependent upon such member or pensioner for maintenance;

(c) a posthumous child of the member or pensioner; and

(d) a person in respect of whom the member or pensioner would have been legally liable for maintenance had that person been a minor.

Based on the definition of the Special Pensions Act, there are three classes of dependants namely, legal dependants, non-legal dependants and future dependants in the form of posthumous children. Despite posthumously conceived children not being explicitly provided for, this Act does provide a notion of eligibility hope in that its subsection (d) does provide for a dependant that the deceased would have been legally or *de facto* liable for maintenance had such a dependant been a minor. It could be successfully argued that posthumously conceived children do meet this requirement. Regardless though, the overall requirements for eligibility for survivors' benefits under the Special Pensions Act are, for the purposes of this study, unsatisfactory. Though not grossly unsatisfactory, the definition of who qualifies as 'dependant' could do with some fine-tuning, in order to guarantee the inclusion of this particular class of 'future' children.

2.2.2.2 Military pensions

The South African military pensions are regulated by the Military Pensions Act 84 of 1976. The Act is primarily aimed at the payment of pensions and gratuities to people disabled, or whose disabilities were aggravated, by military service.[271] As a non-contributory social security scheme, the benefits flowing from the Act are funded through monies appropriated by Parliament.[272]

The Military Pensions Act provides for pension being payable to a widow and a child of a member, defining a widow as the wife of the member at the time of his death, and defining "wife" as:

> (t)he lawful wife of the member and includes a woman who is legally entitled to maintenance for herself from the member, and a woman who is the natural mother of a child who is under the age of eighteen years who is regularly maintained by the member, and a woman with whom the member lived together as man and wife for a period of at least five years immediately prior to the commencement of his military service…[273]

A "child" is defined as:

[271] Mpedi, Kalula and Smit ISSA (n 21) 143.
[272] Section 3 of the Military Pensions Act 84 of 1976.
[273] Section 1 under the definition of "wife".

> an unmarried child under the age of eighteen years who is a full-time student or who is physically or mentally disabled, is also regarded as a child if such a child was regularly maintained by the member. Included under this definition, are stepchildren and adopted children.[274]

A posthumously conceived child would not be eligible for military pensions' survivors' benefits, because such a child had not been regularly maintained by the member whilst alive. This definition of "child" ultimately warrants all classes of future children ineligible, and is as such extremely outdated when considering that such children are in existence and in need of legislative coverage.[275] The Military Pensions Act needs to be reformed in order to align itself with the Constitution.

2.2.3 Social security concluding remarks

In conclusion, what is evident from both the social insurance and assistance systems, children can directly rely on only social assistance if they are not covered under the social insurance benefits. Children can only benefit indirectly from social insurance as a dependant of a beneficiary as no direct social insurance benefits are in place for them. This is in line with the nature of survivor's benefits – the primary beneficiary first has to pass away before any benefits can be issued to his dependants. Thus it can be said that South Africa does not have a mixed direct social security system with regard to children.[276]

3 The Role of international law

Previous South African constitutions made no mention of the place of international law in the South African legal order.[277] This position was remedied with the adoption of the Constitution, which saw public international law play a greater role in South African law.[278]

Although generally speaking, states are not forcefully obliged to adhere to international law, it is 'diplomatically healthy' to do so. Therefore, upholding children's rights is in fact an international obligation that is necessary for a country's international character of being a civilised state within the international system.[279]

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[274] Section 1 under the definition of "child".
[275] This assertion is further perpetuated because only females are recognised as being eligible for spouse's benefits under this act. By only recognising "widows' and "wives" illustrates the extent to which the Act is outdated and discriminatory.
[276] Horsten (n 31) 13.
[277] Dugard "The Role of International Law in Interpreting the Bill of Rights" 1994 *SAJHR* 208.
[278] Dugard (n 277) 210 provides that the specific inclusion of international law within the Constitution represents a significant step forward in the status and role of this legal discipline in South Africa. International law is finally being accorded the position it deserves.
[279] Sillah and Chibanda "Assessing the African Charter on the Rights and Welfare of the Child (ACRWC) as a blueprint towards the attainment of children's rights in Africa" 2013 *International Organization of Scientific Research Journal of Humanities and Social Science* 51.

Section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. As such the duty on the courts to consider international law when giving content to any right contained in the Bill of Rights is thus mandatory.[280] .[281] As Jansen van Rensburg and Olivier put it, "Section 39(1)(b) of the Constitution can be considered to be the most valuable point of departure when discussing the role and influence of international (and regional) law on South African human rights law and, consequently, on the right to access to social security."

Its inclusion fundamentally ensures that human rights in South Africa will develop in line with international rights norms.[282] The South African Bill of Rights is clearly inspired by international human rights conventions.[283] As virtually every provision in the South African Bill of Rights has some counterpart in an international human rights convention or is governed by general principles of international law, it is clear that international law will be applicable to their interpretation in most situations.

Fundamentally, both international and regional law is important, because the manner in which international law manages the protection of the right to social security is instructive for the South African context.[284] Furthermore, due to South Africa being required to report on all ratified and non ratified international and regional conventions,[285] their importance also lies in the fact that they serve as important benchmarks for evaluating South Africa's conformity with international and regional standards, trends and positions.[286]

3.1 Relevant International Instruments

3.1.1 International Labour Organisation Conventions

The ILO is a United Nations' agency based in Geneva that is devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity. Its main aims are to promote rights at work, encourage decent employment opportunities, enhance

[280] Horsten (n 31) 36.
[281] Dugard (n 277) 213.
[282] As opposed to the situation in the past when they developed in opposition to such norms as provided for in Dugard (n 277) 242.
[283] Dugard (n 277) 211.
[284] Jansen van Rensburg and Olivier in "International and supra-national law" *Social Security: A Legal Analysis* (n 15) 649.
[285] Article 19 of the International Labour Organization Constitution provides that "since (the) Conventions have the status of international treaties, they are binding on ratifying states. Recommendations, however, are non-binding instruments which basically serve to clarify the subjects dealt with by the Conventions and to further set out guidelines in order to orient national policy and action."
[286] n 284 above.

social protection and strengthen dialogue in handling work related issues.[287] The International Labour Organisation's standards take the form of International Labour Conventions and Recommendations.[288] This body has adopted a number of conventions relevant to the position of children.

As mentioned before, due to social security being elastic and thus varying from country to country, it does not have a universally accepted and precise meaning. [289] In South Africa, the most common definition follows the International Labour Organisation[290] approach which provides for minimum standards in nine distinct branches of social security, namely, medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor's benefits[291] in its Social Security (Minimum Standards) Convention.[292] Despite this convention not being signed or ratified by South Africa,[293] it marked a new step in international social security legislation by introducing the objective of a basic level of social security to be attained everywhere in the world, whatever the nation's degree of economic development.[294] Furthermore, South Africa is a member of the International Labour Organisation and as such is bound by its vision and mission.[295]

Children as a whole are extensively provided for by the ILO's varies conventions and recommendations despite the fact that posthumously conceived children are not expressly provided for or mentioned. Despite this silence, it can be reasoned that posthumously conceived children are indeed covered because nowhere in the ILO conventions or recommendations are a specific category of children explicitly excluded for coverage. Thus in keeping in line with the objectives of the ILO, it can be positively argued that the current social security survivors' benefits legislative framework is not affording posthumously conceived children a general level of accessing such benefits. Legislative reform is urgently needed in order to afford this class of children their basic human rights and fundamentally create social cohesion as envisaged by the ILO.[296] Most importantly, adequately regulating their eligibility would prevent future harms and subsequently remedy the present exclusion of this class of children. [297]

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[287] *Organization: International Labour Organization* 2010 The South African LED Networking Association (http://led.co.za/organisation/international-labour-organization-ilo,html (09-11-2014)).
[288] Horsten (n 31) 107.
[289] n 169 above.
[290] n 169 above.
[291] Ben-Israel (n 128) 148.
[292] Social Security (Minimum Standards) Convention 102 of 1952.
[293] Horsten (n 31) 107.
[294] Ben-Israel (n 128) 146.
[295] The International Labour Organization provides that through its mission and objectives, "the Organisation is devoted to promoting social justice and internationally recognised human and labour rights, pursuing its founding mission that labour peace is essential to prosperity. " (http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm (19-05-2015).
[296] n 292 above.
[297] According to Mpedi, "Pertinent social security issues in South Africa" (2008) 6, social security should not only be concerned with cash benefits (curative), but that it should also be preventative and remedial in nature.

3.1.2 United Nations Convention on the Rights of the Child

Children, due to their vulnerability, require much greater legal protection than adults, where their best interests will always be paramount.[298] Ratified by countries worldwide, the Convention on the Rights of the Child 1989 can be said to be the most widely accepted human rights instrument yet.[299] This overwhelming normative consensus affirms a shared and welcome global recognition of the rights of the child.[300] It indicated increasing support and acceptance by the world community of the need to promote and protect the rights of the child.[301] This convention gives rise to legally binding norms and principles, and sets international standards to which member states must comply by means of national legislation and policy.[302] It is for this reason that the Convention on the Rights of the Child was drafted and which South Africa has ratified.[303] Thus despite children's rights already having been guaranteed in other general human rights conventions,[304] the Convention on the Rights of the Child showcases a comprehensive compilation of child-specific rights.[305] The convention, which can be seen as the most important legal instrument for the promotion of children's rights, including the right to every child to benefit from social security,[306] is used as the yardstick for the best interests of children in all matters concerning children.[307] The convention defines a child as any human being under the age of 18, unless a particular nation's laws set an earlier age for attaining majority status.

Furthermore, despite the convention placing the primary responsibility on the parents for the upbringing and development of the child,[308] it clearly states that the state parties must therefore, within their means, take appropriate measures to assist parents to implement the right to an adequate standard of living and, in cases of need, provide material assistance and support programmes.[309]

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[298] Section 28 of the Constitution.

[299] United Nations Children's Fund *Poverty Reduction Begins with Children* (UNICEF New York 2000).

[300] Rrwezaura "The concept of the child's best interests in the changing economic and social context of sub-Saharan Africa" 1994 in Alston (ed) *Best Interests of the child; Reconciling culture and human rights* 80, 82.

[301] Rrwezaura "Law, culture and children's rights in Eastern and Southern Africa" 1998 in Ncube (ed) *Law, culture and children's rights in Eastern and Southern Africa* 289.

[302] Human "Die Status van die kind en kinderregte ingevolge die volkereg" 2000 *SAPL* 89.

[303] Adopted by General Assembly Resolution 44/25 of 20 November 1989. Entered into force on 2 September 1990. South Africa signed the document on the 29 January 1993 and ratified it on 15 December 1995.

[304] Horsten (n 31) 98; For example article 10 of the International Covenant on Economic, Social and Cultural Rights, which seeks to protect the rights of families, mothers and children.

[305] n 304 above.

[306] n 304 above.

[307] Article 3 of the United Nations Convention on the Rights of the Child provides that "in all actions concerning children taken by legislative bodies, the best interests of the child shall be a primary consideration."

[308] Articles 5, 18 and 27(1) and (2) of the Convention.

[309] Article 27(3) and (4) of the Convention.

The current social security law regime inadequately regulates posthumously conceived children's access to survivors' benefits and as such falls short in providing these children with their internationally recognised and protected social security right. Despite South Africa having ratified this convention,[310] the legislature is not fulfilling the legally binding norms and principles as provided by the Convention on the Rights of the Child. The way forward for the legislature should encapsulate following the convention's instruction to its members to implement the necessary support programmes to afford posthumously conceived children an adequate standard of living, by drafting concise and clear legislation pertaining to eligibility.

4 Pertinent Regional Instruments

4.1 African Charter on the Rights and Welfare of the Child

The Preamble to the African Charter on the Rights and Welfare of the Child[311] emphasises, as a basic principle, the recognition of the unique and privileged position of children in African society and the right of children to grow up in a stable family environment.

The African Charter on the Rights and Welfare of the Child was adopted by the 26th ordinary session of the Assembly of Heads of State and Government of the Organisation of African Unity on the 11 July 1990 in Addis, Ethiopia.[312] It entered into force on the 29 November 1999, after 15 member states of the Organisation of African Unity had ratified it.[313]

The African Charter on the Rights and Welfare of the Child can be described as a noble innovation as it tries to put in place an international blueprint on children's rights in Africa. It essentially provides the basis for the domestication of children's rights by states in a bid to ensure the utmost and astute upholding of these rights across the African continent.[314] The African Children's Charter is a 'self-standing charter, which has evolved in distinct separation from the African

[310] South Africa ratified this Convention in June 1995. The state is therefore obliged to prioritise the needs of children in all programmes, services and developmental strategies.
[311] African Charter on the Rights and Welfare of the Child 1990 OAU Doc CAB/LEG/24.9/49. South Africa signed the document on the 10 October 1997 and ratified it on 7 January 2000.
[312] Heyns "*Human Rights Law in Africa"* 1999 *African Human Rights Law Journal* 38.
[313] Loyd "A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the child" 2002 *African Human Rights Law Journal* 11; Angola, Benin, Burkina Faso, Cameron, Cape Verde, Chad, Eritrea, Guinea, Kenya, Lesotho, Malawi, Mali, Mauritius, Mozambique, Niger, Senegal, Seychelles, South Africa, Togo, Uganda, and Zimbabwe had all ratified the African Children's Charter. On the other hand, as May 2013, the ACRWC has been ratified by 41 of the 54 states of the African Union, and signed by a further 9 states. The Central African Republic, the Democratic Republic of Congo, Djibouti, Guinea-Bissau, Liberia, Sao Tome and Principe, Sudan, South Sudan, Swaziland, the Sahrawi Arab Democratic Republic, Somalia, Tunisia, and Zambia have not ratified the Charter.
[314] Sillah and Chibanda (n 279) 55.

Charter on Human and People's Rights. Thus, the African Children's Charter is not a supplement to the African Charter.[315]

The African Charter on the Rights and Welfare of the Child addresses various contingencies of social security.[316] It was drafted to take into account the economic, social political, cultural and historical experience of African children,[317] and thereby provide a distinctively African framework for the protection and promotion of children's rights.[318] As such, the reason for its adoption had to do with the shortcomings of the Convention on the Rights of the Child, which as a global instrument failed to adequately identify the issues pertinent to children in Africa.[319] But nonetheless, the African Charter on the Rights and Welfare of the Child also took a leaf from the Charter of the Organisation of African Unity which recognises the elevation of human rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognised therein.[320] In general, the protection granted to children under the African Children's Charter is of a higher level than that granted by the Convention and can be seen as the African 'supplement' to it. [321]

The African Children's Charter was ratified by South Africa on 7 January 2000.[322] In so doing, the State vowed to afford every African child his or her basic human and social security rights. Yes, posthumously conception may be viewed as an international phenomenon, one that may even be novel to some South Africans,[323] but nonetheless, the children who are subsequently born out of these procedures are still worthy of having their rights promoted. Posthumously conceived children's rights and entitlements to survivors' benefits need to be explicitly expressed and provided for. The Charter recognises children as equal bearers of rights, irrespective of their nationality, birth status, sex, etcetera.

4.2 The Code on Social Security in the Southern African Development Community

[315] Loyd (n 313) 12. African Charter on Human and People's Rights adopted June 27, 1981, Organisation of African Unity Document CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)
[316] Rights of the child which enjoy protection in terms of this document are the:
"Article 5: The rights to survival, protection and development,
Article 11: The right to education,
Article 14: The rights to health and health services,
Article 15: The right not to be exploited economically."
[317] See the African Charter, Preamble para 3.
[318] See the African Charter, Preamble para 6, which declares that the virtues of African culture heritage, historical background and the values of African civilization should inspire and characterise the conception of the rights and welfare of the child.
[319] Viljoen "The African Charter on the Rights and Welfare of the Child" 2000 *SALJ* 661.
[320] Sillah and Chibanda (n 279) 50.
[321] n 320 above.
[322] Mirugi-Mukundi (n 265) 7.
[323] Cook, Dickens and Fathalla *Reproductive Health and Human Rights: Intergrating Medicine, Ethics and Law* (2003) 3.

The Code on Social Security in the SADC was approved by the Integrated Committee of Ministers in June 2007 in Windhoek Namibia.[324] It provides member states with strategic direction and guidelines in the development and improvement of social security schemes,[325] in order to enhance the welfare of the people of the SADC region, but it is not a binding document.[326]

The Code on Social Security provides that everyone in the SADC has the right to social security.[327] It further places a duty on every member state to maintain their social security at a satisfactory level at least equal to that required for ratification of the Social Security (Minimum Standards) Convention 102 of 1952.[328] However, the Code employs concepts and principles,[329] which ensure flexibility in the achievement of universal social protection by SADC countries.

The Code guarantees a right to social security,[330] both social insurance[331] and social assistance.[332] It also guarantees social protection related contingencies, amongst others,[333] death and survivor benefits.[334] The Code's duty on member states is echoed in that every citizen in the SADC who has insufficient means of subsistence to support themselves and their dependants should be entitled to social assistance, in accordance with the socio-economic level of the particular member state.[335]

The Code on Social Security in the SADC ensures social security for some vulnerable categories of persons, [336] such as women, [337] people with disabilities,[338] families[339] and amongst others,[340] children and young people.[341]

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[324] Mpedi "Molao wa thireletso ya leago ka mo go ditshaba tseo do hlabologago ta borwa bja Afrika" 2011 *De Jure (Pretoria)* 1.

[325] Nyenti and Mpedi "The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries" 2012 *PER/PELJ* 13; Article 3(1) of the Code.

[326] n 325 above.

[327] Article 4(1) of the Code on Social Security in the SADC.

[328] Article 4(3)(1) of the Code on Social Security in the SADC.

[329] According to Nyenti and Mpedi (n 325) 14 "concepts and principles such as the need for a multi-actor approach to the realization of social protection and the principle of variable geometry. The multi-actor approach to the realization of social protection recognizes that it is not only the state that is responsible for the provision of social protection; while the principle of variable geometry is the principle where a member State or a group of a Member State can move faster on certain activities and experiences learnt are replicated in other Member States."

[330] Article 4 of the Code on Social Security in the SADC.

[331] Article 5 of the Code on Social Security in the SADC.

[332] Article 46 of the Code on Social Security in the SADC.

[333] Such as healthcare, maternity and paternity, retirement and old age, unemployment and underemployment, occupational injuries and diseases, as well as political conflict and natural disasters.

[334] Article 9 of the Code. on Social Security in the SADC.

[335] Article 5(1) of the Code on Social Security in the SADC.

[336] Nyenti and Mpedi (n 325) 14.

[337] Article 13 of the Code. on Social Security in the SADC.

[338] Article 14 of the Code. on Social Security in the SADC.

[339] Article 15 of the Code. on Social Security in the SADC.

[340] Article 17 of the Code. on Social Security in the SADC ensures protection for migrants, foreign workers and refugees.

[341] Article 16 of Code on Social Security in the SADC.

Member states ensure that social insurance schemes provide protection against the contingency of death.[342] It further provides coverage for both legal and factual dependants.[343]

By posthumously conceived children not being expressly deemed eligible for survivors' benefits, South Africa as a member falls short in providing social security in the form of survivors' benefits to these children. South Africa as member state is further falling short in ensuring that every category of children, as one of the vulnerable groups, is guaranteed social protection for certain contingencies. Having agreed to meet the standards in the Code, South Africa is now obliged to bring its social security legislation in accordance with the objectives of the Code; to transform the standards into reality for all children, including posthumously conceived children. Only through satisfactory reformation will our legislation be said to be abstaining from an action that precludes the enjoyment of social security rights for this new class of children or violating their entitlements to benefits.

4.3 Southern African Development Community Charter on Fundamental Social Rights

The objectives of the SADC Charter on Fundamental Social Rights, 2003 are to facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishments of,[344] amongst others, the promotion of the establishment and the harmonisation of the social security schemes.[345]

Article 10 of the Charter provides for social protection. The Charter instructs member states to create enabling environments so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and type of employment, enjoy adequate social security benefits,[346] that should always be at the minimum essential levels of the international rights instruments.[347]

The Charter recalls the objectives of the SADC Treaty.[348] Equality of treatment and of opportunities between men and women in the area of social protection is required; as well as the development of reasonable measures to enable men and

[342] Article 9(1) of Code on Social Security in the SADC.
[343] Article 9(3) of Code on Social Security in the SADC.
[344] Article 2(1) of the SADC Charter on Fundamental Social Rights.
[345] Article 10(1) of the SADC Charter on Fundamental Social Rights. Nyenti and Mpedi (n 325)10; The Charter of Fundamental Social Rights in the SADC makes comprehensive provision for the establishment of harmonised social protection programmes throughout the Region.
[346] Nyenti and Mpedi (n 325)11.
[347] n 346 above; The Charter refers to the SADC Treaty and recalls the objectives contained in a paragraph of the SADC Treaty such as to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through SADC regional integration.
[348] Article 6 (c) of the SADC Charter on Fundamental Social Rights.

women to reconcile their occupational and family obligations.[349] Furthermore, the protection of children is emphasised.[350]

As discussed in chapter one, assisted reproductive technologies (ART) have and are affording many couples who had lost hope in having children a 'second chance'.[351] Some, if not most of the men and women employing these ARTs find themselves working in formal employment. Thus, if such individuals are making contributions to the necessary South African social insurance schemes, they as employees have a right to believe that in the event of their death, their dependants, whether conceived posthumously (if that was his/her wish), will be protected and eligible for survivors' benefits. Hence, the current laws regulating survivors' benefits are neither enabling every worker to be able to reconcile their occupational and family obligations, nor to work in a harmonious work environment whilst being able to enjoy adequate social security benefits.

5 Relevant private law principle

5.1.1 Marriage dissolved by death

Although a marriage is not intended to be entered into with the end thereof in sight, legally all marriages will eventually come to an end, whether by death or divorce.

Marriage in South Africa exists in a number of different forms, as a result of the diversity of religions and cultures in the country.[352] The traditional definition of marriage is a "legally recognized life-long voluntary union between one man and one woman to the exclusion of all other persons".[353] Since 1998 the law has recognised marriages, including polygamous marriages,[354] conducted under African customary law, and in 2006 South Africa became the fifth country in the world to allow same-sex marriage.[355]

[349] Article 7 of the SADC Charter on Fundamental Social Rights.
[350] Cronje, Barnard and Olivier *The South African Family Law* (2004) 149.
[351] According to Zago, "Second class children: The intestate inheritance rights denied to posthumously conceived children and how legislative reform and estate planning techniques can create equality" 2014 *Law School Student Scholarship* 5, "many couples use cryopreservation when dealing with fertility issues. In some cases, some couples, married or unmarried, also elect to preserve their gametes or embryos when one of them has a terminal illness or is going to undergo a procedure that can render them sterile. Military couples have also elected cryopreservation before deployment in the event that they fail to return home."
[352] *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC).
[353] The Free Dictionary defines "Polygamy" as: "Marriage to more than one person at the same time. The most common form of polygamy is where a man has several wives. A less common form, where a woman has several husbands." (http://www.thefreedictionary.com/)(11-05-2015)).
[354] De Vos "Customary marriages unconstitutional" 2006 *Constitutional Speaking* states that, South African customary law refers to that usually uncodified legal system developed and practisced by the indigenous communities of South Africa.
[355] "South Africa same-sex marriage law signed" 2006 *BBC News* (30 November 2006)*;* Same-sex marriage (also known as gay marriage) is a marriage between two people of the same sex.

Death dissolves a marriage, but the law also provides for various dissolutions by an order of the high court. [356] A natural person's legal subjectivity is terminated by his or her death, such that the deceased no longer has legal rights or duties, and – obviously – no capacities.[357] A dead body is thus only a legal object or 'thing', but there are, in the interests of public health and out of respect for the dead and the feelings and sensibilities of relatives, certain protections in South African law.[358] Thus, if both legal subjectivity and a marriage contract are terminated at death, then technically, can a child or children be conceived and subsequently born out of that marriage? Furthermore, would such a child be legally related to her biological father when he or she was conceived after he died?[359] Obviously, the traditional law did not contemplate the existence of children conceived after the death of a parent, which for many centuries was a scientific impossibility;[360] thus what is clear is that posthumous conception has created modern legal complications. Nonetheless, the law must catch up with medical developments to ensure that these children are adequately provided for.

Currently, the legal problem putting posthumously conceived children's legal standing in question is that in many legislations, these types of children do not fit into the prescribed definitions of what a "child" or dependant" is. Currently, laws are only providing for children conceived during the deceased parent's lifetime, by clearly dictating for their eligibility of entitlements.[361] Thus the legal problem is not caused so much by the question of a genetic-tie between such a child and its deceased parent, but rather in the fact that according to the law, as written, this genetic-tie should not be in existence, as it is not being provided for. What is morally disturbing is that posthumously conceived children are being marginalised due to the state applying an outdated set of laws to a novel set of facts. Accordingly, a child who is one hundred percent genetically the child of a deceased person should not be denied any recognition as such in the eyes of the law.[362]

The idea of post mortem and subsequently, posthumously conceived children not being well known, especially in the legal field, lends to the urgency for the South African legal system needing to reform the legislation pertaining to this class of children's eligibility for social security, legal standing and inheritance rights, to name a few. Simply ignoring their existence is not going to work, especially due to the reality that reproductive technologies will continue to

[356] Besides death, the other grounds for the dissolution of marriage include: divorce, presumption of death.
[357] Robinson, Horsten, Human, Coetzee *Introduction to the South African Law of Persons* (2008) 34. The form of death which terminates legal subjectivity is somatic death, which occurs when the brain permanently ceases to function.
[358] Robinson, Horsten, Human, Coetzee (n 357) 42-43.
[359] *Beeler v Astrue,* 651 F.3d 954 (8th Cir. 2011).
[360] Grossman "A growing debate over the rights of posthumously conceived children: Part one in a two-part series of columns" 2011 (https://verdict.justia.com/2011/09/06/a-growing-debate-over- the-rights-of-posthumously-conceived) (23-05-2015)).
[361] Zago (n 351) 6.
[362] Zago (n 351) 10.

develop and, as long as they are out there, individuals will continue to utilise them.[363]

6 Concluding remarks

As early as 1866, a scientist studying the physiology of sperm cells speculated that someday "a man dying on the battlefield may beget a legal heir with his semen frozen and stored at home."[364] Fast forward to today, the technology making it possible for that dying man to beget a biological heir is an accepted and celebrated part of the current medical landscape.[365] The medical phenomenon, that is, posthumously conceived children, is a reality that is here to stay, and as such, a medical reality that the South African social security survivors' benefits legal system needs to become acquainted with. As it stands, the legislative framework for current survivors' benefits is in an unenviable condition, consisting of what Goodwin describes as "outdated statutes and common law ideas".[366] The negative implication of this is that the exclusion of posthumously conceived children could create the impression that the state is undermining children's interests and rights.[367]

Without a shadow of doubt, the Constitution in all its supremacy comprises more than sufficient rights and protections required to safeguard the best interests and welfare of posthumously conceived children.[368] Not only does the Constitution declare that any action inconsistent with it shall be deemed invalid,[369] it further provides clear ways in which the legislature can identify red flags[370] if a constitutional right is being infringed, either by way of an action or an omission. One of the glaring problems pertaining to posthumously conceived children's legal standing is that current legislatures are applying outdated laws[371] to determine the rights of individuals created from modern day technology.[372] These children are no less human and are entitled to be treated for exactly who they are: genetic descendants of their parents.[373]

A comprehensive reformation of the current survivors' benefits regime is needed in order to:

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[363] n 12 above; Lewis "Dead men reproducing to the existence of afterdeath children" 2005 *George Mason Law Revi*ew 407.
[364] Candidate "Late fathers' later children: Re-conceiving the limits of survivor's benefits in response to death-defying reproductive technology" 2014 *Vanderbilt Journal of Entertainment and Technology Law* 1015 cited Anger "Cryopreservation of sperm: Indications, methods and results" 2003 *Urology* 1079.
[365] Sparrow "Orphaned at conception: The uncanny offspring of embryo's" 2012 *Bioethics* 173.
[366] Goodwin (n 9) 260.
[367] Goodwin (n 9) 252.
[368] Both in its entirety and through its Bill of Rights.
[369] n 18 above.
[370] In the form of the listed grounds of unfair discrimination.
[371] Current outdated laws pertaining to children are the law of succession, person and family law in regards to ones legal standing and social security law in regards to survivor's benefits.
[372] Zago (n 351) 31.
[373] n 372 above.

- Prevent any constitutional challenges that the regime is currently facing and may face in the future. Currently due to the lack of express laws pertaining to posthumously conceived children's eligibility, a whole array of their constitutionally protected human rights is being infringed. Thus first and foremost, a comprehensive reformation of the current survivors' benefits is imperative in aligning the current unsatisfactory survivors' benefits regime with all the Constitution has envisaged for the Republic of South Africa and its citizens.

- Secondly, it is needed in order to eradicate and remedy any current factual or legal circumstances creating remembrance of South Africa's past historical disadvantages and material inequalities. Prior to the destruction of the apartheid era, South Africa was characterised by its unfair discrimination, marginalisation and stigma towards certain groups of society, whilst glorifying and protecting certain other group(s). In the current democratic dispensation, any unfair classification of any group is viewed as being constitutionally unenforceable. As it stands, posthumously conceived children are not being treated like other categories of children. One could argue that this class of children is being unfairly discriminated against, whilst the social security survivor's benefits are glorifying the other categories of children. One of the implications of this exclusion is that, like in the apartheid era, it is reminiscent of when certain legally and societally misunderstood groups were being robbed of their right to equality and human dignity, due to circumstances way beyond their control.[374] Furthermore, it seems as if these children, due to being conceived and born after the death of a parent, are being legally treated in the manner in which illegitimate children were handled in the past.

- Thirdly, this reformation is needed in order to fulfill and meet the overall objective behind the inclusion of survivors' benefits within the social insurance scheme. The main objective was to create that financial safety net in the event that a bread-winner of a family was to die. The State was not guaranteeing that the family would continue to live in the exact same manner prior to the death, but, if anything, were providing for death and survivors' benefits in order to afford the dependants a chance to live a dignified life. Posthumously conceived children should also be granted such a chance to live a dignified life. This will only be possible when all the schemes achieve consistency by deeming this new class of children eligible for survivors' benefits.

[374] One such example: One could argue that, in the same way that black people, as a group, were being oppressed and discriminated against on the basis of their skin colour – which is a circumstance out of one's control, posthumously conceived children, as a group, are also being discriminated against due to circumstances beyond their control.

- South Africa as a member has also ratified some of the most influential conventions, charters and codes advocating for the international communities maintainance of satisfactory levels of social security in their respective countries. It is thus safe to say that, combined, the above-mentioned international and regional instruments further recognise children as subjects and equal bearers of rights, with provisions aimed at protecting the equal rights of all children, irrespective of their religion, race, nationality or birth.[375] Thus, the only logical way that this country's social security survivors' benefits legislative framework will be on par with the international and regional instruments' norms and principles by which it is legally bound, will be to adequately reform posthumously conceived children's eligibility to survivors' benefits. Only once this has been carried out, will it be able to be said that these children's welfare and best interests were considered paramount; or that South Africa is indeed raising and maintaining adequate social security levels. Thus, it can be concurred that despite these instruments not specifically providing for "posthumously conceived children" – due to the unlikelihood that the respective drafters could possibly have envisioned such a category of children at the time of their respective adoptions,[376] the legislative intent does indeed provide for and protects posthumously conceived children.

- Lastly, a comprehensive reformation, detailing the rights and eligibilities of posthumously conceived children, will fundamentally assist in changing the current legislative trend to apply outdated laws to a modern set of facts, realities and rights created by ever developing reproductive technologies. Only then will this class of children and all interested parties know their legal standing, their rights to inheritance and their entitlements to social security.

[375] Sabatello (n 13) 41.
[376] Sabatello (n 13) 42.

CHAPTER THREE
RELEVANT FOREIGN EXPERIENCES WITH THE SOCIAL SECURITY ENTITLEMENTS OF POSTHUMOUSLY CONCEIVED CHILDREN

1 Introduction

With the emergence of modern reproductive technology, freedom of choice has not guaranteed freedom from legal confusion.[377] The recuring question as to whether posthumously conceived children are entitled to social security survivor's benefits, amongst other legal rights, has indeed brought about bounds of international confusion. This international confusion has stemmed from the fact that the current statutory and common law legal framework of many jurisdictions "revolves around the idea that the parent–child relationship is created by a man and woman having sexual intercourse and a child being born as a result".[378] However, with the rapid advances in reproductive technology, this concept is clearly antiquated and is now in drastic need of reform, primarily because assisted reproductive technology has made, and can make, a deceased man 'fertile' for another 'lifetime'.[379] As such, it is not only South Africa within the international legal community that has unsatisfactorily responded to the challenges presented by this class of children, but rather, it is an international 'crisis' where a lack of legal uniformity or clarity seems to exist in many jurisdictions.

2 Brief history

Assisted reproductive technologies are relatively new in South Africa, with the first *in vitro* fertilisation 'test tube' baby being born in 1984.[380] Internationally though, assisted reproductive technology practices date considerably further back, and the possibility of conceiving human beings by artificial means has a long history.[381] The first report of artificial insemination was in 1770.[382] "By 1986, it was estimated that as many as 20 000 women were artificially inseminated each year in the United States."[383] Whilst on the 25th July 1978,

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[377] Minor "Posthumously conceived children and social security survivor's benefits: Implications of the ninth circuit 's novel approach for determining eligibility in *Gillett-Netting v Barnhart* 2005 *Golden Gate University School of Law Review* 85.

[378] Schleringer "Assisted human reproduction: Unsolved issues in parentage, child custody and support" 2005 *Journal of Missouri Bar* 22.

[379] n 6 above.

[380] Professor Thinus Kruger's research and fertility treatment resulted in the birth of South Africa's first 'test tube' baby (www.aevitas.co.za/team-prof-thinus-kruger-html (12-8-2014)).

[381] Alberta Law Reform Institute "Report for discussion 23: Succession and Posthumously Conceived Children" 2012 3.

[382] n 381 above.

[383] Jhordan C v Mary K 224 Cal. Rptr 530, 532 n.l (Cal Ct App 1986).

England was the first country in the world to see the first birth of a 'test tube' baby, Louise Joy Brown, as a result of *in vitro* fertilisation.[384]

The first scientific inklings of cryopreservation were in 1949, when it was first made possible to freeze sperm for later use.[385] The first known media report of a posthumously conceived child, Milo Casali, was in 1977 from Cambridgeshire, United Kingdom.[386] A frozen sperm was used to conceive him nine months after his father's death. Though other posthumous conception media reports did occasionally surface, determining the exact number of children conceived posthumously through assisted reproductive technology would be impossible, due to the private nature of reproduction matters in general. However, 32 years later in March 2009, a baby girl was born using sperm which had been frozen twenty-one years earlier.[387] Since then, numerous cases of embryos being implanted after having been frozen for a decade have been reported,[388] with more recently a baby being born after using a sperm that had been frozen for 28 years.[389]

Based on the information provided, it is easy to ascertain that a substantial number of years have lapsed since assisted reproductive technologies were first developed and subsequently the possible number of posthumously conceived children born as a result of them internationally is also substantial. Thus, the impression created by the United Kingdom (the UK) and the United States of America (the U.S.A.) would be that both these countries would have their respective posthumously conceived children's legal framework in topmost order. From a South African social security law perspective, the general assumption would be that the U.S.A and the UK have legal frameworks that exceptionally regulate these children's entitlement to social security survivor's benefits, inheritance rights, legal capacity, etcetera. Furthermore, it could be assumed that both these countries would have a legal framework that other countries may use as a yardstick when initially dealing with the challenges presented by this class of children. But exactly how true are these assumptions?

At first glance, these assumptions are not entirely true or correct. Despite having been in the 'posthumously conceived children's game' for much longer than other countries, both the UK and U.S.A. social security survivor's benefits legal frameworks are far from being perfect. The possible reason being that posthumous conception and posthumously conceived children have been and keep raising many thorny and troubling questions which the courts are still

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[384] n 3 above.
[385] Greenfield "Dad was born a thousand years ago? An examination of post-mortem conception and inheritance, with a focus on the rule against perpetuities" 2007 *Minnesota Journal of Law, Science and Technology* 277.
[386] Bills "The ethics and legality of posthumous conception" 2005 *Southern Cross University Law Review* 2.
[387] n 381 above.
[388] Genesis Fertility Clinic "How long can you freeze sperm?" (www.genesis-fertility.com (5-8-2014).
[389] n 388 above.

grappling with.[390] As clearly reflected by the legal battles in countries such as the United States of America, Australia, the United Kingdom and France.[391]Other developed nations, such as Israel, have formulated policies dealing adequately with posthumous conception and posthumously conceived children that the United Kingdom and the United States could implement.[392]

In the same breath, these assumptions are to some degree true, in that these countries can be used as legal yardsticks. Although the United States of America is a federal country and regulation is thus subject to and varies from one state to the other, there are invaluable lessons to be learnt at state level. The United States of America in particular,[393] despite its' laws pertaining to posthumously conceived children's entitlement to survivor benefits being riddled by inconsistent case-by-case determinations of courts, constitutional and legislative scrutiny and antiquation,[394] has a passable current social security survivor's benefits legal system tailored specifically for posthumously conceived children. [395] Despite this, these very inconsistencies and short-comings experienced by the United States legal system yield imperative legal lessons. South Africa in particular, due to it being silent on this matter, can draw lessons and utilise the United States current legislation as a model.

3 Policy considerations: ethical and legal concerns

As previously mentioned in chapter one, the research is solely a legal one, but due to the inevitable complex moral/ethical considerations involved, this particular chapter will briefly address these considerations, where necessary and relevant. Ethical and legal considerations are a very important focal point in the determination of whether posthumously conceived children are indeed

[390] Ewelukwa "Posthumous children, hegemonic human rights, and the dilemma of reform – conversations across cultures" 2008 *University of Arkansas School of Law Hastings Women's Law Journal* 241.
[391] n 390 above.
[392] In Droghazi (n 2) 1602 reference is made to other countries which have also addressed posthumous conception, for example, Germany, Sweden, Canada and Australia. Western Australia prohibits the use of someone's gametes after death and requires any existing gametes be destroyed within one year of the donor's death. Conversely, Israel allows a surviving wife to use embryos, created with her husband's sperm, for up to one year after his death, regardless of his consent. If the wife dies, Israel does not allow another woman to use the embryo.
[393] To be discussed in great length later in this chapter.
[394] Star "A matter of life and death: Posthumous conception" 2004 *Louisiana Law Review* 614.
[395] According to The U.S. Legal System: A Short Description *Federal Judicial Centre* 1, "the U.S.A Constitution establishes a federal system of government. The Constitution gives specific powers to the federal (national) government. All power not delegated to the federal government remains with the states. Each of the 50 states has its own state constitution, governmental structure, legal codes, and judiciary. The U.S Constitution establishes the judicial branch of the federal government and specifies the authority of the federal courts. Federal courts have exclusive jurisdiction only certain types of cases, such as cases involving federal laws, controversies between states, and cases involving foreign governments." Due to the 50 different states within the United States each having their own state constitution, governmental structure, legal codes, and judiciary serves as the biggest reason behind why its national legal systems may be riddled with inconsistent case-by-case determinations of courts.

entitled to social security survivors' benefits, and if so, to what extent. This is true for two main reasons:

The first reason encompasses the main theme of this research thus far. These ethical and legal considerations in one way or the other play a pivotal role, in that they may affect or influence individuals during the policy making stages, or they may consciously or unconsciously affect judges when they are faced with the legal option of setting new precedents. These moral or legal concerns play such an important role in that if they are not balanced accordingly, and one consideration is given too much weight over the other(s), that the implications are that these children may continue to find themselves in prejudicial legal positions simply because of the 'unconventional' time in which they were conceived. The reality is that, at best, the majority of international legal systems continue to implicitly deny posthumously conceived children their social security and inheritance rights by utilising conventional social security laws and inheritance laws.[396] Or at worst, posthumously conceived children are negatively affected by unbalanced ethical and legal considerations because some countries or states, possibly out of the fear of disrupting estates, or due to the perceived 'problems' that these children bring to the existing law, expressly prohibit granting posthumously conceived children social security survivor's benefits, inheritance rights, etcetera.[397]

The second reason as to why it is important to critically assess the ethical and legal considerations involved is due to fact that before the 'era of posthumously conceived children' ever existed or was ever contemplated, it could be said that together, the social security legal systems, succession legal systems and person's and family legal systems were all coherent, in as far as dealing with children born subsequent to the death of a parent(s). It can further be said that the various interests that were inevitably involved under such circumstances were all adequately protected; hence, no conflict of interests ensued. The various interests involved when determining posthumously conceived children's entitlement to survivor's benefits, include important parties such as siblings, the State or states, taxpayers in the context of social security benefits, and the deceased himself. Due to the ability for reproductive material to be stored for indefinite periods, [398] the lingering possibility that there might be a posthumously conceived child sometime in the unknown future has until now caused growing legal concern.[399] In the current legal reality though, the medical innovation that is posthumous conception and subsequently posthumously conceived children has caused a disturbance with this coherence, thus resulting in these various interests being in conflict with posthumously conceived children's interests.

Star puts it well in the Louisiana Law Review when she writes:

[396] n 394 above.
[397] n 394 above.
[398] Mpedi (n 12) 8; Bills (n 386) 16, 17.
[399] Mpedi (n 12) 8.

> Posthumous conception creates a unique competition between state and personal interests. In determining how best to resolve the problems faced by posthumously conceived children, a legislature must examine and attempt to balance the conflicting legal interests of the state, the child and the decedent. Traditional filiation and inheritance consider only the state's interests, while the interest of the child and the interest of the deceased father are ignored. Nonetheless, to grant posthumously conceived children unrestricted legal status would be to disregard the state's interests. The interests of all involved must be sufficiently addressed in order to achieve fair and effective legislation.[400]

4 Policy considerations: The various competing interests involved

We live in a society comprising persons with different belief, cultural and religious systems.[401] Hence the different views on posthumous conception. Posthumous parenthood is generally frowned upon by some, due to it being viewed as an inability or resistance to accept the inevitability of death.[402] The critical assessment of posthumously conceived children's entitlements and rights, whilst balancing the rights of the other various interests involved, is a subject that has been discussed at length by many academics and a matter that has been extensively argued before the courts in the United States of America.[403] Hence, due to the aim of this chapter being primarily to ascertain the lessons that the South African legal system can learn and effectively implement, particularly from the United States legal system when determining posthumously conceived children's entitlements to survivor's benefits – the various other interests involved when such a determination is made, will be looked at and discussed below.

4.1 The psychological welfare of the child argument

One of the most-cited arguments against postmortem conception and consequentially against posthumously conceived children's entitlement to benefits is the argument of 'the single-parent hypothesis'.[404] This hypothesis rests on the premise that a child born posthumously without a living father and raised by only one parent will be adversely affected.[405] Based on this hypothesis, can it thus be honestly argued that postmortem conception advances the interests of children in any way, due to the potential of the child being intentionally born into "inevitable fatherlessness" as asked by Justice Higgins in the Australian case of *Warren Andrew Gray.*[406] As such, the argument of the

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[400] Star (n 394) 622. Schiff "Arising from the dead: Challenges of posthumous procreation" 1997 *North Carolina Law Review* 901, 904.
[401] Schiff "Arising from the dead: Challenges of posthumous procreation" 1997 *North Carolina Law Review* 901, 904.
[402] n 401 above; Grazi and Wolowelsky "Parenthood from the grave" 2001 *The Jewish Spectator* (http://.daat.ac.il/daat/english/ethic/gravre_1.htm) (02-02-2015).
[403] To be discussed extensively below.
[404] Williams "Over my dead body: The legal nightmare and medical phenomenon of posthumous conception through postmortem sperm retrieval" 2012 *Campbell Law Review* 194.
[405] n 404 above.
[406] Ewelukwa (n 390) 252; *Warren Gray Andrew*, (2000) 117 A Crim R 22, 29 (Australia).

single-parent hypothesis seeks to highlight the psychological difference between children raised in traditional families and posthumously conceived children. "Children who spend their entire childhood living with their married, biological parents experience, on average, fewer academic, behavioral and social problems during both childhood and adulthood than those who spend time in other family types." [407] As such, the argument seeks to highlight the unfairness and undesirability of exposing an innocent child to inevitable fatherlessness.[408]

The second argument relating to the psychological welfare of the child deals with the potential embarrassment or more severe emotional problems that this class of children may suffer due to the child and/or community knowing the circumstances surrounding his or her conception.[409] This very argument was touched on in the *MAW v Western Sydney Area Health Service* case when Justice O'Keefe held: "Furthermore, should the circumstances of the child's conception become known there would be people in the community who would tend to regard the child to be different – not a happy situation, especially for a child."[410]

The seminal case in the American judiciary system encapsulating both the points [411] discussed under the psychological welfare of the posthumously conceived child is the *Hecht v Superior Court* case.[412] William E. Kane, the deceased in the matter, who committed suicide on October 30 1991, left behind the most extraordinary final wish for his live-in girlfriend, Deborah E. Hecht. Prior to his death, in the very same month of October, Kane made a deposit at a sperm bank and also signed an "Authorization to Release Specimens" form, which specifically instructed the sperm bank to release his vials to Hecht or her physician.[413] He further executed a will that expressly stated that his intention and wish was for Hecht to be impregnated with his sperm, before or after his death.[414] Another bizarre aspect of Kane's final wish was the letter he had written to all his children, including his future, as yet unconceived child[ren] where he expressed and conveyed his deep love and paternal connection.[415]

The court in the Hecht case unfortunately refused to decide whether a posthumously conceived child would be adversely affected due to being brought into the world with no chance of ever meeting his/her father, stating that it is not

[407] Magnuson and Berger "Family structures states and transitions: Associations with children's wellbeing during middle childhood" 2009 *Journal of Marriage and Family* 575.
[408] n 390 above.
[409] *Warren Gray Andrew* (2000) 117 A Crim R 22. 29 (Australia).
[410] *MAW v Western Sydney Area Health Service* (2000) NSWSC 358 at 43, 44.
[411] The two points made under the psychological welfare of the child argument are the single-parent hypothesis and the potential of the child experiencing embarrassment of more serious emotional problems as a result of being aware of his conception.
[412] *Hecht v Superior Court* 16 Cal. App. 4th, 20 Cal.Rptr2d (1993).
[413] *Hecht* (n 412) 279.
[414] *Hecht* n 412) 276-277.
[415] *Hecht* (n 412) 277. In a letter addressed "To my Children" and intended to be read after his death, a portion of it read as follows: "I address this to my children, because, although I have only two…it may be that Deborah (Hecht) will decide – as I hope she will – to have a child by me after my death. If she does, then this letter is for my posthumous offspring, as well, with the thought that I have loved you in my dreams, even though I never got to see you born… I wanted to leave with more than a dead enigma that was your father."

the judiciary's role to inhibit the use of reproductive technology when the legislature has not seen fit to do so.[416] Regardless though, Kane's conduct of depositing his sperm and then making his intentions clear for Hecht to have his child posthumously in both the authorisation to release form and his will, feeds right into the single-parent hypothesis. The posthumously conceived child born from this final wish would be born into 'inevitable fatherlessness' and thus be adversely affected, as the hypothesis states. Furthermore, as touching as Kane's letter specifically addressed to his unborn future child may be, it nevertheless does not detract from the painful or even embarrassing feeling and reality, that all he, as a posthumously conceived child, has as a concept of a father, is a 'dead father's letter from the grave'.[417]

It is important to note that as much as the 'psychological welfare of the child' is an essential argument to be considered, it is not however a solid argument. The main reason being that it is not a complete guarantee that all posthumously conceived children will be adversely affected due to the circumstances of their conception. Numerous studies undertaken with the aim of proving the harmful effects suffered by children raised in single-parent homes have shown,[418] however, that children are more likely to suffer harmful effects of a single-parent home when such a home is ineffectively financed.[419] This very point alone further highlights the importance of ensuring that posthumously conceived children are provided with social security benefits. Furthermore, children may also suffer socially and psychologically from being in a single parent home due to other factors. Single parents must juggle more responsibility than their counterparts in husband and wife families; and social and psychological problems may result in these children due to the decreased amount of attention given by their parent.[420] Another imperative point that the single-parent-hypothesis elects to pay no attention to is the reality that single parents are the norm in today's society. Due to about 16% of children worldwide currently living in a single parent household,[421] nearly half of all children under the age of eighteen will spend time in a single parent home.[422]

The 'psychological welfare of the child' argument also falls short in that there exists the real possibility that posthumously conceived children may not experience embarrassment due to the circumstances of the conception. It fails to consider that the psychological harm suffered by posthumously conceived

[416] *Hecht* (n 412) 291.
[417] Ewelukwa (n 390) 252.
[418] n 399 above.
[419] According to Magnuson and Berger (n 407) 575 – 576, "first, on average, two-biological-parent families have higher household incomes and more assets than other family types. Low incomes constrain parents' ability to purchase goods and services for their children, thus reducing the quality of children's home and out-of-home environments. Economic hardship may also increase parents' psychological distress and reduce sensitive caregiving. As a result, low income family incomes may adversely influence children's cognitive development and behavior."
[420] Magnuson and Berger (n 407) 576.
[421] Rampell "Single parents, around the world" 2010 *The New York Times* (http://economix.blogs.nytimes.com/2010/03/10/single-parents-around-the-world/?_r=0 (21-08-2014)).
[422] Magnuson and Berger (n 407) 575.

children may actually be no greater than the harm suffered by a child whose father died before his or her birth, or by a child whose father dies while he or she is still young.[423] This argument and numerous judgments further fail to take into account the fact that as much as the child's birth would be different from the norm, that such was the case with the birth of the first *in vitro* fertilisation baby in 1978, it is a procedure now widely accepted by society.[424] At this rate, it would be safe for one to assume that the single-parent-hypothesis is slowly becoming moot.[425]

4.2 Protection of the taxpayers interest

The American Social Security Act[426] was passed in 1935 as Congress's efforts to promote economic stability following the Great Depression.[427] The act was amended in 1939 (the Amendments Act).[428] It created survivor's benefits for children whose working parents had died.[429] Other eligible survivors included widow(er)s, the mother and father of the insured's child and the insured's parent.[430] As such, the Amendment Acts'[431] main objective was to fill the financial deficit that would be felt by the deceased wage earner's family. Now, fast track to 2014, in today's economy, possibly more than ever, the modern family is faced with an ever intensifying worry and need for financial security with the addition of children.[432] Given the hefty costs attached to raising a child, the act of parents and potential parents searching to employ all available means of income has become the norm.[433] As such when a parent/spouse passes away, the economic hardship of raising a child worsens for the surviving parent.[434] Under such financially tough circumstances, it is evident to see that the Amendments Act's main underlying objective, as when passed in 1939, in replacing the lost financial support of a deceased working parent,[435] is still extremely important and relevant today, maybe even more so.

Since social security benefits are provided by the federal government,[436] there is a duty to consider the interests of taxpayers. The premise of the 'interests of the

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[423] Star (n 394) 624.
[424] Bills (n 386) 6.
[425] Williams (n 405) 196.
[426] Social Security Act of 1935. The act was passed in order to provide a continued income to workers after retirement (Kennedy (n 11) 826).
[427] Kennedy (n11) 826.
[428] Social Security Act Amendments of 1939 (hereafter Social Security Act).
[429] Kennedy (n11) 826.
[430] Droghazi (n 2) 1598.
[431] Social Security Act
[432] Beyer *Article on posthumously conceived children: Wills, trusts and estates prof blog* 2014 (http://lawprofessors.typepad.com/trusts_estates_prof/2014/03/article-on-posthumously-conceived-children (06-03-2014)).
[433] n 432 above.
[434] n 432 above.
[435] n 429 above.
[436] The Free Dictionary defines "federal government" as: "A federal government exits in the United State of America, which is government with a strong central powers, comprising of the executive, legislative and judicial branches." (http://www.thefreedictionary.com/) (11-05-2015)).

taxpayers' argument rests on a policy concern that posthumously conceived children should be denied social security benefits in order to avoid the necessity for the state and taxpayers to support these children.[437] Ordinarily, an individual contemplating having children is limited in his decision by the financial obligation to raise those children.[438] However, economic restraints affecting procreative decisions become less important with the knowledge that death is imminent and someone else will face the responsibility of supporting the child.[439] The question is, why should innocent and already financially stressed taxpayers themselves have to be held financially hostage by some families who decide to conceive and subsequently give birth to children, despite having known their weak financial standing prior to such a monumental decision being made. Is this fair? According to the 'taxpayers' interest argument', the Social Security Act specifically providing benefits for children of a deceased salary earner – the situation of posthumously conceived children being more likely born to a one-parent family,[440] – results not only in a financial need, but also an over-dependence on state and taxpayer funds for social security. This over-dependence, despite ultimately providing for and protecting the best interest of the child, results in an abuse of the taxpayer's interests.

Arguably the biggest rationale against the 'interests of the taxpayers' argument centres on the equal treatment of all children.[441] The law should provide the same benefits to all children.[442] Although posthumously conceived children are conceived differently to most children, they are still children and should be entitled to the same rights and protection afforded to children conceived before the death of a parent.[443] They need not be punished for the decisions taken by their parents, regardless of whether such decisions were taken in good or bad faith. Furthermore, modern commentary on the goals of social security and inheritance law have abandoned the traditional views, and have rather inclined more towards a family law stance, focusing on the needs of the surviving family members.[444] As such, questions about the relationship of parent-and-child are looked at from the vantage point of the best interest of the child,[445] as opposed to the traditional view that the state's interest alone is paramount. This very sentiment was emphasised in the *In re Estate of Kolacy* case.[446] The court, in reaching its conclusion, appealed to public policy by stating that a child, no matter how born, "is a fully fledged human being … entitled to all the love, respect, dignity and legal protection which that status requires. As such, the law should enhance and enlarge the rights of each human being to the maximum extent possible, consistent with the duty not to intrude unfairly upon the interests of other persons".

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[437] Alberta Law Reform Institute (n 381) 51.
[438] Star (n 394) 624.
[439] n 438 above.
[440] Due to being conceived posthumously.
[441] As envisaged by the Equal Protection Clause of the United States Constitution.
[442] Alberta Law Reform Institute (n 381) 50.
[443] *Woodward v Commissioner of Social Security,* 706 NE 2d 257, 17 ALR 6th 851 at 863 (Mass 2002).
[444] Alberta Law Reform Institute (n 381) 47.
[445] n 437 above.
[446] *In re Estate of Kolacy* 753 A.2d 1257 (N.J Super. Ct. App. Div. 2000).

4.3 Timely administration of estates

Posthumous conception has created the succession reality that a child[447] could make a claim against the deceased's estate years after his death. As such, the rights of beneficiaries and legatees to have an orderly and timely administration warrants huge legal consideration.[448] It comes as no surprise then, that one of the major rationales against giving posthumously conceived children inheritance rights is that the orderly administration of estates will be impeded.[449] This rationale is held in high regard by the Supreme Court,[450] where the timely disposition of estates at death has been held as a valid governmental purpose in case law.[451] The court's view is that time periods allow posthumously conceived children to inherit whilst still protecting the state's interest.[452]

The gist of the 'timely administration of estates' consideration lies in the motivation that, due to the very nature of conception of posthumously conceived children, this class of children may or may not ever be born. Hence, allowing these children to inherit could tie-up estates for prolonged periods of time, which would only deprive the existing children and heirs, should there be any, of potentially needed resources.[453] The whole uncertainty surrounding the 'whens and ifs' of posthumously conceived birth children seems to be in direct conflict with the law of succession, a law which aims to create certainty and finality through the expeditious handling of estates.[454] Therefore, the implications of an individual setting aside a portion of his estate for the benefit of a child who might never be born, could be numerous court challenges in an otherwise straightforward situation.[455] This situation could be further amplified by the possibility of posthumously conceived children making claims on estates that have already been finalised. These types of claims could result in the existing children and other beneficiaries themselves being liable, and thus ultimately receiving less than their expected inheritance.[456]

[447] The posthumously conceived child.
[448] Star (n 394) 623
[449] Alberta Law Reform Institute (n 381) 48.
[450] In the United States of America.
[451] Star (n 394) 623 above cited *Reed v Campbell,* 476 US 852, 106 Ct 2234 (1986),
"the state interest in the orderly disposition of the decedent's estates may justify the imposition of special requirements upon an (illegitimate child) who asserts a right to inherit from her father, and of course, it justifies the enforcement of generally applicable limitations on the time and manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may be an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious."
[452] In *Woodward* (n 443), the court required proof of filiation and that time limitations be established on actions against estates.
[453] n 448 above.
[454] Chester "Posthumously conceived heirs under a revised uniform probate code" 2004 *Real Property, Probate and Trust Journal* 736.
[455] Sutton "The real sexual revolution: Posthumously conceived children" 1999 *St John's Law Review* 918.
[456] Knaplund "Legal issues of maternity and inheritance for biotech child of the 21st century"(2008) *Real Property Trust Estates Law Journal* 412.

There is in existence an array of arguments in favour of the granting of inheritance rights, which ultimately serve to counter the 'timely disposition of estates' argument:

(i) Pre-termitted heir: a child or other descendent unintentionally omitted from the will of a testator.[457] Despite a posthumously conceived child not yet being conceived or born at the time of testator's death, modern pre-termitted laws in the United States of America make provision for after-born children.[458] The presumption held by these statutes is that if the child has not been expressly excluded from inheriting, then the testator unintentionally omitted him from his will. Thus such a child will be authorised by these laws to take the same share of the estate that he or she would have taken if the testator had died intestate, without a will.[459] Various academics are of the opinion that application of pre-termitted statutes should include posthumously conceived children.[460]

(ii) Best interests of the child: Another guiding principle in favour of granting posthumously conceived children succession and survivors' benefits rights is the best interest of the child principle.[461] The principle of the best interest of the child – or similar notions used synonymously, the welfare or paramountcy principle – is a comparatively new issue.[462] The principle evolves from the doctrine of welfare and wellbeing of the child,[463] with most emphasis on this principle used as a tool in law and policy making,[464] and as a national and international legal standard in child-related adjudication.[465] The current evolution is seen as a result of children's upgraded position from merely being their parent's property to being fully-fledged legal subjects or right holders.[466] According to Tobin, "under this standard a decision maker has a duty to always analyse the best interests of a child or to give a child's interest a primary consideration above other interests when deciding on any child-related issue or taking of action affecting children. Generally, the "best interest" principle is flexible, because what is considered to be best interests

[457] The Free Dictionary (http://www.legal-dictionary.thefreedictionary.com (07-10-2014)).
[458] In the case of *Reeve v Long* 91 ER202 (1964) the court allowed a child in the womb at the time of the father's death to inherit under a will.
[459] n 457 above (www.legal-dictionary.thefreedictionary.com (07-10-2014)).
[460] Bailey "An analytical framework for resolving the issues raised by the interaction between reproductive technology and the law of inheritance" (1997-1998) *DePaul Law Review* 793.
[461] See Chapter two 2.5.1 above.
[462] According to Schiratzki "The best interests of the child – In the light of normality and exceptions" 2013 *International Family Law, Policy and Practice* 8, although the best interest of a child is a comparatively new issue, occasional references to the welfare of children in legal material can be traced back to the 17th century, and more frequently to the late 19th and early 20th century.
[463] Zermatten "The best interests of the child literal analysis, function and implementation" 2010 *Working Report, International Institution for the Rights of the Child: Switzerland* (http://www.childsrights.org/html/documents/wr/wr_best_interest_child09.pdf (28-04-2015)).
[464] Ennew "A history of children's rights: Whose story" in Rethinking Childhood. Perspectives on Children's Rights 1999 *Cultural Survival Quarterly* 24.
[465] Carr "Incorporating a "best interests of the child" approach into immigration law and procedure" 2009 *Yale. Hum. Rts. & Dev. L. J.* 120, 124.
[466] Dalrymple "Seeking asylum alone: Using the best interests of the child to protect unaccompanied minors" 2006 *B.C. Third World L. J.* 131.

for one child may not be so for another child.[467]. Thus, currently it can be viewed that the social security survivors' benefits regime and inheritance laws, in its best efforts to timely distribute estates and protect the state's interests, are only considering and upholding other categories of children's best interests. This entire system as it stands needs immediate review and decision makers need to comply with their legal duties and adequately balance all the various interests involved, including the interests of posthumously conceived children.

5 Cases addressing the rights of posthumously conceived children to inherit in the social security context

The majority of case law dealing with a posthumously conceived child's right to inherit or obtain benefits emerges when a surviving spouse tries to obtain social security survivor's benefits for that child.[468] Despite the existence of the test under social security being based on whether a child would inherit under intestate state law and the Social Security Act,[469] as well as being there to aid the courts in their decision-making, the question of posthumously conceived children's eligibility for survivor benefits has been marred by conflicting results. It is very important to note that these two aids are interdependent, in that the American Social Security Administration follows the intestate succession in the particular state the child resides in. [470] Hence, irrespective of whether the underlying action may be for social security benefits, the legal analysis for deeming a child eligible for survivor's benefits under state law is the same as determining if a posthumously conceived child can inherit under intestacy law.[471]

Another aid utilised by the courts when deciding on a posthumously conceived child's entitlement for social security survivors' benefits is the definition of 'child' in the Social Security Act. The unfortunate thing though, is that sections 416(e) and 416(h), which are both found in the Act, offer two different definitions for a 'child'.

Section 416(e) defines 'child' as the 'the child or legally adopted child of an individual.'[472] Posthumously conceived children generally fit into this broad definition, due to the tendency of paternity not being disputed.[473] Alternatively,

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[467] Tobin "Judging the judges: Are they adopting the rights approach in matters involving children" 2009 *Melb. U. L. Rev.* 579, 588.

[468] Naguit (n 1) 895.

[469] n 428 above

[470] n 428 above.

[471] n 428 above.

[472] Section 416(e) of the Amendments Act. This broad definition also includes the stepchildren, grandchildren, and step-grandchildren who meet certain conditions listed in subsections (e)(2) and (e)(3).

[473] Kennedy (n 11) 827; *Capato I,* 631 F.3d at 627 held that the biological offspring of a decedent and his widow clearly fit Section 416(e)'s definition.

Section 416(h) uses narrower categories to define who may qualify as a child.[474] Furthermore, subsection 2A indicates that the Act shall apply state intestacy laws to determine whether an applicant is a 'child' of the deceased parent. Simply stated, if the applicant would be able to inherit property from the deceased parent in the state of the parent's domicile at death, then the applicant qualifies as a child for purposes of the subchapter.

Not only are sections 416(e) and 416(h) different, but what further perpetuates the issue is that it is unclear from the text how Congress intends for these two sections to interact.[475] Despite this lack of clarity being somewhat harmless in most cases, it does become problematic when a posthumously conceived child applies for benefits,[476] because, unlike other children, posthumously conceived children often fit the definition of section 416(e) but not section 416(h).[477] However, none of the additional criteria in subsection (h) apply for children conceived posthumously.[478] As such, whether posthumously conceived children are indeed eligible to inherit under a respective state's intestacy laws, will in turn be the deciding factor as to whether these applicants are 'children' under section 416(h).[479] Besides the intestacy law aspect and the definitions provided in sections 416(e) and (h) of the Act,[480] key aspects in establishing eligibility have been identified during cases in which posthumously conceived children sought social security survivor benefits. Furthermore, the key principles that could yield important lessons for the current South African social security survivors' benefits system will be deduced from each matter. All relevant case law in which these aspects where identified will be discussed below.

5.1 Hart v Shalala

The question of whether posthumously conceived children had a right to social security survivor benefits under Louisiana's intestacy laws was addressed in the early *Hart v Shalala* case.[481] Unfortunately though, despite the matter coming

[474] Section 416(h) (2) (B)-(3) of the Social Security Amendments Act. According to these subsections, an applicant is a child if: (1) the applicant's parents participated in a marriage ceremony that would have been valid for a legal impediment; (2) the insured acknowledged parentage in writing; (3) a court decreed the insured to be the applicant's parent before the insured's death; (4) a court ordered the insured to support the child because the insured is the applicant's parent; (5) the Commissioner of Social Security finds satisfactory evidence of parentage, and the deceased parent had lived with or supported the applicant while alive.

[475] n 474 above.

[476] Kennedy (n 11) 827; The court in *Gillett-Netting,* 371 F.3d shared the same sentiments and held at 595, 596 that "The Social Security Act… (does not make) clear the rights of children born posthumously."

[477] n 474 above.

[478] In *Schafer* 641 F.3d at 53 the court held that a marriage ends at death, eliminating the first possibility, and the other four possibilities required the deceased to have performed some action after the child's birth.

[479] Kennedy (n 11) 828 *see* (n 468) above. S 416(h).

[480] n 469 above.

[481] In *Hart v Shalala* No 94-3944 (E.D. La. 1994), Judith's mother filed for social security survivor's benefits for her child, who was conceived by gamete intrafallopian transfer (GIFT) and born twelve months after the death of her father. The Social Security Administration denied the claim on the ground that the child was not the father's legal child. The Administration first

before various social security administrations and being heard by the U.S.A. District Court for the Eastern District, the issue of whether Judith could adequately inherit under intestacy law was never settled,[482] which was unsatisfactory. This was due to the Federal District Court never reaching a decision because the Social Security Commissioner settled the case on public policy grounds,[483] by awarding benefits.[484] The Social Security Administration ultimately reversed its position in order to avoid a test case on the constitutional issues raised.[485] Furthermore, upon awarding benefits, the Social Security Commissioner stated that the resolution on the issue "should involve the executive and legislative branches, instead of the courts."[486]

5.2 Hart v Charter

The *Hart v Charter* case in many respects is similar to the *Hart v Shalala* case.[487] What makes the *Charter* case most significant is that irrespective of the fact that the decedent had given express consent for any posthumous conception and thus a clear intent to support any posthumously conceived child, the Social Security Appeals Council nonetheless determined that a posthumously conceived child

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reasoned that the child was not a qualified heir under Louisiana law because she was neither alive at the time of her father's death nor was she born 300 days within his death. Second, the child was also considered illegitimate because she was born more than 300 days after her parents' marriage had ended (upon the death of her father) and paternity was not proven within the statutorily required period. Third, she was unable to ever prove paternity because her father had not acknowledged her as his child before he died.
Hart appealed the administration's denial of benefits. Following a *de novo* review, the Administration Law Judge awarded the survivor's benefits to both the child and her mother, based on a biological connection between the child and her deceased father. Following an appeal by the Administration of the Administration Law Judge's decision, the Appeals Council of the Administration accepted that the posthumously conceived child was the biological child of the father, but it overturned the decision of the Administration Law Judge on the ground that the child was not dependent on her father at the time of his death.

[482] Star (n 394) 629.

[483] Minor (n 377) 94.

[484] Droghazi (n 2) 1603.

[485] *Id* 481 at 228.

[486] *Id* 481 at 255, 256.

[487] In *Hart v Charter* 79 F.3d 559 (C.A. 7 Ind 1996): In 1991, Nancy Hart conceived a daughter using the sperm of her husband who had died three months earlier. The Louisiana intestacy law required that a child be alive or born 300 days of the death of the decedent in order to be entitled to inherit. Hart, who was born more than a year after her father's death, was not legally considered an heir to his estate. Further, Hart was unable to prove paternity or that she was legitimate under the state's laws. In spite of this, at the initial hearing Hart was awarded survivor's benefits, based on the fact that she was Mr Harts' biological child. The hearing officer further considered evidence that Mr Hart had acknowledged the possibility of posthumous conception by his wife and assigned the rights to his sperm to her. The officer concluded that this indicated an intent by Mr Hart to support any posthumously conceived child and that she therefore be awarded benefits. On appeal, the Social Security Appeals Council disagreed, and reversed the award stating that the hearing officer did not base the award of benefits on the relevant state law. The Council concluded that the child was not dependent on Mr Hart, and therefore not entitled to survivor's benefits.

was not entitled to benefits.[488] Nancy Harts' daughter argued that this verdict was unconstitutional and applied for an appeal to the District Court.[489] Whilst on appeal, the Social Security Administration again reversed its verdict, dismissed the case and awarded social security survivor benefits to Nancy Hart's daughter. [490] Furthermore, just like in the *Hart v Shalala* case, [491] the Commissioner made a plea that the concerns raised by the issue should be decided by the executive and the legislative branches and not the courts.[492]

As the earliest cases that came before the courts where posthumously conceived children sought survivors' benefits, the key principles from both the *Shalala* and *Charter* matters circulate around the fact that the lack of an expressly consistent piece of legislation regulating the rights and eligibility of this class of children, ultimately led to a number of appeals and unsatisfactory decisions. Firstly, this assertion is proven by that fact that despite the deceased's clear intention being proven in the *Charter* case, entitlements were still denied because the legislation was not clear regarding the eligibility of posthumously conceived children as children. Secondly, the need for clear legislation is proven in that in both matters, awards were finally and only given in order to avoid constitutionally challenged test cases. The most important lesson to be learned is that in both matters the Commissioners made a plea for the legislative and executive branches to be more involved and promulgate the needed laws to regulate posthumously conceived children, due to the concerns and complicated issues raised by them. Thus, the South African legislature can learn from these cases that simply 'waiting it out' or 'ignoring' the existence of these children is neither satisfactory nor legally fair. Posthumously conceived children need to be expressly incorporated into the definition of who a child is.

5.3 In re estate of William J. Kolacy

Four years later in the New Jersey case of *Kolacy,*[493] the legal issue of whether posthumously conceived twin children were the heirs of the mother's deceased husband was before the court due to the twins seeking such a declaration to establish their eligibility for social security survivor benefits.[494]

Initially, the Social Security Administration dismissed the social security benefits claim, finding that New Jersey intestacy laws only deem children born prior to

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[488] Salmon "Determining the inheritance rights of posthumously conceived children" 2007 *New England School of Law (Advanced Legal Research Paper)* 5 (available at http://www.nesl.edu/research/rsguides/karen_salmon.htm (2014-03-06)).
[489] n 488 above.
[490] Wollwage-Rymut "Has science outsmarted social security? Posthumously conceived children and survivor's benefits" 2011 *Chicago-Kent College of Law Illinois Institute of Law* 9.
[491] *Id* 481.
[492] *Id* 486 at 255.
[493] *In re estate of William J. Kolacy* 753 A.2d 1257 (N.J Super Ct Ch Div 2000), the decedent had been diagnosed with leukaemia, fearing sterility from chemotherapy, he and his wife deposited his sperm into a sperm bank. About a year after the decedent died, his widow underwent *in vitro fertilization* using the decedent's sperm and gave birth to twins in November 1996.
[494] Droghazi (n 2) 1604. Concurrently, the twins were pursuing their benefits claim with the Social Security Administration.

their father's death eligible.[495] Upon appeal, the New Jersey state court looked to the state's Parentage Act,[496] which established a presumption of parentage if the man "and the child's biological mother have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment or divorce".[497] The state court firstly noted the lack of guidance on this issue, and secondly noted that the above presumption could be rebutted – thus entitling the twins to be recognised as the heirs of their father.[498] The court stated that, although the intestacy statutes' plain language seemingly prohibits the twins from being the mother's husband's legal heirs,[499] the primary legislative intent that children "should be amply provided for" in the event of their father's death must prevail over any "restricted, literal meaning" of legislation.[500] Furthermore, the court held that once paternity is established, the statute's basic purpose is to allow children to take property [or be awarded benefits] from their parents and to grant posthumously conceived children the legal status of an heir.[501]

What is most significant about this case is that the court's decision was result-oriented where an equitable solution was applied.[502] The court explained that "fundamental policy of law" should be to "enlarge the rights of a human being to the maximum extent possible".[503]

In the final analysis as regards this case, due to the uncertainty surrounding the legal status of posthumously conceived children as the children of their deceased fathers due to death dissolving a marriage, the *Kolacy* decision took the necessary efforts to address this problem. The court realised that deeming posthumously conceived children the same legal status that a normal child conceived during the lifetime of the decedent has, was a very important element, a prerequisite, to them being able to access survivors' benefits. The *Kolacy* court held that despite the legislatures' 'plain language' prohibiting benefits to posthumously conceived children, the primary legislative intent seeking to provide for all categories of children in the event of a death should be followed. Posthumously conceived children were deemed to have the necessary legal status on the grounds of public policy. Important lessons that can be drawn from the *Kolacy* matter is that firstly, aspects of public policy, human rights, and essentially equal treatment of children are paramount and are to always be

[495] *Id* 493 at 1259, 1260, in which, after the dismissal, the twins' mother filed a claim in the state courts, arguing that the children should be declared capable of inheriting under the New Jersey intestate law.
[496] (Parentage Act) New Jersey Statutes Annotated.
[497] *Id* 493 at 1262 quoting the (Parentage Act) N.J. Stat. Ann. Section 9:17-43.a (1).
[498] *Id* 493 at 1260.
[499] *Id* 493 at 1259, 1260.
[500] *Id* 493 at 1262.
[501] n 493 above.
[502] *Id* 493 at 1262 the court's application of an equitable solution permitted the posthumously conceived children to inherit from their deceased father. The court limited its statement by requiring an enlargement of rights be "consistent with the duty not to intrude unfairly upon the interests of other persons".
[503] *Id* 493 at 1263 the court furthermore emphasised that New Jersey's Legislature should resolve this intestacy question, stating that "It would be helpful for the Legislature to deal with these kind of issues".

considered. Secondly, it can be argued that *Kolacy's* analysis that posthumously conceived children are the legal heirs of their biological mother's husband was a step in the right direction in determining their legal status. What is most commendable is that this court sought to avoid applying 'outdated' laws that were never drafted with the idea that posthumous conception would ever be a reality.

5.4 Woodward v Commissioner of Social Security

The most noteworthy aspect of the *Woodward* case was that not only was more emphasis,[504] for the first time really, placed on the need for clear and unequivocal evidence of the decedent's consent,[505] but that the court achieved its aim to examine the Massachusetts intestacy rule and announce a balancing test,[506] which is one that many courts have modeled their conclusions on, where state intestacy laws do not address posthumously conceived children.[507]

In *Woodward v Commissioner,* the Massachusetts Supreme Court was faced with answering the following certified question:[508]

> If a married man and woman arrange for sperm to be withdrawn from the husband for the purpose of artificially impregnating the wife, and the woman is impregnated with that sperm after the man, her husband, has died, will the children resulting from such pregnancy enjoy the inheritance rights of natural children under Massachusetts' law of intestate succession?[509]

In reviewing this question, the court analysed the facts of the case and as such dug into the Massachusetts state intestacy laws by examining the facts by way of a balancing test.[510] The court, in order to "effect the legislature's over-all

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[504] In *Woodward v Commissioner of Social Security* 760 n.e.2d 257 (Mass. 2002) similar to *Kolacy* and *Gillett-Netting, Woodward* involved twins conceived using the frozen sperm of a deceased cancer patient. Upon discovering that he had leukaemia in 1993, Warren Woodward and his wife, who were childless, feared chemotherapy would leave him sterile. Thus, before he underwent a bone marrow transplant, the couple deposited his sperm with the hope that they could use it in the future whether or not he survived. He died eight months later. Two years later, his wife, Lauren Woodward gave birth to twin girls. The Social Security Administration rejected the mother's claims for benefits, for she had not established that the twins were her husband's 'children' within the meaning of the Act and therefore they could not inherit under Massachusetts' intestacy law. The twins' mother pursued her claim in the United States District Court for District of Massachusetts.

[505] *Id* 504 at 269, 270 the court in *Woodward* placed a need for clear and unequivocal evidence of the decedent's consent in efforts to best support the legislature's intent to prevent fraud, due to the fact that frozen semen could remain viable for up to ten years and that a person who donates genetic material may have no desire to conceive posthumously.

[506] *Id* 504 at 264, 265.

[507] Wollwage (n 490) 12.

[508] *Id* 504 at 261; Droghazi (n 2) 1605. "*Woodward* did not rule on the factual circumstances because it was answering a question certified from the United States District Court for District of Massachusetts. The question was certified to the Massachusetts Supreme Court because no precedent on this issue had been set yet."

[509] *Id* 504 at 257, 259.

[510] *Id* 505 at 264, 265. The Massachusetts Supreme Court probed into the state intestacy law by way of a balancing test of "the best interests of children, the State's interest in orderly administration of estates, and the reproductive rights of the genetic parent."

purposes," emphasised that its role was ultimately to "balance and harmonize" the competing interest of the child, the state and the deceased.[511]

(i) That posthumously conceived children would need to obtain a judgment of the best interest of the child: The court concluded that the state is firmly dedicated to protecting the rights of all children "regardless of the accidents of their births".[512] Furthermore, the court stated that it believed it would be irrational for the legislature to deny rights and protections to posthumously conceived children.[513]

(ii) The state's interest in the orderly administration of estates: The court held paternity to enable them to inherit, because this class of children was non-marital due to being conceived after the death of their father.[514]

(iii) As to the reproductive rights of the deceased parent: The Massachusetts Supreme Court held that posthumously conceived children could inherit from the deceased if Mrs Woodward could prove the following: the genetic relationship between Mr. Woodward and the twins, that Mr. Woodward had consented before his death to Mrs. Woodward using his stored sperm to reproduce posthumously, and that Mr Woodward had consented before his death to support any child born posthumously.[515]

The court suggested a disclaimer for future matters by providing that a time limit might preclude qualifying for inheritance rights, regardless of whether the above conditions were satisfied.[516]

One could observe that the noteworthy aspect of the *Woodward* decision is that, just like the *Kolacy* decision, the Massachusetts Supreme Court disregarded existing paternity and inheritance laws,[517] but rather concentrated on achieving an 'equitous outcome' for posthumously conceived children.[518] However, unlike the *Kolacy* case, the *Woodward* court went a step further by firstly protecting the interests of the decedent, by allowing benefits to be given to this class of children only if the decedent had indeed consented to the birth.[519] The state's interest is also provided for by preventing the indefinite reality attached to such claims through the inclusion of time limits. Currently, the South African social security survivors' benefits legal system can be viewed as having main consideration for

[511] Star (n 394) 634.
[512] *Id* 504 at 261; In Star (n 394) 634, the court held that "Repeatedly, forcefully, and unequivocally, the Legislature has expressed its will that all children be entitled to the same rights and protections of the law regardless of the accidents of their birth."
[513] *Id* 504 at 265 - 267.
[514] *Id* 504 at 266, 267.
[515] *Id* 504 at 269; Williams (n 404) 187. The court required the deceased's pre-mortem consent to posthumous reproduction to be "clear and unequivocal," stating that silence or equivocal indications of a desire to be a parent posthumously "ought not to be construed as consent.'" (quoting Schiff (n 401) 901,951.
[516] *Id* 504 at 272.
[517] Disregarded sections 416(e) and (h) criteria of what a "child" is for the purposes of the Act, and the court further disregarded the Massachusetts intestacy laws.
[518] Star (n 394) 635.
[519] n 518 above.

the state's interest. Thus, a satisfactory legislative framework would be one that balanced and comprehensively regulated the various interests involved.

5.5 Gillett-Netting v Barnhart

At the time of the *Gillett-Netting* decision,[520] the Ninth Circuit was the only federal court of appeals to consider whether a child conceived by *in vitro fertilization* after the death of one parent is entitled to receive benefits as a survivor under the Act.[521] More importantly, when the Ninth Circuit decided the *Gillett-Netting* case in 2004, it became the first federal circuit of appeals to interpret section 416 in a posthumously conceived child case.[522] As such, this case has had long-lasting effects on the Social Security Administration's treatment of posthumously conceived children. The ruling of the Ninth Circuit in *Gillett-Netting* is a departure from the internal Social Security Administration rulings in all cases examined, both in the outcomes and in the factors used in that determination.[523]

Rhonda Gillett-Netting's applications on behalf of her twins for social security survivor benefits from the Social Security Administration, the Administration law judge and the Appeals Council were all denied.[524] The Administration law judge, in particular held that the twins should not receive benefits because the last possible time that dependency could be determined was at the date of death of the deceased.[525]

On appeal, the Ninth Circuit reversed the U.S. District Court for the District of Arizona,[526] holding that the twins were Netting's children for purposes of the Act.[527] The Ninth Circuit reasoned that Congress included section 416(h) to the Act to offer alternative ways for children whose parents were unmarried or

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[520] In *Gillett-Netting v Barnhart* 371 F.3d 593 (9th Cir. 2004) the plaintiff, Rhonda Gillett-Netting, applied to the Social Security Administration for survivorship benefits for her twin minor children who were conceived by *in vitro fertilization* ten months after her insured husband's death. The Administration denied benefits to the children.

[521] n 428 above.

[522] The Ninth Circuit was tasked to consider whether a child conceived by in vitro fertilisation after the death of a parent was entitled to receive benefits as a survivor under the Social Security Act; Kennedy (n 11) 832. Prior to the U.S. Supreme Court's 2012 decision, *Astrue v Capato (Capato Two),* which held that the Social Security Administration's interpretation of the Act's provisions was reasonable, only four federal appellate cases had addressed the interplay of section 416(e) and section 416(h).

[523] According to Minor (n 378) 86, 87, "even those state courts whose rulings were in agreement with Ninth Circuit used different factors to determine eligibility for social security survivor benefits".

[524] *Id* 520 at 964.

[525] *Id* 520 at 595.

[526] *Gillett-Netting v Barnhart* 231 F. Supp. 2d 961 (D. Ariz. 2002) *rev'd and remanded,* 963-966. When the Social Security Appeals Council refused to review the decision, Gillett-Netting filed suit in the U.S. District Court for the District of Arizona, claiming that the denial of benefits was not supported by any substantial evidence and not in accordance with the law. The district court determined that Arizona's intestacy laws did not permit the twins to inherit from their father and that therefore they did not fit into any category of 'children' in section 416(h). It was thus held that the twins were not Netting's 'children' under the Act.

[527] Kennedy (n 11) 833; *Id* 526 at 966.

whose parentage was in dispute to be awarded survivorship benefits.[528] It stated that there was nothing in the Act suggesting that an applicant must use section 416(h) to establish parentage when it is not in dispute.[529] Therefore, it determined that it would necessarily include a biological child – because it was undisputed that the twins were the biological children of Mr Netting.[530] By electing to focus solely on the definition of 'child' under section 416(e), the Ninth Circuit felt that the twins qualified as 'children' under the Social Security Act.[531]

The court then moved to the next issue of dependency. In beginning a judgment no court had previously taken on an analysis of the fact that legitimate children are deemed dependent under the Act.[532] Hence, the children are eligible for survivor benefits without requiring reference to intestacy law.[533] The court looked to specific laws regarding legitimacy in Arizona, "In Arizona, every child is the legitimate child of its natural parents and it is entitled to support and education as if it is born in lawful wedlock".[534]

For its judgment, the court reversed and ordered that the District Court remand to the Commissioner in order for benefits to be awarded to the children.

The Social Security Administration's Response to *Gillett-Netting v Barnhart*:

- The consequences of the Ninth Circuit's opinion have had broad effects on the manner with which the Social Security Administration treats posthumously conceived children.[535]After the Gillett-Netting decision, the Social Security Administration elected to formally respond to the Ninth Circuit. The Administration claimed that despite the absence of an explicit directive, the regulations did nonetheless require the applicant to pass through a more specific definition of 'child'. In replying, the Ninth Circuit held, however, that the Administration's stance on how the regulations are to be read, was prompted by litigation and not promulgated formally in a regulation. Thus inferring that the regulations themselves do not provide for a specified mandatory interpretation of the Act. As such, in its response to the Gillett-Netting decision, the Administration issued an acquiescence ruling indicating that it would follow the Ninth Circuit's

[528] Kennedy (n 11) 833; *Id* 526 at 596.
[529] Kennedy (n 11) 833. The court held that where parentage is unquestioned, that the applicant is a 'natural child' under section 416(e) and that section 416(h) need not be considered; *Id* 526 at 597.
[530] *Id* 526 at 596.
[531] Wollwage (n 490) 14.
[532] n 531 above.
[533] Naguit (n 1) 897.
[534] Quoting the Arizona Rev, Stat Section 8-601. The court held that nothing in the Act suggests that a child who is legitimate under state law must prove legitimacy under the Social Security Act.
[535] Wollwage (n 490) 15.

interpretation *only* in states within the circuit.[536] The Social Security Practice handbook now reads:[537]

> In *Gillett-Netting* the [Ninth] Circuit court held that a child conceived by artificial means after the death of the insured is a 'child' for purposes of child's insurance benefits under section 202(d)(1) solely because he or she is the biological child of the insured. The court held that, if there was no dispute about the parentage, sections 416(h)(2) and 416(h)(3) of the Social Security Act (the Act) do not apply. Moreover, if such a child is considered legitimate under State law, we will consider the child to be the number holder's 'legitimate' child and thus dependent upon the insured for purposes of section 202(d)(d)(3) of the Act."

In finality, the *Gillett-Netting* decision sought to interpret the much debated interplay between the sections 416(e) and (h) of the Social Security Act when a posthumously conceived child was seeking entitlement to social security survivors' benefits. Under section 416(e),[538] posthumously conceived children, as legal children of the deceased, are eligible for benefits. Whilst finding themselves ineligible under section 416(h), [539] which essentially seeks to establish dependency during the lifetime of the deceased. Furthermore, subsection 2A of the Act provides that the Act will also utilise intestacy laws of the applicable state in which the child resides to determine the eligibility. Like in South Africa, the different schemes providing for survivors' benefits each contain different definitions for what an eligible "child or dependant" is, and also require dependency to be proven by the claimant. In its decision, the *Gillett-Netting* court held that because the children are the natural children of the deceased and their parents were married, then they are children for the purposes under the Act. The court held that section 416(h) and subsection 2A (intestacy law) are made use of if parentage is disputed. The lesson to be drawn here, is that despite being conceived after the death of a parent, a posthumously conceived child is nonetheless the legitimate child of its previously married natural parents, who is worthy of the law's protection and support, like other children. Factual and legal dependency need not be established in cases of posthumously conceived children, because it will be to their detriment.

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[536] Kennedy (n 11) 834. The Social Security Administration issues an acquiescence ruling whenever a decision of a U.S. Court of Appeals conflicts with the Administration's interpretation of the Act. These rulings state why the Administration's differs from the court's and how the Administration plans to apply the holding of the case going forward.

[537] Social Security Acquiescence Ruling 05-1(a), 70fed.Reg 55,656, 55,657 (Sep 27, 2005) WL 6491607 (SSA).

[538] Section 416(e) of the Amendment Act. This broad definition also includes the stepchildren, grandchildren, and step-grandchildren who meet certain conditions listed in subsections (e)(2) and (e)(3).

[539] Section 416(h) (2) (B)-(3) of the Amendment Act. According to these subsections, an applicant is a child if: (1) the applicant's parents participated in a marriage ceremony that would have been valid for a legal impediment; (2) the insured acknowledged parentage in writing; (3) a court decreed the insured to be the applicant's parent before the insured's death; (4) a court ordered the insured to support the child because the insured is the applicant's parent; (5) the Commissioner of Social Security finds satisfactory evidence of parentage, and the deceased parent had lived with or supported the applicant.

Unfortunately the Social Security Administration did not agree with the *Gillett-Netting* interpretation of the interplay between the two sections. They essentially held that the relationship between section 416(e) and 416(h) was an interdependent one – they are to be always read together, and that section 416(h) was not an alternative. The main objective behind the issuing of the acquiescence served to confirm and maintain Administration's position on the correctness of the relationship between section 416(e) and 416(h). Furthermore, the ruling essentially served to notify other jurisdictions not to follow the *Gillett-Netting* interpretation, and it served to preclude future courts from concluding, as the Ninth Circuit had, that the interpretation of the regulations was prompted by litigation and was thus irrelevant.[540] It was important to issue this ruling because the Administration maintained its intention to continue advocating its interpretation in all other jurisdictions.[541]

Besides the Administration's response, the *Gillett-Netting* decision faced some additional criticism, with one commentator stating that the holding "may increase the uncertainty that is already inherent in the application of the Act".[542] Some may argue that this statement appeared to be correct, based on the holdings in subsequent cases.[543] For almost seven years after the *Gillett-Netting* matter, no federal court of appeals addressed the interplay between section 416(e) and section 416(h), and then in 2011, three different circuits faced the posthumously conceived children plaintiffs. [544] What was noteworthy was that in all three cases involved, the only issue in each case was whether the applicants qualified as 'children' without being able to inherit under state intestacy law.[545]

5.6 Capato ex rel B.N.C. v Commissioner of Social Security (Capato I) in agreement with the Ninth Circuit

In January 2011, the U.S. Court of Appeals for the Third Circuit endorsed *Gillett-Netting*'s interpretation of the Act and denied deference to the Social Security Administration's interpretation in *Capato I.*[546] The question presented in court

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[540] Kennedy (n 11) 834.

[541] Thus the acquiescence ruling is only applicable in the Social Security Administration in the Ninth Circuit: Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Northern Mariana Islands. The remaining states are to continue examining these cases by utilising different combinations of the tests in *Gillett-Netting, Woodward,* etc.

[542] Wollwage (n 490) 15-16. Minor (n 378) 35.

[543] Wollwage (n 490) 16.

[544] Kennedy (n 11) 835.

[545] n 544 above.

[546] In *Capato ex rel B.N.C. v Commissioner of Social Security (Capato I)* 631 F.3d (3rd Cir. 2011) *rev'd and remanded sub nom* 640 at 630-631, Karen and Robert Capato married in 1999; however, Robert died from oesophageal cancer in March 2002. At the time of his death, Mr Capato resided in Florida, and his will, executed in Florida, provided for the son born of his marriage to Karen and two children from a previous marriage. The will did not contain any provisions for children conceived after his death. Shortly after Mr Capato's death, Karen Capato began *in vitro fertilization* using her husband's frozen sperm, and eighteen months after Robert's death, Karen gave birth to twins. Karen then filed a claim for survivors' insurance benefits on behalf of the twins; however, the Social Security Administration denied her application. The United States District Court for the District of New Jersey affirmed the Administration's decision. The District Court determined that the twins would qualify for survivor's insurance benefits only if they were

was whether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act.[547] The Third Circuit used the reasoning of the Ninth Circuit in *Gillett-Netting* to reverse the decision by a lower court, that a posthumously conceived child was not a 'child' under the Act.[548] The Third Circuit held that a posthumously conceived child through *in vitro fertilization* to parent's who were married, is unambiguously a 'child' for purposes of the Act, regardless of the state's intestacy laws. The court emphasised the broad interpretation of 'child' in section 416(e), which in turn made the section 416(h) limitations inapplicable because the family status of Robert Capato's biological offspring was undisputed.[549] Furthermore, the court ruled that the plain language of the Act entitles the Capato twins, whose parentage is not in dispute, to survivor benefits.[550]

The *Capato I* decision simply followed the *Gillett-Netting* decision. The court considered the surrounding facts, like existence of a marriage, and the cause of death, the court held that section 416(e) was satisfied, and thus disregarded section 416(h) and intestate succession entirely on the basis that the twins were indeed the biological children of the deceased. The court relied heavily on the broad definition of what is a child under section 416(e).

5.7 Schafer v Astrue and Beeler v Astrue in disagreement with the Ninth Circuit

In April 2011, in *Schafer v Astrue,* [551] the U.S. Court of Appeals for the Fourth Circuit held that Congress unambiguously intended applicants to satisfy section 416(h) of the Act to receive social security benefits. The court examined the Act as a whole and went on to highlight how the Ninth Circuit's opinions were inconsistent with the structure of the Act. The Fourth Circuit pointed out its

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entitled to inherit from the deceased wage earner, their father Mr. Capato, under state intestacy laws. As Robert Capato died domiciled in Florida, Florida intestacy laws applied. Under Florida law, posthumously born children may inherit through intestate succession only if the child is conceived during the decedent's lifetime. The District Court concluded that because the twins were conceived after Robert Capato's death, they could not inherit from their father under state intestacy laws; and, therefore, they also did not qualify for survivor's insurance benefits.

[547]Hellenthal and Liu "Statutory interpretation posthumous conception social security act state intestacy law" (http://www.law.cornell.edu/supct/cert/11-159 (03-09-2014)).

[548] Wollwage (n 490).

[549] Hellenthal and Liu. (n 547).

[550] Hellenthal and Liu (n 577); The Third Circuit reversed the District Court's decision, holding that "the undisputed biological children of a deceased wage earner and his widow qualify for survivor benefits without regard to intestate succession".

[551] *Schafer v Astrue* 10-1500, 2011 1378486 (4th Cir 2011). The deceased in this case, Don Schafer, died in March 1993 as a resident of Virginia. In 1999, his wife conceived a child through *in vitro fertilization* using his frozen sperm, and gave birth nearly seven years after his death. Mrs Schafer applied for benefits on behalf of the child, and the Social Security Administration denied her claim. An Administration Law Judge subsequently awarded the child benefits, but the Social Security Appeals Council reversed this decision, holding that he was not a child under the Act because he could not inherit from his father under the Virginian law. Mrs Schafer sought review in the U.S. District Court for the Western District of North Carolina, which affirmed the decision of the Appeals Council.

acknowledgement of the various family structures that arise from modern reproductive technology.[552] It held that the term 'child' cannot automatically encompass the deceased's 'natural children' simply because they are his biological offspring.[553] Furthermore, biological paternity in many situations does not denote that the child has a relationship with the parent or even an expectation of support from that parent.[554] Finally, the court relied heavily on the Act's legislative history to determine that Congress's intent was unambiguous. As the court correctly pointed out, reliance on intestate laws has always been part of the Act. Furthermore, the 1965 amendments clarify that Congress always understood that applicants must satisfy section 416(h).[555]

On August 2011, in *Beeler v Astrue,* [556] the U.S. Court of Appeals for the Eighth Circuit held that the Social Security Administration's interpretation of the Social Security Act was reasonable and entitled to deference. [557] The court addressed the issue of whether the Administration's interpretation was a permissible reading of the statute. In its response, the court assumed ambiguity and closely followed the Fourth Circuit's reasoning in *Schafer,* and even seemed to be supporting its conclusion.[558] In fact, instead of providing reasons why the statute was ambiguous, the Eighth Circuit court simply quoted the Fourth Circuit, stating that the text of the statute "could hardly be more clear".[559]

The main principle encapsulated by these cases seeks to show how having many different statutes and sections pertaining to one matter, as opposed to one uniform piece of legislation, causes interpretational problems. In these particular circumstances, the problem is heightened by the fact that the law is trying to apply laws to a novel situation that one could argue that a particular law was never intended to regulate when it was initially drafted.[560] At this point, who is to argue that any court was wrong or right in their holdings, due to the fact that

[552] *Id* 551 at 54.
[553] *Id* 551 at 54-55.
[554] In *Id* 546 at 632, the court also reasoned that if Congress intended a biological relationship sufficient, then it would not have included any of the requirements in addition to biological parentage in section 416(h)(2)(B) and section 416(h)(B) (c)(ii). As such the court refused to believe that Congress would leave such a critical term as 'child' for the Social Security Administration to interpret without further assistance.
[555] Wollwage (n 490) 17. The court stated that the decisions of the Ninth and Third circuits treated "Congress's more comprehensive efforts as a mere afterthought".
[556] *Beeler v Astrue,* 651 F.3d 954 (8th Cir. 2011). The father in this case, Bruce Beeler, was an Iowa resident who died in May 2001. His wife, Patti Beeler, conceived a child the following year through intrauterine insemination and gave birth in April 2003. The Social Security Administration denied the child's application for survivor benefits. An Administration Law Judge and the Social Security Appeals Council agreed that she was not a child under the meaning of the Act. Mrs Beeler then sued the Commissioner of Social Security, and the U.S. District Court for the Northern District of Iowa reversed the decision to deny benefits.
[557] Kennedy (n 11) 839.
[558] *Id* 556 at 963-964 held that Congress's unambiguous intent was for the courts to interpret the statute as the Social Security Administration had. The court also used similar strong language in its discussion of the Act's legislative history.
[559] *Id* 556 at 963.
[560] The novel legal situation that is posthumously conceived children's eligibility to social security survivors' benefits.

the legislative and executive branches have in the first place failed to draw up posthumous conception specific legislative. Moreover, they have failed to heed the pleas from the judiciary to address the issues of concern raised by posthumously conceived children seeking survivors' benefits.

5.8 Capato ex rel B.N.C. v Commissioner of Social Security (Capato II)

The U.S. Supreme Court in the *Capato II* matter,[561] in its efforts to resolve the conflict and inconsistencies caused by the 2011 cases,[562] granted certiorari.[563] The issue that the Supreme Court had to consider was whether posthumously conceived children were legally related to their biological fathers, for the purposes of social security survivor benefits.[564] More specifically though, the technical question in *Capato II* was whether section 416(h) provides the exclusive means for proving 'child' status under the Social Security laws.[565] Whilst Karen Capato said 'no', the Social Security Administration said 'yes'.

On May 21, 2012, the U.S. Supreme Court issued a unanimous decision in favour of the Social Security Administration, thus reversing the appellate court's decision. [566] The Court held that the Social Security Administration's interpretation, even if not the only reasonable one, was a permissible one under the Act.[567]

Upon acknowledging that "the technology that made the twin's conception and birth possible … was not contemplated by Congress when the relevant provisions of the Social Security Act … originated (1939) or when amended to read as they now do (1965)", the Court sided with the Fourth and Eighth Circuits and held that the Administration's interpretation of the Act – entitling "biological children to benefits only if they qualify for inheritance from the decedent under state intestacy law, or satisfy one of the statutory alternatives to that requirement" – is "better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime".[568] Hence, the Court determined that using the definition of 'child' in section 416(h)(2)(a) furthers the core purpose of the Act.[569]

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[561] *Capato ex rel B.N.C. v Commissioner of Social Security (Capato II)* 132 S. Ct. 2021 (2012).
[562] Namely: *Capato I, Schafer v Astrue, and Beeler v Astrue.*
[563] *Id* 561 at 2027; Edwards "Legal summaries" 2013 *Journal of the National Association of Administrative Law Judiciary* 440.
[564] *Id* 561 at 2027.
[565] Grossman "The Supreme Court on the social security rights of posthumously conceived children: State law controls family status" 2012 (http://verdict.justia.com/2012/05/29/the-supreme-court-on-the-social-security-rights-of-posthumously-conceived-children (07-08-2014)) 3.
[566] Dwyer "Inheritance rights of posthumously conceived children" 1 (http//www.cga.ct.gov/2012/rpt/2012-R-0240.htm (06-03-2014)).
[567] Kennedy (n 11) 840.
[568] Russo "Intestacy, dependency, and social security, oh my! An in-depth look at posthumously conceived children" 2013 *Law School Student Scholarship* 42.
[569] In Edwards "Legal summaries" 2013 *Journal of the National Association of Administrative Law Judiciary* 443, the court held that "If a child can take personal property from the deceased's estate under intestacy laws, the Court determined it is reasonable to assume that the child will be more

The Supreme Court then reasoned that Karen's elevation of children of married parents to some category where other criteria for parentage need not be applied, is unwarranted under current law.[570] The Court cited dictionaries, law treaties, and other statutory provisions to suggest that 'child' can have different meanings, but many of those meanings, at least today, define 'child' without regard to the marital status of the parents. Moreover, the Court questioned whether the twins were indeed the children of married parents. After all, Robert died before they were conceived, and a marriage is legally over when the first spouse dies.[571]

Thirdly, the Court held that reading the Act to rely primarily on state law regarding family status is consistent with other portions of the statute and with federal law generally.[572] Using state law ensured that the Act would cover all ['child'] applicants within Congress's contemplation, while avoiding congressional interference with family relations, an area traditionally within the realm of state law.[573] The Court also emphasised that "the paths to receipt of benefits laid out in the Act and Regulations … proceed from Congress's perception of the core purpose of the legislation".[574] Thus, despite some states explicitly providing intestate inheritance for posthumously conceived children in their intestacy laws and other states not,[575] the Court held that nonetheless it was "Congress's prerogative to legislate for the generality of cases".[576] Which it did "by employing eligibility under state intestacy law as a workable substitute for burdensome case-by-case determinations, whether the child was, in fact, dependent on her father's earnings".[577]

Finally, based on these observations, the Court held that the Social Security Administration's long-standing interpretation was reasonable and thus entitled to deference.[578] Such deference was entitled under Court's precedent in *Chevron U.S.A. Incorporation v Natural Resources Defense Council Incorporation.*[579]
After considering all these factors, the Supreme Court held that applications for child insurance benefits, as in this case, must be resolved in reference to state

likely to be dependent during the parent's life and after the parent's death. Thus, the intestacy laws help to further the overall purpose of the Social Security Act."
[570] Grossman (n 565) 3. The Court stated that nothing in section 416(e) indicates that Congress meant it to apply to children of married parents but not to those of unmarried parents.
[571] Grossman (n 565) 4.
[572] n 571 above.
[573] Kennedy (n 11) 842.
[574] Russo (n 568) 46.
[575] Kennedy (n 11) 842.
[576] n 574 above.
[577] n 541 above.
[578] n 575 above.
[579] n 571 above; In *Chevron U.S.A. Inc v Natural Resources Defense Council Inc* 467 U.S. 837-838 (1984) decision, the Court laid out the general standard for deference to administrative agencies. Deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority".

intestacy law.[580] Therefore, the Court reversed the Third Circuit's decision and remanded for further proceedings consistent with this opinion.[581]

6 Key lessons from the discussed cases that can be of relevance and value to South Africa

The greatest lesson that can be taken away is that the need for legislative reform, as opposed to the court route, is imperative. The issue of whether posthumously conceived children are entitled to survivors' benefits has been an ongoing legal matter before the U.S.A. judiciary for more than two decades.[582] The South African legislative branch should see that as an indication of how reformation of eligibility is ultimately a ball in the legislature's court. Justification for this assertion is based on the fact that in several of the discussed cases, the Commissioners and presiding officers in question had called for the legislative and executive branches' intervention. This call for intervention was yielded on the basis that the courts are not sufficiently equipped to handle the particular issues brought about by posthumously conceived children. If anything, it reinforces the reality that courts want to avoid getting involved in governmental agency decisions when possible.[583] This lesson is relevant to South Africa because modern reproductive technologies are forever developing, thus laws have to be put in place in order to be on par with the medical landscape as in yesterday, instead of playing the 'wait and see' game. Furthermore, this lesson is a valuable one because, if heeded and the legislature reforms the current social security survivors' benefits laws instead of waiting for a matter to come before court, it will serve in preventing potentially lengthy, costly, dragged-out court battles.

What can be observed from the discussed cases is that the United States of America has a uniform codified act, the Social Security Act, which provides a definition of what a child is for the purpose of, amongst others, dispute resolution regarding benefit claims. This is commendable and is of value to South Africa in that the legislature should strive to make the current social security legislative framework more uniform, preferably under one codified piece of legislation.

On the downside though, is that despite America possessing this uniform piece of social security legislation, its definition(s) of an eligible child is(are) riddled with inconsistencies. This problem is further perpetuated in that eligibility to social security benefits are tied to the child's state intestacy laws.[584] Thus, as in South

[580] Edwards (n 569) 444.
[581] n 580 above.
[582] The first judicial controversy regarding posthumously conceived children may well have occurred in Louisiana 1994 in the case of *Hart v Shalala.* Banks "Traditional concepts and nontraditional conceptions: Social security survivor's benefits for posthumously conceived children" 1999 *Loy. L.A. L. Rev.* 251.
[583] Edwards (n 569) 445.
[584] Requiring state intestacy laws to dictate the eligibility for a child's survivors' benefits perpetuates the inconsistency dilemma because each state in America has its own state specific intestacy laws. Thus where in one state posthumously conceived children are deemed eligible for

Africa, nowhere in the American laws are posthumously conceived children expressly provided for. As such, the courts have for years not been sure how these definitions and laws are to interplay, if at all. This lack of clarity is of particular importance and relevance, because, despite South Africa not having a uniform piece of legislation, the Republic's social security schemes are scattered and their definition of who is a child are as equally riddled with inconsistency upon inconsistency. Furthermore, South Africa's survivors' benefits fail to expressly provide for posthumously conceived children.

Thus, as a result of the legislative inconsistencies, the application of state intestacy laws, and the lack of categorical posthumously conceived specific legislation, the trend in the American judicial system has been and is still to apply outdated laws to a situation that was not contemplated by Congress when drafting such laws.[585] As such these outdated laws will always be detrimental to the eligibility of posthumously conceived children because they all require some sort of dependency that existed during the lifetime of the deceased. Whereas some courts have been cognisant of the unreasonableness lying in these outdated laws,[586] and chose to award benefits on grounds of policy, other courts have been less forgiving.[587] The relevance of all this lies in the fact that South African social security is currently applying outdated laws too. As extensively analysed in Chapter Two, nowhere in the current social insurance schemes or relevant social assistance pension acts are posthumously conceived children expressly or even at times,[588] tacitly provided for. Furthermore, the evidence of the datedness in the South African current social security survivors' benefits legislative framework is noticed by the schemes requirement of dependency to establish eligibility as well.

In the midst of all these negative similarities between the two social security legal systems, a silver lining exists. A paramount lesson that can be taken away is the balancing test, the yardstick, created by the *Woodward v Commissioner of Social Security* court. For the first time in the myriad cases dealing with a posthumously conceived child claiming survivors' benefits, did a court put in place an equitable standard that bore all affected parties' interests in mind. The relevance of this balancing test, equipped with its conditions for South Africa, is that currently as South Africa's social security survivors' benefits legal system

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benefits, another state can declare this class of children ineligible. This fundamentally does not promote uniformity at all. *In re Martin B* 841 N.Y.S 2d 207 (NY Sur Ct 2007), the court suggested "the need for federal initiative to separate federal entitlements from state eligibility requirements".

585 As seen in the precedent setting decision of *Capato II* (n 561).

586 For example the *Hart v Shalala* (n 481) and *Gillett-Netting* (n 520) courts "did admit that the statutes, although formulated in the past, should look to the future, especially if the future will have as its polestar the best interest of the child". O' Brien "The moment of posthumous conception: A model act" 2009 *J. Contemp. Health L. & Pol'y* 385 .

587 In both the *Schafer v Astrue* (n 551) and *Beeler v Astrue* matters (n 556), the courts sought "to strictly interpret the statutes seeking to define a child as in existence at the death of a parent." O' Brien (n 586) 385 .

588 Namely the Special Pensions Act and Military Pensions Act. Furthermore, in COIDA posthumously conceived children are not expressly provided for but one may elect to infer that they may be/are tacitly provided for due to posthumous children being provided for under the Act.

stands, one could understandably perceive that the law is only bearing in mind, and unjustly protecting, the state's interests, to the exclusion of the child's interests and with disregard of the deceased's potential interest. Hence the value of this test is that it should be used as a barometer for South Africa's legislative reform. The *Woodward* balancing test should either be implemented and incorporated into the current social security laws, or be utilised to draft an entirely new but feasible model for regulating posthumously conceived children's specific rights and entitlements. Another impressive element in the decision raised in the matter was a suggestion that time limits might preclude qualifying for inheritance rights, even if the above-mentioned conditions were satisfied.

Lastly, the assertion was made in several matters, based firstly on the fact that posthumously conceived children are the natural biological children of the deceased and secondly because a marriage contract existed between their mother and her husband, that they are legitimate for the purposes of the Social Security Act.[589] As a result of this assertion, the *Capato II* court, when handing down judgment, raised important relevant facts by questioning whether the twins were indeed the children of married parents, stating that after all, Robert died before they were conceived, and a marriage is legally over when the first spouse dies.[590] As such, they sought to dismiss such an assertion that children of married parents are automatically elevated in the eyes of the law. The relevance of this particular issue is imperative to South Africa's private law pertaining to marriage and consequently the legitimacy of posthumously conceived children. This study is of the researched opinion that *Capato I and Gillett-Netting* courts were on the right track, because the core purpose behind making such an assertion rested on the premise that in establishing legitimacy, one could further establish and deem dependency on this class of children. Posthumously conceived children being deemed dependent on the deceased is imperative in securing their entitlements to survivors' benefits because factual or legal dependency during the lifetime of the deceased is always a legal requirement. The key lesson for the South African legislature is in understanding that the *Capato II* verdict was solely based on the U.S. Supreme Courts unwillingness to interpret outside the ambit of the provisions of the Social Security Act.[591] This unwillingness indicates to the judiciary's 'cry out' for the legislature to intervene and amend the current survivors' benefits regime. One might argue that it was right for the Supreme Court to leave the social security question of parentage to the states, but the burden is now clearly on the states to clarify the rules.[592]

Moving forward, the South African legislature should, when reforming the law, firstly consult with medical law experts on how paternity should be ascertained for the purposes of posthumous conception and secondly, establish the particular requirements to be fulfilled when a posthumously conceived child needs to be legally deemed a dependant.

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[589] Namely the *Capato I and Gillett-Netting* courts.
[590] n 571 above.
[591] The court held that the Social Security Administration's interpretation, even if not the only reasonable one, was a permissible one of the Act.
[592] n 668 below.

CHAPTER FOUR
CONCLUSIONS AND RECOMMENDATIONS

In keeping with the aim of this study, namely to identify deficiencies within the current social security legal framework, and with the overall aim being to make recommendations on how the legislature should regulate posthumously conceived children within the social security legal framework and determine conditions for their eligibility, the current situation and shortcomings will be summarised and the necessary recommendations made.

As early as 1866, a scientist studying the physiology of sperm cells speculated that someday "a man dying on the battlefield may beget a legal heir with his semen frozen and stored at home".[593] Fast forward to today, the technology making it possible for that dying man to beget a biological heir is an accepted and celebrated part of the current medical landscape.[594] The medical phenomenon that posthumously conceived children is a reality, is here to stay, and as such, a medical reality with which the South African social security survivors' benefits legal system needs to become acquainted. It is true that when O' Brien wrote that "As much as the law seeks to provide certainties, human evolution illustrates the continuity of uncertainty".[595] The current problem facing the South African social security legislative framework that posthumously conceived children's eligibility to survivors' benefits, as a phenomenon caused by human evolution, is indeed illustrating the continuity of uncertainty, is further perpetuated by the law not seeking to provide any certainty or clarity. The only logical solution for this problem would be for South Africa's policy makers to always be cognisant of, and maintain momentum with, the ever-developing nature of modern reproductive technologies, so as to legislatively align itself with these evolutions and ensure the adequate regulation of all parties involved.

No uniform piece of social security legislation exists in South Africa regulating the different aspects of this branch of law. The problem is not per sé, that the social security survivors' benefits legislative framework is scattered in various different schemes, but that the definition of what an eligible child is, varies from scheme to scheme. The problem lies in the inconsistency and the lack of a uniform definition of a dependant. Possible operable recommendations would either be for the legislature to remove the many different schemes and create one uniform codified piece of legislation that would adequately regulate every aspect of South Africa's social security law.[596] This would be a viable option because it would guarantee that holistic concepts and definitions would be

[593] Candidate "Late fathers' later children: Re-conceiving the limits of survivor's benefits in response to death-defying reproductive technology" 2014 *Vanderbilt Journal of Entertainment and Technology Law* 1015 cited Anger "Cryopreservation of sperm: Indications, methods and results" 2003 *Urology* 1079.
[594] Sparrow "Orphaned at conception: The uncanny offspring of embryos" 2012 *Bioethics* 173.
[595] O' Brien (n 586) 332.
[596] A perfect example would be the United States Social Security Act (n 4276).

consistent throughout the social security spectrum. If overhauling the current legislative framework in favour of one uniform social security act seems to be too adventurous, then the second recommendation would be for policy makers to ensure uniformity across the different schemes by providing a uniform definition for who an eligible child is, amongst others. Adequately answering the eligibility for benefits question will allow for the legislature to lay the foundation for a cohesive policy addressing the complex issues created by assisted reproduction and life cycle manipulation.[597]

Thirdly, the most worrying problem unearthed by this study stems from the fact that the current medley of survivors' benefits administrative frameworks can be viewed as failing to adequately address posthumously conceived children's entitlements and rights. This is so because this class of children does not explicitly appear anywhere as viable 'children' or 'dependants', despite provision being made for every other category of child.[598] One of the implications of this exclusion, whilst accommodating others, is that it fails to adhere to the equal treatment of all children principle. Furthermore, providing survivors' benefits/pensions to some categories of children, whilst denying others, goes against the core purpose behind the implementation of survivors' benefits within the social security legislative framework, which was and still is to compensate the survivors for the permanent loss of economic support as a result of the death of the breadwinner.[599] Thus, a comprehensive social security reform is imperative. The legislature needs to revisit the issue of access to the survivors' benefits system,[600] as posthumously conceived children are indeed children and survivors' for all intents and purposes.

In South Africa, survivors' benefits/pensions take into consideration the actual dependency of the dependants/ children claiming benefits.[601] One should have been dependent on the deceased, *during the period that the deceased was alive* in order to be deemed as having been legally or factually dependent, and thus eligible for survivors' benefits under the social security legislative framework.[602] It is quite clear from this (outdated) requirement that posthumously conceived children will thus ultimately be ineligible for survivors' benefits. The only recommendation would be for the legislature to reformulate the dependency requirement, so that this class of children do not find themselves marginalised and unduly punished for circumstances surrounding their conception.

Another paramount reason for calling for the extensive reformation of the current social security survivors' benefits laws pertaining to the timing of posthumously conceived children's conception, is the negative implications that the private law rule of death dissolving a marriage when a spouse dies, has on this class of children. The fact that this category of children are born subsequent

[597] Doroghazi (n 2) 1620. For example human cloning and genetically engineered children.
[598] Mpedi (n 12) 6.
[599] International Labour Organisation (ILO) *Pension Schemes – Module 4: Survivors' Benefits* (ILO 1997) 74.
[600] Mpedi (n 12) 7.
[601] Namely factual or legal dependency.
[602] Posthumous children are the only exception currently expressly covered by certain schemes and pensions.

to a dissolution of a marriage questions their legitimacy, and consequently places their eligibility for survivor's benefits in further legal jeopardy. The unique, but entangled circumstances brought about by being conceived posthumously needs special consideration by policy makers. Simply ignoring these children and their entitlements can no longer be accepted. Going forward, equitable laws specific to posthumously conceived children have to be put in place, in order to guarantee their adequate and satisfactory regulation.

The argument vying for the legislative reformation and update of the current survivors' benefits framework is guided by and found in the Constitution. A brief analysis into the Constitution and its relevant sections has revealed that the Constitution envisages a country where every citizen, and indeed every child, will have protected fundamental rights which will be upheld by the state at all times.[603] Furthermore the Constitution, as the supreme law of the Republic, accrues children child-specific rights in an effort to provide children with extra special protection as vulnerable inherently dependent citizens of society,[604] through its enactment of section 28.[605] And lastly, with the introduction of the new constitutional dispensation, every citizen and their dependants was provided with the right of access to social security. As such the constitutional obligation placed on the state implies that legislation, amongst others relating to children, should always be in line with what was envisaged, which essentially was to put the best interest standard as paramount in every matter pertaining to the child.

A further argument in favour of legislative reform was found in the overview and analysis of the relevant international and regional instruments. Internationally, the International Labour Organisation recognises survivors' benefits as one of its classical risks, thus binding South Africa as a member to its visions and missions.[606] Thus, the only way that South Africa, as a member, will be said to have adhered to the vision and mission of the ILO is when it promotes social justice and internationally recognises human rights by adequately addressing and expressly providing for posthumously conceived children's entitlements to survivors' benefits. Secondly, as an international instrument, the United Nations Convention on the Rights of the Child prescribes that in every matter dealing with a child, the best interests of the child should always be paramount. It further stipulates that both the child's parents and the State are responsible for the upbringing and development of the child.[607] With South Africa having ratified this convention, and with it being deemed to be the standard to be used when promoting children's international and security rights,[608] policy makers find

[603] Any law or conduct that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law.
[604] In terms of section 28(2), a child's interests are of paramount importance in every matter concerning that child.
[605] n 604 above.
[606] Through its mission and objectives, "the International Labour Organization is devoted to promoting social justice and internationally recognised human and labour rights, pursuing its founding mission that labour peace is essential to prosperity. " (http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm (19-05-2015).
[607] Articles 5, 18 and 27(1) and (2) of the Convention.
[608] n 307 above.

themselves under obligation to promote the welfare and best interests of children and posthumously conceived children alike. Reforming the current survivors' benefits legal system would align with the Convention's directives.

Regionally, the African Charter on the Rights and Welfare of the Child, the Code on Social Security in the SADC and the SADC Charter on Fundamental Social Rights, all cover the African child's human rights, social security rights and social protection. Collectively they provide for any unique but pertinent issues that the ratified international conventions have failed to adequately address with regards to the SADC region.[609] Secondly, they place duties on member states to provide and maintain satisfactory levels of social security.[610] As discussed above, not only is there a call for an overhaul of the survivors' benefits framework, but these three regional instruments further provide the guidelines that the legislature needs to follow in order to successfully regulate for the unique African posthumously conceived child.

One of the most noteworthy aspects unearthed by this study is how this posthumously conceived children's benefits issue consequently affects various other interests. Other important interests that have to be carefully considered, weighed up and balanced, include the State's interest, the deceased's interest and the posthumously conceived child's interest. Currently as things stand legislatively – survivors' benefits wise – one could successfully argue that only the State's interest is being considered and is rendered paramount.

The second objective of this study was to uncover viable ways in which the social security survivors' benefits legal framework may be reformed adequately. As clearly seen thus far, the only way to ensure the eligibility of posthumously conceived children's survivors' benefits is by way of a *comprehensive* legislative reform. This study recommends that specific legislation, expressly outlining and clarifying the legal position of posthumously conceived children's eligibility to social security survivor benefits, needs to be enacted, not only with respect to posthumously conceived children, who are likely to remain a relatively small group, but also with respect to those born by surrogacy or gamete donation.[611] Allowing these families to exist – and be created – in legal limbo does a service to no one and could be legally perilous for the families and their offspring later in life.[612] Thus, as can be seen in the extensively long legal history that the United States judiciary has had with posthumously conceived children's entitlements to social security survivors' benefits, much is to be learned. The balancing testing created by the *Woodward v Commissioner of Social Security* case ultimately serves as a guiding principle for what a feasible South African model, adequately regulating and considering all affected interests, should contain and look like. This recommended, feasible model could be used to either amend posthumously conceived children's entitlements to social security survivors' benefits, or alternatively, to promulgate a separate piece of legislation clarifying and setting

[609] Viljoen "The African Charter on the Rights and Welfare of the Child" 2000 *SALJ* 661.
[610] Article 4(1) of the Code on Social Security in the SADC.
[611] n 566 above.
[612] n 566 above.

out the conditions to be fulfilled by posthumously conceived children in order to establish their eligibility for social security survivors' benefits. If these proposed requirements are not satisfied, then such a child could be deemed ineligible.

7 Requirements for a plausible act or additional provision:

The enacted Act, or the additional section, would state that **if a genetic relationship is proven**, a posthumously conceived child shall be deemed dependent if:

a) **The decedent consented**[613] to posthumous conception using his genetic material and posthumous support; or alternatively the decedent provided for any posthumously conceived child, using his non-anonymously donated sperm, in his will.[614]

b) The new act or provision would limit eligibility for benefits based on how much **time** has passed between the salary earner's death and the child's conception.

c) Though not a requirement, a persuasive factor, would be **the existence of a marriage between the decedent and the mother at the time of his death**, or alternatively, cohabitation where the decedent was contributing to the mother's support at the time of his death.[615]

7.1 Consent

Any legislation enacted must consider the interests of the deceased parent.[616] As such, heightened requirements such as consent would ensure that survivor benefits or inheritance rights would only go to those children whom the

[613] Doroghazi (n 2) 1618. The Legislature when drawing up the act or provision will need to decide what standard of consent is needed and what does and does not fall into the category of contribution. For a discussion of different types of consent, see Ronald Chester "Inheritance rights of the posthumously conceived child: What exactly does *Lauren Woodward v Commissioner of Social Security* decide? 87 *Massachusetts Law Review* 49-51 (2002). Affirmative consent does not require an acknowledgement in writing. Oral or written statements made by members of either parent's family, or records from the fertility clinic, should suffice.

[614] Doroghazi (n 2) 1617. A possible solution would require all sperm banks to discuss posthumous conception with their non-anonymous donors. If the donor wanted to consent, he could sign a form at that time. This proposal would alleviate many of the proof issues. If there is no form signed at this time, this creates a rebuttable presumption of non-consent. Installing this system would also work as a safeguard against spurious claims, because in the absence of a signed form, the rebuttable presumption makes proving consent difficult.

[615] Robinson "Posthumously conceived children" 2012 *TCI College Law Review* 9. If the deceased individual was married it would be logical to conclude that having and providing for a child would have been a desire of theirs, had he or she lived. This is especially true where the couple may have frozen embryos or other genetic material.

[616] Robinson (n 615) 9.

deceased parent intended to conceive and support.[617] Demanding consent not only protects the deceased father's right to be financially responsible only for children he agreed to have and support, but in addition, his consent would function as a second check to insulate the system from abuse.[618] However, consent requirements that are too strict – for example, only allowing for consent in a written record – could be overly exclusive.[619] This simply means that the lack of written consent for a posthumously conceived child should not completely preclude that child from inheriting or being awarded benefits when there are other indications that the decedent expressed consent.[620]

7.2 Time Limits

One of the concerns raised in the *Astrue v Capato* matter pertained to the Third Circuit's holding to award social security survivor benefits, without bearing mind any time constraints in their decision making.[621] Thus, it is clear that the proposed new legislation or additional provision should further limit eligibility for benefits based on the length of time between the salary earner's death and the child's conception.[622] Not imposing such a time restriction could cause a deceased parent's estate to be held open indefinitely in anticipation of a possible posthumously conceived child, causing pre-existing children to wait to collect their benefits or inheritance.[623] What is noteworthy is that as imperative as it is for the legislature to determine the amount of time a surviving partner has to conceive using the decedent's genetic material,[624] cognisance should also be

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[617] Matystik "Recent developments: Posthumously conceived children: Why states should update their intestacy laws after *Astrue v Capato"* (2013) *Berkely Journal of Gender, Law and Justice* 283.

[618] Kennedy (n 11) 859. By only giving benefits to children whose fathers provided consent, the requirement further limits single mothers from unilaterally choosing to conceive using their long-dead husband's sperm – rather than that random donor – for the financial benefit.

[619] Matystik (n 617) 283. Some argue that this is particularly true, since a state will generally allow a non-posthumously conceived child to inherit when there is no will. Furthermore, Knaplund "Children of assisted reproduction" 2012 45 *University of Michigan Journal of Law Reform* 631, 858, 899, 916, proposes "an approach where written consent would be required in some cases, but allowing the actions of the decedent through others to also establish consent – doing so "strikes a balance between strict legal requirements and reality." Furthermore, requiring written consent runs the risk of denying a child financial support "just because the adults failed to comply with some legal formality." In conclusion, survivor benefits function as a replacement for the lost financial support of a deceased parent.[619] This backdrop assumes that were the father alive, he would have chosen to have and support children. There, a consent requirement is imperative."

[620] Slater "Inconceivable consequences: Why the recent UPC Amendments were correct to reject a consent in a record: requirement" (2009) 23 *Quinnipiac Probate Law Review* 80. In her article Slater argued in favour of a rebuttable presumption of intent to conceive where a decedent voluntarily deposited genetic material for future use.

[621] n 561 above.

[622] Kennedy (n 11) 855.

[623] Matystik (n 617) 285. Further, as the New Jersey Superior Court noted in *Kolacy,* "heirs who are already ascertained at time of death are entitled to receive their shares of the decedent's property reasonably quickly. Distributing benefits in this fashion avoids any unfair or unduly burdensome restrictions on the surviving partner's choice in conceiving, and also adequately addresses the state's interest efficiently and provides finality in administrating the estate of the deceased."

[624] Kennedy (n 11) 855.

taken of a couple of additional factors. Namely, the mother cannot be pressured into having a baby too soon, while she is still mourning the death of her husband.[625] Conceiving through artificial reproduction can also be difficult, and women may need some time to fall pregnant.[626] Furthermore, issues vary immensely from person to person based on physical, social, cultural, and other factors.[627] Bearing all this in mind, the overarching question here is how shortly after a parent's death must the child be born to be eligible for survivor benefits? Although ideally each case will be evaluated based on each woman's specific situation, scholars have endorsed the limit of four years by which the child must be in utero.[628] Four years gives most women enough time to grieve a husband's death, to deal with any other crises like the unexpected loss of a job or sudden illness, and to conceive successfully. [629]

Adopting this proposal will strike a balance between reproductive freedom, the child's best interests, and the government's policy interests.[630] Most significantly, adoption of this proposal allows some posthumously conceived children to receive benefits, but it prevents spurious claims and keeps the social security from becoming a general welfare provision.[631] Furthermore, adoption of this proposal will ultimately help improve the position of the posthumously conceived child in law and in reality.

[625] n 624 above.
[626] *Woodward v Commissioner of Social Security* (410).
[627] Kennedy (n 11) 858.
[628] *Woodward* (n 410) 268. A time limit of four years, at the same time can be argued, does not unreasonably reach far past the death of the father.
[629] Doroghazi (n 2) 1619.
[630] Doroghazi (n 2) 1618.
[631] Grossman (n 565) 5.

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